

The Crown

The Crown

essays
on its manifestations,
power
and
accountability

edited by

Martin Hinton and John M. Williams

Foreword by the Hon. Justice Stephen Gageler AC



THE UNIVERSITY
of ADELAIDE

UNIVERSITY OF
ADELAIDE PRESS

Published in Adelaide by

University of Adelaide Press
Barr Smith Library
The University of Adelaide
South Australia 5005
press@adelaide.edu.au
www.adelaide.edu.au/press

The University of Adelaide Press publishes peer-reviewed scholarly books. It aims to maximise access to the best research by publishing works through the internet as free downloads and for sale as high-quality printed volumes.

© 2018 The Contributors.

This work is licenced under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0) License. To view a copy of this licence, visit <http://creativecommons.org/licenses/by-nc-nd/4.0> or send a letter to Creative Commons, 444 Castro Street, Suite 900, Mountain View, California, 94041, USA. This licence allows for the copying, distribution, display and performance of this work for non-commercial purposes providing the work is clearly attributed to the copyright holders. Address all inquiries to the Director at the above address.



For the full Cataloguing-in-Publication data please contact the National Library of Australia:
cip@nla.gov.au

ISBN (paperback) 978-1-925261-79-0

ISBN (hardback) 978-1-925261-72-1

DOI: <http://dx.doi.org/10.20851/crown>

Editor: Rebecca Burton

Book design: Zoë Stokes

Cover design: Emma Spoehr and John Emerson

CONTENTS

Foreword	vii
<i>The Honourable Justice Stephen Gageler AC</i>	
List of Contributors	ix
1 The Crown: Its Nature and Role <i>Professor John M Williams</i>	1
2 Sovereignty and the First Australians <i>Professor Megan Davis</i>	19
3 Sovereignty and the Australian People <i>Richard Niall QC</i>	39
4 The Vice-Regal Officers <i>Michael Sexton SC SG</i>	59
5 The Crown Being a Model Litigant <i>Grant Donaldson SC</i>	75
6 Judicial Review and the Commonwealth Crown <i>The Honourable Chief Justice Michael Grant</i>	99
7 The Rule of Law and the Crown <i>Justin Gleeson SC and Celia Winnett</i>	121
8 The Executive Power <i>The Honourable Justice Martin Hinton and Sue Milne</i>	149
9 The Crown as Prosecutor <i>The Honourable K P Duggan AM RFD QC</i>	179
10 Can the Crown Do Wrong? <i>M G Evans QC and F J McDonald</i>	195

THE CROWN

11	Executive Power and Responsible Government <i>Chris Bleby SC</i>	235
12	The Attorney-General, the DPP, the Police and the Crown — The Pursuit of Independence, Fairness, Equality, Consistency, Accountability and Openness <i>Adam Kimber SC</i>	253
13	Future Directions in the Non-Statutory Power of the Executive Government to Contract and Spend <i>Chad Jacobi and Damian O’Leary</i>	279
14	Judicial Review and the State Crown <i>The Honourable Justice Stephen McLeish</i>	295
15	The Roles of an Australian Attorney-General <i>The Honourable Justice Walter Sofronoff</i>	311
16	The Solicitor-General and the Crown <i>Associate Professor Gabrielle Appleby</i>	337
17	Advising and Acting for the Crown <i>The Honourable Justice Greg Parker</i>	367

FOREWORD

The preamble to the Imperial Act to constitute the Commonwealth of Australia referred to the agreement of ‘the people’ of the Australasian colonies which were, on the proclamation of the Commonwealth, to become the Australian states ‘to unite in one indissoluble Federal Commonwealth under the Crown’. There in the opening words of our national constitutive document were to be found the central constitutive elements of our complex and still-evolving national system of government: one united people, one indissoluble Federal Commonwealth, several states, one Crown.

The notion of the Crown, no less than the notion of the people, is a value-laden abstraction. Within a system of representative and responsible government, the two abstractions are intertwined. The notion of the Crown is capable of appreciation only in its relation to the notion of the people, and only then in the sweep of history and with an understanding of the practical working of democratic and administrative processes. Both notions bring with them a sense of unity and continuity. But it is in the notion of the Crown that there is captured that expectation of tempering privilege with responsibility which characterises our fundamental attitude to institutions of government.

Because it is a notion that is not the product of the law, the Crown defies legal definition. Aspects of its operation and application have been described by lawyers, and aspects of its legal incidents and legal consequences have been identified. But its contours have never been mapped. Perhaps because it has defied definition, it has been a source of both fascination and frustration over many years to many lawyers, whose professional habit of mind has often led them on a quest for greater precision than the subject matter of their study will bear.

Yet for those lawyers who have found themselves in the service of the Crown or providing counsel to the Crown, and who have learned to be comfortable with the ambiguity, the notion of the Crown has shown itself to be capable of providing a sense of stability and of purpose and a moral compass not readily found in more concrete sources. That point was powerfully made by Bradley Selway QC, then Solicitor-General

THE CROWN

for South Australia, when he identified the connection between government lawyering and the maintenance within government of ‘core values’ which he identified as including ethical principles of ‘selflessness, integrity, objectivity, honesty and legality’.¹

The subject matter of this book is as deep as it is wide. Each author whose contribution appears in this book, through long study and experience, is extraordinarily well qualified to shed light on a dimension of it. Collectively, they do much to deepen our appreciation.

The Honourable Justice Stephen Gageler AC
High Court of Australia

¹ Bradley Selway, ‘The Duties of Lawyers Acting for Government’ (1999) 10 *Public Law Review* 114, 114.

LIST OF CONTRIBUTORS

Associate Professor Gabrielle Appleby is an associate professor at UNSW Law and the Associate Dean (International and External Engagement). She researches and teaches in public and constitutional law, particularly focusing on questions about the role, powers and accountability of the Executive Government, the role and ethics of government lawyers, and the independence and integrity of the judicial branch. She is the co-director of The Judiciary Project at the Gilbert + Tobin Centre of Constitutional Law and the blog co-ordinator of www.auspublaw.org. Her books include *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016); *The Tim Carmody Affair: Australia's Greatest Judicial Crisis* (NewSouth Publishing, 2016); *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2014); and *Australian Public Law* (2nd ed, Oxford University Press, 2014). Prior to becoming an academic, she spent time working for the Queensland Crown Solicitor and the Victorian Government Solicitor's Office.

Chris Bleby SC holds honours degrees in a Bachelor of Arts (1992) and a Bachelor of Laws (1995) from the University of Adelaide and the degree of Doctor of Philosophy from the University of Cambridge (2000). He was admitted as a barrister and solicitor of the Supreme Court of South Australia in 1995. He practised in the Office of the Director of Public Prosecutions and then the Crown Solicitor's Office before joining the Independent Bar in 2004, as a member of Hanson Chambers. He was appointed Senior Counsel in 2012. In 2014 he became the Crown Advocate in the Crown Solicitor's Office. He was appointed Solicitor-General of the state of South Australia in November 2016.

Professor Megan Davis is the University of New South Wales's first Pro Vice-Chancellor Indigenous and a Professor of Law. She currently serves as a United Nations expert with the UN Human Rights Council's Expert Mechanism on the rights of Indigenous peoples based in Geneva. She is an Acting Commissioner of the NSW Land and Environment Court, a Fellow of the Australian Academy of Law and a Fellow of the Australian Academy of Social Sciences. She is a member of the NSW Sentencing Council and an

THE CROWN

Australian Rugby League Commissioner. Professor Davis was Director of the Indigenous Law Centre, UNSW Law from 2006-2016.

Grant Donaldson SC is a Senior Counsel practising from Fourth Floor Chambers in Perth. He was appointed Senior Counsel in 2004 and has appeared in all courts of Western Australia, the Federal Court and the High Court of Australia.

The Honourable Kevin Duggan AM RFD QC was a judge of the Supreme Court of South Australia from 1988 to 2011. In addition to his role as a judge he was the Judge Advocate General for the Australian Defence Force from 1996 to 2001. He graduated from the University of Adelaide in 1963. After being admitted to the Bar, he was appointed associate to Sir Edward McTiernan of the High Court of Australia and served in that role in 1965 and 1966. He was the Crown Prosecutor for South Australia from 1971 to 1979 and was appointed Queen's Counsel in 1979. He was in private practice as a barrister from 1980 to 1988. He was president of the SA Bar Association from 1986 to 1988 and vice-president of the Australian Bar Association during that period. He was a lecturer at the Law School, University of Adelaide from 1971 to 1986. He was appointed an adjunct professor of law at Flinders University. He served as the chair of the Sentencing Advisory Council of South Australia from 2012 to 2017. He is presently the Reviewer of the Independent Commissioner against Corruption (SA).

The Honourable Justice Michael Evans, is Chief Judge of the District Court of South Australia. His Honour was appointed Queen's Counsel in 2008. He was the first Crown Advocate for South Australia from 2010-2014 and the Crown Solicitor of South Australia from 2014 until his appointment to the Bench in December 2016.

Justin Gleeson SC is the former Solicitor-General of the Commonwealth. He led the Australian legal team in proceedings in the International Court of Justice and the Permanent Court of Arbitration, as well as in the High Court of Australia. In 2017 he has returned to private practice, specialising in international law and arbitration, constitutional law, appellate law and select commercial cases. He acts as counsel, advisor or arbitrator, in domestic and international matters. He is a Fellow of the Australian Academy of Law, of the Chartered Institute of Arbitrators and of ACICA, and an Australian Member of the Permanent Court of Arbitration. He is a joint editor of "Rediscovering Rhetoric" (2008), "Constituting Law" (2011) and "Historical Foundations of Australian Law" (2013), each published by Federation Press.

The Honourable Chief Justice Michael Grant is the Chief Justice of the Supreme Court of the Northern Territory. At the time of his appointment in July 2016, he held office as the Solicitor-General for the Northern Territory. Prior to that time he practised as a barrister at William Foster Chambers in Darwin. He was appointed as one of Her

Majesty's Counsels in 2006. He has also held appointments as a lecturer in taxation law, torts and ethics at the Charles Darwin University, and is an inaugural member of the Australian Rugby Union National Judiciary Committee.

The Honourable Justice Martin Hinton was appointed to the bench of the Supreme Court of South Australia in 2016. Before that, he served as the second law officer of South Australia in the role of Solicitor-General, appearing for the state in numerous matters before the High Court.

Adam Kimber SC is South Australia's Director of Public Prosecutions. He was appointed to that role in April 2012. He was admitted to practice in 1993, having completed a Bachelor of Arts and a law degree (honours) at the University of Adelaide. His honours thesis was on the topic of delays in criminal justice. He joined the Office of the Director of Public Prosecutions (SA) in 1995 and took silk in October 2010.

Chad Jacobi is a barrister practising principally in administrative law and regulatory criminal law. Prior to going to the Bar, he was Counsel Assisting the Nuclear Fuel Cycle Royal Commission and for more than a decade he advised, and represented, the South Australian government within the Crown Solicitor's Office. He has honours degrees in both law and in economics from the University of Adelaide.

Fiona McDonald completed a Bachelor of Arts and Bachelor of Laws with first class honours at the University of Adelaide, and then undertook an Associateship at the Supreme Court of South Australia with the Honourable Justice Richard White. Thereafter she began her career in legal practice as a solicitor in the Office of the Director of Public Prosecutions (SA), before commencing work in the South Australian Solicitor-General's office. Fiona McDonald is currently Counsel Assisting the Solicitor-General (SA). She specialises in the areas of constitutional law, public law generally and appellate criminal law.

The Honourable Justice Stephen McLeish is a judge of appeal of the Supreme Court of Victoria. He was the Solicitor-General for Victoria from 2011 until 2015, having been a member of the Victorian Bar since 1993. He practised primarily in the areas of commercial and public law and was appointed Senior Counsel in 2007. He holds a Masters degree in law from Harvard University and bachelor degrees in arts and in law, with honours, from Melbourne University.

Sue Milne is a lecturer in law at the University of South Australia. Within the Law School's LLB programs she currently lectures in and co-ordinates: Foundations of Law, Constitutional Law and Human Rights Law. Her research interests are in the fields of public law, constitutional law, legal method and legal research, and legal history. Sue is currently a PhD candidate researching on the aliens power under the *Constitution*.

THE CROWN

Richard Niall QC is the Solicitor-General for Victoria. Before his appointment as Solicitor-General in 2015 he was in private practice as a member of the Victorian Bar for 20 years. He was appointed Queen's Counsel in 2010. His principal areas of practice were public, human rights, employment and industrial, discrimination and revenue law. He is a fellow of the Australian Academy of Law, and a senior fellow of Melbourne Law School, where he lectures in contemporary constitutional law issues. He holds a Bachelor of Laws and a Bachelor of Economics from Monash University.

Damian O'Leary is a barrister in Adelaide. He practises in state and federal jurisdiction in public law (administrative and constitutional), native title, regulatory and civil law matters. He has degrees in political science from Flinders University and the University of Toronto and law from the Australian National University.

The Honourable Justice Greg Parker worked from 1970 in the Commonwealth public service, initially in the Department of Immigration and later the Department of Social Security. He studied law at the University of Adelaide while continuing to work in the public service and was admitted to practice in 1990, immediately joining the SA Crown Solicitor's Office. At the Crown, he primarily practised in administrative and constitutional law, public employment law and industrial relations, state taxation and high level statutory interpretation. He headed the Crown's public law practice from 2004 as Assistant Crown Solicitor Advising and later Deputy Crown Solicitor. He was appointed Crown Solicitor for South Australia in 2010. In June 2013 he was awarded the Public Service Medal by the Governor General for 'outstanding public service in the provision of legal and industrial advice'. In November 2013 he was appointed as a judge of the Supreme Court and as the first president of the South Australian Civil and Administrative Tribunal. He resigned from the latter position in July 2017 but continues to serve as a judge.

Michael Sexton SC SG is Solicitor-General for New South Wales. After degrees in law from the universities of Melbourne and Virginia, he spent some years as an academic lawyer before commencing practice at the NSW Bar in 1984. He took silk in 1998 and was appointed in the same year to the post of Solicitor-General. He is co-author of a text on libel law and the author of several books on Australian history and politics. He has held a number of roles in the area of public administration, including chairman of the NSW State Rail Authority.

The Honourable Justice Walter Sofronoff is the President of the Queensland Court of Appeal and was Solicitor-General of Queensland 2005-2014. He has been involved with numerous high-profile cases, conducted a commission of inquiry into the Grantham flooding and a review of the Queensland parole system.

THE CROWN

Professor John M Williams is Pro Vice-Chancellor — Research Operations and Dean of Graduate Studies at the University of Adelaide. His main research interest is public law, in particular Australian constitutional law, the High Court of Australia, comparative constitutional law, federalism and legal history.

Celia Winnett is a barrister at the NSW Bar. Before going to the Bar in 2016, she served as Counsel Assisting the Commonwealth Solicitor-General, Justin Gleeson SC. Celia previously worked as a lawyer in the Australian Government Solicitor's Office of General Counsel, a solicitor at Mallesons Stephen Jaques (now King & Wood Mallesons), and an Associate to the Honourable Justice Susan Crennan of the High Court of Australia. Celia has an LLM from Columbia Law School, which she attended on a Fulbright Scholarship. She also holds a BA/ LLB (First Class Honours and University Medal) from the Australian National University.

1

THE CROWN: ITS NATURE AND ROLE

PROFESSOR JOHN M WILLIAMS

INTRODUCTION

In their encyclopaedic work on the *Australian Constitution*, John Quick and Robert Garran in 1901 outlined the contours of the newly established Commonwealth. These constitutional cartographers took a keen interest in exploring many of the more obscure formations of the founding document. The phrase ‘under the Crown’, which appears in the Covering Clauses to the Imperial Act, was subject to their commentary. ‘It is’, they said,

a concrete and unequivocal acknowledgement of a principle which pervades the whole scheme of Government; harmony with the British Constitution and loyalty to the Queen as a visible central authority uniting the British Empire with its multitudinous peoples and its complex divisions of political power.¹

While they noted that ‘a few ardent but irresponsible advocates of Australian federation’ had ‘indulged’ in the notion that Australia would ‘become an independent Republic’ the two were pleased to dismiss such misguided talk.² The phrase ‘the Crown’, they opined, was representative of several accepted and indisputable facts about the origins and form of the Australian government:

1 J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 294.

2 Ibid 295.

THE CROWN

1. that it has been established by the concurrence of the Queen
2. that the Queen is an essential part of the Federal Parliament
3. that the Queen is the head of the Federal Executive
4. that the Queen is to be represented in the Commonwealth by a Governor-General.³

The commentary that these constitutional scholars provide is indicative of the many manifestations and functions of the Crown. For Quick and Garran it served as a symbolic link to the Empire; it was the Monarch as an individual and an institution. In the Australian context the Governor-General would be the Queen's representative. Absent from their brief account is a discussion of the powers of the Crown. Moreover, the distinction between the Crown in a federal system, the evolution of the institution and its transplantation in Australia are not mentioned.

The ambiguities, and at times, legal fictions that are associated with the institution of the Crown should not overshadow its significance for the operation and exercise of public power. This chapter highlights the evolution of our understanding of the Crown, from its association with absolute monarchy to its reception and partial codification in the Australian constitutional setting. What will become evident is that the Crown in the Australian context has become increasingly synonymous with 'the government' or 'the state', and the legislative and constitutional direction of authority has been to subject it gradually to greater review and oversight.

This chapter is divided into three sections. The first will outline the Crown as it is understood in the United Kingdom and its evolution into the modern administrative state. The second section will deal with the Australian manifestation of the Crown and its modification to meet the particularity of Australian federalism. The final section will explore recent developments and the increasing importance that judicial consideration of s 61 of the *Constitution* has played in the Australian understanding of the executive at the federal level.

THE UNITED KINGDOM AND THE CROWN

The role and function of the Crown in the United Kingdom is bound up with the historical transition from the absolute ruler to the modern constitutional Monarch. While that history is well known, the vestiges of the authority and capacities of the Crown, and how they may be rationalised in contemporary public law, remain matters for a lively debate. Writing in 1899, Sir Frederick Pollock and Frederic Maitland reflected upon the theoretical contortions that earlier lawyers had performed to describe the many manifestations of the Crown.

³ Ibid.

THE CROWN

In the sixteenth century our lawyers will use mystical language of the king. At times they will seem bent on elaborating a creed of royalty which shall take no shame if set beside the Athanasian symbol. The king was a body corporate in a body natural and a body natural in a body corporate. They can dispute as to whether certain attributes which belong to the king belong to him in his natural or in his politic capacity. Some of their grandiose phrases may be due to that love of mystery which is natural to us all; nevertheless we must allow that there were real difficulties to be solved, and that the personification of the kingly office in the guise of a corporation sole was in the then state of the law an almost necessary expedient for the solution of those difficulties. Also we might show that if, on the other hand, this lawyerly doctrine was apt to flatter the vanity of kings, it was, on the other hand, a not very clumsy expression of those limits which had gradually been set to king's lawful power and that it served to harmonize modern with ancient law.⁴

The 'mystical language', according to one scholar of public law, avoids or obscures a gap in the discussion of the Crown: English law does not recognise the concept of the state. The Crown acts as a proxy or equivalent for it, yet, according to Martin Loughlin, 'the Crown has, in practice, provided a poor substitute for the idea of the State'.⁵

Before exploring in greater detail the various themes that are evident in the nature of the Crown, this chapter will outline the various manifestations of the Crown. In the most basic sense the 'Crown' is the symbolism of the Monarch. As Maitland ruefully put it:

You will certainly read that the crown does this and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers. No, the crown is a convenient cover for ignorance.⁶

However, the jewellery and baubles of the Crown serve to highlight that the Monarch exists in their personal and public capacities. The notion that the Monarch may be bifurcated meant that they could act in their personal capacity, or more likely, in their public capacities. The idea that the Crown in its public guise could be thought of as a body corporate or 'corporate sole' provided one means by which the various powers of the Crown could be authorised and exercised.⁷ Even in this manifestation there remained ambiguity as to how the many officials and bureaucrats that acted in the name of the Crown could be aggregated.⁸ As Maitland noted, again in the context of the

4 Frederick Pollock and Frederic Maitland, *The History of English Law* (2nd ed published 1899, Legal Classics Library Reprint, 1982) 511-12.

5 Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 2003) 33.

6 F W Maitland, *The Constitutional History of England* (first published Cambridge University Press 1908, Legal Classic Library Reprint, 2000) 418.

7 F W Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131.

8 Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 250.

THE CROWN

lack of a 'state' in English law, the problem of a single authority for the Crown was the conundrum. He suggested:

The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our sovereign lord is not a 'corporation sole,' but is the head of a complex and highly organized 'corporation aggregated of many' — of very many. I see no great harm in calling this corporation a Crown. But a better word has lately returned to the statute book. That word is Commonwealth.⁹

This approach of grafting onto the Crown the modern arrangement of government proved to be a useful device in the operation of the complex state. As Lord Simon stated in *Town Investments v Department of the Environment* in 1978:

The legal concept which seems to me to fit best the contemporary situation is to consider the Crown as a corporation aggregate headed by the Queen. The departments of State include the Ministers at their head (whether or not either the department or the Minister has been incorporated) who are then themselves members of the corporation aggregate of the Crown.¹⁰

To this conclusion he offered two 'riders' that only serve to highlight the difficulty of drawing the analogy. The first was that the legal concept did not fit the political reality. That is, the Queen does not command or direct the Ministers, heads of departments or public servants who act in her name. Under the strictures of the theory of a constitutional monarchy it is the advice of the Ministers that dictates how the Queen will act in her public capacity. Second, there is a distinction between 'the Queen' and 'Her Majesty', the former being the natural person and the latter the body politic as manifest in the Crown.¹¹ In the same case, Lord Diplock commented on the evolution that had taken place between the Crown in its public capacity and the government of the day. As he noted,

[t]hese relationships have in the course of centuries been transformed with the continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarch of today; but the vocabulary used by lawyers in the field of public law has not kept pace with this evolution and remains more apt to the constitutional realities of the Tudor or even Norman monarchy than the constitutional realities of the 20th century.¹²

Lord Diplock concluded that to speak of the 'Crown' in reality is to speak of 'the government'. The modern shorthand, while an appropriate summation, does not entirely eliminate the confusion that is created with the rights and capacities that remain within the precinct of the Crown and its prerogatives.

9 Maitland, above n 7, 140.

10 *Town Investments v Department of the Environment* [1978] AC 359, 400.

11 Ibid.

12 Ibid 381.

THE CROWN

In analysing the current usage of the Crown in the United Kingdom, Cheryl Saunders noted three significant steps along the evolutionary path.¹³ First, there was a general acceptance of the characterisation of the Crown into its various personal and corporate manifestations. Second, there was the 'progressive loss of royal power to adjudicate and legislate to the court and Parliament respectively, leaving the Crown with a somewhat nebulous residue of "executive" power'. The final step was the progressive 'constitutionalisation' of the monarchy, which is the settled understanding that the power held by the Crown would be exercised on the advice of the responsible Minister with the support of the House of Commons. These three trajectories then form the backdrop for the evaluation of the Crown. While the manifestations may be bifurcated, and the authority aggregated, the Crown remains a key instrument through which executive power is deployed and sanctioned.

Given the above outline of the evolution of the Crown, the more challenging questions relate to what powers or prerogatives are associated with the Crown in their various manifestations. Moreover, there is the question of how susceptible they are to review by the Parliament or the courts.

In the United Kingdom it is well established that there is no authoritative list of all the prerogative powers of the Crown. Generally there are two forms. The first are those associated with, and solely exercisable by, the Monarch. These are relatively few and relate to the power to appoint a Prime Minister, dissolve Parliament, dismiss a government and grant (and withhold) consent to legislation.¹⁴ While these prerogatives involve the exercise of significant legal authority and power, they are subject to a series of evolving constitutional conventions. So, for instance, the power to withhold consent for legislation remains a prerogative of the Monarch, though it was last used in 1708 when Queen Anne refused her assent to the Scottish Militia Bill.¹⁵ Today there would be significant disquiet if the Monarch was to act contrary to clear and firm advice by the Prime Minister to provide assent to a Bill passed by the Houses of Parliament.

The second form relates to those powers exercised by Ministers in the name of the Crown. This list remains less clear, though it includes

[t]he making and ratification of Treaties; the conduct of diplomacy; the governance of British overseas territories; the deployment of the armed forces both overseas and within the United Kingdom; the appointment and removal of ministers; the appointment of peers; the grant of honours; the organisation of the civil service; the

13 Cheryl Saunders, 'The Concept of the Crown' (2015) 38 *Melbourne University Law Review* 873, 876.

14 A Tomkins, 'The Struggle to Delimit Executive Power in Britain' in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law* (Oxford University Press, 2006) 24.

15 A Tomkins, *Public Law* (Oxford University Press, 2003) 63.

THE CROWN

granting and revoking of passports; the granting of pardons; the claiming of certain privileges and immunities, such as public interest immunity in the law of evidence.¹⁶

As Adam Tomkins notes, this is not a complete list. ‘All’, he concludes, ‘that can be gleaned from such lists of powers is that the executive acts in a bewildering wide array of policy areas and subject matters’.¹⁷ The debate continues as to what the prerogatives are and how they are to be characterised.¹⁸ On one view they are powers that can only be exercised by the Sovereign (and in the modern context the government) and not by the citizen. On such a view the list is relatively short. Citizens cannot make treaties or issue passports, for instance. The alternative view is that the prerogative powers include the residue powers left to the Executive Government that are not subject to legislation. This was the view preferred by Dicey.¹⁹ There remains a lively debate on this point, which serves to underscore the imprecise nature of the breadth of the power of the Crown as exercised by the government.

In *Attorney-General v De Keyser’s Royal Hotel* (*‘De Keyser’s Royal Hotel’*) the House of Lords was asked to consider the use of the prerogative to take over the hotel in order to house troops.²⁰ The House of Lords approved the more expansive view of the prerogative. However, the case also drew attention to the interaction between the statutory and prerogative authority of the Crown. In *De Keyser’s Royal Hotel* it was argued that the Crown’s prerogative was not fettered by the statutory scheme that paralleled the executive action. Lord Atkinson noted that the ramifications of such a proposition — that is, that the executive could go beyond the legislative scheme — were accepted.

It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word ‘merged’ is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing

16 Tomkins, above n 14, 24-5.

17 Ibid 25.

18 See Seddon, above n 8, 245, 253.

19 A V Dicey, *Introduction to the Study of Law of the Constitution* (McMillan, first published 1885, 10th ed, 1959) 424.

20 [1920] AC 508.

THE CROWN

under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance.²¹

In the litigation involving the capacity of the Prime Minister to initiate the exit from the European Union without the approval of the Parliament, the Supreme Court again highlighted the evolution of the prerogative powers of the Crown. In *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* their Lordships noted that

it is a fundamental principle of the UK Constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law. As Lord Hoffmann observed in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 44, ‘since the 17th century the prerogative has not empowered the Crown to change English common or statute law’. This is, of course, just as true in relation to Scottish, Welsh or Northern Irish law. Exercise of ministers’ prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament.

Further, ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation.²²

Thus notwithstanding the difficulty in determining what in fact the prerogatives of the Crown are, by far the more significant question is the susceptibility of their exercise to juridical review. Modern notions of administrative review and the application of the rule of law to decisions made in the name of the Crown are the critical question within public law. As Tomkins laments, ‘[a]cross the wide variety of public law contexts it has been statute, rather than common law, that has done most to delimit the Crown’.²³

Along with identification of the various manifestations of the Crown and the susceptibility of its prerogatives to legislative modification or oversight there is another element of the United Kingdom experience that needs to be considered. That is the transplantation of the Crown to Australia.

THE CROWN IN AUSTRALIA

The unity of the Crown throughout the Empire became a useful political, if not legal, device for the development of Australian law. What is equally clear is that Australian exceptionalism meant that the Crown was not a static concept and it had to be moulded to accept the reality and conditions of the Australian circumstance. Well before

21 Ibid 539.

22 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 17 [50-1].

23 Tomkins, above n 15, 89.

THE CROWN

federation in 1901 the relationship between the Crown and its subjects had given way to the manner of Australian colonisation. As Paul Finn noted when considering the nature of Australian colonisation:

Untroubled by concerns as to the juristic nature of 'the Crown' the colonists appear to have adopted both the personalized and a functionalized view of the Queen (the Crown) and of her constitutional powers and responsibilities. And if the Queen had her place, her province, in the imperial scheme of things, so too in the local arena did 'the Government', of whom a similarly personalized and functionalized view was taken. The tendency was to separate spheres of responsibility, the one the Queen's, the other the government's.²⁴

The history of the arrival of the Crown and the law of England is well known.²⁵ The claims of Captain James Cook of the eastern coast of Australia in the name of the Crown changed a legal norm and had a profound impact on the Aboriginal and Torres Strait Islanders who inhabited the continent. The subsequent commissioning of Arthur Phillip and the arrival of the convict fleet in January 1788 gave a physical presence to the claim made by Cook 16 years earlier. As the convicts unloaded the chattels of the new settlement an unseen, but dramatic, change was also happening to the country. As R T E Latham memorably described it:

Their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood. Their personal law became the territorial law of the Colony.²⁶

The law of colonisation outlined the fate of the Aboriginal and Torres Strait Islander populations. As Henry Reynolds and others have argued,²⁷ the law of the land was largely blind to the plight of the traditional owners. The colony of New South Wales was governed by the legal fiction of an unoccupied land. As the Privy Council stated in *Cooper v Stuart* in 1889:

The extent, to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the

24 Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 4.

25 W J V Windeyer, *Lectures on Legal History* (Law Book Company of Australasia, 1938); Alex C Castles, *An Australian Legal History* (Law Book Company, 1982); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995). See also J Stoljar, 'Invisible Cargo: The Introduction of English Law into Australia' in J T Gleeson, J A Watson and R C A Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) ch 8.

26 R T E Latham, 'The Law and the Commonwealth' in W K Hancock (ed), *Survey of British Commonwealth Affairs* (Oxford University Press, 1937) 517.

27 Henry Reynolds, *The Law of the Land* (Penguin, 1987).

THE CROWN

time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own Legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done; the law of England must (subject to well established exceptions) become from the outset the law of the Colony, and be administered by its tribunals.²⁸

The view that the Crown was freed of the rights of the Aboriginal Australians would be disavowed in 1992 with the *Mabo (No 2)* decision. The idea that Australia was 'peacefully annexed', as Justice Toohey noted, 'carries a certain irony in the light of what we now know'.²⁹ However, one of the 'puzzles of Australian exceptionalism in Crown-Indigenous relations', according to Kirsty Gover, was the relationship to the federal system. As she argues,

the complexity of constitutional allocations of powers in Indigenous affairs between the Commonwealth and the states ... is complicated by unresolved questions about the extent of the respective powers and prerogatives of the state and federal executives, or 'Crowns'. The indeterminacy begins, of course, with uncertainty in Australia about the concept of 'the Crown' itself as a duty-bearing entity. The extent to which 'the Crown' should be understood as a proxy for, or equivalent of 'the State', 'the Government', 'the Executive' or 'the Sovereign' is a matter of considerable controversy in legal and political theory.³⁰

Beyond the fundamental question of the Crown-Indigenous relations were other practical matters. The further development of colonies across the continent and the establishment of local government only served to highlight the absence of a Monarch. Their presence was manifest in the Governors in each colony who represented the Monarch and carried out the duties and functions as outlined in their instructions.³¹ After the colonies achieved a measure of self-government in the 1850s the power of the Governor diminished as elected parliaments emerged. However, the British government exercised some power over the colonies through the overarching power of disallowance, the selection of Governors and the authority of the paramount force of the Imperial Parliament.³²

28 (1889) 14 App Cas 286, 291.

29 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 181 ('*Mabo (No 2)*').

30 Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38 *Sydney Law Review* 339, 344.

31 Anne Twomey, *The Chameleon Crown* (Federation Press, 2006) 1.

32 *Ibid* 14-16.

THE CROWN

As noted, the underlying theme of the Crown in Australia is one of evolution. The catalyst for these changes has turned on the maturation of the Australian polity, changes in the relationship with the United Kingdom and the distinct constitutional settlement.

The federation of the colonies of Australia in 1901 was the result of the determined efforts of political leaders to bring about a union in order to advance the prosperity of the nation and its people. The practical sense of diminishing the interstate barriers, which stood between the colonies, should not overshadow the growing national sentiment amongst the settler community. Australians started to think of themselves as Australians. At the same time that the disparate colonies were coming together there remained the issue of the unity or otherwise of the Crown. The Crown, especially in the guise of the Monarch, served the purpose of unifying the Empire. Writing in 1925, G L Haggan noted the implausibility of the argument:

We are constantly told that the Crown is *the* strongest link binding the Empire together. The necessity which compels us to ask whether there is such a thing, whether this so-called link is a reality or just another of our make-believes, is regrettable but none the less insistent.³³

Notwithstanding the invocation of the unified Crown by necessity the same Crown was divisible within the various polities. As Griffith CJ highlighted in *Sydney Municipal Council v Commonwealth*:

It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea.³⁴

The assumption that the Crowns were divisible within Australia was strangely doubted by the High Court in arguably its most significant decision. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*'the Engineers' case'*) the joint judgment noted that

[t]he first step in the examination of the Constitution is to emphasize the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown. The Act 63 & 64 Vict. c. 12, establishing the Federal Constitution of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial

33 G L Haggan, 'The Function of the Crown' (1925) 41 *Law Quarterly Review* 182, 191-2 (emphasis in original).

34 (1904) 1 CLR 208, 231.

THE CROWN

power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation.³⁵

As George Winterton noted when discussing the evolution of the separate Australian Crown, the concept is better understood as a 'personal union of Crowns'.³⁶ In the Australian context the Crown came to stand in right of the individual polities within the new Commonwealth. Ministers were responsible to their own parliaments and acted in right of the Crown of their respective jurisdictions.

Moreover, the relationship between the Crown in right of Australia has changed over time with regard to the United Kingdom. This has been the product of formal statements and inexorable divergence. The passage of the *Statute of Westminster 1931* (Imp) is one such milestone. The Act followed in the wake of Imperial Conferences in 1926 and 1930 that increased the status of the 'Dominions'.³⁷ Under the Act a number of measures were implemented to release Australia from the United Kingdom's control and to give the Dominions (which included Australia, New Zealand, South Africa, the Irish Free State and Newfoundland) more power.³⁸ For instance, the *Colonial Laws Validity Act 1865* would no longer operate.³⁹ Further, the Dominions could legislate extraterritorially⁴⁰ and no Act of the United Kingdom Parliament would be deemed to extend to the Dominions unless expressly requested by the Dominion to do so.⁴¹ The Commonwealth Parliament adopted the *Statute of Westminster* into Australian law in 1942.⁴² There followed a series of other formal steps including the designation of the Monarch as the 'Queen of Australia' in 1953.⁴³ Writing in 1957, D P O'Connell noted that these changes were no more than 'a formal recognition of the changes wrought in the constitutional framework of the British Commonwealth'.⁴⁴ He concluded that it was no longer possible 'to ignore the fact that the entities of the Commonwealth with a

35 (1920) 28 CLR 129, 152-3 (Knox CJ, Isaacs, Rich and Starke JJ).

36 George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1, 2.

37 Twomey, above n 31, ch 7.

38 *Statute of Westminster 1931* (Imp), s 1.

39 *Ibid* s 2.

40 *Ibid* s 3.

41 *Ibid* s 4.

42 *Statute of Westminster Adoption Act 1942* (Cth).

43 *Royal Styles and Titles Act 1953* (Cth). The Schedule proclaimed the Queen to be 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and her other Realms and other Territories Queen, Head of the Commonwealth, Defender of the Faith'.

44 D P O'Connell, 'The Crown in the British Commonwealth' (1957) 6 *International and Comparative Law Quarterly* 103.

THE CROWN

monarchical system of government are kingdoms in their own right'.⁴⁵ With an eye for the republican implications he further speculated that '[i]f the United Kingdom itself became a republic by Act of Parliament, Australia, where the Crown is entrenched in the constitution, would remain a kingdom'.⁴⁶ Further moves to redefine the relationship between the Governor-General and state Governors with the Australian polity were undertaken by the Whitlam government and were given additional legislative form with the passage of the *Australia Acts* in 1986.⁴⁷

As well as the emergence of the Crown in right of the Commonwealth and the states, and the distinct features which form the United Kingdom Crown, there were the attitudes in Australian law to the privileges of the Crown. Through the operation of statute and judicial interpretation the Crown was treated in ways significantly different from, or in advance of, the position in the United Kingdom. Australia was well in advance in the curtailment of the immunity against suit in tort or contract. As Paul Finn has demonstrated, the Australian colonies, and then the Commonwealth itself, predated by decades — in the case of Queensland nearly 80 years — the curtailment by legislation of the Crown's immunity against suit.⁴⁸ The impetus for these early attempts related to the nature of Australian capital and resources. In the case of Queensland the distribution of Crown land was not without controversy. Relying on the immunity the Crown could act to deny aggrieved parties to sue in the courts without the consent of the government.⁴⁹ Such a situation, punitive and lacking in accountability, is made less tolerable when the Crown or the state was the primary holder of capital and resources. The Parliament and the courts responded to this situation by modifying the unfettered authority of the Crown.

A secondary aspect of the immunity of the Crown related to the liability of suit in torts or contract. Its origins lay in the concept that the 'King can do no wrong'. As the fountain of justice the courts could not seek to rule over the Monarch.⁵⁰ South Australia was the first colony to pass the *Crown Proceedings Act* in 1853, which curtailed that assumption. Other jurisdictions would follow and place this anachronistic presumption on a modern footing.⁵¹

45 Ibid.

46 Ibid.

47 *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

48 Paul Finn, 'Claims against the Government Legislation' in P D Finn (ed), *Essays on Law and Government: The Citizen and the State in Courts* (Law Book Company, 1996) 25-6.

49 Ibid 27.

50 Loughlin, above n 5, 60. See also Seddon, above n 8, 256-8.

51 See Anthony Gray, 'Immunity of the Crown from Statute and Suit' (2010) 9 *Canberra Law Review* 1.

THE CROWN

The trajectory of the Australian Crown and its divergence from the United Kingdom was practically demonstrated in 1999. In *Sue v Hill* the High Court considered a critical question about the nature of the Australian Crown.⁵² The context of the case was the question of whether the United Kingdom was a ‘foreign power’ for the purposes of s 44(i) of the *Constitution*. As part of their reasoning Gleeson CJ, Gummow and Hayne JJ outlined the various manifestations of the Crown in Australia.

The first was to identify the body politic. The usage was not as that in the United Kingdom, which attempted to conflate the Crown with the state as a juristic person. Rather, the state was not merely the Crown. The overarching role and function of the Crown had largely been constitutionalised in the phrase ‘the Commonwealth’ in Australia.⁵³

The second usage that was identified related to the holder of the office through which the international personality of the body politics is represented. This included the diplomatic representatives and the mechanisms by which treaties could be concluded. As Gleeson CJ, Gummow and Hayne JJ noted, there was some conjecture as to when, and in particular on what date, Australia assumed an independent international identity. Without needing to decide, it was inferred that it was possibly decades before the passage of the *Australia Acts* in 1986.

The third, and arguably more modern perspective, is the identification of the ‘Crown’ as the ‘government’. It stands in contradistinction to the legislative branch of the state. As such it is the executive represented ‘by the Ministry and the administrative bureaucracy which attends to its business’.⁵⁴

The fourth usage of ‘the Crown’ was linked to the colonial developments in the nineteenth century. The status of the paramount powers of the United Kingdom was to be contrasted with the colonial status of the imperial dependencies. Quoting Professor Pitt Cobbett from 1904, the joint judgment noted that the personal powers of the Sovereign were not transferred to Australia. As the colonies obtained self-government the rights previously vested in the Sovereign were now vested ‘in the Crown in the colony’. Moreover, the federal structure of Canada and Australia meant that the Crown had to be modified to take account of the complex political structure. Thus the Crown was divisible and acted ‘in right of’ the respective polities.

The fifth sense in which the Crown is used in Australia relates to the historical deploying of the concept in the Constitution Act of a union of colonies and people

52 *Sue v Hill* (1999) 199 CLR 462.

53 *Ibid* 498.

54 *Ibid* 499.

THE CROWN

‘under the Crown’. This relates to the Queen as the person at the head of the hereditary office.⁵⁵

These five manifestations of the ‘Crown’ in Australia highlight the relationship with the United Kingdom, the colonies and now the Commonwealth and states. Further, they incorporate the evolution in that relation and the modern notion of the Crown in the administrative state. In short, the evolution of the Crown in the Australian context demonstrated the unique aspects of the imposition of sovereignty on the continent and the maturation of the relationship between the people and the state.

EXECUTIVE POWER AND THE *CONSTITUTION*

Consistent with the evolution in the Crown in the Australian polity was the codification of the executive power of the Commonwealth in 1901. The *Constitution* in s 61 provides that

[t]he executive power of the Commonwealth 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.

As Saunders notes, this drafting decision ‘reduces, although without (yet) entirely eliminating, the dependence of federal executive power on the concept of the Crown’.⁵⁶

In their brief note on the section, Quick and Garran highlighted a number of points. The first relates to the federal nature of the power. It ‘must be read to mean’, they reminded their readers, that ‘the Federal Executive power as distinguished from the Executive power [is] reserved to the states’.⁵⁷ Given the time of their writing, they highlighted that the executive power of the Commonwealth and the states was but a ‘sub-division or faction of the quasi-sovereign power’. The quasi-sovereign here referred to the status of the Commonwealth within the Empire.

The constitutionalisation and vesting of the executive power of the Commonwealth has necessitated that its operation and scope would be the subject of judicial consideration by the High Court. The history of the litigation relating to the breadth and depth of the executive power of the Commonwealth highlights the changing role of the central government in the Federation and the use of novel means to achieve policy outcomes in areas traditionally left to the states.

The history and language of the *Constitution* presupposes that the common law would be influential in not only its design, but also its interpretation. The degree, and

55 Ibid 500.

56 Saunders, above n 13, 888.

57 Quick and Garran, above n 1, 701.

the context, will be significant in determining the guidance it may provide. However, as Sir Owen Dixon noted,

in the working of our Australian system of Government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates.⁵⁸

Notwithstanding the importance the executive power plays in the governance of the Commonwealth it has attracted only spasmodic litigation since federation. As Saunders again notes, ‘a spate of challenges to the exercise of executive power gives at least an anecdotal impression that such questions are arising more frequently’.⁵⁹ The critical fulcrum around which the litigation has occurred relates to the Commonwealth’s capacity to enter into administrative arrangements and to spend money in areas beyond its express legislative authority. At a greater level of abstraction, cases such as *Pape v Commissioner of Taxation*,⁶⁰ *Williams v Commonwealth (No 1)*⁶¹ and *Williams v Commonwealth (No 2)*⁶² highlight the changing relationship between the federal and state spheres. Equally they underscore the emergent view of the Australian state freed (to a degree) from recourse to the notion of the Crown in order to articulate the operation of executive power.

In *Williams (No 1)* members of the Court considered the question as to whether the executive power of the Commonwealth to spend money was akin to the legal capacity of a juristic person. As Chief Justice French noted, this ‘taxonomical question’ had been given different answers by Blackstone and Dicey. As he summarises it:

Blackstone said that ‘if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer’ and therefore that ‘the prerogative is that law in case of the king, which is law in no case of the subject.’ Dicey thought the prerogatives extended to ‘[e]very act which the executive government can lawfully do without the authority of the Act of Parliament’.⁶³

The Chief Justice perceived that Blackstone’s approach was the more relevant approach to the case at hand. Similarly, Crennan J noted the distinction between the two scholars and concluded that

[t]his restrained approach to the prerogative is consistent with Australia’s legal independence from Britain, the constraints of federalism and the paramountcy of the

58 Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240.

59 Saunders, above n 13, 890.

60 (2009) 238 CLR 1 (*‘Pape’*).

61 (2012) 248 CLR 156 (*‘Williams (No 1)’*).

62 (2014) 252 CLR 416 (*‘Williams (No 2)’*).

63 *Williams (No 1)* (2012) 248 CLR 156, 180 [25].

THE CROWN

Commonwealth Parliament, and respect under our democratic system of government for the common law rights of individuals.⁶⁴

This conceptual question has implications for what analogies can be drawn from the Crown as to the capacity of the executive to act in both a public and private manner. The attempt to argue for the wider view, for instance, was resisted by Hayne J. He concluded that it could not be demonstrated that the Executive Government had all the capacities of a natural person. As he stated,

[t]he argument asserting that the Executive Government of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a natural person was no more than a particular form of anthropomorphism writ large.⁶⁵

Leaving to one side the implications of cases such as *Pape* and *Williams (No 1)* and *Williams (No 2)* for the capacity of the Commonwealth to use its executive power to spend and exercise authority beyond more orthodox means, the decisions mark another step in the unfolding of a notion of the state freed from the historic encumbrance of the Crown as its defining feature of the executive.

There remains a considerable set of questions as to what are the limits of the Commonwealth's executive power. The language of s 61 is particularly unhelpful. The express vesting of authority is juxtaposed with the cryptic phrase 'maintenance of this Constitution', which on its face could extend to the essential elements that may be attributed to the role of the central government.

As Nicholas Condylis has argued, there remains an unresolved debate about the non-statutory powers of the Commonwealth's executive power.⁶⁶ This debate is informed by those who believe that the non-statutory powers take their character from s 61 and only extend to those powers that are inherent to the Commonwealth's role as the national government. The other view is that the meaning of the non-statutory power in s 61 can best be understood by reference to, and is best derived from, the common law tradition. The former approach would appear to be in the ascendancy and reflects the trajectory that has taken place over the decades to formalise the authority of the Crown.

CONCLUSION

The Crown in its many facets remains a mystical, and at times an antediluvian, convenience. Yet in other instances it is the apparatus of a modern constitutional state. This chapter has emphasised the origins of the Crown and its authority. It followed the

64 Ibid 343-4 [488].

65 Ibid 254 [204].

66 Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39 *Melbourne University Law Review* 385, 387.

THE CROWN

track from absolute ruler and the evolution of those capacities to fit more appropriately within the governance of sovereign peoples by their representatives. The manifestation of the Crown in a personal and public guise has required the categorisation, regulation and at times the limitation of its authority. The Australian experience witnessed a willingness to cast the Crown and its role as more akin to the state. Thus from colonial times there are examples of this approach in advance of the United Kingdom.

With the greater attention on the constitutionalisation of executive powers, the role of the Crown has again been brought into relief. The tendency by the courts has been to limit the unfettered power in accordance with the assumptions implicit in a federal structure underpinned by responsible government.

The scope of these limits remains to be determined. However, it is undoubtedly the case that the force of history favours a view of the Crown that is responsible, accountable and exercised in the name of the people of the state.

2

SOVEREIGNTY AND THE FIRST AUSTRALIANS

PROFESSOR MEGAN DAVIS

The concept of the Crown evolved in diverse ways across the constitutional arrangements that emerged from the independence process of the British colonies. As Cheryl Saunders has observed of this diversity, the Crown ‘sometimes encountered conditions that were not replicated within the United Kingdom and that required innovation and adaptation’.¹ Encounters with Indigenous populations occupying these territories and the question of their pre-existing property rights presented one of those conditions in which the Crown was required to innovate and adapt. While the Crown had extensive experience in encounters with ‘non-Christian’ societies during the 16th century, including the use of royal charters as a method of establishing relations with ‘the native inhabitants of the New World’,² a common characteristic of the creation of British settler societies on occupied territories during the 18th and 19th century was treaty making.³ Australia’s public law system, however, is distinguished by a lack of treaty agreement with the First Australians. Consequently, the concept of the Crown has a different legal meaning to that of other comparative common law jurisdictions, such as New Zealand, Canada and the United States.

This chapter will consider the concept of the Crown and the question of Indigenous sovereignty with regard to the Aboriginal and Torres Strait Islander peoples of Australia.

1 Cheryl Saunders, ‘The Concept of the Crown’ (2015) 38 *Melbourne University Law Review* 873, 883.

2 Paul McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2004) 91.

3 *Ibid* 62, 116.

THE CROWN

The unresolved question of sovereignty and the ongoing questioning of Crown legitimacy by Indigenous peoples is, in many ways, a consequence of having no treaty. It is a question that dominates the Aboriginal political domain and in particular shapes the contemporary constitutional reform process that is about the 'recognition' of the First Australians by the Australian people. Sovereignty has emerged as the primary driver of the resistance to recognition because of the potential implications of any request, made voluntarily by the First Australians, to be 'recognised' in the *Australian Constitution*.

This chapter charts many of the legal questions that have arisen over the centuries as a consequence of the indeterminate notion of Indigenous sovereignty. It begins with the arrival of the British, the proclamation of the British colony and the way in which this was later dealt with by the High Court of Australia. It then considers how the unresolved question of sovereignty led to uncertainty about the legal status of Aboriginal people during the Frontier Wars. Next, this chapter considers how the question of sovereignty played out during the protection phase, in particular how conventional notions of the Crown's fiduciary duty toward Aboriginal peoples, as applied in other jurisdictions by the Crown, did not translate to the Australian conditions in the absence of the political legitimacy afforded by a treaty. Finally, this chapter considers the ongoing ventilation of legal questions about the legitimacy of the Crown's application to Indigenous peoples throughout the self-determination era to the present day, now impacting the federal government's 'campaign' for Indigenous constitutional recognition.

THE ARRIVAL OF THE BRITISH

When the British arrived in Australia, the continent was occupied by Aboriginal people. Captain James Cook, who arrived on the east coast in 1770, had instructions from the Admiralty:

You are likewise to observe the genius, temper, disposition and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them presents of such trifles as they may value, inviting them to traffic, and showing them every kind of civility and regard; taking care however not to suffer yourself to be surprised by them, but to be always on your guard against any accident.

You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.⁴

4 'British Admiralty, Secret Instruction Book' in J M Bennett and A C Castles, *A Source Book of Australian Legal History* (Sydney Law Book Co, 1979) 253-4.

THE CROWN

When Cook claimed possession on 22 August 1770 at Possession Island in Cape York, he did not seek the consent of the natives. When Arthur Phillip was commissioned to lead the First Fleet, his instructions were no longer to seek the permission of the natives but rather to ‘conciliate’ and to ‘establish friendly relations’. Phillip was also to grant land to whoever could *improve* the land.

According to the best information which We have obtained, Botany Bay appears to be the most eligible situation upon the said coast for the first establishment, possessing a commodious harbour and other advantages which no part of the coast hitherto discovered affords. It is therefore our will and pleasure that you do, immediately upon your landing, after taking measures for securing yourself and the people who accompany you as much as possible from any attack or interruptions of the natives of that country, as well as for the preservation and safety of the public stores, proceed to the cultivation of the land ...

You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence ...

And whereas We have by our Commission bearing date [2 April 1787] given and granted unto you full power and authority to emancipate and discharge from their servitude any of the convicts under your superintendence who shall for their good conduct and a disposition to industry be deserving of favor: It is our will and pleasure that in every such case you do issue your warrant to the Surveyor of Lands to make surveys of and mark out in lots such lands upon the said territory as may be necessary for their use, and ... that you do pass grants thereof with all convenient speed to any of the said convicts so emancipated, ...⁵

The instructions to Phillip to grant land to those who could ‘improve’ the land lie at the heart of the unresolved grievance of Indigenous Australians and the state. In 2011, in wide-ranging consultations with the Australian people, the Prime Minister’s Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the *Australian Constitution* found that one of the most significant issues raised by Indigenous peoples was ‘a reappraisal of currently accepted perceptions of the historical relationship between indigenous and non-indigenous Australians from the time of European settlement’, including ‘recognition of their sovereign status’.⁶ As Aboriginal lawyer Michael Mansell has argued,

5 G Barton, *History of New South Wales from the Records, Vol 1* (Governor Phillip) (Charles Potter, 1889) 481, 483, 485, 486.

6 Prime Minister’s Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (2012) 205.

THE CROWN

Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the *existence* of Aboriginal sovereignty.⁷

For this reason, the question of a treaty was another dominant feature of the expert panel consultations with Indigenous communities. The failure to enter into a treaty and to recognise the sovereign status of Indigenous peoples was counter to colonial practice in other parts of the world. This is because although Aboriginal people lived on the land when the British arrived, they did not ‘own’ the land in a way that the British recognised ownership; they did not possess it in a way that the British considered possession. For example, Aboriginal people were not *cultivating* the land. According to Paul McHugh, ‘the British did not regard the Australian Aborigine as possessing the political structure necessary for the recognition of sovereignty’:⁸

The social organization of these peoples appeared so backward to late eighteenth- and early mid-nineteenth-century eyes that the British had difficulty perceiving them human let alone holding any semblance of political organization. The Select Committee on Aborigines (1837) described them as ‘[s]o destitute are they even of the rudest forms of civil polity; that their claims, whether as sovereigns or as proprietors of the soil have been utterly disregarded’.

The international theories of settlement, conquest and cession that were influential at the time were central to this. Whether by conquest or cession, the mode of settlement had differing implications for the reception of British law and the rights of Indigenous inhabitants. Settlement occurred when the land was ‘desert and uncultivated’ and inhabited by backward people; conquest was a forcible invasion of occupied land; and cession meant that there was a treaty over occupied land.⁹ If the land was uncultivated, Europeans had a right to ‘bring lands into production if they were left uncultivated by the indigenous inhabitants’. Where lands were cultivated, then they were gained through conquest or they were ceded by a treaty. When lands were settled, the Crown’s laws automatically applied. When lands were taken by conquest, the laws of the native inhabitants applied until the Crown asserted sovereignty.¹⁰ In regard to cession, a treaty was entered into, but the Crown or foreign power abrogated the pre-existing legal system.

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert [*sic*] and uncultivated,

⁷ Michael Mansell, *Finding the Foundation for a Treaty with the Indigenous Peoples of Australia* (Aboriginal Provisional Government Papers, 2002) vol 5, 202. See also (2002) 4 *Balayi: Culture, Law and Colonialism* 83-89.

⁸ McHugh, above n 2, 112.

⁹ See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 201 (Blackburn J); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32-4, 36 (Brennan J), 103 and 108-9 (Deane and Gaudron JJ), and 179-82 (Toohey J).

¹⁰ W Blackstone, *Commentaries on the Laws of England* (first published 1765, 1976 ed) vol 1, 105.

and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country ... They are subject however to the control of the parliament, though ... not bound by any acts of parliament, unless particularly named.¹¹

The legal position of the continent, that it was unoccupied, was confirmed in *Attorney-General (NSW) v Brown*¹² and in *Cooper v Stuart*,¹³ where the Privy Council said that the colony was ‘a tract of territory practically unoccupied, without settled inhabitants or settled law’. Later, in *Milirrpum v Nabalco Pty Ltd* (*‘Milirrpum’*),¹⁴ although Blackburn J found that the doctrine of native title did not form part of the Australian law, he observed that clans in the Gove Peninsula area of Arnhem Land, Northern Territory, had a recognisable system of law, ‘a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence ... “a government of laws, and not of men”’.¹⁵ *Milirrpum* was a precursor to the High Court’s decision in *Mabo v Queensland (No 2)* (*‘Mabo (No 2)’*)¹⁶ where the plurality noted that in international law where land was regarded as *terra nullius* the law recognised conquest, cession and occupation of territory as three effective ways of acquiring sovereignty. The situation in Australia, in the view of the British, was that the Aboriginal people were backward people and the land was not, in their eyes, cultivated.

When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of *terra nullius*, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. The view was taken that, when sovereignty

11 Ibid 104-5.

12 (1847) 1 Legge 312.

13 (1889) 14 App Cas 286.

14 (1971) 17 FLR 141.

15 Ibid 267.

16 (1992) 175 CLR 1.

THE CROWN

of a territory could be acquired under the enlarged notion of *terra nullius*, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that [if] there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists).

Colonies of this kind were called 'settled colonies'. *Ex hypothesi* the Indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The Indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation.¹⁷

The decision in *Mabo (No 2)*, while finding that the land was occupied and there was a sophisticated system of laws in place, assimilated the rules of settlement with the rules for a conquered colony to the extent of their rights and interests in land, creating an uneasy, and for some unsatisfactory, combination of unsettled/settled.

Mabo (No 2) did allow for the survival of Indigenous legal traditions and entitlements because *terra nullius* did not apply to the Murray Islands, as the evidence showed that Indigenous people inhabited the islands and had a system of law that pre-dated the settlement. Those laws remain in force under the Crown but are modified or extinguished by legislative or executive action. But the High Court held that you cannot question the acquisition of the Crown's sovereignty in an Australian court.

Through the mediating operation of recognition by the common law, this older tradition was at least acknowledged as an embodiment of inherent and judicially cognisable bonds between indigenous peoples and their ancestral lands; but by casting it in terms of a 'native title' depending on common law recognition, the Court avoided any suggestion of indigenous 'sovereignty'.¹⁸

The High Court has not directly addressed whether or not this pre-existing legal system derives from Indigenous sovereignty. This is likely because the decision acknowledges the operation of Indigenous legal systems in the present day and holds that the Crown's assertion of sovereignty cannot be challenged in Australian courts, although Brennan J in *Mabo (No 2)* does use the phrase 'changed sovereignty'.

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.¹⁹

17 Ibid 36 (Brennan J).

18 Tony Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3rd ed, 2002) 176.

19 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 63 (Brennan J). See also Gleeson CJ, Gummow and Hayne JJ's use of 'changed sovereignty' in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 446.

THE CROWN

The conquered/settled grafting has been the subject of much criticism. Marcia Langton has argued:

[H]ow can it be explained that native title to land that pre-existed sovereignty and survived it, as the High Court of Australia explained, has been recognised, and yet the full body of ancestral Indigenous Australian laws and jurisdiction are deemed by a narrow, historically distorted notion of sovereignty to be incapable of recognition[?]²⁰

And Mick Dodson has argued in regard to *Mabo (No 2)* that ‘the sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky’.²¹ The expert panel sought legal advice as to the implications of constitutional recognition for the assertion of Aboriginal and Torres Strait Islander peoples’ sovereignty and found that ‘recognition’ of the first peoples as equal citizens ‘could not foreclose on the question of how Australia was settled’.²² The legal position of Aboriginal sovereignty and the Crown is as follows:

It follows that ultimately the basis of settlement in Australia is and always has been the exertion of force by and on behalf of the British Crown. No-one asked permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the Aboriginal peoples by any actions of legal significance voluntarily taken by or on behalf of them.²³

In the early days of the Australian colonies, the unresolved question of sovereignty manifested itself in more ways than land rights. In *R v Murrell*²⁴ the court’s jurisdiction over Aboriginal people was questioned because of the fact that Aboriginal people had not consented to the Crown’s sovereignty.

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country as Great Britain was never at war with the natives, not a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them: therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which

20 Marcia Langton, ‘Ancient Jurisdictions, Aboriginal Polities and Sovereignty’ (Speech delivered at the Indigenous Governance Conference, Canberra, 3-5 April 2002) 1.

21 Michael Dodson, ‘Sovereignty’ (2002) 4 *Balayi: Culture, Law and Colonialism* 13, 18.

22 Expert Panel, above n 6, 212.

23 Ibid 22.

24 (1836) 1 Legge 72.

have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.²⁵

In *Bonjon*²⁶ Justice Willis decided that the court did not have jurisdiction over Aboriginal persons. Willis J decided that New South Wales was different to those places that were conquered or obtained via treaty:

New South Wales was not however *unoccupied*, as we have seen, at the time it was taken possession of by the colonists, for ‘a body of the aborigines appeared on the shore, armed with spears, which they threw down as soon as they found the strangers had no *hostile intention*.’ This being the case, it does not appear there was any *conquest*, and it is admitted there has hitherto been no *cession* under *treaty*. Protectors indeed have recently been appointed and certain lands set apart by order of Government within this district, for the location of the aborigines; but no more. This colony then stands on a different footing from some others for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties.

Notably, Willis J drew upon the United States Supreme Court jurisprudence of domestic dependent nations in regard to the Indian populations. Of note is Willis J’s concern that the Aboriginal people had laws that should have been operative, and, because no treaty had been entered into, there were ‘no terms defined for their government, civilization and protection’.²⁷ For this reason there could be no application of white man’s laws to Aboriginal people, as the sovereignty of Aboriginal people and their customary law was intact. Here, Willis J cites Vattel, whose writings had influenced the British approach to discovery:

[A]s M. Vattel very justly says, ‘whoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour’s property, will acknowledge without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.’

Cases such as these were taking place against the backdrop of a rapidly developing colony. In particular, this period involved what many refer to as the political economy of killing and dispossession that underpins the modern Australian state.²⁸ The expansion of the colony meant that land was needed for industry. Aboriginal people still occupied this land and were not moving. This period from the early 1800s to the early 1900s is known as the ‘Frontier Wars’, the period of dispossession and conflict over land. In

25 (1836) 1 Legge 72.

26 *The Trial of Bonjon* in the *Port Phillip Gazette* (1841), contained in Vol 8, *Papers Relative to South Australia*, IUP, 143-56 (*‘Bonjon’*).

27 *Ibid.*

28 See, e.g., Noel Pearson, *A Rightful Place: Race, Recognition and a More Complete Commonwealth* (2014) 55 Quarterly Essay 12; H Reynolds, *Forgotten War* (New South Publishing, 2013).

THE CROWN

many colonies the killings were sanctioned by law²⁹ and in other colonies they were perpetrated by private vigilantes. In Van Dieman's Land or Tasmania, the killings led to the near-extinction of the Aboriginal race,³⁰ and Queensland is regarded as the 'epicentre' of the killings.³¹

THE FRONTIER WARS

This is an important period for the relationship between Aboriginal people and the Crown as, arising from the indeterminate question of sovereignty, it was not always clear whether Aboriginal people were British citizens or whether they were 'aliens' in a citizenship sense or a foreign, hostile nation in a military sense. This unfixed or inconclusive legal status and the moral questions associated with indiscriminate and state-sanctioned killings (often referred to as 'dispersals') frequently declared via martial law had consequences for the fate of many Aboriginal people. Those accused of being involved in attacks and retaliation attacks were often prosecuted without due process. The unresolved status of Aboriginal sovereignty and the legal status of the people also meant that record keeping in the colony was poor.

Perhaps, if Aboriginal people had really been treated as other 'British subjects' were, and each massacre site, killing field or individual murder location treated as a conventional crime scene, and evidence to secure convictions assiduously gathered, and the contemporary legal documentation had all managed to survive the test of time, we now might have the kind of evidence that could 'stand up in court'. But these mass killings were profligate, furtive and unprosecuted. No perpetrator was ever legally punished for killing an Aborigine in Queensland frontier conflict.³²

The inaccuracy around the numbers of deaths on the frontier fuelled a 'History War' in Australia during the 1990s. While the lack of record keeping meant the official statistics were low and therefore the number of frontier deaths underestimated, others viewed the lack of record keeping as evidence that there were not as many deaths as has been estimated by Australian historians. The most recent estimates, in 2014, are comparable with the numbers of Australian deaths in World War One.³³

29 Raymond Evans et al, *1901: Our Future's Past* (Pan Macmillan, 1997) 27; Henry Reynolds, *The Other Side of the Frontier* (Penguin, 1982).

30 Benjamin Madley, 'Patterns of Frontier Genocide 1803-1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia' (2004) 6(2) *Journal of Genocide Research* 167.

31 Raymond Evans and Robert Orsted-Jensen, 'I Cannot Say the Numbers that Were Killed': Assessing Violent Mortality on the Queensland Frontier' (2014) 5 *Analysis & Policy Observatory* <<http://apo.org.au/node/41404>>.

32 Ibid 6.

33 Ibid 5-6.

Students of World War One will also notice that the figure of 66 680 is remarkably close to the Australian combat death rate of 62 300 in that war. Queensland, with the largest total of pre contact Aboriginal peoples (34-38%) and the largest habitable territory to be usurped (almost half the size of the present day European Union), clearly must be viewed as the epicentre for Australian frontier struggles. The bulk of the casualties occurred here. Yet, if the mortality figures across the other five colonies and one territory were now added, the total death rate for all the Australian frontiers would rise even further above that of the Great War.

The confusion about the legal status of Aboriginal people — whether they were British subjects or not — played out in South Australia during the 1840s. The Coorong Massacre is a useful example of the legal complexities arising from the indeterminate status of Aboriginal people. The background to this story is that in 1840, after a vessel was shipwrecked, its crew and passengers were murdered by Aboriginal people. The Governor, George Gawler, requested an opinion from the Supreme Court on whether British law could deal with the Aboriginal perpetrators. The response from Cooper J was that although the crime occurred within the boundaries of South Australia, it would be ‘impossible to try’ a ‘wild and savage tribe’ who have ‘never submitted themselves to our dominion’.³⁴ Furthermore, in a later opinion Cooper J said that his opinion was founded on the fact that the ‘natives’ could only be subject to our laws if they have to some degree ‘acquiesced in our dominion’ and that there must be ‘some submission or acquiescence on their part, or at least, some intercourse between us and them’.³⁵

Still, Gawler called a Special Council to discuss the crime and he issued instructions to the commissioner of police to ‘bring to summary justice’ those who were responsible.³⁶ Following a ‘crude trial’, two Aboriginal men were sentenced to death and hanged. According to Lendrum, however, the police commissioner and Gawler were subject to ‘severe and damaging criticism’ that ended Gawler’s commission. The criticism was primarily from local Adelaide newspapers, which questioned the legality of the jurisdiction over Aboriginal people, the legality of the declaration of martial law, whether due process was afforded the men, and whether the trial and punishment were ‘morally justifiable’.³⁷ The advocate-general conducted an inquiry into Gawler’s legal justifications, finding that Aboriginal people were not entitled to a trial because they were not British subjects, and that they were ‘a separate nation posing a threat to a

34 Colonial Secretary’s Office 511/1840, cited in S D Lendrum, ‘The Coorong Massacre: Martial Law and the Aborigines at First Settlement’ (1977) 6 *Adelaide Law Review* 26. See also discussion in Alan Pope, *One Law for All: Aboriginal People and Criminal Law in Early South Australia* (Aboriginal Studies Press, 2011).

35 Colonial Secretary’s Office 511/1840, cited in S D Lendrum, above n 34, 26.

36 S D Lendrum, ‘The Coorong Massacre: Martial Law and the Aborigines at First Settlement’ (1977) 6 *Adelaide Law Review* 26, 27.

37 Ibid 28.

British colony, which colony was entitled to take any action necessary to protect itself'.³⁸ Relying on Vattel in his opinion, the advocate-general argued that 'savage erratic tribes are to be considered as nations', and that

[c]ircumstances may occur in which for the safety of the colonist, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however insignificant their numbers, or however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to British interests and authority.³⁹

In his conclusions, the advocate-general found that the procedure was appropriate and that the 'ordinary judicial forms' of municipal law were appropriately dispensed with in the circumstances as it was within the scope of international law to take such action 'for the welfare and the peace of society'.⁴⁰ An editorial in an Adelaide newspaper, the *Southern Australian*, concurred with the advocate-general's findings and with Gawler's justification, arguing that if the natives were British subjects then martial law applied and if they were not British subjects then the tribe could be treated as a nation upon whom war could be declared.⁴¹

This example highlights the complex legal questions that emerged in the early colonies in the absence of the conventional form of Crown agreement and quasi-diplomatic engagement that occurred in other British colonies. As Lendrum argues:

[t]he Aborigines of the colony could only become British subjects by consenting to become such; only by acquiescence could they be bound by British laws. This moral argument was advanced by many people in the context of Britain's colonization of foreign countries in the nineteenth century.⁴²

The Coorong example also reveals the complex debates that occurred within some colonies about the legality and morality of the killings apropos Aboriginal sovereignty. The South Australian *Register* in particular reveals a sophisticated debate about the constitutional position of Aboriginal people and their rights as British citizens, as well as the use or misuse of martial law.

As the killings continued over the course of the century, the colonies also began to make moves toward federating. Concomitant to this process was the rapidly declining population of Aboriginal people. The combination of the 'dying race' theory, Social Darwinism and the vulnerability of the dwindling population saw the exclusion of

38 Ibid 29.

39 Minutes of Council, 15 September 1840; Register, 19 September 1840; SAA 193 cited in Lendrum, above n 36, 29.

40 Ibid.

41 Ibid 31.

42 Ibid.

THE CROWN

Aboriginal people from the crafting of the new federal state.⁴³ Not only were Aboriginal people excluded from the discussions and conventions that led to the *Australian Constitution*, but the text of the *Constitution* itself is also imbued with the dying race theory; Aboriginal people were not expected to survive.⁴⁴

Two sections of the *Constitution* had application to Aboriginal people: s 127 excluded Aboriginal people from the national census and s 51(xxvi) of the *Constitution*, also known as the ‘races power’, provided the Commonwealth Parliament with the power to make laws for ‘the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’.⁴⁵ Sir Edmund Barton had stated that it would ‘not be considered fair to include the aborigines in population counts’, particularly since, as the Aboriginal people were a dying race, counting their numbers was unnecessary.⁴⁶ The uncertain status of Aboriginal people from the early days of the colonies and throughout the frontier phase was compounded by federation, as they were expressly excluded from the legal domain of the Commonwealth. It was the states who were left with the responsibility of protecting the remaining numbers of Aboriginal people.

THE PROTECTION ERA

The state’s approach to the Aboriginal populations in their jurisdictions was to introduce compulsory racial segregation. Statutes aimed at removing Aboriginal people from the wider community and their country and also ‘protecting’ them from dispersals and disease.⁴⁷ This era is known as the ‘protection era’. Protection statutes regulated every element of an Aboriginal person’s life relating to care, custody and education; to marriage, employment and amount of pay; and to freedom of movement.⁴⁸ There are two significant legal issues arising from this era that raised further questions about the Crown in the context of the unresolved question of Aboriginal sovereignty: these are known as the Stolen Generations and Stolen Wages.

43 Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939* (Melbourne University Press, 1997).

44 Gordon Reid, *That Unhappy Race: Queensland and the Aboriginal Problem, 1838-1901* (Australian Scholarly Publishing, 2006) xii.

45 *Australian Constitution* s 51(xxvi), later amended by *Constitution Alteration (Aboriginals) 1967* (Cth) s 2.

46 *Official Record of the Debates of the Australasian Federal Convention: 1891-1898*, Melbourne, 8 February 1898, 713 (Edmund Barton).

47 Reid, above n 44, ix.

48 *Aboriginal Protection Act 1869* (Vic); *Aborigines Protection Act 1886* (WA); *Aboriginal Protection and restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Protection Act 1909* (NSW); *Aborigines Act 1910* (Vic); *Aborigines Protection (Amendment) Act 1940* (NSW).

The ‘Stolen Generations’ is the term that was given to the policy of removal of ‘half-caste’ children from their families by the state. During this time many children were sexually abused, or they experienced violence in state- or church-run institutions.⁴⁹ In addition there was a policy of adoption into white families.⁵⁰ The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families (*Bringing Them Home*) investigated this period, including the argument that the policy constituted genocide, based on 535 oral and written testimonies.⁵¹ It also considered reparations such as monetary compensation and an apology. Following on from the *Bringing Them Home* report, members of the Stolen Generation have sought redress through litigation. Two cases, *Kruger v Commonwealth*⁵² and *Cubillo v Commonwealth*,⁵³ are salient in considering the Crown and Indigenous sovereignty.

Kruger challenged the constitutional validity of Northern Territory removal legislation, the *Aboriginals Ordinance 1911* (NT), and *Cubillo* sought damages for, among other things, a breach of the duty of care allegedly owed to them by the Commonwealth as well as a breach of the Commonwealth’s fiduciary duties. Both cases lost virtually every argument. It was not lost on Aboriginal people that those Indigenous populations in comparative jurisdictions with treaties that alter the Crown’s conception of sovereignty to give legitimacy to Aboriginal populations as a political unit have well-established fiduciary duties between the state and Indigenous peoples. According to Alexander Reilly, the removal policy and the subsequent apology in 2008 to the Stolen Generations support Aboriginal people’s questioning of the legitimacy of the Crown and claims for Indigenous sovereignty. Indigenous sovereignty ‘is essential to properly understand the iniquity of policies of removal’,⁵⁴ despite the fact that this connection is ‘assiduously avoided in official public discourse’.⁵⁵ Reilly argues that ‘most explanations for removal policies in the 19th and 20th centuries in Australia avoid the possibility that policies of removal were asserting an extreme power to eliminate the Aboriginal other, and therefore do not need to account for the possible existence of such a power’,⁵⁶ despite this being ‘a fundamental misconception of the place of Aboriginal people in

49 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *About the Royal Commission* (2013).

50 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Commonwealth of Australia, 1997).

51 Ibid 270-5.

52 (1997) 146 ALR 126 (*Kruger*).

53 (2001) 184 ALR 249 (*Cubillo*).

54 Alexander Reilly, ‘The Inherent Limits of the Apology to the Stolen Generation’ (University of Adelaide Law Research Paper No 2009-002, 3 October 2008) 8.

55 Ibid.

56 Ibid 4.

the order of the State'. Reilly says that '[t]he historical reduction of Aboriginal people and their political strength means that traditional theories of sovereignty adequately account for the laws and policies of the State which progressively dispossessed Aboriginal people'.⁵⁷ Neil MacCormick, by way of example, argues that 'the tenuousness of locating sovereignty within one system is evident when that system is overstretched and its validity is necessarily called into question. Policies of removal are an example of the particularity of sovereignty in Australia being overstretched'.⁵⁸ Reilly states:

To fully account for laws, policies and practices which resulted in the forced separation of Aboriginal children from their families, the State must revisit the question of Aboriginal sovereignty. In addressing Aboriginal sovereignty, the State must acknowledge that its own sovereignty in Australia is limited. The apology of the Rudd government acknowledges that the State should not have implemented policies of removal. But it needs to go the next step to say that the State *cannot* implement such policies. Such policies cannot be supported by law. There is no legal authority to pass them. The denial of their possibility is a vital demonstration of the limits of the State's sovereignty, and this limit needs express acknowledgement.⁵⁹

The other legal issue that arose during this period and remains alive today is Stolen Wages. 'Stolen Wages' is a term used to describe state control over any income earned by Indigenous workers from 1897 to 1972.⁶⁰ While each state and territory government had different statutory schemes, the state collected wages (and Commonwealth child endowment) and placed them in trusts.⁶¹ Most of this money was spent, mismanaged or misused by state officials in ways that included administrators, under the statutory regime, stealing Indigenous workers' money.

These two issues have animated an extensive body of literature relating to the obligations of the Crown in Australia. This literature, similar to that concerning the Stolen Generations, draws comparisons to those jurisdictions such as Canada and the United States where treaties were entered into and the concept of the Crown is one that has more juridical meaning than in Australia. As Cheryl Saunders alluded to when considering the divergent notions of the Crown in the member states of the Commonwealth of Nations, treaties 'strengthened attachment to the Crown or, at least, to the Crown in right of the United Kingdom, as it now became' in a way that has not occurred in Australia.⁶² Saunders observes that 'for some, the Crown represented the

57 Ibid 5.

58 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56(1) *Modern Law Review* 9.

59 Reilly, above n 54, 20.

60 Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) v.

61 Rosalind Kidd, *The Way We Civilise* (University of Queensland Press, 1997).

62 Saunders, above n 1, 884.

original treaty partner with Indigenous peoples, engaging the “honour of the Crown” in dealings with pre-existing Indigenous societies’.⁶³

In regard to the legal culpability of the state for stolen wages, notions of Crown fiduciary obligations and trust have not translated well to the Australian public law system in the way they have in those jurisdictions with Indigenous populations and treaty agreements. Stephen Gray has surveyed the concepts of trust and fiduciary duty and relevant jurisprudence in the context of future potential litigation for Indigenous Stolen Wages victims but has found that in relation to a fiduciary duty between the Crown and Aboriginal people, ‘broader fiduciary obligations are far less likely to be recognised in Australian courts’.⁶⁴

In the post-*Mabo* environment, many have postulated that a fiduciary duty must exist between Aboriginal people and the government. Others, however, argue that in the absence of a treaty or substantive constitutional rights as in New Zealand and Canada the character of Aboriginal nations is not capable of sustaining a fiduciary relationship with the Crown: ‘we are, of necessity, thrown back on constitutional principle, the common law and, where relevant, statute. And it is here, in my view, that advocacy for an enhanced but distinct fiduciary law regulating the State/indigenous people relationship is likely to founder’.⁶⁵ Finn has argued that the lack of constitutional or legal recognition of the separate and distinct status of Australian Indigenous people means that they can only benefit from ‘the *same* fiduciary (or trust) relationship which exists between the State and the Australian people’.⁶⁶ Stephen Gray acknowledges that it is difficult to locate the source of the fiduciary duty between the Crown and Aboriginal people in part because of the historical facts, some of which are charted above, but not least because the fact of violence and negligence characterises both this relationship and the way that the Crown has always treated Aboriginal people. David Tan argues that

the Crown-aboriginal fiduciary relationship sits uncomfortably when juxtaposed against this classical backdrop. More often than not, the Crown and aborigines appear to be adversaries, suggesting the opposite of a fiduciary relationship, where the existence of a conflict between the interests of the fiduciary and the beneficiary indicates a *prima facie* breach of the duty!⁶⁷

63 *Manitoba Metis Federation Inc v A-G (Canada)* [2013] 1 SCR 623, 658-65 [65]-[83] (McLachlin CJ and Karakatsanis J for McLachlin CJ, LeBel, Fish, Abella, Cromwell and Karakatsanis JJ), cited in Saunders, above n 1, 3.

64 Stephen Gray, ‘Holding the Government to Account: The “Stolen Wages” Issue, Fiduciary Duty and Trust Law’ (2008) 32(1) *Melbourne University Law Review* 115.

65 Paul Finn, ‘The Forgotten “Trust”’: The People and the State’ in Malcolm Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995).

66 *Ibid* 138.

67 David Tan, ‘The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?’ (1995) 69 *Australian Law Journal* 440, 445.

THE CROWN

Still, Gray argues that it is not clear why a fiduciary relationship between the Crown and Aboriginal people is unlike other fiduciary relationships:

The argument is perhaps plausible in the context of the post-assimilation, post-*RDA* era of 'self-determination' — an era which, in any case, seems now to have ended. However, it seems far less plausible in the era of 'protection' or of assimilation, during which the *Aboriginals Ordinance 1918* (Cth) and its successors were aimed precisely at 'promoting or defending' Aboriginal rights or interests, as they were then conceived.⁶⁸

Gray suggests a possible *sui generis* fiduciary relationship between the Crown and Aboriginal people on the basis of the special vulnerability of Indigenous people, defining it as an unequal power relationship that, when combined with public policy, could be the source of a broad duty to protect Aboriginal rights and interests.⁶⁹

The purpose of raising these two legal questions from the protection era is to illustrate the difficulties arising from the unresolved question of sovereignty. The ongoing questioning of the Crown's legitimacy punctuated the frontier phase and the protection phase and continued into the assimilation and self-determination phases of Australian history. This chapter will not dwell on the 1967 referendum because the alterations to s 127 and s 51(xxvi) did not alter the situation of Aboriginal peoples apropos the Crown and sovereignty. The referendum deleted the exclusion of Aboriginal peoples from the head of power to enable the Federal Parliament to make laws for Aboriginal people. The very slow response of the Commonwealth to use the new power to legislate for Aboriginal people, in particular to respond to Aboriginal aspirations for its use, is evidence that there was no shift in power relations.⁷⁰

THE SELF-DETERMINATION ERA

The failure of the Commonwealth to use its new power in fact led to the next significant expression of Aboriginal sovereignty, the Aboriginal Tent Embassy. The Tent Embassy was a response to the failure of the state to recognise Aboriginal land rights and protest the post-1967 inertia on Aboriginal rights. The Aboriginal Tent Embassy set up outside Parliament House (now Old Parliament House) on Australia Day (26 January) 1972. The Aboriginal Tent Embassy has continued its protest for the recognition of Aboriginal sovereignty for over 40 years. Following on from this, Prime Minister Gough Whitlam was elected in 1971 and declared a new policy era of 'self-determination'. During this period of 'self-determination', there were many developments in Indigenous rights

68 Gray, above n 64, 137.

69 Ibid.

70 John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 186.

and recognition. This period saw the creation of a statutory body aimed at Indigenous policy and representation, called the Aboriginal and Torres Strait Islander Commission (ATSIC). It also saw the *Mabo* litigation which led to the High Court's decision in *Mabo (No 2)* and the negotiation of the native title statutory framework.

Two decisions during this period squarely addressed questions of sovereignty arising from the High Court's decision in *Mabo (No 2)*. In *Coe v Commonwealth (No 2)*⁷¹ the plaintiff asserted that the Wiradjuri people were either a sovereign nation of people or a domestic dependent nation, and that, following *Mabo (No 2)*, the sovereignty of the Indigenous peoples and the decision in *Coe v Commonwealth ('Coe (No 1)')*⁷² must be reviewed in light of that decision. *Coe (No 1)* involved Wiradjuri man Paul Coe and others who applied for leave to amend a statement of claim that Cook's and Phillip's proclamations and the settlement 'wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign aboriginal nation'. Mason CJ found that *Coe (No 1)* lends no support whatsoever to a subsisting Aboriginal claim to sovereignty.

That claim was rejected by all four justices. Gibbs J stated that the annexation of the east coast of Australia by Captain Cook and the subsequent acts by which the whole of the Australian continent became part of the Dominions of the Crown were acts of state whose validity could not be challenged.⁷³

According to Mason CJ:

Mabo (No 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo (No 2)* denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country.⁷⁴

Similarly, in *Walker v New South Wales (1994)*⁷⁵ the plaintiff, a Noonuccal man who was charged with a criminal offence, argued that (a) Australian law only applied to Aboriginal people to the extent that they had accepted it, and (b) Aboriginal criminal law had been recognised by common law through *Mabo (No 2)*. The High Court rejected this claim, arguing that it was a basic principle that all people stand equal before the law;

71 (1993) 118 ALR 193.

72 (1979) 24 ALR 118.

73 *Coe v Commonwealth (No 2)* (1993) 118 ALR 193, 194.

74 *Ibid* 200.

75 *Walker v New South Wales* (1994) 182 CLR 45.

that ‘in the case of the criminal law ... it was inherently universal in operation’; and that if customary criminal law survived settlement, it was extinguished by passage of general criminal statutes.

CONSTITUTIONAL RECOGNITION AND SOVEREIGNTY

The current phase of Indigenous law and policy is the post-self-determination phase. The end of self-determination is generally accepted as the abolition of ATSIC. From *Mabo (No 2)* and ATSIC emerged a contemporary movement for addressing ‘unfinished business’: the unresolved issue of sovereignty and the negotiation of a post-colonial treaty. This has been central to the Aboriginal resistance to the current constitutional reform project and the ‘Recognise’ campaign that is about the ‘recognition’ of Aboriginal and Torres Strait Islander peoples in the *Constitution*. One of the drivers of resistance is the lack of agreement on what ‘recognition’ means. Political scientist Charles Taylor calls this ‘the politics of recognition’,⁷⁶ meaning that there is a spectrum of recognition. Along this spectrum, strong recognition is something like agreements or treaties or Indigenous parliaments or entrenched Indigenous rights: critically, strong recognition means the redistribution of public power within the state. At the weaker end of the spectrum is non-constitutional symbolism — language that makes reference to Indigenous peoples’ unique relationship with ancestral land and waters, for example, but is not structural accommodation.⁷⁷ As Dylan Lino has pointed out, ‘written constitutions are a major site of contestation in the political struggles of marginalised groups to have their identities respected within public institutions’.⁷⁸

In 2011, Prime Minister Gillard constituted a cross-party, community-based expert panel to determine what recognition might mean. The expert panel recommended removing the remaining references to ‘race’ from the *Constitution*, inserting a new federal power to make laws with respect to Aboriginal and Torres Strait Islander peoples with a statement of acknowledgement and a racial non-discrimination clause. Since the report was handed down in 2012, a Federal Parliament’s Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has also worked on the expert panel recommendations for ‘recognition’, providing alternative drafting to the options for reform. As noted from the outset, the expert panel found two primary concerns dominating the discussion with the Aboriginal and Torres Strait

76 Charles Taylor, ‘The Politics of Recognition’ in Amy Gutmann (ed), *Multiculturalism and the Politics of Recognition* (Princeton University Press, 1992).

77 Dylan Lino, ‘Written Constitutions and the Politics of Recognition: Symbolism and Substance’ (Paper presented at the World Congress of Constitutional Law 2014, University of Oslo, 16-20 June 2014) <<http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws17/w17-lino.pdf>>.

78 Lino, above n 77.

THE CROWN

Islander community, treaty and sovereignty. The panel found that the majority of Australian people did not view the unresolved question of Aboriginal sovereignty and a treaty agreement as legal issues that could be dealt with via the *Constitution*, but rather believed that there should be a negotiated political settlement.

CONCLUSION

The lack of treaty between Indigenous people and ‘the Crown’ continues to be an ongoing source of grievance for the First Australians. Indigenous peoples in Australia often look to the comparative constitutional arrangements in other common law jurisdictions such as Canada, where the fiduciary duty⁷⁹ of the Crown or the concept of ‘honour of the Crown’ is well developed.⁸⁰ Indigenous peoples query why this cannot be done in Australia despite the passage of time. For all the limitations of the Canadian concept of the Crown, as identified by Indigenous peoples themselves, the concept of the Crown as it has evolved in New Zealand, Canada and the United States is incomprehensible to the Australian public law system.

The lack of legal recognition from the outset has had an enduring impact upon Indigenous polities and their acceptance as legitimate political units within the Australian state. Although the decision in *Mabo (No 2)* and native title jurisprudence has seemingly carved out a concept of the Crown in relation to property law, this is limited in many ways: it has not spilled over into public law; it failed to deal with the question of Indigenous sovereignty; and the High Court’s unsatisfactory elision of the settled/conquered distinction in *Mabo (No 2)* continues to feed Indigenous resentment. This chapter deliberately does not mention the Australian reconciliation movement because it was not conceived out of a framework of truth and justice analogous to reconciliation movements worldwide, and because it has achieved little in the way of structural reform and the resolution of the unfinished business between the state and Indigenous peoples.

79 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

80 *R v Sparrow* [1990] 1 SCR 1075, 46 BCLR (2d) 1; see also *Tsilhqot’in Nation v British Columbia* [2014] SCC 44 [69].

3

SOVEREIGNTY AND THE AUSTRALIAN PEOPLE

RICHARD NIALL QC¹

The first three chapters of the *Constitution* are devoted to the Parliament, the executive and the judiciary of the Commonwealth, respectively. Their prominence in the *Constitution* and the allocation of each to separate chapters serve to emphasise that the *Constitution* is, fundamentally, a Commonwealth-centric instrument, structured around a dispersal of power. There are two other institutions of the Federation created in 1901 which are critical to its existence and continuity yet do not occupy the prominence of those identified in the first three chapters of the *Constitution*: the states and the people.

This chapter is concerned with ‘the people’ and the position they occupy within the Australian constitutional framework. It tries to place them within their historical and constitutional setting and to explain how the people, as a concept, inform recognised constitutional imperatives.

The relationship between the Australian people and their *Constitution* is, at least as expressed in the document itself, seemingly ambivalent. The Federation was not forged out of a popular rebellion and does not reflect a focus on the individual rights of those who are governed. The *Constitution* contains no grand statement that the Australian Federation is to be characterised as a government of the people, by the people, nor does it suggest that those governing do so as delegates of the people themselves.² The

1 The author wishes to acknowledge the great contribution given by Ms Julia Freidgeim, Ms Maya Narayan and Mr Andrew Roe to the writing of this chapter.

2 Sir Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597.

THE CROWN

ambivalence that the *Constitution* has for the Australian people is most obviously reflected in the fact that the *Constitution* is an enactment of the Imperial Parliament.

It is an important question to what extent the laconic expression of the role of the people in the text of the *Constitution* — and its focus on the relationship between the institutions of government, rather than that between the people and their government — reflects the secondary position of the people as instruments of government. Are the people the architects of their fate or merely the objects of the powers exercised by the three branches of government?

The people (and it will be necessary to be a bit more specific about who is included within this concept) have always played a significant role in the Australian constitutional framework from the inception of the Federation in 1901. This chapter will focus on the role of the people in two interrelated contexts: the people in representative government; and the people as electors.

THE CONCEPT OF SOVEREIGNTY

Sovereignty is a description of a particular form of power. It connotes some ultimate or controlling source of power and the capacity to determine one's destiny. It suggests a linear relationship of power, with the Sovereign at the apex.

The term 'sovereignty' is commonly used in an international context to describe a nation or polity that exhibits certain features and relates to other nations and peoples in a particular way. In that context, it is both useful and commonplace to describe Australia as a sovereign nation. Internationally, it speaks for itself and with one voice. It relates to the world as a single unit. It has clearly defined borders, a recognised government and self-sustaining system of laws. Australia's capacity to exercise its sovereignty is secured through its own resources and through its alliances and relationships with other nations of common interest. Our nation is neither a satellite nor a dependency.

In *Bonser v La Macchia*,³ Windeyer J referred to Australia having become 'by international recognition ... competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty'.⁴ However, even in the international context, there is an argument that the legal sovereignty of Australia evolved rather than sprang fully formed from the well of federation. Justice Windeyer noted in *Bonser v La Macchia* that the *Statute of Westminster 1931 (Imp)* ('Statute of Westminster') had removed restrictions, 'real or supposed', and thereby affirmed the legal competence of

3 (1969) 122 CLR 177.

4 Ibid 224 (Windeyer J); referred to in *Sue v Hill* (1999) 199 CLR 462, 487 [50] (Gleeson CJ, Gummow and Hayne JJ).

the Commonwealth Parliament. The result, his Honour observed, was that '[t]he law has followed the facts'.⁵

Notwithstanding the nation's international character, internally, the picture is quite different. In a pluralist society governed under a written constitution, with a separation of powers, there is no single repository of power that can answer the description of sovereign. The power of each is subject to the power and role of the others.

Recognising that there are never absolutes in the world, the concept of sovereignty, as it applies to governmental and constitutional structures, is often expressly qualified: parliamentary sovereignty and popular or political sovereignty are obvious examples. Dicey discusses two types of sovereignty: 'political' or 'popular' sovereignty, residing in the people; and 'legal' or 'parliamentary' sovereignty, residing in Parliament. According to Dicey, the fundamental dogma of modern constitutional theory is that 'the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation'.⁶

Dicey's conception, with its focus on the relationship between the Parliament and the people, can in part be explained by the rejection of the sovereignty of the Crown. The dichotomy of which he speaks cannot be applied without significant qualifications to a federal system operating under a written constitution with dispersed and finite legislative power and an independent federal judiciary. It also has to deal with the fact that legal authority of the Australian parliaments (both Commonwealth and state) can be sourced to the authority of enactments of the Imperial Parliament. As Chief Justice French has observed:⁷

The sovereignty of the people, considered as a way of designating fundamental constitutional authority, has no ready definition which engages with the distribution of powers between the arms of government and between Commonwealth and States in the Constitution.

In contrast, popular sovereignty captures the 'evolving complex of ideas' which can be deployed to describe the result that the people are 'constituted the owners, not merely the beneficiaries, of our system of government'.⁸

In the Australian constitutional context, Professor Winterton has observed that sovereignty is a 'notoriously ambiguous concept' that has been used to describe both the legal source from which the *Constitution* derives its authority and the location

5 (1969) 122 CLR 177, 223 (Windeyer J).

6 A V Dicey, *Introduction to the Study of the Modern Constitution* (Macmillan, 8th ed, 1915) 302.

7 Justice R S French, 'The Constitution and the People' [2001] *Federal Judicial Scholarship* 7.

8 Paul Finn, 'A Sovereign People, a Public Trust' in Paul Finn (ed), *Essays on Law and Government* (Law Book Co, 1995) vol 1, 4-5.

of the power to amend it.⁹ The latter view is exemplified by McHugh J's remarks in *McGinty v Western Australia*, where his Honour noted:¹⁰

... ultimate sovereignty resides in the body which made and can amend the Constitution. On that view, the sovereignty of Australia originally resided in the United Kingdom Parliament. Since the *Australia Act 1986* (UK), however, the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people. Only the people can now change the Constitution. They are the sovereign. But, because their rights to amend the Constitution are not equal, the Australian people do not have equal shares in that sovereignty.

In respect of the former view, the starting point in identifying the legal source from which the *Australian Constitution* derives its authority must be the document itself. The text, however, is not couched in the declaratory tones of the United States *Declaration of Independence* and gives contradictory signals.

Although the legal source of the *Constitution*, at least at federation, is an Act of the Imperial Parliament, and two of the main instruments of constitutional change of the 20th century outside the text itself — the Statute of Westminster and the *Australia Act 1986* (UK) — are expressions of the will of the Imperial Parliament, the *Constitution* is properly seen as being a reflection of, and sustained by, the will of the people themselves. That is most clearly seen in the history and role of representative and responsible government both before and since federation and the sustaining role of 'the democratic principle' in the operation of the *Constitution*.¹¹

The Legal Source of the *Constitution*

First, and most obviously, the *Constitution* is an Act of the Imperial Parliament. That points to a legal authority that is neither asserted nor claimed by the people of Australia, but conferred by another sovereign nation. The enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp) ('*Constitution Act*') was not just a formal or symbolic step. Rather, it reflected both a legal and cultural relationship between the Imperial Parliament, its former colonies and the Australian people. It also reflected the truth that the Australian nation was not formed out of revolution or struggle. It did not represent a sudden, bold and independent step, but the amalgamation of self-governing

9 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 4.

10 *McGinty v Western Australia* (1996) 186 CLR 140, 237 (McHugh J).

11 *McCloy v New South Wales* (2015) 257 CLR 178, 226 [110]-[111] (Gageler J), citing H Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 327.

colonies, the legislatures of which were subordinate to the Imperial Parliament. In form, the *Constitution* was a creation of the Imperial Parliament and not a rejection of its continuing role in the government of Australia.

As described by Sir Owen Dixon, the *Constitution* ‘is not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King’s Dominions’.¹² To similar effect, Dawson J in *Australian Capital Television Pty Ltd v Commonwealth* (*ACTV*) described the legal foundation of the *Constitution* as ‘an exercise of sovereign power by the Imperial Parliament’.¹³ Covering clause 5 to the *Constitution Act* provided that it ‘shall be binding on the courts, judges and people of every State and of every part of the Commonwealth’. As Professor Lindell has rightly concluded, in 1900 the *Constitution* was legally binding ‘because of the status accorded to British statutes as an original source of law in Australia and also because of the supremacy accorded to such statutes’.¹⁴

The significance of the fact that the *Constitution Act* was an Act of the Imperial Parliament was magnified by the Diceyan view as to the sovereignty of the British Parliament. Under that view the Parliament at Westminster was sovereign and not subject to any law. As a consequence, as at 1900, the Australian supreme law was not only a law of another nation, but it was also liable to change or amendment upon the will of Westminster. Since 1900 this legal position in respect of the relations between Australia and Great Britain has evolved, as ‘the result of an orderly development — not as the result of a revolution’.¹⁵ Changes occurred first with the Statute of Westminster and then with the *Australia Act 1986* (UK).¹⁶

The effect of the Statute of Westminster was, in essence, to remove the inability of the Commonwealth Parliament to alter or repeal British statutes which applied by paramount force.¹⁷ The main subject of the Statute of Westminster was the supremacy of the British Parliament operating as a derogation from sovereignty in a Dominion.¹⁸ It repealed the doctrine of repugnancy embodied in the *Colonial Laws Validity Act 1865* (Imp), empowered the Commonwealth Parliament to repeal or amend Imperial

12 Dixon, above n 2.

13 (1992) 177 CLR 106, 181.

14 G J Lindell, ‘Why is Australia’s *Constitution* Binding? The Reasons in 1900 and Now and the Effect of Independence’ (1986) 16 *Federal Law Review* 29, 32.

15 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 261 (Gibbs J).

16 Lindell, above n 14, 33-5.

17 Lindell, above n 14, 34.

18 Dixon, above n 2, 610.

THE CROWN

legislation intended to apply to Australia,¹⁹ empowered the Commonwealth to legislate extraterritorially²⁰ and abolished the power of the United Kingdom Parliament to legislate for Australia.²¹ In its terms, the Statute of Westminster did not apply to Australia until it had been adopted by the Commonwealth Parliament, which did not occur until 1942 with the passage of the *Statute of Westminster Adoption Act 1942* (Cth).

The Statute of Westminster did not, however, apply to the states. That was addressed in the *Australia Act 1986* (UK). As expressed by Mason CJ in *ACTV*, ‘the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people’.²²

THE PEOPLE IN REPRESENTATIVE GOVERNMENT

The position of the Australian people in the government of the future Commonwealth was reflected in the text of the *Constitution* in the two contradictory processes just identified: the first, that by which the *Constitution* was enacted; the second, that by which it was written and then adopted by a series of referenda in each of the colonies. It is this second aspect of the process that is a critical foundation for the role of the people under the *Constitution*.

The actors in the text of the *Constitution* are ‘the people’, rather than the British Parliament. Covering clause 3 records that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania ‘shall be united’ in a Federal Commonwealth. The preamble recites that the people of the colonies agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the *Constitution*. One cannot find in the text of the *Constitution* a sovereign power either vested in the Parliament or the people. Instead, to understand the role of the people as a source of the authority of government in Australia, one needs to look beyond the text and to the role of representative government.

The debate about federation and the form it might take did not occur in a vacuum. Two factors of note concerning the context in which the *Constitution* arose help explain why an Australian constitution enacted by the Imperial Parliament was not, at the time, seen as incongruous. The first was the development of representative government in the colonies in the 19th century. The second was the terms of the *Constitution*, which were to be settled by a popularly elected Convention and put to a referendum in the colonies.

19 *Statute of Westminster*, s 2.

20 *Ibid* s 3.

21 *Ibid* s 4.

22 *ACTV* (1992) 177 CLR 106, 138.

History of Representative Government in Australia

By the middle of the 19th century, there was a growing movement within the colonies for self-government, along with an increasing recognition in Britain as to its inevitability. Serle notes that three factors accelerated the process: the end of transportation to eastern Australia, the discovery of gold and the retirement from the office of secretary of state of Earl Grey in 1852.²³ Those factors reflect the changing economic and demographic position of the colonists and the departure of the obstinate Grey, who regarded the colonies as insufficiently mature to accept the responsibility of self-government.

Grey's successor, Sir John Pakington, gave permission in 1852 for the colonies to draw up their own constitutions. He told the Commons that the government was²⁴

bound to meet the demands pressed in a confiding, trustful, and generous spirit, and that we at this distance from those colonies could not judge of their local interests ... so well as the colonists ... and that we ought to place that confidence in them as English subjects, and men accustomed to the freedom and institutions of this country, which they claimed the right to share, and which they were so well entitled to possess.

The push to self-government in Australia was not seen, even by its staunchest proponents, as a rejection of Great Britain. It was felt, both in Australia and in Great Britain, that the freedom that self-government afforded would serve to foster relations with the Imperial Government and avoid the resentment that would flow from a refusal to accord self-government. Great Britain, conscious of the experience of both the United States and Canada, had an interest in both extending freedom and maintaining ties. Some thought that the two outcomes were antagonistic, others that they were symbiotic. Some in the Colonial Office, for example, were pessimistic about the ability of the colonists to govern themselves, and doubtful about whether the colonies would stay in the Empire if given self-government. Others, such as Herman Merivale, under-secretary of state at the Colonial Office, were confident that 'the alliance of blood, and language, and religion' would hold.²⁵ One of the factors that was of concern to the Colonial Office was the extent to which the colonies were sufficiently mature to move from penal colony to self-government. Sir Frederick Rogers, who made the first full report on the Draft State Constitutions at the Colonial Office, was strongly opposed to abandoning the power of veto over colonial laws on the basis that the colonies simply could not be

23 Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1977) 193.

24 Quoted in *ibid.*

25 Quoted in *ibid* 195.

trusted. He was worried about the possibility of ‘palpably immoral’ Acts, especially with regard to Indigenous Australians and non-European immigrants.²⁶

Draft Constitution Acts of the colonies were drawn up in each of New South Wales, Victoria and South Australia and submitted to the Imperial Parliament for passage. They were assented to in late 1855. With the passing of each Act (including the passing of a similar Act in Tasmania) and with the authority of the Imperial Parliament, the colonies attained the status of self-governing polities with responsible government.²⁷

The extent to which the self-governing colonies were independent is a matter of debate. They were certainly independent from each other; no attempt was made in the draft constitutions to provide for future links. However, each colony remained a British dependency. Justice Kenny has noted that the ‘self-government enjoyed by and acceptable to the colonists was of a very limited kind’.²⁸ In this respect, two aspects of the governmental arrangements are of note: first, the fact that the Governor was appointed by, and answerable to, the Imperial Government (but played a very active role in the Australian political community); second, that the legislative capacity and ability of the governor to withhold assent to Bills, acting on the advice of the British Ministers, was limited. As discussed above, the position of the colonies was later clarified by the *Colonial Laws Validity Act 1865* (Imp), which strengthened the powers of the colonial legislatures. The development of responsible government within the colonies as Imperial dependencies was an important part of the context to federation. In practical terms, the government of each colony was responsive to its terms; the actual limitations upon the legislative capacity of the Victorian Parliament (for example) were, before federation, ‘few and practically unimportant’.²⁹ The enthusiasm of Justice Boothby in South Australia for the supremacy of the English common law over colonial legislation was quelled by the *Colonial Laws Validity Act 1865* (Imp),³⁰ and the move to federation was in large part driven by the benefits of economic union rather than emancipation from Imperial rule. In *Cole v Whitfield* the High Court observed that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade.³¹

26 Quoted in *ibid* 197.

27 *Smith v The Queen* (1994) 181 CLR 338, 350 (Deane J).

28 Justice S Kenny, ‘Colonies to Dominion, Dominion to Nation’ in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 251.

29 Dixon, above n 2, 598.

30 *Ibid* 599.

31 (1988) 165 CLR 360, 392, considered in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 455-6 [24] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

At the Constitutional Convention of 1891, it was agreed that any constitution should have the approval of the Australian people, while at the Corowa Conference in 1893, it was resolved that the process of approval should occur by way of separate referendum in each of the states. The Constitutional Convention comprised elected members and concluded its work in 1898, the result being put to a referendum in each of the self-governing colonies that year. Subsequently, in 1898, referenda on the Commonwealth Constitution Bill were held in New South Wales, South Australia, Tasmania and Victoria, pursuant to enabling legislation that had been passed in each colony. A majority of 'yes' votes was recorded in each colony, though in New South Wales the referendum failed because a quota of 80 000 required by the enabling legislation was not reached. A further round of referenda was held in 1899, in which Queensland also participated. The 'yes' case was passed by a majority in each colony, with the exception of Western Australia, which did not hold a referendum until 31 July 1900.

A combined number of just over 420 000 people voted 'yes' to approve the Constitution Bill. About 160 000 voted 'no'. Majorities of those voting were recorded in each colony. Although the 'yes' vote secured a comfortable majority, the number of people casting a vote in favour of federation was only about 11% of the population. That low number is explicable by a number of reasons. First, voting was not compulsory. Second, the population was young, with a median age in 1901 of just 22 years — many people would have been less than the voting age of 21. Third, women were only permitted to vote in South Australia and Western Australia; Indigenous Australians were not allowed to vote in Queensland and Western Australia; and Asians, Africans and Pacific Islanders also faced restrictions. The sorry state of the franchise and the relatively small number of people voting may therefore have undermined claims that the *Constitution* was a work of the people.

Furthermore, the voting population was also relatively homogeneous. In 1901, just over 77% of the population counted was born in Australia, with 23% born overseas. Of those born overseas, almost 80% were born in Great Britain. The proportion of Australian-born compared with those born overseas was not markedly different 100 years later; in the 2001 census, 72.6% of respondents stated that they were born in Australia and 21.9% that they were born overseas.

Perhaps the one group of people that might be thought to have reason to stand apart were those of Irish descent; the issue of home rule in Ireland was a highly contentious and, at times, violent aspect of life in Great Britain. However, even those steeped in the Republican cause in Ireland did not seem to have been keen to bring their battles to Australia. The Irish patriot Charles Gavan Duffy, for example, had been a leader of the Irish nationalist movement and had fought for the unity of an independent Catholic and Protestant Ireland. He edited *The Nation*, the journal of the young Ireland movement, and was elected to the House of Commons. When he arrived in Melbourne in 1856, he

was met by thousands of Irishmen, under the leadership of the populist politician and businessman John O'Shanassy. In the colonies, he made clear that he was leaving the enmity of sectarian politics behind, and he identified the task of the colonists as being to 'fuse into one common Australian nationality' and to avoid the bigotries and divisions that had troubled his homeland.³²

Of those many persons who were disenfranchised, the most notable omissions were Indigenous Australians and, in some colonies, women. The former had by that time suffered terribly from disease, persecution and dispossession (and would continue to do so in the future). As grave as these omissions from the franchise were, there was no reason to think that, had the franchise been more inclusive, the result of the referenda would have been any different.

What the above suggests is that at federation, Australia had a population that was young and locally born, that enjoyed local representative government, and that was keen to unite into one federal union (though comfortable with ongoing ties to Great Britain). To that population, there did not appear to be any discomfort with the fact that the enabling instrument of the Federation was given legal status by an enactment of the Imperial Parliament.

Constitutionally Prescribed Representative Government

The acceptance by the Australian people at the Constitutional Conventions of a model predicated on an enactment of the Imperial Parliament reflected the evolution of representative democracy and the new nation's close social, economic and demographic ties with Great Britain. Undoubtedly, the creation of the Federation was a watershed, but in many ways the Federation was a chimera, picking up aspects of the American system, forged from revolution, whilst retaining inherited bonds to Great Britain.

Although, structurally, the *Constitution* departed in so many fundamental respects from the British model of government, the influence of Imperial ties proved to be significant well beyond federation. In *R v Sharkey* Latham CJ encapsulated the enduring significance of such ties:³³

The Government and Constitution of the United Kingdom and the Houses of Parliament of the United Kingdom are also part of the legal and political constitution

32 Quoted in Serle, above n 23, 251. That is not to say that sectarian divisions were foreign to life in the colonies. Undoubtedly, there were discrimination and tension across those lines. But they did not stand in the way of either self-government or the movement to federation. As well, the sectarian divisions were not obviously fought across the boundaries of the Australian colonies. The homogeneity that existed within individual colonies was also reflected across them.

33 (1949) 79 CLR 121, 136.

THE CROWN

of the Commonwealth and the preservation of their integrity and authority is part of the protection and maintenance of the Commonwealth itself.

Chief Justice Barwick, 30 years later, similarly echoed:³⁴

The historical movement of Australia to the status of a fully independent nation has been both gradual and, to a degree, imperceptible. In that movement, the Statute of Westminster ... and its adoption by the Parliament ... played their very substantial part. Thus, though the precise day of the acquisition of national independence may not be identifiable, it certainly was not the date of the inauguration of the Commonwealth in 1901. The historical, political and legal reality is that from 1901 until some period of time subsequent to the passage and adoption of the Statute of Westminster, the Commonwealth was no more than a self-governing colony though latterly having dominion status.

Indeed, the evolutionary nature of constitutional relations with Great Britain ought not be overlooked when considering the contemporary significance of recognised constitutional imperatives.

Accordingly, in *Attorney-General (WA) v Marquet*, the plurality observed:³⁵

Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. It is not necessary to attempt to give a list of all of those changes. Their consequences find reflection in decisions like *Sue v Hill*. Two interrelated considerations are central to a proper understanding of the changes that have happened in constitutional structure. First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*, ‘in our system the principle of *Marbury v Madison* is accepted as axiomatic’. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.

Consideration of the legal source of the *Constitution* must also take into account the importance of the *Constitution*’s continuing acceptance by the people. As Professor Zines has observed, ‘[t]he basic constitutional instruments [of Australia, Canada and New Zealand] were law because they were enacted by a superior law-maker. They are

34 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 183.

35 (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

THE CROWN

now law because they are accepted as fundamental legal rules of their respective systems and the basic constitutive documents of their communities³⁶.

Of course, an acceptance of the self-evident diminution of power of the Imperial Parliament to act in relation to Australia does not identify the place to which those powers have been devolved.

The structure that was adopted in the *Constitution* necessarily involved a fundamental departure from the precepts of English law. The division of legislative capacity between the Commonwealth and the states and the necessity to have an independent and separate judicial branch to adjudicate on that demarcation mean that it is not possible to view parliamentary sovereignty as, at least in a structural sense, an organising principle. The division of legislative powers across the Federation and the concept of federal jurisdiction are obvious and compelling points of difference that preclude a direct translation of power. The role of the courts in interpreting the *Constitution* and the power to conclusively determine whether enactments of the Commonwealth or states are valid, along with the constitutional role of the High Court in determining the lawfulness of exercises of power by officers of the Commonwealth under s 75(v), are essential to any consideration of sovereignty.

These dual sources of the authority to make the *Constitution* are of some significance for the role of the Australian people under it. On the one hand, the fact that the *Constitution* was enacted by the Imperial Parliament has played a role in its interpretation. Sir Owen Dixon has emphasised that, in Australia (unlike in the United States) the source of our institutions of government is the law, rather than any assumption of sovereignty (whether by the people or Parliament).³⁷ Further, the relevant law is that embodied in the text and construed by the judicial arm of government. Similarly, in *ACTV*, Dawson J, having recorded that the *Constitution* was an exercise of the sovereign power of the Imperial Parliament, went on to say that, as a result, it was to be 'construed as a law passed pursuant to the legislative power to do so'.³⁸

On the other hand, the fact that the *Constitution* was built from a compact of the Australian people, that it enjoys the people's continuing acceptance and that, in its text, it embodies representative and responsible government remains critical to the construction and operation of the *Constitution*. Indeed, the people have come to occupy a central role in the system of representative government prescribed by the *Constitution*, a centrality that is particularly evident in decisions of the High Court concerning the role of the people as electors.

³⁶ L Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press, 1991) 27 (emphases in original).

³⁷ Dixon, above n 2, 597.

³⁸ (1992) 177 CLR 106, 181.

THE CROWN

THE PEOPLE AS ELECTORS

Fundamental to the system of representative democracy enshrined in the *Constitution* is the requirement that Parliament be ‘directly chosen by the people’. This term appears in ss 7 and 24 of the *Constitution*: s 7 provides that ‘the Senate shall be composed of senators for each State, *directly chosen by the people of the State*, voting, until the Parliament otherwise provides, as one electorate’ (emphasis added); while s 24 provides that ‘the House of Representatives shall be composed of members *directly chosen by the people of the Commonwealth*, and the number of such members shall be, as nearly as practicable, twice the number of the senators’ (emphasis added). Justice Crennan has noted that ‘in constitutional discourse over a long period, choice by the people of parliamentary representatives has signified democracy, democratic elections and a democratic franchise’.³⁹

As Professor Winterton has observed, there are different theoretical conceptions of who ‘the people’ are in this context. In Professor Winterton’s view, there are two possibilities — the term may denote ‘the colonial electors who approved the draft constitution’; or it may denote ‘the present Australian people who demonstrate their acceptance of the *Constitution* by complying with its provisions and living peaceably under it’.⁴⁰ Alternatively, in a conception advanced extrajudicially by Justice French (as his Honour then was), ‘the people’ may be a category capable of expansion, which has shifted with the passage of time.⁴¹

The High Court has considered the minimum requirements of our system of representative democracy, so far as those requirements concern the conduct of elections, in a number of cases. In this respect, the Court has recognised an implied limitation on legislative and executive power derived from the *Constitution*, which is directed to ensuring free and informed choice by electors.⁴² Notwithstanding this limitation, the *Constitution* has been held to contemplate legislative action to implement the enfranchisement of electors (particularly ss 7 and 24)⁴³ and leaves it to Parliament to determine, for example, how electoral boundaries are drawn, the identity of electors and the mechanism by which elections are conducted (provided that such prescriptions adequately effect the constitutional mandate of direct choice by the people).⁴⁴ Indeed, representative

39 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 107 [330] (‘*Rowe*’).

40 Winterton, above n 9, 7.

41 French, above n 7.

42 *McCloy v New South Wales* (2015) 257 CLR 178, 206 [42] (French CJ, Kiefel, Bell and Keane JJ), referring to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (‘*Lange*’).

43 *McCloy v New South Wales* (2015) 257 CLR 178, 206 [42] (French CJ, Kiefel, Bell and Keane JJ).

44 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J); *McGinty v Western Australia* (1996) 186 CLR 140, 182 (Dawson J).

democracy, in this context, is descriptive of a spectrum of political institutions and the demands of popular sovereignty necessarily vary across institutional contexts.⁴⁵

Electoral Boundaries

First, the High Court has considered the requirements of popular sovereignty in so far as they relate to the distribution of electors within electoral divisions. In this respect, in *Attorney-General (Cth); (Ex rel McKinlay v Commonwealth)* ('*McKinlay*'),⁴⁶ the High Court considered whether certain provisions of the *Commonwealth Electoral Act 1918* (Cth), to the extent that they effected a distribution of electors into electoral divisions, were inconsistent with the constitutional requirement that the Parliament be 'chosen by the people'. A majority of the Court held that the relevant provisions of the *Constitution*, particularly s 24, did not require equality of numbers of people or electors in electoral divisions.⁴⁷

Relevantly, Gibbs J observed that the term 'the people' in s 24 does not mean all the people of the Commonwealth, noting:⁴⁸

When the section says that the members shall be chosen 'by the people' it cannot mean by all the people of the Commonwealth — obviously it means by those people who are qualified to vote ... It clearly appears from other sections of the Constitution — ss 25, 30, 41 and 128 — that it was recognized that people might constitutionally be denied the franchise on the ground of race, sex or lack of property — the Constitution goes no further than to ensure that an adult who has the right to vote at elections for the more numerous House of the Parliament of a State shall not be prevented by a law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth[.]

Justice Murphy, in dissent, emphasised equality of voting power as a dimension of the popular choice envisaged by the *Constitution*, stating:⁴⁹

In my opinion, the standard of equality [required by s 24] is to be measured in each State in numbers of electors rather than numbers of people. The emphasis in 'chosen by the people' in s 24 is on a choosing by all the people capable of choosing, that is, the electors. The number of members in each State is to be proportionate (subject to the minimum) to the population of each State. But in the choosing in each State, the electors share the voting power equally, whether the State is one electorate or in divisions. This view is supported by the reasoning in the United States cases which

45 See generally *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56-7 (Stephen J).

46 (1975) 135 CLR 1.

47 Ibid 33 (Barwick CJ), 36-7 (McTiernan and Jacobs JJ), 45 (Gibbs J), 57 (Stephen J), 61-3 (Mason J).

48 Ibid 44 (Gibbs J).

49 Ibid 75 (Murphy J).

refer repeatedly to equality of voting power and similar expressions as the principle underlying the command. It is reinforced by the ‘one person, one vote’ mandate in s 30 of the Constitution.

In *McGinty v Western Australia*,⁵⁰ the Court again refused to recognise any constitutional implication requiring equal numerical representation of electors within electoral divisions (this time in the context of a challenge to Western Australian electoral laws).

Identity of Electors

Second, popular sovereignty has implications for the identity of electors. In this respect, the High Court has held that, while Parliament may determine who is an elector for the purposes of the mechanism of popular choice prescribed by the *Constitution*, the Parliament has decided on universal adult suffrage and, subject to certain exceptions, it could no longer permissibly limit the franchise.⁵¹ As Gleeson CJ observed in *Roach v Electoral Commissioner* (*Roach*):⁵²

The *Constitution* leaves it to Parliament to define those exceptions [to universal adult suffrage], but its power to do so is not unconstrained. Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people. To say that, of course, raises questions as to what constitutes a substantial reason, and what, if any, limits there are to Parliament’s capacity to decide that matter.

The bounds of Parliament’s power to exclude certain people from participation in the electoral process have not been fully elucidated, though any exception to universal adult suffrage would require a ‘substantial reason’ that was reasonably appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government.⁵³ Or, on Gleeson CJ’s formulation, a rationale that demonstrates a rational connection with either the identification of community membership (for example, exclusion of those convicted of treason) or with the capacity to exercise free choice (for example, exclusion of those of unsound mind).⁵⁴

50 (1996) 186 CLR 140.

51 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 286-7 (Gummow J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ). See also Chief Justice Robert French, ‘Viva la difference — two countries two systems’ (Speech delivered at the Anglo Australasian Lawyer’s Society, London, 9 September 2016) 8.

52 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

53 *Ibid* 174 [7] (Gleeson CJ), 199 [85] (Gummow, Kirby and Crennan JJ).

54 *Ibid* 174-5 [8]-[9] (Gleeson CJ).

Electoral Procedures

Third, the imperative of popular choice prescribed by the *Constitution* bears on the processes by which elections are conducted. In *Rowe*,⁵⁵ a majority of the High Court held that certain federal electoral laws, which imposed cut-off dates for the consideration of claims for enrolment and for transfer of enrolment, were invalid on the basis that they were not reasonably appropriate and adapted to serve a legitimate end consistent with the maintenance of the system of representative government prescribed by the *Constitution*.

Chief Justice French, referring to the Court's consideration of the term 'directly chosen by the people' in *McKinlay* and *Roach*, opined in *Rowe*:⁵⁶

While the term 'directly chosen by the people' is to be viewed as a whole, the irreversibility of universal adult-citizen franchise directs attention to the concept of 'the people'. Analogous considerations may apply to the term 'chosen' and to the means by which the people choose their members of Parliament. Where a method of choice which is long established by law affords a range of opportunities for qualified persons to enrol and vote, a narrowing of that range of opportunities, purportedly in the interests of better effecting choice by the people, will be tested against that objective.

Thus any changes to long-standing mechanisms or procedures for enrolment or the conduct of elections must be tested by reference to the constitutional mandate of direct choice by the people.⁵⁷

Sovereignty beyond Elections — Political Communication and Political Power

Outside of the electoral context, the High Court has recently considered the demands of popular sovereignty in determining the constitutional consequences of limitations on political communication and political power. In *ACTV*, it was said that the concept of representative government in a democracy signifies government by the people through their representatives: in constitutional terms, a sovereign power residing in the people, exercised by their representatives.⁵⁸ The *Constitution* relevantly reflects this concept in ss 7, 24, 64 and 128.

55 (2010) 243 CLR 1.

56 Ibid 19 [22].

57 Ibid 19 [22], 20 [35] (French CJ), 48 [122] (Gummow and Bell JJ), 120-1 [384] (Crennan J).

58 (1992) 177 CLR 106, 137-8 (Mason CJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

THE CROWN

As a necessary incident of the sovereign power of the people, the *Constitution* impliedly prohibits certain burdens on political communication; the prohibition operates as a limitation on legislative and executive power and reflects a constitution that ‘deals with the structure and relationships of government rather than with individual rights or freedoms’.⁵⁹ The implication does not come from the fact of responsible or representative government, but rather is drawn from the text of the *Constitution* itself.

As Brennan CJ said in *McGinty v Western Australia*:⁶⁰

Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure.

The more recent cases of *McCloy v New South Wales* (*‘McCloy’*)⁶¹ and *Unions NSW v New South Wales* (*‘Unions NSW’*)⁶² stand in the line of cases applying the principle authoritatively propounded in *Lange*.⁶³ That principle — that there is a freedom of political communication implied from the *Constitution* — ultimately derives from the need to preserve the political sovereignty of the people within the constitutionally prescribed system of representative democracy.⁶⁴ In a similar way, the requirement that the Members of the Parliament be elected by the people and that the duration of the term of each House is limited by the *Constitution* means that those who govern are ‘ultimately answerable to the Australian people’.⁶⁵

McCloy will most likely be remembered for the fact that four justices of the Court applied a strict form of proportionality to laws that burdened political communication. However, the reasoning of certain members of the Court also explored the relationship between the implied freedom of political communication and popular sovereignty. In that case, the Court considered the application of the implied freedom of political communication in the context of NSW political finance laws — the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) — which prohibited donations from certain donors and placed general caps on other non-prohibited donations.

Almost two years earlier, in *Unions NSW*, the Court had struck down related provisions of the same legislation as an impermissible burden on the implied

59 *Brown v The Queen* (1986) 160 CLR 171, 208 (Dawson J).

60 (1996) 186 CLR 140, 168 (Brennan CJ).

61 (2015) 257 CLR 178.

62 (2013) 252 CLR 530.

63 (1997) 189 CLR 520.

64 *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 [135] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [196] (Keane J); *Lange* (1997) 189 CLR 520, 560 (the Court).

65 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J).

freedom.⁶⁶ Justice Keane’s judgment, in particular, placed heavy emphasis on the role of political sovereignty in Australian representative government. His Honour relevantly observed:⁶⁷

In assessing the strength of the arguments agitated by the parties, the primary consideration must be that the flow of political communication within the federation is required to be kept free in order to preserve the political sovereignty of the people of the Commonwealth. This must be so, both for legislatures which enact measures which affect the flow of political communication within the federation, and for the courts called upon to rule upon the compatibility of those measures with the requirements of the *Constitution*.

Notwithstanding the outcome in *Unions NSW*, in *McCloy*, the majority held that the impugned provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) imposed a burden on the implied freedom that was justified as a proportionate means of achieving a legitimate purpose — that purpose being to prevent the reality and perception of corruption and undue influence.⁶⁸

Further, several members of the Court in *McCloy* recognised political equality as an essential aspect of the system of representative democracy protected by the *Constitution*. Chief Justice French, Kiefel, Bell and Keane JJ noted:⁶⁹

Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*. In *ACTV*, the law which was struck down was inimical to equal participation by all the people in the political process and this was fatal to its validity. The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty.

Justice Nettle, partially dissenting, also recognised ‘equality of political power’ as being at the heart of the Australian constitutional conception of political sovereignty,⁷⁰ stating:⁷¹

A law infringes the constitutionally implied freedom of political communication if it so burdens, restricts or distorts the free flow of political communication between the

66 The provisions at issue in that case relevantly prohibited political donations from persons other than individuals enrolled to vote and aggregated the amounts spent by way of electoral communication expenditure by a party and its affiliates for the purposes of capping provisions imposed by the Act. The High Court unanimously found these provisions to be invalid: (2013) 252 CLR 530.

67 *Ibid* 578 [135] (Keane J).

68 (2015) 257 CLR 178, 204-5 [36], 220-1 [93] (French CJ, Kiefel, Bell and Keane JJ).

69 (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ), referring to *Harper v Canada (Attorney-General)* [2004] 1 SCR 827, 868 [62], *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72; *ACTV* (1992) 177 CLR 106, 136; *Unions NSW* (2013) 252 CLR 530, 578 [135]-[136]; and *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [197].

70 *Ibid* 273-4 [271].

71 *Ibid* 257 [215]-[217].

governed, their representatives and candidates for elected office as to be incompatible with the continued existence of the political sovereignty which resides in the people and is exercised by their representatives according to ss 7, 24, 62, 64, 128 and related provisions of the *Constitution*.

‘Political sovereignty’ in this sense means the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes. It may be infringed by restricting the freedom of electors and their political representatives to disseminate or receive information bearing on electoral choices. It may be infringed, too, by restrictions on political communications to and from persons other than electors.

Political sovereignty further necessitates that those who govern take account of the interests of all those whom they govern and not just the few of them who have the means of buying political influence.

Much remains to be elucidated as to the origins and implications of political equality as a constitutional principle. Some have aptly raised concerns that a conception of political equality divorced from the text and structure of the *Constitution* carries a risk of constitutional scrutiny that exceeds the institutional competence of the judiciary.⁷² Whether such risk ultimately eventuates, *McCloy* highlights the way in which the demands of popular sovereignty (and the constitutional implications drawn from its mandate) are subject to revision and rearticulation as the context in which the people exercise electoral choice changes.

Moreover, it would seem that the High Court’s work in respect of popular sovereignty remains unfinished. At the time this chapter was written, the third instalment in the *Roach/Rowe* line of authority, *Murphy v Electoral Commissioner* (*‘Murphy’*), remained pending before the Court.

As a postscript, it can be observed that the decision has now been handed down, with the challenge in that case to the prescribed timing of the federal electoral roll closure (sharing some similarities to the mechanisms considered in *Rowe*) being dismissed unanimously.⁷³ Three features of *Murphy* are particularly notable. First, although the Commonwealth asked the Court to proceed upon the basis that *Roach* and *Rowe* were to be applied, some of the members of the Court queried or endeavoured to clarify the propositions for which those decisions are said to stand.⁷⁴ Second, the Court did not reach a consensus on the role (if any) that proportionality reasoning of

72 Joo-Cheong Tham, ‘A Cautionary Note on Political Equality as a Constitutional Principle’ *AUSPUBLAW* (30 October 2015) <<http://auspublaw.org/2015/10/a-cautionary-note-on-political-equality-as-a-constitutional-principle/>>.

73 *Murphy* (2016) 90 ALJR 1027.

74 See for example (2016) 90 ALJR 1027, 1036 [27], 1038 [36] (French CJ and Bell J), 1042-3 [52][60] (Kiefel J), 1049 [96] (Gageler J), 1063-4 [206]-[210], 1065 [222] (Keane J), 1067-9 [234]-[240] (Nettle J), 1081 [310] (Gordon J).

THE CROWN

the kind considered in *McCloy* should play in this area.⁷⁵ Third, six judgments with notably different emphases were delivered, with French CJ and Bell J joining and the other justices writing separately. These features suggest that the area is likely to remain a fragmented one, ripe for future development.

CONCLUSION

Though the *Australian Constitution* lacks the overt, rousing appeal to popular sovereignty of American doctrine, the unique historical and legal context from which our system of representative government emerged has ensured that the people occupy a central and important place within the Federation. The Australian people, both before and after federation, have cherished representative government as the source of their ownership in our constitutional system. The legal authority of the *Constitution* has evolved over time and the role of the Parliament of the United Kingdom has receded into history. The result, a distribution of powers that is the hallmark of the Australian constitutionalism, reflects the antipathy of the Australian people towards concentration of power. Though they have not sought to arrogate power to themselves as sovereign, they remain a central and abiding repository of constitutional authority and legitimacy.

⁷⁵ See in particular (2016) 90 ALJR 1027, 1038-9 [37]-[39] (French CJ and Bell J), 1043-4 [62], [64]-[65] (Kiefel J), 1050 [101] Gageler J, 1062 [202], 1063 [205], 1064 [211] (Keane J), 1070 [245] (Nettle J), 1079 [296]-[297] (Gordon J).

4

THE VICE-REGAL OFFICERS

MICHAEL SEXTON SC SG

INTRODUCTION

There are seven Vice-Regal Officers in the Australian system of government and another office-holder with very similar functions. The Governor-General sits at the apex of the Commonwealth structure and essentially the same role is played by the Governor in each state and the administrator in the Northern Territory, although the administrator of the Territory is not the representative of the Sovereign but of the Commonwealth government. Alone in this collection of polities, the Australian Capital Territory has no Vice-Regal Officer or counterpart as an element of its governmental arrangements.

Each of these eight jurisdictions will be examined in turn in this chapter, but it might be noted at the outset that the roles of these Vice-Regal Officers have changed in many ways since their origins in 1788, although the concept of the Sovereign's representative in a particular geographic area remains essentially the same. It may be something of an irony that over most of the period of Australian history the role of the Sovereign in the United Kingdom political process has diminished to be almost an entirely ceremonial one, whereas there are numerous examples at the federal and state level in Australia where the relevant Vice-Regal Officer has played an important part in the making and unmaking of governments.

THE CROWN

The powers of the various Vice-Regal Officers fall into three broad categories:

- powers exercised under statute
- prerogative powers
- reserve powers.

The powers of Vice-Regal Officers originally derived from Letters Patent as explained or qualified by the Royal Instructions but, in the case of state Governors, their powers are now based in the *Australia Act 1986* (Cth) (*'Australia Act'*). There also existed implied powers that were necessary for a state's administration in the context of its constitutional arrangements. In the aftermath of the *Australia Act*, however, a state Governor is literally a viceroy rather than a delegate of the Sovereign.

In the case of the Governor-General, s 2 of the *Australian Constitution* ('the *Constitution*') provides that, subject to the *Constitution*, the Governor-General is to exercise 'such powers and functions of the Queen as Her Majesty may be pleased to assign to him'. The Governor-General's primary source of powers and functions is found in s 61, which states that the executive power of the Commonwealth is 'vested in the Queen and is exercisable by the Governor-General as the Queen's representative'. These powers and functions are exercised on the basis of advice by Ministers in the Commonwealth government of the day.

Many acts of the Executive Government at both the federal and state level are formally carried out by the Executive Council.¹ The Executive Council comprises solely Cabinet Ministers and is normally presided over by the Vice-Regal Officer.

In relation to statutory powers, it is common for interpretation legislation to provide that a reference to the Vice-Regal Officer is a reference to that person with the advice of the Executive Council, subject to any contrary intention expressed in a particular statute.² The exercise of prerogative powers, such as the prerogative of mercy, is also exercised on the advice of the Executive Council. The exercise of the so-called reserve powers may on occasion be exercised without, or even contrary to, ministerial advice and these will be discussed in more detail below.

GOVERNORS-GENERAL OF THE COMMONWEALTH

On the morning of Tuesday 1 January 1901, the first Governor-General of the Commonwealth, Lord Hopetoun,³ was sworn in at Centennial Park in Sydney before

1 It is not easy to find detailed references to the role of the Executive Council, but there is a chapter on the federal entity in Geoffrey Sawer, *Federation Under Strain: Australia 1972-1975* (Melbourne University Press, 1977) 91-106.

2 See, e.g., *Interpretation Act 1987* (NSW) s 14.

3 The lives of the first nine Governors-General are the subject of Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* (George Allen & Unwin, 1983).

THE CROWN

a crowd estimated at more than 100 000 persons.⁴ Soon afterwards, the country's first Prime Minister, Edmund Barton, and the first Cabinet were commissioned, followed by patriotic songs from a choir of 10 000 children.⁵ Hopetoun had been a Conservative politician in the House of Lords, a Lord-in-waiting to Queen Victoria, and then lord high commissioner to the General Assembly of the Church of Scotland until his appointment as Governor of Victoria between 1889 and 1895.⁶ At the end of his term in Victoria he returned to England, where he became paymaster-general in Lord Salisbury's government from 1895 to 1898, and lord chamberlain from 1898 to 1900.⁷

The title of 'Governor-General' had previously been used between 1846 and 1861 when the then Governors of New South Wales were accorded this additional status because their jurisdiction extended to the other colonies in Australia.⁸

Hopetoun asked New South Wales Premier William Lyne to form the first ministry but he was unable to do so and Barton was then approached.⁹ This was a very early example of a Vice-Regal Officer struggling in the treacherous waters of Australian politics, and it was the subject of adverse comment at the Colonial Office in London.¹⁰ In reflection of another theme from these early years, Hopetoun returned to England in the middle of 1902 after a series of disputes with the government over the financial arrangements for the Governor-General.¹¹ Hopetoun was replaced by Lord Tennyson, who had been Governor of South Australia; but he departed after only a year,¹² to be succeeded by Lord Northcote, who had a career as a diplomat and a Conservative Member of the House of Commons.¹³

At a time when there was more flexibility in the boundaries between political parties in the Parliament, one important function of the Governor-General was to decide whether Parliament should be dissolved when a Prime Minister lost the confidence of the House of Representatives.¹⁴ On two occasions Northcote refused to accept the advice of the Prime Minister that Parliament should be dissolved in these circumstances and successfully commissioned an alternative government.¹⁵ Another function, at least in

4 Ibid 2.

5 Ibid.

6 Ibid 4.

7 Ibid 7.

8 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 608.

9 Cunneen, above n 3, 9-10.

10 Ibid 9.

11 Ibid 31-5.

12 Ibid 37-9.

13 Ibid 48-50.

14 Ibid 55-6.

15 Ibid 55-6, 62.

theory, was to reserve a Commonwealth statute for royal assent, which would be given on the advice of the British government — in effect, the Colonial Office.¹⁶ But this power quickly lapsed in practice, as it had two centuries earlier in England.¹⁷

Northcote's successor, the Earl of Dudley, was asked by Prime Minister Fisher to dissolve Parliament after the government was defeated on the floor of the House of Representatives.¹⁸ His decision raised, however, the important question of what external advice the Governor-General might take in such circumstances. In this case he sought and accepted the advice of the chief justice, Sir Samuel Griffith, and refused the dissolution.¹⁹

Dudley was succeeded by Lord Denman²⁰ and then by Sir Munro Ferguson in 1914 after a long career as a Liberal politician in England.²¹ Soon after Ferguson's arrival, Prime Minister Cook asked for a dissolution of both Houses of Parliament under s 57 of the *Constitution* on the basis that the Senate had rejected a Bill passed by the House of Representatives on two occasions with an interval of three months between the two rejections.²² Ferguson also sought the advice of Sir Samuel Griffith and then granted the dissolution.²³ Given that one of the basic tenets of responsible government is that the Governor-General will act on the advice of Ministers — except in the case of the so-called reserve powers which will be discussed below — it might be thought that the Governor-General has no discretion in relation to such a request by a Prime Minister, although Sir Ninian Stephen granted the request of Prime Minister Fraser in 1983 only after seeking further information as to the importance for the government of an election for both houses at this time.²⁴

There was a significant change to the role of the Governor-General in 1918, when an Imperial War Conference in London resolved, largely on the initiative of Australia's Prime Minister Hughes, that Dominion Prime Ministers should be able to

16 Ibid 64.

17 If still existing at all: see George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 2. At the state level this power was specifically removed by s 9(2) of the *Australia Act*.

18 Cunneen, above n 3, 80-2.

19 Ibid.

20 Ibid 89.

21 Ibid 107-8.

22 Ibid 110-11.

23 See Don Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280, 284-5.

24 See the comments in *Western Australia v Commonwealth* (1975) 134 CLR 201, 278 (Jacobs J) and 293 (Murphy J). Cf Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, first published 1956, 1972 ed) 122-4. In relation to the 1983 double dissolution, see Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 126-7.

communicate directly with the United Kingdom Prime Minister rather than through the Governor-General and the Colonial Office.²⁵ This change was consolidated at the Imperial Conference of 1926, which resolved that the normal channel of communication should be directly between governments on the basis that the Governor-General was the representative not of the British government but of the Sovereign.²⁶

Ferguson was followed by Lord Forster and then Lord Stonehaven, who was the first occupant of the old homestead of Yarralumla after the seat of government was established in the Australian Capital Territory in 1927.²⁷ Then followed an intense struggle between the Australian government and King George V over the government's proposal to appoint Australian-born chief justice Sir Isaac Isaacs as Governor-General — a battle eventually won by Prime Minister Scullin.²⁸

Isaacs remained Governor-General for five years and was succeeded by Lord Gowrie, who remained in the post for nine years.²⁹ In 1940 and 1941 he commissioned as successive Prime Ministers Menzies, Fadden and Curtin while governments rose and fell without Parliament being dissolved. There was a succession of British appointees — except for Sir William McKell — until the appointment of Baron Casey in 1965. McKell had been Premier of New South Wales, but Casey was the first person who had been a politician at the federal level to be appointed Governor-General, having spent more than 20 years as a Member and Minister in the Federal Parliament. He was succeeded by another former federal politician, Sir Paul Hasluck, and then by the chief justice of New South Wales, Sir John Kerr.

Kerr's dismissal of the Whitlam government on 11 November 1975 brought into sharp relief the question of the reserve powers³⁰ — an issue that has arisen more often in the case of state Governors. Usually, the exercise of the reserve powers is occasioned only when an election has produced a Parliament without a clear majority for any party and the Vice-Regal Officer must decide whom to commission as Prime Minister or Premier, although these powers may also be employed, as already noted, when an existing government loses the confidence of the Parliament and its leader then seeks the dissolution of the Parliament. Apart from the dismissal of the Lang government by New South Wales Governor Sir Philip Game in 1932, there were no other precedents in Australian political history for Kerr's action. His decision came at the end of a month

25 Cunneen, above n 3, 144-6.

26 Ibid 167-8.

27 Ibid 170.

28 Ibid 174-83.

29 Ibid 187-8.

30 Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 65.

during which the Senate had blocked the government's supply bills. Kerr sought formal advice from Chief Justice Sir Garfield Barwick, and a great deal of informal advice from one of the other judges on the High Court, Sir Anthony Mason.³¹

None of the occupants of Yarralumla since Kerr has faced instances of political instability that required debatable decisions. There has been something of a preponderance of lawyers over this period, including two former judges of the High Court, Sir Ninian Stephen and Sir William Deane.

GOVERNORS OF NEW SOUTH WALES³²

Arthur Phillip's original commission as Governor of New South Wales was dated 12 October 1786.³³ This document, which enabled Phillip to arrange the First Fleet, referred to territory that included Van Diemen's Land and much of the continent stretching almost to what is now the Western Australian border.³⁴

Until 1987 the Governor's functions were the subject of three documents:³⁵

- a brief commission by way of Letters Patent
- Letters Patent, setting out powers
- Royal Instructions, which were directory only.

There were stormy times for some of the early Governors, culminating in the arrest of Governor Bligh by the New South Wales Corps in 1808.³⁶ Bligh was succeeded in 1810 by one of the longest serving occupants of the office, Governor Lachlan Macquarie, who remained until 1821.³⁷ In 1823 a Legislative Council was established to advise the Governor in the formulation of local laws.³⁸ This body comprised a mixture of civil servants and colonists, all nominated by the Governor. There was also an Executive Council, consisting of four government officials. Both bodies were advisory but were regularly consulted. In 1843 came the first flowering of representative government, with a new Legislative Council consisting of 36 members, 12 appointed by the Governor

31 Sawyer, above n 1, 141. See also Jenny Hocking, *Gough Whitlam: His Time* (Miegunyah Press, 2012) 303-23.

32 The lives of the first 37 Governors of New South Wales are each the subject of a chapter in David Clune and Ken Turner (eds), *The Governors of New South Wales 1788-2010* (Federation Press, 2009).

33 Ibid 33.

34 Ibid.

35 Twomey, *The Constitution of New South Wales*, above n 8, 146-7.

36 Clune and Turner, above n 32, 96.

37 Ibid 100, 107.

38 *New South Wales Act 1823* (Imp) 4 Geo 4, c 96; Clune and Turner, above n 32, 142.

and the others elected on a limited franchise.³⁹ The first move towards responsible government came in 1856 with elections of a Legislative Assembly and a Legislative Council, with members nominated for life by the Governor.⁴⁰

Although legislation might be passed by these and other colonial legislatures, it was still open to the Governor to withhold assent in some circumstances or, in others, to reserve the Bill for the assent of the Sovereign. These options were noted by the High Court in 2001:⁴¹

Upon passage of a Bill through a colonial legislature, three courses were open to the Governor upon it being presented for the assent of the Crown. First, the Governor might assent in the name of the Sovereign; it was nevertheless the obligation of the Governor to transmit a copy of the statute to the Colonial Office in order that the Imperial authorities might have an opportunity to exercise the power of disallowance, and, as will appear later in these reasons, in some colonies that requirement to transmit a copy was expressly imposed upon Governors by Imperial statute. Secondly, the Governor might withhold the Royal Assent in accordance with his Instructions, but failing such Instructions, the Governor of a self-governing colony exercised the veto only on the advice of the local Ministers. Thirdly, the Bill might be reserved for the signification of the pleasure of the Sovereign until that assent was given on British Ministerial advice.

It was not until 1986, with the passage of the *Australia Act*, that any requirement that Bills be reserved for the signification of the Sovereign's pleasure was removed.⁴² The *Australia Act* also removed the power of disallowance.⁴³

The last Governor of the colony — and the first of the new state — was Earl Beauchamp, although he had already left for England well before 1 January 1901.⁴⁴

Political contests in the new state were often hard-fought and Sir Gerald Strickland was recalled by the British government after he fell out with the Labor Premier, William Holman, during Labor's split over conscription.⁴⁵ Labor returned to office in 1925 and Premier Jack Lang quickly became involved in a confrontation with Sir Dudley de Chair over additional nominations to the Legislative Council, it being Labor's policy to abolish

39 Clune and Turner, above n 32, 197.

40 *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54; Clune and Turner, above n 32, 239-42.

41 *Yougarla v Western Australia* (2001) 207 CLR 344, 361 [36] (citation omitted).

42 *Australia Act 1986* (Cth) s 9(2).

43 *Ibid* s 8.

44 Clune and Turner, above n 32, 381, 390-1.

45 *Ibid* 441-2.

this body.⁴⁶ The Governor effectively forced Lang to call an election in 1927.⁴⁷ Lang lost this election but returned as Premier in 1930, by which time the Governor was Sir Philip Game.⁴⁸ On 13 May 1932, Game dismissed Lang and brought the government to an end.⁴⁹ He appears to have acted on the ground that, in the context of a financial dispute between the state and the Commonwealth, New South Wales public servants had been instructed not to pay amounts received from some state taxes into a Commonwealth bank account in accordance with a notice issued under federal legislation.⁵⁰ This would appear to be a question for the courts and not for the Governor to act upon, but Lang did not contest the dismissal and lost the subsequent election.⁵¹

It might be noted that at this time, unlike at the federal level, state Governors continued to be appointed by the Sovereign — but on the advice of the secretary of state for the Dominions rather than on the advice of the state government.⁵² This issue came to a head in 1945, when Premier William McKell insisted on the appointment of the first Australian state Governor, Sir John Northcott.⁵³ In 1986 the *Australia Act* formally spelt out that the advice to the Sovereign in relation to the exercise of his or her powers in respect of a state was to be tendered by the Premier of the state.⁵⁴

The role of the Governor was largely codified by amendments in 1987 to the *Constitution Act 1902* (NSW). The office of Governor was continued, with appointment to be by the Sovereign during the Sovereign's pleasure — the same tenure as in the other states.⁵⁵ The Letters Patent of 29 October 1900, as amended, and all Instructions to the Governor ceased to have any effect.⁵⁶ By further amendments to the *Constitution Act 1902* (NSW) in 1995, a fixed four-year term was established for the Legislative Assembly which could then be dissolved by the Governor at an earlier date where a no-confidence motion has been passed in the government or when the Legislative Assembly rejects

46 Ibid 463-6.

47 Ibid 468-70.

48 Ibid 477.

49 Ibid 488.

50 Ibid 485-7.

51 Ibid 489-90.

52 Ibid 526.

53 Ibid 526-7.

54 *Australia Act 1986* (Cth) s 7(5).

55 *Constitution Act 1902* (NSW) s 9A. See also *Constitution Act 1975* (Vic) s 6(2); *Constitution Act 1867* (Qld) s 11A(1); *Constitution Act 1889* (WA) s 50(1). In South Australia and Tasmania the holding of the Governor's office 'during her Majesty's pleasure' is set out in the relevant Letters Patent: see George Winterton, 'The Constitutional Position of Australian State Governors' in Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook, 1992) 277-8.

56 *Constitution Act 1902* (NSW) s 9F.

THE CROWN

or fails to pass a Bill that appropriates moneys for the ordinary annual services of the government.⁵⁷ Even in the first of these circumstances, the Governor is to consider whether a viable alternative government can be formed without a dissolution.⁵⁸ The reserve powers are, however, preserved by a provision that allows the Governor to dissolve the Legislative Assembly ‘in accordance with established constitutional conventions’.⁵⁹

The offices of Lieutenant-Governor and administrator were also continued by the 1987 amendments, which provided that the appointment of the Lieutenant-Governor should be made under the Sovereign’s ‘Sign Manual and the Public Seal of the State’.⁶⁰ There is a question, however, about whether this provision is consistent with the requirement of the *Australia Act* that all powers and functions of the Sovereign in respect of a state (excluding the power of appointment of the Governor) are exercisable only by the Governor of the state.⁶¹ In Victoria, South Australia and Tasmania, appointments to the office of Lieutenant-Governor are now made by the Governor and not by the Sovereign.⁶² In 2009 legislation was enacted in New South Wales providing that any act taken by the chief justice of the Supreme Court in the capacity as Lieutenant-Governor was deemed to have been also taken in the capacity of administrator.⁶³

GOVERNORS OF VICTORIA

When Victoria became a separate colony in 1850, its first effective Governor was Charles La Trobe, who had been superintendent of the Port Phillip District.⁶⁴ He was, however, commissioned as Lieutenant-Governor of the new colony because, as already noted, between 1846 and 1861 the Governors of New South Wales carried the title of Governor-General.⁶⁵ The first Australian to be appointed Governor was Sir Henry Winneke in 1974, Victoria being the last of the states to depart from the tradition of British Governors.⁶⁶

57 Ibid s 24B.

58 Ibid s 24B(6).

59 Ibid s 24B(5).

60 Ibid s 9B(1) and (2).

61 *Australia Act 1986* (Cth) s 7(2) and (3).

62 See Taylor, above n 24, 83; The Hon Justice Bradley Selway, ‘The Constitutional Roles of the Queen of Australia’ (2003) 32 *Common Law World Review* 248, 257.

63 *Constitution Act 1902* (NSW) s 9B(6) inserted by *Constitution Amendment (Lieutenant-Governor) Act 2009* (NSW). Legislation validating the previous acts of Lieutenant-Governors was also enacted in other jurisdictions: see *Constitution (Appointments) Act 2009* (Vic); *Constitution (Appointments) Act 2009* (SA); *Constitution (Doubts Removal) Act 2009* (Tas).

64 Taylor, above n 24, 25.

65 Ibid.

66 Ibid 51.

THE CROWN

The earliest Victorian Parliament commenced in November 1856 and the Upper House was given the power to reject or delay supply, a power that it invoked in 1865, 1867, 1877, 1947 and 1952.⁶⁷ The first of these confrontations cost the Governor, Sir Charles Darling, his office when he was recalled by the British government for supposedly favouring the Lower House.⁶⁸ Neither on this occasion nor in 1877 was the government of the day forced to an election, but in 1947 Premier Cain advised Sir Winston Dugan to dissolve the Lower House.⁶⁹ In 1952, in a chaotic parliamentary situation, Sir Dallas Brooks refused Premier McDonald's request to dissolve the Lower House and also a subsequent request by his replacement, Premier Holloway, before reappointing McDonald and granting him a dissolution.⁷⁰ In coming to these decisions the Governor initially took advice from the Victorian chief justice, Sir Edmund Herring, and then from the chief justice of Australia, Sir Owen Dixon.⁷¹ It appears that the solicitor-general, Henry Winneke, also provided advice to the Governor on this occasion.⁷²

There were other stormy periods in Victorian political history when the Governor was required to decide whether a dissolution should be granted to a government that had lost support in the Lower House or whether an alternative government should be commissioned. These decisions were required in 1913, 1918, 1935, 1943 and 1950.⁷³ One consistent feature of these exercises of Vice-Regal power was that they were made on the advice of the then Victorian chief justice.

In 1985 Premier Cain effectively asked the British government to dismiss the Governor, Sir Brian Murray, on the basis that he had accepted gifts contrary to the guidelines for public officials.⁷⁴ These events being prior to the passage of the *Australia Act* in 1986, Premier Cain was not entitled to advise the Sovereign directly to dismiss

67 See Peter Hanks, 'Victoria' (1992) 3 *Public Law Review* 33, 34. This article also explains why after 1984 this power effectively fell into disuse for practical reasons.

68 John Waugh, 'Deadlocks in State Parliaments' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 206.

69 Ibid 207-8.

70 See Philip Ayres, *Owen Dixon* (Melbourne University Press, 2003) 235-8.

71 Ibid.

72 Anne Twomey, 'The Exercise of Reserve Powers in Victoria from 1912-1955' (2014) 39 *Australian Bar Review* 198, 211.

73 For a discussion of these events see *ibid*.

74 The negotiations between the Victorian and British governments are discussed in some detail in Twomey, *The Chameleon Crown*, above n 30, 68-71.

THE CROWN

the Governor.⁷⁵ After protracted negotiations between the two governments, Murray resigned without a decision having to be made on the part of the British government.⁷⁶

The office of the Governor in Victoria was finally given a statutory basis in 1994 when legislation revoked the Letters Patent that had previously been the source of the Governor's powers and also the Royal Instructions, while creating the office of Governor and providing the means by which the holder of the office was to be appointed.⁷⁷ In 2009 the Victorian *Constitution Act 1975* (Vic) was amended to provide that the Governor rather than the Sovereign was to appoint the Lieutenant-Governor.⁷⁸

GOVERNORS OF QUEENSLAND

In 1859 the colony of Queensland came into existence, with its southern boundary being a line commencing on the eastern coastline and close to the 28th degree of south latitude.⁷⁹ A constitution was established by an order in council with provision for a Legislative Council and a Legislative Assembly.⁸⁰ The first Governor, who occupied the office for almost a decade, was Sir George Bowen. He was followed by a long succession of English appointees until the first Australian holder of the office, Sir John Lavarack, who took up the post in 1946.⁸¹ In 1920 Premier Theodore recommended the appointment of the speaker of the Legislative Assembly, William Lennon, but the British government insisted on the appointment of an Englishman, Sir Matthew Nathan.⁸² It was almost a year, however, between the departure of the previous Governor and the arrival of Nathan, during which time Lennon administered the state as Lieutenant-Governor.⁸³ In this role he nominated sufficient new members of the Legislative Council pledged to the abolition of that body to bring about its final sitting in 1922.⁸⁴ As a result, there was no scope subsequently in Queensland for confrontation between two houses of Parliament and the involvement of the Governor in such a conflict.

In 1977 the position of the Governor was formalised by statute which also provided that the office could not be abolished or altered without complying with a requirement

75 Ibid 69.

76 Ibid 71.

77 *Constitution Act 1975* (Vic) s 6.

78 Ibid s 6A(2).

79 Richard Darrell Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991) 34-5.

80 Ibid.

81 Twomey, *The Chameleon Crown*, above n 30, 45.

82 Ibid 34-5.

83 Ibid.

84 Ibid 37.

THE CROWN

for a referendum.⁸⁵ These amendments were in part a product of a confrontation between the Queensland and British governments over Sir Colin Hannah, who had taken up the position of Governor in 1972.⁸⁶ In 1975 he sparked controversy by criticising the federal Whitlam government, but the Queensland government proposed the extension of his term, which was due to expire in 1977.⁸⁷ The British government refused, however, to accede to that extension.

An unusual course of events occurred in 1987 when Premier Bjelke-Petersen asked the Governor, Sir Walter Campbell, to dismiss a number of Ministers so that others could be appointed.⁸⁸ The Governor refused this request until the Premier had raised this issue with the entire ministry, having rejected an earlier proposal that all Ministers resign to be followed by the Premier's reappointment. After the full ministry had considered these matters, the Governor agreed to dismiss three Ministers as requested.⁸⁹ It might be doubted whether the Governor was entitled to refuse the initial request, but his ultimate decision essentially precluded any further consideration of this question.

In 1987 the existing Letters Patent were suspended by legislation that again recognised the existence of the office of Governor and provided that the holder of the office could be terminated only by instrument under the Sovereign's Sign Manual taking effect upon publication in the *Government Gazette* or at a later time specified in the instrument.⁹⁰

GOVERNORS OF WESTERN AUSTRALIA

Western Australia was established as a colony in 1829 and its first Governor was Sir James Stirling.⁹¹ A Legislative Council was set up in 1830 but a Legislative Assembly did not emerge until 1890.⁹² The first Australian appointed as Governor was Sir James Mitchell in 1948,⁹³ although he was followed by three further British appointees, the last of whom, Sir Richard Trowbridge, was the last British Governor of any state.⁹⁴ Mitchell

85 *Constitution Act 1867* (Qld) ss 11A and 53. See also *Constitution of Queensland 2001* (Qld) ss 29 and 30.

86 Twomey, *The Chameleon Crown*, above n 30, 62.

87 For a detailed account of these events see *ibid* 62-8.

88 See the discussion of this incident in Winterton, 'The Constitutional Position of Australian State Governors', above n 55, 303.

89 *Ibid*.

90 *Constitution (Office of Governor) Act 1987* (Qld) ss 3 and 13. See also *Constitution of Queensland 2001* (Qld) ss 29 and 32.

91 Lumb, above n 79, 36-7.

92 *Ibid* 36-8.

93 Twomey, *The Chameleon Crown*, above n 30, 41-2.

94 *Ibid* 54.

had previously served as Lieutenant-Governor between 1933 and 1948, during which period no-one occupied the office of Governor — ostensibly, although probably not significantly, for financial reasons.⁹⁵ The office of Governor was recognised by statute in 1978 and its existence, together with the method of appointment, entrenched by means of a requirement that amendment of these provisions should only occur by way of an absolute majority in each house of Parliament and a referendum.⁹⁶

GOVERNORS OF SOUTH AUSTRALIA

South Australia was established as a separate province by Letters Patent in 1836, with the first Governor being Sir John Hindmarsh.⁹⁷ The first Australian appointee was Sir James Harrison, who was appointed in 1968.⁹⁸ The office is constituted not by statute but by Letters Patent.⁹⁹

Harrison's predecessor, Sir Edric Bastyan, was faced with an unusual situation after the South Australian election of March 1968.¹⁰⁰ Each of the major parties won 19 seats in the Lower House, with the remaining seat being held by an Independent Member of Parliament.¹⁰¹ The leader of the Opposition wrote to the Governor, stating that he had the support of the Independent Member on major issues and requesting that he be commissioned to form a government.¹⁰² The existing Premier, who was also the Attorney-General, advised the Governor, however, that the present Ministers should retain their commissions and meet the Parliament when it was due to reconvene.¹⁰³ The Governor accepted this advice,¹⁰⁴ but when the Lower House ultimately met, the government lost an adjournment motion and the Premier then resigned.¹⁰⁵ The leader of the Opposition was then commissioned to form a government.¹⁰⁶

95 Ibid 40-2.

96 *Constitution Act 1889* (WA) ss 50, 51 and 73.

97 Bradley Selway, 'The Constitution of South Australia' (1992) 3 *Public Law Review* 39, 39.

98 Twomey, *The Chameleon Crown*, above n 30, 53.

99 South Australia, *Government Gazette*, 6 March 1986, 518-20.

100 M C Harris and J R Crawford, 'The Powers and Authorities Vested in Him: The Discretionary Authority of State Governors and the Power of Dissolution' (1969) 3(3) *Adelaide Law Review* 303.

101 Ibid.

102 Ibid 308-10.

103 Ibid 306-7.

104 Ibid 310-11.

105 Ibid 334.

106 Ibid.

GOVERNORS OF TASMANIA

In 1825 Van Diemen's Land was separated from the colony of New South Wales and a Legislative Council established for the new colony.¹⁰⁷ A successor to the initial Legislative Council enacted a Constitution Bill in 1854 that was transmitted to England and received the royal assent.¹⁰⁸ This legislation established two houses of Parliament.¹⁰⁹ Starting in 1804, Van Diemen's Land had a succession of Lieutenant-Governors until the appointment of Sir Henry Young in 1855 as Governor. In the following year the colony's name was changed to Tasmania. The first Australian-born appointee was Sir Stanley Burbury, who took office in 1973.¹¹⁰ As in South Australia and Western Australia, the office is constituted by Letters Patent rather than by statute.¹¹¹

The use of the Hare-Clark system of multi-Member electorates for the Lower House has on a number of occasions failed to produce a clear majority for any party at an election.¹¹² At the election held on 13 May 1989, the existing Liberal government won 17 seats and the Labor opposition 13, so that the balance of power was held by five Green independent Members.¹¹³ The leader of the Opposition wrote to the Governor, proposing that a Labor government be commissioned on the basis of its support by the five Green Members, but the Premier advised the Governor that the existing government should remain in office.¹¹⁴ The Governor accepted the Premier's advice until the Lower House met and an effective motion of no confidence in the government was passed. The Governor then sought written assurances from the leader of the Opposition and each of the five Greens in relation to a number of issues, and consulted separately with the Greens.¹¹⁵ The Premier resigned after being informed of these discussions and the leader of the Opposition was commissioned as Premier.¹¹⁶ Over the period of these negotiations, the Governor took extensive advice from the solicitor-general, William Bale, but also obtained opinions from Sir Harry Gibbs, former chief justice of Australia, and Colin

107 Lumb, above n 79, 33.

108 Ibid.

109 Ibid.

110 Twomey, *The Chameleon Crown*, above n 30, 53.

111 Tasmania, *Government Gazette*, 14 March 1986.

112 Winterton, 'The Constitutional Position of Australian State Governors', above n 55, 305.

113 See 'Comment: Documents Concerning the Constitutional Events which Surrounded the Tasmanian General Election in 1989' (1991) 2 *Public Law Review* 4.

114 Ibid 5-6.

115 Ibid 7.

116 Ibid 10.

Howard, a former professor of constitutional law at the University of Melbourne.¹¹⁷ The existing government obtained legal opinions from five constitutional lawyers and supplied these to the Governor.¹¹⁸

A variant on this kind of uncertain result occurred following the election of March 2010, when the existing Labor government and the Liberal opposition each won 10 seats in the Lower House, with the Greens winning the remaining five seats.¹¹⁹ The Premier advised the Governor to invite the leader of the Liberal opposition to indicate whether he was able to form a government, although at the same time the Premier refused to give an assurance that Labor would neither vote against supply legislation nor support a no-confidence motion.¹²⁰ The Governor then commissioned the Premier to form a government, and this was supported by the Greens when the Lower House met.¹²¹ The Governor was advised in the course of these events by the solicitor-general, Leigh Sealy, in relation to the various alternatives available to him.

ADMINISTRATORS OF THE NORTHERN TERRITORY

The Northern Territory was part of the colony of New South Wales for almost the entire period between 1825 and 1863 and then part of the colony and subsequently state of South Australia until 1911, when it was transferred to the control of the Commonwealth government.¹²² In 1978 the Territory became self-governing with a Legislative Assembly and a Chief Minister.¹²³ The administrator is appointed by the Governor-General on the advice of the Commonwealth government and exercises powers very similar to those of a state Governor.¹²⁴ Legislation passed by the Territory Parliament and assented to by the administrator may be vetoed by the Governor-General, acting on the advice of the Commonwealth government, although this has rarely occurred.¹²⁵

The first administrator was John Gilruth, who served in this post between 1912 and 1919. The first administrator of the self-governing polity was John England, between 1978 and 1981.

117 Winterton, 'The Constitutional Position of Australian State Governors', above n 55, 311.

118 Ibid 310.

119 See Michael Stokes, 'Comments: The Role of the Governor Where There is a Hung Parliament: The 2010 Tasmanian Experience' (2010) 21 *Public Law Review* 223, 227.

120 Ibid.

121 Ibid 228.

122 Twomey, *The Constitution of New South Wales*, above n 8, 38-9.

123 *Northern Territory (Self-Government) Act 1978* (Cth).

124 Ibid s 32.

125 Ibid s 8.

THE CROWN

CONCLUSION

It will be observed that the Vice-Regal Officers at both the federal and state levels have been a very important part of Australia's legal and political history, on occasions playing the central role in some of the nation's most turbulent events, including the dismissals of the Lang (state) and Whitlam (federal) governments. Moreover, in situations of parliamentary instability the Vice-Regal Officers remain in a position to exercise significant influence on the outcome of confrontations between two houses of Parliament or in times of uncertainty as to who can command a majority in the Lower House. In many ways the constitutional role of the Vice-Regal Officers is, if not exactly shrouded in mystery, the subject of little public discussion, and this is exemplified by the few public references to the functions of the Executive Council. In the debate in the late 1990s over whether Australia should move to a republican model of government, some questions were raised as to what part the Vice-Regal Officers might play in such a system. They would no longer be Vice-Regal Officers, but it seems likely that under a Westminster system of government there would still be a requirement for some presidential officer who would be empowered to make the kinds of decisions that are still open to Vice-Regal Officers in the exercise of the reserve powers. It may be possible to confine those powers, as has been done to some extent by the introduction of fixed-term Parliaments in a number of states, but it seems unlikely that they could be completely eliminated.

5

THE CROWN BEING A MODEL LITIGANT

GRANT DONALDSON SC¹

The task of writing this chapter has been greatly eased because, in recent years, there have been several excellent papers written about the Australian notion of the model litigant. In particular there is an excellent paper by Gabrielle Appleby² and two excellent papers (jointly written) by Michelle Taylor-Sands and Camille Cameron.³ These papers deal with most of the relevant issues thoroughly. Countervailing this is the difficulty that the thoroughness and excellence of these papers causes; what of value can be added? Rather than simply recount the work of others, I hope in this chapter to provide what might be thought of as somewhat practical perspectives on certain of the issues that often arise in considering this odd thing — the model litigant — and to focus on one or two particular matters.

In this spirit of difference, I confess one matter. I am a product and inhabitant of the Western Australian legal profession. I am sure that I have been asked to prepare this chapter because, as I will explain, Western Australia has taken a somewhat different approach from the Commonwealth and other states and territories to the formalisation

1 I am most grateful for the assistance of Gary Cheung and Kate Dromey in preparing this chapter.

2 See Gabrielle Appleby, 'The Government as Litigant' (2014) 37 *University of New South Wales Law Journal* 94.

3 Camille Cameron and Michelle Taylor-Sands, "Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497; Michelle Taylor-Sands and Camille Cameron, 'Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes' (2010) 21 *Public Law Review* 188.

of model litigant ‘rules’. In recent times the Commonwealth, New South Wales, Queensland, South Australia and the Australian Capital Territory have, in one form or other, expressed, if not ‘codified’, the obligation by means of quasi-statutory instruments. Western Australia has not, and, so far as I am aware, there is no sentiment in government in favour of doing so. The current Attorney-General advised Parliament in 2010: ‘The government has no plans to issue model litigant guidelines for legal practitioners’.⁴

A LITTLE BIT OF HISTORY

The formulation of *the Crown being a model litigant*, by its mere statement, conjures some obvious questions. What is it — a duty, a policy, an idea, an ideal, a rule of law, a right-creating thing, a ‘duty of imperfect obligation’?⁵ To whom does it apply?⁶ What constitutes it, whatever it is?⁷ When does it arise?⁸

As explained below, the first formal statement of model litigation obligations⁹ by an Australian government was that of the Commonwealth in the *Legal Services Directions 1999* (Cth). But, well before 1999, the obligation was entrenched, in the sense that it was referred to a lot. Indeed, Appendix B of the (current) *Legal Services Directions 2005* (Cth), *The Commonwealth’s Obligation to Act as a Model Litigant*, expressly recognises this in noting that ‘[t]he expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts’ and cites *Melbourne Steamship Co Ltd v Moorehead*.¹⁰

The customary starting point of all of this is universally accepted to be the observations of Sir Samuel Griffith in *Melbourne Steamship Co Ltd v Moorehead*.¹¹ Often what is extracted from Sir Samuel Griffith’s judgment is the reference to an ‘old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects’.¹²

4 Western Australia, *Parliamentary Debates*, Legislative Council, 21 September 2010, 6886.

5 *ASIC v Hellicar* (2012) 247 CLR 345, 407 [152] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). This arises from the concept that the Crown has an ‘obligation’ to be a model litigant. Although the word ‘obligation’ is often used, it is done so, as will be discussed, in a rather colloquial way.

6 Or — in *the Crown being a model litigant* — what is meant by ‘the Crown’?

7 Or — in *the Crown being a model litigant* — what does ‘model’ mean?

8 Or — in *the Crown being a model litigant* — what does ‘litigant’ mean?

9 I use the words ‘obligation’ or ‘obligations’ in the customary informal way.

10 *Legal Services Directions 2005* (Cth) Appendix B, citing *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

11 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

12 *Ibid.*

A little more of what his Honour set out provides further assistance:

The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and *a fortiori* not in criminal proceedings.

I am sometimes inclined to think that in some parts — not all — of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.¹³

Melbourne Steamship Co Ltd v Moorehead was, and remains, an important case. It is cited often and will soon come to be considered more as the courts grapple with the implications of the product of compelled pre-trial examinations.¹⁴ Perhaps because of this, and because no Australian government has ever, to my knowledge, denied that it is to act as a model litigant, in considering Sir Samuel Griffith's observations about (what has come to be described as) the model litigant, little attention is paid to the context of his Honour's observations or the circumstances in which they came to be uttered. This context and circumstance is interesting, though. The background to the issue that came before the High Court concerned Commonwealth proceedings brought against various colliery proprietors alleging contravention of the *Australian Industries Preservation Act 1906* (Cth), the initial Australian 'anti-trust'-type legislation. Prior to any trial, the Melbourne Steamship Company, which was not a defendant in these proceedings, was directed by an officer of the Commonwealth to answer certain questions to assist the Commonwealth in the action. Section 15B of the *Australian Industries Preservation Act* was contended by the Commonwealth to empower the asking of such questions and to require their answer. The Melbourne Steamship Company refused to answer the questions put to it. It was then charged with, and convicted of, an offence of unlawfully refusing to answer such questions.

The matter before the High Court was ultimately an appeal from this conviction. By a majority, the Court construed s 15B as to not have empowered the Commonwealth to ask such questions, or to have required their answer, once an action for contravention of the *Australian Industries Preservation Act* had been commenced. Because proceedings against the colliery proprietors had already been commenced, to which the questions asked of the Melbourne Steamship Company related, s 15B did not authorise the asking

13 Ibid.

14 *Melbourne Steamship Co Ltd v Moorehead* is cited in (inter alia) *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 and *X7 v Australian Crime Commission* (2013) 248 CLR 92. This issue has immense contemporary importance and we will be dealing with it a lot — soon.

of such questions, and did not then compel their answer; and so refusal by the Melbourne Steamship Company to answer was not unlawful and the conviction was quashed.

Sir Samuel Griffith's famous observations came about in this way. Sir Hayden Starke (as he was to become), who appeared (in effect) for the Commonwealth, put a proposition to the Court in the course of argument. He stated that, even though the substantive action had been commenced against the colliery proprietors at the time that the questions were put to the Melbourne Steamship Company, the terms of the complaint or pleading that had been filed in that action could be construed as also referring to possible future proceedings.

So, it was contended, even if s 15B was limited to only requiring questions to be answered once an action had been commenced, there was something before the Court to suggest that other proceedings were being contemplated in the future. As such, Sir Hayden Starke submitted, the Melbourne Steamship Company's refusal to answer was unlawful because the questions could be understood as relating to a (possible) future proceeding. It was this argument that drew the ire of Sir Samuel Griffith and prompted his now famous riposte. It was this argument that Sir Samuel Griffith characterised as being 'a purely technical point of pleading'.

Justice Barton, who had been (inter alia) an Attorney-General of New South Wales and Prime Minister, in the course of his concurring judgment, made no reference to this argument put on behalf of the Commonwealth. Justice Isaacs, who dissented, and who was a former Attorney-General not only of Victoria but also of the Commonwealth, did not need to address the point but, as with Barton J, did not seek to be associated with the observation by the chief justice. Indeed, having regard to certain of the reasoning in his Honour's judgment,¹⁵ a fair argument can be made that Isaacs J did not necessarily agree with Sir Samuel Griffith's characterisation of the submission put by the Commonwealth or the consequence of putting it. Plainly, neither Barton J nor Isaacs J was so affronted by the conduct of the Crown, or its counsel, to have sought to associate themselves with Sir Samuel Griffith's response to it.

In any event, and on any view, the famous observation of Sir Samuel Griffith was plainly obiter. Even as a 'purely technical point of pleading', it was dismissed as follows — 'I am not sure that even as a technical point of pleading the point taken is a good one'.¹⁶ No doubt, Sir Samuel Griffith's observation added much to Sir Hayden Starke's legendary good humour.

15 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 351: 'True, the Crown might have discontinued all its proceedings up to date, and paid the costs, then put its questions to this company, examined its documents, and then could have re-started the cumbersome litigation, re-incurred the huge expense on both sides, and it would then have been free from this objection'.

16 *Ibid* 343.

It is interesting to reflect upon certain aspects of Sir Samuel Griffith's observation. This is rarely done, because, as noted above, no Australian government so far as I am aware has ever doubted that the obligation to be a model litigant applies to it (in one form or other and on one understanding of it or other); and because, whatever the circumstances of *Melbourne Steamship Co Ltd v Moorehead*, I am unaware of any authority since that has referred to the extracted passage from Sir Samuel Griffith's judgment other than approvingly.¹⁷ But, be all of this as it may, there are some mysteries about Sir Samuel Griffith's observation. For instance, to whom or what was Sir Samuel Griffith's admonition directed? It seems to me that it was directed at the Commonwealth's counsel for putting a cute and contentious submission. Sir Samuel Griffith expressed surprise that the 'purely technical point of pleading' was taken 'on behalf of the Crown'.¹⁸ So was the admonition really directed at legal advisers to the Crown?

Further, Sir Samuel Griffith referred to the 'standard' as 'old-fashioned traditional, and almost instinctive'. This formulation is interesting. As to tradition and antiquity, the basis in English law for what we now refer to as the model litigant obligation is a little blurry. Justice Mahoney in *P & C Cantarella Pty Ltd v Egg Marketing Board*¹⁹ referred to Lord Abinger's observation in *Deare v Attorney-General*²⁰ of the practice for the officers of the Crown 'to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred' as 'merely an aspect of' that referred to by Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead*.

As Appleby²¹ and Cameron and Taylor-Sands²² (I think correctly) state in their respective papers, support in English decisions can, in addition to *Deare v Attorney-General*, be found in such seminal cases as *Pawlett's case*²³ and *Dyson v Attorney-General*.²⁴

Sir Samuel Griffith's reference to the 'standard' as being 'instinctive' (as well as 'old-fashioned' and 'traditional') compels the question — whose instinct? Ministers of

17 Illustrative of this is *Scott v Handley* (1999) 58 ALD 373, 383 [44], where Spender, Finn and Weinberg JJ described '[i]nsistence upon that standard [a]s a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government'.

18 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (emphasis added).

19 *P & C Cantarella Pty Ltd v Egg Marketing Board* [1973] 2 NSWLR 366, 384.

20 *Deare v Attorney-General* (1835) 1 Y & C. Ex. 197, 208; (1835) 160 ER 80, 85: 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred'.

21 See Appleby, above n 2, 96.

22 Cameron and Taylor-Sands, 'Playing Fair', above n 3, 498-9.

23 *Pawlett v Attorney-General* (1678) Hardres 465; (1667) 145 ER 550 ('*Pawlett's case*').

24 *Dyson v Attorney-General* [1911] 1 KB 410.

the Crown? Other officers of Executive Government? Sir Samuel Griffith had twice been Attorney-General and twice Premier of Queensland. So when his Honour refers to the ‘standard of fair play to be observed by the Crown in dealing with subjects’, which he ‘learned a very long time ago to regard as elementary’, in what capacity did he learn it? As a member of Executive Government or as a legal adviser to Executive Government?

There is a further aspect of interest. Sir Samuel Griffith stated: ‘It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and *a fortiori* not in criminal proceedings’.²⁵ This should not be misunderstood and this sentence bears a meaning deriving specifically from the circumstances of the case. As noted, although the appeal to the High Court was from a criminal complaint before the Local Court, the issue before the Court was really as to the meaning and scope of s 15B of the *Australian Industries Preservation Act*, and the conduct that drew the admonition was the putting of a cute submission about the meaning and scope of the section.

It has never been thought to be the case, in Western Australia at least, that in prosecuting crime, what has come to be referred to as the model litigant obligation is relevant. Specific rules of law and conduct apply to the state and those prosecuting crime. Some are akin to commonly accepted and understood model litigant obligations,²⁶ but it is a misconception, and it is also confusing, to translate the concept of the model litigant to the obligations of the state in crime. In ‘model litigant’, litigant means party to a civil²⁷ dispute. As will come to be explained, it is the modern phenomenon of civil

25 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

26 For instance, the Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), citing Western Australia, *Western Australian Government Gazette*, No 104, 3 June 2005, 2510, 2510, contains the following:

Duty to be Fair

11. The duty of the prosecutor is to act fairly and impartially, to assist the court to arrive at the truth. A prosecutor has the duty of ensuring that the prosecution case is presented properly and with fairness to the accused.

12. A prosecutor is entitled to firmly and vigorously urge the State view about a particular issue and to test and, if necessary, attack the view put forward on behalf of the accused, however this must be done temperately and with restraint.

13. A prosecutor must never seek to persuade a court or jury to a point of view by introducing prejudice or emotion, and must not advance any argument that does not carry weight in his or her own mind or try to shut out any legally admissible evidence that would be important to the interests of the person accused.

14. A prosecutor must inform the court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution, and must offer all evidence relevant to the State case during the presentation of the State case.

27 ‘Civil’ in this context meaning non-criminal.

disputes that look like criminal prosecutions, such as actions on ‘civil penalty provisions’, which has thrown up a few issues. I discuss this below in the context of *ASIC v Hellicar*.²⁸

Support for the conclusion that consideration of the obligations of prosecutors is not assisted by infusing the notion of the model litigant can, I think, be found in recent decisions concerning the state’s obligation of disclosure prior to (criminal) trial. In *Mallard v The Queen* (*‘Mallard’*)²⁹ Gummow, Hayne, Callinan and Heydon JJ, after referring to statutory obligations of disclosure, noted that

the recent case of *Grey v The Queen* in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.³⁰

Their Honours’ citation of *Grey v The Queen* (*‘Grey’*) did not include a page or paragraph reference, and *Grey* is rather slender authority for the existence of such a *common law* obligation. In the majority judgment of Gleeson CJ, Gummow and Callinan JJ in *Grey*, the most that I think can be found is their Honours’ conclusion that ‘[t]he [undisclosed] letter should have been provided to the appellant, as is correctly conceded in this Court by the respondent’³¹ in the circumstance of the case; where there was no reference to a statutory obligation of disclosure. Anyway, the point of this is that, whatever is the status or juristic basis of the state’s non-statutory obligation of disclosure in crime, in none of the consideration of it in the High Court was it contended as being an aspect of the state’s model litigant obligation. No doubt, had the state’s model litigant obligation been relevant it would have been mentioned, at least in *Mallard*.

THE ‘CODIFICATIONS’

In Australia, statement of the parameters (or some of them) of the obligation first occurred in 1999 following the introduction of Part VIII B of the *Judiciary Act 1903* (Cth) (*‘Judiciary Act’*). This followed the Logan Report.³² Part VIII B was introduced into the *Judiciary Act* as part of substantial changes to Commonwealth legal services. Inter alia, the Australian Government Solicitor (*‘AGS’*) was created and provision made for the ‘outsourcing’ of large parts of Commonwealth legal work to the private profession. Section 55ZF (in Part VIII B) empowers the Commonwealth Attorney-General to issue directions to (generally) apply to, and in respect to, ‘Commonwealth legal work’,

28 *ASIC v Hellicar* (2012) 247 CLR 345.

29 *Mallard v The Queen* (2005) 224 CLR 125.

30 *Ibid* 133 [17].

31 *Grey v The Queen* (2001) 184 ALR 593, 598 [18].

32 Basil Logan, David Wicks and Stephen Skehill, *Report of the Review of the Attorney-General’s Legal Practice* (1997).

which includes legal work done by or on behalf of the AGS and by any person for the Commonwealth. (This includes bodies established by Commonwealth law, companies in which the Commonwealth has a controlling interest and any other person if the work ‘relates to the person’s or body’s performance of a Commonwealth function’.)³³

The (first) *Commonwealth Legal Services Direction* was issued in 1999. It was replaced by the current direction in 2005. Clause 4.2 of the direction requires that ‘claims are to be handled and litigation is to be conducted ... in accordance with the ... *The Commonwealth’s Obligation to Act as a Model Litigant*, at Appendix B’.³⁴

It is important to bear in mind why all of this was done. The motivating idea was to ensure that once the ‘market’ for Commonwealth legal work opened up, non-government lawyers, who were going to be acting on behalf of the Commonwealth to a far greater extent than before 1999, understood their obligations when acting for and representing the Commonwealth.

In tone, the *Commonwealth Legal Services Direction* and *The Commonwealth’s Obligation to Act as a Model Litigant* are directed both at Commonwealth bodies that use ‘external’ lawyers and to those lawyers themselves. No doubt it was thought that, prior to 1999, when government legal work, or at least representation in litigation, was provided by government lawyers, the need to state the scope and content of the model litigant obligation was unnecessary. Even if the obligation to be a model litigant was not understood by departments, if all litigation was conducted by government lawyers, *ex hypothesi* well versed in the model litigant ideals, there was no need for written statements. In times prior to 1999, the model litigant obligation was regulated through and mediated by government legal offices and officers.

STATES AND THE AUSTRALIAN CAPITAL TERRITORY

Victoria’s *Model Litigant Guidelines* are policy guidelines that were originally issued by the Attorney-General in 2001 and revised in March 2011.³⁵ Note 3 to the *Model Litigant Guidelines* states:

The State of Victoria acknowledges the assistance of the Commonwealth in developing these Guidelines. The Guidelines are based on the Directions on the Commonwealth’s Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney General pursuant to s 55ZF of the *Judiciary Act 1903*.³⁶

³³ *Judiciary Act 1903* (Cth) s 55ZF.

³⁴ *Legal Services Directions 2005* (Cth) sch 1 cl 4.2.

³⁵ Victoria State Government, Victorian Model Litigant Guidelines (13 March 2015) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>>. The Guideline is part of the Standard Legal Services to Government Panel Contract.

³⁶ *Ibid*.

The Victorian *Model Litigant Guidelines* are, in substance, the same as *The Commonwealth's Obligation to Act as a Model Litigant*.

The New South Wales *Model Litigant Policy for Civil Litigation* was approved for adoption by all government agencies on 8 July 2008.³⁷ It, too, is substantively the same as *The Commonwealth's Obligation to Act as a Model Litigant*.³⁸

In the Australian Capital Territory, the *Law Officer (Model Litigant) Guidelines 2010 (No 1)* came into effect from 2 March 2010.³⁹ They are substantively the same as *The Commonwealth's Obligation to Act as a Model Litigant*.

Queensland's *Model Litigant Principles* state that they are revised as at 4 October 2010, but I cannot find an earlier version.⁴⁰ They appear to me, in substance, to be the same as *The Commonwealth's Obligation to Act as a Model Litigant*, though divided into 'principles of fairness' and 'principles of firmness'.

In South Australia, model litigant rules were issued by the Crown Solicitor as *Crown Solicitor's Office Legal Bulletin No 2: The Duties of the Crown as a Model Litigant* on 10 June 2011. They are more detailed than, but appear to me to be substantively the same as, *The Commonwealth's Obligation to Act as a Model Litigant*. The South Australian *Bulletin* refers to several judicial statements of the obligation which do not appear in *The Commonwealth's Obligation to Act as a Model Litigant*. It also contains three additional headings, which do not appear in any of the other statements. Those sections essentially expand upon the 'nature of the obligation' and are less formally articulated than other statements. They are titled: 'What do the model litigant rules mean in practice?'; 'The fair but firm principle'; and 'Behaviour not expected of a model litigant'.

For reasons that I will come to explain, it is instructive to refer also to some material on the United Kingdom Government Treasury Solicitor's website. It refers to the complaints procedure of the Parliamentary Commissioner for Administration, in

37 New South Wales State Government, *Model Litigant Policy* (13 January 2015) <<http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>>.

38 In some parts the *Model Litigant Policy for Civil Litigation* (NSW) combines some of the Commonwealth's expanding 'notes' into the main text of the state rules. For example: Rule 3.1 of the *Policy* (NSW) combines Note 2 and Note 3 of the *Directions* (Cth). Rule 3.2(h), which deals with appeals, subsumes part of Note 4 of the *Directions* (Cth) into the main text of the rule. Unlike the *Directions* (Cth), the *Policy* (NSW) makes no separate provision for merits review or ADR proceedings. However, the *Policy* (NSW) includes ADR within the definition of 'litigation' in Rule 1.2. Rule 3.2(d), which deals with 'endeavouring to avoid litigation wherever possible', refers in particular to the *Premier's Memorandum 94-25 Use of ADR Services by Government Agencies*.

39 Section 11(2) of the *Law Officers Act 2011* (ACT) provides that the Attorney-General must issue a legal services direction setting out the model litigant guidelines for territory legal work. Such a direction is a notifiable instrument: s 11(3).

40 *Model Litigant Principles 2010* (Qld).

effect the Ombudsman.⁴¹ The Commissioner's website is devoted to complaints about general or regular departmental work; and so the banality of the 'Principles of Good Administration', which the Commissioner believes should be followed by all public bodies.⁴² The Treasury Solicitor's website lists relevant examples of what may constitute 'maladministration' in the context of the work of the Treasury Solicitor.⁴³ These are all expressed in the vernacular of the consumer or the member of the public dealing with a government department and include, as instances of maladministration, avoidable delay; faulty procedures or failing to follow correct procedures; 'not telling you about any rights of appeal you have'; unfairness, bias or prejudice; giving advice which is misleading or inadequate; refusing to answer reasonable questions; discourtesy, and failure to apologise properly for errors; 'mistakes in handling your claims'; and 'not offering an adequate remedy where one is due'.⁴⁴

WHAT IS THE POINT OF THESE VARIOUS DOCUMENTS?

It seems to me plain enough that the *Commonwealth Legal Services Direction* and the incorporated *The Commonwealth's Obligation to Act as a Model Litigant* are expressed to assist Commonwealth offices, officers and private sector legal advisers. This is their purpose, and as explained above it derives from the circumstances of their creation.

41 The Commissioner, also known as the Parliamentary and Health Services Ombudsman, is established by the *Parliamentary Commissioner Act 1967* (UK). Under s 5(1) of the Act, the Commissioner may investigate a complaint by a member of the public that they have 'sustained injustice in consequence of maladministration' in the exercise of an administrative function. A complaint can only be referred to the Commissioner by an MP. There is no direct access to the Commissioner by the public. The Commissioner may investigate complaints made in relation to a wide array of government departments and other government bodies, including the Treasury Solicitor's Department. As with other similar ombudsmen, the Commissioner may report the result of an investigation, but any recommendations made by the Commissioner have no direct binding effect.

It is worth noting that this chapter discusses the Treasury Solicitor's Department, as it was then known (see UK Government, Treasury Solicitor's Department, *Complaints Procedure* <<https://www.gov.uk/government/organisations/treasury-solicitor-s-department/about/complaints-procedure>>); however, the Department is now known as the Government Legal Department (see UK Government, Government Legal Department <<https://www.gov.uk/government/organisations/government-legal-department>>).

42 The Principles are (in summary): (1) Getting it right; (2) Being customer focused; (3) Being open and accountable; (4) Acting fairly and proportionately; (5) Putting things right; and (6) Seeking continuous improvement.

43 See Treasury Solicitor's Department, *Complaints Procedure* <<https://www.gov.uk/government/organisations/treasury-solicitor-s-department/about/complaints-procedure>>; see also above n 41.

44 There is a Civil Service Code, made pursuant to the *Constitutional Reform and Governance Act 2010* (UK) which sets out the standards of behaviour of all UK civil servants. The Civil Service Code forms part of the terms and conditions of service of any civil servant covered by the Code. The Code contains four values: integrity, honesty, objectivity and impartiality. See <<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>>.

The Commonwealth has wisely made plain in s 55ZG(3) of the *Judiciary Act* that noncompliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

It occurs to me that as a tool for advising the private legal profession on what (or some of what) is encompassed by the model litigant obligation, such documents have a sensible purpose. As I will come to posit, it also occurs to me that there remain differences in the obligations of practitioners acting for government and otherwise, and it is a good and sensible thing that government seeks to inform its private legal advisers in this way.

Certain of the other documents have, it seems to me, a different purpose to this. The South Australian *Bulletin* is the best example. It is issued by the Crown Solicitor and is more expansive, and less formally expressed, than others. It is, in its central essence, directed to government departments. It is designed to explain to them what they are to expect when they are represented in litigation by the Crown Solicitor's Office. Again, this seems to me a good thing. Even if Sir Samuel Griffith's reference to 'instinctive' appreciation refers to the instinct of Ministers of the Crown and other officers of Executive Government, Executive Government is a larger and more amorphous being in the 21st century than in the 19th.

Different to all of this is the Treasury Solicitor document, which is really just consumer and complaint-making advice.

As I indicated above, Western Australia does not have an instrument in the same form as most other states. Although I do not really know, I suspect that part of the reason for this is that the circumstance that gave rise to the *Commonwealth Legal Services Direction* and the incorporated *The Commonwealth's Obligation to Act as a Model Litigant* — the widespread utilisation of the private profession in government litigation — has not really occurred in Western Australia. Again, it occurs to me that the position in South Australia is similar and so the South Australian *Bulletin* has a different purpose to (say) the Commonwealth document.

Instruction of external solicitors in government litigation is, in the Commonwealth sphere, now commonplace. A brief perusal of AustLII⁴⁵ shows that in many critical matters in which the Commonwealth or a Commonwealth entity is a party, the Commonwealth entity is represented by firms of solicitors. This is particularly noticeable in immigration and refugee matters. As a tool for ensuring (or seeking to ensure) that legal advisers to the Commonwealth, who have not been brought up in the tradition of government legal service, appreciate the model litigant obligation, such documents (if well crafted) are undoubtedly useful.

45 *Australian Legal Information Institute*, <<http://www.austlii.edu.au>>.

I should make plain that in stating this I do not wish to be thought of as sounding particularly prissy as to the ‘tradition of government legal service’ and any difference between it and non-government legal practice, or to suggest that such traditions are unattainable by the private profession. Plainly, non-government solicitors are well capable of appreciating and acting in accordance with the ideals of the model litigant. But, certainly in Western Australia, there are differences between government and non-government legal practice, in subtle ways. This is a large topic in itself, but, in short, good government legal advisers view their role as far greater than simply delivering a result for a client. Good government legal advisers are an important institutional check on Executive Government power. In Western Australia, for instance, it is unthinkable that a government department would not follow advice provided by the State Solicitor’s Office. Further, within Executive Government, the status of the Office is such that it customarily provides far more than what would conventionally be thought of as legal advice. It advises, and should advise, as to propriety.

In Western Australia this is coupled with the circumstance that it is relatively rare, in litigation in which the state or a Minister or a department is involved, for such entities to be represented by solicitors from the private profession. Indeed, it is relatively rare for counsel from the independent Bar to be engaged. There are historical reasons for this, and although times have changed, it generally holds true today.

It is largely for these two reasons that, I suspect, governments in Western Australia have not thought it necessary to articulate the model litigant obligation. It has, I suspect, been thought to be largely unnecessary. Plainly enough, these circumstances do not apply in all states and territories or the Commonwealth.

MORE SPECIFIC STATEMENTS OF GOVERNMENT LITIGATION OBLIGATIONS

The Victorian Department of Human Services and Education has issued a document, *Common Guiding Principles for Responding to Claims Involving Allegations of Child Sexual Abuse*.⁴⁶ The principles are as follows:⁴⁷

Departments should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.

Departments should ordinarily not rely on a defence that the limitation period has expired, either formally (for example in pleadings) or informally (for example in

46 State Government of Victoria, *Common Guiding Principles for Responding to Civil Claims Involving Allegations of Child Sexual Abuse* (Melbourne, 2014). These are referred to in: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (2015) 227.

47 Ibid.

the course of settlement negotiations). If a limitation defence is relied on, careful consideration should be given as to whether it is appropriate to oppose an application for extension of the relevant period.

Departments should ordinarily not require confidentiality clauses in the terms of settlement.

Departments should ordinarily pursue a contribution to any settlement amount from alleged abusers.

Departments should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.

Departments should develop pastoral letters that acknowledge claims and provide information about services and supports available to claimants.

Departments should offer a written apology in all cases where they consider it is appropriate. Ordinarily it will be appropriate for the apology to be signed by a senior executive officer, however this will depend on the circumstances.

The New South Wales government has issued a similar document.⁴⁸

Both documents are expressed to be intended to complement the state's model litigant guideline document. These documents respond to the shocking truth of long-ignored institutional sexual abuse of children and inadequate government response to it in government institutions. By their nature, these documents are really statements to victims about how they can be expected to be treated when making a claim. They do not give rise to enforceable or justiciable obligations but are designed to not discourage victims from making claims. I do not know whether they are also intended to perform an additional role of educating legal advisers who will represent the state in such actions. I simply do not know how, in Victoria and New South Wales, the state and its parts have been represented in times past.

The point in my drawing attention to these policy documents, in this context, is to highlight (or at least suggest) that such policy-type documents have different purposes than those of more general model litigant guideline documents. It may be that they mark the start of a trend for government to clearly articulate the 'attitude' that it will adopt to categories or particular types of litigation. It may be that if this trend continues, more specific policy-type documents, acutely related to litigation or disputes of particular types, will prove to be useful. What will constitute categories or particular types of litigation will likely prove to be more problematic than articulating the attitude of government that litigants might expect in such categories.

48 See State Government of New South Wales, *Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse* (Sydney, 2014).

IS THERE A NEED NOW FOR MODEL LITIGANT POLICIES AT ALL DUE TO
CONVERGENCE WITH OTHER OBLIGATIONS?

Justice Michael Barker, in a 2010 paper entitled, ‘What Makes a Good Government Lawyer’⁴⁹ observed, in respect of the days when lawyers were viewed as ‘hired guns’, that⁵⁰

times have changed. The biggest changes to litigation concern the emphasis now placed on the duties parties and their lawyers owe courts to cooperate in the conduct of litigation. This has the effect, in my view, of tending to place parties and their representatives under the same type of ‘model litigant’ rules that governments and government lawyers have explicitly met in this country for many years. Indeed, I have difficulty in seeing why the so called model litigant rules do not apply across the board. Why should any party, for example, be able to act uncooperatively in the conduct of litigation, take technical points, fail to be other than perfectly frank with the court, take advantage of its own default, fail to act conscientiously in meeting procedural requirements, and so on (see *Scott v Handley* [1999] FCAFC 404 [43]-[45]).

Justice Barker, contrary to the humility he expresses in his paper, is supremely qualified to comment on such matters. His Honour played an enormous role in establishing the State Administrative Tribunal in Western Australia and saw much of, and many, government lawyers. His Honour was also counsel assisting the ‘WA Inc Royal Commission’ and saw much there.

In all Australian jurisdictions, the changes to which his Honour refers have been introduced both by substantive changes to Rules of Court and the like and by changes to professional conduct rules. Common case management rules empower courts to give directions for expedition and consideration of ‘the real issues between the parties to the proceedings’.⁵¹ Perhaps more striking than these changes to court rules have been those made to professional conduct rules. These are detailed and prescriptive, and, as Justice Barker notes, many are akin to model litigant obligations and impose like obligations on lawyers acting in litigation and legal disputes.

But I am not convinced that we are yet at, or should be at, the stage where ‘parties and their representatives’ should be ‘under the same type of “model litigant” rules [of] governments and government lawyers’.

As to whether we are currently at this point, this can be answered, I think, by analysing and comparing particular professional conduct rules with (say) *The*

49 Justice Michael Barker, ‘What Makes a Good Government Lawyer’ (Speech delivered at Essentials for Government Lawyers: Australian Government Solicitors, Canberra, 16 November 2010).

50 Ibid 11.

51 See, for instance, Part VI of the *Civil Procedure Act 2005* (NSW); *Rules of the Supreme Court of Western Australia* O1 r 4A; Form 5F of the *Supreme Court (General Civil Procedure) Rules 2005* (NSW); *Supreme Court Civil Rules 2006* (SA) r 130J; *Uniform Civil Procedure Rules 1999* (Qld) r 5.

Commonwealth's Obligation to Act as a Model Litigant. To do so exhaustively would be time consuming and rather dull (at least for me). But the following will suffice for my point. Common, I think, are the following. Parties and their legal advisers are required to '[deal] with claims promptly and not [cause] unnecessary delay'.⁵² Breach of this has costs implications for parties, and costs and professional consequences for their advisers. Parties and advisers are required to 'avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate'.⁵³ All are required to, 'where it is not possible to avoid litigation, [keep] the costs of litigation to a minimum'.⁵⁴

But other model litigant obligations seem to me to be inapt. I am not sure that all defendants and their advisers are required to make an 'early assessment of ... prospects of success in legal proceedings that may be brought' and to pay legitimate claims without litigation.⁵⁵ Though I have heard it put, I am unconvinced that a private party cannot run a bare denial. I do not think it improper for a non-government defendant to require a plaintiff to bring on a summary judgment application. The (vague) model litigant obligation to 'not [take] advantage of a claimant who lacks the resources to litigate a legitimate claim'⁵⁶ is not readily referable to private entities. What is a not-impecunious defendant to do with an impecunious plaintiff — fund them? Are applications for security for costs now improper? Likewise the (problematic) model litigant obligation to 'not [rely] on technical defences'⁵⁷ is difficult enough to apply to the Crown.⁵⁸ It seems to me that parties to a private dispute, and their advisers, are entitled to advise, plead and rely upon lawful defences, technical or otherwise.

Notwithstanding Justice Barker's stated 'difficulty in seeing why the so called model litigant rules do not apply across the board',⁵⁹ it seems to me that, to equate parties in a commercial dispute to model litigants, and to impose all of the model litigant obligations on the legal advisers of all parties to litigation, is a step too far. Some are readily referable but others are not. Notwithstanding rule changes and changes to legal profession obligations, I doubt that we will reach the circumstance of the redundancy

52 *Legal Services Directions 2005* (Cth) Appendix B: *The Commonwealth's Obligation to Act as a Model Litigant* (2a).

53 *Ibid* (2d).

54 *Ibid* (2e).

55 *Ibid* (2aa).

56 *Ibid* (2f).

57 *Ibid* (2g).

58 I have heard it said that limitation is 'technical', though I doubt it. If it is I am not sure where Crown Suits type legislation stands.

59 Barker, above n 49.

THE CROWN

of the idea that Executive Governments and their components have obligations in the conduct of litigation more onerous than those of others. Fundamentally, why this will always be so derives from the nature of the entity. There is no warrant for the Crown when dealing with its citizens as a litigant (or in any capacity) to be other than a model. Citizens need only act lawfully.

CONTENT

Plainly enough what is encompassed by the notion of ‘modelness’ is amorphous, and none of the various published instruments or formulations of the obligation seek or purport to be exhaustive. Justice Moore noted in *Qantas Airways Ltd v Transport Workers’ Union of Australia*⁶⁰ that

[w]hile aspects of the model litigant obligations are found in Appendix B to the Schedule to the *Legal Directions 2005* (Cth) issued by the Commonwealth Attorney-General under s 55ZF of the *Judiciary Act* 1903 (Cth) they are broader and more fundamental.

No doubt some will think it ironic that this observation was made in the course of criticism being directed at submissions made by counsel on behalf of the Commonwealth Ombudsman.⁶¹

However detailed or prescriptive, documents will necessarily be imprecise. In this chapter I have referred to *The Commonwealth’s Obligation to Act as a Model Litigant*. This is a good document but inevitable imprecision abounds: ‘dealing with claims promptly and not causing unnecessary delay’; ‘early assessment’; ‘acting consistently’; ‘endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible’; ‘not taking advantage of a claimant who lacks the resources to litigate a legitimate claim’; ‘not relying on technical defences unless the Commonwealth’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement’. All of these require fine judgment. Moreover, all of the published documents are open to differences of view and none is a substitute for either experience in acting as a legal adviser to government or a proper appreciation of the fundamental role of government legal advisers. The vagary and imprecision of any articulation of model litigant obligations is obvious, inevitable and widely observed.

60 *Qantas Airways Ltd v Transport Workers’ Union of Australia* (2011) 211 IR 1, 47 [192].

61 *Ibid.* His Honour stated: As an aside I should observe that this submission was illustrative of the general tenor of a number of the submissions of the Ombudsman. The submissions were, in my opinion, a little too partisan at times for a statutory officeholder. By partisan I mean infused by a measure of zeal rather than detachment. I would have thought that the Ombudsman should aspire to be a model litigant rather than a partisan one. While aspects of the model litigant obligations are found in Appendix B to the Schedule to the *Legal Directions 2005* (Cth) issued by the Commonwealth Attorney-General under s 55ZF of the *Judiciary Act* 1903 (Cth) they are broader and more fundamental.

I am also rather intrigued by the likelihood of different practices or appreciations in different jurisdictions about the scope of the model litigant obligation. In a similar way, it became apparent during the drafting of what has become the uniform Barristers Conduct Rules in all jurisdictions that there were quite different practices in different states concerning particular issues.⁶² Some were quite marked.⁶³ So, too, it occurs to me, there may be differences in the appreciation of certain aspects of the model litigant obligation in different jurisdictions. Further, these differences may change and evolve over time. This can be illustrated again from personal experience. Peter Panegyres was the (legendary) Crown Solicitor in Western Australia between 1985 and 2003. Generally, Panegyres did not much like settlement of anything — he felt that the courts were there to decide. More specifically, he was of the view that any action, where an allegation of fraud or serious impropriety was alleged against a public servant, must go to trial unless the plaintiff discontinued or the state consented to judgment. If the state consented, it paid damages in full. In his view, consistent with its model litigant obligation, the state could not seek to negotiate settlement of such an action.⁶⁴ For him, where any such allegation was made, the action in which it was made could only be resolved by the court or by admission by the state. The state, as a model litigant, could not be seen to

62 I was President of the Western Australian Bar Association at the time and involved in the preparation of the Rules, now known as the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. The matters set out here, in this respect, derive from my own knowledge.

63 For instance, understanding and appreciation of the full extent of the obligation imposed by what is now Rule 79 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (which is Rule 78 of the Western Australian Barristers' Rules), and the way that this rule had operated, varied in practice in different jurisdictions. The rule is:

78. A barrister who, as a result of information provided by the client or a witness called on behalf of the client, is informed by the client or by the witness during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

(a) has lied in a material particular to the court or has procured another person to lie to the court; or

(b) has falsified or procured another person to falsify in any way a document which has been tendered; or

(c) has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the barrister to do so but otherwise may not inform the court of the lie, falsification or suppression.

64 Try as I might, I was never able to convince Panegyres that a contention of misleading and deceptive conduct was not an allegation akin to fraud or of serious impropriety.

compromise in the light of such an allegation. I don't know, but doubt whether this view has been adhered to in other states.⁶⁵

I am not necessarily contending that this view is correct or otherwise. Indeed, it is quite likely that some would take the view that such an attitude would now be inconsistent with the sentiment expressed (say) in *The Commonwealth's Obligation to Act as a Model Litigant* to 'participate in alternative dispute resolution processes where appropriate'.⁶⁶

Anyway, however prescriptive a model litigant policy might seek to be, there is, necessarily, much betwixt cup and lip.

THE JURISTIC NATURE OF 'MODELNESS'

As noted above, for some there is uncertainty of the juristic nature of *the Crown being a model litigant*; is it a duty, a right creating thing, a rule of law, a 'duty of imperfect obligation'? There is discussion of this by Dr Appleby in her excellent paper⁶⁷ to which I referred above, arising out of *ASIC v Hellicar*.⁶⁸

The sad tale of the New South Wales Court of Appeal decision in *James Hardie Industries NV v Australian Securities and Investments Commission*,⁶⁹ which came to be corrected in *ASIC v Hellicar*, has been told in many other places⁷⁰ and I need not add

65 The circumstances of the Pan Pharmaceuticals matter could not have occurred on this view. I have taken these circumstances from a newspaper report in *The Australian* newspaper of 26 March 2011, where (it was reported) the Commonwealth Therapeutic Drugs Administration settled part way through a trial (by agreeing to pay a plaintiff \$67.5 million) shortly after the cross-examination of its principal witness and the following exchange:

Judge: If Mr Selim [plaintiff] succeeds, his damages are going to be huge, aren't they?

Counsel: Yes, your Honour.

Judge: And the reputations of several senior Commonwealth officers are going to be completely destroyed?

Counsel: Yes.

In advertising material after the settlement, the solicitors that represented the Commonwealth Therapeutic Drugs Administration noted that the total quantum of the claims made was between \$162 million and \$1.377 billion and referred to a newspaper report 'suggesting [that] the settlement was a small fraction of the total claimed'.

66 *Legal Services Directions 2005* (Cth) Appendix B: *The Commonwealth's Obligation to Act as a Model Litigant* (2d).

67 Appleby, above n 2, 102-9.

68 (2012) 247 CLR 345.

69 *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85.

70 See, for a discussion of the decisions of the Court of Appeal and the High Court in this context, Suzanne Le Mire, "'It's not Fair!'" The Duty of Fairness and the Corporate Regulator' (2014) 36(3) *Sydney Law Review* 445.

much to it. But to understand Dr Appleby's discussion of *ASIC v Hellicar* requires the following. The factual circumstance that gave rise to the appeal to the High Court was a failure by the Australian Securities and Investments Commission (ASIC), in civil penalty proceedings that it brought against Hellicar and others, to call a particular witness, Mr Robb. This failure gave rise to the central issues in *ASIC v Hellicar*. In the Court of Appeal it was held that ASIC owed to the defendants, against whom it brought the civil penalty proceedings, a 'duty of fairness', which it breached by not calling Mr Robb. The Court of Appeal's reasoning as to the consequence of this was that, as a result of this breach, the 'cogency' of the proof of a particular fact, that ASIC bore a burden of proving, was 'diminished'.⁷¹

One of the issues about all of this that was alluded to in the judgments in the High Court was the source of this allegedly contravened 'duty of fairness'. Chief Justice French, and Justices Gummow, Hayne, Crennan, Kiefel and Bell, in their joint reasons, reversed the Court of Appeal essentially on the basis that — even if ASIC was obliged to call Mr Robb (say by analogy with *R v Apostilides*⁷²) — the failure to do so could never give rise to a reassessment or diminishing or discounting of the evidence that was actually called at trial.⁷³ To get to this (with respect) fairly obvious conclusion, so as to uphold the appeal, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ assumed the following:⁷⁴

For the purposes of deciding these matters, it is convenient to assume, without deciding, that ASIC is subject to some form of duty, even if a duty of imperfect obligation, that can be described as a duty to conduct litigation fairly. What consequences might be thought to follow if failure to call a witness could, and in a particular case did, amount to a breach of a duty of that kind can then be elucidated by reference first to prosecutorial duties in criminal proceedings.

Their Honours made this assumption having earlier noted the following:⁷⁵

It may readily be accepted that courts and litigants rightly expect that ASIC will conduct any litigation in which it is engaged fairly. Nothing that is said in these reasons should be taken as denying that ASIC should do so. But the Court of Appeal concluded that ASIC was under a duty in this litigation to call particular evidence and that breach of the duty by not calling the evidence required the discounting of whatever evidence ASIC did call in proof of its case. Neither the source of a duty of that kind, nor the source of the rule which was said to apply if that duty

71 *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140; 274 ALR 205.

72 *R v Apostilides* (1984) 154 CLR 563 ('*Apostilides*').

73 See *ASIC v Hellicar* (2012) 247 CLR 345, 407-8 [153]-[154].

74 *Ibid* 407 [152].

75 *Ibid* 406 [147].

were breached, was sufficiently identified by the Court of Appeal or in argument in this Court.

Justice Heydon dealt with the reasoning of the Court of Appeal with even greater brutality and addressed directly an aspect of it that had invoked the model litigant obligation. Justice Heydon noted:⁷⁶

The Court of Appeal's conclusion in relation to ASIC's duty to act fairly was avowedly novel ...

The Court of Appeal relied on three factors to support its conclusion that ASIC had an obligation of fairness, breach of which discounted and damaged the cogency of its case. The first was ASIC's obligation as a model litigant, said to be derived partly from the common law and partly from formal governmental statements ...

ASIC as a model litigant. ASIC did not dispute that it had an obligation to conduct proceedings fairly, as a model litigant. But it argued that that obligation did not create duties on it different from those which apply to other litigants in relation to the calling of witnesses in civil proceedings. ASIC accepted that there is, in the words of Griffith CJ, an 'old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects'. Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar.

ASIC also did not dispute that it had a duty to act as a 'model litigant' pursuant to the Legal Services Directions made under s 55ZF of the *Judiciary Act* 1903 (Cth). But App B of the Directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that non-compliance cannot be raised in any proceeding except by or on behalf of the Commonwealth ... Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. The Solicitor-General of the Commonwealth correctly submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants — they apply uniformly.

Now, Dr Appleby, in her paper, discusses *ASIC v Hellicar* under the heading 'Basis of an Enforceable Common Law Obligation'.⁷⁷ This heading is what certain of us might describe as a leading question. What excited Dr Appleby was some skirmishing

⁷⁶ Ibid 434-5 [237]-[240] (citations omitted).

⁷⁷ Appleby, above n 2, 102.

during argument in *ASIC v Hellicar* concerning the juristic nature of the model litigant obligation. Counsel for ASIC⁷⁸ denied that the model litigant obligation was a part of ‘the common law’, but if it was, and thereby picked and applied by s 80 of the *Judiciary Act*,⁷⁹ such common law rule was modified by s 64 of the *Judiciary Act*,⁸⁰ such that the common law as to the model litigant obligation did not, in effect, have a consequence.

It is wrong to read too much into this. This was really just a parlour game point. Although one sometimes comes across reference to the model litigant obligation having something to do with ‘the Common Law’ or ‘common law’ this is a misnomer. It is impossible to contend that the model litigant obligation, in all of its vagary and imprecision, is part of ‘the common law in Australia’. What, in amongst that which courts do, is part, or an aspect of, ‘the common law’ or a ‘common law rule’ is interesting and vexing. So, for instance, I have always been intrigued by whether what we call rules of statutory interpretation and rules of construction of commercial instruments are part of the common law in Australia or whether they are, as Mason and Wilson JJ described the former, ‘... no more than rules of common sense ... [and] not rules of law’.⁸¹ The model litigant obligation — vague, imprecise, complex — is no more a rule of common law than the practice of judges sitting down in court rather than standing, or counsel wearing or not wearing wigs. Even if courts and litigants ‘rightly expect’⁸² the Crown to conduct litigation ‘fairly’, and the Crown should⁸³ do so, this does not create or constitute a rule of law or impose a legal obligation, or anything like it. Plainly and obviously enough, a failure by the Crown in a civil matter to act consistently with the expectation of conduct that courts have of all litigants can have costs consequences. But this is simply a matter informing the exercise of discretions. Not all things that inform or excite the exercise of discretions are rules of, or part of, the common law.

It is a pity, in one sense, that French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, in their joint reasons, dealt with the matter on the assumptions that their

78 ASIC was represented in the High Court by the then Commonwealth Solicitor-General Stephen Gageler SC.

79 *Judiciary Act 1903* (Cth) s 80 provides: ‘So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters’.

80 *Ibid* s 64 provides: ‘In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject’.

81 *Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320.

82 *ASIC v Hellicar* (2012) 247 CLR 345, 406 [147].

83 *Ibid* 406 [147].

Honours did, and did not answer whether the contended for ‘duty to conduct litigation fairly’⁸⁴ is a common law rule. But this omission can really only be seen as politeness. Further, their Honours should not be understood as endorsing an understanding that the discredited ‘duty of fairness’ that was assumed as being the model litigant obligation.

As the passages which I have extracted illustrate, their Honours refer to the hypothesised ‘duty to conduct litigation fairly’,⁸⁵ not to a model litigant duty. Only Heydon J referred to the model litigant in the course of dismantling the reasoning of the Court of Appeal which engaged it. As his Honour observed, in the Court of Appeal, the model litigant concept was one ‘factor to support its conclusion that ASIC had an obligation of fairness’.⁸⁶ Even in the discredited way in which the Court of Appeal invoked the model litigant notion, it and the discredited ‘duty of fairness’ were not co-extensive. Nor were they juristically the same. The former was a ‘factor’ giving rise to the latter.

It is not really clear whether the hypothesised ‘duty to conduct litigation fairly’ considered in the joint judgment and the model litigant obligations are dealt with as though co-extensive. But the word ‘fairness’ in this formulation fired Dr Appleby’s imagination. Dr Appleby records the following:⁸⁷

... [T]here are hints in the oral argument in *ASIC v Hellicar* by Gummow and Crennan JJ that the model litigant obligation may in some way be constitutionalised by the requirements of Chapter III.

Dr Appleby then concludes that⁸⁸

[w]hile they differed in emphasis, it is clear from each of the judgments that the maintenance of a court’s ability to regulate its processes and ensure fairness between the parties is an essential characteristic of a Chapter III court. While the High Court has not been asked to consider directly the question of whether the court’s power to enforce model litigant standards is part of an essential characteristic of a Chapter III court, it is clear that its focus is now on maintaining the court’s ability to achieve fairness between the parties.

In this there are several large questions, but I must confess that, unlike Dr Appleby, it is not clear to me from either of the judgments in *ASIC v Hellicar* that the decision says anything about the idea that ‘a court’s ability to regulate its processes and ensure fairness between the parties is an essential characteristic of a Chapter III court’. Perhaps there is some water to flow under the bridge of this and maybe confluence of such waters. All

84 Ibid 407 [152].

85 Ibid.

86 Ibid 434 [238].

87 Appleby, above n 2, 105.

88 Ibid 106.

of these questions are beyond the scope of this chapter. But I think that care needs to be taken with extracting too much from *ASIC v Hellicar*.

What any constitutionally entrenched notion of a fair trial actually encompasses involves large questions. Such questions are usually and readily avoided. For instance, prior to the hearing of the recent matter of *Police v Dunstall*,⁸⁹ a s 78B notice was issued. The appeal concerned application of the legal rule providing for a court's 'residual discretion' to exclude lawfully obtained non-confessional evidence in a criminal trial where its admission would result in an 'unfair trial'. Both parties accepted the existence of this legal rule. In the s 78B notice it was asserted that the 'proper ambit and operation of' the residual discretion required consideration of whether the source and rationale of the legal rule was entrenched in the *Constitution*. That the residual discretion rule required consideration of the *Constitution* proved unfounded, and the Court dealt with the appeal without considering the issue at all. Not every time that the word 'fairness' arises will ch III be invoked.

It also seems to me that the entrenched fair trial constitutional imperative will have little scope beyond criminal trials; and, as explained, the model litigant notion has no application to criminal trials.

Further, even in the context of criminal trials, when, in cases such as *Mallard*⁹⁰ and *Grey*⁹¹ (which considered the critical issue of prosecutorial non-disclosure), courts do not mention the entrenched fair trial constitutional imperative, as opposed to creating a simple common law rule, I doubt that 'the model litigant' is likely to excite invocation of ch III. In gaging excitement about the prospects of *ASIC v Hellicar* giving rise to developments in constitutional law, we must remember that not only do neither of the judgments mention the *Constitution*, but also all judges found that there had been no contravention of any model litigant obligation or an analogous or co-extensive, hypothesised 'duty to conduct litigation fairly'.

I doubt very much that the notion of the Crown being a model litigant will ever be relevant to the creation or development of legal rules, let alone entrenched constitutional imperatives.

89 *Police v Dunstall* (2015) 256 CLR 403.

90 *Mallard v The Queen* (2005) 224 CLR 125.

91 *Grey v The Queen* (2001) 184 ALR 593.