SUBMISSION TO THE COMMONWEALTH JOINT PARLIAMENTARY SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

The Need for State Parliamentary Consent

1. *The Constitution Alteration (Establishment of Republic) Bill 1999* is seriously flawed because its operation is not expressed to be subject to the consent and request of the Parliaments of all of the States.

2. Without such a provision, an Act in terms of the Bill would be invalid because what the Bill purports to do is outside the scope of **s.128** of the Constitution.

3. This is because Australia is a federation currently united under the one and indivisible sovereignty of the Crown. There is one Crown in Australia, not seven, and one sovereignty, not seven. This doctrine is expressed in the preamble to the *Commonwealth of Australia Constitution Act 1900* which records the terms of the federation pact which created the Commonwealth. That pact places the Commonwealth both *under the Crown* and *under the Federal Constitution* but it does not subject the sovereignty of the Crown to the Federal Constitution. The preamble and the doctrine expressed in it stand outside the Constitution proper and cannot be amended by the referendum process, which is, in terms, limited to the amendment of the Constitution. As a consequence, the function of the Federal Constitution is not to establish the sovereignty of the Crown but merely to regulate the Federal *agencies* of the Crown (just as the State Constitutions regulate the State agencies of the Crown) and to adjust the competing rights of the two agencies where they

overlap. The sovereignty of the Crown, on the other hand, over the whole structure of the federation, Federal and State, remains distinct and separate from the provisions of the Federal Constitution and beyond the scope of **s.128**.

4. Accordingly, whilst **s.128** can be used to amend the Constitution, that is to say, to amplify, modify or restrict the exercise of the sovereign powers of the Crown, it cannot be used to remove those powers from the Crown and place them elsewhere, because the Commonwealth is just as firmly *under the Crown* as it is *under the Constitution.* The Crown is not a creature of the Constitution and does not owe its continued sovereignty to the Constitution.

5. In order to abolish the Crown (even only in respect of its federal functions) it is, therefore, necessary, in addition to **s.128,** to use the request and consent mechanism prescribed by **s.51(xxxviii)** of the Constitution or, perhaps, the mechanism prescribed by **s.15** of the *Australia Acts* so as to permit the Federal Parliament to repeal the doctrine expressed in the preamble. These issues were fully treated in the First Report of the South Australian Constitutional Advisory Council: *South Australia & Proposals for an Australian Republic* at pp.128 to 140 and Appendix 6 at p.299.

6. The opposing view, that a referendum alone is sufficient to abolish the monarchy in Australia, is based on the assumption that **s.128** enshrines the legal sovereignty of the people of Australia, and appears to be drawn from certain pronouncements by individual members of the High Court to the effect that sovereignty now resides in the Australian people.

7. Now, there is a well-known distinction between *legal* sovereignty and *political* sovereignty. Legal sovereignty means legislative omnicompetence -

the legal authority to make and unmake any law. The people of Australia are certainly not sovereign in this sense. There is no doubt that the people are *politically* sovereign, but this means only that the laws of Australia are made and unmade by the will of the people expressed through the democratic process. That is not a controversial proposition. The people are sovereign in this sense in every independent democracy.

8. Random *dicta* by the High Court that **s.128** evidences the political sovereignty of the people of Australia cannot be read or relied upon as exalting **s.128** to the status of a fundamental law of the country by which *legal* sovereignty is reposed in the people. The fallacy of this view can be shortly demonstrated.

9. The prime attribute of legal sovereignty, as I have said, is the legal authority to make and unmake any law. In the United Kingdom, the situation is simple. The Queen in Parliament is the legal sovereign. In Australia, the matter is complicated by the federal structure. Because the power of each of the Australian Parliaments is limited by the Federal Constitution, one must look to the authority which can alter the Constitution to find the legal sovereign – that is, the Queen in her Federal Parliament with the consent of the electors under **s.128**. If that is true, so the argument runs, then there is nothing of which the legal sovereign should be incapable. Accordingly, some theorists maintain that **s.128** should be construed as permitting the amendment or repeal of the preamble and covering clauses of the Constitution Act, and the abolition of the Crown.

10. That conclusion would certainly be arguable if **s.128** were the *only* means of altering the Federal Constitution but **s.15** of the *Australia Acts* provides an alternative means of amending the Constitution, and one, what is more,

which could be used to repeal **s.128** itself, without reference to the people. Pursuant to **s.15**, the Parliaments of Australia, acting in concert, could amend the *Statute of Westminster* so as to repeal the current restraints on amendment of the Commonwealth Constitution Act and the Federal Constitution, and, thus, enable any desired amendment to our constitutional system, including the repeal of **s.128**. To that extent, **s.128** is an inferior source of legal power than **s.15.** For that reason, legal sovereignty in Australia must now be regarded as vested in the Queen acting with the concerted advice and consent of all of her Parliaments, in which case it does not follow that the Constitution Act, the preamble and the sovereignty of the Crown should as a matter of principle be alterable by **s.128**.

11. I note that the Attorney-General's Speech ignores this fundamental problem with the glib statement that the question is one for the Australian people not for the British Parliament. It goes without saying that the British Parliament has no role to play. The only question is whether the lawful means for the Australian people to abolish the monarchy is by referendum alone or by the additional requirement of the consent of the State Parliaments.

12. A rigorous analysis of the situation leads to the conclusion that the Parliaments of Australia acting in concert are the joint inheritors in this country of the legal sovereignty of the old Imperial Parliament. That being so, the argument that **s.128** is the source of legal sovereignty is misconceived. **Yet it is the only argument relied on to support the proposition that s.128 is capable of being used to displace the sovereignty of the Crown in this country, notwithstanding the doctrine expressed in the preamble and the express limitation of the scope of s.128 to the Constitution proper (which is exclusive of the preamble).**

13. The Bill does not in terms purport to repeal the preamble to the Constitution Act or the doctrine there expressed that the sovereignty of the Crown is distinct from the Federal Constitution. One must, therefore, assume that the Attorney-General has been advised, either:

    (a) that the preamble expresses no such doctrine;

    or

    (b) that any such doctrine may be repealed by **s.128.**

    The Committee should scrutinise the Attorney's legal advice in this regard.

14. If the Attorney's advice is in terms of paragraph 13(a) above, it would have to include a convincing explanation why the words placing the Commonwealth *under the Crown and under the Constitution* have the effect of placing the Commonwealth *and* the Crown *under the Constitution*

15. If the Attorney's advice is in terms of paragraph 13(b) above, and is based on the alleged status of **s.128** as the 'fundamental law' of Australia or the source of sovereignty, it would have to explain why **s.15** of the *Australia Acts* is not properly to be regarded as the true 'fundamental law' and source of sovereignty in Australia.

The Need for Unified Sovereignty

16. If I am wrong, then the Bill, if passed in its present form, would have serious repercussions on our understanding of sovereignty and our existing unified system of law.

17. This is because by abolishing the monarchy at the Federal level alone and preserving it at the State level, the Act would have the effect of severing the current unified sovereignty of the Crown and replacing it with a dual sovereignty. All Australians would then have two sovereigns: the people of Australia, for federal purposes, and the Queen, for State purposes. There would be two separate streams of law, justice and government, each derived from a separate legal sovereignty. Even in States which subsequently adopted republican forms, the people of Australia and the people of the State would be dual sovereigns. That is the current American system of federalism, which is utterly foreign to the Australian experience.

18. Nothing is achieved by attempting to blur this startling truth by referring to the continuing sovereignty of the Queen as a State's *links with the Crown* (*Transitional Provisions : cl. 5*), as if they were purely decorative or sentimental and not of a fundamental legal character. Nor is it effective for the Parliament to declare that the change is not to affect the unified system of law (*Transitional Provisions : cl. 6*). The latter provision is diametrically opposed to the whole purpose of the Bill, which is to remove the current sovereign from only a portion of her duties in the Federation and preserve her functions in relation to the balance. In the circumstances, the High Court would have little choice but to find the provision void on the ground of repugnancy. A unified system of law can only flow from a unified sovereignty. A dual system of law must flow from a dual sovereignty. You cannot have one without the other. The Parliament cannot pretend otherwise and the Courts will not allow it to.

19. These two provisions are scandalously inept. It is high time people stopped pretending that the Crown can be abolished at the Federal level alone without

profound effects on our federal system and I urge the Committee to take these matters in hand by insisting that the Bill be subjected to the consent of the State Parliaments so that a proper and safe transition of both States and Commonwealth to a united republic can be achieved without violence to the current structure of the Federal system.

DATED June, 1999

Michael Manetta
Jeffcott Chambers,
7 Gouger Street,
Adelaide SA 5000