CHAPTER 1

WHAT IS CONSTITUTIONAL LAW?

COVERED IN THIS CHAPTER

After reading this chapter you will understand:

- what constitutional law is
- how the doctrine of constitutionalism serves to define and limit government power
- what the sources of constitutional law are
- the importance of non-legal rules called conventions
- how Australia came under United Kingdom sovereignty and how it has become independent
- what the Constitution requires for its amendment.

CASES TO REMEMBER

Entick v Carrington (1765) 19 St. Tr. 1030
Madzimbamuto v Lardner-Burke [1969] 1 AC 645
Mabo v Queensland (No 2) (1992) 175 CLR 1

INTRODUCTION

Constitutional law is the study of the law governing the interaction between the organs of government, and between the government and the people. Although all lawyers are likely to advance reasons as to why their branch of the law has the greatest impact on society, in the case of constitutional law such claims are arguably true, because constitutional law contains the rules prescribing how other rules of law are made, administered and adjudicated.

THE DOCTRINE OF CONSTITUTIONALISM

The doctrine of constitutionalism is at the foundation of constitutional law. This doctrine states that the powers of the organs of government should be defined and limited by law. A country where the doctrine of constitutionalism is respected, and the powers of the government are limited by law, can be contrasted with a country subject to arbitrary government, where the government acts as it pleases. The classic example of the operation of the doctrine of constitutionalism is provided by the following case.

A CASE TO REMEMBER

Entick v Carrington (1765) 19 St. Tr. 1030 is one of the most famous cases in constitutional law. Entick was an anti-government pamphleteer. Carrington, who was a Secretary of State (that is, a government minister), ordered troops to enter Entick's house, search it, and take away documents. The troops had no warrant.

Entick brought an action against Carrington seeking damages for trespass. Carrington's defence was that it was lawful for him to order the search simply because he was acting as a minister of the Crown. This was rejected by the court, which held that in the absence of any common law rule or statutory authority authorising the entry onto Entick's property, such acts were unlawful.

> The case establishes that the government and its agents are just as much subject to the law as anyone else, and that 'acting on behalf of the government' is not in itself a defence to unlawful conduct.

The government could have circumvented the decision in *Entick* simply by enacting legislation permitting searches in the relevant circumstances. This raises a different issue, which will be addressed later in Chapter 8, about whether a Constitution can restrain Parliament from enacting unjust laws. But *Entick* did not deal with that point—all it is authority for is the proposition that the government must act in accordance with legal rules. Nevertheless this is a vitally important doctrine, because it ensures that the government is subject to the law just as an individual is.

Whether the doctrine of constitutionalism is adhered to in a country is usually not a question to which one can give a 'yes' or 'no' answer—it is a matter of degree, because the extent to which governmental power is constrained by law can change over time. A good example of this is provided by the United Kingdom. Prior to the signing of Magna Carta in 1215, it would be true to say that the doctrine of constitutionalism was hardly adhered to at all—the monarch had absolute power, was above the law and could indeed make law himself. The signing of Magna Carta was an event of enormous significance, because in that document King John recognised that monarchical power was subject to at least some restraints, particularly relating to the right to a fair trial. Another important event in which the powers of the Crown were subject to further limitation was the passage of the *Bill of Rights Act 1689* (Eng), which stated that the monarch could not impose taxes, make law or maintain a standing army without Parliament's consent. It is true to say that at each of these points in history, the doctrine of constitutionalism was adhered to, to a greater or lesser degree.

In the contemporary world it would be possible to arrange countries along a continuum measuring the degree to which the doctrine of constitutionalism is adhered to—from those ruled by despots who operate without any legal restraint, to those where the power of government is heavily circumscribed by a range of

constitutional rules. We are fortunate that the Australian constitutional system defines the powers of government and limits what it can do to a significant extent although, as we shall see, there are important restraining features missing from our Constitution, notably a Bill of Rights.

WHERE DO WE FIND CONSTITUTIONAL LAW?

Australian Constitutional law comes from three sources: the Constitution, constitutional statutes, and the common law.

THE CONSTITUTION

The most important source of constitutional law in any jurisdiction is the Constitution. Note the capitalisation of the word 'Constitution'. This signifies that reference is being made to a specific document called 'the Constitution', as distinct from constitutional law in general, which refers to the rules derived from several sources of law. All jurisdictions in the world (bar the United Kingdom and Israel) have a written Constitution which incorporates at least the most important rules of constitutional law.

In Australia, the Commonwealth and each of the States has a Constitution. The Territories do not have Constitutions—their governmental institutions are regulated by *Self-Government Acts* enacted by the Commonwealth Parliament. The Constitution of a jurisdiction is the first place one should look in researching a point of constitutional law. However, one must be careful not to read any of the Australian Constitutions as if they automatically incorporated common law rules. Rather, one must give primacy to their texts and refer to common law doctrines only if the text does not give an answer to the problem at hand. The Commonwealth Constitution, which created the Federation, was enacted by the United Kingdom Parliament and is contained in the *Commonwealth of Australia Constitution Act 1900* (UK), which came into effect on 1 January 1901. The States had begun their existence as separate colonies during the nineteenth century, and the United Kingdom Parliament had passed a *Constitution Act* for each. Some of the States still retain their (now heavily amended) colonial-era *Constitution Acts* (for example, Queensland's *Constitution Act 1867* (UK)), while others have replaced their colonial Constitutions with their own documents (for example, the *Constitution Act 1934* (SA)).

A key difference between the Commonwealth Constitution on the one hand and the State Constitutions on the other is that the Commonwealth Constitution mandates special procedures for its own amendment, whereas the State Constitutions have the status of ordinary Acts of Parliament and can, except for a few specific provisions in some of them (see Chapter 7), be amended by another ordinary Act of Parliament.

CONSTITUTIONAL STATUTES

The second source of constitutional law is constitutional statutes. All jurisdictions in Australia supplement their Constitutions with statutes dealing with constitutional matters.

In the case of the Commonwealth of Australia, some of these statutes, such as the *Statute of Westminster Adoption Act 1942* (Cth) and the *Australia Act 1986* (UK and Cth) deal with Australia's relationship with the United Kingdom. Others, such as the *Parliamentary Privileges Act 1987* (Cth) and the *Commonwealth Electoral Act 1918* (Cth) regulate the operation of governmental institutions.

The States too have statutes dealing with constitutional matters—for example, the *Electoral Act 2004* (Tas) and the *Parliamentary Elections and Electorates Act 1902* (NSW), which regulate elections in those States.

THE COMMON LAW

In the absence of a rule being found in a Constitution or a constitutional statute, constitutional questions are governed by the common law. This means that English legal doctrines, as developed by the Australian courts, underpin the common law of the Constitution in Australia.

AN ADDITIONAL SOURCE OF RULES: CONSTITUTIONAL CONVENTIONS

In addition to the sources of constitutional law discussed above, students of constitutional law must also pay attention to non-legal rules governing constitutional practice, called 'conventions'. An example of a convention serves to illustrate what they are: although s 58 of the Commonwealth Constitution states that once a Bill has been passed by both houses of Parliament, the Governor-General shall declare 'according to his discretion' whether or not he or she assents to the Bill, by convention the Governor-General always gives consent. In other words, the rule of constitutional *law* is affected in its actual operation by a rule contained in a constitutional *convention*. Conventions are unique to constitutional law.

The above example gives one a clue as to the origin of constitutional conventions. Most of them arose in the United Kingdom as a means of transferring power from the monarch to Parliament. This process of evolutionary change, which occurred from the late seventeenth century, allowed constitutional practice to develop beyond constitutional law, and to moderate it. Thus, although, as a matter of law, the Queen could refuse royal assent to a Bill passed by Parliament, she has never done so (the last time royal assent was denied was in 1707), and although, as a matter of law, the Queen could engage in the day-to-day running of government, by convention this is left to the Cabinet, led by a Prime Minister whom the Queen could freely choose,

but who by convention is the person who can command a majority in the House of Commons. Conventions should therefore be seen as political practices, which are regarded as obligatory (even though they are not laws) and which regulate the way in which constitutional powers are exercised. Thus a breach of a convention would certainly be regarded as *unconstitutional*, even if not *unlawful*.

The delegates from the colonies who attended the Constitutional Conventions (here the word 'convention' has a different meaning from above, and refers to an assembly convened for the purpose of drafting a Constitution) held in Australia from 1891 to 1898 drafted the Commonwealth Constitution on the assumption that these conventions, which had operated in the six colonies, would also operate in the context of the Commonwealth Constitution. Therefore, when one reads the Commonwealth Constitution (and indeed the State Constitutions) one must remember that some of the rules of law as written often bear little relation to how people actually conduct themselves. As we will see in Chapters 3 and 4, the conventions are of particular importance to those parts of the Constitution regulating the relationship between the executive branch of government (headed by the Queen as represented by the Governor-General) on the one hand and Parliament on the other. This is because, as stated above, most of the conventions which emerged in the United Kingdom, and which were transplanted to the Australian colonies, came into being as a result of political changes designed to remove real power from the monarch and place it in the hands of Parliament. Therefore, although as a matter of *law* the powers of the Governor-General appear from the text of the Constitution to be extensive, as a matter of *practice* most of those powers are exercised subject to conventions, and to that extent, the text of the Constitution seen in isolation from the conventions gives a completely misleading picture of how government operates.

EXAMPLE

Although s 61 of the Australian Constitution vests executive power in the Governor-General as the Queen's representative, in reality the Governor-General exercises almost all of his or her powers on the advice of government ministers. Similarly, although s 64 vests the Governor-General with a discretion to choose ministers, in reality convention dictates that the Governor-General must choose as Prime Minister a person who is able to command a majority in the House of Representatives, and then act on that person's advice in appointing the other ministers.

Although conventions have the beneficial effect of giving the Constitution flexibility by allowing constitutional practice to develop ahead of constitutional law, the fact that there is no authoritative way of 'making' a convention, and that they are identifiable only by observing what people do, means that there is an element of uncertainty about their content. This became evident during Australia's Constitutional Crisis of

1975, when Governor-General Kerr dismissed Prime Minister Whitlam. In Chapter 4 we will look at the way in which conventions operated in 1975.

THE UNENFORCEABILITY OF CONVENTIONS

Despite the importance of conventions to the operation of the Constitution, it is crucial to remember that they are not laws and are therefore not enforceable by the courts. A famous case from the international Commonwealth (that is, the former British Empire) illustrates this point.

A CASE TO REMEMBER

Madzimbamuto v Lardner-Burke [1969] 1 AC 645 was a case in which a court had to consider the enforceability of an established convention. In 1965, the Government of Southern Rhodesia, which was a British colony, unilaterally declared independence from the United Kingdom. The United Kingdom Parliament enacted legislation declaring the Rhodesian Government's actions unlawful, using provisions in the *Southern Rhodesia Constitution Act 1961* (UK) which made express provision for the United Kingdom to enact legislation for Southern Rhodesia. This was despite a longstanding convention, which had been recognised in correspondence between previous United Kingdom Prime Ministers and Southern Rhodesian Premiers, to the effect that the United Kingdom would not exercise this legislative power without the agreement of Southern Rhodesia.

Madzimbamuto was a political activist who had been detained by the Rhodesian Government under provisions that had been declared unlawful by the United Kingdom legislation. His wife brought a *habeas corpus* application against the Rhodesian Minister for Law and Order, who argued that, because of the convention, the United Kingdom legislation overriding the Rhodesian detention law was invalid. The case reached the Privy Council, which rejected this argument. The Privy Council held that the convention was not a law. It was therefore not enforceable and had no effect on the legal position, which was that the United Kingdom had the power to pass laws for Southern Rhodesia.

The fact that conventions are not enforceable does not, however, prevent their existence from being recognised by the courts. Thus in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 264, Aikin J stated:

> In the present constitutional framework of the Commonwealth and the States and now of the Northern Territory, the Governor-General, Governors or the Administrator are not in personal control of the executive government. The executive power is vested in the Governor-General in Council, the Governor in Council or the Administrator in Council, as the case may be. The executive powers are therefore exercised by the Governor-General by and with the advice of such Ministers of the Crown …

Given that conventions are unenforceable even though they are regarded as binding, what happens if they are breached? First, a breach of convention is likely

to cause political controversy—the more important the convention, the greater the political outcry that would occur if it was breached. Thus, if the Governor-General were to refuse to sign a Bill into law, there would be a constitutional crisis, the outcome of which could only be guessed, but which would no doubt include the Prime Minister asking the Queen to dismiss the Governor-General. Second, although a breach of some conventions may lead only to political consequences, in the case of others, actual breaches of the law may eventually ensue. For example, if the Governor-General did not follow the convention that, in exercising the powers under s 64 of the Constitution to appoint a Prime Minister, he or she should appoint whoever could command a majority in the House of Representatives, and instead appointed a member of a minority party as Prime Minister, the government led by that Prime Minister would be unable to get parliamentary approval for its taxation and expenditure Bills, and would eventually find itself in breach of s 83 of the Constitution if it carried on spending money. This illustrates how practical considerations underlie many of the conventions—the convention that limits the Governor-General's discretion under s 64 serves the practical purpose of ensuring that the government is able to obtain financial authorisation and thus carry on functioning.

ENACTING CONVENTIONS INTO LAW

Given the paradox that conventions are important and yet unenforceable, why not enact them into law? Some writers argue that, because conventions have developed to give the Constitution flexibility, enacting them into law would mean losing that flexibility. It is indeed true that enactment of a convention into law would mean that it would be enforceable and that it would therefore be legally, rather than just politically, mandatory to comply with it. But surely if everyone agrees that conventions are indeed mandatory, should they not be given force of law, rather than being left to people's discretion whether they follow them? The very fact that conventions are flexible constitutes a weakness, in that it leads to doubt both as to their content and as to the circumstances in which they apply.

The other argument is that the content of conventions is too uncertain to allow them to be formulated into legislation. Although the contents of most conventions are, in fact, very well known, it is true that disputes sometimes arise on the question of whether a particular convention exists and, if it does, what its precise content is. But arguably the very importance of conventions adds strength to the argument that their content should be definitively determined and put into statutory form.

There are numerous instances in which countries have enacted conventions into law. Many Commonwealth countries have codified the conventions that regulate the relationship between their Governors-General (if the Queen is still Head of State) or their Presidents (if they are republics) and their governments. Conventions have also

been enacted into law in Australia. The pre-existing convention recognised by the United Kingdom Government in the Balfour Declaration of 1926—that the United Kingdom would not legislate for six colonies that had Dominion status without the request of those colonies—was enacted into law in the *Statute of Westminster 1931* (UK) and adopted by the Australian Parliament by the *Statute of Westminster Adoption Act 1942* (Cth). There would therefore seem to be no good reason why the Constitution should not be amended so as to include the conventions in accordance with which everyone, in any event, acts.

WHERE DID OUR INSTITUTIONS COME FROM?

To understand the structure of the Commonwealth and State Constitutions, we need to know something about the history of Australia's governmental institutions. The reception and development of principles of United Kingdom constitutional law into Australia can be conveniently divided into four main periods.

SETTLEMENT AND THE RECEPTION OF UNITED KINGDOM LAW

Captain Cook claimed sovereignty over Australia on behalf of the British Crown in 1770. This claim was reiterated when Governor Phillip arrived with the first convict settlers in 1788. This assumption of sovereignty—and the subjugation of Australia's Indigenous people that it entailed—was justified on the basis of United Kingdom common law rules and principles of international law as then understood. International law recognised three methods by which one country could obtain sovereignty over another:

- settlement—applicable where the country being acquired was uninhabited, in which case the law of the incoming power applied there
- conquest—where the original inhabitants were conquered, in which case their law continued to apply unless and to the extent that it was formally overridden by a law proclaimed by the conquering power
- cession—where the sovereignty over the acquired country was ceded to the incoming power (either by the inhabitants or the country under whose sovereignty they were), in which case the law then applying in the acquired country continued to apply until overridden.

The acquisition of sovereignty over Australia by the United Kingdom proceeded on the basis that it had occurred by settlement. Clearly this theory was at variance with the facts, given that Australia was obviously inhabited by its Indigenous people. However, according to eighteenth-century international law, and in particular the writings of the theorist Emmerich de Vattel, a land was deemed to be uninhabited, or 'terra nullius', where its population lacked what contemporary Europeans

considered to be the hallmarks of a 'civilised' legal system. Therefore, since the United Kingdom did not consider that Indigenous Australians had a recognisable system of law or government, English law was deemed to be applicable, and Indigenous law non-existent.

A CASE TO REMEMBER

The decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 effected changes to this view of the law. The case concerned the specific issue of whether Torres Straits Islanders had retained title to their land after colonisation. The High Court rejected the terra nullius doctrine and held that pre-existing Indigenous rights to land—referred to as native title—continued in existence after the assumption of sovereignty by the United Kingdom. People who could prove that they held native title, which would be done by reference to Indigenous customary law, would be entitled to continue to exercise the rights they had under such title unless it had been overridden by some positive legal act.

However, the High Court did *not* take the step of saying that sovereignty had been acquired over Australia by conquest or cession and that all Indigenous law not displaced by a positive act had survived—even though one might think this was the logical consequence of the court's rejection of terra nullius, and its statement that reference could be had to Indigenous law in proving the existence of native title. Instead, the court maintained the position that Australia had been acquired by settlement and that United Kingdom law had become the general law, holding that when sovereignty was acquired by the United Kingdom, native title continued in existence as part of *the common law of Australia*, not as the product of a surviving Indigenous sovereignty.

This outcome is unsatisfactory, in that it mixes a consequence of acquisition by conquest (survival of Indigenous law, at least as a method of proving legal rights) with a consequence of acquisition by settlement (reception of the common law).

Nevertheless it remains the case that, according to the common law as subsequently reaffirmed by the High Court in *Coe v Commonwealth (No 2)* (1993) 118 ALR 193 and *Walker v New South Wales* (1994) 82 CLR 45, any Indigenous sovereignty that existed at the time of colonisation was extinguished, and Indigenous customary law no longer survives. This differs from the situation in the United States, for example, where although the United States Government has overriding sovereignty and could theoretically wholly extinguish the power of Indigenous nations, there are aspects of Indigenous sovereignty which are traceable back to the period before colonisation, and which have not been extinguished. The Indigenous authorities that exist by virtue of that continuing sovereignty continue to exercise original (not delegated) law-making power, because colonisation did not have the legal effect of extinguishing all of their sovereignty.

COLONIAL CONSTITUTIONAL DEVELOPMENT

The extension of British settlement throughout the Australian landmass and Tasmania saw the establishment of six colonies. The colonies went through the varying stages of constitutional development at different times but essentially followed the stages of development undergone by New South Wales:

- Initially, the Governor sent from London had both legislative and executive powers—in other words, he could make laws and was in charge of the government that enforced them.
- Subsequently (from 1823, in the case of New South Wales), the Governor was assisted in his legislative role by an appointed Legislative Council, which had to approve legislation. However laws had to be introduced by the Governor—the Legislative Council could not make laws on its own initiative. The colony was also subject to legislation enacted for it by the United Kingdom Parliament. An Executive Council (similar to a Cabinet) was also created to assist the Governor in the exercise of his executive powers.
- From 1842, as a result of political demands by the colonists, legislation was passed by the United Kingdom establishing *representative government* in the various colonies, which meant that the Legislative Council would be elected—although it should be noted that the franchise was restricted to white males who owned property above a certain value. The Governor could however refuse his assent to laws, and he continued to govern through his Executive Council without any legal requirement to refer to the wishes of the colonists.
- The next step in constitutional development, which took place between 1855 and 1890, saw the United Kingdom enact Constitutions establishing *responsible government* in each of the colonies. This was a significant development because it saw the transplantation into Australia of the laws and conventions which governed the relationship between Crown and Parliament in the United Kingdom. This change also coincided with the establishment of bicameral (that is, two-chamber) legislatures, with a lower house elected on a wider franchise than the upper house (but with the franchise still restricted to white males). The doctrine of responsible government meant that the Governor would no longer run the government himself. Instead he would select as Premier of the colony the person who commanded a majority in the lower house of the legislature, and take that person's advice on whom to select as ministers in the colony's Cabinet. Because the government—in the sense of the Cabinet—was required to have a majority in the lower house, and depended for its continued tenure on the retention of that majority, the government was said to be 'responsible' to the legislature.
- Despite the advances made by the colonies in their internal constitutional arrangements, their colonial status meant that they were still subordinate to the

United Kingdom. This subordination was made clear by the *Colonial Laws Validity Act 1865* (UK). Its essential provisions were as follows:

- Section 2 provided that colonial Parliaments could not legislate repugnantly to United Kingdom Acts that applied to the colonies.
- Section 3 confirmed that colonies could legislate contrary to the common law.
- Section 5 stated that colonies could amend their Constitutions, provided that they complied with any procedural restrictions contained therein. It should also be noted that, under the common law, colonies lacked the capacity to enact extraterritorial legislation.

THE ESTABLISHMENT OF FEDERATION

Concerns within the colonies about their perceived military vulnerability, along with a desire to remove economic barriers to trade between them, saw discussions start between the colonies, and between them and the United Kingdom, on the idea of establishing an Australian federation. Between 1891 and 1898 a series of Constitutional Conventions were held around Australia. Each colony elected delegates to the Conventions, at which the proposed text of a federal Constitution was negotiated, prior to being put to the voters in each colony for approval. The proposed Commonwealth Constitution was approved by the voters in all the colonies in 1899 (bar Western Australia), and was enacted by the United Kingdom Parliament as the *Commonwealth of Australia Constitution Act 1900* (UK) on 9 July 1900. (Western Australia approved the Constitution by referendum in August 1900.) The Act came into effect on 1 January 1901.

It is important to note that the Act passed by the United Kingdom Parliament had nine sections, with the Commonwealth Constitution contained in s 9. The other eight sections, often referred to as the 'covering clauses', are not part of the Constitution itself, but contain provisions establishing an 'indissoluble Federal Commonwealth' under the Crown of the United Kingdom (in the preamble), stating that references in the Act to the Queen extend to her successors (s 2), and addressing matters relating to the coming into force of the Act and certain transitional matters (ss 3–9).

The creation of the federation saw the birth of a new entity, the Commonwealth of Australia. The six colonies carried on their existence as States, with their Constitutions continuing to regulate their relationship with the United Kingdom.

AUSTRALIA'S GRADUAL INDEPENDENCE FROM THE UNITED KINGDOM

The Commonwealth of Australia had the status of a colony, which meant that it was subject to the legislative restrictions contained in the *Colonial Laws Validity Act*, and to the common law rule that colonies lacked extraterritorial legislative competence.

Political changes within the British Empire in the wake of World War I affected the relationship between the United Kingdom and its six most constitutionally advanced

colonies (Australia, New Zealand, South Africa, Ireland, Canada and Newfoundland), which became known as 'Dominions'. Although the United Kingdom had the power to legislate for the Dominions (because they were still legally colonies), that power was essentially a dead letter (indeed, it was never used with respect to Australia), and a convention developed to the effect that the United Kingdom would not legislate for the Dominions except at their request. This convention was expressly recognised by the United Kingdom Government in the Balfour Declaration of 1926, issued by the then United Kingdom Prime Minister at the 1926 Dominion Conference. A number of the colonies (in particular South Africa and Ireland) were anxious to have the convention enacted into law, and this led to the passage of the *Statute of Westminster 1931* (UK), which stated that:

- the *Colonial Laws Validity Act* would no longer apply and the Dominions could legislate repugnantly to United Kingdom legislation applying to them (s 2)
- the Dominions could legislate with extraterritorial effect (s 3)
- the United Kingdom Parliament would not legislate for the Dominions except at their request (s 4).

Australia, which had not pressed for the enactment of the *Statute of Westminster*, was given the option in the Act of determining whether it should apply to Australia. This it eventually did when, partly in order to affirm Australia's autonomy in the conduct of World War II, the Australian Parliament enacted the *Statute of Westminster Adoption Act 1942* (Cth), which made the Act effective in Australia with retrospective effect from 3 September 1939.

It is important to note that the *Statute of Westminster* applied only to the Dominions, not to their component parts. Thus the relationship between the States and the United Kingdom Government was unaffected by the passage of that Act. The States continued to be subject to the *Colonial Laws Validity Act* and to lack the legislative competence to alter United Kingdom legislation applying to them or to legislate with extraterritorial effect.

The *Australia Act 1986* (UK and Cth) marked the termination of the United Kingdom's power to legislate for Australia, and was the final stage in the evolution of Australia's constitutional relationship with the United Kingdom. This Act was enacted by both the United Kingdom Parliament and the Commonwealth of Australia Parliament so as to remove any doubt as to its validity. Its essential provisions were as follows:

- the United Kingdom Parliament no longer has the power to legislate for the Commonwealth or the States, even at their request (s 1)
- the States have extraterritorial legislative capacity (s 2)
- the States are no longer subject to the *Colonial Laws Validity Act* and can therefore legislate contrary to United Kingdom statutes applying to them (s 3),

except for the Commonwealth Constitution, the *Statute of Westminster* and the *Australia Act* itself (s 5).

Given that the United Kingdom can no longer legislate for any of the Australian jurisdictions, the only constitutional link that still exists between the United Kingdom and Australia is the Crown. The preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) states that the Commonwealth was formed 'under the Crown of the United Kingdom', and s 2 of that Act provides that references in it to the Queen (then Queen Victoria) apply to her heirs and successors. The monarch appoints a Governor-General (in the case of the Commonwealth) and a Governor (in the case of each of the States) to exercise her constitutional powers on her behalf, although the power of appointment is, by convention, exercised on the advice of the Commonwealth and State Governments respectively. The Commonwealth and State Constitutions vest the Governor-General or Governor with a range of constitutional powers, most of which, subject to a few important exceptions, are exercised on the advice of the government. We will discuss the powers of the Queen and her representatives in detail in Chapter 4.

Practically speaking, Australia is independent of the United Kingdom because the United Kingdom Parliament cannot legislate for Australia, but as a matter of law the monarch remains the source of executive power, and so the link with the United Kingdom has not been entirely severed.

CONSTITUTIONAL AMENDMENT

The Commonwealth Constitution cannot be amended by an ordinary Act of Parliament: it requires a special procedure. For this reason, it is classified as 'rigid', rather than 'flexible'. The amendment procedure is laid down in s 128, which requires that amendments must be passed by both houses of Parliament (or, failing agreement by both houses, then by one house, on two occasions at least three months apart) and then approved of in a referendum of voters in the States and Territories by:

- a majority of voters in a majority of States (note that the Territories are not relevant here); and
- a majority of all voters in the country.

If a proposed amendment would alter the representation of a State in the Federal Parliament or the boundaries of a State, a majority of voters in the particular State(s) so affected would have to approve the amendment. Of the 44 referenda held since 1901, only eight have succeeded in acquiring the requisite majorities for amending the Constitution, indicating how difficult it is to amend the Constitution. One consequence is that constitutional reform has lagged far behind reform in other areas of the law.

EXAMPLE

In 1999 a referendum was held on whether Australia should become a republic, with a President nominated by the Prime Minister and Leader of the Opposition and approved by a two-thirds majority of Parliament. The proposal failed to obtain a majority nationwide or in any of the States.

AN AUSTRALIAN REPUBLIC?

If Australians wanted to sever their link with the monarch, how would this be done?

Amendment of the Commonwealth Constitution to remove references to the monarch and replace them with some other office would not be difficult. However, such constitutional amendment would raise the questions of to whom the powers of the Governor-General should be allocated, how that person should be chosen, and whether it would be convenient to codify the conventions regulating the way in which the powers of the office are exercised. As an alternative to having a person operate the levers of the Constitution, it would be possible to amend the Constitution in such a way as to make it self-executing—for example, for the Constitution to state that, on losing a vote of confidence the Prime Minister would have to resign, instead of providing by law (as some Constitutions do) or by convention (as is the case under the Commonwealth Constitution) that the person exercising the office of Governor-General (or its equivalent) may dismiss the Prime Minister if he or she fails to resign.

It would also be relatively easy for the States to amend their *Constitution Acts* in such a way as to remove the office of Governor; however one should note that it would also be legally possible, although perhaps politically anomalous, for the Commonwealth to sever its link to the Crown while the States maintained theirs.

Finally, there remains the issue of the *Commonwealth of Australia Constitution Act* and its preamble and first eight sections (the 'covering clauses') which are not part of the Constitution but which contain provisions referring to Australia's link to the Crown. These provisions, not being part of the Constitution itself, cannot be amended using the s 128 procedure. Although the establishment of a republic would be effective if only the Constitution was amended, a repeal of the remainder of the *Commonwealth of Australia Constitution Act* would be desirable from an historical point of view. Does the Commonwealth Parliament have the capacity to do this? The answer is 'yes', because s 51(xxxviii) contains a power in terms of which the State Parliaments, if they act unanimously, can request that the Commonwealth Parliament exercise any power which the United Kingdom Parliament could, at the time the Constitution came into effect, have exercised. Since the United Kingdom Parliament could obviously have repealed the first eight sections of the *Commonwealth of Australia Constitution Act*, it follows that the Commonwealth Parliament could, with the concurrence of the States, do this itself, effectively stepping into the shoes of the United Kingdom Parliament.