State Constitutions in an Australian Republic

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If the Australian people were to vote at a referendum in favour of an Australian republic, this would have a significant impact on the States. The referendum itself may contain a provision which prohibits the States from maintaining their current links with the Crown. Even if it did not, the popular support necessary in a majority of States for the referendum to have passed, and the possibility that the Queen may not agree to maintain constitutional links with a State which is a constituent part of a republic, lead to the conclusion that most, if not all, States would also break their ties with the monarchy. Accordingly, there is an onus on the States to prepare themselves for such a possibility and review their Constitutions so that any necessary changes could be implemented smoothly after detailed consideration had been given to all their ramifications. This article does not consider the merits of a republic, but rather considers how such changes could be effected at the State level, and the type of changes which would have to be made to the Victorian Constitution if links to the Crown were to be severed.

INTRODUCTION

In February 1998, elected and appointed representatives of the Australian people will meet to consider whether Australia should become a republic. They will also be asked to consider the type of republican model which should be put to the people in a referendum or indicative plebiscite.[1]

The Commonwealth Government's policy is that if a consensus emerges from the Convention, then that position will be supported by the Government at a constitutional referendum. If, however, no consensus emerges, then the Government is committed to an indicative referendum or plebiscite which would ask the Australian people whether they wish to retain the present system, or whether an Australian head of state should be elected directly by the people, or by a parliamentary vote, or by any other method which emerges from the Convention.[2]

The Government has promised that a formal constitutional referendum would then be put, to give legal effect to the option chosen by the people in the indicative plebiscite,[3] unless, of course, the status quo were chosen.

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1 Second Reading Speech to the *Constitutional Convention (Election) Bill* 1997, in Australia, House of Representatives, *Parliamentary Debates*, 26 March 1997, 3061.

2 Liberal and National Parties' Law and Justice Policy, February 1996.

3 Liberal and National Parties' Law and Justice Policy, February 1996.

This commitment to put the issue to a referendum means that serious consideration must be given to the mechanics of change, in case the Australian people choose to become a republic. While a considerable amount of work has already taken place concerning the changes which would need to be made to the Commonwealth Constitution,[4] little consideration has been given to the State Constitutions. State Constitutions retain separate links to the monarchy. If the Australian people were to vote in favour of an Australian republic, where would this leave the States? Would or could they be forced to amend their Constitutions to sever all links with the monarchy? How could such changes be made? What other types of changes would need to be made to the State Constitutions? These are the issues which should be given deep consideration now, as they are complex and important, and should not be left to the last minute before a referendum is held.

This article briefly reviews the issue of whether an amendment to the Commonwealth Constitution could be used to impose a republican system on the State Constitutions, and how the State Constitutions could otherwise be amended to break all links with the monarchy. It then goes on to consider specifically the Victorian Constitution, and the type of changes which would have to be made to it, if a republican system were to be implemented at the State level as well as the Commonwealth level.

METHODS OF SEVERING A STATE'S LINKS WITH THE CROWN

If a referendum to amend the Commonwealth Constitution in order to become a republic were successful in obtaining the approval of an overall majority of voters and a majority of voters in a majority of States, how could a similar change be effected in the States? Do the States require referenda of their own to institute a republican form of government, or could this occur through the mere passage of legislation? If a State declined to break its ties with the Crown, could the Commonwealth itself act to break those historic links between the States and the British monarchy? These issues are discussed below.

Amendment of State Constitutions

In order to abolish the links between State Governors and the Crown, changes would have to be made to the State Constitutions. The Constitutions of New South Wales, South Australia and Tasmania all refer to the position of Governor, but the provisions concerning the Governor and his or her role and powers may be amended by ordinary State legislation, without the necessity for a special majority or referendum. However, a referendum may nevertheless be advisable in both New South Wales and South Australia due to certain

[4] G Winterton, *Monarchy to Republic* (1986); Republic Advisory Committee, *An Australian Republic: The Options*, Canberra, AGPS, 1993.

entrenched provisions which incidentally refer to Her Majesty.[5] The only way the relevant State could remove references to Her Majesty from these provisions, would be by referendum. While some have argued that the references to Her Majesty do not entrench the monarchy in the State Constitutions of New South Wales and South Australia,[6] others have argued that a referendum would be necessary,[7] or at least that a referendum would be wise to avoid any doubt.[8] A further consideration is the importance of a State Constitution being comprehensible to the people that it governs. Accordingly, even if references to Her Majesty do not entrench the monarchy in a State, they should be removed from the Constitution of a republican State, to ensure that they are not misleading and confusing to the people of the State.

While the Victorian Constitution could be amended to remove the relationship between the State and the Queen without the need of a referendum, there are still 'manner and form' provisions which entrench the monarchy in the Victorian Constitution and would require a special majority vote in both Houses of the Parliament before these provisions could be amended. Section 15 of the Victorian *Constitution Act* 1975 provides that legislative power is vested in the Parliament consisting of Her Majesty, the Legislative Council and the Legislative Assembly. Section 6 provides that the appointment of the Governor shall be during Her Majesty's pleasure. Section 18 provides that neither of these sections, nor s 18 itself, may be repealed, altered or varied, unless the second and third readings of the Bill are passed by an absolute majority of the whole number of members of the Council and the Assembly respectively.

Western Australia combines both methods for amending the relevant provisions of its Constitution, requiring a special parliamentary majority vote and a referendum. Sub-section 2(2) of the *Constitution Act* 1889 (WA) provides that the Parliament of Western Australia consists of the Queen, the Legislative Council and the Legislative Assembly, and s 50 provides that the Queen's representative in Western Australia is the Governor. Sub-section 73(2) provides that any Bill that expressly or by implication provides for the abolition or alteration of the office of Governor shall not be presented for assent unless the second and third readings are passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council and the Legislative Assembly respectively, and the Bill has also been approved by the electors of the State in a referendum. Section 73 itself cannot be altered or repealed without going through the same process.

In Queensland only a referendum is necessary to amend the provisions of the State Constitution which entrench the monarchy. Section 2A of the

[5] *Constitution Act* 1902 (NSW): ss 7A and 7B; *Constitution Act* 1934 (SA): s 10A, both of which refer to Her Majesty's assent to certain Bills. Note s 8 of the *Constitution Act* 1934 *(SA)* also refers to Her Majesty's assent to Bills which require an absolute majority of two thirds of both Houses in order to be passed.

[6] G Winterton, 'The States and a Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 121.

[7] G Carney, 'Republicanism and State Constitutions', in *Australia: Republic or Monarchy?* (M Stephenson and C Turner, eds, 1994) 199.

[8] G Williams, 'The Australian States and an Australian Republic' (1996) ALJ 890, 897.

Constitution Act 1867 (Qld) provides that the Parliament of Queensland consists of the Queen and the Legislative Assembly, and s 11A provides that the Queen's representative in Queensland is the Governor. Sub-section 11A(2) further provides that the office of Governor may not be abolished or altered except in accordance with s 53. Section 53 states that any Bill which provides for the abolition or alteration of the office of Governor shall not be presented for assent unless it has first been approved by the electors in a referendum. Section 53 itself is also entrenched by the same mechanism.

Accordingly, if the States were to choose to amend their own Constitutions to fall into line with a republican form of government adopted at the Commonwealth level, then special parliamentary majorities would have to be met in Victoria and Western Australia and a separate referendum would be necessary in Western Australia and Queensland, and advisable in New South Wales and South Australia. Although no referendum would be required in Victoria and Tasmania, it is possible that an indicative referendum would still be held to consult the people of those States.

Avoiding the manner and form restrictions in State Constitutions

These 'manner and form' restrictions in the State Constitutions may, however, be avoided in certain circumstances. The *Australia Acts* 1986 provide examples of such an occurrence. The *Australia Acts* are two almost identical statutes which were enacted to break certain links between the United Kingdom and the States and to terminate the power of the United Kingdom Parliament to legislate for Australia. The *Australia Act* 1986 (Cth) was enacted by the Commonwealth Parliament at the request of all the States, pursuant to s 51(xxxviii) of the Commonwealth Constitution. The *Australia Act* 1986 (UK) was enacted by the Westminster Parliament at the request of the Commonwealth Parliament and Government and the Parliaments of the States and applies by way of paramount force. This double enactment of the same statute was considered necessary due to doubts as to whether the power under s 51(xxxviii) was sufficient to support the whole of the Act.[9]

Entrenched provisions of the Queensland and Western Australian Constitutions were amended by ss 13 and 14 of the *Australia Acts*, without the necessary referenda. Other State constitutional provisions were affected by ss 8 and 9 of the *Australia Acts* which provide that State laws are no longer subject to disallowance by the Queen, and that no law shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent to a Bill which has been passed in the proper manner or to reserve any Bill for the signification of Her Majesty's pleasure. These amendments either took effect because they were contained in a British Act of paramount force,[10] or because they were contained in a Commonwealth Act which was passed pursuant to s 51(xxxviii).

[9] R D Lumb, 'The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change' (1988) 15 *University of Queensland Law Journal* 3, 26; L Zines, *The High Court and the Constitution*, (4th ed, 1997) 305.

[10] *McGinty* v *Western Australia* (1996) 186 CLR 140, 297 per Gummow J .

The route of avoiding State manner and form provisions by the enactment of overriding British legislation of paramount force has been closed by s 1 of the *Australia Acts*.[11] This section provides that no Act of Parliament of the United Kingdom passed after the commencement of the *Australia Acts* shall extend to Australia as part of Commonwealth, State or Territory law. Thus, an Act of the Westminster Parliament would not be of assistance in liberating the States from their manner and form provisions.[12]

Whether s 51(xxxviii) of the Commonwealth Constitution can be used to avoid State manner and form requirements is the subject of debate. Section 51(xxxviii) provides that the Commonwealth may make laws with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

While on the one hand it is argued that the amendment of a State Constitution is something that only the Parliament of the United Kingdom could have done immediately prior to federation,[13] it is also argued that the States themselves had the power to amend their Constitutions at the time of federation, as long as it was done in conformity with any entrenched manner and form requirements.[14] Accordingly, while s 51(xxxviii) may not extend to allow the Commonwealth to repeal State manner and form provisions, because the Parliament of the United Kingdom was not the *only* body which could perform this function at the time of federation, s 51(xxxviii) may support Commonwealth legislation which grants power to a State legislature to legislate inconsistently with its manner and form provisions in specified circumstances, as certainly only the Parliament of the United Kingdom had such power prior to federation.[15]

Such a course would give rise to two further problems. The first is the fact that s 106 of the Constitution preserves the existence of State Constitutions, subject to the Commonwealth Constitution, 'until altered in accordance with the Constitution of the State'. The question arises whether this provision is a limitation on Commonwealth legislation enacted under s 51(xxxviii), or State legislation enacted pursuant to a power granted by s 51(xxxviii) legislation. Section 51(xxxviii) is, of course, also subject to the Commonwealth

[11] See also s 12 of the *Australia Acts* which repeals s 4 of the *Statute of Westminster*.

[12] It is doubtful whether even an amendment to the *Australia Acts* which would allow the Westminster Parliament to legislate for an Australian State, would be effective. It is arguable that once the Westminster Parliament has divested itself of this power, it cannot be regained: R D Lumb, The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change' (1988) 15 *University of Queensland Law Journal* 3, 29–30. Moreover, it is certainly the case that amendments made to the *Australia Acts* by Australia in relation to their application to Australia, could not affect the powers of the United Kingdom: L Zines, op cit (fn 9) 306.

[13] G Carney, op cit (fn 7) 201.

[14] G Winterton, op cit (fn 4)142.

[15] G Winterton, op cit (fn 4) 142; and G Carney, op cit (fn 7) 199.

Constitution. In *Port MacDonnell Professional Fishermen's Association Inc* v *South Australia,* the High Court held that 'the dilemma which is posed by the inclusion of the words "subject to this Constitution" in both par (xxxviii) and s 106 must be resolved in favour of the grant of power in par (xxxviii)'.[16] It is likely, therefore that legislation enacted under s 51(xxxviii) would not be limited by s 106, especially because s 51(xxxviii) requires the consent of all States directly concerned, but it should be noted that *Port MacDonnell* did not deal specifically with the preservation of the manner and form restrictions of State Constitutions, so the matter has not been finally settled.[17]

The second difficulty arises through s 6 of the *Australia Acts* 1986. Section 6 provides that:

> A law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

Thus, if a State enacted legislation, pursuant to a power granted by Commonwealth legislation enacted under s 51(xxxviii), in a manner which was inconsistent with the manner and form restrictions of the State's Constitution, the State's legislation would be invalid because it would be repugnant to the *Australia Acts.* It would therefore be necessary to amend s 6 of the *Australia Acts.* The procedure for amending the *Australia Acts* is set out in s 15. Sub-section 15(1) provides that the *Australia Acts* may be amended by Commonwealth legislation passed at the request or with the concurrence of *all* the States (rather than merely those states 'directly concerned' as in s 51(xxxviii) of the Constitution). The only other possible means of amending s 6 of the *Australia Acts* is by way of a Commonwealth referendum under s 128 of the Constitution, which grants the Commonwealth Parliament power to make such an amendment.[18]

Commonwealth Referendum

Another way of avoiding the particular manner and form provisions of the States and of preventing the anomalous position where a State retains links with the Crown whilst forming a constituent part of a republic, would be for the Commonwealth referendum which is necessary to implement a republic at the Commonwealth level, also to include provisions or powers which could break the links between the States and the Crown.

It has been contended by some that a referendum under s 128 of the Constitution is not capable of amending a State Constitution. Mr Greg Craven has

[16] (1989) 168 CLR 338, 381.

[17] Prior to *Port MacDonnell,* Professor Lumb expressed the view that s 106 would govern s 51(xxxviii): R D Lumb, 'The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change' (1988) 15 *University of Queensland Law Journal* 3, 32.

[18] The controversy concerning this form of amendment is discussed further below.

argued that on its face, s 128 only permits the amendment of the Commonwealth Constitution, and not the State Constitutions which are protected by s 106 of the Commonwealth Constitution. Further, he queried what legitimate interest the Australian people as a whole would have in forcing the alteration of the constitutional arrangements of a State. Certainly, as he noted, 'such an attempt would be a ripe subject for constitutional challenge'.[19]

However, by entering into a federation, the States subjected themselves to a binding Constitution which prevails over their own laws, including their own State Constitutions.[20] Covering clause 5 of the *Commonwealth of Australia Constitution Act* provides that the Act (which in s 9 includes the Commonwealth Constitution) shall be binding on the courts, judges and people of every State, notwithstanding anything in the laws of the State. Upon forming the federation, the States also subjected themselves to a method of amending the Constitution, which takes account of the support of majorities of voters in a majority of States, but does not require the agreement of all the States to an amendment.[21] Accordingly, any amendment to the Commonwealth Constitution will be binding on the States, notwithstanding a contrary State law, such as a State Constitution. As the amendment would be an express change to the Commonwealth Constitution, no implied protection of State Constitutions[22] would apply.

The question again arises as to the extent that the State Constitutions are protected by s 106 of the Commonwealth Constitution. While some have considered that this section protects and preserves State Constitutions,[23] it also brings the State Constitutions within the scope of the Commonwealth Constitution.[24] Section 106 is not given any immunity from amendment under s 128 of the Constitution. On the contrary, it states that the State Constitutions are 'subject to this Constitution', and are accordingly subject to the Constitution as amended by s 128. Section 106, therefore, could be expressly

[19] G Craven, 'The Constitutional Minefield of Australian Republicanism' (1992) 8(3) *Policy* 33, 36.

[20] *McGinty* v *Western Australia* (1996) 186 CLR 140, 172 per Brennan J; 208 per Toohey J.

[21] Note, however, the penultimate paragraph of s 128 which requires that when an amendment affects the representation of a State in the Commonwealth Parliament, or the borders of a State, it must be approved by a majority of voters in the affected State. This is discussed further in the following section.

[22] Implications of federalism drawn from the Constitution protect the States from Commonwealth legislation which would inhibit or impair the continued existence of a State or its capacity to function: *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192; *The Commonwealth v Tasmania* (1983) 158 CLR 1; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106, 163 per Brennan J; 241–2 McHugh J.

[23] *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319, 391–2 per Dixon J; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 547 per Mason CJ, Wilson and Dawson JJ and 575 per Brennan and Toohey JJ; and *Attorney-General (NSW)* v *Ray* (1989) 90 ALR 263, 276–7 per Young J.

[24] *Attorney-General (Queensland)* v *Attorney-General of the Commonwealth* (1915) 20 CLR 148, 172 per Isaacs J; *New South Wales* v *The Commonwealth* (1975) 135 CLR 337, 372 per Barwick CJ; *Re State Public Services Federation; Ex parte Attorney-General (Western Australia)* (1993) 178 CLR 249, 275 per Brennan J.

amended to state that the Commonwealth Parliament has legislative power to amend State Constitutions.[25]

It may not be necessary, however, to amend s 106 of the Constitution. It may be sufficient to amend the Commonwealth Constitution in a way that is inconsistent with a State Constitution, for the Commonwealth Constitution prevails over State laws. An example of such a provision is provided by Professor Winterton, in his proposed Constitution for an Australian Republic.[26] Section V of Professor Winterton's proposed Constitution provides:

> The Queen shall cease to be Head of State of the Commonwealth or any part thereof, and shall have no powers or functions with respect to the Commonwealth, a State or Territory of the Commonwealth, or any part thereof.

As State laws, including State Constitutions, are subject to the Commonwealth Constitution, this provision would render ineffective any State laws granting the Queen powers or functions with respect to the State.

In addition to this provision, Professor Winterton has proposed the insertion of the following additional sub-sections in s 110:

(1) Subject to this Constitution, including this section, the manner in which a State Governor is appointed and dismissed, and the tenure, powers, functions, and all other matters relating to the office of Governor shall be such as is prescribed by the law of the State.
(2) The Governor of a State shall not represent, or be appointed by, the Queen or any Head of State or officer of the government of another country.
(3) The Commonwealth Parliament shall, subject to this Constitution, have power to make laws which enact the provisions of section V and sub-sections (1) and (2) of this section, and to make laws with respect to the implementation and enforcement of such laws.

By giving the Commonwealth Parliament an express head of power under sub-s 110(3) to make laws to implement and enforce sub-s 110(2), the Commonwealth Parliament could then make use of s 109 of the Constitution, in order to prevail over State laws.

At present the Commonwealth Parliament does not have a head of power to make laws in relation to State Governors, but if it were granted such a power, any State law which was inconsistent with a Commonwealth law severing the ties between the State Governors and the Crown, would be invalid to the extent of the inconsistency. The constitutional implication which protects the constitutional integrity of the States[27] could not prevail over an express constitutional power granted to the Commonwealth legislature to enact such legislation.

Section 6 of the *Australia Acts* would not affect any Commonwealth legislation which effects an amendment to a State Constitution contrary to

[25] J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 990.

[26] G Winterton, 'A Constitution for an Australian Republic' *We The People* (1994) 1. See also: Republic Advisory Committee, *An Australian Republic: The Options*, Canberra, AGPS, 1993, 126.

[27] See fn 22 supra.

manner and form requirements, because s 6 is only directed at State legislation, not Commonwealth legislation.

The referendum procedure

The group 'Australians for Constitutional Monarchy' has contended that there is a strong argument that any amendment to the Commonwealth Constitution which would affect a State Constitution, must be passed by a majority of the voters in that State.[28] This argument is based upon the penultimate paragraph of s 128 which states:

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of electors voting in that State approve the proposed law.

The debate concerns the interpretation of the phrase 'or in any manner affecting the provisions of the Constitution in relation thereto'. One very broad argument is that the word 'thereto' refers to the State.[29] Thus any constitutional amendment which in any manner affects the provisions of the Commonwealth Constitution in relation to a State, requires the approval of the people of that State. It would appear clear, however, from the face of the provision that the reference to amendments 'in any manner affecting the provisions of the Constitution in relation thereto' refers specifically to representation in the Commonwealth Parliament and the borders of the States. It is stretching the interpretation too far to suggest that it refers to any amendments to the Constitution which affect a State in any manner whatsoever. Most amendments to the Constitution will affect the States in some way. For example, the successful constitutional amendment in 1928 which allowed the Commonwealth to take over State debts, would have failed if the penultimate paragraph to s 128 were applied, because it was not passed by New South Wales.

Moreover, the evidence of the development of the penultimate paragraph of s 128 supports the view that it was never intended to give rise to this wider interpretation. Throughout the course of the Constitutional Conventions of the 1890s, the relevant paragraph related specifically to the alteration of the representation of the States. At the conclusion of the final Constitutional Convention in Melbourne in 1898, the provision read as follows:

> An alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives

[28] Australians for Constitutional Monarchy, Press Release, 3 November 1993, republished in *Australia: Republic or Monarchy?* (M Stephenson and C Turner, eds, 1994) Appendix 2.

[29] Sir H Gibbs, 'The Australian Constitution and Australian Constitutional Monarchy', in *Australia: Republic or Monarchy?* (M Stephenson and C Turner, eds, 1994) 11. See further discussion of this argument in Republic Advisory Committee, *An Australian Republic: The Options,* Canberra, AGPS, 1993, 130.

> of a State in the House of Representatives, shall not become law unless the majority of the electors voting in that State approve the proposed law.

After the failure of the Constitution Bill to be passed in a referendum in New South Wales in 1898, a Premiers' Conference met in 1899, at which all the Premiers agreed to certain amendments to the draft Constitution Bill, including an amendment that:

> No alteration should be made in the limits of a State without the approval of its electors voting upon the question.[30]

It appears that when this part was added to the existing paragraph, the words 'or in any manner affecting the provisions of the Constitution in relation thereto' were added. It is inconceivable that the drafter could have taken upon himself[31] to fundamentally change the whole method of amending the Constitution, by requiring each State to approve any amendment which might affect it or its Constitution, when this was neither supported by the Constitutional Convention nor the Premiers Conference. It appears that the word 'thereto' was intended to relate directly to the alteration of the representation or boundaries of a State by an amendment to the Commonwealth Constitution.

Contemporary commentators support this view and provide no indication that it was even considered that s 128 could extend to requiring each State to approve of any constitutional amendment which could affect the State. Quick and Garran assumed that the phrase 'or in any manner affecting the provisions of the Constitution in relation thereto' referred to alterations to the Commonwealth Constitution which affected the 'foregoing matters' of State representation and boundaries.[32] They also assumed that s 128 could be used by the ordinary method to affect State Constitutions.[33]

Professor Harrison Moore assumed that the phrase was intended as a double entrenchment of that paragraph of the Commonwealth Constitution, so that it could not be altered except by the same method, because it is a provision of the Commonwealth Constitution which relates to the representation of States and their boundaries.[34] Others have disputed the interpretation of the phrase in this manner, but still considered that the phrase relates to amendments to the Commonwealth Constitution which affect provisions of the Commonwealth Constitution relating to the representation and boundaries of the States.[35]

[30] J A La Nauze, *The Making of the Australian Constitution* (1972) 242. See also J Quick and R Garran, op cit (fn 25) 988.

[31] There is debate as to who drafted the amendments to this provision, as the Premiers did not have an acknowledged 'drafter' with them at the time the changes were made. It has been suggested that the person who made these alterations was a Mr Cullen, who was a lawyer taken to Melbourne by George Reid: J A La Nauze, op cit (fn 30) 243.

[32] J Quick and R Garran, op cit (fn 25) 991

[33] Id 990.

[34] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 604.

[35] C Howard, *Australian Federal Constitutional Law* (2nd ed, 1972) 508; and see summary of the debate in: Constitutional Commission, *Final Report of the Constitutional Commission 1988*, AGPS, Canberra, 1988, 886–7.

Accordingly, the better view is that the penultimate paragraphof s 128 of the Constitution would not require majorities in every State to approve a referendum to become a republic, as long as the referendum did not affect the representation of the States in the federal parliament or the boundaries of the States, or perhaps amend the penultimate paragraph of s 128 itself.

Australia Acts 1986

Even if the approval of every State is not required for the valid passage of an amendment to the Commonwealth Constitution which would affect the links between the States and the Crown, there may yet be a requirement for agreement by all the States, due to another provision in the *Australia Acts*. Section 7 provides, amongst other things, that Her Majesty's representative in each State shall be the Governor, and shall exercise all the powers and functions of Her Majesty in respect of that State except the power to appoint and terminate the appointment of the Governor, and except when Her Majesty is personally present in the State.

Although it has been argued by some that s 7 does not entrench the relationship between the Governor and the Crown,[36] it is also arguable that Commonwealth legislation which provided that the State Governors shall not be Her Majesty's representative, would be repugnant to s 7, and would therefore be deemed by s 15(2) of the *Australia Acts* to be an invalid attempt to amend the *Australia Acts*. In either case, if Australia were to become a republic and the States were also to break their ties with the Crown, it would be preferable for s 7 to be amended, in order to ensure the validity of the procedure.

Sub-section 15(1) of each *Australia Act* provides that it may be amended or repealed by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States. Subsection 15(3) provides that nothing in sub-s 15(1) limits or prevents the exercise by the Commonwealth Parliament of any powers that may be conferred upon it by any alteration of the Commonwealth Constitution made in accordance with s 128 of the Constitution.

The difficulty that lies in amending the *Australia Acts* by way of the referendum method set out in sub-s 15(3), is that some have argued that this provision is not one which confers power, and that it is doubtful that an amendment to the Constitution could otherwise grant such a power.[37] However, one must also consider the effect of s 15(2) of the *Australia Acts*. It

[36] G Winterton, 'An Australian Republic' (1988) 16 MULR 467, 479; G. Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 121; and see comments in the opinion of the Acting Solicitor-General, Mr Dennis Rose in: Republic Advisory Committee, *An Australian Republic: The Options,* Canberra, AGPS, 1993, Appendix 8, para 42. See to the contrary: R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia Annotated* (5th ed, 1995) 571.

[37] S Gageler and M Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 149; and Submission by the Government of New South Wales to the Republic Advisory Committee, 14 July 1993. For a contrary argument, see the opinion by the Acting Commonwealth Solicitor-General, Mr Dennis Rose, in: Republic Advisory Committee, *An Australian Republic: The Options,* Canberra, AGPS, 1993, Appendix 8, paras 16–29; and G Lindell and D Rose 'A Response to Gageler and Leeming' (1996) 7(3) *Public Law Review* 155.

provides that an Act of the Commonwealth Parliament that is repugnant to the *Australia Acts* shall, to the extent of that repugnancy, be deemed an Act to repeal or amend the *Australia Acts,* for the purposes of s 15(1). This means that unless a constitutional amendment can confer on the Commonwealth Parliament power to amend the *Australia Acts,* then an amendment to the Commonwealth Constitution which is made under the s 128 procedure, and which gives the Commonwealth Parliament power to make laws concerning the relationship between a State Governor and the Queen (as suggested by Professor Winterton, above) would be ineffective because such a law enacted by the Commonwealth Parliament would be repugnant to s 7 of the *Australia Acts* and would not comply with the method for amending the *Australia Acts* set out in s 15(1). This would mean that s 128 of the Constitution has been limited by s 15 of the *Australia Acts.* Such a limitation in the *Australia Act* (Cth) would be invalid, because that Act was enacted pursuant to s 51(xxxviii), and this section, which is 'subject to the Constitution', is therefore subject to s 128 and cannot be used to amend the Commonwealth Constitution.[38]

This problem is resolved, however, by making s 15(1) subject to s 15(3) which states that s 15(1) does not limit or prevent the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution made in accordance with s 128 of the Constitution.[39] The fact that s 15(3) does not expressly confer the power is not significant, because unless s 15 fettered s 128 of the Constitution in some way, then the Constitution could always be amended to grant the Commonwealth Parliament power to legislate in a manner which may be repugnant to the *Australia Acts.*

[38] Sir A Bennett, 'Can the Constitution be Amended Without a Referendum?' (1982) 56 ALJ 358; G J Lindell, 'Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *FL Rev* 29, 42

[39] It should be noted, however, that there is still a risk that s 15 of the *Australia Act* (Cth) is invalid, as s 15(1) purports to limit the manner in which legislation enacted under s 51(xxxviii) can be amended or repealed. It is arguable, though, that legislation enacted pursuant to s 51(xxxviii) can only be repealed in the same manner; at the request or with the consent of the States who requested or concurred in its enactment: K Booker, 'Section 51(xxxviii) of the Constitution' (1981) 4 *UNSW Law Journal* 91, 103; R D Lumb, op cit (fn 9) 31. If this were the case, then s 15 may provide for no more than is required anyway under the Constitution. In any event, s 15 of the *Australia Act* 1986 (UK) would appear still to apply: L Zines, op cit (fn 9) 306–8 (cf Sir Maurice Byers, 'Current Constitutional Problems' in Centre for Research on Federal Financial Relations, *Current Constitutional Problems in Australia* (1982) 55; R D Lumb, op cit (fn 9) 17).

HOW TO AMEND THE VICTORIAN CONSTITUTION[40] TO EFFECT A REPUBLICAN FORM OF GOVERNMENT

Method of amending the Constitution

Unlike the Commonwealth Constitution,[41] as discussed above, there is no necessity for a referendum to amend the Victorian Constitution. Sub-section 18(1) provides that the Victorian Parliament can repeal, alter or vary any of the provisions of the constitution, except those specified in sub-s 18(2), by passing an ordinary Act of Parliament. Sub-section (2) provides:

> It shall not be lawful to present to the Governor for Her Majesty's assent any Bill —
> (a) by which an alteration in the constitution of the Parliament, the Council or the Assembly may be made; or
> (b) by which this section, Part I, Part IIA, Part III, except section 85, or Division 2 of Part V or any provision substituted for any provisions therein contained may be repealed altered or varied —
>
> unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.

Sub-section (4) makes some exceptions in relation to the establishment of new electoral provinces, an increase in the number of members of the Parliament, the qualifications of voters and members of Parliament, and provisions for elections.[42]

There are a number of vital sections which fall within the provisions protected in the Constitution by the requirement that an amendment or repeal can only be passed by an absolute majority of each House. For example, the section providing for the appointment of the Governor is to be found in Part I, and the section which sets out the constitution of the Parliament specifies that the Parliament includes Her Majesty. Accordingly, approval by an absolute majority of the Victorian Parliament would be necessary before Victoria could sever its links with the Crown.[43]

Even though no referendum is required, it is possible that the State Parliament would still consult the people of the State by referendum before taking such a significant step. Alternatively, the State Parliament could rely on the Victorian results of any Commonwealth referendum on the republic issue.

[40] This part of the paper relies on the 1995 reprint of the Victorian *Constitution Act* 1975, and does not take into account other Acts which form part of the broader Victorian constitution.

[41] Section 128 of the Commonwealth Constitution requires a referendum before the Constitution can be altered.

[42] See also s 85 which provides separate restrictions on the manner of amending the jurisdiction of the Supreme Court of Victoria.

[43] As discussed earlier, it is arguable that an amendment to the Commonwealth Constitution could override the manner and form provisions of the Victorian Constitution and legislation under s 51(xxxviii) of the Commonwealth Constitution could also avoid these restrictions.

Appointment of the Governor

The obvious necessary amendment is to s 6 of the Victorian Constitution, which provides that:

> 6(2) The appointment of a person as Governor shall be during Her Majesty's pleasure by Commission under Her Majesty's Sign Manual and the Public Seal of State.

The section also requires the Governor to take the 'Oath or Affirmation of Allegiance'.

One of the primary policy questions in any proposal to sever Victoria's links with the monarchy would be how the Governor should be appointed, and what should be his or her role.

The question might arise as to whether such a position is needed at all. In the Australian Capital Territory, there is no position of Governor or Administrator, and functions such as the appointment of the Chief Minister and the formation of Governments are determined on the floor of the Assembly. However, a residual role is given to the Governor-General, so although the ACT experiment indicates that certain functions of a Governor can be dealt with by other means, it is not a perfect example of how a political entity can function without such a position.

On the assumption that the position of Governor were to be retained, the question is how that person should be appointed. Should the present system of effective appointment by the Premier be retained, or should the Governor be directly elected, or elected by the Parliament or an electoral college? The arguments for and against different methods of appointment have been adequately canvassed by the Republic Advisory Committee.[44] Once resolved, the method of appointment, termination, and any qualifications for office and terms and conditions of office, should be included in the Constitution.[45] It would also be necessary to amend the provisions concerning the appointment of the Lieutenant Governor, Administrator and Deputy Governor.[46]

Powers of the Governor

Depending on the method of appointment of the Governor, and any revised role the Governor might hold, the powers of the Governor may also need to be reconsidered. One vital aspect to those powers is whether the Governor may act independently in exercising them, or whether the Governor is obliged to act on the advice of the Premier or the Executive Council. Section 87E of the Victorian Constitution provides:

> Where the Governor is bound by law or established constitutional convention to act in accordance with advice —

[44] Republic Advisory Committee, *An Australian Republic: The Options,* Canberra, AGPS, 1993. See also A Twomey, 'Methods of Choosing a Head of State', *Background Paper No. 12 1993,* Commonwealth Parliamentary Research Service, 7 June 1993.

[45] Present ss 7 and 7A, which deal with salary and pensions may need revision.

[46] Sections 6A, 6B and 6C of the Constitution.

(a) the Executive Council shall advise the Governor on the occasions when the Governor is permitted or required by any statute or other instrument to act in Council; and
(b) the Premier (or, in the absence of the Premier, the Acting Premier) shall tender advice to the Governor in relation to the exercise of the other powers and functions of Governor.

This provision leaves open the question as to which powers need not be exercised upon advice, according to law or custom. It may be wise to revise these powers and clarify their parameters before undertaking major constitutional amendments. It would not, however, be absolutely necessary to do so, as long as a provision were inserted in the Constitution preserving all powers under prior constitutional conventions.

The present powers and functions of the Governor, as specified in the *Constitution Act 1975*, fall within the following broad categories:

1. the summoning, convening, prorogation, and dissolution of the Houses of the Parliament;[47]
2. the creation of electoral boundaries;[48]
3. matters relating to the resignation and disqualification of members of Parliament;[49]
4. matters relating to appropriations by the Parliament;[50]
5. the appointment of Ministers, and the concurrent exercise of Ministerial functions;[51]
6. proposed amendments and adjusting dates specified in legislation;[52]
7. the appointment, removal and retirement of judges, their pensions and the conferral of non-judicial offices upon them;[53]
8. the appointment and removal of Executive Councillors, and procedures at Executive Council meetings;[54]
9. the appointment of people to public offices and powers to make regulations concerning officers of the Parliament;[55] and
10. the exercise of the Queen's powers under reservation or exception to a Crown grant, lease, deed or document.[56]

The Governor also has powers conferred on him or her under other legislation, and by way of convention, as recognised in s 87E of the Constitution. These may also need to be reviewed.

[47] Sections 8, 20, 21, 38 and 66 of the Constitution.
[48] Sections 27 and 35.
[49] Sections 30 and 61A.
[50] Sections 63, 93 and 94.
[51] Sections 50 and 88A.
[52] Sections 14 and 70.
[53] Sections 75B, 77, 79, 79A, 80, 80A, 80B, 81, 83 and 84.
[54] Sections 87, 87C and 87D.
[55] Sections 88 and 95.
[56] Section 12.

Amendments concerning nomenclature

In many sections of the Constitution, references are made to Her Majesty, or the Crown, when what is really meant is the entity of the State. One English judge has noted that:

> The Crown is a convenient term, but one which is often used to save the asking of difficult questions. It is a description of the powers that formerly at common law were exercised by the King in person, and that latterly have been bestowed by statute on the King in Council or on various Ministers. There is, I think, uncertainty about what is meant by the Crown and uncertainty about who are its servants or agents.[57]

If Victoria were to sever its links with the monarchy, difficult questions would have to be asked about the true meaning of terms referring to the Crown or Her Majesty. In many cases the 'State' could be used as a substitute for the 'Crown'. For example the references to 'Minister of the Crown'[58] could be changed to 'Minister' or 'Minister of the State'. Similarly 'revenues of the Crown'[59] could be changed to 'revenues of the State', 'waste lands of the Crown'[60] could be changed to 'waste lands of the State', 'office of profit under the Crown'[61] could be changed to 'office of profit under the State', and references to 'contracts entered into by, or on behalf of Her Majesty'[62] could merely refer to contracts with the State.

A new name would have to be found for 'royal assent',[63] and references to the grant of power to use the 'Royal Arms'[64] would also have to be removed.

References to Her Majesty

There are also several other references in the Constitution to 'Her Majesty' which would require amendment.[65] The most significant is s 15 of the Constitution which provides that the Parliament consists of Her Majesty, the Council and the Assembly. Some analysis would have to be undertaken as to the precise role of 'Her Majesty' as a constituent part of the Parliamentary trinity. Is it sufficient to replace her with a reference to the Governor, or is more meant by this provision?

Another significant amendment would be to the oath of allegiance. Section 6D currently provides that the oath or affirmation is one 'to be faithful and bear true allegiance to Her Majesty and Her Majesty's heirs and successors according to law'.[66] It would seem inappropriate to replace Her Majesty with a

[57] *Bank Voor Handel En Scheepvart* v *Slatford* [1952] 1 All ER 314, 319 per Devlin J, referring to passages in *Maitland's Constitutional History of England* (1920) 415–21.
[58] See, for example, ss 50, 51, 52, 53, 56 and 58.
[59] See, for example, ss 89 and 91.
[60] See, for example, ss 17 and 92.
[61] See, for example, ss 49, 55, 58, 61, 80A and 83. Section 84 refers to an office under Her Majesty's sign manual, which would also need amendment.
[62] See, for example, ss 13, 54, 55 and 56.
[63] See ss 18, 43, 69, 70 and 71.
[64] Section 76.
[65] See, for example, ss 78 and 94.
[66] See also s 23.

reference to the Governor, as it is not really allegiance to the person, but the entity, which is in question. It may be preferable for a new oath of allegiance to be made to the State and its people.[67]

The Constitution also contains a number of references to the demise of the Crown, and the continuation of appointments made in the name of the former monarch and all acts performed by him or her.[68] The advantage of a republican system would be that it is not attached to the lifetime of any one person, and can continue ad infinitum. These provisions would, therefore, be unnecessary, although transitional provisions for the appointment of new Governors, and the fulfilment of the Governor's functions while the office itself is vacant, would still be needed.

References to the United Kingdom

There are a number of residual references to the United Kingdom in the Victorian Constitution. It would be unnecessary to change them, although they might be reconsidered if the Constitution were being amended to sever links with the Crown.

Section 3 of the Constitution refers to the continuing application of some Imperial laws. This may be inappropriate if links were broken with the United Kingdom. If this were considered to be the case, any remaining remnants of Imperial law which Victoria wished to retain should be directly enacted by the Victorian Parliament.

Section 19 links the privileges of the Victorian Parliament with those of the House of Commons in 1855. While on the one hand it may be preferable to codify these privileges in Victorian law, and sever this historic link to the Westminster Parliament, on the other hand, it may be too restrictive to confine such matters to a code, and it may be preferable to continue to rely on the flexible interpretation of privilege made under common law and parliamentary practice.

Section 44 disqualifies a person from being elected to the Parliament if the person was convicted of certain offences in Victoria, 'or under the law of any other part of the British Commonwealth of Nations'. Assuming that an Australian Republic would remain a part of the Commonwealth of Nations, this provision may still have some relevance, but it could also be argued that it would be anachronistic under a republican system.

Section 48 allows certain British subjects, who are not Australian citizens, to vote in Victorian elections. While on its face, this provision would also appear anachronistic, it may be retained as a matter of fairness, on the grounds that it would be unfair to abolish the right to vote of those who had previously been granted it under these conditions. It would also be important to retain conformity with the Commonwealth electoral laws to avoid the

[67] See, for example, *Australian Citizenship Amendment Act* 1993 (Cth), which changed the former citizenship oath to a 'pledge of commitment' made to 'Australia and its people' rather than the Queen.

[68] See, for example, ss 9, 10, 11 and 77.

situation where a certain class of people can vote in Commonwealth elections but not in State elections.

Saving of existing laws, appointments and structures

In addition to amending existing provisions in the Victorian Constitution, it would be necessary to insert several transitional provisions to save the existing laws and governmental structures of Victoria, as well as the validity of existing appointments to positions of public office.

The Victorian Constitution already contains a guide as to what needs to be saved and how it could be done. The *Constitution Act* 1975 (Vic) re-enacts the earlier *Constitution Act* 1855.[69] Accordingly, the *Constitution Act* 1975 contains a number of provisions which ensure that the enactment of a new Constitution did not leave invalid laws or actions taken under the previous Constitution. Sub-section 2(1) provides:

> All laws which at the commencement of this Act are in force within Victoria shall remain and continue to be of the same force authority and effect as if this Act had not come into force except insofar as the same are repealed or varied by or under this or any subsequent Act.

Section 2 also contains provisions which preserve all Victorian courts, judicial officers, legal commissions, powers and authorities. It specifically preserves the Supreme Court. Section 4 preserves the Legislative Council and the Legislative Assembly, and all members holding office. Sub-section 4(3) preserves appointments and the continuation of the status, operation or effect of any proclamation, regulation, rule, by-law, order, application, appeal, proceeding, agreement, examination, affidavit, declaration, affirmation, writ, poll determination, notice, pension, salary, allowance, liability or right (amongst other things) under any Acts or enactments prior to the commencement of the new Constitution.

In addition to such general transitional clauses, consideration would have to be given to matters which flow from the existence of the Crown, such as the royal prerogative, to allow their continuation, and to base them in the Constitution, rather than on common law inheritance or constitutional convention.

CONCLUSION

If Australia were to become a republic and Victorians wished to sever their ties with the British Crown, the process for doing so would be quite simple. All that would be required would be the enactment of a bill, passed by an absolute majority of each House of the Victorian Parliament. If, however, an attempt were made to avoid this 'manner and form' restriction in the Victorian

[69] 13 & 14 Vict, c 59. This Constitution was also attached as a Schedule to legislation enacted by the Westminster Parliament which authorised Queen Victoria's assent to the Victorian Constitution: 18 & 19 Vict, c 55.

Constitution or if constitutional change were to be imposed by the Commonwealth upon Victorians, the situation would become more complicated, and legal challenges might ensue.

More important, in some ways, than the mechanics of change is the substance of that change. Severing a State's links with the monarchy is not just a matter of substituting the word 'Governor' or 'President' for that of Queen. There must be a fundamental review of the Victorian Constitution to determine whether references to the Crown or Her Majesty really mean the State, the Government, the Governor or the Queen herself. A detailed examination of the position of the Crown in Victoria and under the Victorian Constitution, should be conducted well before any Commonwealth referendum on the issue of a republic takes place.