Chapter Ten

Sovereignty in the Australian Federation

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Delivering its judgment in 1920 in the apparently-notorious *Engineers' Case*, the High Court made the following statement:

> "For the proper construction of the Australian Constitution, it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and … radically distinguish it from the American Constitution…. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government".

Drawing support from the preamble to the *Commonwealth of Australia Constitution Act*, the Court went on to identify the doctrine of the unity and indivisibility of the Crown, in its sovereignty throughout the King's dominions, as a living principle of Australian constitutional law:

> "Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality. The Act establishing the Federal Constitution of Australia [was] passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia…",

powers which it went on to characterise as the *sovereign functions of the Crown.*

Seventy-two years later, the Mason Court, delivering its judgment in the *Capital Television Case*, felt able to say:

> "The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament in the exercise of its legal sovereignty…. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government in which the elected representatives exercise sovereign power on behalf of the Australian people".

The Court pointed to the referendum procedure in s. 128 as the source of popular power over the Constitution, and characterised the *Australia Act* as having *marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.*

The first statement is admirably simple, perhaps because it speaks to us from a simpler time. Sovereignty belongs to the King; it consists of the sum of legislative, executive and judicial powers and is exercised by the King or his agents throughout His Majesty's dominions. By contrast, the second statement is rather diffuse. It says nothing of the Crown; instead, it speaks of sovereignty as something that used to belong to the Imperial Parliament and which now belongs to the Australian people. Moreover, it appears to consist only in the legislative and executive powers exercisable on their behalf by their elected representatives.

The purpose of this paper is twofold; first, to investigate what happened between these two statements of principle that could so have muddied the waters of legal and political thought in this country as to prompt members of its most august tribunal to find the supreme authority of the State vested in the members of the federal legislature; and, second, to postulate a sounder principle of sovereignty having regard to Australia's status as an independent and federal kingdom.

Since the dissolution of the British Empire and the slow eclipse of the old Imperial sovereignty familiar to the judges of the *Engineer's Case*, a view has gained currency in this country that the federal Constitution has become its fundamental law. This may derive from a tendency, deliberate or otherwise, to compare it with the Constitution of the United States. And the fond contemplation of a great federal charter given to itself

by a people freshly liberated from British imperial tyranny may tempt some of us to try and imbue our own instrument of federation with a similar mystique, to make of it a font of popular sovereignty, and to neglect the warning from 1920 that ours is in reality a radically different system.

First principles

So let us return to some basic rules. First of all, we call the Queen our Sovereign. That means, amongst other things, that she is the source of all legal power in this country. No law is passed, no judgment given, no hideous new development approved, save by Her Majesty's authority. True it is, there is little that Her Majesty can do personally without advisers or witnesses to authenticate her acts, and there is much that over the course of time has been delegated to subordinates; but, with equal certainty, nothing that can be done in the governance of the realm can be done without her consent either in person or by her duly appointed agents.

Second, ever since the settlement of the so-called Glorious Revolution of 1688, the common law of England has recognised what is called the *sovereignty* (or sometimes the *supremacy) of Parliament*—that is, that plenary authority, the power to make and unmake any law whatsoever, reposes in the Queen-in-Parliament. The consequence of this rule of recognition, as generations have been taught at the law schools, is that the British Parliament could pass any law it liked. In a whimsical mood, it might ban smoking on the streets of Paris and exact a fine for it (which it never did); in a fanatical mood, it might pass a bill of attainder to declare a man guilty of high treason and put him to death (which it frequently did). Now, the sovereignty of the Crown and the sovereignty of Parliament is a distinction without a difference because, in law, Parliament is but a council of advisers to the Crown, albeit an indispensable one. It owes its summons, continuance and dissolution to the will of the Crown, and every Bill it passes is in form either a petition or a submission to royal power—*advice and consent*, according to the familiar forms of statutory language. The Crown in Parliament is simply the highest expression of the Crown's sovereign power.

In a unitary state, the concept of the Queen-in-Parliament as the repository of absolute authority is an uncontroversial proposition. In a federation, the matter becomes complicated because it is in the nature of a federation that power is divided between the centre and the regions. In this country, the problem of sovereignty in a federal context, however, could not really have been of any moment under the Empire. So long as the Empire was a unitary State, in the sense that the British Parliament possessed plenary authority to override the laws of any of the Dominions or Colonies, combined with the doctrine of the one and indivisible Crown, the Queen in her Imperial Parliament could rightly be said to exercise complete sovereignty over Australia. In the Colonies, it seems to me, the unity of the Crown was rather an important concept. There was only one King and one sovereignty governing every parcel of British territory, and the evolution of local institutions did not undermine that principle. It merely meant that the people of a colony were subject to two sets of organs, local and imperial, by which the same sovereignty was exercised.

Moreover, the imperial organs which exercised the Crown's sovereignty remained the one supreme and, as it were, authentic, expression of that sovereignty, and the British government and Parliament and the Judicial Committee of the Privy Council respectively retained ultimate executive, legislative and judicial authority over the people of each colony. There was no separate Crown in relation to each colony, only two different channels of authority with one clearly subordinate to the other.

When the people of the Australian colonies framed the federal Constitution, they did not agree to parcel out sovereignty to a new entity called the Commonwealth; they merely agreed that the existing sovereign might exercise aspects (i.e., the federal aspects) of that sovereignty through new organs of government apart from the Imperial and colonial organs of government then existing. Federation may be said to have united one people under one Crown; indeed it is more accurate to say that Federation brought closer union to a people already united under one Crown. It certainly did not erect an additional and separate Crown with an additional and separate sovereignty over them.

Post-Imperial evolution

The unity of the Crown is thus the cardinal principle which formerly bound Australia to the United Kingdom and to the other parts of the Empire in one imperial sovereignty; and, today, it continues to bind the States and the Commonwealth in one national sovereignty. Hand in hand with the dissolution of the Empire went the erosion of this principle as it applied between the Crown in the United Kingdom and the Crown in the self-governing Dominions, such as Australia, so that the Crown in each country ultimately evolved into a separate legal entity linked only in the person of the Monarch. The milestones of this process of evolution are as follows:

- 1926: Resolutions of the Imperial Conference made the Governor-General the personal representative of the King rather than of the British Government, and provided for Dominion Prime Ministers to advise the King directly rather than through the relevant British Secretary of State.
- 1931: The *Statute of Westminster* terminated the power of the British Parliament to legislate for a Dominion without its request and consent, though preserving that right in respect of the Australian States.
- 1968 & 1973: Commonwealth legislation abolished appeals to the Privy Council from the High Court and from any court in matters of federal jurisdiction, though appeals remained from State Supreme Courts in non-federal matters.
- 1986: The *Australia Acts* terminated all residual authority of the United Kingdom in relation to the Australian Commonwealth and its States.

It is an evolution neatly reflected in the changes made from time to time to the Royal Style and Title, as follows:

- Pre-1953: *by the Grace of God, of the United Kingdom of Great Britain and (Northern) Ireland and of the British Dominions Beyond the Seas, Queen, &c.*
- 1953 to 1973: *by the Grace of God, of the United Kingdom, Australia and Our other Realms and Territories, Queen, &c.*
- Post 1973: *by the Grace of God Queen of Australia and of Our other Realms and Territories.*

Realm, of course, is simply French for *kingdom,* and it is entirely accurate to say that, nowadays, the relationship between the United Kingdom and Australia is that of the merely personal union of two separate kingdoms.

No internal separation

By contrast, no such evolution and separation has occurred between the Crown as representing the Commonwealth and the Crown as representing any of the States, and, accordingly, it cannot be correct, in my opinion, to speak of Australia as a so-called heptarchy of seven "Crowns", in the terms once favoured by the *Turnbull Report* on abolition of the monarchy. It is a corollary of that continuing unity, that it is simply wrong to speak of the Queen as in any sense the *Queen of Victoria* or the *Queen of South Australia.* Such a title is not merely superfluous or *infra dig*., it is legally inept. Common sense alone tells us the States are not separate kingdoms.

Like the jettisoning of spent stages in a rocket, the division of the Imperial aspects of the Crown did not disturb the unity of its remaining aspects, Commonwealth and State. So, just as the doctrine once gave legal expression to the political unity that was the Empire, it continues today as the only legal expression of the federal union and of Australian sovereignty. As such, it may rightly be said to represent, in a legal sense, the essence of nationhood in this country.

This point bears careful analysis. It has been suggested by some commentators, and by the *Turnbull Report*, that the separation of Crowns is occasioned and can be identified by a change in the *channel of advice* to the Queen. Thus, it is said that when the Australian Prime Minister became entitled in 1926 to tender advice directly to the Monarch as to the appointment of the Governor-General (rather than through, and with the approval of, the Dominion Secretary), the British and Australian Crowns became distinct. As a corollary of this, it is suggested that when a similar development occurred in relation to the appointment of State Governors, by virtue of s. 7 of the *Australia Acts* 1986, the State and Commonwealth Crowns became, perforce, distinct and must now be regarded in terms of a heptarchy.

This analysis is imprecise and uncompelling as a matter of law, quite apart from the fact that it blithely ignores the political reality that, in 1926, no-one would have dreamt of regarding the Australian and British Crowns as distinct. The *Engineers' Case* itself, which is the High Court's most prominent enunciation of the unity of the Crown, was decided only six years before.

In my view, the most principled basis on which to posit the separation of two Crowns can only be the termination of all legislative, executive and judicial competence of one over the subjects of the other. The Crown of the United Kingdom no longer has any such competence over any of the people of Australia. The people of Australia, however (Territorians aside), continue to be subject to both Commonwealth and State legislative, executive and judicial competence, so the Crown, of which those two competencies, so to speak, are an emanation, remains one. In short, if one is subject to one Crown authority but not to another, the Crowns are separate; if one is subject to the authority of both, the Crowns are one.

We may speak loosely of the *Commonwealth Crown* and the *State Crown* but we mean, in law, the one Crown acting through a particular agency, Commonwealth or State. It is well established of course that the

Crown may deal with or even sue itself in different capacities, with the relevant dealings and suits conducted by the appropriate agent. Indeed, agreements entered into, or litigation instituted, between the Commonwealth and the States is so commonplace that we are inclined to forget that the Crown is really agreeing with itself or sueing itself, and the unity of the Crown becomes somewhat obscure. So, for most purposes, the unity of the Crown does not impress upon the day-to-day operations of government.

I say *for most purposes*; but for some purposes—among which is the sovereignty of the Crown and the attempt to remove the Crown from a Constitution, be it State or federal—the unity of the Crown has, in my opinion, profound implications. In particular, the republican argument that the Crown can be removed from the Commonwealth by the referendum process provided by s. 128 of the federal Constitution, and done, what is more, without affecting the States, is founded on a misconceived view of the nature of sovereignty in Australia. In this context, the distinction has great importance. Following the eclipse of the paramountcy of the Westminster Parliament, there has been a tendency, after the American fashion, to regard the federal Constitution as the paramount law of Australia; and, as a consequence, to regard the people as the ultimate arbiter of the Constitution, and the Crown as merely an emanation or component feature of that Constitution—almost as if the Empire had never existed but that, instead, in 1900 the people of the colonies, by their vote, had created a vacant Australian throne and freely summoned Queen Victoria to ascend it.

Such sentimental anachronism, representing as it does the yearnings of some for a different past, makes good copy but bad law. So let us take a leaf from *Engineers'* and turn an unsentimental eye to the text of the Constitution.

The significance of the Preamble

Since, as I mentioned earlier, the unity of the Crown is the legal expression of the federal union, and as such of Australia as a nation, it is hardly surprising that it should be one of two essential things and, indeed, the first of two essential things, mentioned in the statute which brought about the union. Thus, the Preamble to the *Commonwealth of Australia Constitution Act* 1900 provides:

> *"WHEREAS the people … have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established….".*

Having recited the will of the people as the political desire to create the Commonwealth, the Act stipulates two quite separate things which the new union is to be *under*: A—the sovereignty of the Crown; and B—the new Constitution (as set out in covering clause 9 of the Act). They are the two necessary legal mechanisms to establish the Commonwealth. The sovereignty is the power and the Constitution the manner of its exercise.

Now, Item A, the sovereignty of the Crown, is necessary to the Commonwealth because without the Crown the Commonwealth has no substance. In the contemplation of the law, the Commonwealth *is* the Crown. The "Commonwealth" considered apart from the Crown is only an abstraction. It means no more than the "federal aspects" of sovereign power thought of collectively. The Monarch, on the other hand, is the concrete person in whom all sovereign power, including these conceptually federal aspects, resides.

Item B, a Constitution, is necessary to the Commonwealth in order to enumerate the federal aspects of the Crown's sovereignty, legislative, executive and judicial, and to provide for the organs through which the Crown is to exercise them.

Now, Item B, the Constitution, is comprised in but one clause (cl. 9) of the Imperial statute, and contains within itself (in s. 128) a mechanism for its own amendment through the referendum process. Logically, s. 128 cannot be used to amend anything other than what is contained in covering clause 9 of the Act. It can only be used to amend Item B, the Constitution; it cannot be used to amend Item A, which stands outside the Constitution, any more than it can be used to amend any of the other covering clauses of the Act, i.e., clauses 1 to 8, which, similarly, stand outside the Constitution.

A bar to unilateral federal action

It may be argued against this proposition that the Preamble, being merely a preamble and not a legislative enactment, is no bar to a constitutional amendment impacting on the sovereignty of the Crown; but the riposte to that must be that Item A does not *need* to be enshrined in a legislative enactment to have effect. The full and perfect sovereignty of the Crown over Australia pre-dates Federation and the Constitution; it was not created by, and does not owe its continuance to, the *Constitution Act*. What the Preamble does is to serve as a dictionary to the whole Act and, by clearly distinguishing the sovereignty of the Crown from the provisions

of the federal Constitution, defines something which is at once separate from the Constitution and beyond the reach of s. 128.

In my opinion, the legal process of statutory interpretation by which this conclusion is reached is as compelling as it is common-sense:

(a) Parliament does not legislate in vain—i.e., when specific words are used they are there for a reason.

(b) "Crown" is mentioned separately from "Constitution" because the two are different things. If they were not—i.e., if the Crown were merely a part of the federal Constitution—there would be no need to make separate mention of it.

(c) What, then, is the distinction between Crown and Constitution? It is, quite simply, the difference between the repository of sovereign power and the rule-book for its exercise. The Commonwealth is *under* both of them, but neither of them is in any sense *under* the other. Thus, the Crown is bound to comply with the Constitution in the exercise of its power, whilst the Constitution can *only* ever provide for the exercise of a power vested in the Crown.

I have said that s. 128 cannot be used to amend anything in the Act other than Item B. It goes without saying that it cannot be used to introduce into Item B anything inconsistent with Item A. By definition, as I have said (contained in this dictionary Preamble), the Constitution is a document enumerating powers which are elsewhere stated to belong to the Crown. Amendments may amplify or restrict the powers, but they cannot withdraw them from the person to whom they belong. That might be true if the sovereign powers of the Crown were creatures of the Constitution, but they are not.

In this regard, special mention should be made of ss. 1, 61 and 71 of the Constitution, which "vest" the pre-existing sovereign powers of the Crown of a "federal nature"—legislative, executive and judicial—in the Parliament, in the Queen and in the High Court and other federal courts, respectively. Cannot these sections—or, indeed, only ss. 1 and 61 (since, although the courts are Her Majesty's Courts, no express mention of the Queen's function in relation to them is made in s. 71)—be amended pursuant to s. 128 to remove references to the Queen? Do these sections not create the powers of the Crown? Do they not "clothe" the Queen with authority which can as easily be removed by an appropriate amendment?

The answer is, in my opinion, that these sections do not create the sovereign powers of the Crown. Again, they merely provide for the manner of their exercise. This is most clearly demonstrable in s. 61, which states that the executive power of the Commonwealth *is vested* in the Queen. It is declaratory of a pre-existing state of affairs. The Queen would still have had the executive power if s. 61 had not been enacted. The distinction, in this regard, between the language of s. 61 (*is vested*) and the language of ss. 1 and 71: (*shall be vested*) merely reflects the fact that the Crown's legislative and judicial powers must, according to the common law, be exercised through institutions (Parliament and Courts) which, on the enactment of the Constitution, were yet to be brought into existence. Nevertheless, those powers, too, existed already. Prior to the summons of the first federal Parliament, some federal legislative powers were exercised by existing State Parliaments, and federal jurisdiction, in the three years prior to the creation of the High Court, by the State Supreme Courts. By contrast, for the exercise of executive power, the common law asks only the presence of a witness, and if nothing had been said about it in the Constitution, nothing more need technically have been done for the authentic exercise of federal executive power than that the Queen have a Great Seal struck and delivered into someone's possession, so creating the requisite responsible Minister and an Executive Council of one.

A bar to unilateral State action

Support for the proposition that the sovereignty of the Crown cannot be altered by merely altering the federal Constitution is to be gained from a rigorous analysis of the consequences of the opposing view. If I am wrong, and the Preamble is legally ineffective to restrain the use of s. 128 to abolish the sovereignty of the Crown in the Commonwealth, then it follows that the Preamble must likewise be ineffective to prevent a State from abolishing the sovereignty of the Crown in relation to the State; for there is certainly nothing in the body of the *Commonwealth of Australia Constitution Act* or in any other legislation which would prevent a State from so doing.

The unilateral abolition by the act of a State Parliament of the monarchy's functions in respect of the State, if not restrained by the legal doctrine expressed in the Preamble, by which the *entire* constitutional structure of the country is placed in a very real sense *under the Crown,* is legally restrained by nothing. To be sure, such action could have no effect on the continued functions of the Crown in its federal aspects over the people of the State. So its effect would be, not a secession of the State from the union, but a severance of the

unified sovereignty of the Crown and the creation of a dual sovereignty over the State, exercised jointly by the people of the State (or whatever new sovereign is proposed) and the Crown in right of the Commonwealth—a *condominium,* as it is called, like New Hebrides under Anglo-French rule.

No-one, I dare say, would be prepared to suggest that the Parliament of a State has or ought to have the competence to pass such a law. To put it broadly, one has a "bad feeling" about conceding the right of a single State to abolish the monarchy "off its own bat".

This "bad feeling" will invariably be for one of two reasons, which are critical to a significant aspect of the republican position. Briefly stated, one reason (and, I think, the more compelling) is that the States *alone* cannot abolish the monarchy for the same reason that the Commonwealth *alone* cannot do so—**because unilateral rejection of the Sovereign goes right to the heart of the intended nature of the federal union as being a union under *one* Sovereign. That is what was *intended*, because that is what is recorded as having been *agreed*, and the Preamble is the very place where that agreement is recorded.**

An alternative reason for the "bad feeling", which prompts one to disallow such unilateral power to the States but which does *not* pose a corresponding restriction on the Commonwealth, finds favour with the republic cause. According to this argument, the Commonwealth (by which is meant the federal institutions of the union) can change the Sovereign through amendment to the federal Constitution, but the States, individually, cannot, even in respect of the purely State aspects of sovereignty. This is not because the States are constrained by any express legislative enactment prohibiting their Parliaments from doing so, but rather because the States are *inherently inferior* in status to the Commonwealth. The identity of the Sovereign, so the argument runs, is a matter for the Commonwealth alone, and not in any respect for the States.

'Thin line' mysticism

This argument of inherent superiority finds no warrant, in my opinion, in any provision of the *Commonwealth of Australia Constitution Act.* One manifestation of it is what I have heard described as the *thin red line theory*, according to which red lines emanate from the throne beyond the seas, a thick one to the Commonwealth but only a thin one to each of the States. This is all very picturesque but I, for one, cannot find any justifiable foundation for the supposed inherent superiority of the Commonwealth. Of course, federal law prevails over inconsistent State law, but that is merely an adjustment of the rights of competing agencies of the Crown. One cannot extrapolate from that that the sovereignty of the Crown itself must be the province of one only of those agencies, to be altered by simply amending the Constitution of that agency.

Again, no doubt we are inclined to think of the Commonwealth as an altogether grander idea than the State. The Governor-General has precedence before any Governor. The Governor-General is the representative of the nation abroad. Indeed, nowadays, he is a Head of State and, as such, an international person in a sense in which a Governor can never be. His wife is an "Excellency" in her own right. But these are only matters of custom and manners; they are not the basis of constitutional principle. Things might be different if we had adopted the Canadian model of having Provincial Lieutenant-Governors appointed by the Governor-General, so that one could conceive of sovereign power as having been delegated wholesale by the Queen to the Governor-General, and thence strained and sub-delegated in part to the Lieutenants. But in Australia, the red lines emanate direct from the throne, each as thick as the other; there is no straining process, because the Governor-General does not partake in any measure of the authority conferred on the Governors.

The extreme adherents of the "thin red line" theory adopt the view that if the thick red line from the throne to the Commonwealth is severed, *ex hypothesi* the thin ones to the States snap as well—rather as if the whole structure of the union were suspended from the Crown by seven threads, of which only one was thick enough to support its weight. This translates into the notion canvassed in the *Turnbull Report* that, if the Crown is abolished at the Commonwealth level, it is automatically abolished Australia-wide. In reality, there is no warrant for this idea in law or principle or even theory. It is only a fond conclusion drawn from an asserted, but unsubstantiated, superiority of federal institutions and, perhaps, a conviction that s. 128, as a source of popular sovereignty, is, and should be, capable of achieving anything.

The entrenchment of sovereignty

Those who maintain the insignificance of the Preamble sometimes point to the fact that its reference to the *Crown of the United Kingdom of Great Britain and Ireland* is already obsolete as the result of the process of evolution referred to above. But the argument has never been that the Preamble, or the principle embodied in it, cannot be changed at all. It is only that it cannot be changed *by means of s. 128.* And the fact that it *has*

changed really bears out this view. Thus, whilst there is no doubt that the abovementioned words must now be read as a reference to the *Crown of Australia,* it is equally true that none of the changes involved in that process of evolution were achieved by means of s. 128. The legal process of implicit amendment by which these words in the Preamble must now be read as *Crown of Australia* is the result of the legislative changes by which the evolution was accomplished, and those changes were implemented not by s. 128 but by the undisputed authority of the Imperial Parliament, acting either alone or in concert with local legislatures.

There is no doubt that, since 1986, the authority of the Imperial Parliament in Australian affairs has entirely ceased. That does not mean, however, that we are in any sense doomed to a sovereignty which cannot be lawfully withdrawn from the Crown and vested elsewhere. This brings me to the most notable feature of our constitutional arrangements, and that is the system of entrenchment.

One attribute of legal sovereignty is the inability of a sovereign legislature to bind its successors. Perfect sovereignty is the power to make and unmake any law whatsoever. It is axiomatic that the British Parliament had this power, and that attempts to entrench legislative provisions within the United Kingdom were therefore inevitably fruitless. Not so in the colonies however. The *Colonial Laws Validity Act* 1865 *(Imp.)* prohibited a colonial Parliament from legislating contrary to any Imperial statute extending to the colony. It also allowed, by the so-called *manner and form* requirement, for colonial Parliaments to entrench their own legislation, which has been used in some States, for example, to prohibit the abolition of the Upper House except by referendum.

Now, the *Statute of Westminster* and the *Australia Acts* repealed the *Colonial Laws Validity Act* in its application to the Commonwealth and the States, with two effective exceptions. They preserved the manner and form requirement for the States (*Australia Act*: s. 6) and, more importantly, they provided that (apart from whatever amendments may be made to the federal Constitution from time to time under s. 128) no Parliament in Australia could repeal or amend the Constitution, or the *Constitution Act*, or the continuing provisions of the *Statute of Westminster*, or the *Australia Acts*, except by Commonwealth legislation passed with the consent of the Parliaments of all the States (*Statute of Westminster*: s. 8; *Australia Act*: ss. 2 & 15).

This consequence is of vital importance to the proper understanding of Australian constitutional theory because, in my view, it forms the true fundamental law of this country. The mirror image of the old Imperial Parliament is nowadays to be found in the Parliamentary Concert of the Commonwealth and the States. It is in this combination of legislative will that the authority can be found literally to do anything. By this procedure, the Parliaments in concert could remove the fetters that prevent amendment of any part of the Constitution or the Constitution Act, and do so, what is more, without referendum. Indeed, in theory, they could repeal and replace s. 128 itself without reference to the people.

Politically, such an eventuality might be fancifully remote but, legally, it is possible. To that extent, s. 128 can be viewed in its proper place as an inferior source of constitutional authority to s. 15 of the *Australia Acts*. This, in my opinion, is not a theory to be shrunk from, but one to be embraced, particularly as it precludes the debacle of the 1999 republic proposal with its undemocratic complications and implications for the Crown in the minority States. For reasons which I have given, it is the only lawful method (with or without a referendum) by which to abolish the monarchy in Australia—in other words, to change the identity of the Sovereign authority in the federation.

This argument was more fully treated and endorsed in the 1996 Report of the South Australian Constitutional Advisory Council on proposals for an Australian republic. I had the honour to serve on that Council, which was chaired by Associate Professor Peter Howell, a member of this Society. The report rewards careful study, and I commend it to anyone who wishes to enquire into this field more closely.

This "section 15 legislature" is, in my view, an appropriately supreme and appropriately federal organ in which to recognise the sovereign power of the Crown. In the necessary participation of the States, it neatly reflects the original political compact of the people of the separate colonies, as well as having, to my mind, an irresistibly elegant consonance with our British inheritance of common law constitutional theory. The Queen in Parliament, as the omnicompetent legal sovereign of the United Kingdom and of the old Empire, now has a fitting counterpart in Australia. The Queen in Parliament—that is, the Queen acting with the advice and consent of all of her Australian Parliaments—is the true omnicompetent Sovereign of Australia.