

Foreword

The Hon Michael McHugh AC

former Justice of the High Court of Australia

The theme of this splendid book is that, in the Australian constitutional context, the Crown has been a chameleon-like institution that has protected itself by remaining in the background and adapting its nature to the changes in the political landscape. As a result, its influence and power – particularly in the State context – was misunderstood by Prime Ministers and Premiers as well as constitutional scholars almost up to the time when that influence and power were circumscribed by the passing of the *Australia Acts* in 1986. The revelations in this book show how erroneous was the common assumption of Australian politicians and their advisers as well as Australian constitutional scholars that, for many years before 1986, the Foreign Office of the United Kingdom was merely a channel of communication for the views and advices of Australian Governments concerning State constitutional and political matters.

An early draft of the Commonwealth of Australia Constitution Bill provided that all references or communications required to be made by the Governor of a State to the Queen should go through the Governor-General. But the clause was removed on the ground that it unnecessarily interfered with the constitutional rights of the States. After the enactment of the Constitution, the policy of successive Federal Governments was that the States were mere parts of the federation which the Commonwealth represented in all dealings with other Governments including the Government of the United Kingdom. As early as 1902, the United Kingdom Government accepted that the Commonwealth was the body with which it would deal in relation to matters of “federal concern” including treaties with other countries. But it saw the States as “self-governing colonial dependencies” of the British Crown, and it was the United Kingdom Government which bore the responsibility of tendering advice to the Monarch in respect of such dependencies. Nevertheless, until the passing of the *Australia Acts*, the Commonwealth continued to press the claim that it had the right to tender advice to the Monarch in respect of State matters. As late as the 1970s, an attempt by the Whitlam Government to comment on State recommendations for Imperial Honours was firmly rejected on the ground that the Commonwealth Government had no rights in respect of such matters.

PREFACE

Not only did the Foreign Office act on the constitutional theory that only the United Kingdom Government could advise the Crown on State matters but, when it suited its purposes, the Foreign Office did not hesitate to take into account the political and economic interests of the United Kingdom in determining whether or not to tender advice to the Crown on such matters. In 1973, British Ministers flatly rejected the claim of State Premiers that the Ministers could take into account only legal and constitutional matters when advising the Queen on matters concerning the States. The Ministers declared that, in addition to those matters, they could also take into account political and British interests. As the Ministers' handling of the Seabed Petitions from the States in 1973-1974 showed, those interests included maintaining good diplomatic relations with the Commonwealth and protecting the Privy Council from giving what they saw as a non-binding decision on the controversial issue of the sea boundaries of the States and the rights to the territorial seas.

Until the passing of the *Australia Acts*, United Kingdom Governments of all political persuasions never deviated from the view that no Australian Government - State or federal - had any right to advise the Crown on matters concerning the States. A State had a right of consultation with the Foreign Secretary but no right to have its advice or views put before the Monarch. If the British Ministers agreed with the advice or recommendation, they would support it and pass it on to the Queen. But if they disagreed with it, they took whatever steps - including doing nothing - that they considered appropriate. In 1975, the British Minister of State for Foreign Affairs told the Premiers of Queensland and Western Australia that, while the British Ministers would take full account of the constitutional position of the States, it was for the Foreign Secretary to decide if and how State views could be conveyed to the Queen. The Federal Government did not even have a right of consultation in respect of State matters. The revelations in this book - which are the result of access to numerous documents unseen by previous scholars - will come as a surprise to most Australian scholars and politicians. Many long held beliefs and assumptions are demonstrated to be false.

The misunderstanding concerning the "channel of communication" and what it involved is well illustrated by the Whitlam Government's attempts to have all communications between the States and the Queen or the British Government made through the Governor-General together with the right of the Commonwealth to comment on such communications. The Commonwealth contended that such communications involved external relations and that the States had no standing in international law to enter into such relations. However in August 1974, the British Prime Minister informed the Commonwealth that, as long as British Ministers retained the responsibility of advising the Crown on State matters, it was not appropriate to have communications from the States going through the Governor-General. The Commonwealth also

PREFACE

wished the Queen to delegate to the Governor-General all the powers of the Queen in Australia including the power to appoint State governors. In time, this may have led to the Commonwealth having at least a veto on the recommendation of State Governments in respect of such appointments, despite Prime Minister Whitlam's declaration that neither the Governor-General nor the Commonwealth would exercise such a veto. The United Kingdom rejected this wish of the Commonwealth on the ground that it was the Queen of the United Kingdom and not the Queen of Australia who exercised constitutional powers in relation to the Australian States and that Commonwealth Ministers had no power to advise the Queen of Australia to delegate the powers of the Queen of the United Kingdom to the Governor-General.

As Anne Twomey points out, "Commonwealth officials did not seem truly to understand, until a meeting with British officials in London in November 1974, that the British Government was not merely a 'channel of communication' for State requests, but in fact provided substantive advice to the Queen on State issues". Nor, as she points out, "did they understand, or accept, that the role of the 'Queen of Australia' was confined to Commonwealth matters and that State matters were dealt with by the quite separate 'Queen of the United Kingdom'."

Of the many revelations in this book, few will surprise as much as the unfounded assumption that, since the end of World War II, if not earlier, State Governors were appointed on the recommendation of the States. In 1975, the Queensland Premier, Joh Bjelke-Petersen, told the Parliament of that State "appointments to the position of Governor of Queensland are made by Her Majesty on the recommendation of the Government of Queensland". In 1988, Sir Walter Campbell, the Governor and a former Chief Justice of Queensland, publicly stated that a convention to this effect had become "established as a right in the states of Australia". These statements were incorrect. A Foreign Office Memorandum of 1973 pointed out that, although the Secretary of State sought the views of the State Government through the outgoing Governor before recommending an appointment to the Monarch, the Secretary was "not bound to follow their advice". Earlier, Prime Minister Macmillan had informed Prime Minister Menzies that, while full account was taken of a Premier's view, if the candidate was regarded as entirely unsuitable, the United Kingdom Ministers "would feel justified in saying that they could not submit that name to the Queen" and that this had happened on several occasions. However, although the States had no right to insist on the appointment of particular persons as Governors, the Secretary of the State would not persist in a proposed appointment if it was "unacceptable" to a State Government. Thus, the States had a "right" of veto but not of appointment.

This right of veto played an important role in the appointment of the first Australian-born State Governor. In 1945, the Secretary of State for

PREFACE

the Dominions suggested to the Premier of New South Wales the name of a British General as a replacement for Lord Wakehurst, the departing Governor. The Premier said that he was unable to support the appointment and suggested an Australian naval officer. The Secretary of State rejected the suggestion and proposed the appointment of the Queen's brother. The Premier replied that the suggestion was "unacceptable to me". Eventually, the Secretary said he was prepared to support the appointment of Lieutenant-General Sir John Northcott who took the oath of office on 1 August 1946.

Access to relevant documents also discloses the error of the widely held belief that the reason that Western Australia did not have a Governor between 1931 and 1947 was because of its insistence that the Governor should be an Australian-born person. No request for the appointment of an Australian born person appears to have been made at any stage during this period. Indeed, Sir James Mitchell, the Premier in the first part of this period, appears to have actively favoured the appointment of a Governor who was "a good, honest English gentleman". The chief reason for the non-appointment of a Governor during this period appears to have been a desire to avoid the cost of maintaining a Governor.

Access to the relevant documents also shows, contrary to what some States and others have thought, that the Federal Government played no direct part in the failure of the Queensland Government to obtain the re-appointment of Sir Colin Hannah as Governor of that State. In 1975, Sir Colin, who had been appointed Governor in 1972, criticised the Whitlam Government. Prime Minister Whitlam then advised the Queen, in her capacity as the Queen of Australia, to remove Sir Colin's dormant commission to act as Administrator in the Governor-General's absence, which she did on 24 October 1975. The Premier of Queensland, Joh Bjelke-Petersen, defended Sir Colin in a Ministerial Statement in the Queensland Parliament and indicated that he proposed to initiate action to extend the Governor's term of office. At the behest of Buckingham Palace, the Governor-General's Official Secretary advised the Queensland Premier's office that no extension would be acceptable. Provocatively, the Premier offered Sir Colin an extension of his term which Sir Colin accepted, subject to Her Majesty's approval. The United Kingdom Government looked on both Sir Colin's conduct and that of the Premier with disfavour. Ultimately, it decided against recommending the dismissal of Sir Colin. One reason was that, if the Governor was dismissed, the Premier might resign and campaign on the issue at an election. The overwhelming likelihood was that his Government would be re-elected. If it was, he would seek to have Sir Colin reinstated. British officials concluded that this would damage the United Kingdom's standing and economic interests in Queensland. Accordingly, the United

PREFACE

Kingdom Government decided not to dismiss Sir Colin but to rebuke him and to refuse to extend his commission for three years, as requested.

Undeterred, the Queensland Government informally sought to reopen the issue of extending Sir Colin's term. In June 1976, the British Government advised Queensland's representative in London that the matter was closed and the decision was irreversible. Revealingly, an adviser in the Foreign Office noted that Mr Bjelke-Petersen did not yet seem to understand "that Ministers here take very seriously the duty to protect the Crown from embarrassment; and that they do not just rubber-stamp whatever proposals State Governments, for their own selfish reasons, may choose to put forward, but exercise independent judgment in performing their constitutional duty to advise the Crown".

Anne Twomey's access to hitherto unpublished or little known documents also reveals the long and fascinating and little understood history of the negotiations between the United Kingdom, the Commonwealth and the States concerning the abolition of Privy Council appeals and the enactment of the *Australia Acts*. Her book shows that the States, irrespective of the political persuasion of their Governments, were united in their efforts to protect the States against the demands of the Commonwealth in respect of this legislation. All States feared that the Commonwealth sought to increase its powers in respect of State matters. They had good reason for this fear, as Prime Minister Whitlam had made plain at a Premiers' Conference in June 1973 when he told the Premiers that abolition of the *Colonial Laws Validity Act* could not be left to the efforts of the States because it "might lead to suggestions that the Australian Parliament had no legislative role in connection with that matter". Nor were the views of the Coalition Government under Prime Minister Fraser any more sympathetic to the States. At a Premiers' Conference in June 1982, the Prime Minister told the Premiers that he agreed with the view of "the Palace" that any advice to the Queen on State matters would either have to be given by British Ministers or the Commonwealth Government.

This book also shows that, despite the demands of the Commonwealth, the United Kingdom Government was not prepared to enact Imperial legislation affecting the constitutional position of the States without a unanimous request from the States. It maintained this position despite its interest in terminating the constitutional links with the States, links that had caused it concern and embarrassment throughout the period of the Whitlam Government. The exasperation of the Foreign Office in continuing to be involved in State matters was captured in the complaint that "at a time when we are being exhorted to reduce functions and save public money, it is difficult to justify the time spent by FCO officials on Australian State matters of this sort". With the exception of the Wran Labor Government in New South Wales, and contrary to the position of the Commonwealth, the States were united in maintaining

PREFACE

that the United Kingdom Government had an important – perhaps crucial – role in severing the residual constitutional links between Australia and the United Kingdom. The Commonwealth's position was that those links could be severed by federal legislation enacted under section 51(xxxviii) of the Constitution at the request of the States.

So far as United Kingdom officials were concerned, the best way of bringing about the termination of the residual constitutional links was a package of proposals agreed upon by the States and the Commonwealth. At the same time, they were concerned that, once the Foreign Office was removed from the constitutional scheme, the States would have direct access to the Palace, which would place the burden of advising the Queen on Palace officials, particularly the Queen's Private Secretary. These concerns were shared by the officials at Buckingham Palace. Even after the States and the Commonwealth had agreed on a package and Prime Minister Thatcher had taken the view that a deal had been done in Australia and that it would be "too colonial for words" for the British Government to interfere, Palace officials remained unhappy with the prospect of the States having direct access to the Queen. They were particularly concerned that the Queen might be faced with "outlandish proposals" from State Premiers without the benefit of advice from her United Kingdom Ministers. They would have preferred to have the Australian Prime Minister's advice as a means of justifying the rejection of an objectionable State proposal.

Negotiations between the Palace and the Commonwealth caused concern at the Foreign Office. A Foreign Office official noted that, in independence negotiations, the British Government of the day negotiated with the dependent territory and that British Ministers took "into their brief the concerns of the Palace". He noted, however, that "in this instance, the extraordinary situation has arisen where it is the Palace that is now in direct negotiations with representatives of the dependent territory". It appears that direct access by the States to the Queen was unenthusiastically accepted by the Palace only after Palace officials were shown a copy of a draft formal advice which stated that the Commonwealth Ministers would advise the Queen that State Ministers should have direct access to the Queen. This left the Palace with the alternatives of the Queen rejecting the formal advice of her Commonwealth Ministers and precipitating a constitutional crisis or accepting the advice.

The story of the events to which I have referred in the preceding paragraphs and much more is brilliantly told in this engrossing account of the Crown's relationship with Australia. Anne Twomey's book is bound to become the classic account of that relationship. For the historian, constitutional lawyer or political scientist concerned with any aspect of the relationship of the Crown and Australia, it will become the reference point. I regret that it was not available in 1979 when, as counsel, John Bryson and I advised the New South Wales Government

PREFACE

concerning the power of State Parliament to enact legislation concerning the appointment of State Governors. We noted that a Bill for that purpose would have to be reserved for Her Majesty's pleasure but declared that "it is unthinkable that Her Majesty would ever withhold assent to a Bill that has been reserved by a Governor" and that Her Majesty would act on the advice of the State Ministers in relation to giving or a withholding assent. As Anne Twomey points out, these statements "represented the orthodox legal view in Australia". Indeed in March 1977, the Standing Committee of Attorneys-General had noted that reservation of a Bill for the Queen's assent was "no more than a formality" and would not impede a Bill terminating Privy Council appeals from coming into force. But what to Australian lawyers was "unthinkable" was, as it turned out, the orthodox position in the United Kingdom whenever a reserved Bill was regarded as "unconstitutional" in the sense of a departure from constitutional practice or usage and the Bill affected the constitutional status of the Queen or United Kingdom interests. Like other lawyers and politicians before and after us, the chameleon-like nature of the Crown had deceived us into believing that it was what it was not.

235 Macquarie Street, Sydney
October 2006