STATUTORY AUTHORITIES AND CONSTITUTIONAL CONVENTIONS — THE CASE OF THE RESERVE BANK OF AUSTRALIA

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[*A central bank does not sit easily within the Westminster system of government. While bearing a central responsibility for the manipulation of monetary and financial conditions for the public good, a central bank typically operates outside the traditional departmental structure and enjoys a wide capacity for independent action. This situation poses intriguing questions concerning accountability and control. The author analyses the position occupied by the Reserve Bank of Australia, as a Commonwealth statutory authority, within the executive arm of government and its enjoyment of Crown immunity. The widely accepted belief that central banks should be insulated from direct political interference is assessed in the light of the convention of responsible government. The author criticizes the dominance assumed by the doctrine of ministerial responsibility and suggests that the notion of responsible government is a dynamic concept capable of accommodating a diverse and evolving public sector without sacrificing its accountability or control.*]

PART ONE: CONVENTIONAL WISDOM

> [T]he Westminster system is all things to all people — that depends on whom you are asking to define it.[1]

The Reserve Bank of Australia is Australia's central bank and plays the central rôle in the implementation and management of those aspects of Australia's economic policy which bear upon monetary and financial conditions. The Reserve Bank is constituted as a distinct statutory corporation and is entrusted with substantial discretionary powers with which to pursue certain broad-ranging objectives delineated by its incorporating Act and by related legislation.[2] Yet while the Bank operates with substantial independence, the character of its purpose and functions could be said to be closely aligned with that of government.

The existence of statutory authorities such as the Reserve Bank presents a student of the Australian Constitution with something of a paradox. Statutory authorities are commonly formed out of a belief that certain objectives of government are better pursued free from direct political interference and accordingly are usually invested with a greater or lesser degree of autonomy. As one commentator has noted:

> The whole raison d'être of establishing a public corporation for a particular administrative task or undertaking, instead of entrusting it to a Minister of the Crown assisted by civil servants, is to free the task in question from the possibilities of detailed scrutiny by individual members of Parliament . . . , which is the characterisitc accompaniment of Ministerial responsibility.[3]

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1 Sir Geoffrey Yeend (Secretary to the Department of the Prime Minister and Cabinet) giving evidence to the Senate Standing Committee on Constitutional & Legal Affairs, *Report on the Freedom of Information Bill 1978* (1979) 34.

2 Reserve Bank Act 1959 (Cth); Banking Act 1959 (Cth); Financial Corporations Act 1974 (Cth).

3 Gardner, J. F., & Jones, B. L., *Administrative Law* (6th ed. 1985) 310.

Such considerations were plainly paramount in the establishment of Australia's central bank.[4]

And yet the Australian Constitution is said to be one in which the conventions of responsible government form an integral part (notwithstanding the fact that the Constitution itself contains no express reference to them).[5] The Constitution, we are told, embodies the traditions of Westminster government. It therefore embraces Dicey's design of a system of government in which the concomitant principles of parliamentary supremacy, representative government and ministerial responsibility are moulded together and their integrity preserved by the rule of law.[6] Within the Westminster model, the term 'responsible government' has always assumed that the accountability of government is achieved through ministers to the representatives of the people in Parliament. The model is deceptively simple: the people elect a Parliament from which ministers are chosen to make government decisions which are put into effect by an apolitical public service. The public servant is accountable to the minister, the minister to Parliament and Parliament to the people. In Dicey's view these principles secured the legal supremacy of Parliament which was in turn sustained by the political sovereignty of the people.[7] Thus, the coercive power of the state can be said to be exercised by persons whom the electorate has the periodic opportunity of dismissing. In theory, the public service possesses no independent power.

Plainly the exercise of government functions by statutory authorities tests the internal consistency of such a model. Traditionally, compliance with Dicey's model of executive government has been pursued via departments of state, each under the control of a minister, with the emphasis being on public service neutrality and anonymity. In this there are parallels with Weber's model of bureaucracy as a formally rational and purely instrumental organization where both respective rôles and the lines of authority and responsibility can be clearly and unambiguously defined. But ease of definition does not ensure that theory accords with reality.

Despite the longevity of its influence on the study of constitutional law, the adequacy of Dicey's model has been increasingly called into question.[8] It is submitted that Dicey's views on executive government are essentially normative and cannot be regarded as descriptive of the way in which the system actually operates. As Archer observes:

> The theory of responsible government was never an accurate explanation of British political life. It was an idealised picture of British politics which was passed into the twentieth century as constitutional mythology.[9]

4 *Infra* Part 2.

5 *Infra* nn. 40-5, pp. 356-7.

6 Dicey, A. V., *Introduction to the Study of the Law of the Constitution* (10th ed. 1959) especially chs I, IV, XI-XV.

7 *Ibid.* 429.

8 Senate Standing Committee on Constitutional & Legal Affairs, *op. cit.*; Emy, H. V., 'The Public Service and Political Control' in *Report of Royal Commission on Australian Government Administration* (1976) Appendix 1B; Johnson, N., *In Search of the Constitution: Reflections on the State and Society in Britain* (1977); Griffith, J. A. G., & Street, H., *Principles of Administrative Law* (5th ed. 1973) 17-21; Jennings, W. I., *The Law and the Constitution* (5th ed. 1959) chs I-IV.

9 Archer, J. R. 'The Theory of Responsible Government in Britain and Australia' in Weller, P. & Jaensch, D. (eds), *Responsible Government in Australia* (1980).

It is not surprising therefore that, following the rapid expansion and diversification of government activity that has occurred over this century, the principles of Westminster government should come to be under increasing strain. With this expansion there has been a corresponding increase in the amount of governmental activity performed outside the departmental structure. The public statutory corporation in particular has developed as the modern alternative to the government department and their proliferation is further evidence of a functional breakdown in the Westminster model.

Faced with this contradiction, lawyers tend toward one of two commonly advocated responses. These can be styled 'literalist' and 'legalist' viewpoints — although the latter, in particular, is difficult to stereotype.[10] A literal view of the Constitution emphasizes its words alone. As the Constitution makes no express mention of any of the conventions of Westminster government, adherents of this approach question the validity of their incorporation into the Constitution or suggest, at least, that the terms of the Constitution are more selective about which conventions are incorporated. Thus, it is the Constitution and not convention that should decide the permissible forms of executive government. The legalist view on the other hand focusses on the principles on which the Constitution is based. This viewpoint tends to be rather amorphous as disagreement can usually be expected over which principles are fit for legal recognition. Nevertheless, it is generally contended that the mechanics of the executive branch should conform with the principles of responsible government and that these principles inhibit the Commonwealth Government's power to establish statutory authorities or at least restrict the form which they may take.

It is perhaps one of the hazards of a written constitution that constitutional theory can become dominated by questions of interpretation. A third, less common approach is to accept that constitutional theory should be modified or replaced so as to accord more sympathetically to the requirements of contemporary government.

The remainder of this Part will examine the parameters of the problem posed. The balance of the article will consider its consequences while dealing specifically with the case of the Reserve Bank of Australia.

Why create statutory authorities?

Over recent years there have been numerous rhetorical attacks on what is seen to be an excessive use of statutory authorities by governments in both Australia and Britain. They have come to be regarded as a more surreptitious form of 'big government' — enabling further growth in the range of government activity with low visibility.[11] In Britain they have become the focus of a campaign for

[10] Since Australia's constitutional crisis in 1975, a sharp distinction has been drawn between these two approaches: see Cooray, L. J. M., *Conventions, the Australian Constitution and the Future* (1979) ch. 1.

[11] The label 'Quango' (Quasi Autonomous Non-Government Organisation) is now emotively but often inaccurately applied to statutory authorities: see Hague, D. C., Mackenzie, W. J. M., & Barker, A., *Public Policy and Private Interests: The Institutions of Compromise* (1975) 9.

'privatization', implemented by a government elected with a commitment to achieving a reduction in the size of the public sector.[12] So, given their potential to compromise fundamental constitutional principle, it is worth considering why statutory authorities have become such a popular administrative form.

The range of activities dealt with by statutory authorities in Australia is now very wide and it is difficult to generalize about their functions. There appears to be no consistent rationale applied in deciding to place a particular function in the hands of a statutory authority over other organs of public administration. It is sometimes suggested that as a rule departments of state should carry out the more traditional functions of government while it is for statutory authorities to conduct government enterprise. However, given the variety of areas in which contemporary governments have become involved, such a distinction has become virtually meaningless.

Although well known as an administrative device at the time of federation, the Constitution makes no mention of statutory authorities. This however did not fetter the Commonwealth in their use — which has been consistent since federation.[13] Under the growing influence of the labour movement, government intervention in commercial undertakings gained widespread acceptance and initially this function was commonly entrusted to statutory authorities. There are now in excess of 241 Commonwealth statutory authorites whose activities extend beyond business undertakings to the marketing of primary produce, the supervision of grants and subsidies, research, adjudication and the regulation of numerous aspects of economic and social activity.[14]

Primarily statutory authorities are created out of a recognition that the restrictions imposed by the normal departmental structure make it unsuitable for some government functions. A separate corporation is often able to provide a degree of specialization and flexibility of management not normally attainable within a department. Further, given the dominance of political parties, some objectives are considered to be best attained if distanced from political pressures. Statutory authorities also enable sectional interests in the community affected by a particular government activity to have some direct representation in its management.[15] There are, of course, numerous reasons of political convenience which have to varying degrees influenced the creation of some statutory authorities.[16]

Given the unsystematic and diverse reasons offered for their existence, it is hardly surprising that statutory authorities have become targets for complaint.[17] However, to the extent that these complaints are levelled at statutory authorities

12 United Kingdom, *Report on Non-Departmental Public Bodies* (1980) Cmnd 7797.

13 Wettenhall, R. L., 'Commonwealth Statutory Authorities: Patterns of Growth' (1977) 36 *Australian Journal of Public Affairs* 351.

14 See Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth — First Report* (1979) ch. 2.

15 The reasons for the creation of statutory authorities have been elaborated by the Royal Commission on Australian Government Administration, *op. cit.* 84-6 & Appendix 1K at 319-23 & 330-2 and by the Senate Standing Committee on Finance and Government Operations, *op. cit.* 11-8.

16 These were made prominent by the Ditchley Park Conference of 1969 and are analysed in Hague, D. C., Mackenzie, W. J. M., & Barker, A., *op. cit.* 362.

17 See Johnson, N., 'Accountability, Control and Complexity: Moving Beyond Ministerial Responsibility' in Barker, A. (ed.), *Quangos in Britain* (1982) 209.

in general, they lack substance. While it is probable that the device has been used improperly, and possibly too frequently, this does not deny its usefulness in all cases.

The Constitution and the structure of government

It is important to recognize that the Australian Constitution is not based on any one principle of government. It draws upon many sources. The Constitution adopts the principle of represenative government and also attempts to attain a rather delicate balance between the principles of federalism and separation of powers on the one hand and responsible government on the other. Much of the uncertainty surrounding the position of statutory authorities in Australia derives from the contradictions inherent in this situation.

The Australian Constitution derives its validity (at least as a formality) as an Act of the United Kingdom Parliament consisting of nine sections — the last of which contains the 128 provisions of the Constitution. It represents a compact between the six Australian States which grants and distributes power between them and the Commonwealth Government thereby created.[18] The broad framework of the Act appears to follow that adopted in the United States.[19] The first three chapters of each Constitution allot and delineate legislative, executive and judicial power. However the framers of the Constitution preferred the British system of responsible government to the strict separation of Congress and Executive adopted in the United States. Responsible government and the rule of law were also favoured over the enactment of a Bill of Rights.

Yet the fusion of responsible government with a federal bicameral legislature produces a contradiction. The American model of federalism adopted in Australia requires an Upper House representing the component states of the federation and a Lower House consisting of popularly elected representatives. The essential foundation of responsible government however is the notion that the exercise of power derives from the ultimate sovereignty of the people and thus responsibility is to the Lower House. Many authors have noted that there cannot be responsibility to two Houses where each is expected to carry coequal powers and where each might be governed by different political majorities.[20]

Similarly, there is conflict between responsible government and the separation of powers doctrine. Responsible government is predicated upon the notion of parliamentary supremacy; Parliament is able to delegate legislative power to the executive, to vest executive power outside the executive branch and can control the exercise of all executive power. Responsible government assumes political and legislative control of the executive by Parliament. Any strict separation of powers would not permit such control. There is however some ambiguity over

[18] In Dicey's words a federation exhibits a desire for union without the desire for unity: Dicey, *op. cit.* 41.

[19] Privy Council in *R v. Kirby; ex parte Boilermakers' Society of Australia* (hereinafter '*Boilermakers*') (1957) A.C. 288, 311 but note the dissenting judgment of Williams J. in the High Court (1956) 94 C.L.R. 254, 301-2.

[20] See especially Sawer, G., *Federation under Strain* (1977) 171; Cooray, *op. cit.* 15; Winterton, G., *Parliament, the Executive and the Governor-General* (1983) 5-6.

this clash, for much of the principle of ministerial responsibility is designed to preserve the interdependence between Parliament and the executive and to that extent recognizes a functional separation between them. Nevertheless, the two principles have proved difficult to balance[21] and leave some question over Parliament's power to establish statutory authorities and what form they may take.

The executive power of the Commonwealth

Despite the appearance given in the Constitution of a division of power identical to that which applied in the United States, the Australian Constitution can be said to adopt only a very loose separation of powers. Legislative, executive and judicial powers are not kept strictly separate and there is much overlapping. Notwithstanding Sir Owen Dixon's vision of a doctrine of separation of powers as a legal principle of considerable rigidity,[22] no judge (including Sir Owen) has suggested that the doctrine can be applied strictly.[23] Moreover, the legislative and executive powers have not been separated from each other to the extent that the judicial power has been separated from them. Equally, a strict separation of legislative and executive powers is not respected in the United States, being modified by a system of checks and balances[24] and being viewed by the judiciary as impossible to achieve in practice.[25] As Jackson J. stated in the *Steel Seizure* case:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[26]

The more strict separation of the judicial power from the legislative and executive powers undoubtedly reflects the emphasis placed on the rule of law. Clearly there is a recognition of the need for judicial independence. However, it is submitted that such considerations have no bearing on the degree of separation appropriate to the legislative and executive powers.[27] While the Westminster

[21] See *Boilermakers* (1956) 94 C.L.R. 254; *The Victorian Stevedoring & General Contracting Co. Pty Ltd v. Dignan* (hereinafter '*Dignan*') (1931) 46 C.L.R. 73.

[22] *Dignan* (1931) 46 C.L.R. 73, 96; *Boilermakers* (1956) 94 C.L.R. 254, 275.

[23] *Boilermakers* (1956) 94 C.L.R. 254, 278 where the High Court described a rigid separation of power as 'absurd'. Note also the dissenting judgments of Williams J. at 301 & 314 and Webb J. at 328 & 329. In *R v. The Federal Court of Bankruptcy and Another; ex parte Lowenstein* (1938) 59 C.L.R. 556, 576: Starke J. stated that such a view of the doctrine 'would render the Constitution inefficient and unworkable', he preferred to describe the Australian Constitution as involving 'a mingling of functions' (*Johnson Fear & Kingham & The Offset Printing Co. Pty Ltd v. Commonwealth* (1943) 67 C.L.R. 314, 326). See also *Dignan* (1931) 46 C.L.R. 73 (especially *per* Evatt J. at 117 & 118); *R v. Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 90 (*per* Barwick C.J.) and 102 (*per* Mason J.).

[24] Thus, for example, the President can veto the legislation of Congress — but may in turn be overridden by a two-thirds majority of both Houses (U.S. Constitution Art. I, s. 7); officers of the executive can be impeached and removed by Congress (Art. II, s. 4); Federal judges are appointed by the President (Art. II, s. 2) but can be impeached and removed by Congress (Art. III, s. 1).

[25] See *Buckley v. Valeo* (1976) 424 U.S. 1, 121 and the dissent of Holmes J. in *Springer v. Government of the Phillipine Islands* (1928) 277 U.S. 189, 211.

[26] *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 635. This view was applied in *United States v. Nixon* (1974) 418 U.S. 683, 707.

[27] This is acknowledged in *Boilermakers* (1956) 94 C.L.R. 254, 275-6.

model requires no separation of powers (at least not as a legal limitation), there is a corresponding emphasis on judicial insulation.[28] Donaldson M.R. notes:

> Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another . . .[29]

Thus, notwithstanding significant differences of principle between Britain and the United States, a remarkably similar position appears to have been arrived at, albeit from opposite directions, by use of convention. With Australia claiming theoretical allegiance to both systems, it seems clear that any separation of powers need not be equal. To the extent that the separation of powers doctrine is embodied in the Australian Constitution, the degree of isolation afforded each head of power is mutually exclusive. Indeed, it is questionable whether a legal separation of legislative and executive powers can be maintained at all. The extent to which such a division is possible is inevitably dependent upon the extent to which each term is capable of precise definition. Executive power, in particular, is difficult to characterize and the growth of administrative functions and powers which cannot be slotted easily into the usual tripartite structure is illustrative of this difficulty.[30] Professor Vile has noted that the 'multifunctionality' of political structures prevents their division.[31] Virtually all government actions will involve all three types of activity (*i.e.* rule-making, rule-application and rule-adjudication). He points out:

> The whole history of the doctrine of the separation of powers and its related constitutional theories is indicative of the fact that neither a complete separation nor a complete fusion of the functions of government, nor of the procedures which are used to implement these functions, is acceptable to men who wish to see an effective yet controlled use of the power of governments.[32]

The foregoing serves to emphasize that the executive power cannot be considered outside a framework of imprecisely identified and overlapping powers. In comparison with the treatment of legislative power, the Constitution itself does little to delineate the executive power and its interrelationship with the other branches of government. There is clearly much reliance upon understandings not present in the text.[33]

Chapter II of the Constitution, which deals with executive government, is introduced by section 61. Symbolically, this section vests the executive power of the Commonwealth in the Queen and provides that it is to be exercised by the Governor-General as her representative. Section 61 declares that the executive power extends to the execution and maintenance of the Constitution and the laws of the Commonwealth. It is doubtful that such a description could have been

28 See United Kingdom, *Report of the Committee on Ministers' Powers* (1932) Cmnd. 4060, 95; Vile, M. J. C., *Constitutionalism and the Separation of Powers* (1967) chs 8 & 12; Hood Phillips, O., 'A Constitutional Myth: Separation of Powers' (1977) 93 *Law Quarterly Review* 11. Note also *Duport Steels Ltd v. Sirs* (1980) 1 W.L.R. 142, 157 (*per* Lord Diplock) and at 169 (*per* Lord Scarman) where a separation of powers in the United Kingdom is explained in terms of the need to secure judicial independence.

29 *R v. H.M. Treasury; ex parte Smedley* (1985) Q.B. 657, 666.

30 *Dignan* (1931) 46 C.L.R. 73, 115 (*per* Evatt J.).

31 Vile, *op. cit.* 318-20.

32 *Ibid.* 329.

33 See *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 193 (*per* Dixon J.).

intended to be exhaustive.[34] No doubt it was envisaged that the executive power would encompass the various royal prerogatives. Section 62 provides that a Federal Executive Council shall advise the Governor-General in the government of the Commonwealth. There is a compelling inference therefore that the executive power conferred in section 61 is to be exercised on advice, thus imitating the Westminster model. Such an inference is supported by section 63 which declares that those provisions of the Constitution which refer to the Governor-General in Council are to be construed as referring to the Governor-General acting with the advice of the Federal Executive Council — but is confused by the indiscriminate use of the words 'in Council' in conjunction with references to the Governor-General throughout the Constitution.[35] The Governor-General is empowered by section 64 to establish departments of state and to appoint ministers to administer them. The section declares that these ministers shall act as members of the Federal Executive Council and requires that they be members of Parliament as a prerequisite to appointment.

These provisions suggest the adoption of a system of responsible government. They plainly envisage the establishment of an executive branch made up of departments of state under the supervision of ministers who are both elected and accountable to Parliament. Statutory authorities are not mentioned. This of itself need not suggest that their use is outside the ambit of executive power — particularly when the executive power cannot be effectively characterized. Professor Campbell has examined the extent to which the executive power extends beyond section 61. She notes:

> The recital in section 61 that the executive power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth' is clearly not an exhaustive delimitation of the scope of the executive power. Moreover it is questionable whether it is a grant of substantive power at all.[36]

While it is apparent that the powers afforded under a constitution must be interpreted expansively, it is equally apparent that the rôle of responsible government cannot be ignored. Given that responsible government forms such an integral part of Chapter II, the absence of any reference to statutory authorities might be taken as precluding this particular avenue of government or, at least, that Parliament's power to vest them with independence is to be sharply curtailed.

Responsible government

It remains to consider why responsible government should have such a pervasive influence on the Australian Constitution. It is not automatically apparent why a written constitution should necessarily imply the incorporation of principles not present on its face. How are we to know whether or not a principle forms

[34] Renfree describes the executive functions of the Commonwealth as the residue of functions remaining after removing legislative and judicial functions: Renfree, H. E., *The Executive Power of the Commonwealth of Australia* (1984) 389.

[35] Cooray has forcefully argued that any attempt to distinguish references to the Governor-General from those to the Governor-General in Council is without substance: Cooray, *op. cit.* 31-3. See also Quick, J. & Garran, R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 389.

[36] Campbell, E., 'Parliament and the Executive' in Zines, L., *Commentaries on the Australian Constitution* (1977) 89.

part of the Constitution? How are we to know what these principles are? What is the position when they are found to be in conflict with a provision in the Constitution or with each other? Moreover, why should any such principles not be regarded as merely subordinate to the text? It is the presence in the Australian Constitution of numerous unspecified understandings, working in opposite directions, that has led to ambiguity over the place of statutory authorities.

Nevertheless, that the conventions of responsible government permeate the Constitution is a proposition that is almost universally acknowledged. Historically, it is beyond doubt that delegates of the States, responsible for framing the Constitution, intended to implement a system of responsible government, consistent with the system of government actually operating in Britain and which had been emulated in each of the States. (Their emphasis on the *actual* rather than the *formal* is evident in the wide powers vested in the Crown, which, if taken formally, would hardly be consistent with the birth of a new nation.) The Federal Conventions of the 1890s abound with statements to this effect.[37] However, the essentials of responsible government proved difficult to reduce to writing. They are nowhere explicitly incorporated in the Constitution. Responsible government operated in Britain without specification and had been satisfactorily adopted as such in the Australian States and in Canada. It was recognized also that any attempt at codification of conventions in all their varying degrees was bound to prove inadequate and introduce unnecessary rigidity.[38]

When the Australian Constitution Bill was introduced into the House of Commons, Lord Haldane observed:

> This Bill . . . establish(es) a constitution modelled on our own model, pregnant with the same spirit and permeated with the principle of responsible government . . . . It is really a reproduction in Australia of the British Constitution on a large and noble scale. Our Constitution at home is essentially unwritten. So it will be in Australia. The mere framework which the Bill proposes to set up will be filled in, as here, with traditions and doctrines which we have inherited, with tendencies which are not expressed in words, and with bonds which, though invisible to the legal eye, are yet binding and give the people security.[39]

But unlike Britain, the conventions of responsible government in Australia must subsist in conjunction with the enacted provisions of the Constitution. This however has not detracted from their constitutional status. Their presence is clearly implied in those provisions dealing with the executive and this led Quick and Garren (writing at the time of Federation) to comment that responsible government 'has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment of the instrument.'[40] The High Court has consistently endorsed the standing of conventions *within* the

[37] See, *e.g.*, *Sydney Convention Debates* (1891) 571 (*per* Deakin), 575 (*per* Wrixon); *Adelaide Convention Debates* (1897) 909-10 (*per* Reid), 910-12 (*per* Barton); *Melbourne Convention Debates* (1898) 2251-2, 2258 (*per* Deakin), 2252-2255 (*per* Barton).

[38] *Williams v. Attorney General for New South Wales* (1913) 16 C.L.R. 404, 457 (*per* Isaacs J.). In addition, it appears that the framers were self-conscious that any attempt to incorporate conventions would only appear juvenile and clumsy: see Barton, *Adelaide Convention Debates* (1897) 913.

[39] *Parliamentary Debates* (Commons) 14 May 1900, cols 98-9. Approved by the High Court in *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd* (hereinafter *Engineers*) (1920) 28 C.L.R. 129, 147.

[40] Quick & Garren, *op. cit.* 706-7.

Constitution.[41] They have been described as central to our polity,[42] essential to the functioning of the Constitution[43] such that any departure from them need not even be contemplated[44] and something of which judicial notice must be taken.[45] Both as a matter of history and as a judicial reality, a literal construction of the Constitution, ignoring convention, cannot be sustained. Thus, the presumption is strong that the mechanics of executive government must accord with the conventions of responsible government.

Nevertheless, certainty as to the application of conventions does not assist in clarifying their content.[46] Responsible government entails many more conventions and practices than those pertaining to ministerial responsibility, affecting matters such as public service neutrality and the conduct of the Cabinet. Their variable and amorphous character makes precise formulation of their content a contradiction. Constitutional conventions exist on many different levels and are constantly in flux.[47] Further, all conventions do not possess the same weight and authority, both as against each other and as against enacted provisions of the Constitution. Clearly some unwritten practices are of considerable constitutional significance. Yet, while the concepts of parliamentary sovereignty and the rule of law are commonly labelled as fundamental principles and separated from the rather more slippery company of convention, it is submitted that this is purely a matter of degree.

In any case, any description of the principles of responsible government must involve certain assumptions drawn from the political environment of the time. Historically, responsible government developed with the movement to widen the franchise and, in Australia, can be associated with the campaign for self-government.[48] As the political environment changes, rigidly defined principles will lose their usefulness. In Australia this has become a particular source of ambiguity. There is uncertainty as to the extent to which the contemporary application of the concept of responsible government is limited by the historical assumptions about the relationship between society and state.[49] While it may be tempting to explain responsible government by drawing inferences from the system of state existing at federation as being indicative of the framers' intentions, it is submitted that such a process of second-guessing avoids reality and is precisely what the framers sought to avoid.[50]

41 Particularly forceful statements are made in *Engineers supra* 147-8 and in *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 364-5 (*per* Barwick C.J.). See also Cooray, *op. cit.* 19-26.

42 *Dignan* (1931) 46 C.L.R. 73, 114 (*per* Evatt J.).

43 *Uebergang v. Australian Wheat Board* (1980) 145 C.L.R. 266, 311-2 (*per* Murphy J.).

44 *Commonwealth v. Queensland* (1975) 134 C.L.R. 298, 322 (*per* Jacobs J.).

45 *Commonwealth v. Kreglinger & Fernau Ltd and Bardsley* (1928) 37 C.L.R. 393, 411-2 (*per* Isaacs J.).

46 The various actors in the constitutional crisis of 1975, each stressing that responsible government is essential to the Constitution, brought forward many conflicting versions of what responsible government involved.

47 See de Smith, S. A., *Constitutional and Administrative Law* (5th ed. 1985) 186-7.

48 See Ward, J. M., *Colonial Self-Government: The British Experience 1759-1856* (1976).

49 See Emy, *op. cit.* 20.

50 See *Melbourne Convention Debates* (1898) 2262 (*per* Symon); Garren, R. R., *The Coming Commonwealth* (1897) 149.

Conflicting themes

It is apparent that the Australian Constitution is composed of conflicting elements. It attempts to fuse apparently irreconcilable principles. Yet this is not the product of political accident. The framers of the Constitution were well aware that the federal institutions they sought to establish were incompatible with Westminster principles. Indeed it was this that occupied most of their time.[51] The drafting of a constitution, particularly for a federation, necessitates reconciling a wide range of strongly held views. This is not without its difficulties. Even though inconsistent with the notions of parliamentary supremacy and responsible government, the Australian Constitution adopts a bicameral legislature; without it federation would have been unacceptable to many States.[52] Thus Professor Cooray observes that any Constitution will be subject to gaps, deficiencies and contradictions.[53] No matter how generalized, the terms of a Constitution cannot cater for every circumstance.

The long period over which the Australian Constitution was drafted produced an awareness of the futility of attempting to fix constitutional rules and generated a lack of faith in any one constitutional theory. The Constitution is dominated by a sense of pragmatism. Despite its written form, there was a recognition that it must accommodate changing political backgrounds. This is achieved by use of convention. In any event, it is difficult to dispute Professor Griffith's remark that whatever written documents may say, a Constitution is what happens.[54]

Consistent with this theme, this article will suggest that the Constitution does not inhibit the evolution of more effective processes of government. While it could not be suggested that such laudable ambition lies behind the genesis of every statutory authority, it is submitted that they should be criticized on functional grounds rather than on grounds of so-called constitutional heresy. Equally, the Constitution ought not to be interpreted as inhibiting the evolution of more effective avenues of accountability and control over public institutions. It will be argued that the independence given to statutory authorities has become unnecessarily entangled with issues of Crown immunity. Much of a statutory authority's operations is comparable with those of the private sector and ought to be capable of control by the general law — Crown immunity applying only to specified functions.

A central bank provides a useful vehicle for analysis of these issues.

PART TWO: RESERVE BANK OF AUSTRALIA

> Come the revolution, you will be hanged as high as the rest, but as they bear you off to the nearest lamp post you will be crying plaintively, 'But I am a *central* banker!'[55]

51 See *Sydney Convention Debates* (1891) 280 (*per* Hacket); *Sydney Convention Debates* (1897) 784 (*per* Baker). See also Galligan, B. J., 'The Founders' Design and Intentions Regarding Responsible Government' in Weller & Jaensch (eds), *op. cit.*

52 See Galligan, *op. cit.*

53 Cooray, *op. cit.* 101.

54 Griffith, J. A. G., 'Judicial Decision-Making in Public Law' (1985) *Public Law* 564.

55 Remark made to former Reserve Bank Governor, Dr Coombs, who was attempting to explain the differences between commercial and central banking: Coombs, H. C., *Trial Balance* (1980) 142.

The Australian Constitution effects a demarcation of power between the Commonwealth and the States. The powers conferred on the Commonwealth are specific and, subject to some exceptions,[56] are exercised concurrently with the States, in that the States retain residual powers to legislate in all areas not displaced by the valid exercise of a Commonwealth power. Thus, whereas the legislative power of the Commonwealth is confined to certain specified areas, the States possess general legislative powers, including powers which overlap with those held concurrently with the Commonwealth and which remain plenary powers until the Commonwealth chooses to exercise its paramount powers.[57]

The Reserve Bank of Australia being a statutory corporation established under Commonwealth legislation can only be invested with powers and functions within the range of Commonwealth competence. Section 51 (xiii) of the Constitution affords the Commonwealth power with respect to:

> Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money.

And section 51 (xii) grants power with respect to:

> Currency, coinage and legal tender.

Along with section 51 (ii) — the taxation power — these powers represent the main arms available to the Commonwealth to regulate the national economy.

In pursuance of these powers the Commonwealth has created the Reserve Bank of Australia and has conferred upon it the powers and functions of a central bank. These powers and functions are set out principally in the Reserve Bank Act 1959, the Banking Act 1959 and the Financial Corporations Act 1974, and in regulations made under those Acts.[58]

The Reserve Bank Act identifies the Bank as a distinct body corporate (while preserving and continuing in it the corporate existence of its predecessor — the Commonwealth Bank of Australia). Like many government corporations, it is a creature of statute; it has no corporators. Although the Reserve Bank's functions are of a substantially public character it is not a government department; notwithstanding its close relationship with Treasury, it does not answer directly to a minister. Its mandate is determined by statute, as is its relationship with government.

Origins

The practice of establishing central banks as statutory authorities, rather than as departments of state, is founded as much in political pragmatism as in any absolute conviction by governments in the efficacy of the corporate model as a means of implementing the tasks given to central banks. Attempts by governments to regulate the activities of banks and other financial institutions have

[56] S. 52 gives the Commonwealth exclusive power in respect of real property acquired by the Commonwealth (see also ss 111 & 122) and matters relating to the Commonwealth public service and s. 90 gives exclusive power in respect of the imposition of duties of customs and excise and the granting of bounties.

[57] S. 109 invalidates State laws to the extent that they are inconsistent with Commonwealth laws; ss 106-8 specifically preserve State Constitutions, Parliaments and existing laws subject to the terms of the Constitution.

[58] *Infra* pp. 362-4.

shown a remarkable propensity to generate political controversy. There have always been strong advocates both for the freedom of the market and for some curtailment of its influence.

Although the Bank of England has existed since 1694, the inspiration for the development of central banks in their present form owes much to the economic theories of Karl Marx. Point five of the Communist Manifesto advocates the '[c]entralization of credit in the hands of the state, by means of a national bank with state capital and exclusive monopoly.'[59] This picks up on an earlier proposal by David Ricardo[60] but its inclusion in the Communist Manifesto led to its widespread acceptance and adoption by the labour movement. Acceptance of the need for a central bank parallels the growth of the labour movement. The industrial revolution was not only a revolution in industrial techniques but also in the means by which they were financed. Unprecedented amounts of wealth could now be aggregated and channelled into the banking system. The labour movement has always greatly distrusted the power of the financial sector.[61] Particularly has this been so in Australia where the financial crashes of the 1890s provided a catalyst for reform.

In post-federation Australia it was the somewhat eccentric American expatriate, King O'Malley, who became most prominently associated with the eventual establishment of a state-owned bank. However, while O'Malley's efforts were undoubtedly substantial in the face of some significant vested interests opposed to the idea, the legend of his single-handed crusade against an obstructive Labor Party leadership appears to have been largely self-manufactured and highly dramatized.[62] Nevertheless, by the turn of the century there was widespread acceptance of the potential virtues of a national government bank and in 1905 it became Australian Labor Party policy. But Labor's reasoning was divided. Some saw government intervention in banking as a step toward nationalization while others saw it as a means of curtailing excessive profits made by the existing cartel of trading banks. When in 1910 Labor, under Andrew Fisher, obtained a majority in both Houses it proceeded to implement the policy and in 1911 the first Commonwealth Bank Act was passed. The Act however fell well short of establishing a central bank. The Commonwealth Bank operated as a conventional commercial bank, save that it combined trading and savings bank business and was government owned. It had no power of note issue; this function was given to Treasury in the preceding year.[63] In this form the Bank was the antithesis of a

59 Marx, K., & Engels, F., *The Communist Manifesto* (1967) 104.

60 See Ricardo, D., 'Plan for the Establishment of a National Bank' (1824) in Sraffa, P., (ed.) *The Works and Correspondence of David Ricardo* (1951).

61 Love, P., *Labour and the Money Power* (1984); Anstey, F., *The Kingdom of Shylock* (1917).

62 Although American, O'Malley was able to generate sufficient uncertainty about his precise birthplace to represent himself as Canadian and therefore qualify to enter Parliament. He was elected as an independent but later aligned himself with the Labor Party. His raucous style irritated the party leadership and this seems more likely to have spawned O'Malley's colourful account of events. See Gollan, R., *The Commonwealth Bank of Australia — Origins and Early History* (1968); Butlin, S. J., *Australia and New Zealand Bank* (1961) 349-51; Beazley, K. E., 'The Labour Party and the Origin of the Commonwealth Bank' (1963) *Australian Journal of Politics and History* 27.

63 Note Issue is widely regarded as a distinctive attribute of central banks.

central bank. Indeed Dr Coombs has commented that '[t]here seems to have been little comprehension of the incompatibility of active competitive banking with the restraint and responsiblity of central banking.'[64]

In 1924 the Bank was given control over note issue and in the period up to 1945, the Bank gradually adapted its role to that of a central bank. The transition took place without legislative amendment. It was, however, greatly accelerated by the onset of the Depression. Not unnaturally, the inexorable pressures of this period focussed attention on monetary and credit policy. During the Depression there was considerable friction between the Scullin Labor Government and the banks, with the Commonwealth Bank aligning itself with the latter and pursuing objectives contrary to those of government. The Bank refused to support the Government's scheme for generating credit to maintain government expenditure and absorb unemployment.[65] The Government attempted then to establish a 'Central Reserve Bank' but was defeated by a hostile Senate. Criticism grew of the economic and political rôles adopted by the banks. By 1934 Labor, then in opposition, advocated nationalization. These pressures gave rise to the Royal Commission into Monetary and Banking Systems in 1937. The Commission's recommendations stressed the need for central bank independence but not at the sacrifice of ultimate government control; the legislative scheme should encourage a free interchange of views and the reconciliation of policy differences. This balance forms the basis of the relationships that now exist in the Australian banking system.

Initial hestiation in implementing the recommendations was soon overtaken by the need to expand the Bank's powers and responsibilities under wartime regulations.

The banking legislation of 1945 had the effect of preserving the banking system which emerged under war conditions, but in addition sought to require State governments and authorities to conduct their banking business exclusively with the Commonwealth Bank. A local authority challenged this provision and the challenge was upheld by the High Court on the basis that the legislation was not of general application but discriminatory against the States. The Court held that the Commonwealth could not use its powers to interfere with the running of the States as independent units and accordingly could not inhibit them from conducting their banking activities with the bank of their choice.[66]

The Labor Government's response to the decision was immediately to set about drafting an Act to nationalize the banks.[67] This decision is among the most controversial in Australia's history.[68] The banks, using their network of branches, were able to mobilize formidable public opposition to the move. And again this Act failed in the High Court and its decision was sustained, albeit

[64] Coombs, H. C., *The Development of the Commonwealth Bank as a Central Bank* (1931) M.A. Thesis, University of Western Australia 36.

[65] See Giblin L. F., *The Growth of a Central Bank — The Development of the Commonwealth Bank of Australia 1924-1945* (1951) Ch. 3; Marr, D., 'The Nation's Sock', *National Times* (Sydney) (26 December 1982) 8, 13.

[66] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31.

[67] The Prime Minister, Ben Chifley, had sat on the 1937 Royal Commission.

[68] See May, A. L., *The Battle for the Banks* (1968).

obiter, before the Privy Council. The Court found the Act to be in contravention of section 92 of the Constitution which declares that trade, commerce and intercourse among the States shall be absolutely free. The majority ruled first that banking involved an intangible flow of credit and thus was encompassed by the concept of trade and commerce. Secondly, the Court found that a government monopoly of banking amounted to a prohibition of those transactions of the private trading banks which crossed State borders and thereby infringed section 92, notwithstanding that the same transactions were to continue under public ownership.[69]

In the end, what remained was that part of the 1945 legislation which sought to strengthen the Commonwealth Bank's rôle as a central bank and those provisions which defined its relationship with government (thereby returning to the recommendations of the 1937 Royal Commission). In 1959 the Bank's commercial and central banking functions were separated and the Reserve Bank was established to administer the latter. But each stage in the Bank's history has been marked by political conflict and compromise,[70] which is reflected in the powers and functions given to the Bank and in its unique relationship with government.

Powers and functions

The Bank's charter is an ambitious one. Section 10 (2) of the Reserve Bank Act 1959 provides:

> 10 (2) It is the duty of the Board, within the limits of its powers, to ensure that the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia and that the powers of the Bank under this Act are exercised in such a manner as, in the opinion of the Board will best contribute to —
> (a) the stability of the currency of Australia;
> (b) the maintenance of full employment in Australia; and
> (c) the economic prosperity and welfare of the people of Australia.

Rather than defining the Bank's objectives the sub-section appears guilty of tautology. While specifying the objects of (a) currency stability and (b) full employment, it is difficult to see how these can meaningfully qualify (c)'s more general directive to pursue economic prosperity. For one thing the tight monetary policies which have always been integral to central banking in pursuing economic stability have done little to alleviate the growing unemployment of the last decade.[71] Today central banks are doubly damned. The sub-section can now be understood only in terms of a choice between the lesser of competing evils.

Further into the Act, section 26 requires the Bank to carry on business as a

[69] *Commonwealth v. Bank of New South Wales* (1948) 76 C.L.R. 1, (1949) 79 C.L.R. 497. It is interesting to note that the now accepted rationalization of s. 92 would not sustain this result, particularly because this shift occurred whilst Sir Garfield Barwick was Chief Justice, as it was Barwick who so forcefully argued the Banks' case before both the High Court and Privy Council. See particularly *North Eastern Dairy Co. Ltd v. Dairy Industry Authority (N.S.W.)* (1975) 134 C.L.R. 559 (especially *per* Mason J.); *Clark King Co. Pty Ltd v. Australian Wheat Board* (1978) 140 C.L.R. 120. See also Coper, M., Freedom of Interstate Trade under the Australian Constitution (1983) chs 32, 35.

[70] Even the reconstruction of the Bank under a board of directors only took place following a double dissolution of Parliament.

[71] An objects clause in this form was first adopted in the 1945 Act when Depression memories were still fresh in the minds of many Labor M.P.s.

central bank. Indeed, the section enjoins the Bank not to carry on business otherwise than as a central bank. Not surprisingly, the draftsman did not elaborate on this. Other parts of the Act confer on the Bank the functions of note issue and rural credits lending.[72] The Bank's profits from its central banking activities (after deduction of reserves) and from note issue are paid into Consolidated Revenue.[73] The profits from Rural Credits lending (after deducting reserves) are allocated toward rural research.[74] In return, the government undertakes responsibility to meet the Bank's liabilities but without surrendering to any creditor of the Bank a right to sue.[75] The operations of the Bank are subject to inspection and audit by the Auditor-General and the Bank is required to report annually to Parliament.[76] The general powers given to the Bank under the Act to pursue its objectives give some clue as to how the Bank is to operate. They are consistent with those expected of a commercial bank,[77] and thus the Bank implements much of its policy through its own market operations. Further, the Bank is established as a body corporate with perpetual succession and a common seal, has power to hold land and to sue and be sued in its own name.[78]

A companion piece of legislation, the Banking Act 1959, affords the Reserve Bank further powers and extends its responsibilities. It gives the Reserve Bank power to monitor the affairs of the banks and, in certain circumstances, to assume control of banks in difficulties. In exercising these powers the Bank must act for the protection of depositors.[79] The Banking Act also gives the Bank power to regulate liquidity via the Statutory Reserve Deposit system (although this mechanism has now fallen into disuse).[80] Further, it confers both quantitative and qualitative controls over bank lending and powers over foreign exchange.[81] The Bank also has power to control interest rates although this power must be exercised with the approval of the Treasurer.[82] These provisions, although specific, have also proved to be versatile. Significantly, they have founded the Bank's move to a more preventative style of regulation. The specific powers of the Banking Act have been utilized as a means of establishing a more general pattern of prudential supervision. The validity of this course is bolstered by the more general directives of the Reserve Bank Act. Prudential supervision has now become a substantial central banking function.[83]

72 Reserve Bank Act 1959 (Cth) Parts V & VI; the latter representing a political appeal to the rural sector.

73 Reserve Bank Act 1959 ss 30 & 40.

74 Reserve Bank Act 1959 s. 63.

75 Reserve Bank Act 1959 s. 77.

76 Reserve Bank Act 1959 ss 80 & 81.

77 Reserve Bank Act 1959 s. 8. In particular, these powers include receipt of money on deposit, the borrowing and lending of money, the purchase and sale of bills of exchange and of government and other securities, the purchase and sale of foreign exchange and gold, the giving of guarantees and the underwriting of loans.

78 Reserve Bank Act 1959 s. 7(1).

79 Banking Act 1959 (Cth) Part II, Div. 2.

80 Banking Act 1959 Part II, Div. 3.

81 Banking Act 1959 Part II, Div. 5; and Part II, Div. 4 & Part III respectively.

82 Banking Act 1959 Part V. The range of the Bank's powers and functions under the Banking Act were considered by Mason J. in *Yango Pastoral Co. v. First Chicago Australia Ltd* (1978) 139 C.L.R. 410.

83 This position is to be formalized by amendments to the Banking Act now scheduled for 1988.

A further Act, the Financial Corporations Act, gives the Reserve Bank access to information regarding financial institutions other than banks. However, Part IV of that Act, which extends to the Bank power to regulate the business of these institutions, has not been proclaimed.

Over and above its formal powers, a central bank can normally achieve its goals informally — a process which central bankers term 'moral suasion'. This has always been a powerful regulatory mechanism.

Independence

The Bank's volatile history ensures its place in a no-man's land between public and private sectors. The Bank is both linked to, and distanced from, government.

Within the ambit of its objectives, the Bank has power to determine its own policy and the Reserve Bank Act establishes the Reserve Bank Board for this purpose.[84] The Bank's management is placed in the hands of a Governor who must act in accordance with the policy determined by the Board.[85] The Governor and Deputy-Governor are appointed by the Governor-General who acts on the advice of the Treasurer.[86] Along with the Secretary to the Treasury, both sit as *ex officio* members of the Board and the remaining seven members of the Board are appointed by the Governor-General.[87] The Board's members are naturally leading members of the financial community and, by convention, include a senior trade unionist. The government's power of dismissal over both the Governor and Deputy-Governor and Board members is narrowly defined.[88]

While the Bank's policies are independently determined, the board is required to keep the government informed of them.[89] In addition, the Governor of the Bank is required to establish and maintain a close liaison with the Secretary to the Treasury so that each may be fully informed on matters of joint concern.[90] Indeed, it is impossible to conceive of a central bank functioning effectively without maintaining close co-operation with government. Conversely, the Bank provides an important source of independent advice to government on financial matters.

However, since the Depression, governments have been conscious that the Bank may pursue policies that cut across those of their own. Much of the 1937 Royal Commission was concerned with this problem.[91] The Commission found that the Commonwealth Bank was an entity independent of government. Its powers were delegated by Parliament and it was fully entitled to exercise its powers in accordance with its objects, notwithstanding that its views differed

84 Reserve Bank Act 1959 ss 9, 10(1).
85 Reserve Bank Act 1959 s. 12(2).
86 Reserve Bank Act 1959 s. 24.
87 Reserve Bank Act 1959 s. 14.
88 Reserve Bank Act 1959 s. 18, 25.
89 Reserve Bank Act 1959 s. 11(1).
90 Reserve Bank Act 1959 s. 13. It is interesting to ponder how such a provision might be enforced. One commentator has cynically suggested an injunction to lunch: Marr, *op. cit.* 10.
91 See *Report of Royal Commission to Inquire into the Monetary and Banking Systems in Australia* (1937) especially 206.

from that of government. The formula suggested by the Commission to redress this situation was written into the 1945 legislation[92] and its essence has been followed in subsequent legislation.

This procedure is now contained in section 11 of the Reserve Bank Act. The section sets out at length the means by which differences of opinion between the Bank and the government on questions of policy are to be resolved. First, the Treasurer and the Board are to endeavour to reach agreement. If no such agreement is reached, the Board is required to furnish the Treasurer with a statement on the matter over which the difference of opinion has arisen. The Treasurer may then make a recommendation to the Governor-General who may, with the advice of the Federal Executive Council, determine by order the policy to be adopted by the Bank. The Treasurer must then inform the Board of this direction and that the government will accept full responsibility for policy to be adopted. From that moment the Board is under a statutory obligation to ensure that the policy so determined is carried into effect. The section goes on to require, in addition, that if a government avails itself of these procedures, it must notify each House of Parliament that a direction has been issued pursuant to the section and lay before each House statements by the government and the Board setting out their respective views.

The procedure laid down represents a powerful sanction to ensure that the liaison and co-operation between the Bank and the government required elsewhere in the Act eventuates. Resort to such measures would be embarrassing both for the Bank and the government. While the government ultimately has the final say on matters of monetary policy and must be responsible for that policy, it is not likely to turn aside the Bank's advice lightly or fail to make every effort to reach agreement. Thus, the government's absolute authority over monetary policy can only be achieved at the expense of having to take any dispute between it and the Bank into the public arena.

It comes as no surprise to discover that, notwithstanding some quite marked differences of opinion between the Bank and government, the section has never been utilized. It is rare for these differences to receive public exposure but one such incident did so in 1982. The Liberal Government, faced with falling popularity, put forward a proposal in its budget requesting the Reserve Bank to release one per cent of Statutory Reserve Deposits to be allocated towards lending for housing. The Bank, however, had been moving toward a policy of deregulating financial markets and refused the request. The Government took the matter no further.[93]

In 1981 the Campbell Committee Report into the Australian Financial System reviewed the operation of the section but recommended its retention. While the Committee found a fully independent central bank to be unacceptable to a de-

[92] Commonwealth Bank Act 1945 (Cth) s. 10.

[93] See Marr, *op. cit.* 13. Board members have also recently acted to preserve (and assert) their independence when they strenuously opposed the possible appointment by the Fraser Government of its former Deputy Leader, Sir Phillip Lynch, to the post of Governor.

mocracy, it emphasized the importance of distancing the Bank from government:

> If the Bank believes it is being pushed beyond reasonable limits it has the discretion and obligation to hold firmly to its view and ensure its concerns are brought to the attention of the Parliament. Ultimately, however, the Bank cannot rise above the source of its powers — government and Parliament — and must be responsive to the direction which governments may deem fit to give.[94]

Comparisons

Section 11 is unique in the formula it prescribes for the relationship between a central bank and government. A similar, albeit less elaborate, procedure has been utilized in the incorporating statutes of some other Australian statutory authorities.[95] The formulation adopts a pragmatic approach. Primarily, it is designed to encourage co-operation between government and its statutory authorities but failing this, ensures that differences should be fully debated in Parliament.

Outside Australia, the degree of formal independence enjoyed by central banks varies considerably, although in practice most occupy a similar position *vis-à-vis* government. Most central banks adhere closely to the model evolved by the Bank of England. The Bank was established by Royal Charter in 1694 as a private bank for the purpose of financing the war against France.[96] In 1946 ownership of the Bank was transferred to Treasury.[97] But the Bank had long since ceased to operate as a private body. Over time the Bank had developed its more characteristic role of stabilizing the financial system and supervizing the activities of the banks. However, the Bank's commercial style of operation has remained, as has its independent stance.

Section 4 of the Bank of England Act 1946 empowers the Treasury to give such directions to the Bank as are considered necessary in the public interest.[98] Commenting on this provision before the Parker Tribunal, a previous Governor of the Bank, Cameron Cobbold, stated:

> The Bank of England is not, as is sometimes suggested, a mere operating department under the Treasury . . . . In law the Court (of Directors) is responsible for the conduct of the Bank's affairs subject to any direction which may be given by H.M. Treasury under Section 4(1) of the Bank Act 1946. In practice the Court of the Bank accept and discharge these responsiblities, in consultation with Her Majesty's Government and recognising that in the last resort the policy of the Bank must conform with the general policy of Government.[99]

In a more famous passage, the Bank of England's best-known Governor,

[94] *Final Report of the Committee of Inquiry into the Australian Financial System* (the Campbell Committee) (September 1981) 21. See also United Kingdom, *Report of the Royal Commission to Review the Functioning of Financial Institutions* (the Wilson Committee) (1980) Cmnd 7937, 339.

[95] See Broadcasting and Television Act 1942 (Cth) ss 64, 77, 78A and Australian Shipping Commission Act 1956 (Cth) s. 18. The formula was also recommended by Dr R. L. Wettenhall in his report to the Royal Commission on Australian Government Administration in *Report of the Royal Commission on Australian Government*, (1976) Appendix 1K, 335-6.

[96] Bank of England Act 1694.

[97] Bank of England Act 1946 s. 1.

[98] This power also has never been exercised.

[99] Cobbold, C. F. giving evidence to the Parker Tribunal, United Kingdom, *Proceedings of the Tribunal appointed to Inquire into allegations that information about the raising of Bank Rate was improperly disclosed* (1958) Cmnd 350, 2-20 December 1957, 208. See also United Kingdom, *Report of the Committee on the Working of the Monetary System* (the Radcliffe Committee) (1959) Cmnd 827, 271.

Montagu Norman, described the Bank's relationship with government in the following terms:

> I look upon the Bank as having a unique right to offer advice and to press such advice even to the point of 'nagging'; but always of course subject to the supreme authority of government.[1]

The institutional structures of central banks vary.[2] Most central banks are wholly owned by the state but some provide for varying degrees of private ownership.[3] Many central bank Acts contain a provision similar to section 4 of the Bank of England Act empowering the respective governments to issue directions to their central banks.[4] Rarely is a central bank allowed its independence without government retaining some ultimate right of intervention.[5] Even in the United States, where the Federal Reserve operates independently of the President and the executive, provision is made for accountability direct to Congress. And in all countries, a central bank's governing body is effectively government appointed. There is always a legal or practical obligation to consult with government.

The work of a central bank is as much a product of convention as of statute. Although there are significant differences in various central bank statutes, there is substantial uniformity in central banking practice. Even where a central bank is subject to the close supervision of government, the advice of a central bank on matters within its competence will be difficult to ignore. And where a central bank is invested with a great degree of formal independence, successful compliance with its objectives necessitates a certain degree of harmony with government. In practice, the operations of central banks demonstrate substantial compliance with the Bank of England notion of independence within government.

PART THREE: INDEPENDENCE AND RESPONSIBLE GOVERNMENT

> No doubt in practice a statutory corporation will seldom be either a mere passive instrument or wholly autonomous. If the former, its creation would scarcely be worthwhile, departmental officers could serve the purposes just as well. If the latter, it would savour of Frankenstein's monster . . . .[6]

Constitutional restraints on independence

Poincaré is said to have remarked that 'money is too important to be left to the central bankers.'[7] The idea that a body can be charged with the economic prosperity and welfare of a community and at the same time be afforded a substantial

[1] Royal Commission on Indian Currency and Finance (1926) *Minutes of Evidence*, Question 14, 597.

[2] See generally, United Kingdom, *Report of the Royal Commission to Review the Functioning of Financial Institutions* (the Wilson Committee) (1980) Cmnd 7937, Appendix 8 and Aufricht, H., *Comparative Survey of Central Bank Law* (1965).

[3] *E.g.* United States (where stock in the 12 Federal Reserve Banks is owned by commercial banks); South Africa (where all the Bank's stock is on issue to the public but carries voting restrictions) and Japan (where shareholding is split 55 *per cent* government and 45 *per cent* privately owned).

[4] *E.g.* France (where the Ministry of the Economy and Finance enjoys a wide power of direction); India (where the central government rather than Treasury issues directions) and New Zealand (where the Bank may be directed by the Minister of Finance). The Bank of Canada Act 1967 now confers a power of direction on the Minister of Finance following a refusal by the Bank in 1961 to follow government policy, which led to the forced resignation of the Bank's Governor.

[5] Formal independence exists only in West Germany and Switzerland.

[6] Stephen J. in *Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.)* (1979) 145 C.L.R. 330, 348.

[7] Quoted in Friedman, M., *Dollars and Deficits* (1968) 173.

measure of autonomy from government must present itself as an anathema to many lawyers who have uncritically absorbed the Diceyan traditions of government. Consistent with these norms, it might have been expected that the activities of central banks would have been accommodated within the structure of a ministerial department.

But if there is an anomaly in this it has always been there. That a central bank ought to possess at least some independence from government has been widely assumed. Many of the reasons traditionally advanced in support of central bank independence are uncomfortably paternalistic, drawing on a belief that governments cannot be trusted to turn aside short-term expediency when long-term interests are at stake.[8] Further, such a view suggests that central banks are capable of an apolitical stance when the consequences of their actions are inevitably political. Recognition of this is implicit in the Campbell Committee's conclusion 'that ultimate determination of, and responsibility for overall economic policy — including monetary policy — cannot be effectively divorced from government and Parliament.'[9]

While a distrust of government may have been the foundation for much central bank independence, it does not sustain it. The theory of central banking has become much less pedagogic and much more instrumental (and arguably the reality has always been so). Successive Royal Commissions and inquiries have accepted that, insofar as monetary policy is concerned, a government's economic and social objectives are best facilitated by allowing central bank policy to be flexible and responsive to changes in economic conditions.[10] Endorsing the findings of the 1937 Commission, Professor Copland commented that '[m]onetary crises are strewn with the wreckage of banking [A]cts and rigid charters for central banks'.[11] Professor Sayers opens his book on central banking by emphasizing that '[t]he essence of central banking is discretionary control of the monetary system.'[12] Monetary policy does not lend itself to implementation by rules. Increasingly, central banks have sought to manipulate monetary aggregates via direct market participation. The corporate form is well-suited to pursuit of these aims — as is a certain measure of independence.

Implicit in the creation of central banks as statutory authorities is a recognition that there is some utility in disaggregating certain specialized activities from the mainstream of government. Central banks are deliberately placed in a half-world between public and private sectors. They are 'the Government's arm in the City,

[8] See Resolution III, International Financial Conference, Brussels (1920) 18. And see Kisch, K. C. I. E. & Elkin, W. A., *Central Banks* (1932) Ch. 2 and critique by Professor Plumptre in *Central Banking in the British Dominions* (1940) 23-9.

[9] *Final Report of the Committee of Inquiry into the Australian Financial System* (the Campbell Committee) (1981) 20.

[10] Campbell Committee, *op. cit.*; *Report of Royal Commission to Inquire into the Monetary and Banking Systems in Australia* (1937). In U.K. see *Report of the Committee on the Working of the Monetary System* (the Radcliffe Committee) (1959) Cmnd 827; *Report of the Royal Commission to Review the Functioning of Financial Institutions* (the Wilson Committee) (1980) Cmnd 7937.

[11] Copland, D. B., 'Some Problems of Australian Banking' (1937) *Economic Journal* 686, 688.

[12] Sayers, R. S., *Central Banking after Bagehot* (1957) 1.

and the City's representative in the Government'.[13] In this they are an additional source of independent, expert advice to government. Central banks typify a more functional approach to public administration.

Although no express mention can be found of statutory authorities in the Constitution, no one has suggested that this should preclude their use. Nor, it is submitted, would the High Court be likely to accede to such a view. Section 61 of the Constitution delimits the range of executive power to the execution and maintenance of the Constitution and of the laws made under it. The High Court has been flexible in its approach to this section holding that, while its scope is not unlimited, it will extend into all areas within the legislative competence of the Commonwealth and to matters consistent with its status as a nation.[14] Logically, if Parliament has power to legislate in respect of a particular subject matter the power ought to extend to the establishment of a suitable agency to administer its legislation. Statutory authorities have come before the High Court on numerous occasions and their use as an executive mechanism has not been questioned. *Obiter* remarks also suggest that the Court is amenable to recognizing organisational forms other than departments of state. In *Heiner v. Scott*, Griffith C.J. said:

> It may be conceded that the Commonwealth Parliament may for the more convenient exercise of any of the executive functions of government set up a corporation for the purposes of acting as an agent or instrumentality of government, as was done in the United States of America by the establishment of national banks.[15]

And in *Baxter v. Ah Way*, Higgins J. observed:

> Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government of Australia.[16]

Nevertheless, some writers[17] have suggested that the extent to which statutory authorities can be made independent of government is constrained under the Constitution by operation of the conventions of responsible government. Professor Richardson, in particular, has argued that legislation which set up an independent authority and which sought to deprive the Governor-General of 'residual responsibility' should 'be ultra vires as purporting to divest the Crown and the Governor General of their functions in regard to the maintenance and execution of a law of the Commonwealth'.[18] The argument is essentially that the integration of the concept of responsible government into the Constitution requires that any exercise of executive power can only take place under the general oversight of ministers who are responsible to Parliament. In short, all executive action must conform to the Westminster model of government.

It is difficult to understand what this means. How far removed would a

[13] McRae, H., & Cairncross, F., *Capital City* (1985) 217. See also United Kingdom, *Report of the Committee on the Working of the Monetary System* (the Radcliffe Committee) (1959) Cmnd 827, 274.

[14] *Victoria v. Commonwealth* (1975) 134 C.L.R. 338.

[15] (1914) 19 C.L.R. 381, 392.

[16] (1909) 8 C.L.R. 626, 646.

[17] Most notably Richardson, J. E., 'The Executive Power of the Commonwealth' in Zines, L. (ed.), *Commentaries on the Australian Constitution* (1977). Also Goldring, J., 'Accountability of Commonwealth Statutory Authorities and Responsible Government' (1980) 11 *Federal Law Review* 353.

[18] *Supra* 85.

minister have to be before he surrendered 'residual responsibility' for a statutory authority? There are few statutes which purport to oust ministerial control completely.[19] Section 11 of the Reserve Bank Act 1959 specifically grants the Treasurer (acting through the Governor-General) a power of direction over the policy of the Bank but at the same time severely curtails that power. As has been noted, the effect of this provision has been to ensure that no government has yet issued a direction to the Bank. If this section preserves 'residual responsibility' then the concept is particularly dormant; if it does not, it will operate to frustrate a more co-operative approach between the Reserve Bank and the Treasury. The latter would appear to constitute an unnecessary restriction on Parliament's ability to prescribe the most appropriate means for the implementation of its legislation.

Nevertheless, the 'residual responsibility' view draws tangential support from the approach of some judges in the High Court to cases involving the fettering of a statutory discretion by reliance upon government policy. In *R v. Anderson; ex parte Ipec-Air Pty Ltd*[20] the respondent wished to operate an air freight business and applied to the Director-General of Civil Aviation for permission to import the necessary aircraft. The Air Navigation Regulations left the grant of permission to the discretion of the Director-General. He refused to give permission after referring the matter to the Minister and being informed that importation would contravene the government's 'two-airline policy'. In an application for mandamus by the respondent, four judges of the High Court found that the Director-General could have regard to government policy provided the decision itself remained his own. However, they divided on the facts of the case.[21] Windeyer J. found that not only could the Director-General have regard to government policy but that he was obliged to do so. The approach of Windeyer J. received support in *obiter dicta* from Barwick C.J., Gibbs and Murphy JJ. in *Ansett Transport Industries (Operations) Pty Ltd v. Commonwealth*.[22] The case involved similar issues, although by then the statutory discretion of the Director-General of Civil Aviation had been transferred to the Secretary of the Department of Transport. Murphy J. addressed the point explicitly:

> The system of responsible government which is reflected in ss 61 and 64 of the Constitution contemplates (if it does not require) that executive powers and discretions of those in the departments of the executive government be exercised in accordance with the directions and policy of the Minister. Unless the language of legislation (including delegated legislation) is unambiguously to the contrary, it should be interpreted consistently with the concept of responsible government.[23]

Mason J. was strongly of the opposite view:

> Apart from the observations of Windeyer J. the authorities give no support to the notion that a Minister can, without statutory authority, direct an officer in whom a statutory discretion is reposed, how he will exercise that discretion.[24]

It is submitted that a residual power of direction over statutory authorities possessing a degree of independence conferred by statute cannot be inferred from

19 Such as Australian Security Intelligence Organisation Act 1979 (Cth) s. 8(2).

20 (1965) 113 C.L.R. 177.

21 Taylor and Owen JJ. found that he had exercised his own discretion; Kitto and Menzies JJ. (dissenting) found that he had automatically followed the Minister's direction.

22 (1977) 139 C.L.R. 54, 61-2 (*per* Barwick C.J.), 62 (*per* Gibbs J.) and 87 (*per* Murphy J.).

23 *Ibid.* 87.

24 *Ibid.* 83. See also *R v. Mahoney; ex parte Johnson* (1931) 46 C.L.R. 131, 145 (*per* Evatt J.) and *Green v. Daniels* (1977) 51 A.L.J.R. 463.

these judgments. In both the above cases, the Air Navigation Regulations were silent on whether the Minister could issue a direction to an officer in whom discretion was vested under those regulations. Section 11 of the Reserve Bank Act 1959 on the other hand is most explicit as to the relationship that Parliament envisages operating between the government and the Bank. None of the judgments question the constitutional validity of statutory authorities.

More fundamentally, the 'residual responsibility' view ignores the inadequacies of ministerial responsibility as a system of accountability and control of executive action. To insist upon the application of ministerial responsibility to a statutory authority whose statute has removed it from the departmental norm is a *non sequitur*. To do so obviates the benefits which Parliament sought to gain from utilizing this form of administration. While in many cases Parliament might not give sufficient attention to weighing up these benefits,[25] they were fully considered in establishing Australia's central bank. To impose an omnipresent doctrine of ministerial responsibility would be to deny their existence.[26]

There are practical difficulties in holding ministers accountable to Parliament for the affairs of statutory corporations. While a statutory authority's incorporating legislation usually provides for the retention of some ministerial controls, this can provide no foundation for the doctrine of ministerial responsibility. A minister cannot realistically be held responsible for the activities of a statutory authority when legislation specifically confers a measure of independence on that authority. This is reflected in the parliamentary practice of disallowing questions to ministers which relate to a part of a statutory authority's affairs beyond the minister's immediate control. Nevertheless, in Australia, ministers commonly answer questions concerning statutory authorities within their portfolios but, in so doing, will merely act as conduits between the authority and Parliament and will not, by furnishing answers, assume responsibility for any matter arising from the replies given. Thus a minister's rôle is purely formal. It is not an instance of ministerial responsibility and will not compromise the independence conferred on an authority by statute. This is made clear in the Treasurer's reply to a question regarding the Commonwealth Bank. In 1956 an M.P., angered by a delayed response to questions raised about the Bank, asked whether the Treasurer would answer questions concerning the affairs of the Bank. The Treasurer's reply has been adopted as a precedent:

> The Commonwealth Bank has been established by Parliament as a statutory corporation with the intention of giving it a substantial measure of independence . . . In conformity with generally accepted principles and the provisions of the constitutive Act, the practice has been to furnish, in response to parliamentary questions, information as to the monetary and banking policies being followed by the bank and on related matters. It is, however, a question of some difficulty as to how far the bank should be called upon to provide detailed information on matters affecting its day-to-day management. Obviously, a limit must be observed if the degree of independent responsibility conferred by statute upon the bank is to be maintained.[27]

25 Wettenhall, R. L. 'Statutory Authorities' in *Report of Royal Commission of Australian Government Administration*, (1976) Appendix 1K, 315, 342.

26 The point is forcefully made by Craig, P. P., *Administrative Law* (1983) 115-6.

27 Commonwealth of Australia *Parliamentary Debates*, House of Representatives, 6 March 1956, 543. See also Odgers, J. R., *Australian Senate Practice* (5th ed. 1976) 218-9.

Attempts to require the imposition of a system of ministerial responsibility upon the operations of statutory authorities are open to obvious criticisms. To do so would be unrealistic and ineffective.[28]

To the extent that the proponents of this view point to inadequacies in the accountability and control of statutory authorities there is merit in their criticisms. The existence of independent statutory authorities does undermine many of the assumptions fundamental to our constitutional system and creates a sphere of executive operation into which conventional channels of accountability and control will not reach. It is submitted, however, that ministerial responsibility is an inappropriate vehicle for the achievement of these objectives. Ministerial responsibility is largely ineffective as a means of clarifying and regulating what is done by public administrators. It does not provide the public with the safeguards on which the doctrine is based and which have long been assumed of it.[29] The doctrine embodies assumptions about the rôle of the bureaucracy appropriate to the simpler conditions present in the nineteenth century. Public administration has not only grown well beyond Dicey's frame of reference, but its work has become more diversified and technical. A minister cannot be properly appraised of the requisite knowledge to be properly accountable for all that goes on within his department. If ministers are to be held nominally responsible for statutory authorities this is all the more fictitious. The doctrine of ministerial responsibility has largely become a panacea for the absence of the channels of accountability it is assumed to provide. Moreover, as an organisational model, ministerial responsibility has its deficiencies. Its reliance upon a hierarchy of accountability and control can discourage participation in policy formation and is particularly ineffective in accommodating specialist functions.[30] Many government activities are simply not suited to such a structure. It is not normally regarded as appropriate for a central bank.

To regard the doctrine of ministerial responsibility as the lynchpin of public sector accountability is to lose sight of the object of a system of responsible government. It is submitted that responsible government does not bind us to a nineteenth century paradigm of government but rather it imports into the Constitution an adaptable system of public accountability and control. Given the atrophy of ministerial responsibility, the need for alternative channels of accountability and control is obvious. To some extent, this demand has been met. In the course of his judgment in *R v. Toohey; ex parte Northern Land Council* Mason J. remarked:

> [t]he doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[31]

[28] For criticism on other grounds see Finn, P. D., & Liddell, G. J., 'The Accountability of Statutory Authorities' in Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth — Fifth Report*, (1982) Appendix 4 173.

[29] This was expressly accepted in *R v. Toohey; ex parte Northern Land Council* (1981) 151 C.L.R. 170, 192 (*per* Gibbs C.J.) & 222 (*per* Mason J.).

[30] These are well documented in Emy, H. V., 'The Public Service and Political Control' in *Report of Royal Commission on Australian Government Administration*, Appendix 1B, (1976) 27-31 & 38-9. See also United Kingdom, *The Civil Service* — Vol. 2, *Report of a Management Consultancy Group* (the Fulton Committee) (1968) Cmnd 3638.

[31] (1981) 151 C.L.R. 170 at 222.

Recent statutory reform of administrative law has widened access to judicial review, given greater access to reasons for decisions and to supporting documentation and has provided for a review on the merits in respect of a range of decisions.[32] The reforms have widened the avenues of accountability and control by promoting a more participative model of democracy.[33] The more broadly based system of administrative law has restored some substance to the idea of responsible government while substantially altering its form. It has provided an effective supplement to the traditional channels for watching over the activities of statutory authorities.

Further, while the conferral of a degree of independence upon a statutory authority inevitably involves an element of self-denial by government, it should not be forgotten that if circumstances warrant, it is open to Parliament to abolish or reconstitute a statutory authority by repealing or amending its legislation.[34] In addition, the power of appointment to an authority's governing board is invariably reserved for the government of the day. In practice, this power will be far more influential than statutory edict. At the same time, a government will be concerned to ensure that the membership of an authority's board is acceptable to those affected by its activities and will accordingly tend to include representatives of certain community interests. The make-up of the Reserve Bank Board typically consists of a carefully drawn balance of market, trade union and academic backgrounds.

The Reserve Bank as an arm of the executive

If, as I have argued, it is legitimate for Parliament to establish agencies outside the traditional Westminster model and to invest them with a degree of autonomy not normally afforded to agencies operating within that model, then a question arises as to what extent should agencies so established be identified with the Crown. In determining the application of Crown immunities to a particular statutory corporation, the courts have long wrestled with numerous criteria but no conclusive formula has emerged. Australian case law in particular has been fraught with inconsistency.[35] Over the years, the courts have scoured the English language in search of terminology capable of consistently differentiating the various public authorities and explaining their relationship with government.[36]

32 See Administrative Appeals Tribunal Act 1975 (Cth); Ombudsman Act 1976 (Cth); Administrative Decisions (Judicial Review) Act 1977 (Cth); and Freedom of Information Act 1982 (Cth).

33 A full account of these issues is given in Thynne, I. and Goldring, J., *Accountability and Control: Government Officials and the Exercise of Power* (1987).

34 As occurred in 1977 with the insertion of s. 6A into the Trade Practices Act 1974 (Cth).

35 To give but one example, in *Wynyard Investments Pty Ltd v. Commissioner for Railways (N.S.W.)* (1955) 93 C.L.R. 376 the Commissioner was held to be immune from tenancy legislation but in *The Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211 the Commissioners were not. For other anomalies see Renfree, H. E., *The Executive Power of the Commonwealth of Australia* (1984) 321-3.

36 Public authorities have been described, *inter alia*, as 'servants of the Crown', 'agents of the Crown', 'emanations of the Crown', 'instrumentalities of the Crown' and as a transmutation of part of the Crown into corporate form. All these expressions were used to describe the Commonwealth Bank of Australia at various stages of the *Bank Nationalization* case (*Bank of New South Wales and Others v. Commonwealth and Others* (1948) 76 C.L.R. 1).

To a large measure these ambiguities derive from the declining utility of retaining the notion of the Crown as a euphemism for the collective activities of a modern state. But the dangers have long been forseen. In his famous lectures to Cambridge undergraduates in 1887-88, Maitland cogently observed:

> There is one term against which I wish to warn you, and that term is 'the crown'. You will certainly read that the crown does this and the crown does that. As a matter of fact, we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers. No, the crown is a convenient cover for ignorance: it saves us from asking difficult questions, questions which can only be answered by study of the statute book. I do not deny that it is a convenient term, and you may have to use it; but I do say that you should never be content with it. If you are told that the crown has this power or that power, do not be content until you know who legally has the power — is it the king, is it one of his secretaries: is this power a prerogative power or is it the outcome of statute?[37]

Maitland's warning has gone largely unheeded.

Early cases attempted to distill a set of inalienable functions of government as a litmus test of the application of Crown status to public authorities.[38] Such a test inevitably draws on certain assumptions, then current, about the legitimate functions of a state. There are, however, obvious difficulties in sustaining a distinction which turns on a notion that government functions are historically fixed and inalienable.[39] Plainly the range of government activities has not remained fixed and, in particular, it can no longer be said that commercial undertakings are beyond the sphere of government.[40] The very idea that the courts could determine the province of government was scathingly criticized by Latham C.J. in the *First Uniform Tax* case.[41]

Deficiencies in the functional approach led to greater reliance being placed upon alternative criteria — all of which involve some measure of an authority's independence from government control.[42] This methodology has dominated the case law for most of this century. Nevertheless, it also has failed to impart clarity nor has it completely alienated functional considerations.[43] The judgments of the High Court in *Superannuation Fund Investment Trust v. Commissioner of Stamps of the State of South Australia*[44] amply illustrate how the courts have failed to isolate control from other factors. Multifarious tests were applied to the question of whether the S.F.I.T. represented the Crown and different conclusions were reached with the Court, in the ultimate, dividing evenly on the point.

The difficulties are neatly illustrated by the position of a central bank. A

37 Maitland, F. W., *The Constitutional History of England* (1926) 418.

38 See *Mersey Docks and Harbour Board v. Gibbs* (1866) L.R. 1 H.L. 93; *Richard Coomber (Surveyor of Taxes) v. Justices of the County of Berkshire* (1883) 9 A.C. 61; and *The Commonwealth & the Central Wool Committee v. Colonial Combing, Spinning and Weaving Company Ltd* (1922) 31 C.L.R. 421.

39 See Griffith, J. A. G., 'Public Corporations as Crown Servants' (1952) *University of Toronto Law Journal* 169 and Friedmann, W. G., 'Legal Status of Incorporated Public Authorities' (1948) 22 *Australian Law Journal* 7, 12-6. See also *Townsville Hospitals Board v. Council of the City of Townsville* (1982) 149 C.L.R. 282, 288-9 (*per* Gibbs C.J.).

40 See *New York v. United States* (1945) 326 U.S. 572, 580 (*per* Frankfurter J.) and 591 (*per* Douglas J.); and *Committee of Direction of Fruit Marketing v. Australian Postal Commission* (1980) 144 C.L.R. 577, 594 (*per* Mason & Wilson JJ.).

41 *South Australia and Another v. Commonwealth and Another* (1942) 65 C.L.R. 373, 423.

42 *E.g.* powers of ministerial direction, financial autonomy, reporting requirements and ownership of assets. See *Grain Elevators Board (Victoria) v. President, Councillors and Ratepayers of the Dunmunkle Shire* (1946) 73 C.L.R. 70 (*per* Latham C.J.).

43 See in particular the *Bank voor Handel* cases — [1952] All E.R. 314 and [1954] A.C. 584.

44 (1979) 145 C.L.R. 330.

central bank's activities are predominantly commercial in nature, its functions are closely akin to those performed by government and its independence from government is considerable.

Applying a control test, the Reserve Bank could hardly be considered a Crown servant. The Bank determines its own policy and although section 11 of the Reserve Bank Act 1959 gives the Treasurer a limited power of direction over the policy to be followed by the Bank, the section is largely designed to preserve the Bank's independence. The Bank employs its own staff who are outside the public service.[45] Notwithstanding that much of the Bank's profits are paid into Consolidated Revenue, that its liabilities are guaranteed by the Commonwealth and that its accounts are subject to audit, it is financially autonomous in the sense that it has independent discretion in the application of its funds toward the fulfilment of its purposes. A central bank would have difficulty meeting any test of immunity based on government control.

And yet given the objectives of a central bank it is likely that a court would feel considerable unease in reaching such a conclusion. Central banks have become an essential means of implementing economic policy. The Reserve Bank Act 1959 directs the Bank to pursue the economic prosperity and welfare of the people of Australia. It is thus quite likely that the interests of government might be significantly impaired if the Bank were to be denied Crown status in the application of some statutes. A functional analysis would strongly favour much immunity for central banks.

No court has ruled on the Reserve Bank's relationship to the Crown. However, there have been determinations concerning its predecessor — the Commonwealth Bank of Australia. An early case was *Heiner v. Scott*[46] where a Brisbane solicitor contended that Queensland legislation imposing stamp duty on cheques drawn on the Commonwealth Bank was an unconstitutional interference with a Commonwealth Government instrumentality. At the time the Bank's functions were purely commercial. The High Court dismissed the argument. Griffith C.J., in a particularly confused piece of reasoning, held that the Commonwealth Bank Act 1911 had the effect of declaring 'that the Commonwealth may itself carry on the business of banking under the name of the "Commonwealth Bank of Australia".'[47] His Honour then applied a functional test, noting that the functions of government were circumscribed by the Constitution. However, this truism was of little assistance to Griffith C.J. He was unable to elaborate these functions but decided that the conduct of ordinary banking business was not one of them. The rest of the Court also followed a functional approach holding that the receipt of deposits on current account was not a government function but reserved their opinions on whether other functions carried on by the Bank might be identified with the Crown.

By the time of the *Bank Nationalization* case[48] the Commonwealth Bank had taken on many of the functions of a central bank. An aspect of the case concerned

45 Reserve Bank Act 1959 s. 66.
46 (1914) 19 C.L.R. 381.
47 *Ibid.* 393.
48 (1948) 76 C.L.R. 1.

the acquisition by the Bank of the shares and assets of private banks pursuant to the nationalization scheme. A question arose whether section 75(iii) of the Constitution, which confers original jurisdiction on the High Court in all matters in which a person is sued on behalf of the Commonwealth, applied to the Commonwealth Bank. The opinions of the Court differed on the relationship of the Bank to the Commonwealth. Rich and Williams JJ. followed Griffith C.J., holding that the Commonwealth had 'transmute[d] a part of itself into the outward form of a corporation as a convenient means of carrying on a Commonwealth activity.'[49] Other judges were more reserved, holding that such a determination depended upon the particular circumstances.[50] In any event, a majority of the Court concurred with Dixon J. that the application of section 75(iii) is a different question than that posed when considering whether the Bank enjoyed the status of the Crown.[51] For the purposes of section 75(iii) the Commonwealth Bank could be sued on behalf of the Commonwealth notwithstanding that in a number of its capacities the Bank did not act as the Commonwealth. The only other case concerning the status of the Commonwealth Bank is *Inglis and Another v. Commonwealth Trading Bank of Australia*[52] which also dealt with section 75(iii) and it is submitted that Kitto J.'s more sweeping remarks in that case must be read with this in mind.

The High Court has had much less difficulty in deciding that State government involvement in commercial banking will not occasion Crown immunity. Notwithstanding that the Rural Bank of New South Wales was proclaimed as a statutory body representing the Crown, it was held not to be the Crown in the sense that would entitle it to any privilege of the Crown.[53] It was an independent entity possessing independent discretions established under statute to carry on banking business. The Bank has also been held to be subject to landlord and tenant legislation even though the Act under which it was established provided that it would hold land for and on behalf of the Crown.[54] As an independent entity the Bank was bound by the legislation.

These cases are of scant assistance. State government banks do not undertake central banking functions and only in the *Bank Nationalization* case did the Commonwealth Bank possess any rôle of this kind. All that can be said with certainty is that, given the nature of its functions, the case of the Reserve Bank for Crown status must logically be stronger than that of the Commonwealth Bank. However, while considerations of control remain an essential element, the Bank is likely to be denied the attributes of the Crown.

It is submitted that two issues are being confused. While the Reserve Bank is an emanation of the Commonwealth in the sense that it exercises the executive power of the Commonwealth, this is a distinct question from whether or not it is

49 *Ibid.* 274.
50 Should, for example, the Commonwealth be sued if the Commonwealth Bank wrongly dishonoured a cheque? See Latham C.J. *ibid.* 226-7.
51 *Ibid.* 358.
52 (1969) 119 C.L.R. 334.
53 *Rural Bank of New South Wales v. The Council of the Shire of Bland* (1947) 74 C.L.R. 408.
54 *Rural Bank of New South Wales v. Hayes* (1951) 84 C.L.R. 140.

clothed with Crown immunity. The appropriateness of conferring particular immunities upon a statutory authority will inevitably vary according to the authority's particular circumstances. This is not properly a question for the courts but for Parliament. Accordingly, the immunities afforded a public corporation ought to be determined by reference to its incorporating statute. This principle was recognised by Dixon J. in the *Bank Nationalisation* case where he said:

> Such questions depend in the end upon the intention of the legislature establishing the corporate agency. It is within the province of the legislature to say whether the body it forms shall or shall not be suable for the torts of persons employed in its work: to say whether it is or is not to enjoy this or that immunity or privilege of the Crown.[55]

If the rationale for the existence of statutory corporations is the desire to clothe some activities with the attributes of private enterprise, then it is difficult to see why they ought to be afforded immunities beyond those conferred by their incorporating statute.

Commonwealth–State relations

In a federal context, the most significant immunity question for a Commonwealth statutory authority is whether it can be bound by the legislation of a State. This, in turn, touches on the broader constitutional question of a State's power to bind the Commonwealth.[56] Recent High Court decisions have given the latter question a higher profile and appear to have finally put paid to what Meagher and Gummow have colourfully referred to as 'Sir Owen Dixon's Heresy'.[57] This 'heresy' was the proposition that the Commonwealth (but not the States) enjoyed some wider implied immunity than that which can be distilled from section 109 of the Constitution. That section provides that 'when a *law* of a State is inconsistent with a *law* of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid' (emphasis added). It must always be emphasized that this section concerns the supremacy of laws and not the underlying powers.[58]

In the *Engineers'* case[59] the High Court decisively rejected the notion that the Commonwealth and the States should be immune from each other's laws. There are limitations,[60] but since *Engineers* it has been clear that, within the scope of its enumerated powers, Commonwealth laws will generally be binding upon the States. This does not however presuppose a negative answer to the reciprocal question. The States' powers, being plenary, ought equally to take the benefit of the same principle. Indeed this conclusion was reached in *Engineers*:

55 (1948) 76 C.L.R. 1, 359.

56 For a thorough analysis see Lane, P. H., *The Australian Federal System* (2nd ed. 1979) 955-1009.

57 *Dao v. Australian Postal Commission* (1987) 61 A.L.J.R. 229 and *The Commonwealth v. Evans Deakin Industries Ltd* (1986) 60 A.L.J.R. 619; Meagher, R. P., & Gummow, W. M. C., 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25.

58 See Lane, *op. cit.* 1008-9 and Meagher & Gummow, *op. cit.* 28.

59 *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd and Others* (hereinafter '*Engineers*') (1920) 28 C.L.R. 129.

60 The Commonwealth cannot legislate to discriminate against the States or to substantially compromise their place as independent parties to the Federation: *The Lord Mayor, Councillors & Citizens of the City of Melbourne v. The Commonwealth and Another* (1947) 74 C.L.R. 31 (especially 81-3).

> The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, giving of valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec. 109.[61]

Left in this form the issue might have remained relatively uncontroversial. However, through a progression of three cases, Sir Owen Dixon succeeded in partially reviving a rather slanted version of the implied immunity doctrine.[62] Dixon J.'s dissenting judgment in *Uther's* case[63] forms the basis of the alternative view. There, Dixon J. asserts the inability of a State to legislate to affect the rights of the Commonwealth in relation to its subjects. This view was followed by a majority of the High Court in *Cigamatic*.[64] Yet in *Cigamatic* there are reservations. McTiernan and Taylor JJ. dissented and Menzies and Owen JJ. would only extend immunity to the Commonwealth in respect of prerogative rights. In short, a majority of the Court declined to say that the Commonwealth was generally immune from State legislation. In *Bogle's* case[65] Fullagar J. took the argument some way further. After deciding that Commonwealth Hostels Ltd was not the Crown his Honour added a strongly worded *obiter dictum:*

> the State Parliament has no power over the Commonwealth. The Commonwealth – or the Crown in right of the Commonwealth, or whatever you choose to call it – is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament.[66]

Despite its absolutism, this statement is confusing. All proponents of this view, including Fullagar J., acknowledge that the Commonwealth may be 'affected by' State laws which affix legal consequences to given transactions.[67] Thus the Commonwealth may submit itself to State laws so as to take advantage of protections afforded by them but in doing so it must abide by the rules laid down. However, a moment's reflection will show the difficulty of such a position. The point at which 'affected by' can be distinguished from 'bound by' eludes this writer. Also, it is clear from *Maguire v. Simpson*[68] and now *The Commonwealth of Australia v. Evans Deakin Industries Ltd and Another* [69] that section 64 of the Judiciary Act 1903 must of necessity contemplate the application of many State provisions to the Commonwealth. That section provides that 'in any suit to which the Commonwealth or a State is a party, the rights of the parties shall be as nearly as possible the same . . .'. Its effect is to put out of account any special position

61 (1920) 28 C.L.R. 129, 155. Applied: *Pirrie v. McFarlane* (1925) 36 C.L.R. 170; *In re Richard Foreman and Sons Pty Ltd; Uther v. The Federal Commissioner of Taxation and Another* (hereinafter '*Uther*') (1947) 74 C.L.R. 508.

62 His view originates *obiter* in *The Federal Commissioner of Taxation and Another v. The Official Liquidator of E. O. Farley Limited (in Liquidation) and Another* (1940) 63 C.L.R. 278, is developed by his dissent in *Uther* (1947) 74 C.L.R. 508 and is largely accepted by the Court in *The Commonwealth of Australia and Another v. Cigamatic Pty Ltd (in liquidation) and Another* (hereinafter '*Cigamatic*') (1962) 108 C.L.R. 372. Each case deals with the Commonwealth's prerogative right to priority in winding up proceedings.

63 (1947) 74 C.L.R. 508 (especially 528-9).

64 (1962) 108 C.L.R. 372.

65 (1953) 89 C.L.R. 229.

66 *Ibid.* 259.

67 *Ibid.* 260. See also Dixon J. in *Uther* (1947) 74 C.L.R. 508, 528.

68 *Maguire and Another v. Simpson and Another* (1977) 139 C.L.R. 362 where the Commonwealth Bank was held to be bound by the Limitation Act 1969 (N.S.W.).

69 (1986) 60 A.L.J.R. 619.

of the Crown and thus, to the extent permitted by section 109 of the Constitution, will make State laws binding upon the Commonwealth.

Moreover, there is no sound policy behind the Dixon view of federalism. While Sir Maurice Byers has argued it to be a necessary element of nationhood,[70] this argument is not compelling. Within their respective spheres a matter can be just as much for the peace, order and good government of a State as of the Commonwealth. To the extent that this is not so, it remains open for the Commonwealth to assert a priority through the operation of section 109. Nationalistic ambition can be fully accommodated within the Commonwealth's enumerated heads of power — a point amply demonstrated by the *Franklin Dam* case.[71]

It is submitted that section 109 provides the constitutionally correct procedure for the determination of a statutory authority's immunity from State legislation. I have argued that the extent of a statutory authority's immunity from statute is best determined by Parliament. In the case of Commonwealth authorities affected by State legislation, this is achieved by operation of section 109. To the extent that any State legislation unduly compromises a Commonwealth authority's functions as expressed in its incorporating statute, it will be invalid. Notwithstanding his views on Commonwealth–State relations generally, this reasoning has been advanced by Dixon C.J. In *Australian Coastal Shipping Commission v. O'Reilly*,[72] the question was whether the Commission was bound by Victorian stamp duty legislation. Dixon C.J. found that the Commission represented the Crown in right of the Commonwealth but did not suggest that any general immunity from State law could be extended to it. Rather he based his decision on the presence in the Commission's incorporating statute of a provision excluding the operation of State taxes thereby overriding the State provisions.[73]

In considering the position of the Reserve Bank much is made of remarks to the effect that the Bank and the Commonwealth are one and the same.[74] Leaving aside the incongruence of such a position with the fact that the Bank is made a separate legal entity, it is submitted that it is neither correct nor necessary for it to be generally immune from State laws (*i.e.* that *O'Reilly's* case should be followed). In the Reserve Bank Act, the Bank is expressly made immune from State taxation[75] and is afforded a priority above that provided by State laws in relation to the winding-up of a bank.[76] Moreover, the insulation provided by section 109 need not be express. Much other State legislation is displaced by implication. Most importantly, the wide powers conferred on the Bank in the Reserve Bank Act in relation to monetary and banking policy are undoubtedly beyond interference from the States. Further, as the Bank has power to appoint its staff on its

[70] Byers, M. H., 'Comment' in Evans, G. (ed.), *Labor and the Constitution 1972-75* (1977) 67-71.

[71] *Commonwealth v. Tasmania* (1983) 57 A.L.J.R. 450.

[72] (1962) 107 C.L.R. 46.

[73] McTiernan, Kitto, Taylor, Windeyer and Owen JJ. agreed; Menzies J. dissented on other grounds.

[74] See especially Kitto J. in *Inglis and Another v. Commonwealth Trading Bank of Australia* (1969) 119 C.L.R. 334.

[75] Reserve Bank Act 1959 s. 79. However it must pay for services rendered, such as water rates; *Minister of Justice for the Dominion of Canada v. City of Levis* [1919] A.C. 505. See also *The Commonwealth v. The State of New South Wales* (1918) 25 C.L.R. 325, 348.

[76] Reserve Bank Act 1959 s. 86.

own terms and conditions,[77] State legislation as to terms and conditions of employment will not be binding upon it.

The recent High Court decision in *Dao v. Australian Postal Commission*[78] turns on precisely this last point. The applicants were refused permanent employment with the Commission due to the Commission's policy of requiring all applicants for permanent employment to be of a specified minimum body weight. The applicants sought to have the Commission's decision overturned before the Equal Opportunities Tribunal which is constituted pursuant to the provisions of the New South Wales Anti-Discrimination Act 1977. The Commission challenged the jurisdiction of the Tribunal. Its challenge was ultimately successful. In the New South Wales Court of Appeal, Kirby P. and Samuels J.A. found that the Commission came within the Commonwealth's exclusive legislative power under section 52(ii) of the Constitution to regulate the Commonwealth public service. McHugh J.A. chose to adopt the Dixon 'heresy', finding that the States have no power to bind the Commonwealth and that, as the Commission by virtue of s. 24 (3) of the Postal Services Act 1975 enjoyed the immunities of the Commonwealth, it also could not be bound by State legislation. While reaching the same result, the High Court took a very different tack. It found that the provisions of the New South Wales Anti-Discrimination Act were in collision with provisions in the Postal Services Act relating to the Commission's power to employ staff 'on such . . . terms and conditions as the Commission determines'. Accordingly, the Court held that the provisions of the New South Wales Act must give way by force of section 109 of the Constitution. It did so without reference to section 52 of Constitution or to any supervening immunity possessed by the Commonwealth over the States. Rather, the Court laid great stress on the wide application of section 109 and thus, we must assume, embraced this brand of federalism.

When section 109 is applied to the wide powers conferred on the Reserve Bank in the Reserve Bank Act, the Bank is afforded the extensive immunity from State legislation that it undoubtedly requires in the implementation of its central banking functions. Nevertheless, not all the Bank's activities will take the benefit of this analysis. Not all its powers contemplate the exclusion of State laws. For example, its power to acquire property[79] must be exercised in compliance with the laws applicable to the location of the property. There are also numerous State laws of general impact which will of necessity bind the Bank. Matters such as crime, pollution, traffic and municipal planning are examples. The decisions in both *Evans Deakin* and *Dao* serve to emphasize that neither the Commonwealth or its instrumentalities will enjoy an absolute immunity from State legislation. The extent of immunities available to the Reserve Bank from State legislation will be determined by reference to Commonwealth legislation which displaces the State provisions.

The weight of academic opinion is plainly against a view that would imply into

[77] Reserve Bank Act 1959 ss 66 & 67.
[78] (1987) 61 A.L.J.R. 229.
[79] Reserve Bank Act 1959 s. 7(1)(c).

the Constitution a general Commonwealth immunity[80] (and it now seems clear that the judiciary also is of this view). The justification for extending such an immunity to statutory authorities is even less convincing. Statutory authorities in Australia operate as independent agencies in a mixed economy regulated by both federal and State law. There is no reason why the *Engineers'* doctrine should not apply to them with full force. It is submitted that the application of section 109 effects an appropriate balance between federal and State interests and leaves it open for the Commonwealth Parliament to adjust that balance.

PART FOUR: CONCLUSION

The problem posed herein is one in which statutory independence pulls in two directions. On the one hand there exists a perceived need to confer some capacity for independent action upon statutory authorities but, on the other, much has been made of this independence to deny the authority access to many of the immunities enjoyed by other branches of the executive. The case of a central bank casts doubt upon the validity of this linkage. It is submitted that these are distinct questions and must be addressed as such by Parliament.

In practice the use of statutory authorities represents a significant departure from the notion of an indivisible Crown and, to the extent that this gives flexibility to the processes of government, is desirable. If legal theory is to accord more with reality, its conception of the Crown must be disaggregated. The diversity of activity undertaken by contemporary governments requires that their various organs ought *prima facie* to be bound by the general law — it being for Parliament to arm an institution with the immunities it requires.

[80] See Lane *op. cit.* 955-1009; Sawer, G., 'State Statutes and the Commonwealth' (1962) *Tasmanian University Law Review* 580; Zines, L., *The High Court and the Constitution* (1982) 267-7; Sackville, R., 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7 M.U.L.R. 15; Meagher & Gummow, *op. cit.* But see Howard, C., *Australian Federal Constitutional Law* (3rd ed. 1985) 198 *et seq.*