

## The Queen of the Commonwealth of Australia

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### *The Queen*

Will you [Elizabeth] solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, and the Union of South Africa, Pakistan and Ceylon, and of your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?

Elizabeth. I solemnly promise so to do.

Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?

Elizabeth. I will.

Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? . . . [then she also went on to take the oath required by the Bill of Rights, the Act of Settlement and the Act of Union to maintain the Church of England as established within the UK <sup>1</sup>]

Elizabeth. All this I promise to do.

Then [Elizabeth] [rose] out of her Chair, . . . the Sword of State being carried before her, [went] to the Altar, and [made] her solemn Oath in the sight of all the people to observe the premisses: laying her right hand upon the Holy Gospel in the Great Bible, . . . (which was . . . tendered to her as she [knelt] upon the steps), [and said] these words:

The things which I have here before promised, I will perform, and keep. So help me God.

Then [Elizabeth] [kissed] the Book, and [signed] the Oath.<sup>2</sup>

This is Elizabeth's oath of governance to the Australian peoples, which was witnessed by Robert Menzies<sup>3</sup>, elected Prime Minister of Australia, at Her coronation on 2 June

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1953; he, together with many other Australians, had also participated in the Recognition of Elizabeth as Queen<sup>4</sup>, when the Archbishop of Canterbury asked four times, presenting Elizabeth four times to the peoples

I here present unto you Queen Elizabeth, your undoubted Queen; Wherefore all you who are come this day to do your homage and service, Are you willing to do the same?

And four times the peoples agreed, shouting four times ‘God save Queen Elizabeth’<sup>5</sup>.

Elizabeth’s oath of governance had been discussed via cables between the governments of Australia and the United Kingdom<sup>6</sup> (though the Australian people had not been consulted, and to this day remain in ignorance of the words and meaning of The Queen’s oath of governance).

### ***The Australian Parliament***

*I, Edmund Barton, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria Her Heirs and Successors according to Law. So help me, God.*

Edmund Barton, Australia’s first and only appointed Prime Minister, swore this Oath of Allegiance<sup>7</sup> before the Governor-General of the Commonwealth of Australia, Lord Hopetoun, on 1 January 1901.

This Queen, to whom Barton, and Hopetoun before him, had sworn allegiance, is one of three constituent parts of the Parliament of the Commonwealth of Australia.

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called “The Parliament,” or “The Parliament of the Commonwealth”.<sup>8</sup>

This is the legal definition of the Australian Parliament. It replicates the Westminster legal understanding of the United Kingdom Parliament as being the Queen, the House of Lords and the House of Commons.<sup>9</sup>

From 1901 until 1990, each exercise of the legislative power by the Australian Parliament stated the authority for such exercise thus: ‘Be it enacted by the Queen, the Senate and the House of Representatives that . . .’<sup>10</sup>. As a result, however, of agitation by former Labor Prime Minister E G Whitlam, the Hawke Labor Government in 1990<sup>11</sup> approved a new enabling formula for Commonwealth enactments: ‘The Parliament of Australia enacts . . .’<sup>12</sup> The vast majority of Australians were unaware of this change, as indeed were the vast majority of Australia’s lawyers. It is almost as if, by using this terminology, the Houses of the Australian Parliament are attempting to obscure or to deny the existence of the Queen — for to the vast majority of Australians, the word ‘parliament’ means only the *Houses* of parliament: The Queen is conveniently overlooked.

Much of the recent Australian debate on Australia’s becoming a republic has focussed on two allegations. The first is that Queen Elizabeth, Australia’s head of state, is in fact Queen of the United Kingdom and acts on the advice of Her UK ministers and for the benefit of Her peoples in the United Kingdom, and therefore by implication does not act on the advice of Her Australian ministers, or for the benefit of Her Australian peoples.

The second is that She<sup>13</sup> is not ‘an Australian’ and is a ‘foreign Queen’, and for that reason Australia should become a republic with an ‘Australian’ head of state. The inference that is invited is that Elizabeth is in reality no Queen of Australia, and that any attempt to suggest that She is amounts in reality to mere window dressing or, more seriously, to deliberate delusion of the Australian peoples. But the logical conclusion to be drawn is that such proselytisers continue to deny any Australian independence or any significance in the Australian monarchy and realm.

### *The Queen’s Regnant of Australia 1901–2001*

#### Victoria and Elizabeth — accession and oath

In 1837, Victoria succeeded as Queen of the United Kingdom of Great Britain and Ireland and its possessions at the age of 18. She was the only woman in all the English-speaking world to have any semblance of political power.

She made her Declaration of Sovereignty to the Accession Council at 11.30 a.m., 20 June 1837, the day William IV died<sup>14</sup>. She was proclaimed by it to be Queen that same day. At her coronation on 28 June 1837, the Archbishop asked the people gathered in Westminster Abbey four times whether they were willing to do homage to Victoria as Queen, and four times the people said that they would. After this Recognition, Victoria then took her oath of governance to ‘. . . govern the People of this United Kingdom of Great Britain and Ireland, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective Laws and Customs of the same.’<sup>15</sup>

On 8 February 1952, the Australian High Commissioner to the United Kingdom was present when the Princess Elizabeth made her Declaration of Sovereignty to the Accession Council :

. . . I shall always work . . . to uphold the constitutional Government and to advance the happiness of My Peoples, spread as they are the world over. . . .  
I shall be inspired by the loyalty and affection of those whose Queen I have been called to be, and by the counsel of their elected Parliaments.<sup>16</sup>

He, together with other members of the Accession Council, then promulgated in the name of the peoples over whom She was to reign, the Accession Proclamation, which did ‘with one Voice and Consent of Tongue and Heart publish and proclaim, that the . . . Princess Elizabeth . . . is now become Queen Elizabeth II by the Grace of God, Queen of this [the UK] Realm, and of Her other Realms and Territories . . . , to whom Her Lieges do acknowledge all Faith and constant Obedience . . . .’<sup>17</sup>

Robert Menzies, as shown earlier<sup>18</sup>, gave all allegiance and recognition on behalf of the Australian peoples whom he represented to Elizabeth.

These are ancient ceremonies.

But they are also ancient common law requirements for the making of a monarch.<sup>19</sup> They involve three steps: first, acceptance of the putative monarch by the representatives of the peoples over whom she is to be monarch (here the Accession Council), the proclamation by the Council of that acceptance (the Accession Proclamation), and the later ratification of this choice by a larger group of representatives of the peoples at large at the coronation (the Recognition of the putative monarch); the binding of the

monarch to the people by the taking of the oath of governance; and finally the consecration of the monarch in a religious ceremony.

It is the mutual recognition and binding of the Australian peoples (through their elected representatives and other Australians present) and the monarch which gave common law authority to Elizabeth to be Queen of the Commonwealth of Australia, and which also acknowledged Her to be the heir and successor of the Australian Crown under Australia law and the Constitution.

That Elizabeth was Queen of the Commonwealth was belatedly acknowledged by the Australian Senate and House of Representatives with the Queen in 1973, when *The Royal Style and Titles Act* (Cth) was enacted.<sup>20</sup>

These matters are of both legal and political significance, because the executive power of 'the Commonwealth', that is, of the peoples of the former colonies of NSW, Victoria, South Australia, Queensland, Tasmania, and Western Australia,<sup>21</sup> ***is vested in the Queen and is exercisable*** by the Governor-General as the Queen's representative, ***and extends to*** the execution and maintenance of this Constitution and of the laws of the Commonwealth,<sup>22</sup> and because The Queen is legally one of the constituent parts of the Australian Parliament. As opposed to s. 61 of the Constitution which uses the present tense: '... the executive power of the Commonwealth *is vested in the Queen* ...', conferral of the legislative and judicial powers of 'the Commonwealth'<sup>23</sup> is stated in the future tense — to certain bodies which *shall be* established in the future.<sup>24</sup>

Vitaly, then, the power of The Queen under the Constitution both predates, and is simultaneously co-existent with, the creation of the Commonwealth of Australia, (since it is by virtue of The Queen's Proclamation and Her satisfaction as to the agreement of the people of Western Australia that the Commonwealth came into existence); that it predates the existence of the Commonwealth Constitution (as the Constitution could not exist until there was a Commonwealth for which it was to be the Constitution); and that it continued to exist immediately after the Commonwealth came into existence and also under the Constitution.

No oath at law is meaningless; and the oath of a monarch is one of supreme importance. Alleged breach of the king's oath has led to deposition,<sup>25</sup> murder,<sup>26</sup> civil war,<sup>27</sup> revolution,<sup>28</sup> invasion,<sup>29</sup> a hard fought legal case,<sup>30</sup> and the execution of a king.<sup>31</sup> The oath of Elizabeth of Australia deserves much greater public scrutiny.

### ***The people, parliamentarians and the succession***

Many attempts had been made both by monarchs and parliamentarians to confine the succession of the kingship to certain categories of persons<sup>32</sup>. The most successful such attempts at limitation were in the English *Bill of Rights*<sup>33</sup> (which the English protestant revolutionaries compelled William of Orange and Mary to accept as a condition precedent to their kingship); and the English *Act of Settlement* of 1701<sup>34, 35</sup>.

Some have suggested that these two English enactments, by attempting to prescribe in perpetuity limitations on the sorts of persons who could become monarch of England, meant that it was and is the [English] 'parliament' which determined the succession to the English and, later, the UK and the Australian thrones. (The Scots did not accept the English *Act of Settlement*, and they had in fact enacted with the Queen their own

legislation<sup>36</sup> requiring that the Scots Estates select their own successor to Anne, and that whoever it was, that it *not* be the monarch of England, and that she take the Scots' oath and endorse the Scots *Claim of Right* of 1689.)<sup>37</sup>

Such a suggestion is untenable, not only because history has demonstrated the folly of any such assertion,<sup>38</sup> and not only because it flies in the face of any doctrine of parliamentary sovereignty;<sup>39</sup> and not only because the monarch or putative monarch whose successors the parliament is attempting to entrench is a necessary and constituent part of Parliament, thus giving rise to allegations of *ultra vires* of any such purported legislation through bad faith.<sup>40</sup> It is untenable primarily because it overlooks the role of the people in selecting the monarch.

That the people had such a role had been recognised by the English revolutionaries themselves. The *Regency Act* (England) enacted in 1706,<sup>41</sup> provided for the making of a Proclamation with regard to the next protestant successor 'in such manner and form as the preceding Kings and Queens respectively have been usually proclaimed',<sup>42</sup> It did not override or replace the common law 'election' and Proclamation of the king and the King's Peace by the Accession Council, nor the subsequent Recognition or otherwise of that person by the people. It specifically applied the existing common law situation with regard to the Accession Proclamation to the next and immediate *protestant* succession as set out in the Act. After some torrid negotiation with the Scots (who, it will be recalled, had held out against any acceptance of the English *Act of Settlement*) they were persuaded by the English to accept that succession to the Scots throne, and treaties were entered into which resulted in the 1707 *Act of Union* of the kingdoms of England and Scotland. The English *Regency Act* was then substantially re-enacted as the *Succession to the Crown Act* [GB] of 1707.<sup>43</sup>

Finally, the English *Act of Settlement* of 1701 required that any person who was to be monarch of England must take the English coronation oath set out in the *Coronation Oath Act* 1689<sup>44</sup>; the Scots *Claim of Right* of 1689 required that any person who was to be monarch of Scotland must take the Scots coronation oath.<sup>45</sup> And the 1707 *Act of Union* required the monarch of Great Britain to take oaths to maintain each of the Scots and English religions,<sup>46</sup> but was silent as to the coronation oaths to be taken by the monarch of the kingdoms.

At the foundation of the monarchy, then, are these common law procedures, more ancient than any legislation, and still operative to this day. All that the *Bill of Rights* and the *Act of Settlement* did was to attempt to limit the applicability of the common law procedures for making a monarch in the kingdoms of England and Scotland to certain types of protestant people who must take a most discriminatory kind of oath.

One final observation needs to be made. As a result of these common law procedures (so long as the Australian peoples acquiesce in them) — the giving of obedience to the monarch by the peoples over whom she is to govern, and the monarch's binding to the people through the oath, and the subsequent anointing in a religious ceremony — she who had been a subject of the previous monarch is a subject no longer.<sup>47</sup> She has adopted a unique *persona* through these legal procedures. She is no longer a citizen or subject of any country, nor indeed has she any nationality at all.<sup>48</sup> She has become Queen, Sovereign, of the peoples who have recognised her and given her obedience, and to whom she has sworn the oath of governance.<sup>49</sup> The Monarch carries no passport,<sup>50</sup> as she is neither a citizen nor a subject, as it is in her name and sovereign

authority that safe passage and protection for her people is pleaded in and through foreign sovereign States.<sup>51</sup> She is the apex of governance of each particular people to whom and for whom she has taken the oath of governance.

There are corollaries to these propositions of relevance for Australia. But, most importantly, the people need to be informed of these legal processes involving themselves and their Queen, rather than leaving them to be decided in secret by passing parliamentarians.

### *Victoria and the colonies*

When Victoria took her oath of governance, the Australian colonies fell within the category of territories 'belonging to' the United Kingdom; the Queen through her Governors held the executive power, and the governance of the colonies was achieved through a mixture of applications of UK statutes as in force in England applicable to the colony, colonial statutes, and colonial common law. The situation changed radically during Victoria's reign, until it could be said that under the colonial constitutions which came into operation after 1850, Victoria, head of each of the Australian colonial legislatures, was the Queen of that colony, as well as being Queen of the United Kingdom.<sup>52</sup>

After an unsuccessful experiment in quasi-federation<sup>53</sup> and years of discussion, certain men representing the Australasian colonial peoples at Conventions in the 1890s approved on 16 March 1898 a 'Federal Constitution under the Crown'<sup>54</sup>, to 'constitute the Commonwealth of Australia'.<sup>55</sup> Thirteen months later, the (male white<sup>56</sup>) peoples themselves pledged, through a series of referendums,<sup>57</sup> to unite into a federal Commonwealth of Australia.

Because the people of the former colonies 'humbly relying on the blessing of Almighty God, [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 . . .', ' . . . the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present [British] Parliament assembled, and by the authority of the same,'<sup>58</sup> enacted 'an Act to Constitute the Commonwealth of Australia'.<sup>59</sup> On 9 July 1900, Victoria, Queen of the United Kingdom of Great Britain and Ireland, gave Royal Assent to the Act.

That Act provided that the Commonwealth of Australia should be established on a date to be appointed by Proclamation by the Queen.<sup>60</sup>

Accordingly, on 17 September 1900, Queen Victoria issued a Proclamation declaring that the former aforementioned colonies 'shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia' on and after the first day of January 1901.<sup>61</sup>

Thus the Commonwealth of Australia was established under an Act enacted by the Parliament of Great Britain, (consisting of the Queen, the House of Lords and the House of Commons), by virtue of its section 3 and the proclamation authorised thereby.<sup>62</sup>

It should be noted that the Commonwealth of Australia was established by virtue of Queen Victoria's Proclamation<sup>63</sup> and that the Constitution of the Commonwealth was dependent upon, and consequential to, that establishment.<sup>64</sup>

### *The Queen forms the Commonwealth*

Now what is the legal effect of these provisions and actions?

The Commonwealth Bill clearly could only refer to Victoria as Queen of the United Kingdom and Ireland, as, so far as the Australian colonists were concerned, at the time of formulation of the Bill, this was her formal and legal status, though through their Constitutions, approved by the Queen and the UK Houses of Parliament, they had asserted that she was independently head of their legislatures.<sup>65</sup> But the colonies were at that time still 'colonies' for the purposes of the *Colonial Laws Validity Act 1865*,<sup>66</sup> and were not independent sovereign states or nations, but rather possessions of the United Kingdom.

Once the United Kingdom Parliament, that is, the Queen, and the Houses of the Lords and Commons, had all agreed to the *Commonwealth of Australia Constitution Bill*, it became law. But at that time the Commonwealth of Australia still did not exist. Its existence was dependant upon a Proclamation of the Queen. It was for the Queen to be satisfied that not only those peoples of the colonies who had accepted the Bill wanted to unite into a new entity, but that the people of Western Australia also wished so to unite.

Any Proclamation, whether enabled by the houses of the legislature and the monarch together, or made by motion of the monarch herself, is an exercise of Royal power, of the prerogative.<sup>67</sup> Victoria's proclamation had been enabled both by her subjects in Britain through their representation in the British Houses, and by her subjects in Australia, through their representative endorsement both at referendum and in her colonial enactments with her colonial houses of parliament.

The effect of the Proclamation was to create a new entity, with its own totality of executive power residing in Victoria, and exercisable by the Governor-General of Australia, for whose appointment in advance of the actual establishment of the Commonwealth the UK Act had provided in section 3. By an exercise of their collective wills, the subjects of Victoria in the Australian colonies and in the United Kingdom of Great Britain and Ireland, through their respective parliaments — the one representing the Australian part of Victoria's subjects, and the one representing all the subjects of the Kingdom and its possession — had agreed on a partitioning of the flow of their respective allegiance to the Queen.

No longer were the Queen's Australian subjects subject to her as Queen of the United Kingdom through the medium of the United Kingdom Parliament, where they had no voice and were not represented. Now they were subject to her in her capacity as the apex of their constitutional being. She did not cease to be Queen of the United Kingdom, just as James VI earlier had not ceased to be King of Scots. She still held the 'Crown of Great Britain and Ireland' — but she was now about to become Queen of the new Commonwealth of Australia *as well*, just as James VI had before her become King James of the English. There was no diminution of allegiance. There was no diminution of the Queen's oath. But by virtue of the respective Acts of Parliament and the Queen's proclamation, there was a change in the law. Australians were no longer people 'belonging to' the kingdom of Great Britain. The people of the United Kingdom recognised that Australia was no longer a 'possession' of the United Kingdom. Australians belonged to themselves and to their Queen.

Consequently, Victoria's oath taken in 1837 when she had sworn to govern them according to the statutes of both the United Kingdom as applicable, and those of the colonies, and the colonies' laws and customs, underwent a fundamental shift. According to laws of both the United Kingdom, and of the peoples of the Australian colonies, there was about to be formed a new governance — the Commonwealth of Australia headed by the Australian Queen.

### *Australian royal power*

As soon as Victoria made the Proclamation, the Commonwealth was waiting to be born. It is here that the continuance of royal power as recognised by s. 61 of the Constitution becomes important. The Queen had decreed that the Commonwealth would come into being on 1 January 1901. The Australian Parliament did not exist, but the Queen's power was such, because of her binding to the Australian people and theirs to her, that she could exercise her power on their behalf before the birth of the Commonwealth. This she did, by setting in train measures for the appointment of a Governor-General pursuant to her prerogative, and as was enabled by s. 3 of the UK Commonwealth Constitution Act 1900.

That the seventh Earl of Hopetoun would be appointed Governor-General was announced on 14 July 1900; Australian officials noted that this was in advance of the Queen's Proclamation, and would seem to have been 'a breach of the spirit' of s. 3.<sup>68</sup> But Edmund Barton, leader of the Australian delegation in London at that time, had urged that the appointment be made as soon as possible after the Proclamation,<sup>69</sup> and in fact this is what occurred. Victoria established the Office of Governor-General and Commander in Chief of Her Commonwealth of Australia by Letters Patent on 29 October 1900,<sup>70</sup> and commissioned Lord Hopetoun to the office the same day.<sup>71</sup> Again on that day, Victoria issued the Royal Instructions<sup>72</sup> to the new Governor-General.

These actions were very significant because they enabled the Australian Commonwealth to be governed according to law as soon as it came into existence at one nano-second after midnight on 31 December 1900.

Victoria was 81 when she signed the documents, but was fully alert to all circumstances and would continue to keep her journal until four days before her death after a short illness on 22 January 1901.<sup>73</sup> The Letters Patent established the Office of Governor-General of the Commonwealth in perpetuity, to avoid any disruption which may be caused by the demise of the Crown — that is Victoria's death.<sup>74</sup> The issue of these documents under the prerogative (which of course was also enabled by s. 3 of the UK Commonwealth of Australia Act 1900 and, anticipated by s. 2 of the Australian Constitution) ensured that the royal power necessary for the functioning of the Australian parliament (and indeed the Commonwealth as constituted) would continue, at least until the Australians had agreed to the succession of a new Monarch, which in turn would see the continuance of the royal power.

### *The first Australian government*

When Lord Hopetoun arrived in Australia, his first duty was to arrange to commission a government which could operate from 1 January 1901. It must be emphasised that this

first Commonwealth government was *not elected*. It was formed by the Governor-General using the prerogative powers of the Queen. Initially, Hopetoun, on advice from George Reid, attempted to commission Sir William Lyne, Premier of New South Wales (the oldest colony), to form a government. Lyne had been perceived as an anti-federalist, and his appointment was opposed by Edmund Barton's supporters, including Alfred Deakin who called this action by Hopetoun the 'Hopetoun blunder'. When Lyne told Hopetoun that he was unable to form a government (due in part to the reluctance of Barton's supporters, and the parleying of Sir Samuel Griffith whom Lyne had asked to be Attorney-General), Hopetoun then invited Barton to form a government<sup>75</sup>.

On 1 January 1901 in Centennial Park, Sydney, E G Blackmore<sup>76</sup> read, as was required by the Royal Instructions, the Proclamation of 17 September 1900, the Letters Patent establishing the Office of Governor-General, and Hopetoun's Commission.<sup>77</sup> Then Lord Hopetoun was sworn as 'the first Governor-General of the newest born of nations.'<sup>78</sup> He took the Oath of Allegiance,<sup>79</sup> the Official Oath of the Governor-General,<sup>80</sup> and the Judicial Oath,<sup>81</sup> before the Lieutenant-Governor of New South Wales, and in the presence of representatives of the governments of all the States.<sup>82</sup> Blackmore then read a Proclamation by the Governor-General declaring that he had assumed office which was published later that day.<sup>83</sup>

Hopetoun commissioned Barton as Prime Minister in the Queen's name, pursuant to Clause III of the Letters Patent<sup>84</sup>, and to s. 62 of the Australian Constitution<sup>85</sup>:

To Our Right Trusty and Well-beloved Councillor,

Edmund Barton, —

We, confiding in your loyalty, integrity, and ability, are pleased to nominate and appoint you the said Edmund Barton, to be a Member of Our Executive Council of Our Commonwealth of Australia, to hold the place of such Member of Our said Executive Council during Our Royal Pleasure.

In Witness Whereof, Our Right Trusty and Right Well-beloved Cousin and Councillor John Adrian Louis, Earl of Hopetoun [and here his titles are rehearsed] Our Governor-General and Commander in Chief of Our Commonwealth, hath, by virtue of Our Commission and Authority to him in that behalf, caused this Instrument to be sealed with the Great Seal of Our said Commonwealth, at Government House, Sydney, in the State of New South Wales, and in the Commonwealth of Australia aforesaid, this first day of January, in the year of Our Lord one thousand nine hundred and one.

Signed Hopetoun [for the Queen]<sup>86</sup>

Hopetoun then heard Barton and the other members of the Executive Council take the Oath of Allegiance<sup>87</sup> and the Executive Councillor's Oath. The Executive Councillor's Oath states:

I, Edmund Barton, being chosen and admitted of Her Majesty's Executive Council in the Commonwealth of Australia, do swear that I will to the best of my judgment at all times when thereto required freely give my counsel and advice to the Governor-General of the Commonwealth of Australia for the time being for the good management of the public affairs of the Commonwealth of Australia; that I will not directly or indirectly reveal such matters as shall be debated in Council and committed to my secrecy, but that I will in all things be a true and faithful Councillor.

So help me, God.<sup>88</sup>

The Executive Council met with Lord Hopetoun as Government House, Sydney, at 4.30 p.m. on 1 January 1901. On the advice of the Council, the Governor-General created seven departments of State, pursuant to ss. 63 and 64 of the Constitution. He then appointed the following Ministers of State in the Queen's name, pursuant to s. 64 of the Constitution and Clause III of the Letters Patent:

Prime Minister and Minister for External Affairs	E Barton	NSW
Attorney-General	A Deakin	Vic.
Treasurer	G Turner	Vic.
Minster for Home Affairs	W J Lyne	NSW
Minister for Trade and Customs	C C Kingston	SA
Minister for Defence	J R Dickson	Qld.
Postmaster-General	J Forrest	WA
Without Portfolio	R E O'Connor	NSW
Without Portfolio	N E Lewis	Tas.

Letters Patent for each Minister to administer a specified department of State were issued by Hopetoun on 1 January 1901, the only difference in them being that that for Edmund Barton, as Prime Minister (a courtesy title, as no department of State of that name was created), has inserted the word 'Right' before the words 'Trusty and Well-beloved Councillor'.<sup>89</sup> Each Minister then took the Official Oath of Office<sup>90</sup>.

All the oaths taken by the new Governor-General and Executive Councillors swore allegiance and duty to 'Victoria'; all the instruments issued by Victoria, or in her name, were with regard to 'Our Commonwealth of Australia'. None of the oaths were sworn to Victoria, Queen of the United Kingdom etc. None of the instruments referred to Victoria's colony of the Commonwealth. The Commonwealth was Victoria's and she was Queen of the Commonwealth. And all oaths taken on 1 January 1901 were recorded as being sworn and witnessed in 'the State of New South Wales', not the 'colony' of New South Wales. Where an oath, like, for example, the Oath of Allegiance, requires the person to swear allegiance to 'Victoria, Her Heirs and Successors according to Law', what did this mean?

As outlined earlier, it is the common law that provides for the establishment of the kingship and the empowering of the king with his prerogatives after recognition by the people over whom he is to be king and to whom he has taken the oath of governance. It was argued earlier that by exercise of royal power with the concurrence not only of the Australian peoples but also of the United Kingdom peoples through their representatives in the Parliaments, a shift in allegiance, responsibility and governance had occurred. The peoples of Australia were no longer a possession of the UK; they no longer owed allegiance to the monarch of the UK. They were a new nation with their own Queen who held the executive power of the Commonwealth. Therefore, Victoria's heirs and successors in Australia were to be those in the sovereignty of a united Commonwealth of Australia, according to both common law and statute law of both the United Kingdom and any new law the Commonwealth may care to make. Moreover, Victoria's heirs and successors in the 'sovereignty of the United Kingdom' were to be bound to recognise and to accept by virtue of section 2 of the UK Act that this new *additional* Commonwealth sovereignty was theirs.<sup>91</sup>

Thus, on and from 1 January 1901, there existed a mutual divestment of sovereignty between the Parliament of the UK, and the Parliament of Australia. The former had, by virtue of its own Act, recognised a new Parliament of the Commonwealth Senate, House of Representatives and the Queen, and also recognised that *Victoria* [not the UK parliament] held the executive power of the new Commonwealth. This amounted to recognition of a secession of parts of Victoria's peoples into a new entity, and recognition of a new sovereignty. Effectively the UK parliament had disenabled itself from making any law for the new Commonwealth in whose birth it had been instrumental. The Commonwealth Constitution Act 1900 bound all future monarchs of the United Kingdom (and thus the UK parliament of which the British Queen is part) in recognition of the new Commonwealth entity by virtue of s. 2 of that Act which bound all Victoria's successors 'in the sovereignty of the United Kingdom'. Victoria's successors in the sovereignty of the Commonwealth would clearly be bound by any Commonwealth Act to which they had assented. Thus, so far as Australia is concerned, Victoria's heirs and successors were those according to Australian law, and whom the Australians recognised and accepted as their monarch.

### *The States' colonial mindset*

Conspicuously absent from the inauguration ceremony had been any other representative of the Queen in the former colonies. The governors of South Australia and Queensland did not attend; the Lieutenant Governors of NSW, Tasmania and Western Australia attended, but the Lieutenant Governor of Victoria did not. This was a display of State jealousy and pique initiated by Lord Tennyson, South Australia's Governor (later himself to be Governor-General). He wired Chamberlain in the Colonial Office: 'It is felt that politically it would be a mistake for Governors to attend arrival or swearing in of Governor-General at Sydney . . . The States would resent any appearance of subordination of Governors of States to the Governor-General.'<sup>92</sup>

One augury of this state of affairs had been seen in 1891. The 1891 Draft Commonwealth Constitution contained a clause [Chapter V. — The States, Clause 5]<sup>93</sup> which said that 'All reference or communication required by the constitution of a state or otherwise to be made by the governor of the state to the Queen shall be made through the Governor-General, as Her Majesty's representative in the commonwealth, and the Queen's pleasure shall be made known through him.' A torrid debate at the 1891 Convention revealed the inherently backward-looking colonial mind-set of many which was to be perpetuated in the on-going concept of states' rights. Some said such an idea was 'irritating',<sup>94</sup> would deprive the colonies of constitutional and self-governing rights,<sup>95</sup> would impair the provinces' sense of independence and inspire distrust and jealousy and, in any event, 'it is not proposed to have a unified government',<sup>96</sup> would result in a 'loss of prestige',<sup>97</sup> for colonial governors would be 'lowered in public estimation' and might stop 'men of high attainment to come out' to be governor,<sup>98</sup> colonial governors should not be 'denuded of all power' and 'cut off from the mother country',<sup>99</sup> that it was a 'most mischievous' provision.<sup>100</sup>

On the other hand, Sir Samuel Griffith said:

[What is maintained ] is that after the establishment of the commonwealth, the governments of the different states should be in direct communication with the Queen's government in London, each pulling in different directions, as

they have done before. . . . I have always maintained that one of the principal reasons for establishing a federation in Australia was because the governments were always pulling in different directions. Australia speaks with seven voices instead of one.<sup>101</sup>

I have always maintained that ministers in Australia are to be the Queen's ministers for the commonwealth, and any communication affecting any part of the commonwealth which has to be made to or by the Queen, should be made with their knowledge. Without that, we shall not have the voice of one commonwealth in Australia. . . . I think the idea is that there is to be but one government for Australia, and that we shall have nothing more to do with the Imperial Government except the link of the Crown. . . . [The former colonies' agents general] will no longer be diplomatic agents. I maintain that Australia is to have only one diplomatic existence, and, therefore, only one diplomatic head, and one diplomatic mouthpiece in any other part of the world<sup>102</sup>

Mr Baker, a self-confessed advocate of 'state rights' strongly supported the clause :

For it seems to me that one of the very fundamental ideas of a federation is that, so far as all outside nations are concerned, the federation shall be one nation; that we shall be Australia to the outside world, in which expression I include Great Britain; . . . that . . . we shall not have seven different opinions, but that her Majesty's government in Great Britain shall communicate to Her Majesty's government in Australia through one channel of communication only. . . . [t]o the outside world — to Great Britain — we shall be the Commonwealth of Australia, and not seven separate independent states, acting in seven different manners, even so far as Great Britain is concerned.<sup>103</sup>

Sir Henry Parkes said :

I cannot understand for the very life of me, how we can aspire to be one Australian people under the Crown, and have several different channels of communication with the Crown. We must either be a nation or we must be a chain of unfederated states. . . .

For myself, I say that throughout the proceedings of this Convention I have desired to keep my eyes steadily on the Australian people . . .<sup>104</sup>

Sir John Bray suggested that the clause be 'limited to communications relating to the whole of the commonwealth'<sup>105</sup>. Sir Henry Parkes interjected: "The Commonwealth cannot be separated from the states!"<sup>106</sup>

Sir John Bray riposted: 'It is separated from them.' And went on to say how 'at the present time' 'we allow each state to make its own laws without any interference on the part of the commonwealth . . .'<sup>107</sup>

Alfred Deakin said :

. . . If [there were to be just the one means of communication through the Governor-General] that is not to be the case, what will be the commonwealth? It will not even be a bundle of sticks; it will not even be tied together; on the contrary, each state will stand apart . . .<sup>108</sup>

. . . It follows that there will be but one representative for diplomatic matters in Great Britain . . . and that will be the representative of the commonwealth. The several states would always remain independent with regard to one another, but with regard to the outside world they would appear undivided.<sup>109</sup>

. . . Upon this clause hangs the essential principle governing relations of Australia to the mother country in future. If this clause is defeated the

proposed governor-general will cease to be a governor-general. He will become one governor among many. . . . you will deprive the commonwealth of its influence.

. . . Do this and you will strike one of the severest blows at Australia as a commonwealth and its relations to the mother country.<sup>110</sup>

Never did he say a truer word.

On the one hand, there were men who thought as colonists, spoke as colonists, acted as colonists, and wanted the new States to continue in precisely the same way, as if they were still colonies — they spoke long and often of the ‘colonies’. On the other there were men who saw Australia as an independent nation, speaking with one voice for all Australians to the world, including Great Britain — they spoke of the Commonwealth and the States.

‘That the clause as read stand’ was voted on, and was passed with a majority of 6 votes<sup>111</sup>. But it disappeared from subsequent drafts.<sup>112</sup> Nevertheless, in September 1900, Chamberlain of the Colonial Office decided that the new Governor-General should be aware of correspondence passing between the State Governors and London, and an Instruction drafted to all colonial Governors to this effect was despatched on 2 November 1900, Hopetoun having been made aware of the Instruction before he left for Australia.<sup>113</sup>

Hopetoun, a former Governor of Victoria who had strongly supported federation, saw the Commonwealth as a united nation — he was the Governor-General of ‘the newest born of nations.’<sup>114</sup> Accordingly, on 9 February 1901, Hopetoun wrote to the Governors of South Australia and Queensland requesting compliance with the Instruction, only to receive abrupt and strongly worded opposition from Tennyson in South Australia, who as well threatened to flood Hopetoun’s office with an endless stream of purely formal documents. Hopetoun wrote that unless he had access to communications from State governors he envisaged great difficulty in administering the government of the Commonwealth.<sup>115</sup> From suggestions in the early 1890s that States should elect their Governors, through the States rights debates of the 1890s, the States had come to a position of preferring to be glorified colonies, disdaining the views put forward by Parkes, Deakin and Griffith, for the sake of provincial jealousies and self-glorification.

From the start of the administration of the Commonwealth, then, it was the States and their Governors who refused to see the Commonwealth as one nation, with one Queen, preferring to maintain their colonial links with London and to see the Queen as the Queen of Britain with whom they dealt through the Colonial Office, rather than as the Queen of the Commonwealth of Australia, with whom they dealt through her representative, the Governor-General.

### ***The Australian monarchy confirmed 1901–02***

When Victoria died, the Accession Council met in London to hear the Declaration of Sovereignty by her son, Edward, on 23 January 1901.<sup>116</sup> The Accession Proclamation was made on 24 January 1901,<sup>117</sup> though no Australians were present.<sup>118</sup> Edward had been expected to take the name Albert as king (his mother’s wish) but told the Accession Council he wished to be known as Edward VII — this nomenclature means that he

was the seventh Edward king of *England* after the Conquest. The Scots objected, saying he was the first Edward king of Scotland,<sup>119</sup> as indeed he was Edward I of Australia.

Some small additional comfort came for the new independent Commonwealth with its own king in the change to the (UK) *Royal Style and Titles Act*<sup>120</sup> by which the British parliament announced its king's title would thenceforth be king of 'Great Britain and Ireland and the British Dominions beyond the Seas, Emperor of India',<sup>121</sup> Edward himself had written a letter in his own hand to 'My People Beyond the Seas' as well as to the 'Princes and People of India' in February 1901, at the same time as he had sent such a letter to the people in the United Kingdom:<sup>122</sup>

... I shall ... [devote] myself to the utmost of my powers to maintaining and promoting the highest interests of my people, and to the diligent and zealous fulfilment of the great and sacred responsibilities which, through the grace of God, I am now called upon to undertake.<sup>123</sup>

Edmund Barton, as Australia's first elected Prime Minister,<sup>124</sup> set sail to attend the coronation of Edward, which had been set down for 26 June 1902. Other representatives of the Australian peoples were present, including a detachment of Australian soldiers.<sup>125</sup> Because of the king's illness, the coronation was postponed until 9 August 1902. Barton was present,<sup>126</sup> representing the peoples of Australia, at Edward's Recognition, and was there when Edward swore the oath of governance. Australia, therefore, through its elected Prime Minister, recognised Edward as King of Australia.

There seems, from the perspective of a century, to have been a real desire in the king to be monarch directly of all his peoples; and there seems also to be a continuance of the bureaucratic mind-set among the English, that the king was theirs to own, control and, if necessary, coerce. There seems also to be a real desire among a number of State leaders and later Commonwealth parliamentarians to establish the Commonwealth of Australia as an independent international identity with its own people responsible to its own monarch.

It is unfortunate, but given the infancy of the Commonwealth, its internal disputation as between the Commonwealth and the States, and the afore-mentioned proprietary attitude of the English, that Edward's oath referred to his governing 'the people of this United Kingdom of Great Britain and Ireland and the Dominions thereunto belonging according to the statutes in parliament agreed on and their respective laws and customs.'<sup>127</sup> Australia no longer 'belonged' to anyone, despite the English continuing to see the monarch as theirs alone, and his oath as establishing *English* sovereignty, and the 'colonies' as being 'English' colonies.<sup>128</sup> I have been unable to ascertain if Barton was consulted on the terms of the oath while he was in London.

However, the representatives of the Australian peoples acknowledged Edward as their king, he was sworn to govern them according to their laws and customs, and he was under the common law and under the Australian Constitution therefore, King of the Commonwealth of Australia.

It is because of a lack of political will by Commonwealth parliamentarians, and the continuing anomalous States' rights position of State parliamentarians and State Governors as graphically illustrated at the inception of the Commonwealth, that the idea of the Australian Monarch of the Australian peoples was not seized upon. If the doctrine of the sovereignty of parliament meant anything, then there was nothing the houses of

the Australian parliament with their Monarch could not do. If the conventions of the Monarch acting on the advice of her ministers meant anything, there was nothing that the Monarch's Australian ministers could not advise Her to do, provided it did not breach Her oath of governance to them.

But it was as if many Australian politicians and judges were bent on a continued Australian infantilism, and through entrenching 'States' rights' perpetuated a colonial mindset thinking of England as 'Home' and themselves as 'colonies', dooming the Commonwealth to be perceived in the same fashion.

### ***Conclusion 2001***

Only few dared to consider Commonwealth independence in all its glory under its houses of parliament and its Monarch. Perhaps the best explication of the intellectual and judicial confusion and internal inconsistency of this determinedly 'States-rights'-related colonial mind-set, is set out by Murphy J<sup>129</sup> in *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172, where he maintained Australia's independence since 1901. Murphy blamed the High Court which had '... almost consistently failed to give effect to the fundamental change which occurred in 1901',<sup>130</sup> and quoted both Sir Samuel Griffith<sup>131</sup> and Prime Minister Billy Hughes<sup>132</sup> in support of his view that Australia had been since 1901 completely independent of Britain. Murphy J sustained his view also by reference to the fact that the *only* way in which the Australian Constitution can be changed is by referendum of the peoples of Australia pursuant to s. 128.<sup>133</sup>

Murphy J's views are, it seems to this writer, also endorsed by the common law as explicated above. Australia's Monarch therefore came into existence in 1901 as a result of the will of the Australian peoples and the Queen, and the agreement of the peoples of the United Kingdom and the Queen. Australia's Monarch has continued with every recognition of him or her by the Australian peoples through their representatives, and the Monarch's taking of the oath of governance. The continuity of all the royal prerogatives of the Australia Monarch necessary for the governance of the Australian peoples is thus achieved by this means, and they exist to this day by virtue of the Australian peoples' recognition of Elizabeth, and Her oath of governance. Of course, if this analysis is correct, there is no reason why the Australian peoples and their Monarch could not form their own oath of governance independent of any English view, nor indeed change by statute change the old bigoted English limitations on the sorts of persons who may be Monarch, which have absolutely no applicability to modern day Australia.<sup>134</sup> ▲

### ***Endnotes***

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<sup>1</sup> See also note 35.

<sup>2</sup> Oath of governance taken by Elizabeth, 2 June, 1953 — see the order in J Arlott, *Elizabeth Crowned Queen, the Pictorial Record of the Coronation*, Odhams Press, London, 1953, at pp. 53–54. My emphasis.

<sup>3</sup> Later Sir Robert, knighted 1963.

- <sup>4</sup> The Governor-General of Australia, Sir William Slim, had also, on 1 June 1953, sent this message to Elizabeth: 'On the occasion of Your Majesty's coronation, with humble duty I offer to Your Majesty the heart-felt congratulations of the Peoples and Government of Your Commonwealth of Australia. The People of Australia, throughout the length and breadth of this continent and its territories and dependencies greet the day with enthusiasm and joy. Our thoughts and prayers are with Your Majesty. We reaffirm our deep loyalty to Your Throne and Person. May Your Majesty long be spared to reign over Your Australian people as their Beloved Sovereign.' See National Archives of Australia, Series A462/4, Item 821/1/27, Royalty, Coronation of Her Majesty Queen Elizabeth the Second, — Policy.
- <sup>5</sup> See the Order for the Coronation of Elizabeth in J Arlott, *Elizabeth Crowned Queen*, at p. 53.
- <sup>6</sup> See National Archives of Australia, Series A462/4, Item 821/1/85, folios 3, 4, and 5. The people as a whole, however, would appear not to have been consulted.
- <sup>7</sup> Folio 21, Government House Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original in National Archives of Australia, (Australian Archives) AA. Series A5447/1, Item 1. This is the same oath of allegiance as was sworn by Lord Hopetoun — see note 79 below. 'I, Edmund Barton, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria Her Heirs and Successors according to law. So help me, God.' 1 page document, signed in his own hand by Edmund Barton, and witnessed and signed in his own hand by Lord Hopetoun, — 'Sworn and subscribed before me, the Governor-General of the Commonwealth of Australia at Sydney in the State of New South Wales, and in the Commonwealth aforesaid, the first day of January, in the sixty-fourth year of Her Majesty's Reign; and in the year of our Lord one thousand nine hundred and one.' This is the oath set out in the Schedule to the Australian Constitution which all members of the Houses of the Commonwealth Parliament must swear pursuant to s. 42 of the Constitution.
- <sup>8</sup> Section 1, Constitution of the Commonwealth.
- <sup>9</sup> See A V Dicey, *Introduction to the Study of the Law of the Constitution*, 1<sup>st</sup> edn 1885, Macmillan, 10<sup>th</sup> edn. 1959, p. 39.
- <sup>10</sup> See for example, *The Income Tax Act 1975* (Commonwealth).
- <sup>11</sup> Office of Parliamentary Counsel, Drafting Instruction No. 9 of 1990, 18 October 1990. 'Enacting formula. For some years Mr E G Whitlam has been devoting a great deal of attention and energy to the enacting formula of Bills, and the Attorney-General's Department has sought my views on 2 of his suggested formulae. 2. I have now been informed that the Attorney-General, with the Prime Minister's (Mr R J Hawke) approval, has decided that the enacting formula for all Bills should be as follows: "The Parliament of Australia enacts:". 3 This instruction applies to Bills introduced after this today. I M L Turnbull, First Parliamentary Counsel, 18 October 1990.' Copy provided to the author by OPC, 8.3.2001.
- <sup>12</sup> See, for example, *The Electoral and Referendum Amendment Act 1998* (Commonwealth).
- <sup>13</sup> Throughout this article, Her Majesty Queen Elizabeth when referred to directly is referred to in the third person using capitalised letters — e.g. She, Her, The Queen. This is done because it is the appropriate protocol when referring to the monarch, just as it is proper protocol to refer to His Excellency, the Hon. Sir William Deane, AC, KBE; His Honour, Chief Justice Gleeson, AC; or The Hon. John Howard, Prime Minister.
- <sup>14</sup> So far as I have been able to ascertain, no member of any of the colonies was present.
- <sup>15</sup> These are the common law processes of the making of a monarch — see note 19 and page 150 below. For full details, see the author's PhD thesis, *King and Crown*, 1998, in Macquarie University Library.
- <sup>16</sup> See for text, Dorothy Laird, *How the Queen Reigns*, Hodder and Stoughton, London, 1959, pp. 138–139.

- <sup>17</sup> For full text see Brian Barker, *When the Queen was Crowned*, Routledge and Keegan Paul, London, 1976, p. 26.
- <sup>18</sup> See p. 148, and also note 4 and p. 173.
- <sup>19</sup> This is a very brief statement of the law on this issue. For a detailed explication, see the author's doctoral thesis, *King and Crown*, 1998, in Macquarie University Library.
- <sup>20</sup> *Royal Style and Titles Act* (Commonwealth), 1973: 'Elizabeth the Second, by the Grace of God, Queen of Australia and Her other Realms and Territories, Head of the Commonwealth . . .'
- <sup>21</sup> For the definition of 'The Commonwealth', see *The Commonwealth of Australia Constitution Act* (UK) 1900, An Act to constitute the Commonwealth of Australia, 63&64 Vic., c. 12, 9 July 1900, s. 6 "'The Commonwealth" shall mean the Commonwealth of Australia as established by this Act.' And s. 3 'It shall be lawful for the Queen to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. . . .' And s. 4. 'The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. . . .'
- <sup>22</sup> s. 61, The Constitution of the Commonwealth, contained in s. 9 of the *Commonwealth of Australian Constitution Act* (UK) 1900.
- <sup>23</sup> See Constitution s. 1, legislative power, and s. 71, judicial power.
- <sup>24</sup> My emphasis. See s. 1, 'the legislative power of the Commonwealth *shall be* vested in a Federal Parliament . . .' The first meeting of the Houses of the Federal Parliament established under the constitution met in Melbourne on 9 May 1901, after an election held on 29 and 30 March 1901 — see Geoffrey Bolton, *Edmund Barton, The One Man for the Job*, Allen & Unwin, Sydney, 2000, p. 234 and p. 237; and s. 71 'the judicial power of the Commonwealth *shall be* vested in a Federal Supreme Court . . .' The High Court of Australia was not established until the enactment of the *Judiciary Act 1903*, assented to 25 August 1903, with the first 3 Justices being drawn from the contestants in the Constitutional Convention debates of the 1890s, and the members of the Commonwealth Parliament. Chief Justice Samuel Griffiths (former Premier and Chief Justice of Queensland, and influential delegate to the Constitutional Conventions of 1891, and unsuccessful aspirant for the post of Attorney-General in the first (appointed) Australian government — for this last, see Bolton, *Edmund Barton*, pp. 218, 220, 227). Sir Edmund Barton, delegate to the Conventions of 1891, 1897, and 1898, NSW Attorney-General, first and only appointed Australian Prime Minister, and first elected Australian Prime Minister); and Richard O'Connor, (NSW Minister for Justice and NSW Solicitor-General, delegate to the Constitutional Conventions of 1897, Minister in the first and second Commonwealth Barton Governments) were sworn in as High Court Justices on 7 October 1903.
- <sup>25</sup> Edward II, Richard II, Henry VI, James II and VII.
- <sup>26</sup> Richard II was allegedly murdered at Pontefract in 1399. Henry VI was murdered in the Tower of London in 1471. The killing of Charles I at law was murder (see the trial of the regicides under Charles II, and see F W Maitland, *The Constitutional History of England*, Cambridge, 1908; reprinted Cambridge University Press, 1950, at 282.)
- <sup>27</sup> The war between Stephen and Matilda, lady of the English, Stephen crowned 1135, Matilda capturing Stephen and being proclaimed Queen in 1141; between Henry VI and Edward IV, both of whom had been recognised by the people; that between Charles I and the royalists, and certain parliamentarians in the 1640s. Civil war was averted in 1688–89 by James II and VII's physical and mental collapse and flight to France.

- <sup>28</sup> The [English] revolutions of 1326–27 [Edward II/Edward III]; 1399 [Richard II/Henry IV]; the Interregnum of 1649–1660; and the ‘bloodless revolution’ of 1688 [James II and VII, and the parliamentarians and William of Orange].
- <sup>29</sup> That of William of Orange in 1688.
- <sup>30</sup> The Duke of York’s case, 1460, Rot. Parl., V, 376–8
- <sup>31</sup> Charles I.
- <sup>32</sup> See details in note 38 below.
- <sup>33</sup> *Bill of Rights* 1689, 1 Will. & Mar., sess. 2, c. 2, An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, validated by the *Crown and Parliament Recognition Act* 1689[Old Style], (1690 New Style) 2 Will. & Mary c. 1
- <sup>34</sup> *Act of Settlement* 1701 (NS), 1700(OS), 12 & 13 Will. III, c. 2; *Statutes in Force, Official Revised Edition*, An Act for the Further Limitation of the Crown and better securing the Rights and Liberties of the Subject. (*Rot. Parl.* 12 & 13 Gul. III. p.1, n.2.), revised to 1st February 1978; HMSO, London, 1978; Short Title give by *Short Titles Act 1896*, (c. 14), Sch. 1
- <sup>35</sup> Not only did the revolutionaries attempt to circumscribe the types of people who could become king by certain lines of descent, but they also attempted to limit it on the basis of religion, not only through the *Bill of Rights* and the *Act of Settlement* provisions as to lineal succession, but through requirement of oaths. The English revolutionaries required that William and Mary, and their successors, take the coronation oath they had drafted in *The Coronation Oath Act* (England) 1689; while the Scots required them to take the coronation oath set out in the Scots *Coronation Oath Act* 1567, as stipulated in the Scots *Claim of Right*, 1689. The English also required, in s. 2 of the *Act of Settlement*, that a monarch take the anti-transubstantiation oath as set down in the *Second English Test Act*, 1678, 30 Car. II, stat. 2, c. 1.
- <sup>36</sup> See *Scots Act for the Security of the Kingdom*, 1704, (Act 1704, c. 3, Passed 5 August, 1704), reproduced in D Oswald Dykes, (Professor of Constitutional Law and Constitutional History in the University of Edinburgh), *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 137–138.)
- <sup>37</sup> *Claim of Right Act (Scotland)*, 1689, c. 28 [or 1689, c. 13]; The declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the crown to the King and Queen of England; adopted by the Scots Estates 11 April 1689; from *Statutes in Force, Official Revised Edition*, revised to 1st February 1978; HMSO, London, 1978, Short Title give by *Statute Law Revision (Scotland) Act 1964* (c.80). Sch. 2.
- <sup>38</sup> The *Act of Settlement* prescribes that certain people in certain categories may become monarch of England. Entrenching the succession has been attempted many times — for example, by Henry IV, Richard III, Henry VII, Henry VIII, Edward VI, Mary I, Elizabeth I, and William III and Mary II; and by the House of Commons where it connived at the deposition of a king and the installation of a new ruler, as in the cases of His Highness, Oliver Cromwell Lord Protector and his son Richard, William III and Mary II, William III, Anne I, George I, and his immediate successors. But, as history has proved, the mere statement of future succession, even in legislation, can never be immutable. Moreover, without the concurrence of the people(s), any such attempt is an usurpation [see here Sir Matthew Hale, *The Prerogatives of the King*, 1640–1660, D E C Yale (ed.), Selden Society, London, 1976, at p. 84 [114–115 in original], and p. p. 64, p. 83, and pp. 71–83], and in the absence of armed oppression, doomed to failure (and even in where armed suppression exists, as for example in the Interregnum from 1649–1660, the will of the people tends ultimately to prevail.) For an interesting view on this phenomenon, see A V Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century*, [a series of lectures given in 1898 to the Harvard Law School], Macmillan and Co., Ltd, London, 1905, pp. 2–3, restating Hume’s view in terms that ‘the opinion of the governed is the real foundation of all government’ *ibid.*, p. 3, referring to Hume, *Essays*, Vol. i., Essay iv., p. 110, Greene and Grose. (Though Dicey carried this idea to an extreme, claiming

slaves in the American south, for example, were subjugated by virtue of their opinion — that they agreed in the subjugation, because they did not rebel against their oppressors; opinion was the ultimate arbiter).

<sup>39</sup> The author assumes for the purpose of this article that such a doctrine exists, in so far as the two Houses of parliament, [or the constitutionally recognised house(s)] and the Queen, constitute the Parliament. [Of course, this being the case in Australia, there is no basis at all for any statement of so-called ‘independence’ on the part of any State, as they are not independent sovereign states enacting acts with the Queen. The only Queen of Australia is the Queen of the Commonwealth of Australia in whom all executive power lies by virtue of s. 61 of the Constitution, and so the States must be subject to the Commonwealth’s Queen pursuant to ss. 106, 107, and 109 of the Constitution.

<sup>40</sup> Either on the part of the Houses, by bringing to bear duress on the monarch or putative whose successors they are trying to entrench, or on the part of the monarch or putative monarch, who may well consent to any such purported legislation to secure the crown for himself for certain purposes extraneous to the governance of the peoples concerned. This, it could well be argued, is a signal failing in both the *Bill of Rights* 1689 (which William had to accept before the revolutionaries would accept him as king, and which attempted to entrench a protestant succession) and the *Act of Settlement* (which reiterated the succession as set out in the *Bill of Rights* and made additional provision for Sophia of Hanover and her heirs to be next in the line of succession after the death of Anne of Denmark’s only surviving son.) — William of course wanted to pursue his adventures against catholic France.

<sup>41</sup> *Regency Act*, 1706, 4 & 5 Ann., c. 20

<sup>42</sup> See the provision of the Regency Act as re-enacted as *Succession to the Crown Act*, [GB], 1707, 6 Ann., c. 41, § X

<sup>43</sup> *Succession to the Crown Act*, [GB], 1707, 6 Ann., c. 41, An Act for the security of Her Majesties Person and Government and of the Succession to the Crown of Great Britain in the Protestant Line, *Rot. Parl.*, 6 Anne., c. 41, p. 5, n. 6, *Statutes in Force, Official Revised Edition*, revised to 1st February 1978; HMSO, London, 1978; Short Title give by Short Titles Act 1896, (c. 14), Sch. 1.) The Act provided that neither the Privy Council nor the parliament was to be automatically dissolved by the demise of the crown (as was the situation under the common law), the parliament to run for six months after that event, with a specific saving of the royal prerogative to summon and dissolve parliament; and for the Privy Council to proclaim ‘in such manner and form as the preceding Kings and Queens respectively have been usually proclaimed’ the next protestant successor in accordance with statute, and provided that any and all Privy Councillors who neglected or refused to cause such proclamation to be made were traitors and guilty of treason, and ‘shall suffer pains of death’; and also provided for the establishment of Seven Officers to carry out the administration of government in the name of the successor, should he be abroad. See § VII and § XI. The terms of the *Succession Act* relating to the succession have since been repealed.

<sup>44</sup> See *Act of Settlement*, (Eng.) 1701, s. 2

<sup>45</sup> See *Claim of Right Act (Scotland)*, 1689, c. 28 [or 1689, c. 13]. The declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the crown to the King and Queen of England; adopted by the Scots Estates 11 April 1689; from *Statutes in Force, Official Revised Edition*, revised to 1st February 1978; HMSO, London, 1978, Short Title give by *Statute Law Revision (Scotland) Act* 1964 (c.80). Sch. 2.

<sup>46</sup> See *Act of Union*, 1707, Arts. XXV (II) and XXV (III).

<sup>47</sup> See Sir Edward Coke’s exposition of the position of James VI of Scotland who became as well James of England, in *Calvin’s case, Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, 77 ER (KB) 377. *Calvin’s case* was a test case raised on behalf of the *Postnati* as a whole, to counteract prevailing ‘blind hostility to the alien’, whereby the landed English gentry argued that a Scot

born in Scotland owed allegiance to the king only as king of Scotland, and was therefore an alien in the king's kingdom of England.

- <sup>48</sup> Monarchs of England, Scotland, Ireland, Great Britain, and the United Kingdom have held differing original nationalities — English, Scottish, Welsh, German, French, and Danish. All Australian monarchs have been of UK origin.
- <sup>49</sup> For example, James was recognised by the Scots and had sworn on his behalf as an infant the Scots oath of governance, and he became King James VI of the Scots; but he also was recognised by the English people, and swore the English oath of governance to the English peoples, and he became King James I of the English. Lawyers in *Calvin's case* [see note 47 above] had attempted to draw a distinction between the *Anti-nati* (persons born in Scotland before James's accession to the English throne) and the *Post-nati* (those born in Scotland after his accession), and the case dealt with the question of alienship or allegiance of the *Postnati*. *Calvin's case* was a test case raised on behalf of the *Postnati* as a whole, to counteract prevailing 'blind hostility to the alien', whereby the landed English gentry argued that a Scot born in Scotland owed allegiance to the king only as king of Scotland, and was therefore an alien in the king's kingdom of England.
- <sup>50</sup> See, [The British Monarchy](http://www.royal.gov.uk/faq/passport.htm) web-site at, frequently asked questions <http://www.royal.gov.uk/faq/passport.htm> (though the explanation there is necessarily brief and somewhat equivocal)
- <sup>51</sup> See, for example, the authorisation on the front over every Australian passport in the name of the Queen, made by Her representative the Governor-General.
- <sup>52</sup> This is necessarily a very brief statement of what was an exceedingly complicated legal position.
- <sup>53</sup> Federal Council of Australasia had been established with the co-operation of some of the colonies in 1885, see the *Federal Council of Australasia Act*, 1885, 48&49 Vic., c. 60.
- <sup>54</sup> See the heading of the Draft of a Bill to Constitute the Commonwealth of Australia, authorised by E G Blackmore (Clerk) and C C Kingston (President), of the Australasian Federal Convention, Melbourne, Colony of Victoria, in *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1898, (II), Vol. V, Legal Books Pty Ltd., Sydney, 1986, [hereinafter the 6 volumes of these Debates and their Index are referred to as the *Convention Debates* Vols. I–VI]p. 2523.
- <sup>55</sup> Draft of a Bill to Constitute the Commonwealth of Australia, *ibid.*, *Convention Debates*, Vol. V., p. 2523.
- <sup>56</sup> In the main. By this time SA had given the vote to adult women.
- <sup>57</sup> *New South Wales*, Enabling Act of 22 April 1899, and referendum of 20 June 1899, 107,420 votes (79 electorates) for union, 82,741 votes (46 electorates) against union; *South Australia*, Enabling Act of March 1899, referendum of 29 April 1899, 65,990 votes for union, 17,053 against union; *Victoria and Tasmania*, Enabling Acts, June(?) 1899, referendum of 27 July 1899, votes (Victoria) 152,653 for union, 9,805 against union; votes (Tasmania) 13,437 for union, 791 against union; *Queensland* Enabling Act, 19 June 1899, referendum of 2 September 1899, votes for union 38,488, votes against union 30,996; *Western Australia* Enabling Act, 13 June, 1900, referendum of 31 July 1900, votes for union, 44,800, votes against union, 25,109 [total number of electors] — see John Quick, and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth of Australia*, Angus & Robertson, Sydney, 1901, reprinted by Legal Books, Sydney, 1976, 1995, pp. 221–237, and p. 249). The Enabling Acts were based upon the draft Enabling Bill drawn up at the 1895 Hobart Premiers' conference supposedly by C C Kingston and G Turner (but in reality by Kingston, see L F Crisp, *Federation Fathers*, Melbourne University Press, Melbourne, 1990, pp. 313–315 and n. 62); and see Quick and Garran, *loc. cit.*, at pp. 158–163. A total of 573,865 electors voted, with 73.67% voting for the union, each joining state necessarily having a majority. New Zealand did not vote.

- <sup>58</sup> See Preamble to the Commonwealth of *Australia Constitution Act*, 63 & 64 Victoria, c. 12
- <sup>59</sup> The Commonwealth of Australia Constitution Act, 63 & 64 Victoria, c. 12.
- <sup>60</sup> Commonwealth of Australia Constitution Act, 63 & 64 Victoria, c. 12, section 3.
- <sup>61</sup> See Proclamation, Victoria, 17 September, 1900, Frontispiece John Quick and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth of Australia*, Angus & Robertson, Sydney, 1901, reprinted by Legal Books, Sydney, 1976, 1995.
- <sup>62</sup> See Proclamation, Victoria, 17 September, 1900, *ibid.*
- <sup>63</sup> See section 3 Commonwealth of Australia Constitution Act, 63 & 64 Victoria, c. 12
- <sup>64</sup> See section 4 and section 9 of the *Commonwealth of Australia Constitution Act*, 63 & 64 Victoria, c. 12
- <sup>65</sup> See *Constitution Act (NSW)*, 1855, 17 Vic No. 41, s. 1, s. 33; received Royal assent as a schedule to the *New South Wales Constitution Act 1855 (UK)*, 18 & 19 Vic c. 54. Similar provisions were in the Queensland Constitution passed by the Queensland parliament in 1867. See also *Constitution Act (Vic) 1855*, enacted as schedule to the *Victorian Constitution Act (UK)*, 18 & 19 Vic c. 55, section 1, section 32 and Schedule C.
- <sup>66</sup> *Colonial Laws Validity Act 1865 (UK)*, 28&29 Vic., c. 63. This Act arose from that activities of Justice Boothby in the colony of South Australia, who persisted in holding colonial legislation invalid by virtue of repugnance to UK statutes and English common law.
- <sup>67</sup> Length constraints have compelled omission of discussion on the legal status of proclamations and the legal history surrounding Sir Edward Coke's assertions in the *Case of Proclamations*, 12 Co. Rep., f. 74; 77 ER (KB) 1352, 1610 (written by Coke *ex post facto*, and published posthumously), and his alternative views in the *Case of Non Obstante*, 12 Co. Rep., folio 18, 77 ER (KB) 1300. [‘The Twelfth Part of the Reports published from the Notes of Sir Edward Coke, Knt., after his Death. With Notes and references, by John Farquahar Fraser Esq., of Lincoln’s Inn, Barrister at Law’, published 1658, with a note of authenticity dated 1655 — see 77 ER (KB) at 1283. No date is given for the case.]
- <sup>68</sup> See Notes, 20.10.1900, to folio 19, Queen Victoria’s Commission appointing Lord Hopetoun as Governor-General, from the Office of the Australian Governor-General, copy provided to the author by the Official Secretary to the Governor-General with the consent of the Governor-General, 20 February 1996. Note that Christopher Cunneen in *King’s Men*, George Allen & Unwin, Sydney, 1983 at p. 7 says that the appointment was announced on 13 July 1900.
- <sup>69</sup> See Christopher Cunneen, *King’s Men*, *ibid.*
- <sup>70</sup> The Letters Patent establishing the Office of Governor-General and Commander in Chief of the Commonwealth of Australia; facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996, folio 17, Queen Victoria’s Letters Patent constituting the Office of Governor-General, Original in government House, Yarralumla, A handwritten parchment scroll of 2 pages, with decorative borders with large wax seal attached by a fancy cord. The Letters Patent were intended to be Letters in perpetuity, [‘And whereas We are desirous of making effectual and permanent provision for the office of Governor-General and Commander in Chief in and over Our said Commonwealth of Australia, without making new Letters Patent at each demise . . . ’] They were made under the prerogative:-
- ‘Victoria by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India, To whom these presents shall come, Greeting —
- Whereas . . . Now Know Ye that we have thought fit to constitute, order and declare, and Do by these presents Constitute, Order and Declare that there shall be a Governor-General and Commander in Chief . . . in and over Our Commonwealth of Australia . . .
- Witness Ourself at Westminster the twenty-ninth day pf October in the sixty-fourth year of Our reign. ‘

- <sup>71</sup> Commission passed under the Royal Sign Manual and Signet, appointing the Right Honourable The Earl of Hopetoun, PC, KT, GCMG, GCVO, to be Governor-General and Commander in Chief of the Commonwealth of Australia, ‘ . . . Given at Our Court of St James’s this Twentieth day of October 1900, in the sixty-fourth year of Our reign’, folio 19, facsimile provided to the author by the Office of the Governor-General with his consent, 20 February 1996. Original at Government House, Yarralumla.
- <sup>72</sup> Queen Victoria’s Royal Instructions to the Governor-General and Commander in Chief, 29 October 1900, folio 18; facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original at Government House, Yarralumla. The Instructions on the first page are signed in the Queen’s handwriting *Victoria R I*, and on the last page initialled *VRI*. These Instructions required *inter alia* that I. ‘Our first appointed Governor-General shall . . . cause [the Queen’s Commission appointing him Governor-General] to be read and published in the presence of the Governors of Our Colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia. And such of the members of the Executive Council, Judges, and members of the Legislatures of Our said Colonies as are able to attend.’ [the word ‘colonies’ had to be used here, since on the 29 October 1900 when the Instructions were issued, they were still Colonies at law, and would not become States of the Commonwealth until 1 January 1901.] II The Governor-General take the Oath of allegiance as set out in 31 & 32 Vic., c. 72, and ‘the usual oath for the due execution of the Office of Governor-General in and over our said Commonwealth, and for the impartial administration of justice.’
- <sup>73</sup> See Antonia Fraser (ed.), *The Lives of the Kings and Queens of England*, Weidenfeld & Nicolson, London, 1975, new edition, 1998, p. 315.
- <sup>74</sup> See note 70 above.
- <sup>75</sup> Hopetoun had invited Lyne to form a government on 19 December 1900, who had told Hopetoun that he had been unable to gather enough support at 10.30 pm on 24 December 1900. Hopetoun immediately sent for Barton, and saw him between 10 and 11 p.m. that night. On 30 December 1900, Barton advised the Governor-General to appoint the following Executive Councillors: E Barton, W J Lyne, R E O’Connor [NSW]; A Deakin and G Turner [Victoria]; J R Dickson [Qld]; C C Kingston [SA]; J Forrest [WA]; and N E Lewis [Tas]. Hopetoun took this advice and appointed them on 1 January 1901. — see Notes, folio 20, Office of the Governor General Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. See also Geoffrey Bolton, *Barton*, pp. 219–222, and Christopher Cunneen, *King’s Men*, pp. 9–10.
- <sup>76</sup> Edwin Gordon Blackmore, Clerk of the Legislative Council of South Australia and of the Parliaments, Clerk to all the sittings of the Constitutional Conventions from that held in Adelaide in March 1897, and to be the first Clerk of the Senate. See J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, p. 277 and index.
- <sup>77</sup> See folio 20, Office of the Governor General, Yarralumla.
- <sup>78</sup> See Cunneen, *King’s Men*, p. 2.
- <sup>79</sup> I, John Adrian Louis, Earl of Hopetoun, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her Heirs and Successors according to Law. So help me, God. Sworn out loud in the presence of the people, and signed by him, witnessed by the Lieutenant-Governor of NSW, Sir Frederick Darley. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. A One page document bearing the signatures of Hopetoun and Darley. Folio 20, Government House Yarralumla, Original in National Archives of Australia, AA Series A6661/1, Item 146.
- <sup>80</sup> I, John Adrian Louis, Earl of Hopetoun, do swear that I will well and truly serve Her Majesty Queen Victoria in the Office of Governor-General of the Commonwealth of Australia. So help

me, God. Sworn out loud in the presence of the people, and signed by him, witnessed by the Lieutenant-Governor of NSW, Sir Frederick Darley. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. A One page document bearing the signatures of Hopetoun and Darley. Folio 20, Government House Yarralumla, Original in National Archive of Australia, AA Series A6661/1, Item 146.

<sup>81</sup> I, John Adrian Louis, Earl of Hopetoun, do swear that I will well and truly serve Our Sovereign Lady Queen Victoria in the Office of Governor-General of the Commonwealth of Australia, and that I will do right to all manner of people after the Laws and usages of this Commonwealth, without fear or favour, affection or ill-will. So help me, God. Sworn out loud in the presence of the people, and signed by him, witnessed by the Lieutenant-Governor of NSW, Sir Frederick Darley. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. A One page document bearing the signatures of Hopetoun and Darley. Folio 20, Government House Yarralumla, Original in National Archive of Australia, AA Series A6661/1, Item 146.

<sup>82</sup> Because of the change in status of the colonies (they would become States from 1 January) no new Governor had been appointed to NSW and Victoria until after 1 January 1901. Lieutenant-Governors were at that time governing Tasmania and Western Australia. But Victoria's Lieutenant-Governor did not attend, and neither did the Governor of South Australia, Lord Tennyson.

<sup>83</sup> See folio 20, Office of the Governor General, Yarralumla. The Proclamation was later signed by Barton after he had been sworn in as Prime Minister, the proclamation was signed by both Hopetoun and Barton, and promulgated under the Great Seal with Hopetoun's authority by Barton. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. A One page document bearing the signatures of Hopetoun and Darley. Folio 20, Government House Yarralumla, Original in National Archives of Australia, AA Series A6661/1, Item 145.

<sup>84</sup> 'III. The Governor-General may constitute and appoint in Our Name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Commonwealth, as may be lawfully constituted or appointed by Us.'

<sup>85</sup> 'There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.'

<sup>86</sup> Commission of Edmund Barton, 1 January 1901, signed by Lord Hopetoun and issued under the Great Seal of the Commonwealth, entered in the Register of Patents, No. 1, Page 1, on 1 January 1901 by A Hunt. Folio 21 at Government House, Yarralumla. Originals NLA. MS51/ [(National Library of Australia)] It is not clear from the documents I have where and when the commissioning took place. Hopetoun could not Commission Barton until he Hopetoun had taken the Oaths, nor could he take Barton's oaths until the Commissioning had occurred. But the Commission says that it was given at Government House, while the oaths taken by Hopetoun were taken 'at Sydney'. It is known that Hopetoun and his new ministry all swore their oaths at Centennial Park in Sydney on 1 January 1901.

<sup>87</sup> Folio 21, Government House Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original in National Archives of Australia, (Australian Archives) AA. Series A5447/1, Item 1. This is the same oath of allegiance as was sworn by Lord Hopetoun — see note 79 above. 'I, Edmund Barton, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria Her Heirs and Successors according to law. So help me, God.' 1 page document, signed in his own hand by Edmund Barton, and witnessed and signed in his own hand by Lord Hopetoun, — 'Sworn and subscribed before me, the Governor-General of the Commonwealth of Australia at Sydney in the State of New South Wales, and in the Commonwealth aforesaid, the first day of January,

in the sixty-fourth year of Her Majesty's Reign; and in the year of our Lord one thousand nine hundred and one.' This is also the oath set out in the Schedule to the Australian Constitution which all members of the Commonwealth Parliament must swear pursuant to s. 42 of the Constitution.

- <sup>88</sup> Signed by Edmund Barton in his own hand, and witnessed and signed in his own hand by Lord Hopetoun, with the same subscription as to time and place as the oath of allegiance. Folio 21, Government House Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original in National Archives of Australia, (Australian Archives) AA. Series A5447/1, Item 1.
- <sup>89</sup> 'To Our *Right* Trusty and Well-beloved *Councillor, Edmund Barton*, Greeting: Know you, that We, reposing especial trust and confidence in your loyalty, integrity, and ability, Do, by these Presents constitute and appoint you the said *Edmund Barton* to be Our *Minister of State of Our Commonwealth for External Affairs*, to hold, exercise, and enjoy the said office during the pleasure of Our Governor-General, or other Officer administering the Government of Our said Commonwealth, for the time being, together with all the rights, profits, privileges, and advantages thereunto belonging or appertaining. In Testimony whereof, We have caused these Our Letters to be made patent, and the Great Seal of Our said Commonwealth to be hereunto affixed, Witness . . . (signed Hopetoun)'. [words in italics written by hand.] Folio 22, Government House Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original in National Library, NLA. MS51/ [Barton]; other Ministers NLA. MS1540/. The Insertion of the word 'Right' would lead one to suppose that Edmund Barton had been appointed a Privy Councillor. I have not been able to find any documentation supporting this. However, the biography of Barton at <http://www.geocities.com/CapitolHill/5557/barton.html>, states that he became a Privy Councillor in 1900, while that at [LAWLINK NSW: Barton, Sir Edmund](http://www.agd.nsw.gov.au/history/lah.nsf/pages/agbarton) at <http://www.agd.nsw.gov.au/history/lah.nsf/pages/agbarton> states that he became one in 1901. Barton was knighted in 1902.
- <sup>90</sup> 'I, *Edmund Barton*, do swear that I will well and truly serve Her Majesty Queen Victoria in the Office of **Minister of State of the Commonwealth for External Affairs**, so help me, God. *Edmund Barton*'. Words in italics written in Barton's own hand; words in bold written in Hopetoun's own hand. Witnessed and signed in his own hand by Hopetoun in 'the State of New South Wales' 1 January 1901. Folio 22, Government House Yarralumla. Facsimile copy made available to the author by the Office of the Governor-General with his consent, 20 February 1996. Original in National Archives of Australia, AA. Series A5447/1, Item 1.
- <sup>91</sup> S. 2 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.' There are of course differing views as to the meaning of this section. Quick and Garran discuss it without throwing a great deal of illumination on the matter at p. 320 ff of their annotated constitution. The meaning of this section was debated by the delegates at the Conventions in the 1890s, and by the UK parliamentarians in 1900, because the UK Law Officers had opposed inclusion of words binding the Crown. But, in the event, the words as now stated in the UK Act are the ones which operate.
- <sup>92</sup> Quoted by Cunneen, *King's Men*, pp. 10–11. Sourced by him at note on p. 196 as follows: 'Draft of Tennyson's wire is in Tennyson's papers, diary entry 20 December 1900 MS 479/2 NL.
- <sup>93</sup> See *Convention Debates*, Sydney, 2 March–9 April 1891, Vol. I, text at p. 961, debate on the clause, p. 850 ff. Subsequent page references to comments in this debate are to this volume of the Debates.
- <sup>94</sup> Duncan Gillies, 57 at the time of these statements [1834–1903; born Scotland; arrived Australia 1852; MLA Vic. 1959; minister, premier 1886 — all personal information such as this for the speakers is from La Nauze, Appendix 8], p. 850

- <sup>95</sup> Sir John Downer 47 at the time of these statements [1844–1915; born SA, MHA SA 1878, premier 1885, senator 1901] p. 852
- <sup>96</sup> Sir Henry Wrixon, 52 at the time of these statements [1839–1913; born Ireland, arrived Australia 1850; MLA Vic. 1868, later MLC Vic., minister] p. 855.
- <sup>97</sup> Duncan Gilles, [see note 94 above], p. 856
- <sup>98</sup> Sir Henry Cuthbert, 62 at the time of these statements [1829–1907, born Ireland, arrived Australia 1854, MLC Vic., minister], p. 858
- <sup>99</sup> Sir Adye Douglas, 76 at the time of these statements [1815–1906, born England, arrived Australia 1839; MLC Tas. 1855; later MLC, minister, premier 1884], p. 859
- <sup>100</sup> Charles Kingston, 41 at the time of these statements [1850–1908, born SA, MHA SA 1881, later MLC, minister, premier 1893; MHR 1901, minister], p. 860
- <sup>101</sup> Sir Samuel Griffith, 46 at the time of these statements [1845–1920, born Wales, arrived Australia 1854; MLA Qld 1871, minister, premier 1883; chief justice of Qld 1893; chief justice of the High Court 1903], p. 850
- <sup>102</sup> Sir Samuel Griffith, see note above, pp. 850–851
- <sup>103</sup> Sir Richard Baker, 49 at the time of these statements [1842–1911, born SA, MHA SA 1868, later MLC, minister; senator 1901, President of Senate], p. 852 and p. 853
- <sup>104</sup> Sir Henry Parkes, 76 at the time of these statements [1815–1896, born England, arrived Australia 1839; MLC NSW 1854, later minister, premier 1872], p. 853.
- <sup>105</sup> Sir John Bray, 49 at the time of these statements [1842–1894, born SA; MHA SA 1871, minister, premier 1881], at p. 860.
- <sup>106</sup> Parkes at p. 860.
- <sup>107</sup> Parkes, *ibid.*
- <sup>108</sup> Alfred Deakin, at the time of these statements [1856–1919, born Vic.; MLA Vic. 1879; minister, joint leader of the govt. 1886; MHR 1901, minister, prime minister 1903], at p. 856
- <sup>109</sup> Deakin, at p. 875.
- <sup>110</sup> Deakin, p. 857
- <sup>111</sup> See the voting figures at p. 864; Edmund Barton is recorded as voting on this clause, but he did not speak in the debate.
- <sup>112</sup> The commentators whom I have read who deal with this matter (La Nauze, at pp. 73–74, and Cunneen, at p. 14) give no reason for its disappearance. Both, however, refer to D I Wright, *Shadow of Dispute, Aspects of Commonwealth–State Relations, 1901–1910*; and also to D I Wright’s PhD thesis, ANU, 1968, *Commonwealth and States, 1910–1910*. I have not had the opportunity of reading these works.
- <sup>113</sup> This information in Cunneen, p. 14.
- <sup>114</sup> See Cunneen, p. 2, and notes his p. 2 at p. 194.
- <sup>115</sup> All this information is taken from Cunneen, pp. 14–15, with his sources notes at p. 196.
- <sup>116</sup> See Sir Richard Holmes, *Edward VII, His Life and Times*, 2 Vols. The Amalgamated Press Limited, London 1911, Vol. II, p. 477.
- <sup>117</sup> Holmes, *Edward VII*, Vol. II, p. 478.
- <sup>118</sup> I have not been able to ascertain the composition of this Accession Council.
- <sup>119</sup> See Holmes, *Edward VII*, p. 479.
- <sup>120</sup> See Holmes, *Edward VII*, p. 487. The Act received Royal Assent on 30 July 1901.

- <sup>121</sup> See Holmes, *ibid.* I have not been able to ascertain whether this had been discussed at all with Australian Ministers or the Governor-General, or whether it was a well-meaning effort by the British bureaucracy. Australia was, according to my analysis, nobody's dominion except hers and her monarch's.
- <sup>122</sup> See Holmes, *Edward VII*, p. 480.
- <sup>123</sup> See Holmes, *Edward VII*, *ibid.*
- <sup>124</sup> The first Commonwealth Parliament met on 9 May 1901, after an election held on 29 and 30 March 1901.
- <sup>125</sup> See Bolton, *Edmund Barton*, p. 265–266; and see Holmes, *Edward VII*, p. 494–496.
- <sup>126</sup> See Holmes, *Edward VII*, p. 505; and W J Loftie, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India*, Cassell & Company, London, 1902, p. 154.
- <sup>127</sup> For oath of governance of Edward VII, see Sir William Anson, *The Law and Custom of the Constitution*, Vol. II, The Crown, OUP, London, 3<sup>rd</sup> edn. 1907, p. 236.
- <sup>128</sup> See Anson, *The Law and Custom of the Constitution*, at p. 237–238, where he refers to the oath as establishing *English* sovereignty.
- <sup>129</sup> See *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172, 231 ff.
- <sup>130</sup> *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172, at 238.
- <sup>131</sup> *Baxter v. Commissioners of Taxation (N.S.W.)* (1907) 4 CLR 1087, at p. 1121, and p. 1126.
- <sup>132</sup> Referring, *inter alia* to his contributions in *Commonwealth Parliamentary Debates*, vol. 172, pp. 1424–1430, on the *Statute of Westminster Adoption Bill*.
- <sup>133</sup> *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172, at 237.
- <sup>134</sup> These issues involve complex legal issues, and overlap with the primitive current views on formation of a 'republic', and will be dealt with by the author elsewhere.