The Evolution of a Separate Australian Crown

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It is perhaps ironic that a lecture series commemorating the constitutional meanderings of the SS *Lucinda* should commence with an analysis of the Crown, one of the few subjects not to trouble the nautical voyagers — or their terrestrial colleagues, for that matter. Apart from a brief debate regarding an elective Governor-General (obviously resolved in the negative),[1] the constitutional framers gave virtually no consideration to the formal executive,[2] simply taking it for granted that the Imperial monarch would remain Australia's Head of State. Even republicans like Inglis Clark[3] accepted the status quo and registered no dissent.

However, as will be seen, the nature of our Head of State has changed considerably since 1901 without one word of our Constitution being altered, and largely through the efforts of others. Now more radical change is foreshadowed. Although republicanism has been a feature (albeit a minor one) of Australian life for a century and a half, it has now become probably the principal subject of constitutional debate, and appears to be the top priority for constitutional reform of a government which arguably recently received an electoral mandate to initiate the steps leading to a referendum on the introduction of an Australian republic by 2001.[4] This makes timely an analysis of the constitutional position of our present Head of State, because useful debate on its future must obviously be grounded in a clear understanding of present arrangements.

THE QUEEN OF AUSTRALIA

Although the preamble to our constituting document proclaims that the Commonwealth was established 'under the Crown of the United Kingdom',[5] and in the distant past the High Court several times asserted that that Crown was 'one and indivisible throughout the Empire' (most notoriously (and unnecessarily) in the *Engineers* case of 1920, where the proposition was said to be

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1 *Official Report of the National Australasian Convention Debates* (Sydney, 1891) 561–73; Commonwealth Constitution, s 2.

2 One exception was the question of the appropriate channel for communications between State Governors and the Queen: see G Winterton, 'The Constitutional Position of Australian State Governors', in H P Lee and G Winterton eds, *Australian Constitutional Perspectives* (Sydney, Law Book Co, 1992) 274, 301 fn 174.

3 See J M Neasey, 'Andrew Inglis Clark Senior and Australian Federation' (1969) 15(2) *Aust J Pol & Hist* 1, pp 1, 2, 3, 15.

4 See Prime Minister Keating's election policy speech, *The Australian*, 25 February 1993, 1, 2.

5 *Commonwealth of Australia Constitution Act* 1900 (UK), preamble.

'elementary'),[6] it is a commonplace that Australia's present Head of State is the Queen of *Australia*.[7] Although, of course, the same person as the Queen of the United Kingdom (as required by covering clause 2 of the Constitution),[8] the Queen of Australia is legally distinct from her. In other words, we have an Australian 'Crown', but since our monarch is constitutionally required to be the British monarch, it is probably inappropriate to speak of an 'Australian monarchy'[9] or an 'Australian throne'.[10] As it has been aptly expressed, although we have a Queen of Australia, we do not have an Australian Queen.[11]

Widespread acceptance of the notion of a separate Australian Crown, in other words rejection of the concept of a single indivisible Crown throughout the Queen's realms in the (British) Commonwealth, is relatively recent, and was probably delayed by the anomalous position of the Australian States prior to the *Australia Acts* of 1986, whereby *British* Ministers tendered advice to the Queen of *Australia* on State matters, such as the appointment of State Governors.[12] Moreover, the concept of a separate 'Crown' has rarely been subjected to close analysis.[13] How, for example, does one know whether or not one has a separate 'Crown'?

What we have now is a personal union of Crowns, analogous with the

[6] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152. It was unnecessary for the Court to comment on the Imperial Crown. It would have sufficed for its purposes to acknowledge the unity of the Crown within Australia: cf *Bradken Consolidated Ltd* v *BHP Co Ltd* (1979) 145 CLR 107, 135–6 per Mason and Jacobs JJ; *Victoria* v *Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353, 379 per Barwick CJ.

[7] Nevertheless, Geoffrey Marshall appears to have doubts on the subject: G Marshall, *Constitutional Conventions* (Oxford, Clarendon Press, 1984) 173.

[8] Contra L Zines, *The High Court and the Constitution* (3rd ed, Sydney, Butterworths, 1992) 273–4; (Australian) Constitutional Commission, *Final Report* (1988) vol 1, 81. In his second reading speech on the Royal Style and Titles Bill 1953, Prime Minister Menzies twice appeared to recognize Commonwealth power to legislate regarding succession to the throne — stating that 'we have a perfect right to do so' — but ultimately left open the question whether covering clause 2 prevented this: see 221 *Commonwealth Parliamentary Debates* (House of Representatives, 18 February 1953) 55–6. (Dr Evatt did not comment on this issue.) However, 17 years earlier, as Attorney-General, Menzies had denied the Commonwealth's power to legislate on this subject: 152 *Commonwealth Parliamentary Debates* (House of Representatives, 11 December 1936) 2908–9.

[9] 'Monarchy' has connotations wider than 'Crown' (as to which, see infra fn 13), including the trappings of royalty and perhaps even the entire royal 'establishment', including the royal family.

[10] K Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966) 86.

[11] M Turnbull, 'Why we need the Republic' (Speech to the National Press Club, Canberra, 18 March 1992) 1. (Excerpts from this speech are published in Australian Republican Movement, *Newsletter* No 2 (1992).)

[12] However, some considered the Head of the Australian States to be the Queen of the *United Kingdom*, not Australia: see Marshall, loc cit; infra, text accompanying fn 15.

[13] 'Crown' is a metonym whose meaning varies according to the purpose for which it is used: cf F W Maitland, *The Constitutional History of England* (Cambridge, Cambridge University Press, 1908) 418; F W Maitland, 'The Crown as Corporation' (1901) 17 LQR 131, 138–9, reprinted in *The Collected Papers of Frederic William Maitland* (H A L Fisher ed, Cambridge, Cambridge University Press, 1911) vol 3, 244, 257–8. It is usually employed to refer to the executive government in a monarchy (see Zines, op cit 272), but is used here more narrowly to refer to the kingship (or queenship), the office of the monarch itself.

unions of the Crowns of England and Scotland between 1603 and 1707, and Great Britain (the United Kingdom after 1801) and Hanover between 1714 and 1837.[14] But it was easy to see that those were personal unions of Crowns because they involved pre-existing monarchies whose countries were separate nations, international persons, at the time when the Crowns were united. Such was not the case with the 'Dominions' in the British Commonwealth. Although, of course, they later became independent nations and most remained in the Commonwealth of Nations, the Crown which first began to rule their territories was clearly the Crown of the United Kingdom, commonly called the Imperial Crown.

Obviously, one of the most important features identifying a separate Crown is that it receives advice on local matters from local Ministers who, under the principles of parliamentary government, are responsible to the local legislature for such advice. Indeed, the identity of the Ministers advising the Queen is the most obvious means of determining in which capacity she is acting. A dramatic illustration of this occurred in early 1986 when new *Letters Patent* were issued for all Australian States except New South Wales, to come into effect at the same time as the *Australia Acts* 1986 (UK and Cth). Although the Head of State of Australia, even before the *Australia Acts*, was clearly the Queen of Australia, because the *Letters Patent* were issued on the advice of the British government, they were granted by the Queen of the *United Kingdom*.[15] If the power to advise the monarch alone established the existence of a separate Crown, the Australian Crown would probably date from 1926, when the right of Dominion governments to advise the King directly was first (ambiguously) recognised.[16]

But the position in Australia since the coming into effect of the *Australia Acts* in 1986 demonstrates that the mere existence of separate ministerial advisers does not in itself establish the existence of a separate Crown. Pursuant to s 7(5) of those Acts, advice to the Queen in regard to the exercise of her powers and functions in respect of a State is tendered by the State Premier, not a British or an Australian Commonwealth Minister. But that does not mean that the Queen is separately Queen of each State, although the Victorian oath of allegiance might suggest otherwise.[17] On the contrary, the Head of the Australian States, as of the Australian Commonwealth, is the Queen of *Australia*, because Australia is one nation and, therefore, has one Head of State.[18] As a distinguished commentator has noted, 'Australia is one monarchy, not

[14] Zines, op cit 272; W Hudson, 'An Australian Federal Republic?' (1992) 64 *Aust Q* 229, 233–4 (Dr Hudson considers Australia an 'independent kingdom': id 232. See also infra, text accompanying fn 96); D P O'Connell, 'The Crown in the British Commonwealth' (1957) 6 ICLQ 103, 124 (O'Connell noted that the Commonwealth realms were 'kingdoms in their own right': id 103). But see infra, text accompanying fn 98.

[15] See Winterton, op cit 289. See also supra, fn 12.

[16] See infra, text accompanying fn 39.

[17] See *Constitution Act* 1975 (Vic), sch 2. Cf C D Gilbert, 'Section 15 of the Australia Acts: Constitutional Change by the Back Door' (1989) 5 QUTLJ 55, 56 fn 8, referring to 'the Queen as Queen of Australia *and the individual Australian States*' (emphasis added).

[18] Winterton, op cit 274–5. See also Hudson, op cit 238. Cf *Bradken Consolidated Ltd* v *BHP Co Ltd* (1979) 145 CLR 107, 135 per Mason and Jacobs JJ ('there is one country').

seven separate monarchies'.[19] The monarch who appoints and removes State Governors on the advice of the State Premier pursuant to s 7(5) of the *Australia Acts* is the Queen of *Australia*. Thus a separate Crown demonstrates, represents and, to some, even embodies separate nationhood.

There are, therefore, two pre-conditions for the existence of separate 'Crowns': first, the monarch must be advised by separate Ministers responsible to separate legislatures, and secondly, those Ministers must represent independent nations.

When, then, was a separate Australian Crown established? Several dates suggest themselves. The Queen's present Australian Royal Style and Title dates from 1973 when the *Royal Style and Titles Act* of that year dropped all reference to the United Kingdom, mentioning specifically only Australia. Her formal title is 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth'.[20] It is sometimes thought that the nationalization,[21] or 'patriation', of the Crown is attributable to the Whitlam Government, which secured the enactment of the *Royal Style and Titles Act* 1953 (Cth), but it is more accurately ascribed to Sir Robert Menzies, whose government introduced the *Royal Style and Titles Act* 1953 (Cth), which for the first time formally recognised the Queen as monarch of Australia. The 1953 title was 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'.[22] But even Menzies was not really responsible for that title, since it was introduced pursuant to a Commonwealth Prime Ministers' Conference in London in December 1952, which led to the introduction of new Royal Styles and Titles (not completely uniform even among the Queen's realms) throughout the Commonwealth.[23] The 1953 Act was the first specifically to mention Australia in the Queen's Royal Style and Title and provided sufficient foundation

[19] Zines, op cit 272. But cf G Craven, 'The Constitutional Minefield of Australian Republicanism' (Spring 1992) *Policy* 33, 35: 'we effectively have not one but seven monarchies'.

The formal unity of the Australian Crown is not inconsistent with the fact that the different Australian governments — Commonwealth, State and Territory — are separate juristic entities which contract with and sue one another. These governments, theoretically merely 'agents' of the Crown, are denominated as 'the Crown in right of' the relevant polity. See P J Hanks, *Australian Constitutional Law* (4th ed, Sydney, Butterworths, 1990) para 6.079.

[20] *Royal Style and Titles Act* 1973 (Cth), s 2(1). There is little doubt that the Commonwealth has power to enact such legislation: see *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 186; Zines, op cit 272–3; (Australian) Constitutional Commission, *Report of the Advisory Committee on Executive Government* (1987) 7–8. Contra K C Wheare, *The Statute of Westminster and Dominion Status* (5th ed, London, Oxford University Press, 1953) 220 fn 1.

[21] See S A de Smith, *The New Commonwealth and its Constitutions* (London, Stevens & Sons, 1964) 17: 'the Crown has been nationalised by a process of juristic parthenogenesis'.

[22] *Royal Style and Titles Act* 1953 (Cth), s 4(1).

[23] For the various titles, see K C Wheare, *The Constitutional Structure of the Commonwealth* (Oxford, Clarendon Press, 1960) 166–8; and see generally S A de Smith, 'The Royal Style and Titles' (1953) 2 ICLQ 263.

upon which to rest the Queen's present title 'Queen of Australia'.[24] This is demonstrated by the fact that the Queen's Canadian title, 'Queen of Canada', rests on the 1953 formula, equivalent to that in the *Royal Style and Titles Act* 1953 (Cth).[25]

The two criteria mentioned earlier for establishing the existence of a separate 'Crown' were satisfied before 1953, so the Australian Crown pre-dates the present monarch's reign. In fact, as will be seen, its existence probably dates from 11 December 1931, the date of enactment of the *Statute of Westminster* 1931 (UK). It is appropriate now briefly to trace the history of the establishment of separate Dominion 'Crowns' which, it will be seen, has practical implications, and is not merely of theoretical interest.

PERSONAL UNION OF CROWNS

Prior to 1926

It is hardly surprising that one finds little reference to the idea of a personal union of Crowns prior to the Imperial Conference of 1926, it being generally conceded that separate Dominion Crowns did not exist before then.[26] Nineteenth-century Australian republicans, for example, generally advocated secession from the British Empire and complete independence under a separate Australian Head of State. No thought appears to have been given to a personal union of Crowns as a way of reconciling complete independence of action and separate nationhood with retention of the monarchy;[27] a 'halfway house between separation and some real unity', as one commentator aptly expressed the concept.[28] Thus, notwithstanding its author's republican sympathies, Andrew Inglis Clark's draft Constitution, prepared for the 1891 National Australasian Convention, gives no hint of the notion, and his draft clauses involving the monarch follow the orthodox pattern ultimately adopted.[29]

(The proposal by the framers of the Canadian Constitution to call their Confederation the 'Kingdom of Canada' does not appear to have been based

[24] See D Smith, 'A Toast to Australia' (1991) 35(5) *Quadrant* 11, 14; D Smith, 'Some Thoughts on the Monarchy/Republic Debate' in *Upholding the Australian Constitution: Proceedings of the Inaugural Conference of The Samuel Griffith Society* (1992) 159, 165; J B Paul, 'The Head of State in Australia' in *Upholding the Australian Constitution*, supra 177, 202–3. But cf E G Whitlam, *The Whitlam Government 1972–1975* (Ringwood, Penguin, 1985) 132.

[25] *Royal Style and Titles Act*, RSC 1985, s 2.

[26] See, eg, *Theodore* v *Duncan* [1919] AC 696, 706 (PC); *Williams* v *Howarth* [1905] AC 551, 554 (PC); W H Moore, 'The Dominions and Treaties' (1926) 8 JCL (3rd ser) 21, 33–6; T Baty, 'Sovereign Colonies' (1921) 34 *Harv LR* 837, 842, 860; A B Keith, *Imperial Unity and the Dominions* (Oxford, Clarendon Press, 1916) 293, 516–17.

[27] Cf W J Hudson and M P Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne, Melbourne University Press, 1988) 61–2.

[28] A B Keith, *The Sovereignty of the British Dominions* (London, Macmillan, 1929) 491.

[29] See the draft Constitution, preamble, ch III and sch 1 in J Reynolds, 'A I Clark's American Sympathies and his Influence on Australian Federation' (1958) 32 ALJ 62, 67, 74.

upon the notion of a separate Canadian Crown, although it might have this connotation to modern ears. The British government nevertheless rejected that name, partly because it was thought too pretentious for a self-governing colony, but principally in order not to offend republican sensibilities in the United States.)[30]

However, one does find an occasional reference to the notion of separate Dominion Crowns prior to 1926, perhaps because the two earlier personal unions involving the British Crown were thought by some to offer a solution to the problem of Dominion nationalism. Thus, Sir Frederick Pollock is reported to have remarked that the Dominions were 'separate kingdoms having the same king as the parent group', though he added that they had chosen 'to abrogate that part of their full autonomy which relates to foreign affairs'.[31]

Probably the most significant suggestion of a personal union of Crowns prior to 1926 appeared in a memorandum prepared by Prime Minister Smuts of South Africa for the 1921 Imperial Conference. Having commented that Dominion equality with the United Kingdom 'requires that the king should have exactly the same relation to a Dominion that he has to the United Kingdom', he remarked that that was not presently the case in practice.[32] However, it would be, he suggested,

> if the king were also the sovereign of a Dominion in his *personal capacity*. But this is not so. The king in his relation to a Dominion is not the king in his *personal capacity*, but the king in his official capacity as the constitutional sovereign of the United Kingdom.[33]

Nevertheless, he did not go so far as actually to propose separate Dominion Crowns. He merely advocated that Dominion governments should have

[30] See D Creighton, *The Road to Confederation* (Toronto, Macmillan, 1964) 421–3; D Creighton, *John A Macdonald: The Young Politician* (Toronto, Macmillan, 1952) 458–9. However, John S Ewart KC, long an advocate of a separate Canadian Crown, argued that Sir John A Macdonald did have such a notion in mind in proposing the name 'Kingdom of Canada': J S Ewart, *The Kingdom Papers*, vol 2 (Toronto, McClelland, Goodchild and Stewart, undated c 1918) 366ff. But that Crown would not, in any event, have enjoyed the independence of the modern Canadian Crown; Canada would, at most, have been an 'Auxilliary Kingdom': 'The Queen of Canada' (1953) 43 *Round Table* 316, 317. The title 'Kingdom of Canada' was subsequently proposed unsuccessfully in the Canadian Parliament in 1932: J E S Fawcett, *The British Commonwealth in International Law* (London, Stevens & Sons, 1963) 79 fn 13.

[31] Quoted (unfortunately unsourced) in Keith, *Imperial Unity and the Dominions*, op cit 516. (A lengthier quotation (also unsourced) appears in J S Ewart, *The Kingdom Papers* (Ottawa, 1912) vol 1, 13. Sir Frederick Pollock rejected the notion of a personal union of Crowns, fearing it would lead to the 'assumption of personal authority by the King': F Pollock, 'Imperial Organization' (1905) 36 *Proceedings of the Royal Colonial Institute* 288, 292. He was still expressing such concerns 25 years later: see his letter of 25 May 1930, in *Holmes–Pollock Letters* (M De W Howe ed, Cambridge, Mass, Harvard University Press, 1941) vol 2, 266. Cf infra, text accompanying fns 51–3.) Cf Canadian Governor General Earl Grey (1911), quoted in Ewart, *The Kingdom Papers*, op cit vol 1, 116: 'there is no question of interference by the parliament of one kingdom (ie the United Kingdom) with the parliament of *another kingdom* or dominion within the empire' (emphasis added).

[32] J van der Poel ed, *Selections from the Smuts Papers* (Cambridge, Cambridge University Press, 1973) vol 5, 72.

[33] Id 72–3 (emphasis added).

direct access to the King on matters affecting them, but would not have prohibited British Ministers from also tendering advice to the King thereon; advice on such matters was to be tendered by both British and Dominion representatives.[34] He made no specific recommendation on the question of the unity or otherwise of the Crown. Although he failed in 1921 and was unable even to persuade the Imperial Conference to call a special constitutional conference,[35] many of his suggestions, such as Dominion exemption from the *Colonial Laws Validity Act* 1865 (UK), conferral of power upon the Dominions to legislate extra-territorially, and even adoption of the name 'British Commonwealth of Nations', were adopted by subsequent Imperial Conferences and ultimately found legislative expression in the *Statute of Westminster*. As his biographer noted,

> Smuts' memorandum of June 1921 contained by anticipation the Balfour Declaration of 1926 and the entire constitutional achievement from then until the Statute of Westminster of 1931; but Smuts gained no credit from it.[36]

The 1926 Imperial Conference

The Imperial Conference of 1926 marked a watershed in the development of separate Dominion Crowns. As is well known, the conference declared (*in italics!*) that Britain and the Dominions were:

> autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[37]

Accordingly, Dominion Governors-General no longer represented the British government, but solely the Crown, and no longer served as the official channel of communication between the Dominion and British governments. Rather, they held

> in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain.[38]

However, the position of the Conference on advice to the monarch was far

[34] Id 74–5. (But cf the stronger earlier statement, id 73 point (b): 'Dominion governments should have *direct access* to the king who *will act on their advice without the interposition of the British government* or a secretary of state' (emphasis added).) For comment on Smuts' proposal, see Hudson and Sharp, op cit 66–7.

[35] W K Hancock, *Smuts: The Fields of Force 1919–1950* (Cambridge, Cambridge University Press, 1968) 48–9.

[36] Id 48.

[37] *Report of the Imperial Conference, 1926* (Cmd 2768) 14. This is often called the 'Balfour Declaration', since it was drafted by the Inter-Imperial Relations Committee chaired by former British Prime Minister Lord Balfour. For the background to the Declaration, see H Duncan Hall, 'The Genesis of the Balfour Declaration of 1926' (1962) 1 *Journal of Commonwealth Political Studies* 169, which notes that the Declaration's italics were a fortuitous printer's error (id 169).

[38] *Report*, op cit 16.

from clear. It recognised that, apart from statutory provisions providing for reservation of Bills, the government of each Dominion was entitled

> to advise the *Crown* in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to *His Majesty* by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion *against* the views of the Government of that Dominion.[39]

This passage is riddled with ambiguity, much of it no doubt deliberate.[40] The word 'Crown' is, of course, itself ambiguous, and could refer merely to the Governor-General, rather than 'His Majesty', the term employed throughout the report, including the next sentence, to refer to the King himself. But it would have made little sense to state the obvious, namely that Dominion governments were entitled to advise their Governors-General. Indeed, they were *obliged* to do so. Moreover, the reference to reservation of Bills, although unclear, and the following sentence, introduced by '*consequently*', do suggest that advice to the King is being referred to. The term 'Crown' was probably employed to avoid recognising the right of Dominion governments to communicate *directly* with the King, in the expectation that the Governor-General would continue to provide the official channel of communication between the Dominion government and the King (although no longer via the British Dominions Office).[41]

The second sentence is also unclear. Why the limitation 'against the views' if Dominion governments were to be the *sole* source of advice to the King on Dominion affairs? Presumably, it was intended to leave open the possibility of joint British-Dominion advice, as had been advocated by Prime Minister Smuts in 1921,[42] or even to continue the pre-existing practice whereby British Ministers were the King's sole constitutional advisers, with Dominion governments still formally communicating with the King through them.

Dominion advice to the monarch

The 1926 report's declaration on Dominion advice to the monarch may have been ambiguous, but hindsight confirms that it was hardly insignificant. Yet several participants, including Australian Prime Minister Bruce and British

[39] Id 17 (emphasis added).

[40] Cf Hudson and Sharp, op cit 97–8.

[41] That route terminated in 1927: see C Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* (Sydney, George Allen & Unwin, 1983) 183; B Sexton, *Ireland and the Crown, 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin, Irish Academic Press 1989) 110; D W Harkness, *The Restless Dominion: The Irish Free State and the British Commonwealth of Nations, 1921–31* (London, Macmillan, 1969) 107, 108–9.

[42] Dominions Secretary Leo Amery recorded in his diary that the British overcame Irish attachment to a formula (incautiously suggested by Amery himself) that 'it was the *exclusive* privilege of Dominion ministers to give advice on Dominion affairs', so that the final formula did 'not deny to British ministers the right in sharing in advice about the Governor-General': J Barnes and D Nicholson (eds), *The Leo Amery Diaries. Vol. 1: 1896–1929* (London, Hutchinson, 1980) 481–2 (emphasis added). Amery confidently believed that the Report had avoided 'any danger of the personal union theory being revived'!: id 484.

Dominions Secretary Amery remarkably omitted to mention it in their contemporary accounts of the Conference.[43] However, the Irish, at least, knew clearly what *they* wanted, which they thought had been achieved.[44] In a well thought-out memorandum, prepared for, and during, the Conference, they had clearly spelt out their position regarding Dominion advice to the monarch:

> The fundamental right of the Government of each separate unit of the Commonwealth to advise the *King* in all matters whatsoever relating to its own affairs should be formally affirmed and recognised in practice.[45]

The similarity in language between this document and the final report on this point suggests that the report was based upon it,[46] although significantly ambiguity was introduced by substituting 'Crown' for 'King'. One of the implications of the Irish position was spelt out specifically in their memorandum: 'The choice of the representative of the King should lie with the Dominion Government, on whose advice *alone* the appointment should be made.'[47]

Many commentators, however, simply assumed that British Ministers would continue to provide the King's only source of constitutional advice (ie, advice which must ultimately be followed). This was, for example, apparently the view of former Australian Prime Minister W M Hughes,[48] and was

[43] See 115 *Commonwealth Parliamentary Debates* (Prime Minister Bruce, House of Representatives, 3 March 1927) 62–80; L S Amery, 'Some Aspects of the Imperial Conference' (1927) 6 *Journal of the Royal Institute of International Affairs* 2. See also former Canadian Prime Minister Sir Robert Borden, 'The Imperial Conference' (1927) 6 *Journal of the Royal Institute of International Affairs* 197. Keith regarded this declaration as 'obscure', and 'neither novel nor important': A B Keith *Responsible Government in the Dominions* (2nd ed, Oxford, Clarendon Press, 1928) vol 2, 1229, 1232. He assumed that the King would continue to be advised only by British Ministers, even on Dominion matters (id 910); the resolution 'denies only in a certain class of cases the right in constitutional usage to advise the Crown *contrary* to the wishes of the Dominion Government': id 1229 (emphasis added).

[44] See infra fn 47.

[45] Memorandum, 2 November 1926, in Harkness, op cit 101 (emphasis added). (The entire memorandum is reprinted by Harkness, id 101–4.)

[46] See id 104.

[47] Id 102 (emphasis added). A letter of 9 November 1927 from the Irish Department of External Affairs to the Secretary of the (Irish) Executive Council shows that the Irish believed that the Imperial Conference had adopted their views:

> Prior to the Imperial Conference there was no explicit recognition of the right of the Dominions to advise the King. *The recognition of that right at the Imperial Conference* reverses the role of the British and Dominion governments in the appointment of Governors General. It is the Dominion Governments who will now advise the King to appoint their nominee after friendly consultation with the British Government and not vice versa as hitherto has been the practice.

Quoted in Sexton, op cit 110 (emphasis added).

[48] 115 *Commonwealth Parliamentary Debates* (House of Representatives, 22 March 1927) 863: 'although all the Prime Ministers are advisers of the King, *it is the advice of his Ministers in London that he follows* . . . . [Dominion] Prime Ministers are theoretically equally entitled to advise the King; but *the only advice the King can accept is that of the Government of Britain*' (emphasis added). Hughes appears to have maintained this view 15 years later: 172 *Commonwealth Parliamentary Debates* (House of Representatives, 7 October 1942) 1450.

certainly the opinion of Lord Stamfordham, the King's Private Secretary, who, four years later, could still declare that he could not

> for the life of me understand from anything that was passed at the [1926] Imperial Conference that the Dominion Governments have the right to advise the King on the appointment of Governors-General, or indeed upon any other point.[49]

Constitutional orthodoxy laid it down as a fundamental principle of responsible government that the monarch can never act on his or her own responsibility, but must always follow the 'advice' of Ministers responsible to Parliament, even if it becomes necessary to change those Ministers in order to receive the appropriate 'advice'.[50] Up to 1926, it had always been taken for granted, because no alternative had ever been contemplated, that this principle meant that the monarch must act on the advice of British Ministers responsible to the British Parliament. Constitutional traditionalists could not initially comprehend that the fundamental principle might be satisfied by the King acting on the advice of *Dominion* Ministers responsible to *Dominion* Parliaments. Hence it was thought that if the King followed Dominion advice, without the intervention of British Ministers to take responsibility therefor, he would be acting 'on his personal discretion and responsibility',[51] which would be a 'constitutional monstrosity', as Keith vividly expressed it.[52] The King himself apparently suffered from this delusion, believing that he would have to act 'on his own initiative' in such matters, since British Ministers were no longer to tender advice thereon.[53]

Interestingly, even Dominion statesmen could not see what to us, in retrospect, appears fairly obvious, namely that the principle of ministerial responsibility is satisfied as long as the monarch follows the advice of Ministers responsible to their local legislature.[54] Thus, W M Hughes inquired incredulously whether it was 'suggested for a moment that the King would act on his own initiative',[55] adding that

[49] Letter to the Prime Minister's Private Secretary, 19 June 1930, quoted in H Nicolson, *King George the Fifth: His Life and Reign* (London, Constable & Co Ltd, 1952) 479.

[50] Marshall, op cit 35–6. For the consequent doctrine of '*ex post facto* ministerial responsibility', see G Winterton, *Parliament, the Executive and the Governor-General* (Melbourne, Melbourne University Press, 1983) 197–8.

[51] Keith, *Responsible Government in the Dominions*, op cit vol 1, xiii.

[52] Ibid.

[53] Nicolson, op cit 478. The English Law Officers took a similar view in 1930: id 479. See also infra fn 67.

The unitary conception of the Crown and the principle of British ministerial responsibility for all its actions (and consequently sole responsibility for advising the monarch) is illustrated by the notion (especially evident in connection with the declaration of martial law in Natal in 1906) that British Ministers were responsible to Parliament for the actions of the Governor of a self-governing colony acting on the advice of local Ministers: see Keith, *Responsible Government in the Dominions*, op cit vol 1, 215–16; Sir Frederick Pollock, Letter to the *Times* (London), 5 April 1906, 8.

[54] The Imperial Conference of 1930 recognized that '[t]he constitutional practice that His Majesty acts on the advice of responsible Ministers' was satisfied by requiring the King to act solely on the advice of Dominion Ministers in appointing Governors-General: *Report of the Imperial Conference, 1930* (Cmd 3717) 27.

[55] 115 *Commonwealth Parliamentary Debates* (House of Representatives, 22 March 1927) 866.

> some body has to be responsible for every action taken. The King, *qua* king, is not responsible to anybody; it is his Ministers who bear the responsibility for his acts and utterances.[56]

One of the few commentators to see the position clearly — or at least presciently — was Edward Jenks, who, interestingly, had briefly been a professor of law at the University of Melbourne more than thirty years previously. In an address at Cambridge in February 1927, he noted that the 1926 report did not mean that the King's Private Secretary would '"run" the British Empire'.[57] 'Who then', he asked, 'is to advise the King upon the appointment of a Governor-General . . .?', and replied:

> The answer . . . seems as a matter of principle to . . . be reasonably plain, namely, that, just as the King in matters affecting the United Kingdom takes the advice of his Prime Minister in London, so, in matters affecting Canada, he will take the advice of his Prime Minister in the Dominion, and in the case of Australia that of his Prime Minister in the Commonwealth of Australia, and so forth. And I see no difficulty in applying the principle in that way.[58]

But Jenks was ahead of his time, although he was vindicated by the declaration of the Imperial Conference of 1930 on the appointment of Governors-General,[59] which resulted from Australian Prime Minister Scullin's successful battle to secure the appointment of Sir Isaac Isaacs as Governor-General in 1930.[60] However, only a year earlier, South African Prime Minister Hertzog had been unable to secure the appointment of his nominee for Governor-General without the intervention of the British Prime Minister, who wrote to the King '"advising" him to approve General Hertzog's submission'.[61] Two years earlier, in December 1927, the Irish Free State's second Governor-General was appointed on the 'effective advice' of its government, but it was conveyed through the British government which tendered the formal advice to the King.[62]

'Irresponsible' (in the technical sense) royal action was not the only difficulty perceived in direct Dominion advice to the King. Another alleged barrier included the impracticality of the King exercising his rights to be 'consulted' and to 'warn'[63] if he was to act on Dominion advice tendered by correspondence, or by a Dominion representative like the High Commissioner in London.[64] (Australian Prime Minister Scullin's presence in London to attend the Imperial Conference was a fortuitous exception,

[56] Ibid.
[57] E Jenks, 'The Imperial Conference and the Constitution' (1927) 3 CLJ 13, 21.
[58] Ibid.
[59] See supra fn 54.
[60] For accounts of the battle, see the literature cited in Winterton, *Parliament, the Executive and the Governor-General*, op cit 219 fn 197.
[61] See Nicholson, op cit 478 fn 2.
[62] Sexton, op cit 113–14.
[63] As to which, see W Bagehot, *The English Constitution* (Fontana Library ed, 1963, originally published 1867) 111.
[64] See Sir W Harrison Moore, 'Constitutional Issues in Vice-Regal Appointment', *Herald* (Melbourne), 4 December 1930, 1; J P Walshe (Irish Free State Department of External Affairs), memorandum on 'Change of Seals' (c 1931) in Harkness, op cit 236.

enabling him to tender personal advice to the King on the appointment of Isaacs.)

Keith also maintained that the public would not accept the King simultaneously pursuing contrary policies — such as war and neutrality — in his separate British and Dominion capacities, yet that could well result from direct Dominion advice;[65] what may have been acceptable in Stuart and Hanoverian times would not be tolerated in these 'days of democracy', he declared.[66] However, as Irish neutrality during the Second World War demonstrated, this concern was a phantasm. The public was well able to distinguish between the King and 'his' governments.

Finally, it is interesting to note a novel objection to direct Dominion advice raised both by the English Law Officers of the Crown and some conservative Australian lawyers during the controversy surrounding Prime Minister Scullin's efforts to secure the appointment of Isaacs as Governor-General, namely that the Commonwealth government lacked the power to tender constitutional advice directly to the King.[67] This was based in part upon s 62 of the Commonwealth Constitution, which establishes a Federal Executive Council 'to advise the *Governor-General* in the government of the Commonwealth'.[68]

But this argument was fanciful, since nothing in the Constitution, including s 62, expressly confines the Federal Executive Council to that role. Moreover, s 62 cannot be regarded as dealing exhaustively with the subject of ministerial advice to the Crown, because ministerial advice tendered in respect of powers vested in the 'Governor-General', rather than the 'Governor-General in

[65] Keith, *The Sovereignty of the British Dominions*, op cit xvii–iii, 431, 491.

[66] Id 491.

[67] See Nicolson, op cit 79 (English Law Officers); Cunneen, op cit 181–2 (Sir Edward Mitchell KC); Z Cowen, *Isaac Isaacs* (Melbourne, Oxford University Press 1967) 195–6 (J G Latham KC). Sir Edward Mitchell's opinion was published in the *Argus* (Melbourne), 10 January 1931, 21 and 12 January 1931, 9. See also *Sydney Morning Herald*, 4 February 1931, 17. Wilfred Fullagar concurred with Mitchell, subject to the qualification that the appointment would be valid if a British Minister accepted formal responsibility for it (*Argus*, 12 January 1931, 9). On this ground he ultimately concluded that Isaacs' commission was valid because the British Royal Assent signet had been affixed to it, though this apparently failed to satisfy Mitchell: *Sydney Morning Herald*, supra.

In addition to the argument based upon s 62, Sir Edward Mitchell argued that 'appointed by the Queen' in s 2 of the Constitution meant 'appointed by the Queen acting constitutionally, that is, on the advice of her *British* responsible Ministers'; s 2 did not 'confer a power of personal appointment . . . to be exercised at [the monarch's] own volition without the advice of *responsible Ministers*': *Argus*, 10 January 1931, 21 (emphasis added). This demonstrates the depth of entrenchment of the notion that only *British* Ministers could constitutionally advise the monarch.

Interestingly, the Victorian Chief Justice, Sir William Irvine (who opposed judicial involvement in extra-judicial activities such as Royal Commissions), had several months earlier extra-judicially expressed the same view as Mitchell on s 62 of the Constitution, arguing that it expressed the full ambit of the power of Commonwealth Ministers to advise the Crown, so that they lacked the power to tender constitutional advice to the King: *Argus*, 26 May 1930, 7. For general discussion of the question, without consideration of the validity of Isaacs' appointment, see also Moore, *Herald*, loc cit.

[68] Emphasis added.

Council', need not be tendered through the Federal Executive Council.[69] The powers to appoint and dismiss Ministers and to summon, prorogue and dissolve Parliament, for example, are exercised on the advice of the Prime Minister alone.[70] Moreover, if one wishes to be pedantic, it may be noted that Commonwealth Ministers are constitutionally denominated 'the *Queen's* Ministers of State for the Commonwealth'.[71] In any event, any doubt regarding the power of the Commonwealth government to tender advice to the Queen has been removed by High Court recognition thereof,[72] with Justice Murphy suggesting that it would now be unconstitutional for British Ministers to advise the Queen on Australian matters.[73]

Separate Dominion Crowns from 1926?

In view of the uncertainty surrounding Dominion advice to the King, it is hardly surprising that opinion was divided on the question whether the 1926 Imperial Conference had resulted in the creation of separate Dominion Crowns. This depended, to some extent, upon whether the declaration of Dominion 'autonomy' was taken seriously, and how much weight was attached to the partially countervailing observation in the report (not in italics) that 'the principles of equality and similarity, appropriate to status, do not universally extend to *function*.'[74]

As the report's subsequent remarks make clear, this passage was included in recognition of Britain's continuing role in Imperial diplomacy and defence, which had the warm support of Dominions like Australia and New Zealand, who placed great value on Imperial defence links.

Probably the leading sceptic of Dominion autonomy was Berriedale Keith, a former Colonial Office official and easily the most prolific commentator on Imperial constitutional issues. He regarded the declaration of Dominion autonomy as idealistic rather than factual,[75] and derisively declared the term 'British Commonwealth of Nations' 'an odious phrase to which no person has yet ascribed an intelligible meaning'.[76] He insisted that in foreign affairs the Dominions remained 'mere dependencies'.[77] In view of the legislative

[69] See Winterton, *Parliament, the Executive and the Governor-General*, op cit 15, 199 fn 32, 210 fn 136.

[70] See Practices G, I and N adopted by the Australian Constitutional Convention in 1985: *Proceedings of the Australian Constitutional Convention* (Brisbane, 1985) vol 1, 416–7.

[71] Commonwealth Constitution, s 64 (emphasis added).

[72] See *Nationwide News Pty Ltd* v *Wills* (1992) 108 ALR 681, 722 per Deane and Toohey JJ; *Western Australia* v *Commonwealth* (*First Territory Senators* case) (1975) 134 CLR 201, 278 per Jacobs J; *Attorney-General (Commonwealth)* v *T & G Mutual Life Society Ltd* (1978) 144 CLR 161, 196–7 per Aickin J (impliedly). See also Sir Garfield Barwick, *The Monarchy in an Independent Australia* (Melbourne, Sir Robert Menzies Lecture, 1982) 15–17, referring to advice given as Commonwealth Attorney-General, c 1960.

[73] See *Commonwealth* v *Queensland* (1975) 134 CLR 298, 335.

[74] Report, op cit 14 (emphasis added). ('Status' was italicized in the report.) Keith saw this passage as a 'qualification' to the Balfour Declaration: Keith, *Responsible Government in the Dominions*, op cit 1224–5. See also Keith, *Sovereignty of the British Dominions*, op cit 432.

[75] See Keith, *Responsible Government in the Dominions*, op cit 1224.

[76] Id 1145.

[77] Id 1151.

restrictions to which they were still subject, which were lifted only by the *Statute of Westminster* five years later, he declared that 'even autonomy is perhaps an exaggerated expression; independence is absurd'.[78] Accordingly, he maintained that the Crown remained single and undivided,[79] though even he had to concede that the King had 'a distinct personality for certain purposes' in the various Dominions,[80] and that the notion of a personal union of Crowns had 'the support of the general language used in the report'.[81] He appears to acknowledge that it is the Dominions' lack of independence — the second pre-condition for a separate Crown, as noted earlier — which precluded the British Commonwealth from being a mere personal union of Crowns.[82]

Most commentators concurred that the Imperial Conference had not established separate Dominion Crowns. Thus, perhaps most significantly, Leo Amery, the British Secretary of State for Dominion Affairs, remarked in November 1926, one week after the conference ended, that the unity of the Crown was

> a cardinal point in the . . . constitution of the British Empire. The Crown in the British Empire is *one and undivided.* There was a time not so long ago when the King of England was also the King of Hanover, but he was King in two different capacities, the wearer of two different Crowns . . . . There is no such division within the British Empire. The King is not King of Great Britain in one capacity, King of Australia in another. He is King in the same sense, and as wearer of the *same Crown*, of the whole Empire.[83]

This was also the view of the Australian government which, in a memorandum prepared for the Imperial Conference of 1930 (probably by Solicitor-General Sir Robert Garran),[84] argued that 'the King is not separately the King of each Dominion, but is the common King of all the Dominions'.[85] Other commentators, including Sir Cecil Hurst, the legal adviser to the British Foreign Office, and Sir John Latham, then Commonwealth Attorney-General, likewise concluded that the Imperial Conference of 1926 did not

[78] Id 1233.

[79] Id 1152–4; Keith, *Sovereignty of the British Dominions*, op cit ch 19. O'Connell attributes this view to Austinian influences: O'Connell, op cit 104.

[80] Keith, *Responsible Government in the Dominions*, op cit 1153. Cf P J Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London, Longmans, Green and Co, 1929) 190–1.

[81] Keith, *Sovereignty of the British Dominions*, op cit 418.

[82] Ibid.

[83] Amery, op cit 16 (emphasis added). He had written likewise to Sir Sydney Low the previous day: 'The one fatal heresy to guard against is the idea that there are many Crowns and that the King is King in different parts of the Empire in different senses.' Letter from Amery to Low, 29 November 1926, quoted in R F Holland, *Britain and the Commonwealth Alliance 1918–1939* (London, Macmillan, 1981) 60. Amery still believed in a single, indivisible Crown twenty years later, and probably even as late as 1953: see L S Amery, *Thoughts on the Constitution* (2nd ed, London, Oxford University Press, 1953) 133, 151–2, 168–9.

[84] Hudson and Sharp, op cit 114.

[85] Quoted id 115.

effect a division of the Crown.[86] As Philip Noel Baker aptly put it, the King was King *in*, but not *of*, Canada and the other Dominions;[87] he had only one Crown, not six.[88]

In view of the criteria for recognising the existence of a separate Crown noted earlier, this view is surely correct because the constitutional constraints, such as the *Colonial Laws Validity Act* 1865 (UK), to which the Dominions were still subject in 1926 prevented them from having the independent nationhood which is an essential precondition for the existence of a separate Crown. As two recent commentators noted,

> personal union supposed the utter and absolute independence and separation of the United Kingdom and the dominions from each other, with the person of their sovereign the only constitutional bond between them.[89]

Nevertheless, some participants and observers took a more radical view of the consequences of the 1926 Imperial Conference. Thus, just a few weeks after the Conference, Sir Sydney Low, a lecturer in constitutional history at the University of London, wrote to Dominions Secretary Amery that opinion in Canada and South Africa saw the report as

> [contemplating] that the present conception of an Empire-Realm under the Crown should pass to that of an alliance of *separate nation-states or Kingdoms*.[90]

This was certainly also the opinion of the Irish Free State government.[91]

Moreover, in view of the Balfour Declaration's recognition of Dominion 'autonomy', this interpretation of the report was certainly not fanciful. Even Sir Kenneth Roberts-Wray, later a legal adviser to the Commonwealth Relations and Colonial Offices, suggested that 1926 may have been the critical date:

> The doctrine of the divisibility of the Crown could hardly have come into existence had it not been for the Statute of Westminster, 1931, or at any rate *the Imperial Conference of 1926*.[92]

And a judge of the Canadian Federal Court recently asserted that

> *since 1926* there exists a king or queen of Canada, distinct at law from the

[86] Sir Cecil J B Hurst, 'The British Empire as a Political Unit' in *Great Britain and the Dominions* (Chicago, University of Chicago Press, 1928) 1, 52–5; J G Latham, *Australia and the British Commonwealth* (London, Macmillan, 1929) 27–9.
[87] Noel Baker, op cit 349–50.
[88] Id 350.
[89] Hudson and Sharp, op cit 62.
[90] Letter from Low to Emery, 17 December 1926, quoted in Holland, op cit 60 (emphasis added).
[91] Harkness, op cit 118–19. Accord 'Ireland: Events in the Free State' (1931) 21 *Round Table* (No 83, June 1931) 619, 628: 'The Free State is in fact no longer a Dominion, but a *Kingdom*' (emphasis added).
[92] Roberts-Wray, op cit 85 (emphasis added).

British Monarch and there is now a distinction between the king or queen of Great Britain and the king or queen as Head of State for Canada.[93]

The effect of the *Statute of Westminster*

The first criterion for the establishment of separate Dominion Crowns was satisfied at least by 1930, when the Imperial Conference explicitly recognised that in Dominion matters the monarch would act solely on the advice of Dominion Ministers. But it was still uncertain whether the second precondition — independent nationhood — had also been fulfilled because, notwithstanding the resolutions of the Imperial Conferences of 1926 and 1930, legally speaking the Dominions were still British colonies in that they were subject to the *Colonial Laws Validity Act* 1865 (UK)[94] and allegedly lacked full power to legislate with extra-territorial effect. These final restrictions were removed by the *Statute of Westminster* 1931 (UK),[95] thus enabling the second precondition for the establishment of separate Dominion Crowns to be satisfied. As Hudson and Sharp rightly noted,

> from 1931 the crown gave way to a personal union of crowns, with several crowns on one head. . . . Australia became an independent nation state, an *independent kingdom*, on 11 December 1931.[96]

The *Statute of Westminster* itself actually said nothing on the nature of the Crown. Indeed the only allusion to the Crown is in the preamble, which

[93] *Roach* v *Canada* [1992] 2 FC 173, 177 (emphasis added). However, it was unnecessary to mention the date of inception of the Canadian Crown.

In *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, 916–17 (CA), Lord Denning MR also appears to date the division of the Crown from 1926, but it is unclear whether he believed that the 1926 Imperial Conference merely recognized a pre-existing division, or whether the division resulted therefrom. (See *Manuel* v *Attorney-General* [1983] Ch 77, 91 per Megarry V-C.) However, Lord Denning employed the concept of the division of the Crown more loosely than is usual. Thus, he refers to the crown as being 'separate and divisible for each self-governing dominion or province or territory' and speaks of the 'Queen of Mauritus' (which was then a self-governing colony) and even the 'Queen of the Province of New Brunswick': [1982] QB 892, 917. See also *R* v *Secretary of State for Home Department, ex parte Bhurosah* [1968] 1 QB 266, 284 (CA) per Lord Denning MR: 'In Mauritius (then a self-governing British colony) the Queen is Queen of Mauritius'. None of his colleagues used the same term.

[94] A Dominion was still a 'colony' within s 1 of the *Colonial Laws Validity Act* 1865 (UK): see, eg, *Nadan* v *R* [1926] AC 482, 492–3 (PC). Murphy J believed that Australia, at least, was free from the *Colonial Laws Validity Act* from the inception of the Commonwealth: see G Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *FL Rev* 223, 236–7.

[95] See *Southern Centre of Theosophy Inc* v *South Australia* (1979) 145 CLR 246, 257 per Gibbs J. As William Hudson has noted, 'in 1926, [Dominion] *governments* became independent of United Kingdom governments; in 1931, their *legislatures* were given their independence of United Kingdom governments': Hudson, op cit 230 (emphasis added). Of course, effective Dominion governmental autonomy long antedated 1926.

[96] Hudson and Sharp, op cit 138 (emphasis added). 11 December 1931 was the date of enactment of the *Statute of Westminster*. The present writer agrees with Hudson and Sharp (id 135–8) that no significance in this respect attaches to the fact that the operative provisions of the *Statute* did not apply to Australia until it adopted them (*Statute*, s 10), because from 1931 Australia's subjection to the legal constraints removed by the *Statute* was entirely voluntary, and was removable by the Commonwealth at any time without further reference to the United Kingdom.

declares that, since 'the Crown is the symbol of the free association of the members of the British Commonwealth of Nations', who are united by a common allegiance to it, the 'established constitutional position' required any change in the law relating to the Succession to the Throne or the Royal Style and Titles to receive the consent of all Dominion Parliaments as well, of course, as the British Parliament.

This provision is ambivalent on the question of the unity of the Crown, although reference to '*the* Crown' might suggest that there was only one, not seven.[97] Yet the exact nature of a personal union of Crowns in the (British) Commonwealth is unclear, and is probably not completely analogous with the previous personal unions of Crowns, especially those of Britain and Hanover, because those nations had separate laws relating to Succession to the Throne (which eventually terminated the union on the accession of Queen Victoria) and were never joined in any relationship resembling the (British) Commonwealth, of which the British monarch is 'Head'.[98] The Queen, on the other hand, is monarch of Australia and her other realms *because* she is monarch of the United Kingdom. Sir Robert Garran, who recognised separate Dominion Crowns[99] employed theological imagery, describing the relationship as 'analogous to that of the Trinity'[100] because '[t]hough *one*, the Crown is . . . the Crown of each Dominion *individually*'.[101] Keith similarly spoke of 'a unity in multiplicity'.[102]

Following the *Statute of Westminster*, commentators began to concede the division of the Crown, at least as a matter of practical reality, if not legal theory.[103] Thus, as early as February 1932, a leading Canadian commentator declared that

> Canada's relationship to the United Kingdom has become that of a Personal Union. It is the same sort of union that existed between England and Scotland from 1603 to 1707, and between the United Kingdom and Hanover from 1714 to 1837.[104]

[97] As Leopold Amery argued: Amery, *Thoughts on the Constitution*, op cit 151. But see Wheare, *The Statute of Westminster and Dominion Status*, op cit 29–30.

[98] See A B Keith, *The Dominions as Sovereign States* (London, Macmillan and Co, 1938) 110, 133; A B Keith, *The Constitutional Law of the British Dominions* (London, Macmillan, 1933) 61; Amery, *Thoughts on the Constitution*, op cit 151, 169.

[99] R R Garran, *Prosper the Commonwealth* (Sydney, Angus and Robertson, 1958) 336.

[100] Ibid.

[101] Ibid (emphasis added).

[102] Keith, *The Dominions as Sovereign States*, op cit 145. In March 1937, the *Round Table* spoke of the '*Commonwealth* Crown' as 'at once sixfold and single': 'Crown, Constitution and Commonwealth' (1937) 27 *Round Table* 239, 256 (emphasis added). For Amery, who continued to believe in the unity of the Crown, it was 'a jewel of many facets, not a string of disconnected pearls': Amery, *Thoughts on the Constitution*, op cit 169.

[103] See, eg, W Y Elliott, *The New British Empire* (New York, Whittlesey House, 1932), ch II, esp 59–65.

[104] J S Ewart, 'The Statute of Westminster, 1931, as a Climax in its Relation to Canada' (1932) 10 *Can Bar Rev* 111, 121. Accord T Baty, 'The History of Canadian Nationality' (1936) 18 JCL (3d ser) 195, 203 (and contrast Baty's view fifteen years earlier: Baty, 34 *Harv LR* 837, loc cit). (John S Ewart KC had long advocated a personal union of Crowns: see Ewart, *The Kingdom Papers*, op cit vol 1, 116–19, 142–3, 178–85; vol 2, 212; J S Ewart, *Independence Papers* (Ottawa, 1921) 108–9. Ewart, in fact, would probably have

Similarly, in 1937, Sir Keith Hancock, a leading historian of Commonwealth developments (and an Australian), noted astutely that it was

> becoming apparent that the symbol of the Crown could be employed to support a theory and programme of separation, as well as to support the theory of 'the special relationship' and the ideal of unity.[105]

He added that the trend in Dominion treaty-making 'gave much support to the contention that the King had become juristically *six separate persons.*'[106]

The abdication of Edward VIII and coronation of George VI probably provide, at least in retrospect, the first reasonably explicit evidence of the Crown's new position.[107] Although all Dominion Parliaments consented to the alteration in the Succession to the Throne, as foreshadowed in the preamble to the *Statute of Westminster*,[108] the abdication of Edward VIII (and consequent accession of George VI) was not *legally* simultaneous throughout the Commonwealth. While in the United Kingdom and all but two Dominions it occurred on 11 December 1936,[109] the abdication became effective in South Africa a day earlier, and in the Irish Free State a day later.[110] Moreover, George VI's Coronation Oath, which for the first time specifically mentioned each Dominion, provided some (admittedly not unambiguous) corroboration of the division of the Crown.[111]

The division of opinion regarding the unity of the Crown, both among and within the member nations of the Commonwealth, was well illustrated by the declarations of war against Germany and Japan in 1939 and 1941 respectively.

In September 1939, Australia and New Zealand appeared to assume the continued unity of the Crown by announcing that the British declaration of war meant that they too were at war with Germany.[112] However, the actions of

preferred an independent Canadian republic (id 114, 119; Ewart, *The Kingdom Papers*, op cit vol 2, 389–90), remarking, eloquently: 'If we are to have a functioning King, he ought to reside here. But here is the only place we do not wish him to be .... A resident President would be a better executive head for an Independent Canada than an absentee King, and very much better than a resident King.': *Independence Papers*, op cit 113, 119).

Frank MacKinnon noted that the 1947 Canadian *Letters Patent* relating to the office of Governor-General were granted by George VI as King of *Canada*, but does not state when the Canadian Crown originated: see F MacKinnon, *The Crown in Canada* (Calgary, Glenbow–Alberta Institute, 1976) 88.

105 W K Hancock, *Survey of British Commonwealth Affairs: Problems of Nationality 1918–1936* (London, Oxford University Press, 1937) vol 1, 287.

106 Id 288 (emphasis added).

107 See K H Bailey, 'The Abdication Legislation in the United Kingdom and in the Dominions' (1938) 3 *Politica* 1 (pt 1), 147 (pt 2), 149, 153; Fawcett, op cit 81–2; J E Read, 'Problems of an External Affairs Legal Adviser, 1928–1946' (1967) 22 *International Journal* 376, 383–4, 388; J D B Mitchell, *Constitutional Law* (2nd ed, Edinburgh, W Green & Son Ltd, 1968) 178–9. But cf de Smith, *The New Commonwealth and its Constitutions*, op cit 10.

108 For Australia's consent, see 152 *Commonwealth Parliamentary Debates* (11 December 1936), 2892–6 (Senate), 2898–2926 (House of Representatives).

109 *His Majesty's Declaration of Abdication Act* 1936 (UK).

110 Keith, *The Dominions as Sovereign States*, op cit 106–7, 109–10.

111 Id 145. (For George V's Coronation Oath, see Nicolson, op cit 145.)

112 See O'Connell, op cit 116–17; P Hasluck, *The Government and the People 1939–1941* (Canberra, Australian War Memorial 1952) 152.

the other members of the Commonwealth clearly demonstrated the division of the Crown:[113] Ireland remained neutral, and though Canada and South Africa declared war (the latter after Prime Minister Hertzog, who favoured neutrality, had been replaced by Smuts),[114] they did so separately from the United Kingdom, South Africa declaring war three days after Britain, and Canada taking a further four days.[115] By the time war was declared on Japan in December 1941, the advent of a Labor government in Australia and a new Prime Minister in New Zealand meant that all four Dominions declared war separately from the United Kingdom,[116] thereby unanimously demonstrating the division of the Crown.

However, the debate on Australian adoption of the *Statute of Westminster* 1931 (UK), less than a year later, demonstrated that some Australians nevertheless remained committed to the unity of the Crown. The strongest proponent of an indivisible Crown was undoubtedly Robert Menzies, who professed himself incapable of understanding the concept of an empire comprising six kingdoms, one of which was neutral while the others were at war.[117] Interestingly, even Dr Evatt asserted the 'unity of the Crown throughout the Empire',[118] although one wonders whether he was not at least partly motivated by a natural concern to secure passage of the Bill by placating the diehard Empire loyalists among the Opposition. This is indeed suggested by a telling exchange with Menzies. The latter having referred to 'a common allegiance to a common Crown', Evatt interjected 'I prefer the word "King" to "Crown"'[119] (although he himself had earlier employed the word 'Crown').[120] Menzies replied:

> I accept the word "King" with pleasure, because it emphasizes my contention. If there is to be a common allegiance to a king, there can be only one king. How one king — one person — can act in six different ways on one problem, because he gets six different sets of advice from six different lots of Ministers, I have never been able to understand.[121]

He had obviously overlooked the earlier personal unions of the English, Scottish and Hanoverian Crowns.

Some Australian constitutional lawyers were slow to adapt to the Crown's new position, no doubt, at least in part, because they were unable to dissociate the wider issue of the Crown's unity throughout the (British) Commonwealth

[113] D J Bercuson and B Cooper, 'From Constitutional Monarchy to Quasi Republic: The Evolution of Liberal Democracy in Canada', in J Ajzenstat ed, *Canadian Constitutionalism 1791–1991* (1992 (albeit undated)) 17, 20.

[114] See E A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto, Oxford University Press, 1943) ch VII.

[115] O'Connell, op cit 116; Read, op cit 389–92.

[116] O'Connell, op cit 117; P Hasluck, *The Government and the People 1942–1945* (Canberra, Australian War Memorial 1970) 5–9; Read, op cit 393.

[117] See 172 *Commonwealth Parliamentary Debates* (House of Representatives, 7 October 1942) 1436–7.

[118] Id 1337, 1399.

[119] Id 1437.

[120] See supra fn 118. However, he later spoke of a 'common *kingship*': id 1477. See also 1476 ('the *kingship* is one throughout the Empire' (emphasis added)).

[121] Id 1437.

from the undoubted unity of the Crown within Australia.[122] As Hudson and Sharp noted

> only with the passing of a whole generation of lawyers and lawyer-politicians could the old doctrine of the indivisibility of the crown give way to the notion of separate kingdoms.[123]

Failure to distinguish between political and legal notions of Crown unity is evident even among lawyers who endeavoured to do so. Thus, Sir John Latham, who in 1928 had declared it a 'primary *legal* axiom that the Crown is ubiquitous and indivisible in the King's dominions'[124] sixteen years later ridiculed the notion, 'when stated as a *legal* principle', as 'verbally impressive mysticism' of little practical utility.[125] Yet, on the same occasion, he reiterated that the principle of Crown indivisibility was 'very important and significant from a *political* point of view',[126] although he did not say why, or why the Chief Justice should be commenting on such matters. Nevertheless, he continued to apply the principle of Crown unity as a *legal* principle, treating debts owing to other Dominion governments as entitled to the priority accorded to 'Crown' debts within Australia.[127]

However, those notions have now long passed, and modern judges have no illusions regarding the divisibility of the Crown.[128] Thus, for example, the

[122] See, eg, *Minister for Works (WA)* v *Gulson* (1944) 69 CLR 338, 356–7 per Rich J, endorsed by W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, Sydney, Law Book Company Limited, 1976) 391–2. Sir Kenneth Bailey still assumed the unity of the Crown in 1935: K H Bailey, *The Statute of Westminster, 1931* (Melbourne, Government Printer, 1935) 26 (but he had changed his mind three years later (after the abdication): see Bailey, 3 *Politica* 1, loc cit). But see H V Evatt, *The Royal Prerogative* (Sydney, Law Book Co, 1987, written 1924) ch 9, esp 55–6, 65. See also L Zines, 'Commentary' in id, C2, C23–24.

[123] Hudson and Sharp, op cit 6. See also 62, 100–1.

[124] Latham, op cit 28 (emphasis added). (Latham cited the *Engineers* case.)

[125] *Minister for Works (WA)* v *Gulson* (1944) 69 CLR 338, 350 per Latham CJ (emphasis added).

[126] Ibid (emphasis added).

[127] See *Federal Commissioner of Taxation* v *Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 286; *Uther* v *Federal Commissioner of Taxation* (1947) 74 CLR 508, 519. All these comments were obiter.

The confused artificiality of legal conceptions of Crown unity is demonstrated by *In re Johnson* [1903] 1 Ch 821, where Farwell J, while acknowledging that England and Scotland were separate kingdoms during the reign of James I (and VI), nevertheless stated: 'as *Calvin's Case* [(1608) 7 Co Rep 1a; 2 St Tr 559] shews, the *Crown* is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms' (832–3) (emphasis added). Confusion could have been avoided by treating *Calvin's* case as establishing merely that, as Farwell J himself later expressed it, '[a]lthough there were . . . two distinct kingdoms . . . there was but one allegiance to one *King*': id 833 (emphasis added). His error was to equate the king's human and legal personalities. (Farwell J's judgment was nevertheless quoted with apparent approval by Atkin J in *Gavin Gibson & Co Ltd* v *Gibson* [1913] 3 KB 379, 388–90.) The writer's view is shared by O'Connell, op cit 105 fn 8.

[128] See, eg, *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 184, 185–6; *Sykes* v *Cleary* (1992) 176 CLR 77, 118-19; *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, 916–17, 918, 928 (CA); *Tito* v *Waddell (No 2)* [1977] Ch 106, 231; *Re Ashman* [1985] 2 NZLR 224 n (1976) (discussed in F M Brookfield, 'New Zealand and the United Kingdom: One Crown or Two?' [1976] NZLJ 458. Cf F M Brookfield, 'The Monarchy and the Constitution Today: A New Zealand Perspective' [1992] NZLJ 438, 439–41).

description 'subject of the Queen' in s 117 of the Commonwealth Constitution refers to a subject of the Queen of *Australia*,[129] a British subject (ie, a subject of the Queen of the United Kingdom) can be an 'alien' within s 51(xix) of the Constitution,[130] and treaty obligations to Canadian Indians undertaken by the Crown in colonial times now bind Canada, not the United Kingdom.[131] Similarly, the Queen's non-Australian realms — or, more accurately, the realms of monarchs other than the Queen of Australia — are presumably no longer entitled to the priority accorded Crown debts, since they are the debts of a different Crown.

THE FUTURE

Does the history of the evolution of a separate Australian Crown hold any lessons for the future of our Head of State?

Perhaps the outstanding *political* feature of that history is how little part Australia played in it. Australia was, of course, present at the Imperial Conferences and consented to the enactment of the *Statute of Westminster*, but independent nationhood was achieved because Australia was a Dominion, and thus entitled to the benefits that accrued to that status as a result of the efforts of others, especially Ireland, South Africa and Canada. Australians, or at least the conservative politicians who governed them (federally) throughout the 1920s and most of the 1930s, were generally satisfied with the status quo and afraid of change. It took eleven years (and a war) for the *Statute of Westminster* to be adopted.[132] As Hudson and Sharp noted, 'Other dominions struggled for independence; Australia struggled for continuing *dependence*.'[133] Not for nothing did they subtitle their book 'Colony to *Reluctant* Kingdom'.

Australia was able to achieve independent nationhood without changing one word of its Constitution through a combination of British legislation (the *Statute of Westminster* 1931, and later the *Australia Act* 1986) and the adaptability of the 'Crown' through simply changing the Ministers on whose 'advice' executive powers were exercised.[134] Thus powers constitutionally vested in the monarch, and so originally exercisable by the British government (ie the monarch acting on the advice of British Ministers), were effectively transferred to the Commonwealth (ie the monarch or her representative

Sir Garfield Barwick acknowledged that the Australian Crown pre-dated 1936: Barwick, op cit 12.

129 *Street* v *Queensland Bar Association* (1989) 168 CLR 461, 505, 525, 541, 554, 572.

130 *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Pochi* v *Macphee* (1982) 151 CLR 101, 109.

131 *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892 (CA).

132 *Statute of Westminster Adoption Act* 1942 (Cth), retrospective to 3 September 1939.

133 Hudson and Sharp, op cit 6–7 (emphasis added).

134 As Sir Garfield Barwick noted, 'Australian independence with a separate monarchy . . . has occurred *without the change of a single syllable* of the written Constitution': Barwick, op cit 6–7 (emphasis added).

acting on the advice of Commonwealth Ministers).[135] As Leslie Zines has aptly remarked, 'from a constitutional point of view, all that has been altered are the Queen's advisers.'[136]

However, the next step in the evolution of our Head of State — abolition of the monarchy and establishment of an Australian republic — will not be so easy. That step will require a constitutional amendment,[137] approved by a referendum enjoying the large majorities specified in s 128 of the Commonwealth Constitution,[138] something that was never required for our achievement of independent nationhood. This time we will be unable to rely upon others' coat-tails.[139]

Leslie Zines thought it 'remarkable' that it took sixty years from the Balfour Declaration for the 'old Dominions' finally to free themselves from the last vestiges of the 'Imperial' Parliament and 'Imperial' Crown,[140] yet it is sobering to consider whether we would, even now, have attained independent nationhood under an Australian Crown if a s 128 referendum had been required to achieve it.

An Australian republic appears inevitable, the only logical outcome of the whole development of Australian history,[141] yet one cannot help recalling Dr Evatt's observation, albeit in a different context, of 'the gradualness, the *extreme gradualness*, of inevitability'.[142]

[135] See Winterton, *Parliament, the Executive and the Governor-General*, op cit 24–5. The *Australia Acts* 1986 (UK and Cth) also transferred all remaining British powers over the Australian States to the State governments.

[136] L Zines, *Constitutional Change in the Commonwealth* (Cambridge, Cambridge University Press, 1991) 6.

[137] See G Winterton, 'An Australian Republic' (1988) 16 MULR 467, 468–9.

[138] The monarchy can be validly abolished at both Commonwealth and State level by a constitutional amendment pursuant to s 128: see id 475ff. With due respect, Greg Craven's doubts in this regard are unconvincing: See Craven, op cit.

[139] Cf Hudson, op cit 239: 'if at some time in the future there is to be an Australian republic, it should spring from an Australian initiative. Independence fell into our laps . . . Australians dithered . . . . It would be a pity if an Australian republic fell into our laps not because for good reasons of our own we wanted it but because London newspapers or dynastic foibles left us no option.'

[140] Zines, *Constitutional Change in the Commonwealth*, op cit 32.

[141] See Winterton, 16 MULR 467, op cit 470–3.

[142] *R* v *Hush, ex parte Devanny* (1932) 48 CLR 487, 518 per Evatt J (emphasis added).