TIDYING UP THE LOOSE ENDS: CONSEQUENTIAL CHANGES TO FIT A REPUBLICAN CONSTITUTION

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'Tidying up', at first glance, suggests something akin to trimming the edges and smoothing the wrinkles. The title has legitimacy in so far as the Joint Select Committee on the Republic Referendum has itself used the expression when referring to some of the consequential changes that might occur if primary changes are made to substitute a President for the Governor-General.[1] Nevertheless, many changes that flow from those primary changes may be seen to involve substantive and not merely formal alterations to the structure and the principles underpinning the *Commonwealth Constitution*.[2] It is also the case that whereas some consequential changes may merely be optional and desirable (a matter of preference) others may be regarded as necessary.[3] Thus, repeal or amendment of the Preamble[4] could fall into the first category whereas, arguably, some alterations to the covering clauses[5] to the Constitution, in particular clauses 5 and 6, might be regarded as necessary. 'Tidying up' can, therefore, mean on the simplest level merely clearing up the loose ends and verbal infelicities in order to produce a more elegant, intelligible and symmetrical Constitution rather than a thing of shreds and patches. If, however, the object is to ensure that a more conceptually coherent and cohesive document emerges that

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1 Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, paras 7.14, 7.36, 7.39 and 7.41.

2 *Commonwealth of Australia Constitution* ('*Commonwealth Constitution*').

3 Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, Ch 7 'Miscellaneous'.

4 For a discussion of the problems of amending the Preamble see Zines, L. 'Preamble to a Republican Constitution' (1999) 10 *PLR*, 67; and Williams, J. 'The Republican Preamble: Back to the Drawing Board' (1999) 10 *PLR*, 69.

5 The first eight sections of the *Commonwealth of Australia Constitution Act 1900* (UK).

addresses the fundamental re-adjustments that flow from instituting a republic on the national scale, more radical surgery and reconstruction may be required. Hence, the first issue to be addressed should be the criteria by which we measure the need for particular changes.

Let it be assumed that the principal purpose of making the primary changes, which includes the substitution of a President for the Queen as Head of State and the transference to the President of the functions relating to the office of Governor-General, is to adjust the constitutional text to the republican reality of an Australia[6] that formally and substantively has severed the remaining legal attachments to the United Kingdom and to the Monarchy. If that purpose is pursued with unmitigated rigour issues arise as to whether, for example, State Governors appointed by the Queen should continue to perform functions, however nominal, under the provisions of the *Commonwealth Constitution*.[7] This is independent of the question of whether and what amendment should be made to the States' constitutions to re-align them with a republican Commonwealth. Similarly, once adjustments are made at the core of the Constitution ,repercussions will necessarily follow in relation to such matters as the status and position of the States themselves in the federal polity, including the relationship between State constitutions and the *Commonwealth Constitution*. In turn, deletion of the Queen, both as symbol of the unity of the national polity[8] (Head of State) and as the manifestation of the institution otherwise known as the 'government/ executive', entails further revisions and reconceptualisations that would follow from the demise of the 'Crown'[9] as a constitutional construct.[10] This may affect the meaning we attribute to the very notion of a 'State'

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6 Here 'Australia' is used in the sense of the Commonwealth and the States together. In the course of this paper the question of the relationship between the two will be explored.

7 For example, under *Commonwealth of Australia Constitution Act 1900* (UK) s15, filling a casual vacancy in the Senate.

8 The role of the Monarch as Head of State for Australia is complicated by the fact that the United Kingdom, of which she is also Head of State, is now for Australian constitutional purposes a 'foreign power': *Sue v Hill* (1999) 199 CLR 462; 73 ALJR 1016.

9 Whether it is appropriate to use the expression 'the Crown in right of [a State]' when considering constitutional issues has been questioned in *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 429-431, per Gummow J. Also, note his distinguishing between the identification of the Monarch as the Crown and referring to particular bodies politic within the federal system and the executive governments thereof: *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 432, footnote no. 118.

10 While the 'Crown' is not a term generally used in the *Commonwealth Constitution* itself (s44 (vi) excepted; the Preamble to the Covering Act (*Commonwealth of Australia Constitution Act 1900* (UK)) explicitly mentions the 'Crown of the United Kingdom of Great Britain and Ireland' in the historic context of the formation of the

itself.[11] The mystifying and obfuscating notion of the 'Crown' may be finally extirpated from the various constitutions in consequence of eliminating the monarchical references and features in them. In that case it will become necessary to reconsider the continuing basis for retaining those powers, privileges and immunities presently associated with the royal prerogative, and indeed, to examine the relationship between the prerogative powers, the Constitution and the Common Law.

If consistency is one of the values driving republican amendments to the Constitution, issues of the kind mentioned above present themselves for consideration. If, on the other hand, the criterion is simply removing dead wood and references that have lost a meaningful context, a lesser standard of rigour is acceptable.

In the following sections, this article will first address those *essential issues* relating to the position of the States and the loss of relevance of the Crown. This is because they appear to be logically prior to other matters consequently arising from the primary alterations involved in the republican venture. The article then turns to what can be classified as the *optional tidying ups*. These include repealing the Preamble, amending the covering clauses and incorporating a republican notion of citizenship in the Constitution.

This article assumes, further, that the States themselves, necessarily observing any manner and form procedural requirements in their constitutions, will effect the necessary amendments to the State constitutions to realise a thoroughly republican 'Commonwealth of Australia'.[12] It does not enter into the debate about whether State constitutions can be amended through resort to ss128 or 51(xxxviii) of the *Commonwealth Constitution*.[13] This is not to overlook the problems that may result, for example, from having to satisfy the need

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Australian Federation).

11 Some of these matters are addressed by Stokes, M. 'Comment: Are There Separate State Crowns?' (1998) 20 *SydLRev,*127.

12 Twomey, A. 'State Constitutions in an Australian Republic' (1997) 23 *MonLR*, 312 has identified and analysed the problems and requirements associated with changing state constitutions in accordance with their own processes. Others who have addressed these aspects of republican changes are Winterton, G. 'The States and a Republic: A Constitutional Accord' (1995) 6 *PLR,* 107; Carney, G. Republicanism and the States. IN Stephenson, M.A. and Turner, C. (eds) *Australia, Republic or Monarchy?: Legal and Constitutional Issues*. St. Lucia, University of Queensland Press, 1994, 199; and Mason, A. 'Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *UNSWLJ*, 750.

13 Twomey, A. 'State Constitutions in an Australian Republic' (1997) 23 *MonLR*, 312 at 318-321, discusses the difficulties in the use of ss51(xxxviii) and 128 to effect alterations that would affect State constitutions. See also Gageler, S. and Leeming, M. 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *PLR*, 143; Lindell, G. and Rose, D. 'A Response to Gageler and Leeming' (1996) 7 *PLR*, 155; and Craven, G. *Implications of a Republic for Western Australia.* Perth: Government Printer, 1998.

in states like Western Australia, Queensland and Victoria for referenda.[14] Similarly, this article is not concerned with the debate about whether the Preamble and the covering clauses themselves can be amended through that process or under the Australia Acts 1986 (Cth and UK).[15]

PROCEEDING TO THE OMEGA POINT

The first issue is the effect of a republican change upon the relationship between the Commonwealth and the States under the Constitution. This raises the logically prior question of what is a 'State'.[16] The constitutional meaning of that term is ambiguous.[17] Exploration of that meaning entails the related issues of the identity and the personality of the component parts of the 'Commonwealth'.[18] Both conceptually and as a matter of their constitutional foundation, any consideration of this issue entails an analysis of the role of s106 of the *Commonwealth Constitution*. It reads:

> 'The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth … until altered in accordance with the Constitution of the State.'[19]

On one view, the State constitutions find their origin in the contrasting documents by which they were founded as colonies subject to Imperial authority.[20] If their *grundnorm* is seen to depend in part on that colonial foundation they, therefore, may be regarded as continuing in

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14 Twomey, A. 'State Constitutions in an Australian Republic'(1997) 23 *MonLR*, 312 at 312-314.

15 Summarised in; Australia. Constitutional Commission. *Final Report of the Constitutional Commission 1988*. Canberra: Australian Government Publishing Service, 1988, para 3.103. The Advisory Report sidestepped the issue; Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, para 7.14.

16 The definition of 'States' in covering clause 6 of the *Commonwealth Constitution* functions both by way of designation ('such of the colonies of New South Wales … and South Australia') and qualification ('as are part of the Commonwealth'). As such it obscures the issue as to how they form part of the Commonwealth at the same time as maintaining a separate identity. One way to characterise the 'States' is as artificial entities that represent the 'people of the States'; see *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484 per Deane and Toohey JJ. 'State' can have a variable meaning in the Constitution according to its context; see *SGH Ltd v Commisssioner of Taxation* (2002) 76 ALJR 780, at 782-783 per Gleeson CJ, Gaudron, McHugh, and Hayne JJ.

17 'What is a "State" for the Purposes of the Constitution and the Judiciary Act?' (1987) 61 *ALJ* 56.

18 To refer to the 'Commonwealth' in this way is itself to raise the issue of the split personality of that polity.

19 *Commonwealth Constitution* s106.

20 *Western Australia v Wilsmore* [1981] WAR 179 at 184 per Burt CJ. Supporting the opposite view *Pfeiffer v Stevens* (2001) 76 ALJR 269 at 287 per Kirby J, that the

some kind of satellite, but basically independent relationship to the Commonwealth (as a separate polity) and the *Commonwealth Constitution* itself. Against this it may be contended that the 'Commonwealth of Australia', both as a political phenomenon and as a legal polity[21], embraces the Commonwealth *and* the States. The corollary to that proposition is that the States and Commonwealth constitutions fuse into a single legal regime so that the States and the Commonwealth form one organism. That proposition was put to the High Court in *McGinty v Western Australia*[22] but was rejected by Brennan CJ who appears to have regarded the State constitutions as existing in a loose relationship with that of the Commonwealth.[23]

In *McGinty's* case[24], s106 was advanced not solely as the font of authority for the continuation of pre-existing colonial constitutions but more than that, as also a conduit pipe linking the *Commonwealth Constitution* and the individual State constitutions into one corpus. From that, so it was argued, principles in the nature of implied guarantees of the freedom of political communication and of political equality that were grounded in the *Commonwealth Constitution*, were transmitted through to the State constitutions.

None of the Justices in that case accepted the organic theory as such.[25] Had the theory been accepted one could see parallels between the way the High Court has approached issues of judicial power (in terms of the relationship of the Constitution and State courts) and attendant requirements (sourced in the *Commonwealth Constitution*) for

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legitimacy of all law in Australia must ultimately be traced to the *Commonwealth Constitution*. This reflects the view expressed in the High Court joint judgment in *Durham Holdings Pty Ltd v New South Wales* (2001) 177 ALR 436 at 439, that the State constitutions derive their force from s106 of the *Commonwealth Constitution*. These cases are discussed by Gageler, S. 'The High Court on Constitutional Law: The 2001 Term'. IN University of New South Wales Gilbert and Tobin Centre of Public Law, *Papers Presented at the Constitutional Law Conference*, 15 February 2002. <http://www.gtcentre.unsw.edu.au/publications.html>.

21 Stokes, M. 'Comment: Are There Separate State Crowns?' (1998) 20 *SydLRev*, 127 elaborates on the complex issues concerning the ambiguities surrounding discourse about State Crowns as legal or juristic, as against political, entities. Whether it is accurate to describe the Commonwealth and the States as juristic entities is uncertain: *Sue v Hill* (1999) 199 CLR 462 at 501-505.

22 (1996) 186 CLR 140.

23 *McGinty v Western Australia* (1996) 186 CLR 140 at 173. A consequence that follows from whichever view is taken of this matter is whether manner and form restrictions in State constitutions derive their binding force from the *Commonwealth Constitution* independently of s6 of the Australia Acts (*Australia Act 1986* (Cth) and *Australia Act 1986* (UK)). In *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1333-1335, Kirby J discussed the ambiguity inherent in the notion of 'the Constitution of the State' in s106.

24 *McGinty v Western Australia* (1996) 186 CLR 140.

25 *McGinty v Western Australia* (1996) 186 CLR 140 at 176 per Brennan CJ, at 207-210 per Toohey J, at 216 per Gaudron J, at 251 per McHugh J, and at 259 per Gummow J.

minimal standards of electoral fairness affecting the State legislatures. A majority of the Court in *Kable v Director of Public Prosecutions (NSW)*[26] derived from the Constitution a notion of the systemic integrity of the Commonwealth and State judicial systems, involving the maintenance of certain standards of independence for State judiciaries. No similar organic parallels have been recognised, however, in relation to the other arms of government.[27]

Nevertheless, it may be argued that the relationship of the States and the Commonwealth as reflected in the *Commonwealth Constitution* is more than one of particular intersection. Rather, it is suggested, the *Commonwealth Constitution* may be regarded as an *evolutionary* document. As such, it is based on an assumption on the part of the originators of the Constitution (embracing, fictionally, those who were responsible for drafting it, together with the colonial legislatures that provided delegates to the Constitutional Conventions and the people of the various colonies that endorsed it by referendum). The assumption was that the relationship as at 1900 would not remain static and immutable but would be capable of further development towards greater independence of each of the constitutive elements of the Australian federation (the States and the Commonwealth) from the United Kingdom. Though not expressly articulated, it can be argued that inherently the Constitution included a faculty or propensity anticipating the convergence of the separate polities into an organic nation. Borrowing from the theological writings of the French Jesuit paleontologist, Theilhard de Chardin, the process of realising that potential can be described as proceeding to an 'Omega point'.[28] That is, as a natural consequence of creation, all entities progress towards convergence and a merging of elements. The principal judicial exponent of a line of constitutional convergence in the Australian context has been Justice Deane. In cases such as *Street v Queensland Bar Association*[29] and *Leeth v The Commonwealth*[30] he (joined by Justice Toohey)[31]

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26 (1996) 189 CLR 51. The unity of the Australian judicial system also was influential in the decisions in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-564 and *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 574.

27 Professor Lindell has commented on the strangeness of this lack of correspondence in Lindell, G 'Expansion or Contraction? Some Reflections about the Recent Judicial Decisions on Representative Democracy' (1998) 20 *AdelLR* 111 at 120 and *McGinty v Western Australia* (1989) 168 CLR 461 at 527-529.

28 Pierre Thelilhard de Chardin. *Le Phénomène Humaine*. Paris: Éditions Du Seuil, 1955, 286-289 and Pierre Thelilhard de Chardin. *The Phenomenon Of Man*. London: William Collins, 1959, 294-299.

29 (1989) 168 CLR 461 at 527-529.

30 (1992) 174 CLR 455 at 486-491.

31 *Leeth v The Commonwealth* (1992) 174 CLR 455. Their Honours' approach to constitutional interpretation can be found at 484-491.Their Honours comment on the nature of the States as 'artificial' entities can be found at 484.

recognised as an assumption of construction, the development under the Constitution of a polity in which increasingly the 'peoples' of the separate entities would merge into a national unity.[32] More recently, the majority opinions in *Sue v Hill*[33] arguably take their colour from a similar view of the constitutional disengagement from the United Kingdom, albeit in a context not dependent on amendment of the Constitution itself.[34] The analysis of the historic progress towards nationhood delineation in that case is consistent with an evolutionary progression within the contemplation of the founders of the Constitution.

The milestones on the way to 'Omega' can be taken to be the assertion, consistent with the Balfour Declaration in 1926, by the Commonwealth Government of international independence during the Second World War, the adoption of the *Statute of Westminster 1930* (UK) in 1942, the passage of the Australia Acts in 1986 and the adoption of other statutes terminating the relationships with United Kingdom authorities such as the Privy Council.

Removing the United Kingdom connection: Implications for the Commonwealth-States relationship

Once the States join the Commonwealth in terminating their remaining connections with the United Kingdom (that is, the few vestigial links such as the Queen appointing State Governors) it will immediately pose the issue of what authority underpins the constitutions of the

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32 This aspect of Deane J's jurisprudence is noted by Doyle, J. QC. 'At the Eye of the Storm' (1993) 23 *UWALRev*, 15 at 20-21 where he discusses the possibility of a 'grand design' implicit in the Constitution. Other instances of Deane J's national unity view may be found in the political speech cases; *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104 at 164-174 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 257. Though not endorsed by other members of the Court at the time it is a view that may receive greater acceptance under a republican Constitution. A contemporary exponent of a dynamic and evolutionary approach to constitutional interpretation is Kirby J but without the sense of ultimate national convergence that appears to be implicit in Deane J's judgments: see, for example, *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 599-600 and *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479. For a theory of constitutional interpretation that shares some resemblance to Deane J's, while not accepting its premises, see Kirk, J. 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *FLRev*, 323.

33 (1999) 199 CLR 462; 73 ALJR 1016.

34 Reflecting constitutional developments resulting from other constitutional legislation such as the *Statute of Westminster 1931* (UK) and the Australia Acts 1986 (*Australia Act 1986* (Cth) and *Australia Act 1986* (UK)). For a discussion of this process of constitutional development see Twomey, A. '*Sue v Hill* - The Evolution of Australian Independence'. IN Stone, A. and Williams, G. (eds), *The High Court at the Crossroads.* Leichhardt: Federation Press, 2000.

Commonwealth and of the States. Will the 'people of the Commonwealth' and the 'people of the States' truly succeed the United Kingdom Parliament as the source of constitutional legitimacy?[35] If so, how could one reconcile the federal tensions inherent in locating that sovereignty in two different sets of 'peoples'? Can there be a schizophrenic sovereignty shared between the Commonwealth people and those of the States?[36] The assumption that the ultimate binding authority of the Constitution on the Australian community, government, legislatures and courts is now derived from the people – that is, it is attributable to a popular sovereignty – is problematic.[37] If constitutional legitimacy is rooted in popular sovereignty, the position of minorities may be reduced unless a bill of rights accompanies the constitutional alteration. Certainly, in States that do resort to a referendum to effect republican change, the claim for popular sovereignty will be enhanced on democratic grounds. The principle that republican changes are best implemented by the States themselves extends not just to the States where constitutional changes require reference to the electorate (Western Australia, Queensland and South Australia) but the other States as well.

The Republic Bill in fact envisaged the possibility that some States might continue to retain links with the Crown.[38] If an organic view is taken of the constitutional arrangements it puts into question the view that, legally, the Commonwealth and some States may proceed to a republican rearrangement but other States may stay out, however

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35 As suggested by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138.

36 These issues are further explored by Thomson, J. 'States in an Australian Republic: Constitutional Conundrums' (2001) 3 *UNDALR*, 95. See also Selway, B. 'The Horizontal and Vertical Assumptions under the Commonwealth Constitution' (2001) 12 *PLR*, 113.

37 Winterton, G. 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *FLRev* 1. Displacement of the United Kingdom Parliament, as the root of legitimacy of the *Commonwealth Constitution*, by a notion of popular sovereignty poses logical problems in other areas of constitutional principle, including the relationship between the express terms and provisions of the Constitution and a developing 'constitutional' common law. If the latter derives normative force from the usages, expectations and practices of the 'people' should the High Court reformulate its interpretation of the Constitution in the light of the same?

38 The Constitutional Alternation (Establishment of Republic) Bill 1999 cl 5; Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, para 6.37.

39 Griffith, G. QC in submissions to the Joint Select Committee referred to the situation as a 'constitutional aberration': Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, para 6.43. That the States could legally remain monarchies was accepted by Rose, D. QC, 'Acting Soliticor-General's Advice'. IN Australia. Republic Advisory Committee. *An Australian Republic: The*

bizarre that might be.[39] While the Joint Select Committee considered that there were good legal and policy reasons for allowing the States to retain such monarchical connections, there are strong arguments to the contrary position. Expedience might suggest that the issue should be conceded or deferred until a later occasion. However, when 'tidying up' the loose ends of the relationship of the States and the Commonwealth there is much to be said for involving the States in a *co-ordinated process of amendment* when the people of the nation ultimately determine their republican destiny.[40]

At least at the conceptual level the matter is more than simply one of incongruity and confusion. Arguably, there would be a fracture in the body politic in terms of national constitutional unity if any of the States were not to undertake the necessary arrangements to adjust to a republican change at the Commonwealth level. Fortunately, it would appear that the States have committed themselves to undertaking the necessary processes to adjust their own status to that of the Commonwealth so far as severing the links with the United Kingdom is concerned.[41]

The argument here is *not* that the States are required to assume *a uniform* constitutional system to realign themselves in a new constitutional relationship with the Commonwealth consequent upon the adoption of a republic. Arguably, the diversity that presently exists as between various States should continue except perhaps at the level of core institutions such as legislatures from which the Monarch has been removed. One such core adjustment as an essential element in a new 'Commonwealth' system would be the severance of links between the Governors and the Queen. Those links comprehend not only the means of appointment but also the *representative function* of Governors. In that respect the role of the President *vis a vis* the States comes into contention. The President may have relevant functions to discharge if that office assumes responsibilities previously associated with the Monarch. On the other hand, the function of the Governors as representative of the Queen will cease to exist. The relationship between the President and the offices that are created in lieu of the State Governors will need to be newly defined.

Options. Vol 2, Canberra: Australian Government Publishing Service, 1993, 305-306.

40 Thomson, J. 'States in an Australian Republic: Constitutional Conundrums' (2001) 3 *UNDALR* 95 at 107-111.

41 In anticipation of a favourable outcome of the 1999 referendum, the States passed request and consent legislation allowing for such a severance. It did not, however, resolve the issue of how amendments could be validly made to those State constitutions that require referenda for the removal of the Queen from institutions like the State legislatures or the power to appoint State governors.

Whether or not removal of the Governors' representative function requires an alteration to s7 of the Australia Acts[42] is another matter. The better view, it would appear from commentators, is that s7 only has legal force so long as there are State Governors performing representative functions on behalf of the Queen. Once the Queen is removed as the ostensible Head of State (if that expression has any meaning with respect to States) their representative function lapses into desuetude, and hence, s7 becomes defunct.[43] Arguably, this would be so even if all the States were to retain Governors as their symbolic heads of government[44] and even if they all retain the title of 'Governor'. Repeal of s7, whilst legally unnecessary, might be justified, however, as an exercise in tidying up.

There would certainly be economy of amendment of the *Commonwealth Constitution* if the office of State Governor were retained. Provisions in the Constitution such as s15 arguably could continue without textual alteration and in fact would retain their substantive operation unchanged.

Whether the office of Governor should be retained will be a matter essentially to be determined by the people of the States and the State parliaments. Unlikely though it may be, some States may see fit to abolish the role of Head of State altogether (hence, adopting some arrangements similar to the Australian Capital Territory). A diversity of approaches would be consistent with the flexibility and freedom permitted by the *Commonwealth Constitution* within the federal relationship.

The discussion to this point has focussed on the position of the *States* under a republican regime. It should be noted that there are vexed issues that arise as to whether the 'internal' *territories* – the Australian Capital Territory and the Northern Territory – are inexorably committed to adopt a republican constitutional status upon the Commonwealth achieving the same.

EFFECT ON THE 'CROWN'

Much has been written about both the unsatisfactory contradictions that are entailed in the concept of the 'Crown' and the lack of

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

43 Similar to the way that s59 of the *Commonwealth Constitution*, providing for disallowance of Commonwealth laws by the Queen, has no contemporary operation.

44 Of course, the Governors' roles would be more than symbolic if they retain reserve powers. In that regard the view of Sir Francis Burt that State Governors no longer retain those powers, seems unsupportable; Burt, Sir F. 'Monarchy or Republic: It's All in the Mind' (1994) 24 *UWALR*, 1 at 4-6.

45 These issues are extensively traversed by Seddon, N. 'The Crown' (2000) 28 *FLRev*,

correspondence with reality.[45] Even more fundamentally, it may be argued that if the regnal elements (that is, the references to the Queen) are removed from both the Commonwealth and State constitutions the issue of what effect those changes may have in relation to the mysterious entity that is known as the 'Crown'[46] should be addressed.

Twenty-five years ago Professor O'Connell, when considering the possibility of a change by Australia to a Republic, expressed the view that the Crown was the ultimate bulwark of our constitutional arrangements.[47] He estimated the difficulties of expunging the Crown from the Australian constitutional system to be so great that he could not foresee the possibility of an Australian republic at all. Of course, those views were expressed prior to the passing in 1986 of the Australia Acts[48] which largely removed the role of the Queen (apart from the appointment of Governor on the advice of the State Premier) from Australian constitutional arrangements.

Some reasons are advanced for why the notion of the Crown having a practical significance, so that if it were expunged from the Australian constitutional system it would leave gaps that needed replacement. Thus, Winterton has suggested that until a republic is installed on the States' level, the Crown is an appropriate means of describing the Head of State at that level.[49] Once a republic is installed an equivalent personification may, therefore, be needed.

Further, while the notion of an indivisible Crown[50] is conceptually difficult to maintain[51], Selway argues that stripped of its mystical apparel, the notion is a basic assumption on which the Constitution is predicated and has significance both in term of preserving, under a system of divided but shared sovereignty, the federal relationship

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46 Seddon, N. 'The Crown' (2000) 28 *FLRev*, 245. The Australian context enlarges on the explorations into the vagaries of the notion of the Crown undertaken in the English setting by Sunkin, M. and Payne, S. The Nature of the Crown: An Overview. IN Sunkin, M. and Payne, S. (eds) *The Nature of the Crown*. Oxford University Press, 1999, 23-32. As to the notoriously ambiguous shifts of meaning entailed in the concept see also Stokes, M. 'Comment: Are There Separate State Crowns?' (1998) 20 *SydLRev*, 127.

47 O'Connell, D. Monarchy or Republic. IN Dutton, G. (ed) *Republican Australia*. South Melbourne: Sun Books, 1977, 23.

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

49 Winterton, G. The Constitutional Position of Australian State Governors. IN Lee, H.P. and Winterton, G. (eds) *Australian Constitutional Perspectives*. Sydney: The Law Book Co., 1992, 275.

50 As recognised by the early High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152.

51 *Bradken Consolidated Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107 at 335-336.

52 Selway, B. 'The Horizontal and Vertical Assumptions under the Commonwealth Constitution' (2001) 12 *PLR*, 113 at 118, citing *John Pfeiffer Pty Ltd v Rogerson*

between the various governmental entities and the unity of the Australian legal system.[52] Even if the *Imperial Crown* as embodied in the Preamble is banished, a substitute notion will still be needed to symbolise national unity and cement the relationship between the component parts of the federation.

Thus, even if there is a continuing role for someone in the position presently occupied by the Queen and her representatives, the Governor-General and State Governors, the disconnection with the source of authority that attaches to the monarchical system entails replacing the concept of the Crown, not only in so far as it is used as a synonym for government, but also as a source of constitutional authority. It will require rethinking what we mean by the terms 'Commonwealth', 'State', 'executive' and 'government'. The changes consequent upon removing the Monarch from our constitutional system go beyond mere cosmetics. On that trite level, sad as it may be for some, names like the 'Crown Law Department' and 'Crown Solicitor' will fall by the wayside.[53] On both the theoretical and practical levels it will be necessary to erase some of the ambiguities that attach presently to the notion of the Crown. While oaths presently are sworn to the Queen (though that fashion has increasingly ceased to be honoured as time has gone on) and criminal process undertaken in her name, new formulations will be required. Will prosecutions be taken in the name of 'the State' or 'the People of Western Australia'? At least the arid debate about the divisibility or indivisibility of the Crown will be removed forever.[54] So will the controversies about whether there is a separate Crown personality attributable to the State legislature (to the extent that it involves a role for the Queen) as against her personification as the executive government.[55]

One casualty of the demise of the Crown may well be the cessation of a role presently attributed to the Attorney-General as the custodian of the public interest (*parens patriae*). This public welfare role, though it has largely diminished as statutory provisions have displaced it in relation to matters such as guardianship, family relations and wardship, still inheres in the office of Attorney-General and State and federal courts, as an

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(2000) 74 ALJR 1109.

53 Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, paras 7.22-7.25 points out that abolition of expressions such as 'royal' may be dealt with by ordinary legislation post-republic.

54 Gaudron J in *Sue v Hill* (1999) 199 CLR at 525-526 preferred to speak of the States as separate legal entities rather than as manifestations of a divisible Crown.

55 See Johnston, P. 'The Legal Personality of the Western Australian Parliament' (1990) 20 *UWALR*, 323.

56 *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's case)* (1992) 175 CLR 218 at 258-259.

attribute of government.[56] If the *parens patriae* principle, enshrining a notion of public interest, is dependent on the notion of the Crown, does the demise of the latter mean that the former would cease to exist? So far as the role of Attorney-General in supervising other matters of public interest, such as trusts, is concerned, the High Court has already accepted the model that evolved in the United Kingdom has not endured in Australia.[57] If the Crown is expunged from constitutional operations there would appear to be no articulated theory of public trust, as yet, that could replace it.[58]

In any event, with the seemingly incessant moves to 'corporatisation' and privatisation of governmental functions, the reliance on a Crown connection to sustain an ethical principle of *pro bono publico* at the heart of government may cease to matter. The removal of the last monarchical ties will, therefore, have significant constitutional ramifications in terms of the protections of the disadvantaged that have been assumed to exist previously. Perhaps, on the other hand, the notion of a benign Crown has long been a matter of illusion so that no effective change will be entailed in the absence of an equivalent in a republican substitute. On the other hand, the removal of an aristocratic notion of constitutional protection attributable to the Crown, calls for more than an alternative construct based on the shibboleth of 'representative democracy' and 'trust in parliament'. So far as minorities are concerned, the development of a new republican virtue in place of the parental oversight of the Crown will be called for.

The abolition of the Crown also has implications for the continuing basis for powers and privileges traditionally classified as inhering in the royal prerogative, both positive (that is effectively executive powers) and negative (for example, immunities from suit).[59] On one view the positive prerogatives of the Commonwealth Crown, such as that of mercy, have been subsumed under s61 of the *Commonwealth Constitution.* Out of abundance of caution, perhaps, the Constitutional

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57 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Trust Pty Ltd* (1998) 194 CLR 247; 72 ALJR 1280; 155 ALR 684.

58 Though note Paul Finn's arguments in support of an alternative notion of 'public trust' in the context of government accountability: Finn, P.D. *Integrity in Government: Second Report, Abuse of Official Trust. Conflict of Interest and Related matters*. Canberra: Australia National University, 1993; Finn, P. 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1993) 75 *CBPA*, 14 and *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 246. On another view the *parens patriae* function may inhere in courts exercising Federal jurisdiction under the *Commonwealth of Australia Constitution Act 1900* (UK) Ch III as an attribute of the common law aspects of judicial power. As such any proper applicant may invoke it.

59 Seddon, N. 'The Crown' (2000) 28 *FLRev*, 245 at 253-257.

60 The Constitutional Alternation (Establishment of Republic) Bill 1999 cl 70A.

Alteration (Establishment of Republic) Bill 1999 proposal explicitly provided for the continuance of the 'royal prerogatives and immunities' enjoyed by the Crown.[60] Such caution might well be justified since without the Crown to sustain them there must be some doubt about whether they could survive.[61] It is arguable that Chapter III of the *Commonwealth Constitution*[62] has displaced common law prerogatives in rendering the Commonwealth liable to suit, and hence, regulates the Commonwealth's immunity from suit.[63] The situation of the States in both respects is more obscure, including the question of whether, even presently, the Commonwealth may legislate under s78 of the *Commonwealth Constitution* to affect the States' immunity from suit.

To address the survival of the prerogative also raises for closer analysis the extent to which the prerogative itself is dependent on common law. That, in turn, puts the spotlight on the relationship between the common law and the *Commonwealth Constitution*. The latter has attracted some academic and judicial comment of late.[64] This has yet to be satisfactorily resolved. Whether or not the prerogative powers formerly vested in the Crown are now located in s61 of the *Commonwealth Constitution*, the question arises whether they would continue to be exercisable by the President as the Queen's successor if the element of the Crown is removed from the constitutional regime. Simply recasting s61 in terms of vesting the executive power of the Commonwealth in the President as Head of State may remove uncertainty on this point. Accordingly, an express preservation of the

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61 A similar approach to the preservation of the 'reserve powers' of the Crown, to be exercised by the future President, was adopted in cl 59 of the Constitutional Alternation (Establishment of Republic) Bill 1999.

62 Particularly *Commonwealth Constitution* s75(iii) which allows the Commonwealth to be sued in the High Court's original jurisdiction.

63 To the extent that comparative constitutional jurisprudence is any guide, the Irish view is that continuance of powers or immunities grounded in the royal prerogative is inconsistent with an independent constitution, and that after severance from the Crown, matters such as governmental immunity depend on the constitution itself; *Lynch v Ireland* [1972] I R 241. As to the continuance of the prerogative powers under s61 of the *Commonwealth Constitution* see *Ruddock v Vadarlis* ('The Tampa Case') (2001) 183 ALR 1 per Black CJ at 7-13 and French J at 47-53.

64 Zines, L. *The Common Law in Australia: Its Nature and Constitutional Significance*. Law and Policy Paper No 13. Leichhardt: Federation Press in association with the Centre for International Public Law, Australian National University, 1999; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *ACCC v Berbatis Holdings Pty Ltd* (2000) 169 ALR 324; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 534-535 and *Lipohar v The Queen* (1999) 200 CLR 485.

65 The principle of responsible government is an integral part of the *Commonwealth Constitution*; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135 per Mason CJ. The principle is extensively discussed in *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1444-1445 per Gleeson CJ, at 1451-1455 per Gaudron J and at 1479-1480 per Gummow and Hayne JJ and *Egan v Willis* (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

prerogative powers is arguably desirable.

A similar issue arises in relation to the maintenance of the system of *responsible government*[65] that is reflected in the institution of the Federal Executive Council that exists by virtue of s62 of the *Commonwealth Constitution* to advise the Governor-General. Caution again dictates that the institution be retained in an altered Constitution[66]; although a more explicit recognition that the President should act on the advice of the Ministers of State (apart from the exercise of a reserve power) is also arguably justified.

Likewise, the nature of citizenship is not accurately reflected in the existing Constitution.[67] Oddly, while s44(i) disqualifies from membership of the houses of parliament any person who is a citizen of, or, who owes allegiance to a foreign power, it does not reciprocally define Australian citizenship in terms of allegiance to the Queen. Section 42 does require a member to take an oath to be faithful to the Queen[68] but that has no necessary relationship to the member's status of citizenship. This is no doubt because when the Constitution was drawn up the prevailing notion was that of 'subject of the Queen'.[69] The removal of the Queen may thus provide an opportunity to give explicit recognition to the attributes of Australian citizenship.

Disentangling the core of constitutional principles that are associated with the Crown from the legal person holding the office of Monarch may, therefore, be more than a matter of terminological adjustment to the constitutional façade. To the extent that the Crown is more than a creature of constitutional rhetoric, explicit substantive provisions may be required to ensure that important aspects of the present executive system discussed above survive constitutional amendment. Removal of the vestigial footprints of the monarchy in Chapter II is not merely a matter of tidying up; it entails substantive replication of elements presently associated with the Crown.[70]

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66 As was provided in the Constitutional Alternation (Establishment of Republic) Bill 1999 cl 59.

67 Mason, A. Citizenship. IN Saunders, C (ed) *Courts of Final Jurisdiction: The Mason Court in Australia*. Sydney: Federation Press, 1996, 45. Gaudron J discusses the relationship between citizenship and the constitutional notion of 'British subject' in *Sue v Hill* (1999) 199 CLR 462 at 527-528. See also Re *Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1461-1463 per McHugh J, and at 1480-1482 per Gummow and Hayne JJ.

68 See Schedule to the *Commonwealth Constitution*.

69 *Commonwealth Constitution* s117.

70 To use s44(iv) of the *Commonwealth Constitution*, which deals with disqualification on the basis of holding an 'office of profit under the Crown', as an example, disqualification in circumstances where a member of parliament accepts remuneration subject to executive discretion and influence should be retained.

COSMETIC AND OTHER OPTIONAL CHANGES

Apart from the significant debate about whether alteration of the Preamble may give rise to implications affecting the interpretation of the Constitution[71], alterations to the Preamble would largely seem to be cosmetic and fall within the optional category. It may be claimed, nevertheless, that removal of the existing Preamble and those parts of the covering clauses that convey the impression that the 'Queen' still has a constitutional presence in Australia would be desirable.[72] An alternative approach would be to retain those clauses to the extent that they reflect the historic evolution of the antecedent regime but making minor amendments to avoid confusion.[73] Likewise, despite the unhappy fate of the proposed new Preamble rejected in the 1999 referendum, due no doubt in part to its partisan formulation, there is much to commend a simple and direct version such as that put forward by Professor Winterton to reflect popular endorsement of the republican Constitution.[74]

In that regard, there is good reason to amend the Constitution, both with respect to the Preamble and the covering clauses, to reflect the authenticity and autochthony of the new constitutional arrangements. In other words, they should mirror the prevailing political and popular reality. Arguably, the measures included in the Constitutional Alternation (Establishment of Republic) Bill 1999 were sensible in taking a moderate approach. In any future move to a republic it is to be hoped that a more comprehensive attempt to rid the Constitution of its myths and anachronisms will gain popular endorsement.

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71 Zines, L. 'Preamble to a Republican Constitution' (1999) 10 *PLR*, 67 at 68 discusses concerns expressed by some commentators, and most notably by Professor Craven about the Preamble being used for interpreting the Constitution.

72 For example, *Commonwealth Constitution* s2 dealing with the Queen's successors. For a general discussion of the issues concerned with amending the Preamble see McKenna, M., Simpson, A. and Williams, G. 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 *UNSWLJ*, 382.

73 The Advisory Report addresses these aspects: Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, paras 7.1-7.5.

74 Australia. Joint Select Committee on the Republic Referendum. *Advisory report on: Constitutional Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*. Canberra: Australian Government Publishing Service, 1999, para 7.7; and McKenna, M., Simpson, A. and Williams, G. 'With Hope in God, The Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 *UNSWLJ,* 401.

75 The Constitutional Alternation (Establishment of Republic) Bill 1999 cl 5.

76 The Constitutional Alternation (Establishment of Republic) Bill 1999 cl 6.

While removal of defunct provisions in the covering clauses may be relegated to the optional category, retention of clause 5[75], concerning making Commonwealth laws binding on the courts, and clause 6[76], which defines 'the Commonwealth' and 'the States', should, however, be regarded as essential. This could be effected, preferably, through re-enactment in the Constitution itself.[77] To the extent that covering clause 6 is re-enacted, one can suggest that greater thought be given to reformulating it so as to indicate more precisely the organic relationship between the Commonwealth and the States.

CONCLUSION

This article has sought to establish that what might at first glance be seen as minor consequential changes to the Constitution may, nevertheless, entail alterations of a fundamental character. These will require, in future, a proper conceptual and functional analysis. That will extend not only to matters involving the removal of the monarchical vestiges, but also to instances such as the demise of the notion of the Crown and associated concepts. In such cases substitute arrangements need to be put in place to fill the resultant voids.

Overarching all these, however, are more fundamental issues. What is to be the relationship between the States and the Commonwealth and between their respective constitutions in the light of the changes that will result from the republic? The republic arguably is the final manifestation of Australia's journey towards the Omega point and the achievement of a single nationhood devoid of separate 'Crowns'. Whilst it may be expected that there will be no fundamental alteration to the diversity permitted within the federal polity, a clear articulation in both the Commonwealth and State constitutions would be desirable to clarify the organic basis on which the two sets of governments co-exist.

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77 As was proposed in the Constitutional Alternation (Establishment of Republic) Bill 1999 cll 126, 127.