THE AUSTRALIA ACTS 1986: A STATE CONSTITUTIONAL LAW PERSPECTIVE

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I. INTRODUCTION

Drawing on the past to govern the present and future - change with continuity[1] - bestrides constitutional law in Australia.[2] Evolution, not

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1. However, "continuity with the past is not a duty, it is only a necessity." O Holmes "Learning and Science" in O Holmes *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920) (rep 1952) 138, 139. See also M DeWolfe Howe *Justice Oliver Wendell Holmes: The Shaping Years 1841-1870* (Cambridge: Harvard University Press, 1957) vii. Holmes considered that

> if we want to know why a rule of law has taken its particular shape, and ... why it exists at all, we go to tradition.... The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave ... you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.... It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

   O Holmes "The Path of the Law" (1897) 10 Harv L Rev 457, 468-469 reprinted in Holmes supra, 167, 186-187. For the suggestion that this represents Holmes' rejection of tradition and precedent see A Kronman "Precedent and Tradition" (1990) 99 Yale LJ 1029, 1035-1036. More generally see J Thomson "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 21 Rutgers LJ (forthcoming). For other views about the uses, limitations and dangers of history see P Freund *The Supreme Court of the United States: Its Business, Purposes, and Performance* (Cleveland: The World Publishing Co, 1961) 76-77. See also infra n 21 (history and constitutional interpretation).

2. For one example see R Lumb "The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change" (1988) 15 U Qld LJ 3.

revolution,[3] has, for example, characterised Australia's movement away from the sovereignty of the United Kingdom Parliament and towards

3. The classic revolutionary or unilateral seizure of independence is the American War of Independence 1775-1783. See generally The Declaration of Independence (US 1776); J Rakove *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A Knopf, 1979) 1-132; G Wills *Inventing America: Jefferson's Declaration of Independence* (New York: Doubleday, 1978); S Katz "The American Constitution: A Revolutionary Interpretation" in R Beeman, S Botein and E Carter (eds) *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987) 23. See also (UK) 22 Geo 3 c 46 (An Act to enable His Majesty to conclude a Peace or Truce with certain Colonies in North America therein mentioned 1782); (UK) Statute Law Revision Act 1964 (repealing the (UK) American Colonies Act 1766); Treaty of Peace between the United States and Great Britain (3 September 1783) in C Parry (ed) *The Consolidated Treaty Series 1781-1783* vol 48 (New York: Oceana Publications, 1969) 489-498. On the Canadian Constitution's patriation see eg E McWhinney *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982); D Milne *The New Canadian Constitution* (Toronto: Lorimer, 1982); R Sheppard and M Valpy *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982); K Banting and R Simeon (ed) *And No One Cheered: Federalism, Democracy and the Constitutional Act* (Toronto: Methuen, 1983); R Romanow "'Reworking the Miracle': The Constitutional Accord 1981" (1983) 8 Queen's LJ 74; M Gold "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Supreme Ct LR 455; A MacKay "Judicial Process in the Supreme Court of Canada: The Patriation Reference and its Implications for the Charter of Rights" (1983) 21 Osgoode Hall LJ 55; Symposium "Reshaping Confederation: The 1982 Reform of the Canadian Constitution" (1982) 45 no 4 Law & Contemp Probs 1; Symposium "The New Canadian Constitution" (1984) 32 Am J Comp L 221. For other countries see M Moshinsky "Re-enacting the Constitution in an Australian Act" (1989) 18 FL Rev 134, 138-140, 146-149. For a jurisprudential approach to the establishment of autochthony see eg J Eekelaar "Principles of Revolutionary Legality" in A Simpson (ed) *Oxford Essays in Jurisprudence* 2nd series (Oxford: Clarendon Press, 1973) 22; J Finnis "Revolutions and Continuity of Law" in Simpson ibid 44.

the attainment of complete legal independence.[4] Culmination of that journey appears[5] to have occurred at 5.00 am Greenwich mean time on 3 March 1986.[6] At that moment the Australia Acts[7] came into operation.[8] Their existence affects and influences three strands of constitutional law: British, Australian federal and Australian state constitutional law. Despite careful negotiations and drafting,[9] a plethora of academic

4. For the evolution of Australian colonial constitutions from 1788 to 1901 see eg A Castles *An Australian Legal History* (Sydney: Law Book Co, 1982); A Castles and M Harris *Lawmakers and Wayward Whigs: Government and law in South Australia 1836-1986* (Adelaide: Wakefield Press, 1987); P Finn *Law and Government in Colonial Australia* (Melbourne: Oxford University Press, 1987); E Jenks *The Government of Victoria (Australia)* (London: Macmillan, 1891); R Lumb *The Constitutions of the Australian States* 4th edn (St Lucia: University of Queensland Press, 1977) 3-44; A Melbourne *Early Constitutional Development in Australia* 2nd edn (St Lucia: University of Queensland Press, 1963); W McMinn *A Constitutional History of Australia* (Melbourne: Oxford University Press, 1979); J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901); Z Cowen "A Historical Survey of the Victorian Constitution, 1856 to 1956" (1957) 1 MUL Rev 9; J Rose, A Newton and E Benians (eds) *The Cambridge History of the British Empire* vol 7 pt I: Australia (Cambridge: Cambridge University Press, 1933) 273-295, 395-453. For post-1901 developments see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 Barwick CJ, 182-183; Stephen J, 208-214; Murphy J, 236-239 ("*China Ocean Shipping*"); *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 Gibbs J, 257.
5. See infra nn 15-20 (constitutional validity of Australia Acts) and 75-77 (Privy Council appeals).
6. Commonwealth of Australia Gazette no S 85 (2 March 1986); (UK) Statutory Instrument no 319 of 1986 (24 February 1986).
7. (UK) Australia Act 1986; (Cth) Australia Act 1986. In all substantive respects the Australia Acts are identical. Some minor differences occur in s 16. Eg, the (Cth) Australia Act defines the (UK) Statute of Westminster 1931 but the (UK) Australia Act does not.
8. Simultaneous commencement resulted from proclamations pursuant to s 17(2): see supra n 6. Thus, it may not matter if for some purposes the Cth Act is invalid: see eg infra nn 15-20. "The purpose of using [two] methods of bringing the scheme into effect was to ensure that no argument could occur as to the validity of the arrangements." L Zines *The High Court and the Constitution* 2nd edn (Sydney: Butterworths, 1987) 270.
9. For the history see Western Australia, Legislative Council 1985 *Debates* vol 257, 3214-3220 (I Medcalf).

commentary[10] and some judicial decisions,[11] conundrums continue to resonate.

What is the effect, vis-a-vis future British statutes, of section 1 of the United Kingdom Parliament's Australia Act, which purports to

10. See eg Zines n 8, 268-273, 279; L Zines *Constitutional Change in the Commonwealth* (Cambridge: Cambridge University Press, 1991) (forthcoming) ("Constitutional Autonomy"); G Carney "An Overview of Manner and Form in Australia" (1989) 5 QUTLJ 69; G Craven "A Few Fragments of State Constitutional Law" (1990) 20 UWAL Rev 353, 359-365; D Cremean "Australia - You're Legislating in it!" (1986) 60 Law Inst J 436; J Dickinson "The Australia Act 1986 - An End to Constitutional Links between Australia and the UK" [1986] New LJ 401; M Gaudron "The Realisation of an Australian Legal System" (1987) 61 Law Inst J 686; C Gilbert "Section 15 of the Australia Acts: Constitutional Change by the Back Door" (1989) 5 QUTLJ 55; J Goldring "The Australia Act 1986 and the Formal Independence of Australia" [1986] Pub L 192; J Goldsworthy "Manner and Form in the Australian States" (1987) 16 MUL Rev 403; I Harris "Australia Acts end our last constitutional links with UK" (April 1986) 21 no 3 Australian Law News 21; I Harris "The Australia Act 1986 - Severance of Remaining Constitutional Links" (1986) 54 Table 64; H Lee "The Australia Act 1986 - Some Legal Conundrums" (1988) 14 Mon UL Rev 298; G Lindell "Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 FL Rev 29; Lumb supra n 2, 26-32; A Mason "The Australian Constitution 1901-1988" (1988) 62 ALJ 752, 754; Note "Abolition of residual constitutional links between Australia and the United Kingdom" (1986) 60 ALJ 253; B O'Brien "The Australia Acts" in M Ellinghaus, A Bradbrook and A Duggan (eds) *The Emergence of Australia Law* (Sydney: Butterworths, 1989) 337; C Pincus "An Australian Republic? Legal Aspects" Labor Lawyers National Conference, Brisbane (Qld) 22 Sept 1990; G Sawer "Queensland joker raises knotty points of law" The Canberra Times 26 Nov 1987, 2; J Thomson "Australia Act 1986: A Declaration of Independence?" (April 1986) 13 no 3 Brief 22; A Watts "The Australia Act 1986" (1987) 36 Int'l & Comp LQ 132. See also infra n 30 (references); M Detmold *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Sydney: Law Book Co, 1985) 104-108; Note "Another residual constitutional link with the United Kingdom terminated; diplomatic letters of credence now signed by Governor-General" (1989) 63 ALJ 149.

11. See eg *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 ("*Union Steamship*"); *Boath v Wyvill* (1989) 85 ALR 621 ("*Boath*"); *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648 ("*Seymour-Smith*"); *R v Judge Bland; Ex parte Director of Public Prosecutions* [1987] VR 225; *R v Minister for Justice and Attorney-General; Ex parte Skyring* (unreported) Supreme Court of Queensland 17 February 1986 (Connolly J); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister of Industrial Relations* (1986) 7 NSWLR 372, 415.

terminate the power of that Parliament to make laws[12] having effect as part of Australian - Commonwealth and/or state - law?[13] Textually, it seems to constitute "a total abdication of authority by the United

12. This concerns legislative, not executive, power. As to Commonwealth executive power see ss 2, 59, 61 and 68 of the Australian Constitution (Queen's powers and functions). Is the Queen acting as Queen of Australia? See s 2 of the (Cth) Royal Style and Titles Act 1973 designating the Queen as "Queen of Australia." However, it has been suggested that "[a] pedant might argue that, in view of the Preamble, covering clause 2, and the Schedule to the Constitution, that [1973] Act is unconstitutional, and that the Queen's title must include 'of the United Kingdom', as in the Royal Style and Titles Act 1953 s. 4 (C'th)." G Winterton *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983) 215 n 159. But see *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-186; Zines supra n 8, 280-283. For state executive power see text accompanying nn 66-73.

13. S 1 states:

> No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

Compare s 4 of the (UK) Statute of Westminster 1931 which states:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

On s 4 see *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 ("*Kirmani*"); *China Ocean Shipping* supra n 4 Stephen J, 212 (UK legislative power required Australian request to operate in Australia); K Wheare *The Constitutional Structure of the Commonwealth* (Oxford: Oxford University Press, 1960); O'Brien supra n 10, 343-345; B Hadfield "Learning from the Indians? The Constitutional Guarantee Revisited" [1983] Pub L 351. In so far as it was part of Australian Commonwealth, state or territory law, s 4 was repealed by s 12 of the Australia Acts. See infra n 14. It has been suggested that s 4 was the "legislative authority ... relied on to support the legal validity of the British version of the Australia Act." Lindell supra n 10, 34 (footnote omitted). S 15 of the Australia Acts provides that the UK Act can be amended in so far as it is part of Australian law by Commonwealth legislation.

Kingdom Parliament in relation to Australian matters."[14] Others, more enamoured of parliamentary sovereignty, can espouse an opposite conclusion.[15]

Doubts also remain concerning the validity of the Commonwealth Parliament's Australia Act, whether the external affairs power in section 51(xxix), the request power in section 51(xxxviii) or the implied nationhood power are advanced as providing the requisite

14. Lumb supra n 2, 30. See also *Final Report of the Constitutional Commission* vol 1 (Canberra: AGPS, 1988) 120 ("[A]s a result of the enactment ... of the *Australia Acts 1986*, the authority of the United Kingdom Parliament to legislate for Australia has been terminated. It cannot even legislate for Australia at the request and with the consent of the Government and Parliament of the Commonwealth"); Zines supra n 8, 271 (The (UK) Australia Act "clearly amounts in British Law to an abdication of all sovereign power and responsibility in relation to Australia."). See also Zines ibid, 283-284. It has been suggested that "the possibility of the United Kingdom Parliament legislating for Australia after [3 March 1986] was terminated as a result of [s 12 of the Australia] Acts which put an end to the procedure provided for in the Statute of Westminster." Lindell supra n 10, 35 (footnote omitted). S 12 repeals "[s]ections 4, 9(2) and (3) and 10(2) of the Statute of Westminster 1931, in so far as they are part of the law of" Australia. S 51(xxix) of the Australian Constitution has been suggested as the constitutional basis of s 1 of the (Cth) Australia Act. Zines supra n 8, 279. See also J Crawford "Amendment of the Constitution" in G Craven (ed) *Australian Federalism: Towards the Second Century* (Melbourne: Melbourne University Press, 1991) (forthcoming). For the view that the UK Parliament's power to legislate for Australia terminated on 1 January 1901 see G Winterton "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 FL Rev 223, 235-238.

15. O'Brien, for example, postulates, but ultimately rejects, the view that

> [w]hile [s 1 of the Australia Acts] reproduces much of the language of s 4 [of the Statute of Westminster] and extends it to the States and Territories, it omits the request and consent limb of s 4 and thus fails to reproduce the manner and form requirement. According to the Dixonian theory the United Kingdom Parliament would be free to legislate for Australia and [Australian] courts would be bound to give full effect to any such law. A paradoxical situation would thus arise: the Australia Acts, far from securing [Australia's] legal independence from the United Kingdom, would place [Australia] in that same state of servitude in which [Australia was] prior to the adoption of the Statute of Westminster 1931.

O'Brien supra n 10, 345. See also Moshinsky supra n 3, 137. For various views about parliamentary sovereignty see G Winterton "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 LQR 591; G Winterton "Is the House of Lords Immortal?" (1979) 95 LQR 386; G Anav "Parliamentary Sovereignty: An Anachronism?" (1989) 27 Colum J Transnat'l L 631. See also M Flaherty "The Empire Strikes Back: *Annesley v Sherlock* and the Triumph of Imperial Parliamentary Supremacy" (1987) 87 Colum L Rev 593.

foundation.[16] Two sets of provisions in this Commonwealth legislation are particularly vulnerable.[17] First is section 15, which concerns the amendment or repeal of the Australia Act and the Statute of Westminster 1931. It is doubtful whether future Commonwealth Parliaments are bound by the requirement in section 15(1) that all State Parliaments must request or concur in Commonwealth legislation repealing or amending the Australia Acts.[18] In so far as section 15(1) stipulates, through section 15(3), that only constitutional amendments which confer power on the Commonwealth Parliament can result in amendments to or repeal of the Australia Act or Statute of Westminster 1931, it unconstitutionally restricts the operation of section 128 of the Australian Constitution.[19] Secondly, sections 13 and 14, purporting to amend the Queensland and Western Australian Constitutions, are also susceptible to constitutional infirmity.[20]

16. See eg Zines supra n 8, 268-280; Lee supra n 10, 305-306; Lindell supra n 10, 35.
17. See also Zines supra n 8, 273 (suggesting that s 7 of the (Cth) Australia Act "might give rise to these issues" creating doubts about constitutional validity).
18. Ibid, 271 and 279 (suggesting that s 51 does not provide the Commonwealth Parliament with power to bind its successors at least in respect of s 15 type provisions). It has been suggested that s 15(1) confers a power on the Commonwealth Parliament to amend the Australian Constitution (after amending or repealing s 8 of the Statute of Westminster). Lindell supra n 10, 41-42. However, such a power derived from the (Cth) Australia Act would be unconstitutional because the external affairs and request powers, which constitute possible constitutional foundations for s 12, are subject to the Constitution. Does s 15(1) of the (UK) Australia Act confer that power? For an affirmative response see O'Brien supra n 10, 342. But see infra n 19 (limits on UK Parliament's power to alter the Constitution); J Thomson "Altering the Constitution: Some Aspects of Section 128" (1983) 323, 342-343 (opposing views). See generally Gilbert supra n 10, 58-64.
19. Zines supra n 8, 271; Lee supra n 10, 305-306; Lindell supra n 10, 35 n 22. Thus, "s 15 can only be valid as a result of British paramount power...." Zines supra n 8, 273. But can, and in s 15 did, UK legislation amend the Constitution? For various views see Zines supra n 8, 272; Lindell supra n 10, 41-43; Crawford supra n 14. Can the UK Act in so far as it is part of Australian law be amended by Commonwealth legislation requested or concurred in by all states pursuant to s 15? Would such amendments override the Australian Constitution? What is the relationship between ss 1 and 15?
20. For arguments that ss 51(xxxviii), 51(xxix) and 128 of the Australian Constitution do not suffice to sustain the constitutional validity of ss 13 and 14 see Western Australia, Legislative Assembly 1985 *Debates* vol 256, 1549, 1553-1555, 1557 (A Mensaros); ibid, 1808, 1809-1812 (W Hassell); ibid, 1813-1814 (J Grill); Western Australia, Legislative Council 1985 *Debates* vol 256, 2217-2218 (C Griffith). However, in so far as the ss 13 and 14 amendments deal with matters pertaining to the UK, s 51(xxix) may suffice. Zines supra n 8, 268-269 (discussing application of external affairs power to relations between Australia and the

Other questions requiring elaboration include: are the Australia Acts merely ordinary legislation or constitutive documents? Have they altered or become part of Australia's constitutional structure? What interpretative principles or analyses should be utilised when courts, parliaments, governors and citizens confront this legislation?[21] Postulating answers is particularly important for state constitutional law. The reason emanates from the text of the Australia Acts. All principal facets of state constitutions - legislative, executive and judicial - are directly implicated by this United Kingdom and Commonwealth legislation. Consequently, state constitutions can be perceived as encompassing these statutes.[22] As a result, are state constitutional powers enhanced or diminished? Does state constitutional law rest upon and draw legal efficacy from a Commonwealth law? Is state integrity, independence and capacity to function bolstered, curtailed or weakened? Has parliamentary sovereignty or constitutionalism been strengthened? Beneath such puzzles lie a morass of details.

UK). For a discussion of whether federal legislation pursuant to s 51(xxxviii) could directly amend state constitutions to avoid "manner and form" provisions in state constitutions, see G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986) 142. See also s 9(2) of the Australia Act which purports to render of no "force or effect" requirements, for example, in the second proviso in s 73(1) of the (WA) Constitution Act 1889, that Bills be reserved "for the signification of Her Majesty's pleasure thereon."

21. For various ways of characterising constitutional documentation and their interpretation see J Thomson "The Australian Constitution: Statute, Fundamental Document or Compact?" (1985) 59 Law Inst J 1199. Different interpretative strategies are noted in J Thomson "State Constitutional Law: Some Comparative Perspectives" (1989) 20 Rutgers LJ 1059, 1075-1077. See also A D'Amato "Aspects of Deconstruction: The 'Easy Case' of the Under-Aged President" (1989) 84 Nw UL Rev 250 (deconstructing art II, § 1, cl 5 of the US Constitution that "[n]o person ... shall be eligible to the Office of President ... who shall not have attained to the Age of thirty-five Years ...").

22. "[I]n Australia a State Constitution is fissiparous ... in content and form. It is an elusive beast, hard to pin down.... [T]he various State Constitution Acts do not contain all those statutory provisions which could properly be described as 'constitutional'." R Lumb "Methods of Alteration of State Constitutions in the United States and Australia" (1982) 13 FL Rev 1, 4, 10.

II. STATE LEGISLATIVE POWER

Grants of state legislative power are derived from a multiplicity of sources: United Kingdom legislation,[23] the Australian Constitution,[24] state constitutions[25] and Commonwealth legislation.[26] Traditionally, plenary power has been conferred on state parliaments[27] to legislate for the "peace, order and good government" of the state.[28] Three provisions in the Australia Acts engender the query whether additional power has been secured for state parliaments[29] or whether only clarification and express declarations of existing legislative competence have been provided. To the extent that the former view prevails and section 15 proves to be legally effective, subsequent diminution or alteration of any additional power will be extraordinarily difficult.[30]

23. See eg (UK) Western Australia Constitution Act 1890; (UK) Australia Act 1986.
24. See eg ss 7 (para 2), 9 (para 2), 29 and 112 of the Australian Constitution.
25. See (WA) Constitution Act 1889-1987; (WA) Constitution Acts Amendment Act 1899-1990; (SA) Constitution Act 1934-1988; (Vic) Constitution Act 1975-1989; (NSW) Constitution Act 1902-1988; (Qld) Constitution Act 1867-1987; (Qld) Constitution Acts Amendment Act 1971-1987; (Tas) Constitution Act 1934-1988.
26. See eg ss 4 and 5 of the (Cth) Coastal Waters (State Powers) Act 1980. For differing views as to the effect of this Act vis-a-vis state legislative power see K Booker "Section 51(xxxviii) of the Constitution" (1981) 4 UNSWLJ 91, 109 n 2 ("preserved"); M Crommelin "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 Aust Mining & Petroleum LJ 191, 193-194 ("confers" or "adds to"); E Freeman "Comment" ibid 227, 227-229 ("confirms"). See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 (s 5(c) of (Cth) Coastal Waters (State Powers) Act 1980 constitutional).
27. For discussion of the difference (and its significance in relation to the constitutional entrenchment of democratically elected institutions) between the terms "Parliament" in the Australia Acts 1986 and "Representative Legislature" in s 5 of the (UK) Colonial Laws Validity Act 1865 - quoted infra n 46 - see O'Brien supra n 10, 350-352; Goldsworthy supra n 10, 423-424.
28. See eg s 2 of the (WA) Constitution Act 1889. Similar provisions in all Australian state constitutions are reproduced in C Enright *Constitutional Law* (Sydney: Law Book Co, 1977) 158-160.
29. See eg Zines supra n 8, 279 ("Section 2 [and] 3 ... confer increased power on the States ...").
30. However, all three provisions - ss 2(1), 2(2) and 3(2) - are, because of s 5, unable to alter amend or repeal the (UK) Commonwealth of Australia Constitution Act 1900, the Australian Constitution, the (UK) Statute of Westminster 1931 and the Australia Acts. All three provisions are also made subservient to the "manner and form" provision in s 6. See infra n 54.

Section 2(1) of the Australia Acts declares and enacts that state legislative power includes "full power" to enact laws having "extra-territorial operation."[31] Have the limitations on state legislative competence,[32] however tenuous prior to 3 March 1986, been swept aside? Different views are strenuously advanced.[33] Resort to explanatory memoranda and second reading speeches assists an affirmative response.[34] Negating that evidence of more power are the words "peace, order and good government" in section 2(1), which can be taken to suggest that only codification of pre-1986 doctrine has occurred. If extra-territorial limitations have been codified, their removal may be much more difficult than would have been possible prior to 3 March 1986.[35]

31. S 2(1) states:

> It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

Compare s 3 of the (UK) Statute of Westminster 1931 which states:

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

32. For the pre-1986 position see eg C Gilbert "Extraterritorial State Laws and the Australia Acts" (1987) 17 FL Rev 25, 25-29; *Union Steamship* supra n 11; *Port MacDonnell* supra n 26.
33. See eg Gilbert supra n 32; P Griffin "Division 30 of the Stamp Duties Act - Territoriality and the Australia Acts 1986" (1988) 17 Aust Tax Rev 142; I Killey" 'Peace, Order and Good Government': A Limitation on Legislative Competence" (1989) 17 MUL Rev 24; M Moshinsky "State Extraterritorial Legislation - Further Developments" (1990) 64 ALJ 42; M Moshinsky "State Extraterritorial Legislation and the Australia Acts 1986" (1987) 61 ALJ 779. See also *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 Brennan J, 335 (state legislative competence "to create proprietory rights out of property beyond the boundaries of the State and to which the State has no title" is doubtful).
34. Lee supra n 10, 309. But see Gilbert supra n 32, 34-35.
35. For opposing views as to whether the "peace, order and good government" requirement in state constitutions could have been removed by using the legislative power conferred on State Parliaments by s 5 of the (UK) Colonial Laws Validity Act 1865 see Lee supra n 10, 308. Another source of power to effect such a removal might be in s 4 of the (UK) New South Wales Constitution Act 1855, s 4 of the (UK) Victorian Constitution Act 1855 and s 5 of the (UK) Western Australia Constitution Act 1890. On s 4 of the New South Wales Constitution Act see *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394 ("*Trethowan*"); B O'Brien "The Indivisibility of State Legislative Power" (1981) 7 Mon UL Rev 225, 228, 238-245; O'Brien supra n 10, 353; Goldsworthy supra n 10, 405-406, 409-411. See also infra n 45.

Legislative powers of the United Kingdom Parliament which might have been exercised prior to 3 March 1986 for a state's "peace, order and good government" are "declared and enacted" by section 2(2) to be included within state legislative power. One exception is immediately apparent. Section 2(2) expressly does not confer on states "any capacity" which states "did not" possess before 3 March 1986 "to engage in relations with countries outside Australia." A less discernible extra-territorial limitation, as in section 2(1), may also be inherent in the words "peace, order and good government."[36] Utilisation of the word "confers" and the express insertion of an exception in section 2(2) enhances the possibility that State Parliaments have gained some legislative power from the Australia Acts. The Second Reading Speech and the Explanatory Memorandum view section 2(2) as removing limitations on state legislative power which existed in United Kingdom legislation or elsewhere because of the states' pre-1986 colonial status.[37] In the presence of section 3,[38] it is difficult to envisage what legislative power emanates from section 2(2). Is it "a continuing constituent power which, subject to s. 6, the State Parliaments themselves cannot abdicate or restrict"?[39] The Explanatory Memorandum concludes that the express exception in section 2(2) ensures that the Australia Acts

36. S 2(2) states:

> It is hereby declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

37. Australia, House of Representatives 1985 *Debates* vol HR145, 2685-2687 (L Bowen); Australia, House of Representatives 1985 *Explanatory Memorandum: Australia Bill 1986 [and] Australia (Request and Consent) Bill 1985* 3.

38. See text accompanying nn 42-49.

39. Goldsworthy supra n 10, 411 (footnote omitted). One reason for an affirmative response is that "[sections] 5 and 15 of the [Australia] Act[s] ... prevent the state Parliaments from using the power conferred in sub-s. 2(2) against itself." Ibid, 411 n 50. As to whether, and if so, to what extent, the constituent power granted in state constitutions and UK Acts ratifying those constitutions (see supra nn 28 and 35) could be used to abdicate, restrict or enlarge that power see *Trethowan* supra n 35 Dixon J, 429-431; Goldsworthy supra n 10, 410, 417, 425, 426; infra n 64. In this respect the power in s 2(2) of the Australia Act may be qualitatively, even if not quantitatively, different from pre-1986 state legislative power. See infra n 49 (relationship between ss 2(2) and 6 of Australia Acts).

"will not make it possible for the States to establish diplomatic relations with other countries, or relations in the nature of diplomatic relations."[40] Whether and how far states could engage, prior to 3 March 1986, in such matters as well as other dealings with foreign nations remains a matter of debate.[41] At least, the Australia Acts do not purport to curtail the capacity, if any, which State Parliaments previously possessed.

A third possible conferral of extra state legislative power resides in the closing portion of section 3(2). This provision indicates that state parliamentary powers "shall include the power to repeal or amend any [United Kingdom] Act, order, rule or regulation in so far as it is part of the law of the State." Again, as the Explanatory Memorandum indicates, section 3 of the Australia Acts is "modelled on section 2 of the Statute of Westminster," including the final portion of section 2(1), which engenders "a good deal of academic and judicial controversy as to whether [it] constitutes an independent grant of legislative power."[42] Replication of that debate may ensue over the ambit of section 3(2). Even if an affirmative answer is required, the power in section 3(2) is limited by sections 5 and 6. Therefore, it cannot, for example, amend the Australia Acts[43] or the stipulation that "manner and form" requirements concerning the "constitution, powers or procedure" of State Parliaments must be followed. Not saved from the scope of an independent section 3(2) power are state Constitution Acts of the United Kingdom Parliament.[44] Some provisions in those Acts provide a power

40. *Explanatory Memorandum* supra n 37, 3.
41. See eg H Burmester "Federalism, the States and International Affairs: A Legal Perspective" in B Galligan (ed) *Australian Federalism* (Melbourne: Longman Cheshire, 1989) 192; H Burmester "The Australian States and Participation in the Foreign Policy Process" (1978) 9 FL Rev 257; J Thomson "International Relations of States of Regional and Federal Systems: Australia" in A Tay (ed) *Law and Australian Legal Thinking in the 1980s* (Sydney: University of Sydney, 1986) 463.
42. O'Brien supra n 10, 340 (footnote omitted referring to *Kirmani* supra n 13).
43. Compare *Kirmani* supra n 15 Brennan J, 418 (s 2(2) of the Statute of Westminster 1931 did not confer power on the Cth Parliament to amend the Statute of Westminster 1931). Is the s 5 limitation on s 3(2), in respect of amendment or repeal of the Australia Acts, therefore, unnecessary?
44. See eg (UK) New South Wales Constitution Act 1855; (UK) Victorian Constitution Act 1855; (UK) Western Australia Constitution Act 1890. Compare s 8 of the Statute of Westminster 1931 which saves the (UK) Commonwealth of Australia Constitution Act 1900 from s 2(2) of the Statute of Westminster 1931.

for State Parliaments to amend state constitutions by ordinary laws.[45] While such amendment power flowed from United Kingdom legislation, state laws outside exceptions stipulated in those provisions or the manner and form proviso in section 5 of the United Kingdom Colonial Laws Validity Act 1865[46] may not have been able to stipulate restrictive constitution amendment procedures binding future State Parliaments,[47] and state law could not have amended or repealed that amendment power. Section 3(2) might enable State Parliament to achieve these objectives, either by repealing the United Kingdom provisions and then enacting restrictive amendment procedures, or by merely doing the latter and accomplishing the former by implication. That is, manner and form provisions - independently of section 6, and therefore having a wider coverage than the "constitution, powers or procedure" of State Parliaments - could be legally efficacious under section 3(2).[48] Consequently, could State Parliaments obliterate, abdicate or substantively restrict their power to amend state constitutions? If section 2(2)

45. See eg s 4 of the (UK) New South Wales Constitution Act 1855; s 4 of the (UK) Victorian Constitution Act 1855; s 5 of the (UK) Western Australia Constitution Act 1890. As to whether the NSW provision is spent see *Trethowan* supra n 35 Rich J, 416-417; Dixon J, 427-429; Starke J, 423-424; *Attorney-General for New South Wales v Trethowan* [1932] AC 526, 539 (Privy Council); Goldsworthy supra n 10, 406, 410. S 4 of the NSW Constitution Act has been characterised as "a manner and form requirement which would take effect under s 5 of the Colonial Laws Validity Act." O'Brien supra n 10, 353. See also supra n 35.

46. S 5 of the (UK) Colonial Laws Validity Act 1865 states:

> [E]very Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament ... or Colonial Law for the Time being in force in the said Colony.

47. Other sources which might sustain the validity of restrictive procedural requirements include the principle in *Bribery Commissioner v Pedrick Ranasinghe* [1965] AC 172 and s 106 of the Australian Constitution. See infra nn 64 and 65.

48. Goldsworthy supra n 10, 410-411; O'Brien supra n 10, 352-353. S 6 operates "[n]ot withstanding section[] ... 3(2) ...". This only prohibits s 3(2) restricting s 6. S 6 does not prevent s 3(2) furthering s 6's objective of making manner and form provisions binding.

of the Australia Acts confers "a continuing constituent power," a negative response may prevail.[49]

Another restriction on state legislative power also remains. Unlike removal of other fetters,[50] nullification of state laws "respecting the constitution, powers or procedure of" State Parliaments unless "made in such manner and form" as required by prior state laws was reimposed[51] by section 6 of the Australia Acts. Several tantalising problems are, however, engendered by this seemingly innocuous replication of an earlier statutory provision.[52] Initially, sections 6 and 2(2) must be reconciled. One approach is to accord priority to the latter over the former. Manner and form requirements must be narrowly construed so that restrictive procedures on the making of state laws respecting State Parliaments' constitution, powers or procedure do not substantively restrict the constituent power, if any, conferred by section 2(2).[53] Textually, however, the opening portion of section 6 expressly indi-

49. Goldsworthy supra n 10, 411, 417 (footnotes omitted):

> [Section 2(2)] confers a continuing constituent power which, subject to s. 6, the State Parliaments ... cannot abdicate or restrict.... The Australia Act cannot possibly have the intention or the effect of removing the power of the State Parliaments to alter their own constitutions; indeed, sub-s. 2(2) of the [Australia] Act is now a further source of that power....
>
> ....
>
> [I]f provisions substantively restricting [State Parliaments' continuing] constituent power can be binding under s. 6 - then the power could be completely extinguished, which would defeat sub-s. 2(2).

50. In addition to the possible removal of extra-territorial limitations (see supra nn 33-35), ss 3(1) and 4 of the Australia Acts remove the restrictions in the Colonial Laws Validity Act 1865 supra n 46 and the (UK) Merchant Shipping Act 1894, and ss 8 and 9 remove limitations concerning disallowance or suspension of laws and withholding of assent or reservation of Bills. The Colonial Laws Validity Act 1865 was originally perceived as a grant, not a restriction, of colonial legislative power. See eg *Union Steamship* supra n 11, 155; Quick and Garran supra n 4, 348, K Roberts-Wray *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) 396; D Swinfen *Imperial Control of Colonial Legislation 1813-1865: A Study of British Policy Towards Colonial Legislative Powers* (Oxford: Clarendon Press, 1970) 7, 167.

51. S 3(1) of the Australia Acts terminated the application of s 5 of the Colonial Laws Validity Act 1865 to post-1986 state laws. S 5 granted and restricted state legislative power. See supra n 46. S 6 of the Australia Act replicates only the latter aspect.

52. S 5 of the Colonial Laws Validity Act 1865 (partially quoted at supra n 46).

53. Goldsworthy supra n 10, 411, 417-425 (partially quoted at supra n 49).

cates that manner and form provisions are to be adhered to "notwithstanding" any legislative power in section 2.[54] Thus, at least this aspect of section 2 - legislative power to make laws respecting State Parliaments' constitution, powers or procedure - can be rendered otiose by state laws requiring stringent manner and form requirements.[55] At this juncture the second section 6 conundrum arises. Should a broad[56] or narrow[57] interpretation of the phrase "manner and form" in section 6 be adopted? Judicial authority and re-enactment, without alteration, of terminology favour the former view.[58]

Whether that conclusion can be maintained against reasons supporting a narrow interpretation may, like other section 6 issues,[59] be determined by broader concerns than mere resort to principles of statutory interpretation.[60] Similar arguments can be pursued in endeavours to ascertain the meaning of the words "constitution, powers or procedure" of State Parliaments in section 6.[61] Finally, the maxim "expressio unius est exclusio alterius"[62] invokes a more far-reaching

54. S 6 of the Australia Acts states: "Notwithstanding sections 2 and 3(2) above ...".
55. This possibility also appears to be within the text of s 5 of the Colonial Laws Validity Act 1865 (partially quoted at supra n 46).
56. Manner and form includes "all the conditions which [Parliaments] may see fit to prescribe as essential to the enactment of a valid law." *Trethowan* supra n 35 Dixon J, 432-433. Similar expansive formulations were adopted ibid Rich J, 419 and by the Privy Council in *Attorney-General for New South Wales v Trethowan* supra n 45, 541.
57. Manner and form requirements "cannot do more than prescribe the mode in which laws respecting [the constitution, powers and procedure of the legislature] must be made." *Trethowan* supra n 35 Dixon J, 431.
58. "[A]ny objections to the broad interpretation of the term 'manner and form' adopted in *Trethowan* are now weakened by the presumption that a re-enactment of words confirms their prior judicial interpretation. But ... this is a relatively weak presumption." Goldsworthy supra n 10, 411 (footnote omitted).
59. Ibid, 417-425.
60. Compare the suggestion that

> [i]n the end it may well be that the answer [to whether s 6 has precluded other sources of manner and form requirements] does not lie solely in a legalistic application of the provisions of the *Australia Act*. In this area of constitutional law a blend of legalism, doctrines of "representative" government and the "will" of the people may be resorted to in order to resolve this conundrum.

Lee supra n 10, 311.

61. See eg Goldsworthy supra n 10, 414.
62. "The express mention of one thing implies the exclusion of another." R Kersley *Broom's A Selection of Legal Maxims* 10th edn (London: Sweet & Maxwell, 1939) 443.

controversy: if they exist,[63] has section 6 excluded other sources of authority which would make manner and form provisions, operating even beyond laws respecting State Parliaments' constitution, powers or procedure, binding?[64] Again, large issues of parliamentary sovereignty versus constitutionalism need to be invoked to decide if an affirmative or negative response is required.[65]

III. STATE EXECUTIVE POWER

Whether the nature, repository and constitutional foundations of state executive power have been transformed by the Australia Acts depends upon the meaning and significance of section 7 of that legislation. What section 7 does is, therefore, vitally significant. Three alternatives are available: section 7 merely designates who is to exercise the Queen's powers and functions in respect of a State; section 7 patriates to Australia all of those powers and functions; or, section 7 transfers those powers, other than the appointment and dismissal of State Governors, from the Queen to State Governors.[66]

63. For a negative answer see Goldsworthy supra n 10, 425-428.
64. The obvious sources are the *Ranasinghe* principle and s 106 of the Australian Constitution. See supra n 47. For a rejection of these sources see Goldsworthy supra n 10, 409-410, 425-428. Other sources include the "peace, order and good government" legislative power. See supra n 28; G Winterton "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 FL Rev 167, 189-190.
65. For a discussion of various views see Goldsworthy supra n 10, 411-412; Lee supra n 10 309-311.
66. S 7(2) "goes further than to merely patriate all the prerogative powers of the Crown which are exercisable in a State.... [It] confers on the Governor of a State all the prerogative power of the Crown." O'Brien supra n 10, 348. But s 7(2) expressly stipulates two circumstances where the Queen can exercise power. First, the appointment and dismissal of Governors. See s 7(3). Does s 7(5) preclude Prime Ministers giving the Queen advice on s 7(3) matters - even though Governors perform functions under ss 12 and 15 of the Australian Constitution? See also infra n 67 (possibility that the Governor-General, pursuant to powers (which could be, but which have not, as yet, been) assigned by the Queen, under s 2 of the Australian Constitution, could appoint Governors). Secondly, the power to exercise "any of Her powers and functions" when the Queen is in a State. See s 7(4). But this will occur "only if there has been mutual and prior agreement between the Queen and the Premier that it would be appropriate for her to do so." Bowen *Debates* supra n 37, 2685. See generally A Castles "The Tasmanian Constitutional Crisis and State Governors' powers after the Australia Acts" (1989) 63 ALJ 781.

Assuming the third alternative is correct, far-reaching consequences might follow. Transferred functions, despite the section 7 nomenclature - "powers and functions of Her Majesty" - would no longer emanate from the Queen. Consequently, no "powers and functions of the Queen" in respect of a state, other than appointment and dismissal of Governors, would exist for assignment by the Queen to the Governor-General under section 2 of the Australian Constitution.[67] From where would those powers emanate? That is, does section 7 merely effect a transfer of power or does it become the source of such powers and functions? The latter would entail the codification of state executive power in Commonwealth or United Kingdom legislation, thereby changing its nature from prerogative to statutory power.[68] To some extent, such a change would facilitate the amenability of Governors' actions pursuant to that power to judicial review.[69] If, however, the Governor, not section 7, is the only repository of state executive power after 3 March 1986, the Australia Acts do not "prevent legislative alteration of the powers of the Crown in rights of the State."[70] Otherwise, section 7 would establish a zone of executive power immune, except by amending the Australia Acts, from legislation. Therefore, should Governors utilise executive power "to amend the Letters Patent and thereby redefine their constitutional powers and relationship with their ministers,"[71] state legislation can intervene. Textual support can also be garnered to resist constitutionalisation of separate and independent spheres of executive and legislative power. Specific reference to State Premiers tendering advice to the Queen concerning the exercise of executive power[72] constitutes a strong, even if elliptical, reference to responsible government.[73] Without a definition of "Premier" in the Australia Acts, this assumes that interpreters will resort to accepted and traditional meanings and connotations of that word. Should that

67. On s 2 see generally Winterton supra n 12, 51-53.
68. Compare s 61 of the Australian Constitution which is in a statute, the (UK) Commonwealth of Australia Constitution Act 1900. See also *Victoria v Commonwealth* (1975) 134 CLR 81 Barwick CJ, 119 ("The powers given to the Governor-General by s. 57 [of the Australian Constitution] are statutory powers ...").
69. See eg O'Brien supra n 10, 349. See also J Thomson "State Constitutional Law: The Quiet Revolution" (1990) 20 UWAL Rev 311, 319 nn 47-49.
70. Zines supra n 8, 273.
71. O'Brien supra n 10, 348.
72. S 7(5) of the Australia Acts. See also s 10.
73. Zines supra n 8, 273.

occur, the Australia Acts will have entrenched, subject only to removal or amendment under section 15, that governmental system into state constitutional law.

IV. STATE JUDICIAL POWER

Modification of the structure of state judicial systems, but not the nature of state judicial power, has been effected by section 11 of the Australia Acts. Direct appeals from state courts to the Judicial Committee of the Privy Council have been terminated. Immediately prior to 3 March 1986, only purely state law cases - not federal jurisdiction cases in state courts or state judicial decisions involving federal and state law[74] - could be taken directly from state courts to the Privy Council.

One avenue from state courts to the Privy Council, however, remains[75] and is expressly preserved by the Australia Acts.[76] If the High Court granted a certificate under section 74 of the Australian Constitution, cases involving "inter se" questions which originated in state courts can be determined by the Privy Council.[77]

74. For both aspects see J Thomson "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 Tex L Rev 1225, 1257-1262.

75. The first two paragraphs of s 74 of the Australian Constitution provide:

> No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.
>
> The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

See generally H Renfree *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) 783-795.

76. The definition in s 16(1) of "Australian court" from which appeals to the Privy Council are terminated by s 11 expressly excludes "the High Court." Could the UK Parliament's Australia Act have amended s 74 of the Australian Constitution by not including that exclusion? See supra n 19.

77. This remains a "theoretical possibility" despite the High Court's indications that it will never again grant a s 74 certificate. P Lane *Lane's Commentary on The Australian Constitution* (Sydney: Law Book Co, 1986) 386-387.

V. CONCLUSION

Not all residual constitutional links between Australia and the United Kingdom have been severed. Appeals to the Judicial Committee of the Privy Council represent only one example of remaining links. The status of the Australian Constitution, the reason why it continues to be binding and the United Kingdom Parliament's Australia Act may represent others.

Even if the principal assertions - invalidity of the Commonwealth Parliament's Australia Act, the nature, character and effects of the Australia Acts and the retention of Australian-United Kingdom links - are erroneous, another bleak prospect - Commonwealth legislation establishing and controlling state constitutional law - may be imminent. Conversion of state constitutional law questions into matters of federal jurisdiction, with the prospect of being confined within the Federal Court's exclusive jurisdiction, will have occurred.[78] Much more lethal than such federal judicial supervision is the possibility that state constitutional law is vulnerable to change or decimation by the Commonwealth Parliament. Far from a gentle evolution, that would represent a revolution.

78. State constitutional amendments had previously been federalised. See eg *Western Australia v Wilsmore* [1981] WAR 179. See also *Boath* supra n 11, 634 (questions of state legislative competence involve a matter concerning the interpretation of ss 106 and 107 of the Australian Constitution). But see *Seymour-Smith* supra n 11, 654 (disagreeing with *Boath*). See generally Thomson supra n 69, 314 n 20 (various views concerning s 106 of the Australian Constitution).