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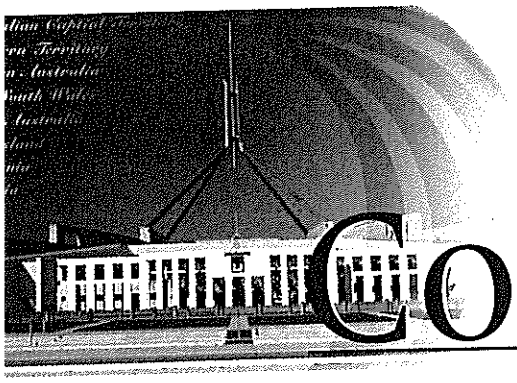

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The Queen and her dominion successors: the law of succession to the throne in Australia and the Commonwealth of Nations Pt 2

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contents

The first part of this article, published in (2001) 4(2) CLPR, discussed the law of succession under English law, before going on to discuss succession and the Australian Constitution.

The Australian Constitution

Commonwealth heads of power

Accepting that the succession to the throne in Australia is now to be governed by Australian law, and that the Parliament of the UK is no longer competent to alter such law, it is necessary to determine how the present law in Australia could be altered. This topic will be dealt with firstly by considering whether the Commonwealth has power to make laws with respect to the succession, and then whether there exists any limitation on Commonwealth power in favour of the States.

The powers of the Parliament contained in s 51 of the Constitution do not include one explicitly relating to succession to the throne.[1] There are two grants of power upon which such a law might be framed: s 51(xxix), the external affairs power; and s 51(xxxviii), the exercise within the Commonwealth of powers formerly exercisable only by the Parliament of the United Kingdom. In addition, such an enactment might also be supported by an alleged implied power from nationhood or an implied power created by the *Statute of Westminster*.

Section 51(xxxviii) provides that the Commonwealth may, at the request of the States, exercise any power which could at the establishment of the Constitution be exercised only by the Imperial Parliament.[2] This power was considered by the High Court in *Port MacDonnell Fishermen's Association Inc v South Australia*.[3] The Court held that the effect of the provision 'is to empower the Commonwealth Parliament to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies'.[4] One purpose of this provision was described as 'plugging gaps which might otherwise exist in the overall plenitude of the legislative powers exercisable by the Commonwealth and State Parliaments under the Constitution'.[5]

It would seem that succession to the throne falls within the scope of this power. As has been stated above, in colonial times matters pertaining to regal dignity were determined by the Imperial authorities. Indeed, such an approach was bound to persist until the doctrine of the divisibility of the Crown won acceptance. It will be submitted in the subsequent discussion that this should be the preferred method of

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altering the law even if there is some other power which would permit the Commonwealth to act unilaterally.

Although not canvassed by the Constitutional Commission, it is submitted that under certain conditions the Commonwealth could also enact legislation in reliance upon s 51(xxix), the external affairs power. It is now clear from the reasons of all the judges who considered the matter in *Sue v Hill* that the UK is, for the purposes of the Constitution, a foreign power.[6] As has also been seen, there is a longstanding convention that any alteration to the law touching the succession to the throne should be achieved by all of the Queen's realms acting in concert. If this convention were to be enshrined in a treaty, the Commonwealth could then effect its obligations by legislative enactment in reliance upon s 51(xxix). It is now well accepted that a law will be valid under this placitum, even if the Commonwealth would not otherwise have legislative competence over the subject matter, as long as it is faithful to the treaty provisions it purports to implement and is not a mere 'device to attract domestic legislative power'.[7]

A treaty would obviate the need to determine whether the subject matter of the legislation would otherwise fall within a Commonwealth head of power. In the absence of a treaty, however, it is unlikely that a law with respect to the succession to the throne could be characterised as dealing with subject matter of an external nature. It is for this reason that a treaty would be necessary to support such a law under s 51(xxix).

It is also necessary to consider whether any implied head of Commonwealth power might support a Commonwealth law with respect to succession to the throne. The Constitutional Commission observed that the reasoning of certain judges in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[8] suggests that such a law would be supported by s 2(2) of the *Statute of Westminster*.[9] This subsection provides that a law made by a Dominion Parliament after the commencement of the *Statute* shall not be void for repugnance to the law of England or any Imperial statute. It concludes by stating: 'the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.' This is qualified by a saving provision with respect to the Commonwealth Constitution and the *Constitution Act* (s 8) and matters within the exclusive authority of the States (s 9(1)).[10]

In *Kirmani* the Court considered whether the expression in s 2(2) that 'the powers ... shall include the power to repeal or amend any such Act' extended to *any* Imperial Act, or only such Acts as traversed the field of the Commonwealth's legislative competence under the Constitution. This is particularly important in the case of succession to the throne in Australia, as this is presently governed by Imperial statutes and the Commonwealth has no express head of power to legislate in this area. Thus, even if the Commonwealth has no express head of power to legislate with respect to the succession, it could nevertheless do so on one reading of this subsection in so far as this involved repeal or amendment of these Imperial Acts. If, however, this provision only allows the Commonwealth to repeal or amend Imperial laws to the extent that they encroach and place an external restriction upon the competence of the Commonwealth under the Constitution, then the Commonwealth cannot use this subsection to amend the existing law of succession to the throne for Australia as these Acts do not fall within Commonwealth legislative competence.

While Gibbs CJ did not find it necessary to decide whether a new head of power was created by s 2(2), his Honour referred specifically to the circumstances in which this could become a critical issue, explaining:

> If there were matters which are not within either Commonwealth or State authority, s 9(1) would not apply, and it would then be a real question (although one of limited importance) whether s 2(2) is an independent grant of power, or whether it does no more than strengthen existing powers. However I very much doubt whether that third position exists, ie whether there are matters which fall outside the

> authority of both the Commonwealth and the States. I rather think, as Barton J said in *Smith* v *Oldham* (1912) 15 CLR 355, at p 361, that 'the Constitution in the distribution of powers between the Commonwealth and States embraces the whole range of legislative authority within the territorial limits of Australia'.[11]

The whole range of legislative authority is not distributed between the Commonwealth and the States and this third position does exist. Consistently with his Honour's reasoning, Bailey maintains that there are two situations in which the Commonwealth would not be competent to legislate under s 2(2) unless a new head of power were created.[12] The first category, addressed by s 9(1), is that of exclusive State jurisdiction. Of the second, Bailey explains:

> The other group is probably very small; it comprises those Imperial statutes which deal with matters not hitherto brought within the range of Dominion self-government at all. The *Act of Settlement*, as relating to the succession to the throne, is the most important case in point.[13]

In the case of this group of Acts it is not the exclusive competence of the States to legislate that restricts the Commonwealth — for indeed, as Bailey says, the States were never competent in this respect — but rather the limited grant of legislative power enjoyed by the Commonwealth Parliament. The present discussion does not permit of a detailed analysis of the competing arguments for and against giving the second limb of s 2(2) a construction which creates a new head of power. As Deane J concluded in *Kirmani*:

> If the matter were free of authority, the arguments favouring the competing constructions of the provision in the second part of s 2(2) might perhaps be seen as uncompelling in either direction. There is, however, no absence of authority. To the contrary, the decision of the Judicial Committee of the Privy Council in *Moore v Attorney-General for the Irish Free State*[14] bears directly upon the correct construction of the provision in s 2(2) and supports the wider view that sees that provision as embodying an independent grant of legislative power.[15]

Mason J also considered that the Privy Council decision was significant. However, the persuasive force of this decision may be less than some have been inclined to think. As Wilson J explains:

> Although several ... writers, including Sir Owen Dixon,[16] incline to favour the construction I have preferred, they find that a different conclusion is necessitated by the decision of the Privy Council. With all respect, I wonder whether that is so. It is to be remembered that in *Moore* their Lordships were concerned with the powers of a Dominion Parliament under a unitary constitution granted by an Imperial Act.[17]

It is submitted that the unitary nature of the Irish Free State changes the situation dramatically. It is implausible to speak of the creation of a new head of power in a state whose legislature enjoys plenary powers no longer fettered by restrictions once imposed by the Imperial Parliament on their exercise. In a unitary system there is no other limit to the legislature's powers such as exists in the case of the Commonwealth Parliament. In a unitary state the removal of external fetters allows the legislature to exercise the plenary power already conferred by its constitution. In the case of a federation, there is a very real difference between the removal of external fetters on the exercise of existing powers and the grant of a new power to a legislature which it did not previously enjoy. This is the reasoning of Wilson J who held that

> the Statute was not directed to a review of the legislative powers possessed respectively by each of the Dominion Parliaments. It was not concerned with the distribution of legislative powers within those Dominions which exhibited a federal structure. It was concerned with removing old fetters and establishing new conventions in order to eliminate any trace of the historical subordination of the colonial legislatures to the Imperial Parliament and to emphasize the free association under the Crown of members of the British Commonwealth of Nations.[18]

In a similar vein Dawson J concluded:

> If the purpose of s 2 of the Statute of Westminster was to remove a restriction upon the legislative powers of Dominion Parliaments rather than to enlarge the ambit of those powers — and that plainly is the case — then, with the greatest of respect to those who think otherwise, it is to my mind quite mistaken to give to subs (2) of that section a construction which disregards that purpose and which is required neither by the words themselves nor the context in which they are to be found.[19]

It remains unresolved whether a new head of power is created by s 2(2).[20] If it is accepted that there is such a power, the Commonwealth may rely on it to legislate with respect to the succession to the throne. If, however, it is conceded that on its proper construction s 2(2) creates no new power, it would seem, as Bailey maintained, that the succession does not fall within one of the enumerated heads of power and consequently is beyond the Commonwealth Parliament's legislative competence, except under s 51(xxxviii).[21]

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Furthermore, Bailey maintains that the second recital in the preamble to the Statute — reciting the convention by which each Dominion is required to assent to any change in the law touching the succession — cannot affect the construction of s 2(2):

> Not without some anxiety, as I have said, I have come to the conclusion that the new convention concerning the succession, recited in the preamble to the Statute, does not oblige me to a construction of s 2 which would actually add new subject-matters to the legislative power of the Commonwealth Parliament. And even apart from the difficulty of determining the precise meaning of some of the terms used in the recital, the declaration of such a convention cannot possibly avail to make lawful legislation otherwise invalid.[22]

Some consideration should also be given to the implied power of the Commonwealth as a national government. The Constitutional Commission cites judicial recognition of the inherent power of the Commonwealth as a consequence of nationhood in *Victoria v Commonwealth (AAP* case)[23] as a possible basis for Commonwealth legislation.[24] Zines maintains that although the succession should properly be classified as within the Commonwealth rather than State sphere, it is difficult to accommodate such a law if the notion of an implied national power is rejected, as it was by Wilson and Dawson JJ in *Davis v Commonwealth*,[25] with whom Toohey J was in general agreement.[26] His basis for asserting this is that the

> only express power is the express incidental power, of which he comments that '[i]t is difficult to see how such laws could be characterised as incidental to the execution of power vested in "the Government of the Commonwealth" within the meaning of s 51(xxxix)'.[27]

The question of an implied power from nationhood was revisited in the *Tasmanian Dam* case. It has been observed that this case is of limited assistance, providing little concrete guidance as to the existence or extent, of the power.[28] What is apparent from the case, however, is the limited scope of the power where the interests of the States are concerned. As Deane J explains:

> As one moves away from those matters which lie at the heart of the inherent powers of the Commonwealth, it becomes increasingly predicable that any such powers will be confined within areas in which there is no real competition with the States. There are, no doubt, areas within the plenitude of executive and legislative power shared

> between Commonwealth and States ... which, while not included in any express grant of legislative power, are of real interest to the Commonwealth or national government alone.[29]

Succession to the throne is a curious subject matter in this context. If one accepts that by convention the Imperial legislature rather than Colonial legislatures had jurisdiction in this matter and that, as a result, it has never come within the States' legislative competence, then it is, on Deane J's reasoning, a potential area for the Commonwealth to legislate under the implied power.[30] Whether such a law would be of real interest to the Commonwealth alone is not so clear. This depends largely on whether one understands the institution of the monarchy principally as a constitutional institution or a national symbol.

In *Davis v Commonwealth* Brennan J held that the implied power must extend to matters of symbolic importance to the nation:

> With great respect to those who hold an opposing view, the Constitution did not create a mere aggregation of colonies ... The Constitution summoned the Australian nation into existence... The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood — a flag or anthem.[31]

One problem then is whether the monarchy is merely a national symbol, a law touching the succession to which could accordingly be characterised under this implied head of power. Much has been made of the Crown as a national symbol. Indeed it has been argued that the absence of a distinct Royal style and titles for each of the polities comprising the Commonwealth lends support to an emerging notion of 'One Australia' — a quasi-unitary vision of the Australian polity emphasising the fundamental significance of the nation as a whole in interpretation.[32]

It is well, however, to remember that whatever symbolic value the institution might have to the nation as a whole, it is first and foremost a constitutional institution. In O'Connell's words, '[t]he Monarchy is the keystone of the system'.[33] Moreover, it is as fundamental to the structure of the States as it is to the Commonwealth. This has become all the more apparent since the failed attempt by the Commonwealth in 1973 to prevent the States from having access to the Crown via the British Government which would have rendered the Commonwealth the only source of advice in Australian matters.[34] As O'Connell observes, the effect of this event was to reinforce the importance of the monarchy 'by making so explicit the link between the role of the Crown and the Federal system of government'.[35] This relationship, it is submitted, has been strengthened by s 7 of the *Australia Acts*.

This episode prompted the Queensland Parliament to pass the *Appeals and Special Reference Act 1973*, under which the Attorney-General sought and obtained a certificate from the Full Court of the Supreme Court of Queensland to refer certain matters to the Judicial Committee of the Privy Council. Had the reference been successful, a clear statement would now be available as to the impact of the *Royal Style and Titles Act 1973* (Cth) on the States and the competence of a State legislature to authorise the Queen to adopt a specific Royal style and titles for use in association with that State.[36] As it was, however, the Queensland Act was contested by the Commonwealth in the High Court, where it was held unanimously in the *Queen of Queensland* case[37] that the Act was invalid for inconsistency with Ch III of the Constitution.

It is submitted that a law touching the succession should be distinguished from a symbolic matter such as the commemoration of the bicentennial year considered in *Davis*. A law touching the succession has the capacity to alter radically the nature of the institution — for example, by rendering the succession elective rather than hereditary, or making the Commonwealth cabinet or Houses of Parliament the body responsible for electing the successor. Thus a law with respect to the succession could have significant repercussions for the States. In this way a law touching the succession may readily be distinguished from one authorising the sovereign to adopt a new style and titles, which is, after all, a purely symbolic measure.

Thus it is submitted that attempts such as that of Zines to justify a Commonwealth head of power are not soundly based. Rather, as Bailey has maintained, the succession is as much beyond the unilateral legislative power of the Commonwealth as it is of the States (unless the law in question falls within s 51(xxix)). It belongs to a peculiar and narrow class of subject matters which some contemporary scholars may think ought to be assigned to the Commonwealth, but which, until such time as this is achieved through a referendum, remain outside the grasp of the Commonwealth except at the request of the States under s 51(xxxviii). In this context it is well to remember the dictum of Kitto J:

> This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications.[38]

Position of the States

The discussion of potential heads of Commonwealth power has proceeded on the assumption that the succession to the throne is outside the States' legislative competency. This is indeed a widely accepted view and stems from an approach which focuses upon the question of whether the subject matter falls within the exclusive jurisdiction of the States — a question which must in this case inevitably be answered in the negative. It may not, however, be an entirely satisfactory view when the relationship between the Commonwealth, the States and the Crown is analysed closely.

Much has been made of the Crown as a national institution. Such statements beg the question as to what it means to be a 'national institution' in this context. It is widely accepted that there is but one Crown in Australia, as Winterton explains, '[s]ince there is only one nation, Australia, there is only one Australian "Crown", that of "Australia"'[39] (though this is by no means undisputed; Craven, for instance, maintains that Australia is properly described as a heptarchy comprising six separate State monarchies all distinct from a seventh Commonwealth monarchy).[40] Winterton is careful to avoid describing the single monarchy as a Commonwealth institution even though it is a national one, and instead develops the idea of a 'notional entity' explaining that '[a]s "Queen of Australia", the Queen is head of state of "Australia", a notional entity comprising seven polities: the Commonwealth and the six States'.[41] Winterton then proceeds to consider the hypothetical situation which might result should the Commonwealth successfully sever its ties with the Crown.

According to this approach, while the Commonwealth could unilaterally sever its own ties to the monarchy, it could not destroy the notional entity as such. If Winterton's approach is accepted, the Commonwealth Parliament could only alter the succession unilaterally to the extent that it forms part of the Commonwealth's constitutional arrangements.

Because of the fundamental nature of the Crown within Australia's constitutional arrangements, the problem goes to the heart of the nature of the Federation. O'Connell observed long before the *Australia Acts* that, unlike the position in Canada, the Crown in Australia is not centralised.[42] The Governor General of Canada is effectively a viceroy, enjoying an absolute delegation of the royal prerogative including the power to appoint provincial Lieutenant Governors. In Australia the Governor-General has never had this power, State Governors always having been appointed by the Queen, originally on the advice of her British Ministers and now on the advice of the relevant Premier. The significance of this became apparent in 1973 when Mr Whitlam, having established the sovereign as 'Queen of Australia',[43] asserted that he alone could advise the Queen in State matters.[44] Had this been the case, the monarchy in Australia would reflect the centralised nature of the Canadian institution. That it is not the case is all the more apparent since the *Australia Acts*.

The *Australia Acts 1986* removed the remaining constitutional ties between the States and the UK. Section 7(5) stipulated that the appropriate source of advice for matters relating to the Queen's powers in a State is the Premier of that State. This terminated the anachronistic arrangement by which the advice of the State ministers was tendered to the Queen through the British Secretary of State for Foreign and Commonwealth Affairs. The legislation could have substituted the Commonwealth Government for the UK Government, but to have done this would have disturbed the federal balance and moved towards the Canadian model of a centralised Crown.

What if anything is the significance of this development for the law of succession? It would seem that a strong argument could now be made against characterising the succession as an appropriate subject for unilateral Commonwealth action. The Crown is an integral part of each State's constitutional arrangements and is now constitutionally entrenched. Each State has a vital interest not only in the maintenance of the institution but in the identity of the incumbent.

The fact remains that there are numerous instances in which the Commonwealth has legislated unilaterally with respect to the Royal style and titles. Furthermore, only the Commonwealth was consulted during the abdication crisis. These might appear to be precedents for the proposition that the Commonwealth is competent to act unilaterally in this area. However this view is misguided if these events are put in their historical context. The abdication crisis was dealt with in accordance with conventions that had been articulated at the Imperial Conferences and enacted in

the *Statute of Westminster*. The Balfour formula only ever applied to the UK and the Dominions. The States, unlike the Commonwealth, never acquired Dominion status but continued to retain colonial legal vestiges until the *Australia Acts*. Such conventions must now be revisited since they do not reflect the new position of the States. The Canadian Provinces do not provide a useful precedent as Canada has always had a centralised monarchy.

In the case of the 1936 *Abdication Act*, neither Commonwealth nor State assent was legally required; but pursuant to the convention the assent of the former was sought and granted. With the adoption of the *Statute of Westminster* by the Commonwealth, this (or at least its recitation) became a formal legal requirement if it was to apply to Australia. It is submitted, however, that as the legal relationship between the UK and the States did not change until 1986, this precedent is of limited relevance.

Any precedent based on the various alterations by the Commonwealth to the Royal style and titles is even less persuasive.[45] Firstly, it would generally be accepted that such a law does not involve any substantive aspect of the federal balance. This cannot be said of the succession which would have a substantive effect on the identity of the incumbent, to whom the States now have direct access. Secondly, the particular laws were enacted pursuant to inter-governmental agreements[46] so that the particular statutes might fall within the scope of the external affairs power.

It is submitted that succession to the throne should not be regarded as amenable to unilateral Commonwealth legislation even if the Royal style and titles are. Furthermore, even if a law with respect to the succession can be supported by an implied power, it is submitted that this is not the appropriate avenue for change. Given the decentralised nature of the Crown within the Australian Federation, the preferable vehicle for legislative reform is s 51(xxxviii).

In the foregoing discussion the doctrine of the divisibility of the Crown within Australia has not been discussed at any length. This is appropriate, as the doctrine is of limited significance to the present discussion which is concerned with how the succession could be altered. The divisibility of the Crown at the domestic level is concerned with the Crown as the symbol of executive government and is concerned with the relationship between the Governments of the States and the Commonwealth.[47] Our present concern is with legislative rather than executive power. Irrespective of the relationship between the instrumentalities of the Crown, the power must exist to legislate with respect to the succession, unless covering clause 2 provides the substantive law of succession. No express statement provides that either the States or the Commonwealth has legislative competence. If there were separate State Crowns, a stronger argument could be made in favour of the necessity of State legislation in addition to Commonwealth legislation. Since the Colonies did not have such a power prior to Federation and according to s 107 their powers were not affected by federation, except as provided by the Constitution, this power must fall within s 51(xxxviii) of the Constitution.

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Status of the law in the Queen's other independent realms

It is beyond the scope of this article to provide a detailed treatment of the problems that might be encountered by attempts to alter the succession in any of the other 16 countries in the Commonwealth in which the present uniform law of succession operates. These comprise the UK, the three 'old Dominions' — Australia, Canada and New Zealand — and states which obtained independence in the post-*Statute of Westminster* era, for the most part Pacific and Caribbean micro-states — Antigua and Barbuda, The Bahamas, Barbados, Belize, Grenada, Jamaica, Papua New Guinea, St Christopher and Nevis, St Lucia, St Vincent and The Grenadines, Solomon Islands and Tuvalu.[48]

In the UK, there is no constitutional impediment to an alteration of the law other than the convention that this be done in concert with the other countries. In NZ, as in Australia and Canada, UK legislation would not be effective to alter the existing Imperial statutes; however the plenary power of its Parliament would give it power to alter the rules of succession.[49] Section 5 of the *Constitution Act 1986* (NZ) provides that the succession shall be determined 'in accordance with the enactment of the Parliament of England intituled The Act of Settlement (12 & 13 Will. 3, c.2) and any other law relating to the succession to the Throne'. An alteration to the *Act of Settlement* would not apply to NZ, however, as s 15(2) of the *Constitution Act* declares that no future Act of the UK Parliament shall apply as part of the law of NZ. Thus the NZ Parliament would have to pass legislation amending the *Act of Settlement* in its application in NZ.

The situation is somewhat more complicated in Canada. Although the Dominion Parliament enjoys a

residuary grant of power, s 2(a) of the *Constitution Act 1982* (UK) requires that constitutional amendments relating to the office of the Queen, the Governor General or provincial Lieutenant Governors must obtain the unanimous consent of the Provinces. It is suggested by Hogg that an alteration to the law of succession to the throne would constitute such a constitutional amendment and thus require the assent of all the Provinces.[50]

In each case it is apparent that an Act of the UK Parliament would not be sufficient and local legislation would be required. It is submitted that in each of the sovereign states which acquired independence after the *Statute of Westminster* such an approach would also be taken, as uncertainty in a constitutional instrument is likely to be resolved in favour of national sovereignty and local legislation would be regarded as desirable, if not necessary, to alter the law of succession in that country.

The Sovereign is, of course, Head of the Commonwealth in each of the other members of the Commonwealth of Nations, but as Head of the Commonwealth the Sovereign attracts no constitutional significance in any country. The position is not governed by the law of succession. As Bogdanor explains:

> At the London Conference in 1949 the title 'Head of the Commonwealth' was made specific to 'the King'. It was not conferred as a hereditary title and there was no indication in the London Declaration that it would necessarily pass to the successors of George VI. The presumption, no doubt, was that it would so pass, but perhaps, in the euphoria of achieving a formula which kept India within the Commonwealth, little thought was given to the matter ... George VI died in February 1952, less than three years after the London Declaration and before further thought had been given to whether the position of Head of the Commonwealth was hereditary. Upon the accession of Elizabeth II, however, Nehru, the prime minister of India, at the time the only republican member of the Commonwealth, sent her a message welcoming her as the new Head of the Commonwealth. On 6 December 1952 Elizabeth II was formally proclaimed 'Head of the Commonwealth'. The queen is thus Head of the Commonwealth not by right of succession but by common consent. The presumption must be that the successor to Elizabeth II to the throne will similarly, by common consent, be greeted as the new Head of the Commonwealth, for only the sovereign can fulfil the peculiar requirement of the position.[51]

As the law of succession does not determine the occupancy of the position of Head of the Commonwealth and does not otherwise affect the members of the Commonwealth which do not form part of the Sovereign's dominions, the consent of such countries would not be required before a change is made to the law. In practice, however, those countries are likely to be informed in advance as a courtesy, perhaps at a Heads of Government meeting, to ensure that no diplomatic incident occurs as a consequence of such action.

Reforming the law of succession to the throne

Having set out the existing law of succession and the means by which it may be altered in Australia and the other nations of the Commonwealth, it is now appropriate to suggest some reforms. In order to do this, an appreciation of the concerns which the Royal succession has historically sought to address and those which ought now to underpin it is desirable.

Changing demands made on succession law

The persistent theme in the history of the law of succession has been the doctrine of heredity. Its application to realty evolved in English law to guarantee certainty.[52] Its application to the Crown ensured that the succession would not be contested because the heir can always be determined, and this together with the maxim that 'the king never dies' makes for constitutional stability. As Nenner observes:

> The related principles of certainty in the succession, as guaranteed by indefeasible right, and an uninterrupted

> continuity of rule from one monarch to the next, were both essential to the preservation of a stable political order.[53]

However desirable heredity may have been, there were practical considerations to contend with, not least the unacceptability of a Catholic sovereign in a Protestant realm. Thus parliamentary regulation of the succession was accepted:

> It was an unreasonable burden and a violation of the fundamental right of self-protection for Englishmen to suffer the succession of a king who would not likely protect them in their law, property, liberty, and religion.
> ... Although theorists of hereditary monarchy were still being heard, their concern to identify the claimant with the best right to the crown seemed far less important than the need to determine whether a prospective occupant of the throne would be able to preserve and protect his subjects, their property, and their interests.[54]

With the rise of constitutional monarchy and ministerial responsibility in the 19th century, the requirements of the succession law changed. It was no longer necessary for the succession law to produce a king who would actively pursue policies which would protect his subjects and their interests. The qualities of the ideal sovereign had changed dramatically:

> He can but be an average man to begin with; sometimes he will be clever, but sometimes he will be stupid; in the long run he will be neither clever nor stupid; he will be the simple, common man who plods the plain routine of life from the cradle to the grave.[55]

This heredity could provide better than any other system of succession, and indeed continues to provide. As Winterton explains:

> The principal constitutional benefits derived from a hereditary constitutional monarchy are the stability and continuity provided by the predictability, if not certainty, of the line of succession to the throne, and the long tenure of its occupant.[56]

While a sovereign is no longer required to participate actively in the determination of government policy, a new role has been assumed, one of impartiality, requiring that the process of accession not involve any partisan element:

> The nation is divided into parties, but the Crown is of no party. Its apparent separation from business is that which preserves its mystery, which enables it to combine the affection of conflicting parties ...[57]

This remains the single most important function that the rules of succession continue to serve: a certain, predictable formula which excludes any partisan element, ensuring that the incumbent can assume office without being tarnished by any political affiliation, ensuring that the institution can remain above politics. As Hasluck explains,

> [T]he Queen has no obligations to any other source of power or influence, nor does she owe her position to the support of any group or party ... [T]he Crown, being outside politics, attracts the same loyalty from all subjects all the time and stands for those matters on which the nation is undivided.[58]

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Substantive amendments to the existing law

There are a number of reforms to the existing rules which would not compromise the function which the succession law continues to serve but could improve the ability of the Crown to provide these constitutional benefits and so improve its popular acceptance. The priority given to male heirs over female heirs of the same degree should be abolished. It is inconsistent with contemporary human rights jurisprudence and is perceived to be offensive to some sections of the community. Furthermore, it serves no useful purpose since sisters do not succeed to the Crown as coparceners. Moreover, it unnecessarily creates uncertainty where the sovereign has only female issue. In such a case, the eldest daughter is only ever heir presumptive as it is always theoretically possible that the sovereign may bear or beget male issue who would then take ahead of the female issue.[59]

The second set of provisions which require amendment are those imposing religious qualifications. There are three constitutional provisions of a religious nature: the statutory conditions of tenure, the title 'Defender of the Faith', and the sovereign's position in relation to the Church of England and the Church of Scotland. Only the first is relevant to the law of succession. The title 'Defender of the Faith' has not been part of the sovereign's titles in Australia since 1973.[60] In the UK the sovereign is supreme Governor of the Church of England 'in virtue of his or her position as head of state, from which it cannot be separated'.[61] The position has constitutional significance only in England. Thus in so far as the supreme Governorship of the Church is determined *by* the law of succession to the throne and in no way *determines* the law of succession to the throne, there is no reason why the holding of such office in addition to many others (for example, Sovereign of the Order of the Garter and Head of the Commonwealth) should cause any problem, especially in countries such

as Australia where the religious office is not recognised.

However the present relationship between the office of supreme Governor of the Church of England and the law of succession is deceptive. Although the former is dependant on the latter, the statutory conditions of tenure guarantee that a person who succeeds to the throne is, informally at least, able to play that role in the Church. These statutory conditions, in so far as they are part of the law of Australia, are perceived to be troublesome to some sections of the community and are hardly consonant with the spirit of s 116 of the Commonwealth Constitution which prohibits any religious test or qualification for any office or public trust under the Commonwealth.[62] The provisions have outlived their useful life.[63]

The provisions in s 2 of the *Act of Settlement* excluding Catholics and those married to Catholics from the succession should be repealed. The mandatory language in the provisions imposing the Coronation Oath and Declaration and the promises to preserve the established Church in England and the Presbyterian Church in Scotland should be amended by the UK Parliament and recast in directory language so that the sovereign may make and subscribe such oaths but is not constitutionally required to do so.[64] In so far as any of these provisions are part of the law of Australia, they should be repealed completely, with the possible exception of the Coronation Oath which could be amended to eliminate reference to any specific Church and cast in directory rather than mandatory language. The succession should not be subject to the subscription to any oath. As Coke said, there is no interregnum. An oath or other ceremony may have some symbolic value but should really be devoid of any legal significance.[65] Finally, the requirement in s 3 of the *Act of Settlement* that the sovereign must join in communion with the Church of England should be repealed.

Method of implementing reforms

It is submitted that there are two principles which should underpin legislative reform in this sphere in Australia. Firstly, there is the unique position of the Crown within the Australian Federation. As has been seen, the Crown forms an integral part of each polity. As such, it is submitted that even if the Commonwealth does have the legislative competence to act unilaterally, the appropriate way to alter the law touching the succession to the throne would be under s 51(xxxviii). This would reflect the unique position of the Crown within the 'notional entity' of Australia. It would also serve to depoliticise such reform, ensuring that the Crown continues to transcend party politics.

Secondly, any reform should be approached in light of the international significance of the law of succession. As has been mentioned above, the preamble to the *Statute of Westminster* recites a convention that both the law touching the succession to the throne and the Royal style and titles should only be altered by mutual consent of the Parliaments of the UK and all the Dominions.[66] Given the acceptance of the divisibility of the Crown at the international level and other developments in the relationship between the various independent realms within the Commonwealth of

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Nations, it becomes apparent that the sole remaining connection between these nations is the uniform law of succession.

There is no longer any constitutional reason why the law of succession must remain common throughout the Commonwealth of Nations. If Australia alone were to enact the proposed reforms, it would have severed this sole remaining connection with the other countries within the Queen's dominions. This might have the effect that in the event of a future demise of the Crown a different person could succeed to the throne of Australia from the person who would succeed to the throne of the UK and any other countries which did not alter their law accordingly. In some quarters this might be thought desirable. Such a 'patriation' of the Crown would result in a symbolic change which would see the sovereign identified solely with Australia. Such an alteration to the law of succession would not alter the constitutional role of the sovereign or the Governor-General. However a resident sovereign would presumably allow greater use to be made of s 2(1) of the *Royal Powers Act 1953* (Cth) at the Commonwealth level, and s 7(4) of the *Australia Acts* at the State level. Any other alteration to the sovereign's position would require constitutional reform.

The Constitutional Commission did not embrace any move to alter the succession which would be inconsistent with that operating in the UK on the basis that 'it would not be practical to envisage Australia as a Monarchy with a sovereign different from that of the United Kingdom'.[67] A uniform law should be retained on the basis of principle rather than convenience. There is much to be gained from a common law of succession. It adds to the status of the institution and promotes an invigorating sense of internationalism rather than exclusive nationalism at the heart of a country's constitutional arrangements.[68] Thus it is submitted that after obtaining the States' consent, the Commonwealth should conclude a treaty with the 15 foreign states in which the uniform law currently applies. Such a treaty should set out the amended law of succession and, after ratification, would be incorporated into the municipal law by an Act of the Commonwealth Parliament under s 51(xxix) and (xxxviii).

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If an international compact replaced the existing foundation of the law grounded in the evolution of the state in English history, the mutual consent of independent members of the international community to continue and affirm this last constitutional link would create an appropriate foundation for the modern law of succession. Ideally, this covenant would constitute a code and, once incorporated into the municipal law of each country, would replace both the existing statute and common law.

Conclusion

In *Sue v Hill* Gleeson CJ, Gummow and Hayne JJ alluded to an observation of Viscount Birkenhead LC in *Viscountess Rhondda's Claim*,[69] of which their Honours remarked:

> In 1922, the Lord Chancellor observed that doctrines respecting the Crown often represented the results of a constitutional struggle in past centuries, rather than statements of a legal doctrine.[70]

The time has come to reformulate the rules of succession to the throne into statements of legal doctrine, rather than persisting with the remnants of past struggles. If the law is to be amended, the opportunity arises to revise not merely particular aspects of the succession rules which are in need of revision — for example, aspects of religious and sexual discrimination — but to provide a new foundation for the law. Thus it is submitted that, while the origin of the rules is of historical significance, the institution of the monarchy could be significantly enhanced if the basis of the rules of succession were to be found in a compact between free and equal members of the international community who value the symbolism of a uniform law of succession even after their respective domestic institutions have been severed from each other. Furthermore, in the case of Australia, by legislating in reliance upon s 51(xxxviii) the process of reform would serve to reiterate the fundamental significance of the monarchy to the constitutional institutions of each of the States as well as the Commonwealth. In doing so, it would affirm the unique position of the monarchy within the constitutional structure of Australia as an institution which is intimately entwined in the government of each of the States and the Commonwealth and yet transcends them all.

The reforms that have been mooted would bring the rules touching the succession to the throne into conformity with current community attitudes to human rights and improve public perceptions about the institution, including its ability to continue to evolve. Furthermore, they would serve as an opportunity to demonstrate the equal and voluntary nature of Australia's relations with other countries, not least the UK.

But most importantly, these reforms would serve to bolster the extent to which the rules achieve their greatest virtue. The rules would acquire an increased level of certainty by removing

the possibility of disqualification for violating the statutory conditions of tenure, and the uncertainty that results in an heir presumptive rather than heir apparent in the case of female issue. The removal of such uncertainties would be the greatest contribution any agenda for reform could make, as it is this sense of certainty which has come to be a significant contribution made by the rules of succession to the functioning of the monarchy within the constitution. ●

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Endnotes

1. The Constitutional Commission considered that there was such power: Constitutional Commission, *Final Report* (Canberra, 1988), vol 1, 81. An express head of power would not be expected given that such matters were regarded at the time of Federation as of Imperial concern and to be dealt with by the Imperial Parliament.

2. Section 51(xxxviii) is the only express power identified by the Constitutional Commission that the Commonwealth could rely upon: above n 1, 81. The related power, s 51(xxxvii), which allows the Parliament of a State to refer a matter to the Parliament of the Commonwealth, is not helpful as this requires the State to be competent rather than the Commonwealth. It cannot be said that it is the States alone *rather than* the Commonwealth are competent in this matter.

3. (1989) 168 CLR 340.

4. Ibid at 378.

5. Ibid at 379.

6. (1999) 199 CLR 462, 486ff. This applies *a fortiori* to the other 14 realms within the Queen's dominions.

7. *Tasmanian Dam Case* (1983) 158 CLR 1, 259 per Deane J, affirming *R v Burgess, ex parte Henry* (1936) 55 CLR 608.

8. (1985) 159 CLR 351.

9. Above n 1, 81.

10. For an analysis of the Court's approach to s 2(2) see G J Craven, 'The *Kirmani* Case — Could the Commonwealth Parliament Amend the Constitution without a Referendum?' (1986) 11 *Sydney Law Review* 64.

11. *Kirmani* (1985) 159 CLR 351, 366.

12. K H Bailey, *The Statute of Westminster, 1931: Opinion of K H Bailey* (Melbourne, 1935), 6.

13. Ibid.

14. [1935] AC 484.

15. *Kirmani* (1985) 159 CLR 351, 427-428.

16. O Dixon, 'The Statute of Westminster 1931' (1936) 10 *Australian Law Journal* Supp 101.

17. *Kirmani* (1985) 159 CLR 351, 391.

18. Ibid at 390.

19. Ibid at 449.

20. Mason, Brennan and Deane JJ held this was the case, Wilson and Dawson JJ that it was not, Gibbs CJ came to no conclusion, and for Murphy J the question was irrelevant because of his novel approach to the date of Australian independence.

21. K H Bailey, 'The Abdication Legislation in the United Kingdom and in the Dominions' (1938) 3 *Politica* 1, 8.

22. Ibid at 9.

23. (1975) 134 CLR 338.

24. Above n 1, 81.

25. (1988) 166 CLR 79, 103-104.

26. Ibid at 118-119.

27. L Zines, *The High Court and the Constitution* (4th ed, Sydney, 1997), 315.

28. C Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267, 271.

29. (1983) 158 CLR 1, 252.

30. It may be argued that s 2(2) of the *Australia Acts* abolishes this limitation on State legislative competence. If this is so, however, it may be that, unless there are State monarchies, the States still do not have competence, in that such a law might not be one 'for the peace, order and good government' *of that State.*

31. (1988) 166 CLR 79, 110-111.

32. G Nicholson, 'The Concept of "One Australia" in Constitutional Law and the Place of Territories' (1997) 25 *Federal Law Review* 281, 284.

33. D P O'Connell, 'Monarchy

or Republic?', in G Dutton (ed), *Republican Australia?* (Melbourne, 1977), 23, 23.

34. Ibid at 27-28.

35. Ibid at 29.

36. R D Lumb, *The Constitutions of the Australian States* (5th ed, Brisbane, 1991), 101-102.

37. *Commonwealth v Queensland* (1975) 134 CLR 298.

38. *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, 115; quoted by Wilson J in *Kirmani* (1985) 159 CLR 351, 396.

39. G Winterton, 'The Constitutional Position of Australian State Governors', in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Sydney, 1992), 274, 274.

40. G Craven, 'The Constitutional Minefield of Australian Republicanism', *Policy*, Spring 1992, 33, 35.

41. G Winterton, *Monarchy to Republic: Australian Republican Government* (Melbourne, 1986), 103.

42. D P O'Connell, 'Canada, Australia, Constitutional Reform and the Crown' (1979) 60 *The Parliamentarian* 5, 11-12.

43. *Royal Style and Titles Act 1973* (Cth) s 2(1).

44. O'Connell, above n 42, 12. Virtually all commentators have accepted that the Act in question had no such substantive effect, but note R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia Annotated* (5th ed, Sydney, 1995), 500: 'it was arguable that, in all matters affecting Australia, the sole advisers to Her Majesty would in future be Her Majesty's Australian (Commonwealth of Australia) Ministers.' (Not repeated in the 6th ed: G Moens and J Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (6th ed, Sydney, 2001), 348.)

45. *Royal Style and Titles Act (Australia) 1947* (Cth); *Royal Style and Titles Act 1953* (Cth); and *Royal Style and Titles Act 1973* (Cth).

46. See reference to the 1952 Prime Ministers' Conference in the preamble to the *Royal Style and Titles Act 1953* (Cth), and the reference to this preamble in the preamble to the 1973 Act.

47. For a comprehensive study of this issue, see generally M Stokes, 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127.

48. Australia, Republic Advisory Committee, *An Australian Republic: The Options* (Canberra, 1993), vol 2, 1.

49. L Zines, *Constitutional Change in the Commonwealth* (Cambridge, 1991), 29.

50. P W Hogg, *Constitutional Law of Canada* (4th ed, Toronto, 1997), 48.

51. V Bogdanor, *The Monarchy and the Constitution* (Oxford, 1995), 263.

52. H Nenner, *The Right to be King* (London, 1995), 8.

53. Ibid.

54. Ibid at 12.

55. W Bagehot, *The English Constitution* (Ithaca, NY, 1966; orig publ 1867), 117-118.

56. G Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 109.

57. Bagehot, above n 55, 90.

58. P Hasluck, *The Office of the Governor-General* (Melbourne, 1979), 8.

59. At common law a woman is never regarded as being too old to bear children: C d'O Farran, 'The Law of the Accession' (1953) 16 *Modern Law Review* 140, 146-147. Thus if the sovereign has only female heirs, it is always technically possible that the line of succession may be disturbed by the birth of a son, even a posthumous one.

60. See the *Royal Style and Titles Act 1973* (Cth).

61. Bogdanor, above n 51, 215.

62. Section 116 of the Constitution would appear to reinforce the fact that the Crown does not constitute an office under the Commonwealth. If it were, the religious test required by the existing law of succession would be in violation of it as the second part of the section would not appear to be limited to the laws which the Commonwealth may make.

63. This should not be construed as any criticism of the relationship between that Crown and the Church in England and Scotland. Such considerations are beyond the scope of the present discussion and are matters for the respective Churches to determine. Were the statutory conditions of tenure to be altered, the Churches could continue to maintain their present relationship with the Crown. The Church of England might consider such an eventuality the appropriate moment to disestablish itself from the state.

64. For proposals made by the Prince of Wales as to amendments to the content of the existing Coronation Oath, see J Dimbleby, *The Prince of Wales: A Biography* (London, 1994), 526-534.

65. If the Prince of Wales' suggestion (see ibid) regarding a new title of 'Defender of Faith' (as opposed to the present title in the UK of 'Defender of the Faith') were accepted, it might be appropriate for the title to be assumed only after an appropriate oath has been sworn at the coronation; this might elevate the significance of the ceremony without the need for the oath or ceremony to have any significance in terms of succession law.

66. As has been seen, it is thought that the convention may no longer apply to the Royal style and titles, it having since been resolved that it is no longer appropriate to maintain a uniform Royal style and titles throughout the Queen's dominions: see 1952 Prime Ministers' Conference. It is submitted that the desirability of a uniform law of succession is quite distinct from the question of a uniform Royal style and titles.

67. Above n 1, 82.

68. See, for example, M D Kirby, 'Australia's Monarchy — Meeting the People's Needs', in G Grainger and K Jones (eds), *The Australian Constitutional Monarchy* (Sydney, 1994), 87, 98:

> Since Hiroshima, it behoves intelligent people to abhor nationalism and to seek after international harmony. Our Head of State is an international one; and none the worse for that fact. The idea that we must have a local Head of State, always in our midst, is one which derives from the inflexibility of the mind, set firm in its orthodoxy before the age of modern telecommunications, the jumbo jet and global ideas.