Constitutional LAW AND POLICY REVIEW

The Queen and her dominion successors: the law of succession to the throne in Australia and the Commonwealth of Nations Pt 1

Damien Freeman

Introduction

At the heart of constitutional theory in Australia lies the monarchy, and at the heart of the monarchy lie the rules touching the succession to the throne. It is these rules that define the character of the institution as much as, if not more than, the duties imposed on the incumbent determined by them. It is now exactly 50 years since the law of succession has been summoned into action. While some criticism has been made of these ancient rules, little attention has been paid to their details or the means by which they might be reformed. Thus it is timely to consider more closely how this law operates in Australia and the other members of the Commonwealth of Nations of which Elizabeth II is the sovereign, and what scope there is for reform of them.

The present law is to be found in the common law, 17th and 18th century statutes, developments last century in the relations between the constituent elements of the former British Empire and the Australian experience of federalism. Once this law as it evolved in England and now operates in Australia is understood, it is possible to reflect on both the changes that ought to be made to this law and the way in which such alterations should be achieved. An attempt was made two years ago by a British tabloid newspaper and a celebrity barrister to bring an action to have the key succession legislation declared inconsistent with European human rights law.[1] While nothing came of this, it did serve to draw attention to the rules and to question their relevance.

An appreciation of these rules is necessary if there is to be any meaningful discourse on the future of the monarchy generally, a topic of particular interest in this Golden Jubilee year. It may be that closer investigation will reveal that the rules for determining the succession to the throne are so fundamentally inconsistent with contemporary attitudes that they are beyond repair. It may be, however, that such offensive aspects could easily be rectified. Moreover, it may be that the very process of reforming the rules of succession might itself provide an opportunity to reinvigorate the institution which the rules regulate.

The law of England

It is with the law of England that any discourse on the law touching the succession to the throne must commence. It is the substantive provisions of this law that presently determine the succession not just to the Crown of the United Kingdom, but in each of the independent polities within the Queen's dominions. This law provides essentially for a principle of heredity at common law subject to certain statutory qualifications.

Competing theories of succession in English history

In the history of the English monarchy there has been no single principle which has consistently underpinned accession. Any number of doctrines have been invoked on occasion to justify a claim to the throne, ranging from the principle of heredity, to the right of conquest and to the right of popular or parliamentary election.

Maitland considers the accession of

Henry III in 1216 to be the point at which it was accepted that at common law the Crown was hereditary. He cites the Archbishop of Canterbury's assertion at the earlier coronation of John that 'no one could claim the crown by hereditary right — kinship to the late king would give a preference; it is natural and proper to elect a near kinsman, and we have elected Earl John' as evidence of the persistence of an elective element before this time.[2]

Notwithstanding the extent to which the rule of heredity may have established itself in the subsequent history of succession, the Tudors readily acknowledged that their claims were grounded not on birthright but Act of Parliament. Both Mary I and Elizabeth I put considerable weight on Henry VIII's third *Act of Succession 1544*.[3] Indeed the second Elizabethan *Statute of Treasons 1571*[4] rendered treasonous any challenge to the right of the Queen-in-Parliament to determine the succession.

When ultimately the right to determine the succession was conclusively asserted by Parliament in the *Bill of Rights 1689*[5] and the *Act of Settlement 1701*,[6] the hereditary descent of the Crown appeared to be entrenched by this process. As Nenner explains:

> It would be a mistake ... to believe that the result of dynastic conflict and confusion was the ultimate vindication of an unalterable hereditary monarchy. On the contrary, the *Bill of Rights* (1689) and the *Act of Settlement* (1701) finally accomplished what Elizabethan legislation had only pretended to achieve, namely the placing of the succession in the disposal of parliament. Henceforth there would be the presumption of a hereditary descent of the crown, but a presumption that was subject to modification or abrogation by the parliament's will. Apparent heirs to the throne, even if they were first-born adult sons of the monarch, could no longer be totally secure in their expectation of rule. In practice, they were now presumptive heirs only, a constitutional lesson that was to be learned at considerable cost by Edward VIII in 1936.[7]

Common law foundations of the present statutory regime

At common law the succession to the throne is entirely hereditary and no longer admits of any elective element known in Anglo-Saxon times (a reminder of which is still to be found in the Recognition at the commencement of the coronation ceremony). While it is clearly accepted that the descent of the Crown at common law is derived from the feudal rules of hereditary descent formerly applicable to land,[8] the basis for this proposition remains uncertain. The authority for these rules appears to be found principally in their continuous usage and the fact that in any case of departure from them it has been thought necessary to enact a statutory measure affirming the validity of the particular accession in question.[9]

There are three principal common law rules that governed succession to realty which continue to govern the succession to the Crown.[10] Firstly, there is the question of sex. The common law has never held that succession to the throne is regulated by the Salic law familiar to the civilians, particularly in Catholic states, on the Continent; however the two sexes have never enjoyed identical rights of succession as has been the case in Sweden since 1979.[11] Rather, male heirs take precedence over female heirs of the same degree, so that a son's claim, for example, would always take precedence over that of his sisters.

Secondly, under the right of primogeniture, the eldest of the sex takes priority over all the younger heirs of the same sex and degree. To determine this priority, however, the third principle is invoked, namely that surviving children are taken to represent their deceased ancestors *per stirpes in infinitum*.[12] Thus at common law the order of succession is determined among those of equal degree such that the eldest male — or the eldest of his surviving male issue — takes seniority over all other males of equal degree, who take seniority according to age over all females of the same degree, with a rider that in each case surviving issue represent their deceased ancestor.

According to Blackstone, however, certain rules of land law never applied to the succession to the Crown. The claim of the nearest relation on the failure of lineal descendants was always recognised and the exclusion of half blood from the inheritance never applied to the descent of the Crown.[13] Furthermore, as will become apparent from the following discussion, the Crown does not devolve upon all females of equal degree as coparceners.[14]

The heir apparent is determined according to these rules and on the demise of the Crown the accession occurs immediately by operation of law, giving rise to the old common law maxim that the king never dies. As Coke explained, 'If the crown descend to the rightful heir, he is Rex before coronation: for by the law of England there is no interregnum: the coronation is but an ornament or solemnity of honour.'[15] Similarly, the proclamation by the Privy Council is not necessary to effect the new sovereign's accession.

Before considering the statutory elements of the law governing the succession, a brief excursus into the question of the rights of females of equal degree is in order. The *Act of Settlement* refers to the 'heirs of the body' which, in the absence of male issue, means in real property law that the land descends upon daughters as equal co-heiresses. Yet, as Farran observes, in 1952 the Crown was proclaimed to have come 'solely' to Elizabeth II despite the fact that she was one of two sisters.[16] Maintaining that the common law precedents against coparceners and the Crown are 'most unsatisfactory' and that despite both Coke and Blackstone asserting the inapplicability of the rule neither is able to cite any authority, Farran concludes that it must be accepted that special rules govern the succession to the Crown.[17] He observes that female heirs have been subject to different rules in contexts other than real property, including the hereditary office of the Lord Great Chamberlain (where coparcenary applies),[18] peerage titles (which in the case of baronies by writ and certain

other old dignities fall into abeyance rather than vesting in coparceners),[19] and the old counties palatine (where there is some uncertainty as to female succession).[20] Farran concludes that the succession rules in these contexts should not apply to the Crown, explaining:

> We can only rely on the argument that, as the Crown is not real property, nor a peerage, nor a county palatine, but *sui generis*, its descent need not follow the lines customary in any of these things. The courts in interpreting the phrase 'heirs of the body' in the Act of Settlement are not bound by their decisions on the meaning of these words in other connections. Indeed, by acknowledging Her present Majesty as sole Queen they have given the phrase a special meaning confined to the Crown, that is, that it implies primogeniture among females as well as among males. This conclusion can be legitimately reached by looking at the whole scheme of the Acts of Settlement and Union, which in other sections clearly contemplates the sovereign as being necessarily a single individual. In construing phrases in statutes the same rule applies as in construing other documents: that the whole Act is to be looked at. The general intention overrides the particular intention.[21]

Finally, it should be noted that the succession to the throne is still subject to the common law disqualification of illegitimate children. Although the *Legitimacy Act 1976* (UK) abolished this status for other purposes, nothing in the Act affects the succession to the throne.[22]

The present statutory regime

While the common law rules of succession continue to apply to the descent of the Crown, since the late 17th century the title to the throne has been essentially parliamentary. The well known story starts with the supposed abdication of James II when he cast the great seal of the realm into the Thames and fled the country. The Convention Parliament, summoned by William, Prince of Orange, declared this to have caused a demise of the Crown. The Prince and his wife were offered the Crown jointly and it was accepted, accompanied by the Declaration of Rights.[23] This was then incorporated into the *Bill of Rights*, an Act of a Parliament summoned by writs of William and Mary. Yet as Maitland explains, however much the convention might have tried to dress up the events as a lawful abdication and election of a new sovereign, this would appear to be far from the case:

> Grant that parliament may depose a king, James was not deposed by parliament; grant that parliament may elect a king, William and Mary were not elected by parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament. The act which declares it to be a parliament depends for its validity on the assent of William and Mary. The validity of that assent depends on their being king and queen; but how do they come to be king and queen? Indeed this statute very forcibly brings out the difficulty — an incurable defect. So again as to the confirming statute of 1690.
>
> Do not think that I am arguing for the Jacobite cause. I am only endeavouring to show you how much purely legal strength that cause had. It seems to me that we must treat the Revolution as a revolution, a very necessary and wisely conducted revolution, but still a revolution. We cannot work it into our constitutional law.[24]

Such considerations are only of passing concern to the present inquiry. Irrespective of its constitutional validity, the *Bill of Rights* is important for two reasons. Firstly, it is the origin of the statutory conditions of tenure which will shortly be considered. Secondly, it represents a conscious break with the traditional primacy of hereditary descent and the unambiguous affirmation of the parliamentary title:

> The Convention Parliament, breaking with the doctrine of perpetuity by which the sovereign never dies, declared the throne to be vacant, and invited William of Orange and Mary to fill it as joint sovereigns. But William and Mary's claim to the throne could not be based solely on hereditary right, nor ought it, in the Convention's view, to be based solely on the right of conquest. Instead, William and Mary

> became sovereigns primarily in virtue of an Act of Parliament, although it could be argued that, if James II had abdicated and if, as was alleged, his son was illegitimate, then Mary was the next in line. Nevertheless, it appeared to many that a deliberate breach had been made in the order of succession so as to bring the monarchy once again under the rule of law, as Magna Carta had implied nearly five centuries earlier.[25]

The hereditary right of succession has since been limited by Parliament twice. Firstly, by s 1 of the *Act of Settlement*, the succession was vested in the heirs of the body of Princess Sophia, Electress of Hanover, being Protestant. As Bogdanor explains:

> In terms of hereditary right, there were over fifty descendants of the Stuart kings who had a better claim to the throne than George I. The Act of Settlement thus reinforced the fundamental constitutional rule established when William and Mary came to the throne, that parliament had the right both to determine the succession to the throne and also the conditions under which the Crown was to be held.[26]

The English succession as settled by the *Act of Settlement* continued to govern the succession to the throne of Great Britain under art II of the *Union with Scotland Act 1706*,[27] and then that of the United Kingdom of Great Britain and Ireland under art 2 of the *Union with Ireland Act 1800* (subsequently modified by s 1(1) of the *Ireland Act 1949* (UK)). This law continues to govern the succession, subject only to *His Majesty's Declaration of Abdication Act 1936*, which caused a demise of the Crown to occur,[28] and excluded Edward VIII and any issue he may have had from making any future claim to the throne.[29]

Edward VIII's abdication provides an interesting opportunity to investigate what is really meant by asserting that the title to the throne is parliamentary. Bogdanor asserts that the unilateral action of the reigning sovereign could not have caused a legal demise of the Crown and that legislative action was therefore required to give effect to the sovereign's will.[30] However Bogdanor relies exclusively on Latham on this point and although Latham maintains that such an enactment is necessary,[31] the matter remains unsettled. It would seem that the preferred interpretation of the Act is that, for political rather than legal reasons, the Instrument of Abdication stated that it was the King's wish that the legislature cause a demise of the Crown.[32]

In Bailey's opinion, a demise of the Crown could be achieved 'by the voluntary resignation of the reigning monarch'.[33] Bailey considers situations in which it might be impossible to cause a demise by statute (for example, if Parliament were dissolved, or the two Houses disagreed with each other or the King, or the King had left the country or could not be persuaded to give his assent) and concludes that it must be possible for a demise to be caused by the sovereign's unilateral action.[34] That the King's Instrument of Abdication did not have this effect was because of its terms rather than because it was legally impossible. Latham, on the other hand, maintains that in the case of abdication, a demise can only be created by statute. This he appears to assert simply because the title is statutory and there is no voluntary abdication.[35]

In 1936 a demise was achieved by legislative action but this need not mean that a demise cannot be created by the unilateral action of the sovereign. On Bailey's view, the South African Government's position, that the Instrument of Abdication effected a demise without the need for legislative action, was defensible in principle but the Instrument of Abdication did not permit this construction. On Latham's view, however, since this was not a theoretical possibility, the abdication became precedent in South Africa for a new rule which permitted a demise to be caused by the sovereign's own action but this was a departure from the law of the UK and that formerly applied in South Africa.[36]

Zines asserts that the *Royal Marriages Act 1772*[37] also regulates the succession.[38] That this is not strictly the case is established by the accession of George IV in 1820, whose marriage to a Catholic would have prohibited him from inheriting the throne were it not for the fact that the marriage was rendered void by non-compliance with the *Royal Marriages Act*.[39] It may, however, have an indirect effect on the succession.[40] Although a person who contravenes the Act can nevertheless succeed to the throne, the issue of such a person would be illegitimate as the marriage was void and could not succeed to the throne at common law.[41]

Having considered the extent to which statutory provisions have altered both the nature of the title and the line of succession, it is now necessary to consider the conditions of tenure which have been imposed by statute. These conditions are overwhelmingly of a religious nature and date from the *Bill of Rights* and the *Union with Scotland Act*. A condition in the *Bill of Rights*, later incorporated in s 2 of the *Act of Settlement*, was that 'any person who shall be reconciled to, or hold communion with, the see or Church of Rome, or profess the popish religion, or marry a papist' is excluded from the succession to the throne. The joint effect of this section and s 1 of the *Bill of Rights* is to cause a demise of the Crown if the sovereign or his or her consort is of the Roman Catholic faith. In such circumstances the Crown then descends to the next in line as if the disqualified sovereign were dead. This gives rise to the second requirement, now prescribed by the *Accession Declaration Act 1910* (UK), that the sovereign must declare himself or herself to be a faithful Protestant, either sitting on the throne in the House of Lords at the first meeting of the first Parliament or at the coronation should this occur first. Thirdly, the sovereign must, according to s 3 of the *Act of Settlement*, join in communion with the Church of England. This does not require the sovereign to be a member of this Church, and there are two precedents for non-membership because George I and George II were both Lutherans.[42]

The sovereign must, upon accession, take certain oaths. Section 2 of the *Act*

of Settlement requires the sovereign to take the coronation oath in the form prescribed by statute. This is contained in s 3 of the *Coronation Oath Act 1688*[43] as in force from time to time. This now includes a promise to govern the peoples of the named realms and territories thereof according to their respective laws and customs and a promise to preserve the established Church of England in England. Finally, under art XXV of the *Union with Scotland Act*, the sovereign must take an oath to preserve the presbyterian Church of Scotland. The present sovereign took this oath at the first meeting of the Privy Council after her accession.

... notwithstanding the desirability of the maintenance of a uniform rule of succession throughout the Commonwealth of Nations, 'it would be unconstitutional, although not illegal, for the British government unilaterally to alter the rule of succession'.

The UK Parliament retains the right to alter these rules of succession, but the exercise of this right is now limited by the convention first articulated at the Imperial Conference of 1930,[44] subsequently recited in the second preamble to the *Statute of Westminster 1931*, and confirmed by the procedure adopted for the passage of *His Majesty's Declaration of Abdication Act* some five years later. This constitutional convention, which shall be considered in detail in the following discussion, requires the consent of the Dominion Parliaments to be obtained before the Imperial Parliament alters either the law touching the succession to the throne or the Royal style and titles. Bogdanor observes that notwithstanding the desirability of the maintenance of a uniform rule of succession throughout the Commonwealth of Nations, 'it would be unconstitutional, although not illegal, for the British government unilaterally to alter the rule of succession'.[45]

There is a school of thought which rejects Bogdanor's opinion and maintains that this convention is no longer binding on the Parliaments of the United Kingdom and those of the former Dominions. According to this approach, the convention became obsolete when relations between the members of the Commonwealth of Nations commenced to be governed by international law rather than municipal constitutional law.[46]

The Australian Constitution

Having considered the rules of succession under English law, it is now possible to examine the operation of these rules in Australia. There are two stages to such an investigation. It is first necessary to examine the relationship between Australian and British law at the time of Federation, after the *Statute of Westminster 1931* (UK), and finally since the *Australia Acts 1986* (Cth and UK); and then the effect of the Commonwealth Constitution. This involves two broad topics: the effect of s 2 of the *Commonwealth of Australia Constitution Act 1900* (covering clause 2) and the legislative competency of the Commonwealth and the States.

Reception of English law and present status of the law in Australia

With the exception of the law governing the abdication of Edward VIII, the rules governing the succession at common law and by statute are by antipodean standards rather ancient, predating the mid-18th century. As such, the common law rules were received into the colony of NSW on settlement in 1788 with the rest of the English law. Similarly, the *Act of Settlement 1701*, enacted well before 25 July 1828, the 'cut off' date for the application of British statutes under the *Australian Courts Act 1828* (UK), applies irrespective of whether

a specific intention to that effect is expressed. The grant of local legislatures to the Australian colonies is of no real significance as such organs lacked competency to legislate in these matters. As Zines explains, '[m]atters relating to regal dignity were historically regarded in colonial times as not within colonial power. They were Imperial matters'.[47]

It is unnecessary to delve any further into a detailed account of the developments leading up to the *Statute of Westminster 1931* and the status of the law in Australia during this period other than to make two brief remarks. Firstly, it is appropriate to note that the developing notion of the divisibility of the Crown within the British Empire, and the rules governing the succession thereto, have been consistently identified as linked to the emergence of Australian nationhood. This is reflected by the Constitutional Commission's treatment of the succession to the throne in the section of its final report dealing with 'Australia's Status as an Independent Nation'.[48] The significance of this for present purposes is to be found in the second remark, namely that until this development occurred, the need to address the legal and constitutional competence of the various legislatures did not arise.

In former times the Imperial Crown was understood to be one and indivisible. It was not until the Balfour formula — first articulated at the Imperial Conference of 1926 — gained acceptance that a common allegiance was distinguished from complete internal and external autonomy. This political compact subsequently acquired legal effect with the passage of the *Statute of Westminster*. The significance of the *Statute of Westminster* for present purposes was the emancipation of Dominion Parliaments from the application of the *Colonial Laws Validity Act 1865* (UK) by s 2(1) and the repugnancy rules by s 2(2). Section 4 of the Statute limited the effect of subsequent Imperial Acts in Dominions by providing that no such Act would be deemed to extend to a Dominion as part of its law unless it contained an express declaration of the Dominion's request and consent to the enactment. These arrangements were further complicated in their application to Australia (as well as New Zealand and Newfoundland) by s 10 which provided that ss 2-6 would not take effect until such time as specified in an adopting Act of their Parliaments. In the case of Australia, this was s 3 of the *Statute of Westminster Adoption Act 1942* (Cth) which applied retrospectively from 3 September 1939.

The effect of the *Statute of Westminster* was to grant full legislative powers to the Dominion Parliaments, subject to their respective constitutions, with the corollary that they were not subject to any Imperial statute unless they consented to its enactment. While this law applies to all heads of power, the succession to the throne and the Royal style and titles were subject to the convention in the second preamble that any alteration to these laws required the assent of the Parliaments of all the Dominions and the UK. The rule which this convention qualifies was changed by the *Australia Acts 1986* (Cth and UK).

Under s 1 of the *Australia Acts*, Imperial statutes may no longer extend, or be deemed to extend, to the Commonwealth, a State or Territory as part of the law of Australia, and s 12 repeals s 4 of the *Statute of Westminster*. It is no longer correct to speak of the Parliament of the UK altering any law — including one touching the succession to the throne — for Australia even with its consent and request. Since the *Australia Acts*, the process for amending any law in Australia does not involve the Parliament of the UK. But that is not to say that the convention regarding alteration of the laws of succession and the Royal style and titles may not still have some effect.

As already discussed, the only significant alteration to the law touching the succession to the throne last century occurred as a result of the abdication crisis of 1936. This is now of limited use in terms of precedent. In Australia and New Zealand the substantive sections of the *Statute of Westminster* were not yet in force and the Imperial Act operated automatically. The old rules still applied and an Imperial statute would take effect if expressly declared to do so or this intention appeared by necessary implication (though an established convention prevented such action without the consent of the relevant Dominion).[49] As Bailey explains:

> [A] law touching the throne was one which would, even without express words, inevitably be construed as necessarily intended to extend throughout the whole Empire. Usage no doubt required consultation ... to ensure the changes would be acceptable to the Dominions. But legislative authority was regarded as belonging to the Parliament of the United Kingdom alone.[50]

Thus it was not for these Dominions to enact any legislation as it 'would have been either void if inconsistent with the United Kingdom Act or supererogatory if not'.[51] In both countries the convention was observed, in Australia's case by resolution of both Houses of the Commonwealth Parliament.

In the other Dominions where s 4 did apply, namely Canada, South Africa and the Irish Free State, unilateral action on the part of the United Kingdom Parliament could not have effect, consistently with that section, unless the request and consent of those Dominions was recited. Only the Canadian response is of any significance. The South African Government's view was that the abdication occurred as a result of the act of the King, so that the Imperial statute was merely declaratory. The Irish Free State, for political reasons, did not assent before the Imperial Act was passed but later passed the *Executive Authority (External Relations) Act 1936* which ratified the abdication. The events in these countries are of historical interest only.

Although the *Statute of Westminster* was already operative in Canada, the demise of the Crown in that country was caused by the Imperial enactment. The Canadian Government responded to the abdication crisis by requesting

and consenting to the extension of the Imperial Act to Canada as part of the law of Canada under s 4 of the *Statute of Westminster*. Australia does not now stand in the position in which Canada found itself in 1936, as s 4 of the *Statute of Westminster* has been repealed by s 12 of the *Australia Acts 1986*. Consequently a statutory demise of the Crown, or any other alteration to the law of succession, would now require Australian legislation.

Significance of covering clause 2

Section 2 of the *Commonwealth of Australia Constitution Act 1900* (UK) provides:

> The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

There is some dispute as to whether this clause merely has an interpretative function, 'giv[ing] recognition to the constitutional practice that the Crown is a corporation sole',[52] or whether it entrenches a substantive requirement that the Australian sovereign be the person who is the sovereign of the United Kingdom of Great Britain and Ireland for the time being. According to Quick and Garran the intention behind this provision was to displace the common law presumption that an Act does not bind the Crown unless an intention to the contrary is found either expressly or by necessary implication.[53] The real question is whether its effect is to render any Australian enactment touching the operation of the law of succession to the Crown in Australia of no effect because the *Constitution Act* requires that the person who is sovereign of the UK is automatically the sovereign of Australia.[54]

This construction was advocated by Keith in the context of the abdication legislation. On his analysis of the law, irrespective of whether Canada enacted its own legislation, or whether either it or Australia gave consent for the UK legislation to apply under s 4 of the *Statute of Westminster*, the Imperial legislation would have automatically applied under s 2 of the *British North America Act 1867* (UK) and s 2 of the *Commonwealth of Australia Constitution Act*.[55] This construction continues to have its advocates among contemporary scholars; Winterton, despite acknowledging opinions to the contrary, maintains:

> Although, of course, the same person as the Queen of the United Kingdom (as *required by covering clause* 2 of the Constitution), the Queen of Australia is legally distinct from her.... Our monarch is *constitutionally required* to be the British monarch.[56]

Bailey, however, 'with special trepidation' ventured to doubt Keith's view, explaining that such provisions:

> ... are couched in the language of an Interpretation Act rather than of substantive enactment. All that in terms they seem to do is express specifically for the Dominion what would otherwise be provided for generally in an Interpretation Act, that references to His (or Her) Majesty are not to be taken as personal to the monarch reigning at the time of enactment. In other words, the writer's submission is that they do not enact, but assume, the existence of a succession law operative in the Dominion. No doubt they designate the person who may exercise from time to time the supreme executive power in the Dominion. A Dominion wherein such a section is paramount law (Australia for instance) could not validly authorise the King of Denmark to assume the executive power of the Dominion. But that is not to say that by virtue of such a section the person who is at any given moment King in the United Kingdom must *eo ipso* be King in the Dominion. If he is so, that will be because the succession law itself says so. All that such a section should properly be regarded as doing is to ensure that whenever in future a person comes to the throne by a succession law operative in the Dominion, the provisions in the Dominion constitution referring to His Majesty will extend to such person. The references in these sections to 'the Sovereignty of the United Kingdom' cannot be construed as implying a reference to the law of the United Kingdom as distinct from that of the rest of the Commonwealth; the sovereignty of the United Kingdom

> implies the wearing of an Imperial Crown, and succession by an Imperial law. If an alteration in the law touching the succession were to have been made by the Parliament of the United Kingdom, before the Statute of Westminster, it would have needed no sections of this kind to bring it into operation in a Dominion, nor would the absence of such a section from a Dominion constitution necessitate the specific mention of that Dominion in order to ensure the operation of the change there. In the writer's view, the law touching the succession operated in the Dominions, prior to the Statute of Westminster, universally and *proprio vigore*, and these sections assumed such operation.[57]

This understanding of covering clause 2 is shared by Zines,[58] on whom the Constitutional Commission placed considerable reliance.[59] Zines notes that the equivalent section in the *British North America Act* was repealed by the *Statute Law Revision Act 1893* (UK),[60] because of the enactment of s 30 of the *Interpretation Act 1889* (UK).[61] This section provided that references to the sovereign or the Crown in any Act should be construed as a reference to the sovereign for the time being unless a contrary intention appeared.[62] Zines also believes that the law of succession to which the covering clause refers was an Imperial law for an Imperial Crown.[63]

This line of reasoning would appear to be endorsed in the High Court by Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill*.[64] In the context of their consideration of the UK as a foreign power in terms of executive government in Australia, their Honours identify five distinct usages of the term 'the Crown' and cognate expressions in constitutional theory.[65] In covering clause 2 their Honours explain that the reference to 'the Queen' and her 'heirs and successors in the sovereignty of the United Kingdom' is used in the fifth sense, and 'identifies the term "the Queen" used in the provisions of the Constitution itself ... as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom'.[66] The question is, then, whether their Honours believe that the section requires the person thus defined to be the Queen of Australia in all circumstances. It would seem that they follow the approach of Bailey and Zines, holding that the section refers back to another body of law, statutory alterations to which would once have been effective in Australian law if enacted at Westminster but which may now only take effect if altered by Australian legislation:

> The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the Australia Act would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.[67]

In summary then, covering clause 2 does not pose any substantive limitation on the law of succession in Australia. It renders the Constitution binding on the Crown (formerly) governed by the Imperial law of succession. Once the *Statute of Westminster* had come into effect, this law of succession could no longer be amended by unilateral action on the part of the Parliament of the UK, but would only extend to a Dominion if request and consent was recited. This reveals that even before adoption of the Statute, it was only ever as a result of the succession law to which covering clause 2 referred, rather than by virtue of covering clause 2 itself, that Imperial law governed the succession in Australia — otherwise Australia would continue to be bound after such time as Keith asserts. With the enactment of the *Australia Acts*, the regime established under the Statute is no longer of any consequence in this respect as the UK Parliament may no longer alter Australian law (even at the request and with the consent of the Commonwealth). ●

The second part of this article will discuss the relevance of the Commonwealth heads of power under the Constitution and the position of the States, before going on to examine the status of the law in other Commonwealth nations, and the avenues available for reform of the law of succession.

Damien Freeman, Solicitor, NSW. The author wishes to acknowledge his debt to Professor Ivan Shearer and Justice K R Handley for their comments on earlier versions of this paper.

Endnotes

1. See *The Australian*, 7 December 2000 for a report of the action planned by *The Guardian* newspaper and Geoffrey Robertson QC in the UK.
2. F W Maitland, *The Constitutional History of England* (Cambridge, 1908), 97-98.
3. 35 Hen VIII c 1.
4. 13 Eliz c 1.
5. 1 Will & Mar (Sess 2) c 2.
6. 12 & 13 Will 3 c 2.
7. H Nenner, *The Right to be King* (London, 1995), 5-6.
8. W Blackstone, *Commentaries on the Laws of England* (16th ed, London, 1825), vol 1, 192-193.
9. *Halsbury's Laws of England* (4th ed, 2d re-issue, London, 1996) vol 8(2), [34].
10. The rules governing the descent of realty at common law are summarised in the 'Canons of Descent' in C Watkins, *Law of Descent* (3rd ed, London, 1819), extracted in R F Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (Sydney, 1996), 97-98.
11. V Bogdanor, *The Monarchy and the Constitution* (Oxford, 1995), 42.
12. Blackstone, above n 8, 194.
13. Ibid.
14. Ibid.
15. E Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes* (4th ed, London, 1669), 7.
16. C d'O Farran, 'The Law of the Accession' (1953) 16 *Modern Law Review* 140, 141.
17. Ibid at 144.
18. Ibid at 141.
19. Ibid at 144.
20. Ibid at 145.
21. Ibid at 145-146.
22. Section 11, Sch 1 para 5.

23. Maitland, above n 2, 283-284.
24. Ibid at 285.
25. Bogdanor, above n 11, 5.
26. Ibid at 7-8.
27. 6 Anne c 11.
28. Section 1(1).
29. Section 1(2).
30. Bogdanor above n 11, 44
31. R T E Latham, 'Constitutional and Legal Aspects of the Abdication of King Edward VIII', in W K Hancock, *Survey of British Commonwealth Affairs*, Vol I: *Problems of Nationality 1918-1936* (Oxford, 1937), 616.
32. K H Bailey, 'The Abdication Legislation in the United Kingdom and in the Dominions' (1938) 3 *Politica* 1, 7-9.
33. Ibid at 7.
34. Ibid at 5.
35. Above n 31, 617.
36. Ibid at 618.
37. 12 Geo 3 c 11.
38. L Zines, *The High Court and the Constitution* (4th ed, Sydney, 1997), 315.
39. Bogdanor, above n 11, 55.
40. See generally M Stokes, 'The Constitutional Position of the Crown of Australia' (unpublished paper; University of Tasmania) for a study of the effect of the Act in Australia and its status under Australian law. It is submitted, however, that the Act is better understood as dealing with the law of marriage rather than that of succession as such, for its effect on the law of succession is indirect.
41. *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034.
42. Bogdanor, above n 11, 44.
43. 1 Will & Mar c 6.
44. Cmd 3717, p 21.
45. Bogdanor, above n 11, 45.
46. See M Stokes, 'Changing the Law of Succession to the Throne of Australia' (unpublished paper; University of Tasmania).
47. Zines, above n 38, 313.
48. Constitutional Commission, *Final Report* (Canberra, 1988), vol 1, 72ff.
49. Bailey, above n 32, 10.
50. Ibid.
51. Ibid at 11.
52. G Moens and J Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (6th ed, Sydney, 2001), 33.
53. J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), 320-323.
54. It would be well to contrast the Canadian and Australian provisions with s 3 of the *Status of the Union Act 1934*, a Dominion enactment which defines 'heirs and successors' in s 2 of the *South Africa Act 1909* (UK) thus:

> 'heirs and successors' shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland *as determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland* (emphasis added).

Such a provision was clearly substantive and intended to make the UK law of succession to the Crown as in force from time to time applicable to South Africa as well.
55. A B Keith, 'Notes on Imperial Constitutional Law' (1937) 19 *Journal of Comparative Legislation and International Law* 105, 106.
56. G Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1, 2 (emphasis added).
57. Above n 32, 17-18.
58. Above n 38, 315-316. See also E Campbell, 'Changing the Rules of Succession to the Throne' (1999) 1 *Constitutional Law & Policy Review* 67.
59. Above n 48, 81.
60. 56 & 57 Vict. c. 14.
61. 52 & 53 Vict. c. 63.
62. Zines, above n 38, 316.
63. Ibid at 315.
64. (1999) 199 CLR 462.
65. The Crown as the personification of the body politic at common law, as the incarnation of the international personality of a body politic, as the executive as distinct from the legislature, as the paramount power of the parent state in colonial law and finally the fifth sense which is relevant for the present discussion: 199 CLR at 498-502.
66. 199 CLR at 502.
67. Ibid.