
The States, the Commonwealth and the Crown— the Battle for Sovereignty*

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Federation and State Sovereignty

Before the Australian states were even formed, the battle for sovereignty had already begun. Some of the framers wanted a system akin to the Canadian one, where the Governor-General would be the senior British representative in Australia and all communications from the states to the Crown would go through the Governor-General. Others sought to maintain the sovereignty of the states through their direct and independent relationship with the United Kingdom and the Crown. In the end, they prevailed.

Sir Samuel Griffith made it clear that the term ‘governor’ was used in the Constitution, rather than ‘Lieutenant-governor’, in order to show that the ‘states are sovereign’¹ and maintained their independent links with the United Kingdom. Unlike the Canadian system, state governors were to be appointed directly by the Queen, rather than by the Governor-General. The proposal that communications between state governors and the monarch be passed through the Governor-General was defeated.²

The result was that in the federation established by the Commonwealth of Australia, sovereignty was shared.³ Both the Commonwealth and the States were sovereign within their own spheres. Each had an independent relationship with the Crown

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† This speech is based on UK, Commonwealth and State Government records, which are discussed in greater detail in: A. Twomey, *The Chameleon Crown—the Queen and Her Australian Governors*. Federation Press, Sydney, 2006.

¹ Samuel Griffith, *Official Record of Debates of the Australasian Federal Convention*, 8 April 1891, Sydney, 1891, p. 866. The Debates are online at <http://www.aph.gov.au/Senate/pubs/records.htm>

² *Ibid*, 22 April, 1897, Adelaide, 1897, pp. 1180–1.

³ UK, ‘Report by the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia’, HC 88, *British Parliamentary Papers*, 1934–5, vol. 6, p. 613, at para 8; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, per Evatt J at 378; and *New South Wales v Commonwealth* (1931) 46 CLR 155, per Evatt J at 220-1; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, per McHugh J at 451; *Austin v Commonwealth* (2003) 215 CLR 185, per McHugh J at [207]; and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [65].

through the British Secretary of State for the Colonies. The Commonwealth had no say or involvement in matters such as the appointment or removal of State governors, the reservation of State Bills or the disallowance of state laws. These were all dealt with by the monarch on the advice of British ministers. The states preferred this outcome, because they regarded the British as being less politically interested in their affairs than the Commonwealth Government, and therefore more likely to be fair and reasonable in their dealings.

The Commonwealth, however, from the very beginning kept trying to claw back state sovereignty and assert its dominance over the states. If it could not control all state communications to the Crown, it at least wanted copies of them. The British Government agreed that state governors should, at their discretion, copy their communications to the Governor-General if they concerned federal matters.⁴ This led to constant complaints by Governors-General that they were not receiving copied correspondence. In 1912, A B Keith explained to his masters in the Colonial Office that the 'truth of course is that the Governor General has comparatively little work to do and therefore is naturally anxious to see as much correspondence as he can otherwise he has little of interest to read.'⁵

The Statute of Westminster

The relationship between the Crown and its dominions changed dramatically in the 1920s. The Governor-General ceased to be a representative of the British Government, and dominion ministers were permitted to advise the monarch directly on dominion matters, including the appointment of the Governor-General, the reservation of bills and the disallowance of laws.⁶ These changes culminated in the enactment of the *Statute of Westminster 1931*, which freed dominion legislatures from the application of the *Colonial Laws Validity Act 1865*, so they were no longer bound by Imperial laws of paramount force, except for those of constitutional status. These changes, however, did not apply to the Australian states.⁷

The states are often unfairly criticised for not lobbying to be given the legislative freedom granted by the *Statute of Westminster*. However, they had good reasons for not doing so.

⁴ Despatch by the Colonial Secretary, Mr Chamberlain, to the Governor of South Australia, 11 March 1901.

⁵ Minute by A.B. Keith, Colonial Office, to Mr Davis, January 1912.

⁶ See the Imperial Conferences of 1926 and 1930.

⁷ The position was different in Canada, as it was the Canadian Governor-General who dealt with matters such as the appointment and removal of provincial Lieutenant-Governors and the reservation of provincial bills or the disallowance of provincial laws. As the British Government and the monarch had no involvement in these matters, there was no issue of change. There was also no problem with giving provincial legislatures the same legislative freedom under the *Statute of Westminster*, as there was no need for British legislative power to support any executive responsibility with respect to the provinces.

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- First, Western Australia, South Australia and Tasmania wanted British legislative protection from Commonwealth abuse of power and to be able to seek British legislation to allow them to secede from the Commonwealth.⁸
 - Secondly, without the application of the *Colonial Laws Validity Act*, the states would not be able to entrench provisions of their own constitutions, such as those entrenching the existence or the abolition of an upper House.
 - Thirdly, the British Parliament would only relinquish its legislative power over state matters if it no longer had executive responsibility for state matters. As neither the King, nor the British Government, was prepared to let state ministers advise the King directly about state matters, the only substitute for British ministers would be Commonwealth ministers, or the delegation of the King's powers to the Governor-General, as in Canada. Neither result was acceptable to the states, as it would subordinate them to the Commonwealth and they would lose their sovereign status.

So the states remained under the British Crown, leaving all these arguments to arise again in the negotiation of the *Australia Acts* half a century later.

The states continued to take comfort in the belief that the British Government, being so far away and disinterested in their affairs, would act as a trustee, to protect their interests but not to interfere in them. As Australia gained its independence, this belief became treated as convention. Australian history books, politics books and constitutional law books all stated that the British Government merely acted as a 'channel of communication' in putting state advice to the monarch about state matters, and that it would be a breach of 'convention' for it to act independently or in its own interests in doing so.⁹

In the United Kingdom a completely different view was taken. British ministers considered that if they advised the monarch on a matter, including an Australian state matter, they were responsible to the Westminster Parliament for that advice and were therefore under an obligation to give their own independent advice and to take into account the interests of the British Government. As long as state matters remained uncontroversial, this difference of view was not apparent. In the 1970s, however, with the election of the Whitlam Government, matters became very controversial indeed and the cracks in convention became chasms.

⁸ See, for example: Memorandum by WA Attorney-General to WA Premier, 1 October 1931; Letters by SA Agent-General, Sir H. Barwell, to the SA Treasurer, 16 April 1931 and 14 May 1931; and Letter by Tasmanian Premier to Mr Lyons, Commonwealth Opposition Leader, 7 August 1931.

⁹ See, for example: T.P. Fry, *The Crown, Cabinets and Parliaments in Australia*. University of Qld, Brisbane, 1946, p. 266; A.C. Castles, 'Limitations on the Autonomy of the Australian States' [1962] *Public Law* 175, at 176; G. Sawer, *The Australian Constitution*. AGPS, Canberra, 1975, p. 71; R.D. Lumb, *The Constitutions of the Australian States*. University of Queensland Press, St Lucia, Qld, 4th ed, 1977, p. 72, n. 48; L. Zines (ed.) *Commentaries on the Australian Constitution*. Butterworths, Sydney, 1977, p. 38; and H.E. Renfree, *The Executive Power of the Commonwealth of Australia*. Legal Books, Sydney, 1984, p. 439. See also the same assertion made in standard historical and political texts: H.R. Anderson, 'The Constitutional Framework' and R.L. Reid, 'The Government of South Australia', both in S.R. Davis (ed.), *The Government of the Australian States*. Longmans, London, 1960, pp. 5–6 and p. 374; R.S. Parker, *The Government of New South Wales*. University of Queensland Press, St Lucia, Qld, 1978, p. 259, n. 3; S. Encel, *Cabinet Government in Australia*. Melbourne University Press, 1962, p. 69; and W.G. McMinn, *A Constitutional History of Australia*. Oxford University Press, Melbourne, 1979, p. 91.

The Whitlam Government

The Whitlam Government, upon its election, faced an interesting dilemma. On the one hand, it wanted to sweep away all colonial relics. On the other hand, it wanted to subordinate the states. This led to a piecemeal approach, with the Whitlam Government first seeking the termination of Privy Council appeals and references from the states.

The Colonial Laws Validity Act

The British Government did not appreciate this fragmented approach. It wanted all matters dealt with together. The Lord Chancellor put this directly to Gough Whitlam when they met in London on 24 April 1973. Lord Hailsham asked him why he would not 'do a job of it' and 'cut the painter'.¹⁰ The formal UK record of the meeting states:

Mr Whitlam said that in some respects his government did not mind the Australian states having a residual colonial status since this helped to make clear that they were not fully sovereign. For this reason he did not at present want to press for the abolition of the application to the states of the *Colonial Laws Validity Act* since to do so might seem to increase the claim of the states to sovereignty.¹¹

The British Prime Minister, Edward Heath, noted in his personal record of a meeting with Whitlam on the same day:

I then asked him about Section 2 of the Colonial Laws Validity Act, to which he replied that he did not wish to have this repealed, certainly not before they had been able to consider legislation in Canberra to take its place. If the United Kingdom Parliament were to repeal Section 2 of the Colonial Laws Validity Act, it would only increase the actual powers of the states and this he strongly opposed. It was only when his Government had been able to take the powers away from the states that he would wish Section 2 of the Colonial Laws Validity Act to be repealed in respect of the states. I refrained from commenting on this desire to retain legislation which was not only colonial in aspect but colonial in title.¹²

The Channel of Communication

The Whitlam Government also pressed for all vice-regal communications between the states and the United Kingdom to be made through the Governor-General.¹³ The next British Prime Minister, Harold Wilson, gave this proposal short shrift, replying that as long as the British Government remained responsible for advising the Queen on state matters, state communications on these matters had to go through it, rather than the

¹⁰ UK note of meeting on 24 April 1973, between Mr Whitlam, Sir A Douglas-Home, Lord Hailsham, Sir Peter Rawlinson QC, and various officers.

¹¹ Ibid.

¹² Memorandum by Mr Heath on his meeting with Mr Whitlam, 24 April 1973.

¹³ Letter by Mr Whitlam to Mr Wilson, 6 June 1974.

Governor-General. The British Government was not prepared to change its constitutional relationship with the states without their agreement.¹⁴ The Whitlam Government had not realised that British ministers played a substantive role in state affairs, and had mistakenly regarded their role as a mere formality.

At a meeting between Prime Ministers Whitlam and Wilson on 20 December 1974, Whitlam suggested that the Governor-General could be a 'post-box' for state recommendations to the Queen. The British Foreign Secretary, James Callaghan, pointed out that only ministers could advise the Queen, so the consequence of this proposal would be that state ministers would be advising the Queen, increasing their power and sovereignty.¹⁵ This thought disconcerted Whitlam, who then suggested that the Governor-General take on all the powers of the British Government with respect to the states, making him a Viceroy. He said that he was happy to vest such an important power in his trusted Governor-General, Sir John Kerr, whose appointment, he noted, had been roundly 'applauded'.¹⁶

The Seabed Petitions

The British were not prepared to change the status of the states without their agreement. That status was of a colonial dependency of the British Crown. This was confirmed during the seabed controversy. In 1973 Queensland and Tasmania petitioned the Queen to refer to the Privy Council, for an advisory opinion, the question of who owned the seabed adjacent to the states. The states claimed that they were petitioning the Queen as Queen of Tasmania and Queen of Queensland. The Whitlam Government claimed that it was an Australian matter, so the 'Queen of Australia' should decide it and she could only be advised by Commonwealth ministers.

The Queen referred the petition to her British ministers for advice. The British Cabinet concluded that Her Majesty was not Queen of each state, as state ministers could not directly advise her. It also concluded that the Australian states remained dependencies of the British Crown and that it was the Queen of the United Kingdom who performed functions with respect to the states, on the advice of British ministers. The 'Queen of Australia' only had powers with respect to Commonwealth matters, not state matters. Finally, it concluded that Commonwealth ministers also had a right to advise her in her capacity as Queen of Australia, because the Commonwealth also claimed ownership of the seabed and therefore had an interest in the matter.¹⁷

In making its decision on how to advise the Queen, the British Cabinet also accepted that the British Government's own political and strategic interests should be taken into account. These included not upsetting political relations with the Commonwealth, and avoiding the application to itself of any Privy Council opinion on the law concerning the ownership of the seabed.¹⁸ It did not regard itself as a mere 'channel of

¹⁴ Letter by Mr Wilson to Mr Whitlam, 1 August 1974.

¹⁵ UK record of meeting between Mr Wilson and Mr Whitlam, 20 December 1974.

¹⁶ Australian note of meeting between Mr Whitlam and Mr Wilson, 20 December 1974.

¹⁷ Record of meeting of the UK Defence and Overseas Policy Cabinet Committee, 30 July 1973.

¹⁸ Opinion of the UK Attorney-General, Sir P. Rawlinson, 27 July 1973; and Cabinet Minute, DOP(73) 77, 17 December 1973.

communication' for state issues. Nor did it consider that it was under an obligation to act in the best interests of the states without regard to its own interests.

The British Foreign Secretary advised the Queen not to refer the petition to the Privy Council, as did Commonwealth ministers. The Queen accepted the advice of both sets of ministers, effectively rejecting the argument of Commonwealth ministers that they alone had the right to advise her on the matter.¹⁹

Nonetheless the Commonwealth tried hard to 'spin' the impression that the Queen had accepted the argument that only Commonwealth ministers could advise her on Australian matters, including state matters. It even tried to get the Queen to do so by inserting a reference to her acceptance of Australian advice in her speech on the opening of the Commonwealth Parliament. It was changed by the Queen's Private Secretary 'for the sake of truth'.²⁰

Other Controversies

There were other incidents that showed the states that the British Government gave independent advice to the Queen on state matters. The British Government rejected Joh Bjelke-Petersen's advice to extend the term of the Queensland Governor, Sir Colin Hannah, in 1976,²¹ and seriously considered sacking Sir Colin for involving himself in local politics by criticising the Whitlam Government. It was only the dismissal of the Whitlam Government that saved him, because British officials considered that it would be hard to sack Hannah when Sir John Kerr had involved himself far more spectacularly in local politics.²² Bjelke-Petersen later confessed to a Premiers' Conference that until that point he had always believed that he was the one advising the Queen about such matters, and it was a surprise to learn that the British Government gave its own independent advice to the Queen.²³

In 1979, the British Foreign Secretary also threatened to advise the Queen to refuse royal assent to two New South Wales bills if they were reserved.²⁴ One concerned the termination of appeals to the Privy Council from state courts. The other proposed bill required that the Queen act on the advice of state ministers in appointing the state governor. British officials were concerned that if the states could advise the Queen directly, she would become Queen of each state and each state would become a realm

¹⁹ For a more detailed discussion of the ensuing controversy, see: A. Twomey, *The Chameleon Crown*, op. cit., Ch 10; and A. Twomey, 'Constitutional Convention and Constitutional Reality' (2004) 78 *Australian Law Journal* 798.

²⁰ Letter by Sir M. Charteris, Buckingham Palace, to Mr Wright, No 10 Downing St, 27 December 1974.

²¹ Letter by the UK Foreign Secretary, Mr Callaghan, to Sir C. Hannah, 16 January 1976.

²² Letter by Mr Fergusson, Foreign and Commonwealth Office ('FCO'), to Sir M. Charteris, Buckingham Palace, 6 January 1976. For a more detailed discussion of these events see A. Twomey, *The Chameleon Crown*, op. cit., pp. 62–8.

²³ Transcript of the Premiers' Conference, 24 June 1982, p. 44. See also his previous assertion that the Queen appointed State Governors on the Premier's advice: *Queensland Parliamentary Debates*, Legislative Assembly, 28 October 1975, p. 1520.

²⁴ Letter by Lord Carrington to Sir R. Cutler, 19 November 1979.

of the Crown on an equal footing with the Commonwealth.²⁵ It was argued that this would unbalance the federal structure and that such action could not be taken without Commonwealth agreement.²⁶

Unfortunately, the Governor, Sir Roden Cutler, received this despatch from the British Foreign Secretary on the same day that the Privy Council Appeals Abolition Bill, which had already passed both Houses, was sent to him for assent. The Wran Government balked at the idea of its bill being refused assent, so it did not provide the necessary certificate needed for the assent process to proceed. The bill was left in legislative limbo in the Governor's desk drawer. Nervous British officials waited for the bill to arrive, checking to see if there were any postal strikes, but it never came.²⁷ British diplomats in Australia later boasted that they were pursuing a 'policy of masterly inactivity' on the matter.²⁸

After many more diplomatic skirmishes and a bit of provocation on the part of the NSW Government, its proposal to require the Queen to act on the advice of state ministers was eventually dropped. One British official concluded that:

New South Wales authorities, who had clearly been trying to pull a fast one, and were not really very surprised to be caught, simply gave in.²⁹

In the many discussions between New South Wales and British officials on the issue, it was made abundantly clear that the British Government would give independent advice to the Queen on reserved state bills, and that if it regarded them as 'unconstitutional', it would not advise her to assent.³⁰

The *Australia Acts 1986* and sovereignty—a battle won

These events spurred the states to reach agreement on the *Australia Acts* to terminate the United Kingdom's role with regard to the states. However, this raised the same dilemma that arose during the enactment of the *Statute of Westminster*. If British ministers were no longer to advise the Queen upon state issues, who would replace them? The Fraser Government argued that Commonwealth ministers should replace them. This was not acceptable to the states.

Later, the Hawke Government suggested that the Prime Minister act as a 'post-box' in passing on state recommendations to the Queen. This proposal was subsequently scotched by the Department of the Prime Minister and Cabinet, on the ground that the

²⁵ Memorandum by Mr Whomersley, Legal Adviser, FCO, to Mr Britten, FCO, 20 September 1978. See also: NSW, 'Minute of Meeting with UK Officers re Abolition of Privy Council Appeals and Appointment of Governor', 27 September 1979, p. 5; and Memorandum by Mr Upton, FCO, to Dr Hay, Research Dept, FCO, 12 March 1980.

²⁶ Telegram by Sir D. Murray, FCO, to Sir D. Tebbit, UK High Commissioner, Canberra, 16 November 1979.

²⁷ It was eventually annulled by the *Constitutional Legislation (Repeal) Act 1985* (NSW). See the more detailed account in A. Twomey, *The Chameleon Crown*, op. cit., Ch 14.

²⁸ Memorandum by Mr Spire, UK Consulate, Sydney, to Mr Baylis, FCO, 6 March 1980.

²⁹ Minute by Mr Upton, FCO, 7 February 1983.

³⁰ FCO, Paper, 10 September 1980; and NSW, 'Residual Constitutional Links—Further Discussions with British Authorities', March 1981.

Prime Minister would remain politically responsible for unpalatable state advice. Hawke was told that if the Queensland Government wanted Sir John Kerr to be appointed as its next governor, Hawke would have to make the formal recommendation and defend it in the Parliament. This was a bridge too far for Hawke and the end of the post-box solution.

The states insisted that they should advise the Queen directly on state matters. This was not acceptable to Buckingham Palace, which was concerned about the Queen receiving conflicting advice from Commonwealth and state ministers. The Palace also argued that it would be ‘unconstitutional’ for the Queen to receive advice from persons who were not ministers of an independent country.³¹

The British crown law officers responded that ‘independence’ was not relevant, as the dominions had first started advising the monarch directly before they became completely independent. Moreover, the crown law officers pointed out that in a federation, sovereignty is shared, and that the state of Victoria had been treated by the British courts as an independent state for the purposes of a claim of Crown immunity.³²

Sir Antony Acland, the permanent head of the Foreign Office, wrote to the Queen’s private secretary explaining that in a true federation, state ministers can just as much be ministers of the country as federal ministers. The states were not inferior in status to the Commonwealth and state ministers were not necessarily disqualified from advising the Crown on matters within their exclusive competence. He concluded:

As we see it, the relationship of Her Majesty with the Government (or Governments) of a country of which she is Queen is a matter of that country’s domestic affairs. Australia as a whole is independent. When the United Kingdom bows out, the Government of that independent country will comprise all Australia’s Governments (Commonwealth and state)—in other words ‘independence’ and ‘sovereignty’ will not be the prerogative solely of Commonwealth Ministers.³³

After years of argument and negotiation, this view was reached in Australia as well. The Commonwealth Government agreed that the states should advise the Queen directly about state matters. Senator Evans, in trying to convince the Palace that this was an acceptable proposal, explained that:

The states are jealous of their sovereignty, and the Commonwealth has no wish to impinge upon it. The states are not prepared to solve one offence by committing themselves to another—that is by handing to the Australian

³¹ Letter by Sir P. Moore, Buckingham Palace, to Sir A. Acland, Permanent Under-Secretary, FCO, 2 March 1984.

³² Brief to the UK Attorney-General, 22 March 1984. See also the Memorandum by Mr Chick, FCO, to Mr Boyd, FCO, 14 September 1984, where he observed that the sovereignty argument would ‘strike an Australian as showing an inability to understand a federation where sovereignty is divided between the States and the Commonwealth.’

³³ Letter by Sir A. Acland, Permanent Under-Secretary, FCO, to Sir P. Moore, Buckingham Palace, 14 February 1984.

Prime Minister the right to recommend or block appointments of state Governors who, in the states, exercise significant constitutional authority. Any such solution would run counter to the nature and history of federation in Australia as shown by the express provisions of the Commonwealth Constitution continuing the constitutions and residual sovereign powers of each state.³⁴

The formal advice to the Queen from Prime Minister Hawke also stressed the nature of the federal system and recognised the importance of maintaining the ‘sovereign identities and powers’ of the states within their constitutional limits. He concluded that it was therefore necessary for the states to advise the Queen directly.³⁵

Section 7 of the *Australia Acts* now gives the states the power to advise the Queen directly on state matters—the same power that was regarded by Whitlam as dangerously increasing the status of the states and was regarded by the British Government as establishing independent Realms and Crowns.

The states not only had a victory in maintaining their own sovereign status and independent relationship with the Crown. More important was s 15 of the *Australia Acts 1986*, which secured their place in Australian sovereignty. The original source of the Commonwealth Constitution was the sovereignty of the Westminster Parliament. The Commonwealth Constitution was legally binding because it was a British law of paramount force. British legislative supremacy over Australia was diminished by the *Statute of Westminster*, but was terminated by the *Australia Acts*.

The power to amend or repeal those fundamental statutes that form our Constitution, the *Commonwealth of Australia Constitution Act 1900*, the *Statute of Westminster 1931*, and the *Australia Acts 1986* was transferred by s 15 of the *Australia Act 1986* (UK) not to the Commonwealth but collectively to the Commonwealth and all the state parliaments. If all the state parliaments request the Commonwealth Parliament to do so, it can now amend or repeal these foundational constitutional provisions. This is the ultimate recognition that no matter how much our federal system is trammelled and distorted by Commonwealth laws or High Court decisions, sovereignty in Australia remains vested collectively in the Commonwealth and the states.



Question — That last point which our speaker made about what the British version of the *Australia Acts* said, what did the Australian version of the *Australia Acts* say on that particular point?

Anne Twomey — That’s a very good question. They are in fact identical in substance and the reason why I said the British version did that rather than the Australian version, is that although the words in them are the same, the power to do that was

³⁴ Commonwealth Government, ‘Aide-Memoire’ provided by Senator Evans to Sir P. Moore, February 1985.

³⁵ Letter by Mr Hawke, to Her Majesty, 31 July 1985.

effectively exercised by the British version. Now one of the notable things about the *Australia Acts* is that there was quite a significant disagreement within Australia as to whether it should be done independently in Australia without the involvement of the United Kingdom. That was the view of the Commonwealth and that was also the view of New South Wales after just having had its fingers burnt over the whole business with the British Foreign Secretary. So New South Wales and the Commonwealth were very strongly of the view that this should only be done in Australia, by Australians, with no British involvement. Other states, such as Queensland and Western Australia in particular, thought that the British should also be involved because if you're trying to transform sovereignty, if you're trying to limit the powers in the United Kingdom, you need the involvement of the United Kingdom in abdicating its power and passing it on. So to make sure that everything was done neatly and constitutionally correctly, so that it couldn't be challenged and result in lots of nasty litigation, the deal was that they would do identical Acts. Those who believe that only the Australian version should count could believe that and ignore the British version. Those who believed that the British version was necessary could say: 'Well that works even if the Commonwealth version doesn't.'

Now there are some disputes between constitutional scholars on this subject. People have different views as to what is necessary and what is done but to the extent that there is a provision that vests control in Australia over documents that were previously exclusively in control of the United Kingdom, then it is a United Kingdom power that is needed to support it. So once that happened, once Section 15 of the *Australia Acts* and the British version of the *Australia Acts* passed that over, at that point the United Kingdom stopped being involved in our system. Now the United Kingdom could repeal the UK version of the *Australia Acts* but it wouldn't make one iota of difference because what has happened now is that all power has passed here, and even if the British legally under their constitution, under their powers, could say that they reclaimed power, that would be irrelevant for us because all power is now vested here. Our courts would always recognise that all power is now vested here. The United Kingdom power is now completely irrelevant to us, but it was necessary to have that act of transferring it across.

Question — You focussed very much on the historical past. I wonder whether you would comment on some of the implications for the future, for example if Australia became a republic by a referendum at the federal level, how would you see your argument playing out in relation to the states. Would it be open to each of the states individually to decide whether it remained a monarchy or do you see the situation differently?

Anne Twomey — That's a terrific question actually, and it's a very difficult one. It's one I try to address in the book *The Chameleon Crown*. The question here, and this is one that the British addressed but the Australians didn't, is what did the *Australia Acts* do? Does the fact that the states now advise the Queen directly, did that create a separate Crown in relation to each state? Are there now separate realms? Do we have seven Crowns in Australia: one Queen of Australia for the Commonwealth level and a Queen separately for every state? Or did it somehow transform that crown of Australia so that the Queen of Australia is now changed and instead of just being Queen in relation to the Commonwealth level, she's now become Queen in relation to

the whole of Australia, but is now just advised separately by different ministers accordingly to Australia's internal system?

That's something that the British were prepared to face head on. They raised it in their own discussions, and one of their officers went to Australia and discussed this with Commonwealth and state ministers and asked: 'Well, what is it you're trying to do?' He came back and said: 'There are obvious differences of opinions out there and no-one is prepared to address the question.' Basically it was swept under the carpet because nobody wanted to face that fight. They had enough difficulty getting agreement as to the terms of the *Australia Acts*. They didn't want to get into this idea as to whether there was one Crown or seven Crowns because they didn't want to have the fight and therefore destroy the agreement that they already had. So at the Australian level it was just ignored. If you look at the *Australia Acts* there's no reference to the Queen of Australia or anywhere else, it's just the Queen, and you interpret it as you wish. Interestingly, if you try to apply normal rules of statutory interpretation you end up with a very bizarre position because the Commonwealth *Acts Interpretation Act* would apply to the Commonwealth version and the United Kingdom's *Interpretation Act* would apply to the UK version, and of course they refer to different queens, so that in itself is just a complete mess. One has to assume that there was some overall intention.

What the British said in the end was, on the basis of history; one would normally assume that separate Crowns were created because state ministers were advising the Queen directly. But the British are very pragmatic in their constitution-making and they said: 'You could devise for Australia a separate system. You could say you now have transformed the Queen of Australia so you have one Queen of Australia and you have her advised by different ministers because it's a federation.' So basically, you can make what you want of it would be their view, and that's how it was left. Ultimately it's up to Australians to decide. It's a matter of trying to achieve some sort of consensus as to what it is that was created. Now that leads to all sorts of difficulties when you come to a republic, because if you're not absolutely sure what you've got, you don't know quite how to change it. If you only have one queen and you get rid of her, then automatically there is no queen in relation to each state, unless you actually had a republic referendum that had the effect of abolishing one queen and creating six, which would just seem a little bit silly. So that's one possibility. The other possibility is to say that the states retain their connections to the Queen: that there were separate Crowns and that each state was left to deal with it. Now in the 1999 referendum, that was the view that was taken that each state would be able to retain its own Crown and break up relationships later but I think that's something that needs a lot more thought and a bit of consensus-building.

I tried to address this in a PhD thesis I had. I think if one wants to take analogies from it, one should be able to say that if sovereignty were vested collectively in the Commonwealth and the states, and that's what Section 15 of the *Australia Acts* did, then by analogy you would say that the Crown then is a collective Crown of the Commonwealth and the states. It is therefore one Crown; and I think you can make a good argument for that. Ultimately, I think this is not for me to decide, but something for everyone to decide, and I don't have a final view on it.

Question — Before I ask my question, I might crosscheck my understanding of the issue. My understanding is that when the Prime Minister goes in to the Governor-General to get the writs issued for a general election, that then passes on to the state governors who then also have to agree to a general election being called. So there is a check and balance, in a way, a sovereignty there—that was an issue around the Whitlam dismissal. With the enactment of the *Australia Acts*, has that power changed, and what would that mean in relation to the previous gentleman's question about a republic? Would states if we moved to being a republic give up that check and balance in power?

Anne Twomey — There are some complicating factors in all of this. When the Prime Minister seeks to call a general election, if he's just seeking to call a general election in relation to the House of Representatives, then that's a matter between the Prime Minister and the Governor-General. If a half Senate election is also to be called at the same time, which is what normally happens, then it's the state governors who issue the writs in relation to that. Normally there is a communication to the states and state governors are asked to issue a writ. There can be complicating factors if state laws about Senate elections in issuing the writs aren't consistent with Commonwealth laws, and then there may be some timing problems that come up.

In the 1975 period there was an issue as to whether if Mr Whitlam, in the dying days of his government in November 1975, had called a half Senate election, there was some question that some state premiers might have advised their governors not to issue the writs for the election. In my research I've written a bit about this because the British government was quite aware that this was a problem. Interestingly, at the time, there was a rumour going around that what would happen is that Mr Whitlam would advise the Queen as Queen of Australia to instruct the state governors to issue the writs. Now again, that was a misunderstanding of the different status of the Queen in relation to the Commonwealth and the states because it was not the Queen of Australia who could instruct the state governors, it was the Queen of the United Kingdom who could instruct the state governors. So really, Mr Whitlam would be advising the Queen of Australia to advise the Queen of the United Kingdom to advise the governors to issue the writs. The British government was quite aware of this problem and was very concerned about it, and so in the lead-up to the dismissal that was the thing that was spooking the British government. Sir Roden Cutler had actually advised the British High Commissioner that if he was instructed by the Queen to issue the writs against the advice of his state premier, he would resign. So that was going to be a big constitutional crisis if it happened—instead we got a different constitutional crisis.

How does that differ now if we just have one Queen of Australia? If the same situation arose again, with a state premier advising the governor not to issue the writs to an election, could the Commonwealth Prime Minister advise the Queen as Queen of Australia to instruct the state governors to do so? That would in part depend upon whether we have one hybrid crown or whether we have separate Crowns, to which we don't know the answer. Ultimately it's probably irrelevant, because Section 7 of the *Australia Acts* doesn't give the Queen that power any more. The Queen only has power in relation to the appointment and removal of the governor. So unless the Queen were to say to the governor: 'I will remove you unless you issue the writs', it wouldn't be within her power. The Queen could only be advised on appointing and

removing the Governor by the state premier. So it's not going to happen. There is no jurisdictional power for a Commonwealth Prime Minister to advise the Queen of Australia to instruct state governors to issue writs.

Not that I think any of this is actually going to happen, but theoretically that's the answer.

Question — So the state government could still stop a half Senate election?

Anne Twomey — Technically a state premier could advise the governor not to issue writs for that particular state for a half Senate election, yes, but the Constitution would require that that half Senate election occur by the time that the Senate's term is finished. It could delay a half Senate election technically. Realistically it's not going to happen.

Question — The flyer that came around for the lecture, did it say 'Crown, States and Territories', did I remember rightly?

Anne Twomey — 'States, the Commonwealth, and the Crown—the Battle for Sovereignty'.

Question — Well, OK, I still want to bring up the territories—we are in one. The fact is that we people in the territories don't appear to have the same rights as the states. Is it to do with the amount of people, or why can't we get the same rights? We do need them—there have been several variations where the states have overturned things, as you know, particularly euthanasia, which people want the choice of. So why is it that the states are the poor relation?

Anne Twomey — In terms of the *Australia Acts*, just as a matter of interest, there is a definition in there that makes the *Australia Acts* extend to states and to new states. Now that was put in at the request of the Northern Territory because the Northern Territory was anticipating becoming a state and therefore wanting the *Australia Acts* to apply to it. There are all sorts of fascinatingly technical constitutional issues that arise in relation to that, which I won't go into, but if anyone's interested, in the latest edition of *Public Law Review* I've written an article about the Northern Territory, the *Australia Acts* and how all this could connect in relation to statehood.

The ACT is in a different position. The ACT is different because it contains the capital. There are provisions in the Constitution expressly for the formation of a territory which is to be the place of government in which the capital is to be placed. There are special powers in the Constitution that deal with this 'seat of government'. No-one's ever been exactly sure what the seat is and where it is but I'm pretty sure we're in it now. How far the seat extends, we're not absolutely sure. So that leaves the ACT in an awkward position. Could the ACT itself ever become a state? The answer is probably no unless you carved off everything but the 'seat of government' and turned that into a state, but that would be pretty awkward. In most federal countries that the idea is that the capital should be in a territory of its own outside the system of states and federations. So there are broader political reasons for that.

The Northern Territory is a different category. Yes, it technically could become a state. The conditions on which it would become a state would be a matter for some debate. It doesn't have to come in on the same conditions as every other state, so you wouldn't have to give it the same number of senators and the like. The difficulty with becoming a state is that all sorts of responsibilities are then incurred and it's very difficult if you have a small population and not enough critical mass to be able to manage a government to do those sorts of things. The Northern Territory is certainly trying to head towards statehood and deal with those issues. The ACT is in a bit more of an awkward position, but it is privileged also to have the capital and to have much greater access to members of parliament than many other people do.

Question — First of all, congratulations on bringing to life what could be a very flattish subject for some of us. Has the appointment of Australian-born and Australian citizens as governors and as governors-general changed the situation and the relationships between the United Kingdom and Australia?

Anne Twomey — I think it has to some extent. There was a fair battle over it, although from the time Sir Isaac Isaacs was appointed in 1930-odd, Australians were able to be Governor-General of Australia. At the state level that wasn't accepted until after World War II. So we didn't get an Australian as a state governor until 1946 and even then that was a fairly mighty battle. The reason for that was that the King took the view that he wanted to personally know his representatives. On the appointment of Sir Isaac Isaacs, one of the objections of the King at the time was that he was not personally known to him, and he wanted to have as his representative somebody that he knew.

So how does that change and shape Australia? I think it does make a big difference and there was a long campaign for that. You might be aware that in Western Australia there was a long period in which they didn't have a state governor, they just relied on their lieutenant governor, partly because of that issue of Britishness, but actually more because of the Depression, and you had to pay a lieutenant governor half what you had to pay a governor, and that was the main reason for that. I think that in terms of the role of the governor, if the role of the governor or the Governor-General is to represent ourselves that is something that would be a real challenge for a British person to do. I think it's something more successfully achieved by Australian appointments.