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AUSTRALIANS FOR CONSTITUTIONAL MONARCHY

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The Hon. Michael Kirby AC CMG

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A question arises as to whether the provisions of the *Australian Constitution* governing amendments to that document applies to a proposal for changing the constitutional monarchy of the *Australian Constitution* into a republic.

Many commentators have assumed that this is so. Some have even stated that it is so. In an article in the *Australian Law Journal*[1] I reviewed my then understanding of the impediments to treating s128 of the Constitution as applicable to an amendment so fundamental as to remove the very many references to the Crown as if these were simply ordinary provisions of the Constitution, without having regard to the specific provisions that postulate a different view. These provisions include the reference in the "covering clauses" to the decision of the founders of the Commonwealth to create an "indissoluble union under the Crown". There have been some justices of the High Court of Australia who have posited that the ultimate sovereign in the case of the Australian nation is the people of the Commonwealth, i.e. the entirety of the people (expressing their views through the representative

[1] M.D. Kirby, "250 Years of the Crown in Australia: from Cook to the Palace Papers 1770-2020" (2021) 96 ALJ 520 at 526.

system of government ultimately pre-existing in the pre1901 colonies that united in the Commonwealth. Although this view has not yet attracted a majority of the justices of the High Court, it has scarcely been tested in a case that raises a matter so fundamental. If the language and structure of the Constitution, as adopted and brought into effect of the passage enabling imperial act, assented to by Queen Victoria at the end of her long reign, is taken into account, there are certainly arguments to the contrary.

The only decisions upon judicial decisions on analogous question of which I am aware are those of the Supreme Court of India in the annunciation of the "basic structure" doctrine.[2] This or a local variant of it, may be seen in the Quebec referendum decisions of the Supreme Court of Canada. And also in a decision of the Supreme Court of Pakistan.[3] The foregoing Indian doctrine has some attractions. It arose in relation to the ambit of the provisions for the amendment of the *Indian Constitution*. These do not provide for a national referendum, although in some other provisions in the *Indian Constitution* the approach of the *Australian Constitution* has been followed by India (see e.g. s92) . The fundamental reasoning of the doctrine is that the power of "amendment" is, of its nature, confined to alteration of non-fundamental provisions that leave standing and unimpaired any fundamental provisions as identified by the Supreme Court. In other words, "amendment", which in India is a parliamentary process that has not provide difficult to apply in successive parliaments of the Union. It applies rather to matters of detail, inferentially, as in Canada, reserving fundamental

[2] *Kesananda Bhanati v State of Kerala* (1973) 4 SCC 225.
[3] *Pakistan Lawyers Forum v Federation of Pakistan* PLD 2005 SC 719. This was adopted by the Supreme Court of Bangladesh in Chowdhury v Bangladesh 1989 BLD (Supp 1) and *Islamic Republic of Pakistan v Abdul Wali Khan PLD* 1976 SC 27.

provisions of the Constitution to a procedure requiring a higher degree of unanimity and approval than a transient parliamentary majority. Essentially, therefore, the Indian doctrine which could be applied to the Australian Commonwealth, having regard to the separate provisions of the *Australian Constitution* and the so-called "covering clauses" of the *Imperial Enabling Act* that contains the assertion that, in the case of Australia, the union approved by the *Imperial Enabling Act* requires unanimity for something fundamental. Arguably, the abolition of the Crown envisaged by both the "covering clauses" and the text of the *Australian Constitution* so approved, is a matter so fundamental that it must conform to the rule of unanimity in all parts of the Commonwealth. Otherwise, populist causes could be enacted by transient majorities. Whilst this has not been the history of the *Australian Constitution*, it is necessary to consider this in weighing up the application to our fundamental document of the Indian doctrine having regard to the inbuilt provisions of section 128 and also the references to State constitutions in Australia and to parliaments to the States destined to become something more than British colonies, namely States with separate parliaments. Such parliaments in all jurisdictions of Australia (except the Australian Capital Territory, a creation of the Federal Parliament) all contain express provisions that constitute the States to be governed by a parliament giving effect to representative government. In this way, the Crown is arguably a key provision of the constitutional law of the States. Absent an express power of the Federal Parliament to abolish the Crown, it is strongly arguable that abolition of the Crown in rights of the several States as part of the State parliament would not be achieved simply by a constitutional amendment provision in the Federal Constitution. No State parliament has enacted such

an enabling provision. But if it did, it also would be subject to arguments about the "fundamental structure" of the Constitution, read a whole.

One response to this argument could be, if a federal constitutional referendum succeeded in accordance with the "double majorities" provided for in s128, it would remain the more States that wished to do so, to retain the participation of the Crown in the States concerned. However, this would not along be awkward. It would quite possibly be rejected by the monarch, who would be bound to take advice from the Federal Government and not necessarily to conform to any advice received from a State Parliament or a State government. A second inconvenience of such an arrangement would be the fracturing of the constitutional unity of the nation in such a fundamental matter. However, that argument cuts both ways. Possibly it supports a notion that either the proposal for change to a republic would have to be approved by the electors of the Commonwealth voting under section 128 but with a majority in every State. Such a provision is not spelt out in s128 which has conventionally, since the *Engineers case*[4] been given a highly literal interpretation based on the language of the text of the federal constitution and only rarely has it been construed (as originally it was) as subject to any implications that derive not from the language of the constitution itself but from the structure, purpose and other provisions elsewhere in the federal instrument.[5]

In my article of 2021 on the history and role of the Crown in the *Australian Constitution* I set out in greater detail the arguments both ways on the

[4] (1920) 28 CLR 129.
[5] *NSW v The Commonwealth (*2006) 229 CLR 1.

foregoing questions. In doing so, I referred to the decision of the High Court of Australia in the Queen of Queensland case.[6] So far as the argument that the monarch of the United Kingdom might be tempted to "cut the Gordian Knot" by signifying that [he] was not willing to remain as monarch in a minority of States (or a minority of States and/or Territories), I suggested that in such a matter it would be expected that a monarch would act according to constitutional advice. The monarch's sworn duty is to obey the *Australian Constitution* in its true meaning. However, what that true meaning is would ultimately be a question of the courts. It would not be the question for the personal wishes or inclinations of the monarch himself.[7] The argument is therefore circular and takes the decisionmaker back to the fundamental question of, who is the relevant government to give advice to the monarch, is such a constitutional question. As Professor Twomey has pointed out, the issue is not only that of protecting (and possibly preserving) the parliament of the States and Territories (except the ACT) it is also a matter of protecting and preserving the function of the governors (in the Northern Territory of Australia, the Administrator appointed under federal legislation). Because the monarch is part of the foregoing legislatures, notwithstanding the Queen of Queensland case, it is possible that State parliament and governor would feel obliged to express to the monarch the disagreement of the citizens of Australia and the electors of the Commonwealth, as evidenced in the vote of a republican referendum question in the state of their concern have not (as it is assumed) voted in favour of the change to amend the composition and constitution of State parliament and to abolish (or radically alter) the office of

[6] *The Commonwealth v Queensland* (1975) 134 CLR 298; A. Twomey, "Keeping the Queen in Queensland: How Effective is the Entrenchment of the Queen and the Governor in the Queensland Constitution" (2009) 28 *University of Queensland Law Journal* 81.
[7] Kirby above n.1 (2021) 95 ALJ 520 at 528.

governor of the State, dating back to the earliest days of the colonies, who stands to be removed from office despite a contrary vote in his or her jurisdiction. This issue is partly political and partly a matter of constitutional law. It is removed from debate if each of the Australian sub-federal jurisdictions votes by a majority to abolish the role of the Crown in Australia. To this extent, the problem, if it is created by our constitutional arrangements, remains one which it is available to the electors, through their representative legislatures to alter. Theoretically, it may also be an issue that could be removed, in a last self-terminating provision of the imperial era. Effectively, this was what was done by the United Kingdom Parliament in enacting the *Australia Acts (Commonwealth and UK)*. However, that imperial intrusion into Australia, already an independent country, has not passed unnoticed and has received re-expression of some doubts in the High Court of Australia, including by this writer.[8]

So far, there is relatively little material available to decisionmakers in Australia (or the United Kingdom) on this issue of the abolition of the monarchy where it is alleged to follow a majority non-unanimous vote in favour of that course; but not a unanimous vote. One of the more striking features of the outcome of the 1999 first referendum of the abolition of the Crown and a republic of Australia was the unanimous vote in all of the States and the Northern Territory of Australia, against the proposal. Relevant to the present context, the more striking feature was the significantly lower votes for change for a republican form of government that were recorded in

[8] *Marquet v Western Australia* (2) CLR .

Tasmania, South Australia and Western Australia.[9] Reference was also made in my article to an opinion that had been procured in 2019 by the civil society organisation, Australians for a Constitutional Monarch from Mr Alister Henskens SC MP. However, that opinion was not analysed because unavailable to the writer.

The view if the already strict provisions of s128 of the federal constitution were fulfilled, political reality could suggest that was sufficient to achieve the amendment desired by republicans. In the end, however, the matter would be one for judicial decision in the independent courts of Australia (ultimately the High Court of Australia) rather than in the views of political parties media or electors clambering for change. If and when a further constitutional referendum on this issue is held, it would likely demand the resolution of the issue on which the 1999 referendum was lost, namely divisions amongst supporters of an Australian republic between those who favoured a nomination process in the federal (but not state) parliaments and those who favour a creation of a national president elected or appointed by the Federal Parliament. Much debate in 1999 indicated that whilst a majority of Australian electors did not favour superimposition of a president with executive powers superimposed on the Westminster model found elsewhere in the *Australian Constitution,* the people of Australia appear to have been highly sceptical and a majority of them antagonistic to creation of a President in which the people had no direct vote for themselves. This situation may

[9] A. Blackshield, D. Williams, *Australian Constitutional Law and Theory* (19). The details of voting in federal constitutional referendums records that the proportion of "No" votes in the different Australian jurisdictions were: (NSW); (Victoria); (Queensland); (South Australia); (Western Australia); and (Tasmania). The negative for Northern Territory of Australia was , although votes in that jurisdiction count only towards the national majority or minority. In the Republic Referendum of 1999 the national votes were and proportions were .

have been altered in the 22 years since the 1999 referendum. However, another intervening argument is the great affection demonstrated at the time of Queen Elizabeth II's death, as Queen of Australia. The constitutional arrangements by which the monarch in the *Australian Constitution* is also the monarch of the United Kingdom seem intolerable to some Australians. Their viewpoint can be understood and must be respected. However, so far, for maintaining a temperate provision in the model of the *Australian Constitution* does not appear to have gathered clear support. In fact, following the funeral of the Queen in September 2022, opinion polling in Australia showed that a proportion of Australians supporting a republic had actually fallen.[10] And this change was without factoring in a potentially divisive issue of whether any such president of an Australian republic should be nominated or elected by the Federal Parliament (or some other means); whether the officeholder should be elected or approved by the people of the Commonwealth in a direct vote; whether any of these courses would combine to muster a majority; and whether many tidying up features that would become essential, including following 1975, the definition and elaboration of the "reserved powers" of the Crown that caused so much disquiet when invoked by Sir John Kerr in 1975.[11]

One additional feature to the foregoing arguments should be added from the opinion of a much respected jurist and one time Chief Justice and Justice of the High Court of Australia, Sir Harry Gibbs. His opinion, whilst not surprising was unknown to the author when he wrote his article in 2000. It should be recorded here because of the distinction of the author. Sir Harry Gibbs

[10] *Sydney Morning Herald*, 9 September 2022, p1.
[11] Kirby above n.1 at .

became Chairman of the Advisory Council of Australians for Constitutional Monarchy. Accordingly, he cannot be presented as someone entirely neutral on the subject of his opinion. Nevertheless, in an article written by Mr Julian Leeser MP (now a shadow minister serving in the Federal Parliament) there are resonances of the "fundamental structure" argument that should be added to those earlier expressed.[12] After reviewing judicial and non-judicial remarks of Sir Harry Gibbs, both from the Bench of the High Court of Australia and in non-judicial remarks, Mr Leeser observes:

> "similarly, as the republic debate gained a head of steam, Gibbs became worried that not enough attention had been paid to the role of the States in a republic: in particular whether, in order to alter the *Constitution,* pursuant to s128, to make Australia a republic, the referendum would need to pass in all States because, in effect, one was being asked to dissolve the "indissoluble federal commonwealth under the Crown". His other concern related to the position of State Governors, and the need to consider amendments to the State constitutions as well as the Commonwealth constitution concurrently. As we know, the republic referendum was soundly defeated, but those who seek its revival have not focused enough on these particular questions."[13]

The resolution of the proposal to change the Australian Commonwealth into a republic may one day be achieved. In the meantime, electors of the

[12] J. Leeser, "Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution" [2006] Samuel Griffith Soc UPH AU Con 7 and in upholding the *Australian Constitution* (2006) 18.
[13] http://classic.austlii.edu.au/au/journals/sgSoc/UphAUCon/2006/7.html

Commonwealth have to face the promised conduct of another different and important legacy designed to alter elements of our national past. This is the request of nationwide representatives of the Australian First Nations people for the creation of a "Voice" to the Federal Parliament for our Indigenous peoples.[14] Correctly, the new Prime Minister, Mr Anthony Albanese, identified this constitutional amendment as a priority and one that the Federal Government proposed to address urgently and put before the electors of the Commonwealth during the government's first term in office. The republican referendum, it was announced, would not occur until a second term in office. Inferentially, if by mischance the First Nations' Voice were not accepted by the electors, it would seem unlikely that an early opportunity would be taken to represent a model of a republic for the decision (however to be framed and voted upon) concerning Australia's constitutional monarchy.[15]

Meantime, Australian parliament and Australian leaders of different persuasions have joined together in honouring the late Queen Elizabeth. The history of constitutional referendums in Australia tends to show that if a referendum proposal is rejected, the already difficult provisions of the "double majority" in s128 of the Constitution become even more difficult to carry into effect. This is not a reason for abandoning a proposal for a referendum on a republic which is clearly felt deeply by a not insignificant number of Australian citizens. However, it is a reason for taking care of the timing of any second referendum on the subject. The word "never" should not be used in the context of constitutional discourse, even in Australia. As Professor Geoffrey Sawer has declared; "Australia is, constitutionally

[14] *Uluru Statement from the Heart* in at 2019.
[15] A. Albanese, Statement on Constitutional change in Australia.

speaking, a frozen continent."[16] In constitutional matters as the communism referendum of 1951 and the republic referendum of 2000 (and other instances demonstrate) timing of proposals for large constitutional change needs to be most carefully considered. Although there have been a few discouraging referendums, there has never been a third referendum to amend the *Australian Constitution* which has secured the "double majority" that we copied in 1901 from the Swiss. As a people, the Swiss are master makers of clocks and watches. In a very busy world of unrest and uncertainty (including in constitutional matters) the Swiss knew above all, that timing must be precise. We should remember that one of the purposes of the great voyage of navigation and discovery undertaken by Lieutenant James Cook was to observe transit of the sun by the planet Venus[17] in connection with the development of ultimately accurate chronometers to guide the Australian people in the years that have passed and centuries that are to come.

[16] G. Sawer,
[17] Kirby, above n.1 at