UNILATERAL STATE REPUBLICANISM: CAN VICTORIA INDEPENDENTLY SEVER ITS LINKS WITH THE CROWN?

Joel Fetter

INTRODUCTION

In November 1999, the referendum on severing Australia's ties to the monarchy failed to gain the requisite popular approval.[1] This outcome may mean that a second republic referendum will not be held for several years. Due to this long delay, individual States may feel popular pressure to take up the cause of constitutional reform; especially Victoria, the State whose populace was most in favour of the referendum. This essay examines the legal possibility of unilateral action by the Parliament of Victoria to sever its links with the Crown, disregarding for the main the merits or the political probability of such action. The various obstacles facing the Victorian Parliament shall be analysed, and the options open to the Parliament to overcome those impediments shall be discussed.

I. ALTERATIONS NEEDED TO SEVER VICTORIA'S LINKS WITH THE CROWN

Victoria's formal links with the Crown derive from the entrenchment of a system of monarchical government[2] in the Victorian Constitution.[3] The two key provisions are: s 6, which

[1] see Constitution Alteration (Establishment of Republic) Bill 1999 (Cth).

[2] Gerard Carney, 'Republicanism and State Constitutions' in M A Stephenson and Clive Turner (eds), *Republic or Monarchy?: Legal and Constitutional Issues* (1994) , 198; George Williams, 'The Australian States and an Australian Republic' (1996) 70 *The Australian Law Journal* 890 , 897. Note that in this essay, unless otherwise expressly or implicitly indicated, the term 'Constitution' refers to the Australian Constitution. References to that Constitution are references to the document embodied in clause 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

[3] *Constitution Act 1975* (Vic). I acknowledge that there are other legislative "links" to the Crown, such as the *Australian States Constitution Act 1907* (UK) (dealing with the powers of the Governors) but these links may be severed by an ordinary Act of the Victorian Parliament.

provides that "there shall be a Governor" in the State to represent the Queen;[4] and s 15, which ensconces the Queen as one of the three components of the Parliament. Further examples of the monarchical link are: the constitutional preamble, which recounts the role of the British Queen in creating the State Parliament; and the formal Oath of Allegiance, which is sworn to "Her Majesty".[5] Several other provisions contain monarchical nomenclature[6] and refer to the role of the Crown, for instance, in granting royal assent.[7] In order to sever Victoria's links with the Crown, these provisions (especially ss 6 and 15) must be amended or repealed.

II VICTORIAN LEGISLATIVE POWER

A. Source and Scope

The primary source of the legislative power of the Victorian Parliament is the State's Constitution Act.[8] The Victorian Constitution was originally enacted as an Imperial statute,[9] and thus it derives its authority from the paramount force of the Westminster Parliament.[10] Although there have been some attempts to source the legislative power of the Victorian Parliament in the Australian Constitution[11] the orthodox theory remains the legally accepted description.

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[4] see generally *Constitution Act 1975* (Vic), Part 1 ('The Crown'), which includes s 6.
[5] *Constitution Act 1975* (Vic) sch 2.
[6] eg 'Her Majesty' (eg ss 13, 54, 55 and 56), 'Minister of the Crown' (eg ss 50–3, 56 and 58), 'the Royal Arms' (s 76), etc.
[7] eg *Constitution Act 1975* (Vic) ss 18, 43, 69–71.
[8] *Constitution Act 1975* (Vic); I acknowledge the existence of other sources of legislative power, such as those powers conferred by British legislation applying by paramount force.
[9] *Constitution Act 1855* (Imp).
[10] Peter Hanks, 'Victoria' (1992) 3 *Public Law Review* 33 , 33.
[11] see Michael Stokes, 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127, 139; Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 143, 152. For supportive judicial opinion, see *New South Wales v Commonwealth* (1975) 135 CLR 337, 372 (Barwick CJ); *Western Australia v Wilsmore* (1982) 149 CLR 79, 86 (Murphy J); *Victoria v Commonwealth* (1971) 122 CLR 353, 371 (Barwick CJ); *China Ocean Shipping v South Australia* (1979) 145 CLR 172, 182 (Barwick CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 206 (Brennan CJ); *Attorney General (Queensland) v Attorney-General of the Commonwealth* (1915) 20 CLR 148, 172 (Isaacs J"); *Re State Public Services Federation; Ex parte Attorney-General(Western Australia)* (1993) 178 CLR 249, 275 (Brennan J); cf, eg, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 246 (Deane J).

The initial grant of legislative power to the State Parliament was plenary[12] and that power was widened by the passage of the *Australia Act 1986* (Cth and UK) ('*Australia Acts*').[13] For the purposes of this essay, the source and general scope of Victorian legislative power is only relevant to the extent that it gives context to the undoubted ability of the Victorian Parliament to alter the Victorian Constitution,[14] subject (for the internal purposes of the Victorian Constitution) only to certain "manner and form" restrictions.[15] Therefore the Victorian Parliament is *prima facie* empowered to amend the Victorian Constitution so as to sever Victoria's constitutional links with the Crown.

B. Implied Limitations

In the absence of any express deficiencies in Victoria's legislative power, it may be argued that there is an *implied* inability of the Parliament to remove an essential feature of the Victorian Constitution, such as the Crown.[16] This view may be supported by obiter dicta in the *Union Steamship* case, where the High Court remarked that there may be an implied restriction on State legislative power "by reference to rights deeply rooted in our democratic system of government and the common law".[17] However, these remarks are surely directed at protecting the liberty of individuals, not protecting the institution of the Crown. This limitation may, for instance, prevent the State Parliament from abolishing itself or the courts, but it does not protect the Crown from displacement.

Some commentators argue that a further limitation is implied in Victoria's colonial history. It is asserted that as the UK

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[12] *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, paras 14 & 16; James Thomson, 'The Australia Acts 1986: A State Constitutional Law Perspective' (1990) 20 *Western Australian Law Review* 409, 417. See *Constitution Act 1975* (Vic) s 16: legislative power 'in and for Victoria in all cases whatsoever'.

[13] see *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) ('*Australia Acts*') esp ss 2 and 3. Carney, above n 1, 200; Thomson, above n 11, 417-24; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 269.

[14] see *Constitution Act 1975* (Vic) s 18(1).

[15] see *Constitution Act 1975* (Vic) ss 18(2), (2A), (3).

[16] see D P O'Connell, 'Monarchy or Republic?' in G Dutton, *Republican Australia?* (1977) 23-6; Colin Howard, *The Constitution, Power and Politics* (1980) 107.

[17] *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, para 16.

Parliament cannot abolish the Crown, therefore "any onetime colonial legislature" is unable to do that which the mother Parliament cannot do.[18] With respect, this argument is misplaced in the modern Australian constitutional context. In light of the evolution of Australia as an independent nation, there can no longer be restrictions on the legislative power of Australian legislatures which are external to the Australian constitutional system.[19] To so contend is to deny the text and the spirit of the *Australia Acts* and to regard the Australian Parliaments as incomplete law-making bodies.[20]

Therefore, subject only to the restrictions which will be discussed below, the Victorian Parliament has the legal ability to alter the Victorian Constitution so as to sever all links with the Crown. This power is today limited by three sources: [21] (1) the "manner and form" restriction in the Victorian Constitution; (2) the Australian Constitution and the *Commonwealth of Australia Constitution Act 1900* (Imp)[22]; and (3) the *Australia Acts*.[23] I shall examine these documents in sequence.

III. RESTRICTIONS IN THE VICTORIAN CONSTITUTION

The Crown is entrenched in the Victorian Constitution by virtue of "manner and form" restrictions. Section 18 protects several of the constitutional provisions dealing with the Crown from being amended or repealed without the Bill purporting to do so having been passed by an absolute majority of MPs in both Houses of Parliament.[24] This requirement cannot be ignored by the State Parliament.[25] The protected provisions are those extensive sections in Part 1, dealing with the Crown and the Governor, portions of Part 2, entrenching the Queen's role in

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[18] F M Brookfield, 'Monarchy to Republic: Book Review' (1996) 7 *Public Law Review* 60, 62; D P O'Connell in Dutton (ed), above n 16, 32.
[19] see generally the *Australia Acts*.
[20] see *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 638 (Dawson J).
[21] Geoffrey Lindell, 'Why is Australia's Constitution Binding?: The Reasons in 1900 and Now and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 36.
[22] including inconsistent Commonwealth legislation: *Australian Constitution* s109.
[23] and the *Statute of Westminster 1931* (UK) as amended by the *Australia Acts*.
[24] *Constitution Act 1975* (Vic) s 18(2).
[25] see H P Lee, '"Manner and Form": An Imbroglio in Victoria' (1992) 15 *University of New South Wales Law Journal* 516. See also *Bribery Commissioner v Ranasinghe* [1965] AC 172.

Parliament, as well as minor references in Part III and Part V Division 2.[26] Interestingly, key sections dealing with the Crown are unprotected from alteration in the ordinary way. These include the powers of the Governor with respect to the executive government.[27]

It is also worth noting the scenario in which the special majority requirement cannot be met by a certain Parliament. In that case, it is possible that the Victorian Parliament could enact "request and consent" legislation seeking the Commonwealth Parliament to legislate pursuant to s 51(xxxiii) of the Constitution to enable Victoria to ignore s 18 of its own constitution.[28] However, since s 6 of the *Australia Acts* protects "the constitution, powers or procedure of the Parliament of the State" from being altered in any way repugnant to the s 18 "manner and form" requirements, such action would be insufficient to remove the Crown from the Victorian Constitution, or at least from its role in the Parliament.[29]

Therefore any Bill attempting to sever Victoria's links to the Crown would require the approval of an absolute majority of Parliament. Given the nature of the electoral system in Victoria, it is not difficult for a popular government to win control of both Houses at a successful election and thus overcome the "manner and form" requirements.[30] This is to be contrasted with the position in other States, where the Crown is more forcefully entrenched.[31] Queensland,[32] and probably New South Wales[33] and South Australia[34] require successful referenda to sever their

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[26] *Constitution Act 1975* (Vic) s 18(2).
[27] *Constitution Act 1975* (Vic) Part IV.
[28] Carney, above n 1, 201; cf George Winterton, *Monarchy to Republic: Australian Republican Government* (1986), 142. Note the wide scope of s 51(xxxviii) declared *in Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 338, 381.
[29] Ann Twomey, 'State Constitutions in an Australian Republic' (1997) 23 *Monash University Law Review* 313, 317.
[30] see Lee, above n 24, 519.
[31] see generally Williams, above n 1, 895-8; Twomey, above n 28, 313-5.
[32] see *Constitution Act 1867* (Qld) ss 2, 2A(1), 2A(2), 11A and 11B entrenched by s 53.
[33] see *Constitution Act 1902* (NSW) ss 7A and 7B. See Carney, above n 1, 199; Republic Advisory Committee, *An Australian Republic: the Options* (1993) vol 2, 308; cf George Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 121.
[34] see *Constitution Act 1934* (SA) ss 8, 10A, 88.

links with the Crown.[35] Western Australia must hold a successful referendum *and* ensure an absolute majority vote in Parliament.[36] Only in Tasmania is displacement of the Crown easier to achieve, potentially needing only the passage of legislation by an ordinary majority.[37]

IV. RESTRICTIONS IN THE AUSTRALIAN CONSTITUTION

A. The Constitution Proper

The Victorian Parliament is bound both by the *Commonwealth of Australia Constitution Act 1900* (Imp) and by the Constitution which that Act contains.[38] The distinction between the two must be drawn as there is debate as to the legal effect of some elements of the former and their relationship with the latter document.[39] The Constitution itself contains no express prohibition on the power of State Parliaments to sever their links with the Crown. Where the Crown is mentioned in relation to the States, the references are descriptive rather than prescriptive.[40] Indeed, the apparent flexibility of the Constitution to accommodate such a change is evidenced by the wide definition of "Governor" in s110 as the "chief executive officer or administrator of the government of the State". Thus abolishing the Crown and replacing the Governor in Victoria would not be repugnant to the express provisions of the Constitution.[41] Any restrictions on such action must come from a) the preamble and covering clauses of the Constitution Act, or b) the implied terms of the Constitution as a whole.

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[35] Twomey, above n 28, 313; Williams, above n 1, 897; Carney, above n 1, 199.
[36] see *Constitution Act 1889* (WA) ss 2(1), 2(2), 2(3), 50(1), especially s 73. See Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee* (1995), Ch 3.
[37] see *Constitution Act 1934* (Tas) ss 23, 41A.
[38] by virtue of the *Commonwealth of Australia Constitution Act 1900* (Imp) cov cl 5. Note that in this essay, a reference to the 'Constitution Act' is a reference to the preamble and covering clauses 1–8 of the *Commonwealth of Australia Constitution Act 1900* (Imp), unless otherwise expressed or implied.
[39] see Dennis Rose QC, 'Acting Solicitor-General's Advice: Establishment of a Republic' in Republic Advisory Committee, above n 32, vol 2, 296-7; Williams, above n 1, 893; Sir Anthony Mason, 'Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *University of New South Wales Law Journal* 750, 753; Gageler and Leeming, above n 10, 144.
[40] eg s 117. Republic Advisory Committee, above n 32, vol 1, 144.
[41] Williams, above n 1, 895.

B. The Constitution Act

The Preamble to the Constitution Act states that the Australian people federated "under the Crown of the United Kingdom and Great Britain and Ireland". Covering clause 2 defines all references to the Queen in the Constitution as references to the lawful monarch "in the sovereignty of the United Kingdom". If these words are regarded as requiring the people of Australia to eternally live under the sovereignty of the (British?) Crown, then Victoria may be prohibited from severing its links with that Crown.[42] However, the weight of academic opinion holds that these words should neither be read literally nor have binding force.[43] Firstly, the specific Crown mentioned in the preamble no longer technically exists.[44] In the course of Australia's development this century, the Crown under which Australia is federated has, by the "silent operation of constitutional principles"[45] come to be regarded as the Crown of Australia.[46] Thus the preamble merely recites an historical fact - that in 1900, Australia was federated under the British monarch – rather than prescribing that Australia shall always have the British monarch as Head of State.[47]

Secondly, the legal effect of the preamble is uncertain; it probably lacks the binding force of the Constitution itself.[48] The

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[42] see Quick and Garran, *Annotated Constitution of the Commonwealth of Australia* (1901) 994; P H Lane, *An Introduction to the Australian Constitution* (3rd ed, 1983) 3; J A Thomson, 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal Law Review* 323, 331-5.

[43] eg Rose, above n 38, 296; Mason, above n 38, 753; Republic Advisory Committee, above n 32, vol 1, 118.

[44] Rose, above n 38, 296; Winterton, 'The States and the Republic', above n 32, 115-6.

[45] *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J), quoting *Cooper v Stuart* (1889) 14 App Cas 286, 293 (Watson LJ).

[46] see George Winterton, 'The Evolution of a Separate Australian Crown' (1993) *Monash University Law Review* 1; see *Royal Style and Titles Act 1973* (Cth); see *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 186; *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ).

[47] Rose, above n 38, 296; Republic Advisory Committee, above n 32, 135; Winterton, *Monarchy to Republic*, above n 27, 124; Winterton, 'The States and the Republic', above n 32, 116; Wynes, *Legislative, Executive and Judicial Power in Australia* (5th ed, 1976), 542; cf Sir Harry Gibbs, 'The Australian Constitution and Australian Constitutional Monarchy' in Stephenson and Turner (eds), above n 1, 11.

[48] Rose, above n 38, 297; Republic Advisory Committee, above n 32, 118; Gageler & Leeming, above n 10, 144; Craven, *Secession: The Ultimate States Right* (1986) 83-91;

High Court has referred to the preamble and covering clause 2 in several judgments,[49] and has relied on them expressly in at least two cases.[50] The consensus emerging from the Court is that "recourse to the preamble may throw light on the statutory purpose and object" of the Constitution, but it cannot of course be relied on in the presence of contrary provisions in the Constitution itself.[51] Among constitutional experts, most early commentators regarded the preamble and covering clause 2 as conveying the same binding force as the Constitution proper,[52] while the modern trend is to regard most of those provisions as more or less descriptive.[53] Most modern academic debate centres on the correct method of amending or repealing these clauses.[54]

If the provisions are indeed binding, Victoria cannot sever its links with the Crown without those clauses being overcome. The State Parliament cannot alter the Australian Constitution unilaterally; the assistance of the Commonwealth Parliament must be sought.[55] As mentioned, however, there is great controversy over how the Constitution Act may be amended. A tension exists between the existing referendum powers under s 128 of the Constitution and the powers conferred (or described) by s 15 of the *Australia Acts*. The proposed options are: (1) direct

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Winterton, 'The States and the Republic', above n 32, 119. See Bennion, *Statutory Interpretation* (2nd ed, 1992) 499-501.

[49] eg *Victoria v Commonwealth* (1971) 122 CLR 353, 386 (Menzies J); *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ); *McGinty v Western Australia* (1996) 70 ALJR 200, esp McHugh J.

[50] *R v Sharkey* (1949) 79 CLR 121, 135-6 (Latham CJ), 163-4 (Webb J); *Leeth v Commonwealth* (1992) 174 CLR 455, 475 (Brennan J), 486 (Deane & Toohey JJ).

[51] *Wacando v Commonwealth* (1981) 148 CLR 1, 15-6 (Gibbs CJ); 23 (Mason J); *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 258 (Gibbs J); see also Bennion, above n 27, 499-501.

[52] eg Quick and Garran, above n 27, 989; Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 603; *Report of the Royal Commission on the Constitution* (1929) 16-17, 228; H B Higgins, *Essays and Addresses on The Australian Commonwealth Bill* (1900), 69, 71.

[53] eg George Winterton, 'Section 51(xxxviii) of the Constitution and Amendment of the "Covering Clauses"' (1982) 5 *University of New South Wales Law Journal* 327, (328; R D Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia' (1978) 9 *Federal Law Review* 148, 158-60; Lee, 'The Australia Act 1986 - Some Legal Conundrums' (1988) 14 *Monash University Law Review* 298, 312-14; Craven, above n 27, 20-30; see also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 (Murphy J). cf Gageler and Leeming, above n 10, 148-9; Wynes, above n 46, 541.

[54] see below nn 56–58.

[55] see the *Australian Constitution* s 128.

alteration of the enacting clauses by national referendum,[56] (2) alteration by the Commonwealth Parliament pursuant to a referendum conferring specific power to do so,[57] or (3) alteration by an Act of the Commonwealth Parliament with the "request and consent" of all the States.[58]

There is not sufficient room in this essay to evaluate the merits of each proposal. However, it is clear that one lawful solution must and does exist. This author leans towards the opinion, advanced by many eminent scholars (and one High Court judge) that the power resides directly in s 128, as reinforced by s 15(3) of the *Australia Acts*.[59] If this opinion is correct, then the Victorian Parliament would need to persuade the Commonwealth Parliament (or at least the lower House)[60] to initiate a referendum to alter the Constitution Act. Some monarchists have interpreted the words "in relation thereto" in s 128 to mean that such a referendum would have to be passed by a majority of electors in *all* States.[61] However, that interpretation is probably erroneous.[62] Therefore if the preamble

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[56] pursuant to the *Australian Constitution* s 128 and allegedly pursuant to the *Australia Acts* s 15(3): Sir Samuel Griffith, *Official Report of the National Australasian Convention Debates* (1891) 490; Enid Campbell, 'An Australia-Made Constitution for the Commonwealth of Australia', Australian Constitutional Convention 1974, Standing Committee D, *Report to Executive Committee* (1974), Appendix H, para 21; Geoffrey Lindell and Dennis Rose QC, 'A Response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?"' (1996) 7 *Public Law Review* 155, 159-60; Constitutional Commission, *Final Report* (1988), 122-3; Mason, above n 38, 754; Winterton, *Monarchy to Republic*, above n 27, 124-5; R D Lumb, 'The Framework of Constitutional Monarchy in the Australian States' in G Grainger & K Jones (eds), *The Australian Constitutional Monarchy* (1994) 66; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 236 (Murphy J). See the remarks of Deane & Toohey JJ in *Nationwide News v Wills* (1992) 177 CLR 1, 70-1.

[57] pursuant to the literal wording of the *Australia Acts* s 15(3): see eg Carney, above n 1, 196; George Winterton, 'An Australian Republic' (1988) 16 *Melbourne University Law Review* 467, 480; Rose, above n 38, 298-303; Zines, above n 12, 263; Lumb, *The Constitution of the Commonwealth Annotated* (4th ed, 1986) 11; Campbell, above n 55; cf Gageler & Leeming, above n 10, 143.

[58] pursuant to the *Australia Acts* s 15(1): Gageler and Leeming, above n 10, 150-2; Craven, above n 27, 183; Constitutional Commission (1988), above n 55, 121.

[59] see above n 54.

[60] see *Austalian Constitution* s128, para 2.

[61] Gibbs, above n 46, 11; Sir Harry Gibbs, 'The States and a Republic: A Legal Opinion by Sir Harry Gibbs and the Legal Committee of Australians for Constitutional Monarchy in Response to the Republic Advisory Committee Report' in Stephenson and Turner (eds), above n 1, 299 ('*Gibbs & ACM*'); see also the dicta of McHugh & Gummow JJ in *McGinty v Western Australia* (1996) 186 CLR 140, 237.

[62] Mason, above n 38, 752; Twomey, above n 28, 321-3; Republic Advisory Committee, above n 32, 130; Constitutional Commission (1988), above n 55, 886-7; Winterton, 'The

and covering clause 2 are interpreted as binding, Victoria cannot sever its links with the Crown unilaterally but must convince a) the Commonwealth Parliament,[63] and b) a majority of electors in a majority of States, of the merits of its proposed course of action.[64]

C. Implications in the Constitution

If the preamble and covering clause 2 are not held to be binding, and in the absence of any express restriction in the Constitution proper, any prohibitions on unilateral Victorian action can only flow from restrictions implied in the Australian Constitution. There may be such a restriction flowing from the theory of the indivisibility of the Australian Crown. Orthodox opinion holds that the Australian Crown is one and indivisible,[65] with the seven Australian governments acting as separate "agents" of that Crown.[66] If this doctrine is held by the High Court to be implied in the Constitution,[67] it would follow that Victoria could not sever its links to the monarchy without fracturing the institution of "the Crown" as a whole. However, one must be extremely wary in dealing with the doctrine of indivisibility since "the Crown" is essentially a "verbally impressive mysticism",[68] part of the legal fiction employed to reconcile Australia's modern parliamentary, democratic and constitutional government with our monarchical heritage.

States and the Republic', above n 32, 116; Colin Howard, *Australian Federal Constitutional Law* (2nd ed, 1972) 508.

[63] a referendum can be initiated by one House of the Commonwealth Parliament with the co-operation of the Governor-General. In practical terms this means that a referendum can be initiated by the Commonwealth government without the support of the Senate. See *Australian Constitution* s 128.

[64] if I am incorrect and a referendum is not required, then Victoria must still obtain the co-operation of all of the State and Commonwealth Parliaments. In either case, the requirements are extremely onerous.

[65] see Winterton, 'The Evolution of a Separate Australian Crown', above n 45; LBC, *The Laws of Australia*, vol 19, 15-17; Zines, above n 12, 272.

[66] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152; *Bradken Consolidated Ltd v the Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 135-6 (Mason & Jacobs JJ); *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-6; *Attorney-General(UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 45; *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 247 (Gibbs J).

[67] perhaps based on the preamble and covering clause 2 of the Constitution.

[68] *Minister for Works (WA) v Gulson* (1944) 69 CLR 341, 350 (Latham CJ).

If one insists on invoking the concept and language of "the Crown", it is more easily argued that there effectively exist *seven* Crowns in Australia – the Crown "in right of" any of the seven governments of Australia.[69] These "Crowns" are juristically independent: they sue each other, contract with each other and generally function as independent entities.[70] For this reason it has been put forward that there truly exists a "heptarchy" in Australia,[71] comprising the Queen of Victoria,[72] the Queen of the Commonwealth of Australia, and so forth. The seven monarchies are bound together in federation by the Constitution and united by the personal union of the seven Crowns in the physical person of Queen Elizabeth II.[73]

If the Australian Crown is held to be divisible in this way, then there would be no obstacle to Victoria severing its links to the "State monarchy". Such a move would not breach the other relevant constitutional implication which is judicially recognised as being implied in and protected by the Constitution – federalism.[74] A federation entails a "system of government in which authority is constitutionally divided between central and regional governments".[75] The relationship of agents inter se is independent of the relationships between each agent and its master; therefore it should not be an obstacle to federalism or good federal relationships if one government does not share the same notional "Head of the Executive" as the

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[69] *Minister for Works (WA) v Gulson* (1944) 69 CLR 341, 350 (Latham CJ).

[70] *Bank Nationalisation Case* (1948) 76 CLR 1, 262; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 140 ALR 129, 151 (McHugh & Gummow JJ); Zines, above n 12, 272.

[71] Republic Advisory Committee, above n 32, 125; Craven, 'The Constitutional Minefield of Australian Republicanism', *Policy*, Spring 1992, 35; cf George Winterton, *The Australian Crown: Its Creation and Demise* (1992) 4-5.

[72] see *Constitution Act 1975* (Vic), sch 2, which refers to the Queen as 'lawful sovereign... of this State of Victoria.'

[73] see Winterton, 'The Evolution of a Separate Australian Crown', above n 45, 2–3. This situation is akin to the personal union of the Crowns of England and Scotland between 1603 and 1707 and the Crowns of Great Britain (the United Kingdom after 1801) and Hanover between 1714 and 1837.

[74] see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, esp 149-152; see also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*'), etc.

[75] J Gillespie, 'New Federalisms' in J Brett, J Gillespie and M Goot (eds), *Developments in Australian Politics* (1994) 60.

others.[76] This is what will in fact occur if the Commonwealth becomes a republic without the States later this year.

Some supporters of the indivisibility of the Australian Crown,[77] including those on the bench,[78] have relied on the assertion that monarchical unity "serves as the foundation for a unified system of law"[79] within the federation. Some have even put forward the "ludicrous" [80] suggestion that the proposal to remove the Crown from the Australian constitutional landscape federation would breach the present Constitution and necessitates "a new agreement to unite".[81] With respect, these objections are fallacious, since the unity of the law derives not from the Crown but from the constitutional compact between all the people of the nation.[82] Indeed, the High Court itself is the constitutional body which exists to supervise the unity of Australian law.[83] This view is supported by the modern judicial trend in viewing the Constitution in the light of the theory of popular sovereignty.[84]

Nevertheless, the orthodox view of the unity of the Australian Crown remains intact. Professor Winterton, among others, ascribes the existence of a unified Australian Crown to the

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[76] Republic Advisory Committee, above n 32, 125-6; Winterton, 'The States and the Republic', above n 32, 114; cf P Bassett, 'The Governor and the Constitution: A Practical Perspective' (1994) 53 *Australian Journal of Public Administration* 49, 51-2.

[77] noted by Republic Advisory Committee, above n 32, 125

[78] see *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 135 (Mason & Jacobs JJ).

[79] Republic Advisory Committee, above n 32, 125. See *Bradken Consolidated Ltd v the Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 135-6 (Mason & Jacobs JJ); *Breavington v Godleman* (1988) 169 CLR 41, 78 (Mason J).

[80] Winterton, 'The States and the Republic', above n 32, 115.

[81] Gibbs & ACM, above n 60, 299; Gibbs, above n 46, 11-12. See also P J Boyce, 'The Reserve Powers of State Governors' (1994) 24 *University of Western Australia Law Review* 145, 149.

[82] see *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 135-6 (Mason & Jacobs JJ).

[83] see Alfred Deakin, House of Representatives, March 1902, quoted in J M Bennett, *Keystone of the Federal Arch* (1980) 13.

[84] see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason J); *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-7 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 485 (Deane & Toohey JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane & Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J); *McGinty v Western Australia* (1996) 70 ALJR 200, 239 (McHugh J), 265 (Gummow J); see Lindell, above n 26; Constitutional Commission (1988), above n 55, 123.

recognition of Australia as an undivided sovereign nation at international law.[85] This opinion is supported by dicta of the High Court.[86] Therefore, the Court may well decide that the "unified Crown doctrine" does operate to prevent a State from unilaterally severing its links with that Crown, if only for symbolic, traditional or conceptual reasons. In my view, however, this is an insufficient basis on which to ground a constitutional implication, as the indivisible Crown is not "logically or practically necessary for the preservation of the integrity of [the] structure" of the Constitution.[87]

If there does exist an adverse implication in the Constitution, Victoria must seek to have the basis for that implication removed if it is intent on severing its links with the Crown. This would require the insertion in the Constitution of an express provision facilitating the division of the Crown in order to negative any opposing implications. As mentioned, this would have to be done by convincing the Commonwealth Parliament to initiate a referendum and subsequently convincing a majority of electors in a majority of States to support the vote. All of these moves are legally possible, but practically and politically unlikely, as evidenced by the paucity of successful referenda in Australia's history.[88]

V. RESTRICTIONS IN THE *AUSTRALIA ACTS*

The final relevant restriction on Victorian legislative power is to be found in the *Australia Acts*. Victoria is bound by both the Australian[89] and UK[90] forms of that Act. Great controversy has surrounded the interpretation of s 7 of those Acts.[91] Section 7(1) states that "Her Majesty's representative in each State shall be the Governor". One group of commentators maintains that s 7

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[85] Winterton, 'The Constitutional Position of State Governors' in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 274-5; Zines, above n 12, 235-6.
[86] *Breavington v Godleman* (1988) 169 CLR 41, 77-9 (Mason CJ), 98-9 (Wilson & Gaudron JJ), 134-5 (Deane J).
[87] *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).
[88] see 'Referendum Statistics' in *Commonwealth Electoral Procedures* (1992) 86-7.
[89] by virtue of s 109 of the Australian Constitution.
[90] by virtue of the paramount force of British legislation. See *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J).
[91] Winterton, 'An Australian Republic', above n 56, 479.

prescribes and entrenches a monarchical system of government in the States.[92] The opposing view is that s 7 merely assumes the existence of and regulates the monarchical system so long as it exists, and that should Victoria legislate to sever its links with the Crown, the section would cease to have any operation.[93]

The latter view is supported by the flexibility of the wording in s 7.[94] Read literally, the States are not restricted by s 7 from, say, diminishing the powers of the Crown in the State completely, save that a) the office of Governor continues to nominally exist,[95] and b) the Queen may still exercise her (non-existent) powers personally when she is present in the State.[96] The Parliament might then provide for another person to perform the functions that the Governor previously exercised. However, the definition of Governor in the *Australia Acts* as "any person... administering the government of the State"[97] may prevent this course of action, as the new "Head of the State" may attract the obligations imposed by s 7.[98]

The "safer" option is to amend section 7. However, the legal controversy is not ended by this suggestion. As previously mentioned, the section which prescribes the method(s) for amending the *Australia Acts* (s 15) is potentially ambiguous.[99] While s 15(1) allows alterations to the Acts by Commonwealth legislation with the "request and concurrence" of the States, s 15(3) preserves the ability of the Commonwealth Parliament to

[92] Gageler & Leeming, above n 10, 153; Gibbs & ACM, above n 60, 130; Gibbs, above n 46, 10-11; Lumb, above n 56, 571.
[93] Winterton, 'An Australian Republic', above n 56, 479; Winterton, 'The States and the Republic', above n 32, 121; Mason, above n 38, 755; Zines, above n 12, 266; Williams, above n 1, 894 and Republic Advisory Committee, above n 32, 127 prefer this view but recommends the other 'safer' option.
[94] Winterton, 'An Australian Republic', above n 32. Cf *Constitution Act 1975* (Vic) s 6: : 'there *shall* be a Governor'.
[95] *Australia Acts* s 7(1).
[96] *Australia Acts* s 7(4). See Rose, above n 38, 307.
[97] *Australia Acts* s 16(1).
[98] Gageler & Leeming, above n 10, 153.
[99] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 1999, 798 (Mary Henderson, Minister for Housing) [Australia Acts (Request) Bill (Vic) – Second Reading Speech]; Winterton, 'The States and the Republic', above n 32, 120.

legislate pursuant to any power conferred "according to" s 128 of the Constitution.[100]

Although there is not sufficient space in this essay to explore the nuances of the issues, the familiar three options are open. The *Australia Acts*[101] may possibly be amended by a) Commonwealth legislation enacted with the concurrence of all the States,[102] b) the insertion, pursuant to a successful referendum, in the Constitution of a provision purporting to amend s 7,[103] or c) the conferral of a specific power, via a referendum, allowing the Commonwealth Parliament to amend the *Australia Acts*.[104] Whichever one (or more) of these options is legally valid, it is clear that the Victorian Parliament cannot alter s 7 unilaterally but must again gain the support of either a) all of the Australian Parliaments, or b) the Commonwealth Parliament and a majority of electors in a majority of States. The political problems associated with this course of action have been noted.

CONCLUSION

A radical analysis of the issues presented in this essay may lead to the conclusion that the Victorian Parliament could "legally" sever its links with the Crown by unilateral action. The "manner and form" restrictions in the Victorian Constitution could be overcome by a popular government, the Australian Constitution and Constitution Act could be read down so as to deny any relevant restrictions on the legislative power of the States, and the *Australia Acts* could be interpreted so as to have only a minimalist effect.

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[100] Winterton, 'The States and the Republic', above n 32, 120-1; cf Gageler and Leeming, above n 10. As mentioned, there is great controversy over the interpretation of s 15(3).

[101] really only the *Australia Act 1986 (UK)*, as the domestic version of that legislation may potentially be amended by an ordinary Act of the Commonwealth Parliament.

[102] pursuant to s 15(1). See, eg, *Australia Acts (Request) Act* (NSW, Vic & WA); Australia Acts (Request) Bill (Qld, SA & Tas).

[103] allegedly pursuant to s 15(3).

[104] pursuant to the literal wording of s 15(3). Rose, above n 38, paras 16-29; Lindell and Rose, above n 55, 155; cf Gageler & Leeming, above n 10, 149; cf Submission by the Government of New South Wales to the Republic Advisory Committee, 14 July 1993.

However, undoubtedly the evidence points to the more conservative conclusion that, to overcome any one or more of the obstacles discussed in this essay, Victoria would have to:

(1) amend the *Constitution Act 1975* (Vic) by an absolute Parliamentary majority; and

(2) seek to have the enacting clauses of the *Australian Constitution* amended, either by:

(a) direct alteration pursuant to a national referendum;

(b) alteration by the Commonwealth Parliament pursuant to a referendum conferring a specific power to do so; or

(c) alteration by an Act of the Commonwealth Parliament with the "request and consent" of all the States.

I have argued that direct alteration of the Constitution is the safest option. In any case, it is clear that the Victorian Parliament cannot act unilaterally to sever its links with the Crown but must obtain the assistance of at least the lower House of the Commonwealth Parliament (ie the incumbent government) and most probably the consent of a majority of electors in a majority of States. Victoria is thus best advised to eschew unilateral republicanism and to await Australia's second bite at the constitutional cherry some time in the future.