THE TREVOR REESE
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THE CROWN AND AUSTRALIA

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In the mid-1960s, the Commonwealth of Nations seemed to many to be lurching from crisis to crisis, mainly - then as now - over Southern Africa. It was in this climate of crisis as usual that in 1965, Trevor Reese wrote an article entitled "Keeping Calm About the Commonwealth"(1). He spoke of the gradual but spontaneous evolution of the Commonwealth and of its contemporary value, and argued that reports of its death, like Mark Twain's, were premature; but that, because it "functions ... as a flexible and informal system of co-operation between States", little, if anything, was to be gained from artificial schemes to bolster it. We should, in short, keep calm about the Commonwealth.

The theme of this lecture in tribute to Trevor Reese is very similar. The link between the Crown and Australia - which plays some part in the bonds of Commonwealth - has evolved over time, adjusting to Australia's changing circumstances, and developing in this century an increasingly Australian identity as Australia has developed as a nation. The monarchy - a constitutional monarchy - plays a valuable role in the Australian constitutional system. It is likely to be with us for many years to come. And I shall argue that, with Australia's Constitution currently being reviewed, there are some changes that could sensibly be made to the constitutional provisions relating to the Crown, but these are neither many nor especially important. In short, I shall suggest that Australians should keep calm about the Crown and calm about their Constitution.

Having said something more of Trevor Reese, I should like, first, to give some overview of the evolution of the links between the Crown and Australia, making some reference to republicanism; secondly, to touch on the present constitutional role of the Crown in Australia; and, thirdly, to say something of how it might - and should - develop.

I do not assume that Trevor Reese would necessarily agree with all that I shall argue. But I hope, at least, that he would think some discussion of these issues worth undertaking. Trevor Reese lived in Australia for what he called "six happy years", 1956-1962(2). In 1964, his short but masterly

1. Trevor Reese: "Keeping Calm About the Commonwealth", *International Affairs*, vol. 41, no. 3, 1965.

political history of *Australia In the Twentieth Century* was published. It is an incisive, concise, measured account, beautifully written, and marked by the dry wit that sparkles in so much of Trevor Reese's writings.

I cannot speak with first-hand knowledge of the quiet, warm-hearted, considerate man to whom others have paid such warm tributes at other times. But anyone who reads Trevor Reese's writings will see that he had "that vital intangible, a scholar's instinct", as his mentor, Professor Gerald Graham, put it in his tribute in the *Journal of Imperial and Commonwealth History*(3), of which Trevor Reese was founder-editor. He applied this scholar's instinct to the close and thorough study of a number of aspects of Commonwealth history - British imperial policy in the eighteenth century in the American colony of Georgia; the nineteenth and twentieth century evolution of the Empire and Commonwealth as reflected in the history of the Royal Commonwealth Society; and Australia in the twentieth century, including what Robert O'Neill (4) has called a "classic" study of Australia's and New Zealand's relations with the United States of America as they developed from the Second World War.

Australia's links with the British Crown began with Captain Cook. Trevor Reese wrote that during Cook's journey of discovery, "the English colours were displayed ashore and on a tree an inscription carved to signify formal annexation, consent to which the natives were assumed to have granted by their absence"(5). And the historian of colonial Georgia elsewhere noted that "the principal social motive" for the foundation both of Georgia in 1732 and of the penal settlement in New South Wales in 1788 "was clearly one of convenience in enabling the mother-country to rid herself of persons she did not want"(6) .

2. Trevor Reese: *Australia in the Twentieth Century:A Short Political Guide*, Pall Mall Press, London, 1964, P. 9.

3. *Journal of Imperial and Commonwealth History*, vol. 5, no. 1, 1976, p. 3.

4. R.J. O'Neill: *Australia, Britain, and International Security: Retrospect and Prospect* (The Trevor Reese Memorial Lecture, 1985), University of London, 1985, p. 2.

5. Trevor Reese: *The History of the Royal Commonwealth Society, 1868-1968*, Oxford University Press, London, 1968, p. 4.

6. Trevor Reese: *Colonial Georgia: A Study in British Imperial Policy in the Eighteenth Century*, University of Georgia Press, Athens, Georgia, 1963, PP. 133-4.

It is from these humble origins that the history of the Crown and Australia begins. It is a story of the development of penal colonies governed by all-powerful Governors into the increasingly self-governing colonies of the mid-nineteenth century; the federation in 1901 of these colonies into a Commonwealth of Australia "under the Crown", with the monarch represented in that Commonwealth by a Governor-General, while retaining the six State Governors; and the evolution of the office of Governor-General to one much more distinctly Australian.

The government of the first British settlement "was vested entirely in the governor, subject to the final, though distant, control of a minister in the English government in London". "The main problem was to keep the convicts, soldiers and officials alive" and, later, sober(7). It was not all smooth going, and not just because so many of the inhabitants were somewhat reluctant to be there. The efforts of Governor Bligh "to suppress the use of spirits as the only acceptable medium of exchange ... eventually led", on the twentieth anniversary of settlement, 26 January 1808, to the *coup détat* we remember as the "Rum Rebellion"(8). One - admittedly partisan - witness recorded that when the little army from the New South Wales Corps marched to Government House to depose the Governor, "his unfortunate Excellency (the representative of Majesty) was found beneath a bed upstairs, to which he had flown for refuge"(9). (This point has, however, been much disputed.)

Bligh's chief adversary, John Macarthur, assailed him as a "tyrant", and many of the early Governors, including the great Macquarie, were, rightly or wrongly, so assailed. This had much to do with the sides the Governors took on local Issues, not least the rights of ex-convicts. From 1823, a nominated legislative council shared responsibility with the Governor for legislation. But it did not control the Executive Council, which comprised senior government officials appointed by the Governor and the British Colonial Secretary. Little by little the powers of the Governor were reduced. In 1842, the N.S.W. Legislative Council gained elected members, though with a high franchise qualification.

7. Gordon Greenwood (ed.)*: Australia; A Social and Political History*, Angus & Robertson, Sydney, 1955, pp. 7, 1.

8. *Ibid*., p. 8.

9. Quoted from Alan Birch & David Macmillan*: The Sydney Scene 1788-1960*, Melbourne University Press, 1962, p. 43.

The clamour for more representative institutions, for self-government, and for the executive government to be responsible to the legislature, became louder and louder, culminating in 1850 in the grant of self-government to the four eastern colonies of N.S.W., Victoria, South Australia and Van Dieman's Land. The legislative council of each was free to frame its own constitution. The 1850s saw the framing of such constitutions based on, though not fully introducing, the doctrine of responsible government, which underlies Australia's - and Britain's - political institutions to this day.

> The doctrine of responsible government has been expressed this way(10):
>
> (1) That the Executive is subject to control by Parliament and holds office by the sanction of Parliament. (2) That the powers vested in the Governor by the various Constitution Acts are, with certain exceptions, not exercisable by him personally but on the advice of and through the ministers responsible to Parliament.

The establishment of responsible government meant that for the first time in Australia the Executive was subject to control by Parliament. Trevor Reese's *History of the Royal Commonwealth Society* tells us that the Australian colonies were following a path recently beaten in Canada(11). But responsible government was not completely achieved in the nineteenth century. It applied to matters local to the colony, in which the Governor was comparable to a constitutional monarch; but in matters "touching the interests of the mother country" - such as navigation, Immigration and protection - the Governor retained the right as an agent of the Imperial - or British - government to, for instance, reserve bills for the royal assent(12). In local matters, the Governor would almost always act on and only on the advice of ministers supported by the legislature; but he also retained - as Governor-Generals and State Governors do to this day - a very narrow area of

10. Darryl Lumb: *The Constitutions of the Australian States*, 2nd ed., University of Queensland Press, Brisbane, 1965, p. 66.

11. Reese: *History of the R.C.S.*, pp. 8-10.

12. John Quick & Robert Garran: *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 388. See also, e.g., H.V. Evatt: The King and His Dominion Governors, Oxford University Press, London, 1936, chapters 2 & 3.

independent discretion, over the appointment and dismissal of ministries and requests for dissolution of Parliament to bring on elections.

The campaigns of the 1840s and early 1850s in N.S.W. for self-government, extension of the franchise and against renewed transportation of convicts revealed, though not for the first time, a streak of republican sentiment that has emerged from time to time in Australian public debate ever since. But as the other objectives of the campaigners were met, their "red republicanism" subsided; Indeed, some of those threatening a republic, such as the young Henry Parkes, later Premier of N.S.W. and a "father of federation", went on to become staunch defenders of the Crown.

The most prominent republican of this time was Dr John Dunmore Lang, whom Trevor Reese described as "a fiery, heavily built Presbyterian minister"(13). In 1851, believing the gold rushes would help bring forth the republic he sought, he "published a little fantasy about Australia in 1871, twenty years on", in which he envisaged Australia as a federal republic like the United States of America(14). It may well be that such radical proposals retarded the cause of Australian federation. Republicanism certainly gained some support on the gold fields; but it was not, for instance, central to the protest at Eureka.

The 1880s were another period of some republican fervour in the Australian colonies, as they were in Britain. Queen Victoria's golden jubilee year, 1887, exactly a century ago, drew from Australia great profusions of loyalty to Britain and enthusiasm for the Queen; Henry Parkes, who had threatened a republic in 1849, spoke of the Queen "in language little short of idolatry"(15). But there were loud notes of dissent. Two loyalist public meetings in Sydney to mark the jubilee were disrupted by republicans, leading the organisers to arrange a third meeting which was, according to

13. Reese: *History of the R.C.S.*, p. 51.

14. Eric Fry (ed.): *Rebels and Radicals*, George Alien & Unwin, Sydney, 1983, P.101.

15. C.M.H. Clark: A History of Australia, Vol. 4. *The Earth Abideth for Ever, 1851-1888*, Melbourne University Press, 1978, p. 397.

Manning Clark, policed by "foot-ballers, larrikin undergraduates and prize-fighters" . The meeting was a great success. But it so angered the young Henry Lawson that be wrote the first of his poems to be published: "A Song of the Republic" appeared in *The Bulletin* in 1887. The "signs of the times" foretold, said Lawson, that the day of the republic was near.

Lawson was part of a Sydney republican circle, partly political, partly literary, impressed by the American example, allied to if not part of the "growing Radical-Labour movement"(17), opposed to honours and aristocracy, and combining its assertively Australian hostility to Britain with a strong commitment to a white Australia.

The choice presented by radical Australian nationalists was between an Australian identity and an Australia ruling itself, on the one hand, and, on the other, an Australia both politically and culturally subordinate to Britain. This is the dichotomy that today gives the work of that Old Testament prophet turned Church historian, Manning Clark, its scorching fire. But it was and is a false dichotomy. As A.G.L. Shaw tells us of the 1880s: "Of course many Australians managed to combine an intense local patriotism with allegiance to Britain". And Trevor Reese wrote of the same phenomenon(18). Sir Henry Parkes, the artist Tom Roberts, the author of the well-known Australian novel *Robbery under Arms*, "Rolf Boldrewood", are just a few instances. Interestingly, Trevor Reese placed some stress on the anti-republican Boldrewood's "appreciation of the individuality of the Australian peoples and their way of life"(19). And Lawson himself ended up a supporter of the British Empire.

This is, I think, an important point: though republicanism has been evident in both political and literary expressions of Australian nationalism for at least 140 years, Australian nationalism can be strong and proud without being republican and, as more than a century of Australian nationalism has shown, without Australia being a republic.

16. *Ibid*.

17. A.G.L. Shaw: *The Story of Australia*, 5th ed., Faber & Faber, London, 1983, P. 160.

18. *Ibid*.; Reese: *Australia in the Twentieth Century*, pp. 85-6.

19. *Ibid*., P. 12.

Indeed, the 1890s were the period when, more than ever before, the citizens of the Australian colonies came to think of themselves as Australians, and the movement towards federation triumphed. Yet it was in 1896 that *The Bulletin* "dropped its republicanism" because "European rivalries and Japanese militarism" made British defence seem more valuable(20). And there were few republican voices heard in the long debates on federation.

Quick and Garran, in their commentary on the Australian Constitution, published in 1901, explained how the words "under the Crown" in the preamble to the Constitution reflected "loyalty to the Queen as the visible central authority uniting the British Empire"(21). They went on:

> Some years ago a few ardent but irresponsible advocates of Australian federation indulged in predictions that the tine would inevitably come when Australia would separate from the mother country and become an independent Republic. Those ill-considered utterances caused, at the time, strong expressions of disapproval throughout the colonies, which effectively prevented the repetition of such suggestions, as being beyond the arena of serious contemplation and debate.

The development of the Crown and Commonwealth in the twentieth century now means that Australia can be fully independent, as it is today, without being a republic. But a century ago, and well into this century, loyalty to the Crown and loyalty to the Empire were inseparable. Australians overwhelmingly thought of themselves as "Australian Britons"; they looked to Britain for defence; and, in any event, the Empire did not impinge on Australia's domestic affairs. J.D.B. Miller made this point in his contribution to a volume of essays about Anglo-Australian relations dedicated to Trevor Reese(22); he made it by quoting a passage from a short story by

20. Sydney Labour History Group*: What Rough Beast? The State and Social Order in Australian History*, George Alien & Unwin, Sydney, 1982, p. 78.

21. *Op. cit*., pp. 294-5.

22. A.F. Madden & W.H. Morris-Jones (eds.): *Australia and Britain: Studies in a Changing Relationship*, Frank Cass, London, 1980, p. 97. See Rudyard Kipling: *Debits and Credits*, Macmillan, London, 1965, p. 307.

Rudyard Kipling. An Englishman says to an Australian: "Have you started that Republic of yours down under yet?". The Australian replies: "No. But we're goin' to. Then you'll see".

"Carry on. No one's hindering", says the Englishman.

The Australian scowls. "No. We know they ain't. And - and - that's what makes us all so crazy angry with you ... What can you do with an Empire that - that don't care what you do?"

The Constitution, drafted by Australians and approved at referendum by the people of Australia, came into effect on 1 January 1901. It provided for a Governor-General to be "Her Majesty's representative in the Commonwealth" (section 2); but it also left intact the constitutions of the States, so that the Queen continued to be represented also by six State Governors. Attempts to make the State Governors subordinate to the Governor-General came to nought. The Constitution was based on the Westminster doctrine of responsible government, combined with the American model of a strong federal Senate. The Governor-General was given various powers, but either the letter of the Constitution or constitutional conventions required that these would, with rare exceptions, be exercised only on ministerial advice. I shall return to this constitutional role of the Governor-General later.

It is sometimes said, dismissively, that Australia's constitution is "archaic, horse and buggy, anachronistic". But as Sir Darryl Dawson, a justice of the Australian High Court, has said, this view fails to recognize both that "the Australian Constitution works" and that it is, in practice, "not the same as it was in 1901" but has evolved(23). This has included evolution of the position of the Crown. This point was well made at the first Constitutional Convention - a gathering of State and federal politicians to discuss constitutional reform - in 1973. The Prime Minister, Mr Whitlam, moved a vote of thanks to the Governor-General, Sir Paul Hasluck, for opening the Convention. Mr Whitlam said of the Governor-General(24):

23. Sir Darryl Dawson: "The Constitution - Major Overhaul or Simple Tune-up?" (The Southey Memorial Lecture, 1983),*Melbourne University Law Review*, vol. 14, 1984, p. 354.

24. *Proceedings of the Australian Constitutional Convention, Sydney. 3-7 September 1973*, p.7.

> He holds a great office; he represents the Head of State of our nation. In this century how much that office has grown. The first Governor-General swore fealty to the Queen of the United Kingdom of Great Britain and Ireland. Henceforth the Governor-General will swear fealty to the Queen of Australia and her other Realms and Territories, Head of the Commonwealth. In this office and in those titles is shown the development of our nation.

There are, I think, four major ways in which Mr Whitlam's thesis - that the Crown has changed in line with Australia's development as a nation - can be demonstrated. They amount to what might be described as a very considerable "Australianization" of the Crown. This development has not always been smooth - the first appointment of an Australian as Governor-General is testimony to that - and in the case of the Australian States it has been especially slow, though the *Australia Act* last year has rectified that. In speaking of this and, later, the constitutional role of the Crown, I will refer in most cases only to the position at the federal level, relating to the Governor-General.

The first development to note was the gradual but relatively early abandonment of the role of the Governor-General as an agent of the Imperial Government. For example, the early Governor-Generals, like the colonial governors, reported back to the Colonial Secretary in London; the Governor-General was the formal channel of communication between the British and Australian Governments. Though the abandonment of this Imperial role occurred over many years, the clear marker to it was the Imperial Conference of 1926. The conference - in a declaration Trevor Reese likened to the Athanasian Creed (25) - held it to be "an essential consequence" of the "equality of status" of Great Britain and the Dominions, of which Australia was one, that "the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His

25. Reese: *Australia in the Twentieth Century*, p. 86. The text of the declaration is in, e.g., A. Berriedale Keith (ed.): *Speeches and Documents on the British Dominions 1918-1931*, Oxford University Press, London, 1938, p. 161 ff.

Majesty's Government or of any Department of that Government". The "official channel of communication" would "be, in future, between Government and Government direct". The Governor-General would be constitutional monarch within Australia, but no longer have an Imperial role.

But who was now to advise the King on whom to appoint as Governor-General? This is the second area of development to which it is necessary to refer. The first Governor-Generals were appointed by the monarch on the nomination of the Colonial Secretary, that is, the British Government. The first eight Governor-Generals - from 1901 to 1931 - were British aristocrats, generally men of ordinary ability with undistinguished political careers at Westminster. Though some were excellent, not all were well suited to facing the Isolation, expense and hostility from some radical, including republican, elements that the job involved. Correspondence in the British Library shows that in 1908, Lord Elgin, the Colonial Secretary, and Sir Henry Campbell-Bannerman, the Prime Minister, had in desperation to sound out several peers before the young Lord Dudley took the job(26). He was not a great success.

In 1930, difficulties in the appointment of a Governor-General arose in a quite different way. The Australian Cabinet asserted a right to give the King binding advice on who the Governor-General should be, and proposed Sir Isaac Isaacs, a High Court judge, of whom our Chairman, Sir Zeiman Cowen, is, of course, biographer. The King objected. One of his reasons was that a local man "must have local political predilections" and his impartiality would be open to doubt(27). The King looked forward to the day when "a citizen of one Dominion [was] appointed Governor or Governor-General of another part of the British Commonwealth"; but that idea, though gaining occasional support in some quarters, never reached fruition, and its day has clearly passed.

In the event, Prime Minister Scullin insisted on Isaacs, and the King agreed. This was not before the Imperial Conference of 1930 had declared certain principles as flowing "naturally from the new position of the

26. See: Ripon Papers 43552 ff. 44-51; 43518 ff. 158-163. Campbell-Bannerman Papers 41225 ff. 230-240. Additional MS. 43552 fol. 46. Also interesting are: Iddesleigh Papers Add. MS. 50033 ff. 95-96. British Library, London.

27. Christopher Cunneen: *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs*, George Allen &Unwin, Sydney, 1983, p. 177.

Governor-General as representative of His Majesty only": the King made his appointment on the advice of his ministers in the Dominion concerned, and "the ministers concerned [would] tender their formal advice after informal consultations with His Majesty"(28). This has been the practice since, though usually - and, I think, rightly - the advice to the Queen is that of the Australian Prime Minister alone and has generally not been discussed in Cabinet. Apparently not all Prime Ministers have been as scrupulous as Sir Robert Menzies was in the instance of Sir William Slim's appointment to ensure that the "informal consultations" are early and open enough to give the Queen some effective say in who her representative will be.

Until the *Australia Act* of last year, appointment of State Governors continued to be on the advice of the British Government, not of the State Government. Generally, but by no means invariably, the British Government gave the Queen the advice the State Government wished given. Now, however, this advice "shall be tendered by the Premier of the State" direct(29).

Sir Isaac Isaacs was the first Australian to become Governor-General. The arguments against such an appointment - that a local man could not be impartial, that appointment of an Australian weakened the link with Britain - were met by the arguments that British peers could not be assumed impartial either, and that Australia should assert its nationhood. But it was not until the appointment of Lord Casey, an Australian, on the advice of Sir Robert Menzies in the mid-1960s that it was generally accepted that, Royalty perhaps excepted, the Governor-General would be an Australian. In at least one State, it has been much more recently still that this has come to be accepted.

Although it was on the advice of an Australian Labor Government that the Duke of Gloucester became Governor-General in 1945, it is clear from the opposition of Mr Hayden (when leader of the Labor Party) to the appointment of Prince Charles as Governor-General that many in the Labor Party today believe that the Governor-General should always be an Australian. Many other Australians thought the idea unwise because of the danger of the heir to the throne becoming embroiled in acute controversy, as Australia's 1975 crisis shows is all too possible.

28. Keith: *op. cit.*, p. 222.

29. *Australia Act*, 1986, section 7(5).

The process whereby the Governor-Generalship of Australia has come to be "Australianized" has been paralleled by an "Australianization" of the Queen. Whereas, for instance, King George V was King "of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas", King George VI's Coronation Oath in 1937 expressly named each of the Dominions, including Australia. The Canadian Prime Minister, W.L. Mackenzie King, stressed the point that "for the first time, in this great ceremony, it was recognized that the relationship between the King and [the] people of [the Dominions] is direct and immediate"(30).

Australia's *Royal Style and Titles Act* of 1953 declared the Queen to be "Elizabeth the Second, by the grace of God, of the United Kingdom, Australia and her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith". Thus when the Queen visited Australia in 1954 she came as Queen of Australia. Sir Robert Garran, who over fifty years before had co-authored the great Quick and Garran annotated Constitution, wrote at the time(31):

> Our Queen comes to us, not as Queen of a far-off country, representing authority exercised over us from the other side of the world, but as one of ourselves: as our own Queen of Australia, who reigns here, not in accord with her despotic will, but by and with the advice of her Australian Ministers.

In 1973, an Australian Act removed the reference to the United Kingdom in the Queen's title in Australia, thus bringing into even clearer light her status as "Queen of Australia". It also removed reference to her as "Defender of the Faith".

It has been argued in Australia that the removal of other constitutional links between Britain and Australia - such as the ending of all appeals to the Privy Council, and termination of the power of the United Kingdom Parliament to legislate for Australia - through removing any suggestion of Australian dependence on the U.K., strengthens the Queen's position as Queen of Australia. It does this by highlighting the fact that her relationship with her people there is direct and immediate and not part of some broader pattern

30. W.L. Mackenzie King: *Crown and Commonwealth*, Canadian Broadcasting Corporation, Ottawa, 1937, p. 2.

31. Sir Robert Garran: *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958, p.336.

of British dominance. It should be noted that almost all the practices in the States which Mr Whitlam identified in his book, *The Whitlam Government*, as detracting from the "Australian identity of the monarchy" have been rectified by the *Australia Act* proclaimed last year(32).

The Australian Government believes, I think, that the 1984 revision of the Letters Patent and the revoking of the Royal Instructions relating to the office of Governor-General are further steps in making provisions to do with the Crown reflect as much as possible Australia's development as a nation. But some more conservative Australians believe that some aspects of these changes - such as the removal of reference to the Governor-General as "Commander in Chief" - reflect a desire, not to modernize the monarchy, but to achieve a "republic by stealth". Some point to the elimination of the official use of "God Save the Queen" except when a member of the Royal Family is present; some allege the removal from public view of portraits of the Queen in some public buildings, though the Government denies there has been any Government decision to do so; some were relieved that nothing came of the Government's attempt to end the requirement that people seeking naturalization must swear allegiance to the Queen. Strengthening the Australian identity of the Crown does not, such critics think, require removal of the manifestations of it from Australian life.

The Australianization of the Crown was, I think, promoted by the decline of the idea, once so important, that loyalty to the Crown was equivalent to loyalty to the British Empire; this helped a shared Crown to be seen increasingly in Australia as an *Australian* one. This change came gradually, of course. Even when it was widely accepted that for legal purposes and for purposes of declaration of war the Crown was not one and indivisible, it was still thought fundamental that the British Empire and Commonwealth was "united by a common allegiance to the Crown". But this latter view was officially abandoned in 1949 when the newly independent India was allowed to remain within the Commonwealth while becoming a republic. India continued to accept the King as "the symbol of the free association of [the Commonwealth's] independent member nations, and, as such. Head of the Commonwealth"(33). Some of the newspaper hysteria last summer about the Queen, Mrs Thatcher and the

32. E.G. Whitlam: *The Whitlam Government*, Penguin, 1985, p. 132.

33. S.A. de Smith: *Constitutional and Administrative Law*, 3rd ed., Penguin, 1978, p. 653.

Commonwealth might have been diminished had it been remembered that that title - "Head of the Commonwealth" - is symbolic and carries with it no powers or rights.

Trevor Reese records that "Chifley and Evatt represented Australia at the [1949] Commonwealth Conference in London and were not happy with the compromise formula for Indian membership, declaring that the Australian government believed the personal relationship of the sovereign to the Commonwealth to be of supreme importance"(34). Chifley regretted that India had become a republic; Menzies argued that "common allegiance to the Crown" was the basis of the unity on which the Commonwealth depended, though he later said that he learned to live with the formula allowing India and later many other countries to remain in the Commonwealth as republics.

I have so far touched on four major developments in the Crown in Australia in this century - the abandonment of any imperial role for the Governor-General; the appointment of the Governor-General on the advice of the Australian Prime Minister; the appointment of Australians as Governor-General; and the "Australianization" of the Queen. But we have barely touched on the constitutional role of Governor-General. This is an area of some controversy, and the five propositions I wish to put would not all command universal agreement.

First of all, the Governor-General acts in almost all cases on and only on the advice of ministers. This, of course, is fundamental to responsible government.

The second point is that, like the Queen, the Governor-General has the rights that Walter Bagehot made famous - "the right to be consulted, ... to encourage, [and] ... to warn"(35). These can be exercised both in formal meetings of the Executive Council and in informal discussions with ministers, especially the Prime Minister.

My third proposition is that there have always been and remain some matters on which the Crown has an Independent discretion. These are often called the "reserve powers" of the Crown; they relate to the appointment and dismissal of ministries, and requests for dissolution of Parliament to bring

34. Reese: *Australia in the Twentieth Century*, p. 143.

35. Walter Bagehot: *The English Constitution*, 1963 ed., Fontana/Collins, p. 111. For the Australian application, see Sir Paul Hasluck: The *Office of the Governor-General*, Melbourne University Press, 1979, pp. 17-20.

on elections. It was established very soon after federation that - with only the most bizarre exceptions possible - the reserve powers did not include the right to withhold the royal assent from legislation. If legislation is unconstitutional, it can be declared so by the High Court.

The Governor-General's independent discretions come into play only on rare occasions; they are exercised as part of the Crown's role to ensure the maintenance of constitutional government, and generally give the Governor-General no power other than to send the matter back either to Parliament or the people.

There are various instances in Australia's federal history and in the experience of the States of the exercise of these Independent discretions. Take appointment first. Usually it is clear which leader can command a majority in the House of Representatives and therefore become Prime Minister. But not always. It is an old-established convention that an outgoing Prime Minister has no right to name his successor; his opinion, if it is sought by the Governor-General, is not binding. Instead, convention gives the Governor-General an independent discretion; *he* must choose. If he commissions someone who is defeated in Parliament, there must either be a new Government or a new election.

Australia has had some instances of the appointment of Prime Ministers which have had no parallel in Britain in the twentieth century. The first Governor-General, Lord Hopetoun, had to commission a Prime Minister before the first federal Parliament had been elected, and his botching of it is remembered as "the Hopetoun blunder". Whereas no British Prime Minister in the twentieth century has died in office, this has happened on three occasions in Australia - in 1939, 1945 and 1967 - and the Governor-General has had to appoint a short-term Prime Minister pending the election by the deceased Prime Minister's party of a new leader. As in Britain, so in Australia, a "hung Parliament" might involve the Crown in assessing the Parliamentary situation to decide whom to commission as Prime Minister.

Just as Governor-Generals have had to exercise their discretion on the appointment of ministries, so Australia provides examples of the dismissal of ministries. In N.S.W. in 1932, the Governor, Sir Philip Game, dismissed Jack Lang as Premier after Lang's government persisted in breach of federal legislation over the payment of interest on loans and was "unable to carry on

essential services without breaking the law"(36). At the federal level in 1975, the Governor-General, Sir John Kerr, dismissed the Prime Minister, Mr Gough Whitlam, because the latter was unable to secure passage of money bills through the Senate to finance the carrying on of government services and refused to advise a dissolution of Parliament and the holding of elections, which would have unblocked supply. In both 1932 and 1975, the opposition leader - in a minority in the lower house - was appointed Premier or Prime Minister - in 1975 on an explicitly caretaker basis - until elections could be held, and in both cases the dismissed leader was defeated overwhelmingly at the polls. Both dismissals generated enormous controversy, though the degree of bitterness evident since the 1975 dismissal has far exceeded that after the 1932 dismissal, and, regrettably, continues to overshadow much discussion of constitutional reform in Australia.

Australia has also seen the exercise of another reserve power, the refusal of advice to dissolve Parliament. Where a Prime Minister clearly commands a majority in the lower house, it seems to be clear that - except perhaps in the most bizarre circumstances - any advice from him to dissolve the House cannot be refused. However, on three occasions at the federal level in Australia - in 1904, 1905 and 1909 - Governor-Generals have refused advice to dissolve. These three instances were in the days "of shifting party alliances before Australia's two-party mould was set"(37). In each case, the Government was defeated in the House of Representatives. As it was clear that another leader could form a government commanding majority support there, the Governor-General refused the request of the defeated Prime Minister for a dissolution and he resigned; the leader who could command a majority was commissioned as Prime Minister.

On those occasions where Prime Ministers have advised the dissolution of the whole of both Houses under the special constitutional provisions for resolving deadlock between the houses - in 1914, 1951, 1974, 1975 (under most unusual circumstances, of course) and 1983 - the Governor-General has sought to assure himself that the constitutional requirements for a double dissolution have been met, and in each case they have. Some authorities take the view that the Governor-General must be convinced, not only that the

36. Evatt, *op. oit*., p. 164.

37. "Masters of Dissolution", *The Times Literary Supplement*, 12 April 1985.

technical conditions are met, but that Parliament is unworkable; but other authorities disagree.

The proposition that the Governor-General must always and invariably act on and only on the advice of the Incumbent ministers - that is, that there are no reserve powers - is heard from time to time. But the wording of the Constitution, the practice before and since federation, and the writings of major constitutional authorities - such as H.V. Evatt and Dr Eugene Forsey - all support the existence of reserve powers. These powers must, of course, be exercised in accordance with constitutional conventions; the exact nature of these conventions is usually but not always clear.

The fourth proposition I wish to put is that, in the exercise of his various functions, the Governor-General is free to consult whomever he believes it prudent to consult. A discretion to act without or against ministerial advice must surely carry with it a discretion to seek such wise counsel about the matter as the Governor-General thinks he needs. There has been a very considerable history of consultation of High Court judges by Governor-Generals. At least three Chief Justices of Australia (Sir Samuel Griffith, Sir Owen Dixon and Sir Garfleld Barwick), a number of other High Court judges, and at least eight Governor-Generals (Lords Northcote, Dudley and Denman, Sir Ronald Munro Ferguson, Lords De 1'Isle and Casey, Sir Paul Hasluck and Sir John Kerr) have considered that it is proper for a representative of the Queen, in seeking the best legal advice in a crisis, to consult the Chief Justice of Australia and for the Chief Justice to give him his advice, at least on non-justiciable matters(38). The exercise of the reserve powers has traditionally been held to be non-justiciable - that is, not subject to review by a court - and recent developments in administrative law seem to me not to have changed this. Some commentators have suggested further or alternative means of providing Governor-Generals and State Governors with impartial advice (e.g. through panels of eminent constitutional authorities); but nothing has yet come of these proposals.

38. On this, see J.B. Paul: "The Dismissal: History Justifies Barwick's Advice", *The Bulletin*, 1 March 1983; Richard Lucy: *The Australian Form of Government*, Macmillan, 1985, pp. 247-250 (and Lucy's letter to *Quadrant*, September 1986); D.J. Markwell: "On Advice from the Chief Justice", *Quadrant*, July 1985, and letters to *Quadrant*, October 1985 & April 1986.

The fifth and final proposition I wish to put is that the Queen has no part in the constitutional functions of the Governor-General. The Constitution provides that the Governor-General will do such things as appoint ministers and dissolve Parliament. His decisions cannot be overturned by the Queen. It seems now to be well-established that, though a representative of the Queen will report regularly to her, he will not risk embroiling the Queen in controversy by seeking from her prior approval for his action. This was the principle on which, for instance, Sir John Kerr acted in 1975 and Sir Paul Scoon in Grenada in 1983, and to it has been added the authority of our Chairman, Sir Zeiman Cowen.

Thus, with rare and minor exceptions, the Queen's only action under the Australian Constitution is the appointment of the Governor-General on the advice of the Australian Prime Minister. The *Australia Act* of 1986 means that, except when she is in a State, the only power the Queen can exercise in State affairs is the appointment of the Governor on the State Premier's advice. There is very considerable authority for the proposition that the Queen, however reluctantly, would also remove a Governor-General or Governor from office on the advice of the relevant Prime Minister or Premier to do so. The belief that such advice might be given and that the Queen would then be embroiled in the Australian crisis was a major factor in shaping Sir John Kerr's handling of the 1975 crisis. There is a strong case for some greater security of tenure for representatives of the Queen; this has been provided for in the Letters Patent relating to the Governorship of at least one State.

What can we say of the future of the Crown and Australia? There are, I think, three key questions to consider about this. First, should Australia become a republic? Secondly, will it become a republic? Thirdly, what changes, constitutional or otherwise, might sensibly be made?

The central arguments advanced for Australia's becoming a republic are basically twofold. First, it is argued that a truly Australian national identity is incompatible with sharing a monarchy which is, first and foremost, that of another country. Secondly, it is argued that the monarchy is incompatible with truly democratic political institutions in Australia, or that a republic will at least be more democratic.

Neither of these propositions is especially compelling. I have earlier suggested that it was possible in the nineteenth century for what Trevor Reese

called "a distinctive Australian tradition"(39) to develop while Australia was a monarchy and with only some Australian nationalists favouring a republic. There is, I think, little evidence, if any, to suggest that the development of Australia's sense of its own identity or its image abroad is being stunted by the Crown. As I have mentioned, Mr Whitlam's concerns about this have almost all been met, and others could be met without Australia becoming a republic.

Nor is it at all apparent that Australia's parliamentary democracy and constitutional monarchy give less effective expression to the will of the people than the institutions of any other country, or that in those ways in which they might be thought to do so - such as electoral boundaries in some States - the matter has anything to do with the Crown.

In the Australian and British systems, the monarch is not seen as partisan or political. But perhaps the greatest advantage of the present system is that it works. We can have no certainty that any alternative system would work better than the present, and there is every possibility that it would not work so well. As Professor Geoffrey Bolton has argued, any attempt to make Australia a republic would split the federation; quite simply, some of the States would not remain within a republican Australia(40).

It may be that the shared monarchy contributes something to the warmth of regard held for Australia in Britain, and in a world of tension such links are an asset. The Queen is "the sole symbolic link uniting all" nations of the Commonwealth (41). Although the Commonwealth includes many republics, the position of the Queen and her successors as a unifying force in it would be, I think, gradually weakened by the abandonment of the monarchy by countries such as Australia.

What are the prospects of Australia's becoming a republic? Such a change would need to be approved at referendum by a majority of Australian voters In a majority of States. Opinion polls fairly consistently show strong majorities - around 60% - in favour of retaining the monarchy, with around 30% favouring a republic and the rest undecided. Few people doubt the message of

39. Reese: *Australia In the Twentieth Century*, p. 12.

40. Evidence to the Executive Advisory Committee of the Constitutional Commission, Perth, 1986.

41. *A Year Book of the Commonwealth 1973*, H.M.S.O., London, 1973, P. 2.

the opinion polls that any such proposal in the foreseeable future would be soundly defeated.

In 1981, the national conference of the Australian Labor Party included republicanism in its party platform; but Labor's Senator Gareth Evans has described this decision as virtually "accidental", and it was made by a small margin(42). Partly because it would be defeated, and partly because it would be extremely divisive, Labor politicians who support a republic as a long-term goal do not favour pushing the issue now; it is very low down on Australia's political agenda.

Nonetheless, many people would probably agree with the premise of a recent book by Professor George Winterton that "an Australian republic is Inevitable"(43). It is said by some that the tide of events - of Australia's constitutional development and of the diminution of its links with Britain - leads inexorably to a republic; that there has been a gradual shift of public opinion in favour of a republic; that the 1975 constitutional crisis significantly encouraged this; that so has non-British immigration; and that republican sentiment is strongest among the young and will therefore grow over time.

There is a certain plausibility to most of these propositions. Yet, when critically examined, most of them are at best uncertain. It seems to me that the logic of what I have called the "Australianization" of the Crown is not necessarily that it will end in a republic, but that the Crown will continue to adjust gradually in line with Australia's changing circumstances; this has been the story of the last two centuries, and it has produced what most Australians seem to believe is a constitutional monarchy appropriate to the circumstances of modern Australia.

As we have seen, some republicans in Australia in the 1850s and 1880s believed that Australia would inevitably - indeed, soon - become a republic; what seemed to them the tide of history has, like natural tides, ebbed and flowed ever since. Maybe the economist Keynes was right when he said that "the inevitable never happens. It is the unexpected *always*"(44).

42. George Winterton: *Monarchy to Republic: Australian Republican Government*, Oxford University Press, Melbourne, 1986, p. 14.

43. *Ibid*., p. ix.

44. *The Collected Writings of John Maynard Keynes*, vol. 28, p. 117.

Professor Winterton's book brings together the evidence of over 20 opinion polls in Australia on the question of "monarchy versus republic". Only one of the polls was before 1966. As Professor Winterton says, these polls must be read with caution. But the clearest message of them is that, while there have been some fluctuations in sentiment over the last twenty years, there has been very little decline in support for the monarchy or growth in republican sentiment over that time. For Instance, confronted in July 1966 with the false dichotomy of retaining existing links with Britain or becoming an entirely separate republic, 63% of respondents favoured present links and 28% favoured a republic; in February 1986, asked the same question, the percentage favouring existing links was identical, at 63%, and the republican vote had risen a staggering 2% - from 28% to 30% - in twenty years. Where in such minor shifts an "inevitable" republic is to be found, I do not know.

Both Professor Winterton and Senator Evans have acknowledged, in Winterton's words of last year, "the absence of any appreciable growth in republican sentiment during the last decade". So much for the alleged Impact of the 1975 crisis. Indeed, Winterton writes that "an outstanding feature of the opinion polls over the last decade is the remarkable consistency of the pro-monarchy vote". Interestingly, the opinion polls suggest that republican sentiment nay well have been stronger during the "early euphoria" of the Whitlam Government than at or after its end(45). While the 1975 crisis clearly converted some Australians to republicanism - Mr Whitlam being the most important - its greater effect seems to have been to activate existing republicans and to give acute emotional intensity to some advocates of a republic.

Between the Anglophobes and the Anglophiles in Australia today, there is a large body of Australians whose attitude to the Crown is, I think, largely one of sympathetic Indifference. For many people in Australia, as in Britain, the real interest is not arcane constitutional matters, but the family soap opera - the regular pictures of the Princess of Wales in *the Australian Women's Weekly*, frequent Royal Tours, including their "walkabouts" - the term, if not the idea, must be an Australian contribution - and the occasional Royal Wedding. A survey suggested that 83) of television sets in Sydney were tuned in to the wedding of the Prince and Princess of Wales in July 1981(46).

45. Winterton: *op. cit*., pp. 12-13, 154.

46. *Sydney Morning Herald*, 6 August 1981, p. 9.

Opinion polls show much stronger support for a republic amongst non-British Immigrants than amongst immigrants from the U.K. and people born In Australia. But it cannot be assumed that this republicanism is transmitted to the Australian-born descendants of non-British migrants. Neither should too much be made of the greater inclination to republicanism among the young than among their elders; there is ample evidence from Australia's history of young republicans growing into older monarchists. It is not, I think, altogether irrelevant to the future that, in the words of one Australian journalist, "Prince Charles ... enjoys a transcendental warmth among Australians that no one can deny, having visited the country eight times and spent some of his schooldays here"(47).

So my answer to the question, "will Australia become a republic?", is that it well might one day, but that that day is probably far off, and that it cannot be assumed to be "inevitable".

I have suggested that Australia's monarchy has evolved in line with Australia's changing circumstances. What changes are appropriate now? This is a question that the Constitutional Commission currently reviewing Australia's Constitution will also be asking.

It would be good to see a more satisfactory provision for resolving deadlocks between the two houses of Parliament on supply. The provision I would favour is making a double dissolution automatic if the Senate failed to pass the supply bills after a set number of days. There is little chance that any proposal to remove the Senate's power to block supply would be passed in the three outlying States, even if it passed elsewhere.

Apart from such changes, perhaps the single most important question is whether it would be wise to codify in legal form the conventions - either as they are or as we would like them to be - relating to the reserve powers. The Australian Constitutional Convention (politicians from the State and federal Parliaments), meeting in Brisbane in 1985, in fact adopted a set of "18 principles" relating to some aspects of the Crown's independent discretion. But these "18 principles" were silent on important questions, Inconsistent in major respects with well-established conventions, and liable in some instances to cause uncertainty and controversy rather than prevent it. The status of these "principles" is problematic: they cannot bind either

47. Red Harrison: "Was the Royal Tour worth all the trouble and expense? *The Prince and Princess in Australia*", The Listener, 21 April 1983, P. 6.

politicians or Governor-Generals, and they will have no force in a court of law.

Some countries have detailed constitutional provisions setting out procedures relating to the appointment and removal of ministries and the calling of elections - matters which in Australia, as in Britain, are left largely as a matter of constitutional convention. The arguments for such codification are that it would make the constitutional position more certain; by so doing would reduce or eliminate the instances where the Crown, through exercising an Independent discretion, is drawn into damaging controversy; and would enable issues of, say, appointment and dismissal of ministries to come before the courts and so be settled finally on legal grounds. Against this it is argued that codification would not necessarily eliminate uncertainty, as there might then be debate about the meaning of the words, just as there is uncertainty and debate about the meaning of words in the existing Constitution; that to leave such matters to the adjudication of the courts is to invite delay where speed is sometimes of the essence, and to risk damaging respect for the courts whenever they have to make controversial decisions about political matters; that questions such as who is to be the Government are best decided by remitting them to Parliament or the people, which is all the Crown can do, rather than to the courts; that if the Governor-General makes a mistake, the Parliament or the electorate will correct it, and there is thus no need or place for the courts; that codification would make the principles inflexible and incapable of evolution; that they could not possibly cover all the diverse and unique circumstances in which the Crown might have to exercise an independent discretion; and that codification would change the spirit of politics from one where there is some realization, however slight, of the need to play fairly and not embroil the "umpire" to one where you play the rules as hard as possible. If there were a greater realization by politicians in Australia of the need to observe the conventions of the constitution and not to embroil the Crown needlessly in controversy, I would myself think the case *against* codification to be overwhelming. Even so, it seems to me convincing.

It would not, I think, be inappropriate to write into the Constitution some explicit recognition there that the Queen is Queen of Australia. But this is certainly not necessary, and it may raise other difficulties that it is, perhaps, best to avoid. There has in the past been all but universal agreement that certain anachronistic provisions to do with the Crown should be

removed from the Constitution(48). The provision in section 3 that "the salary of the Governor-General shall not be altered during his continuance in office" seems inappropriate in times of continuing inflation. As I have said, I would myself hope that the Constitutional Commission would recommend some means of ensuring greater security of tenure for the Governor-General.

Such changes, modest as they are, would fit in well with the gradual development of the Crown throughout this century. As this lecture has argued, the Crown has been developing an Australian identity in line with the growth of Australia as a nation, on which Trevor Reese's study of *Australia in the Twentieth Century* placed much stress. This "Australianization" of the Crown has added to its strength and durability.

Just as Trevor Reese argued that the Commonwealth could not be bolstered by grand artificial schemes, so I would argue that far more important than changing words in the Constitution is that the office of Governor-General and the State Governorships should continue to be occupied by men - and, in future, women - of the highest quality. And it is essential for politicians to remember that, as much as possible, they should seek to avoid confronting the Crown with necessarily controversial decisions. In the words of one former Governor-General, "no constitution can work smoothly if politicians play too rough"(49).

48. See, e.g., Gareth Evans: "The 'Machinery of Government' Constitutional Referendum Bills", *Australian Law Journal*, vol. 57, 1983, pp. 699-700.

49. "Whitlam and Kerr: The P.M.'s Cataclysmic Errors" (interview with Sir John Kerr), *The Bulletin*, 17 September 1985, p. 68.

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