THE GAINING AND LOSING OF NATIONAL INDEPENDENCE

A lecture delivered at Warrane College
University of New South Wales
1 June 2005

Warrane College Monograph No.12
THE GAINING AND LOSING
OF NATIONAL INDEPENDENCE

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Warrane College Monograph No.12
WARRANE MONOGRAPHS

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ISBN 0-9750847-4-7

Published by Warrane College,
PO Box 123, Kensington, NSW, 1465, Australia

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August 2006
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I  Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II The growth of Australian independence</td>
<td>7</td>
</tr>
<tr>
<td>The 19th century position</td>
<td>7</td>
</tr>
<tr>
<td>The move to Federation</td>
<td>10</td>
</tr>
<tr>
<td>The criteria for independence</td>
<td>15</td>
</tr>
<tr>
<td>Australia’s capacity to deal with the world up to 1919</td>
<td>22</td>
</tr>
<tr>
<td>The move to independence between 1919 and 1931</td>
<td>37</td>
</tr>
<tr>
<td>The Australia Acts (Cth and UK)</td>
<td>45</td>
</tr>
<tr>
<td>International activities from 1931</td>
<td>48</td>
</tr>
<tr>
<td>Conclusion</td>
<td>50</td>
</tr>
<tr>
<td>III The loss of British independence</td>
<td>53</td>
</tr>
<tr>
<td>IV Threats to Australian independence</td>
<td>54</td>
</tr>
<tr>
<td>The ICC Statute</td>
<td>54</td>
</tr>
<tr>
<td>Less direct effects on independence</td>
<td>65</td>
</tr>
<tr>
<td>V  Conclusion</td>
<td>72</td>
</tr>
</tbody>
</table>
THE GAINING AND LOSING OF NATIONAL INDEPENDENCE

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I Introduction

On 1 January 1901 the Commonwealth of Australia came into being. It did so because the Imperial Parliament at Westminster had passed the Commonwealth of Australia Constitution Act 1900, which contained our federal Constitution. At that time the Australian population was little more than one percent of that of the British Empire as a whole. The governments and characteristics of the Australian population differed from those of most of the other 400 million people. Like the United Kingdom itself, and like those other colonies which from 1907 were known as "Dominions"\(^1\) – Canada, Newfoundland and New Zealand, from 1910 the Union of South Africa and from 1922 the Irish Free State – Australia was governed by parliamentary democracy. Australia was not subject to direct Imperial rule, as in Africa, and parts of India. It was not subject to indirect rule through princes, nawabs and zamindars, as in India, or through sultans, sheikhs, chiefs or other aristocrats and

\(^1\) As a result of a resolution at the 1907 Colonial Conference.
elites elsewhere. Australia lacked the conflicting castes, communities, religions and interests of other parts of the Empire. It had no large hostile minorities like the Boers, against whom the Empire was fighting a war at that moment in South Africa, or the French Canadians, who still bitterly regretted Wolfe's defeat of Montcalm on the Plains of Abraham in 1759. There was not in Australia any thin crust of white settlers ruling a much larger indigenous population.

In recent years there have been disputes about when Australia attained independence. On one view it was achieved on 1 January 1901. The late Lionel Murphy – Labor Senate leader for eight years, Attorney-General in the Whitlam Government, High Court Judge – said: "Australia's independence and freedom from United Kingdom legislative authority should be taken as dating from 1901."²

He is the only significant Australian to have thought this. However, there are Englishmen whose language is superficially supportive of Murphy J's point of view. Take the 15th Earl of Derby – son of the Victorian Prime Minister, Foreign Secretary under Disraeli in the 1870's and Colonial Secretary under Gladstone in the

² Bistricic v Rokof (1976) 135 CLR 552 at 567; see also China Ocean Shipping Co v South Australia (1979) 145 CLR 172 at 236-239. Murphy J's view was strongly criticised in the latter case by Stephen J at 207-215 (Barwick CJ at 183-184 concurring); see also Gibbs J at 194.
1880's. On 20 March 1887, in his diary, he described the Australian colonies and Canada, which had united in 1867 in a similar way to Australia in 1901, as having "practical independence". On 6 July 1914 Arthur James Balfour, former Prime Minister, one of the most senior members of the British Government at the time when the Commonwealth was created, and a statesman who was to have much to do with it in future years, delivered the third of three admirable speeches in the House of Commons on the death of Joseph Chamberlain, speaking after Asquith and Bonar Law. He denied that "any species of control" continued over the Dominions, and said that there was "absolute equality as between these great self-governing communities and ourselves". In 1914 Normal Angell wrote a once-famous book, The Great Illusion, in which he said that the Dominions were "independent States ... five nations [who] have surrendered ... the use of force the one as against the other ...."

But these statements of English politicians and publicists were very general. They were not directed to any precise legal criteria for independence. Their authors would have acknowledged that Australia was subject to Imperial control of foreign policy. And, as


4 Hansard p 854.

5 The Great Illusion pp 360-361.
Murphy J accepted, there were many statements to the contrary of what he said. There are also technical difficulties in the path of accepting it: some can be overcome, but not all. Not least of them was the existence of the former Colonies, now States, but with Governors still appointed by the United Kingdom, with constitutions still operating (subject to legislative powers conferred on the Commonwealth), with direct access to United Kingdom governments. Australia was a federation, not a union in which the Colonies were swallowed up. Murphy J tended to stress the political realities of the mid 20th century as distinct from, and without sufficient regard to, earlier legal rules. His words "should be taken" suggest velleity – Australia needs a year in which independence was achieved, it would be nice if independence had been achieved in 1901, and therefore it was.\(^6\)

If not 1901, what are the other possible dates?

Some trace Australian independence to its separate representation in negotiating the Treaty of Versailles in 1919, and its separate signature of that Treaty. A more conventional opinion is

\(^6\) W J Hudson and M P Sharp *Australian Independence: Colony to Reluctant Kingdom* p 21. This subject has been well discussed by Winterton "The Acquisition of Independence" in (eds) French, Lindell and Saunders *Reflections on the Australian Constitution* pp 31-50. I am indebted to George Winterton and Anne Twomey for correcting some errors in an earlier draft of what follows.
that Australian independence was achieved in 1926, when, after an Imperial Conference, the Balfour Declaration described the United Kingdom and the Dominions thus:

"They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

Other dates are 1931, when the Statute of Westminster, which purported to remove the last United Kingdom legislative restraints on the Australian Parliament, and embodied decisions made at and after the 1926 Imperial Conference, was enacted in London;\(^7\) or 1942, when the Statute of Westminster was adopted in Australia (or 1939, the date to which its adoption was retrospectively applied); or 1986, when the Australia Acts, enacted in London and Canberra, removed the last United Kingdom legislative restraints on the State Parliaments.\(^8\) The validity of the Australia Act 1986 (UK) has been questioned\(^8\) and, since it seeks to bolster parts of the Australia Act

\(^7\) Jacobs J favoured this view: *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 498.

\(^8\) Gleeson CJ, Gummow and Hayne JJ thought, as did Gaudron J, that at least since 1986 the United Kingdom was a foreign power: *Sue v Hill* (1999) 199 CLR 462 at 492 [65] and 528 [173].

\(^9\) Kirby J has doubted the validity of the United Kingdom Act: *Attorney-General (Western Australia) v Marquet* (2003) 217 CLR 545 at 612-613 [202]-[203]. See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 66

Footnote continues
1986 (Cth) which may be of questionable validity, from that position may flow the extreme view that even now Australia is not independent. Further, an academic author contends that since the Constitution is part of an Imperial Act, and since the Westminster Parliament could repeal that Act, Australian independence will not be complete until there is a shift in sovereignty by means of that Act being approved by referendum in Australia.\footnote{\textsuperscript{10}} Apart from those minority and rather rarefied points of view, the only body of opinion which contends that Australia is not independent is that which complains about the selection of the Governor-General by the Queen. However, the Queen has acted on the advice of the Australian Prime Minister at least since King George V, admittedly reluctantly, appointed Sir Isaac Isaacs on the advice of Prime Minister Scullin in 1930. The kindest thing that can be said of this position is that it is the weakest of all the arguments for a republic.

This paper seeks to trace in over simple fashion the complex evolution of Australian independence, to contrast it with the

simultaneous gradual loss of United Kingdom independence, and to identify emerging threats to Australian independence today.

II The growth of Australian independence

The 19th century position

When white settlement began, the English arrivals brought with them so much of English law as was compatible with local conditions. Before 1828 the Australian colonies certainly lacked independence. They were British colonies ruled from Britain by British Governments through British officials, of whom the most senior were the Governors. The Governors ruled as military despots, although a court system did operate, and a court system comparable with that operating in England and still in place to this day was introduced in 1824.

In 1828 an appointed legislature was introduced. Representative government – involving a legislature which was wholly or partly formed by popular election – came to New South Wales in 1842 and to most other colonies in the 1850’s. Responsible government – by which the politicians who led and ran the executive (headed by the Governor) were responsible to the legislature, and obliged to resign if defeated on key votes in it –

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came to New South Wales in 1855 and most other colonies in the same decade.

Colonial law was made up of the applicable common law – that is, the law declared by the English judges over the preceding centuries –, of Imperial legislation applying locally, and of local legislation. But what if local legislation was inconsistent with Imperial legislation? There was a common law rule, also to be found in some of the legislation creating colonial constitutions, that any law enacted by a colonial legislature which was repugnant to Imperial legislation applying to the colony was invalid.

This common law rule was systematised by the Colonial Laws Validity Act 1865 (Imp), s 2. The Act amplified colonial legislative power by giving to colonial statutes the force of sovereign legislation, but they were to be read as subject to any applicable Imperial legislation and were void to the extent of any repugnancy.

In addition, certain types of colonial legislation (eg constitutional amendment) could not be approved by Governors and had to be reserved for royal assent in the United Kingdom on the advice of United Kingdom Ministers. And any legislation, even if approved by Governors, could be disallowed by the sovereign on the
advice of United Kingdom Ministers. But these powers were not often used.\textsuperscript{12}

A final limitation on colonial parliaments was that they could not legislate with extra-territorial effect. It was left to the Westminster Parliament to do so.

Just as the Westminster Parliament was supreme over colonial Parliaments, so colonial Governors were appointed by, and could only be dismissed by, the United Kingdom Government. Only from the 1880's were colonial Governments consulted on the choice of Governor. Governors acted on the advice of politicians controlling majorities in colonial legislatures, but they were also responsible to the United Kingdom Government. Colonial Governments could not communicate directly with the sovereign, or the British Prime

\textsuperscript{12} W G McMinn, \textit{A Constitutional History of Australia}, p 90, asserts that up to the end of the 19\textsuperscript{th} century only fifteen New South Wales bills had been reserved, and all received royal assent in London. W J Hudson and M P Sharp, \textit{Australian Independence: Colony to Reluctant Kingdom}, pp 12-13, assert that from 1891 to 1900 no Australian reserve bill was denied assent, and by 1900, of all the bills passed by Australian colonial legislatures, only five had been disallowed, and none in the previous thirty-five years. On the other hand, Twomey, \textit{The Constitution of New South Wales}, p 233, lists thirteen New South Wales bills between 1843 and 1900 for which royal assent was reserved but not given, five being in the period 1891-1900. At p 239 she lists seven bills in the period 1837-1849 which were disallowed. In part the divergence is explained by the fact that it was the Queen's practice not to refuse assent expressly, but merely take no action, with the result that after two years, unless colonial representations succeeded in overcoming British objections, the bills lapsed: see Twomey at p 233.
Minister: they only communicated through their Governor with the Colonial Secretary. But the position of Governors was less than it had been. The Earl of Derby remarked in his diary on 19 January 1884 that Governors in Australia "have no power, their sole function is to keep a court".

Finally, the ultimate Court of Appeal for colonial citizens was not the Full Court of the Supreme Court of each colony, but the Privy Council in London.

The move to Federation

In general the United Kingdom offered few provocations, and relations with the Australian colonies before 1901 were calm and peaceful. British military forces were withdrawn in mid century. By the middle of the 19th century the United Kingdom generally saw the colonies as expensive, particularly from the defence point of view. Disraeli called them "millstones about our necks". The United Kingdom tolerated colonial policies which were radically different

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13 W J Hudson and M P Sharp *Australian Independence: Colony to Reluctant Kingdom* pp 11-12.


15 The Earl of Derby saw the defence of the Australian colonies as their responsibility, not England's: (ed) Vincent *The Diaries of Edward Henry Stanley, 15th Earl of Derby (1826-93) Between 1878 and 1893* p 571 (10 July 1883).
from its own: it was devoted to free trade, most of the Australian colonies were protectionist; it had no immigration colour bar, some Australian colonies did. The United Kingdom's approach to the federation movement in the 1890's – the series of negotiations between colonial politicians, the conventions, the Parliamentary debates and the referenda which led to the Constitution enacted in London in 1900 – was equally non-provocative.

*Joseph Chamberlain.* This was a little surprising in view of the adamantine character of the man who held the office of Colonial Secretary from 1895 to 1903, Joseph Chamberlain. However, he positively encouraged federation. Despite that, he has had an undeservedly bad press from Australian, South African and English historians. In truth he was an unquestionably great man. He was a self-made businessman, having made a fortune as a screw manufacturer in his youth. He was a successful Mayor of Birmingham, a champion of improved living conditions for the working classes, pioneering new developments in utilities, sanitation, parks and the urban environment generally. He entered national politics relatively late, but became the first politician to extend into a standard technique Gladstone's occasional use of mass oratory. He was a non-socialist radical and a republican. He developed a tightly controlled machine in the Birmingham seats in which he and his son Austen sat, and nearby seats. He was a combination of aggression and dandyism – always wearing an orchid in his buttonhole and a gold-rimmed monocle. He started as a Liberal, but was driven into
cooperation with the Tories because of his reaction to Gladstone's policy of home rule for Ireland. When that policy caused the Liberal Party to split, and Chamberlain and the Marquess of Hartington formed different segments of the Liberal Party into the Unionist Party, Gladstone remarked sadly of the contrast: "There is this difference between Hartington and Chamberlain – the first behaves like and is a thorough gentleman. Of the other, it is better not to speak." He was the hardest and most energetic British statesman of his time – perhaps of any time since Oliver Cromwell – and in some key respects was ultimately as unsuccessful as Cromwell. His career was said by Asquith to be "strewn with the débris of abandoned hypotheses." But his policy towards Australian federation was one of his successes. Except in one respect he strongly favoured the constitution which the federation movement had developed. That was because he had a fear of long-term imperial decline. In 1900, while Chamberlain was negotiating the final form of the Constitution with the Australian colonial delegates, thousands of Australian volunteers were fighting in the Boer War – "Joe's War". They made a great impression in several ways: Kipling, for example, wrote one of his finest poems, "Lichtenberg", about a homesick soldier from New South Wales. For their support Chamberlain was deeply grateful, and he wanted it in future. Later, in a speech delivered during the celebrations of the coronation of Edward the VII in 1902, he said, perhaps over-dramatically: "The weary Titan staggers under the too vast orb of its fate. We have borne the burden for many years. We think it is time that our
children should assist us to support it." In 1903 he started a great public campaign for Imperial unity based on tariff walls against competition from outside the Empire coupled with an increase in free trade within it. That campaign, which involved exhausting mass meetings all over the country, ended his career in government, divided the Conservative Party, and caused it to lose the 1906 election. So he surpassed Peel, Gladstone and Lloyd George, who in a single lifetime each split one great political party: he split two. The campaign ruined his own health – he ceased to appear in public after a stroke in 1906. But the campaign was consistent with his encouragement of federation as a means of increasing the defensive strength of Australia within an Imperial framework. Despite being the father of Austen Chamberlain and Neville Chamberlain, two veteran and distinguished statesmen, he is now a rather forgotten figure. But as long as six decades after federation, Frank Chamberlain, a very left wing Western Australian trade unionist, and Sir Roderic Chamberlain, a fairly right wing South Australian judge, were nicknamed "Joe" after their great namesake, whom they had little else in common with.

Like Chamberlain, the leading Australian politicians were Imperialists. They saw nothing incompatible in being loyal to their

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State, to Australia and to the Empire. They have been described as "Imperial nationalists, liberal in their sympathies, Australian in sentiment, and firm in their attachment to the Empire. Alfred Deakin ... combined a religious fervour for the national cause with an exalted loyalty to the British connection." This has been called a "now almost incomprehensible combination".  

Three of those leading colonial politicians became the first three High Court justices – Griffith CJ, Barton and O'Connor JJ. In Baxter v Commissioners of Taxation, New South Wales they summarised the aims of federation thus. Before, the six colonies were "isolated units"; there was no means by which the united voice of all the people of Australia could be ascertained or made effective; no efficient measures could be taken for defence; and "the conflict of tariffs ... frustrated the desire for free intercourse among people of one stock, who had come to regard themselves as the inheritors in common of a great continent." The effect was to create a government of national character "exercising the most ample powers of self-government consistent with allegiance to the British Crown."

Chamberlain promised the House of Commons in 1900 that Britain would not stand in the way of any Australian move further.


18 (1907) 4 CLR 1087 at 1108.
away from Britain after that date. He said the links between the United Kingdom and the self-governing colonies were "very slender", but, "slender as they are ... if they are felt irksome by any one of our great colonies, we shall not attempt to force them to wear them."\textsuperscript{19} Over the next century that was a promise his successors kept: at least on large questions they never refused to take appropriate action or introduce appropriate legislation in response to reasonable requests.\textsuperscript{20} But, from 1901, how slender were the links? How irksome were they? How far did they negate Australian independence?

\textit{The criteria for independence}

There are two criteria for independence which Australia arguably did not satisfy in 1901.

One criterion is the capacity to engage in international relations. This involves the power to negotiate and enter treaties

\textsuperscript{19} Howell "Joseph Chamberlain and the Amendment to the Australian Constitution" (2001) 7 The New Federalist 16 at 27.

\textsuperscript{20} For a number of requests which Lord Hailsham (the Lord Chancellor), Sir Alec Douglas-Home (the Foreign and Commonwealth Secretary) and Mr Edward Heath (the Prime Minister) understandably did not regard as falling within this category, see those made by Senator Murphy and Mr Whitlam in 1973 in an attempt to terminate Privy Council appeals without legislating pursuant to the Statute of Westminster: Twomey \textit{The Constitution of New South Wales} pp 157-158.
and other agreements with other independent States; the power to declare war, peace or neutrality; and the power to appoint and exchange diplomatic representatives with other governments. In 1901 Australia did none of these things and one school of thought contends that it lacked power to do them. It now has all those powers, and has exercised them all.

The other criterion for full independence is freedom from external control by the exercise of any outside executive, legislative or judicial power. While in 1901, and even before 1901, to a large extent Australian legislatures and governments controlled Australian affairs without external interference, from 1901 there were at least three qualifications. The first related to executive power – the position of Governor-General. He had four roles. He was the representative of the Crown, carrying out the duties of a constitutional monarch under the Westminster system, and having the rights of that monarch to advise, to be consulted and to warn. He also represented the London Government, in effect as an Imperial diplomat reporting Australian developments to London and passing the views of the United Kingdom Government to the Australian Cabinet; to which was added the function of attempting to guide Australian Cabinets along paths favourable to British interests. (In this latter respect only the ablest and most vigorous of the early Governors-General, Sir Ronald Munro Ferguson (1914-1920) had
much success, and the function lapsed.) In addition, he was the sole official channel of communication between the Australian and the United Kingdom governments. That is, the Australian Prime Minister did not deal directly with the United Kingdom Prime Minister; rather the Australian Prime Minister would communicate through the Governor-General to the Colonial Office, who would communicate if necessary with some other Department of State, or the Prime Minister, or the Queen, and return communications would follow the same route. These complex procedures took time. Finally, the Constitution gave the Governor-General power to withhold assent to legislation and reserve it for consideration by the Queen (s 58), and she had the power to disallow it within a year (s 59). (In fact none ever was disallowed.) The purpose of these

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23 Cunneen Kings’ Men: Australia’s Governors-General from Hopetoun to Isaacs pp 64, 66 and 68 considers that the power of reservation had become obsolete by 1907. This is an exaggeration. One of the reasons why there was no refusal of assent was that in practice the British Government would, instead of refusing assent outright, advise of its objections and of what changes it desired to make the legislation acceptable, and in practice the Commonwealth (and the States) heeded these suggestions. In the earliest years these suggestions often related to immigration legislation objected to particularly by Japan, which Britain wished to remain on friendly terms with, and which the British Government allied itself with in 1902. This led to the "dictation test" supposedly based on educational rather than racial criteria: Immigration Restriction Act 1901 (Cth). See also the Queensland "Bill to Amend the Sugar
powers was to prevent the Australian Parliament from legislating extra territorially in a way damaging to the interests of the Empire as a whole: they operated as a backup to the Colonial Laws Validity Act 1865, which applied as much to Federal Parliament as it did to the Parliaments of the colonies (now the States). (None of these inhibitions now exist: although ss 58 and 59 of the Constitution remain, an immutable unwritten convention exists against their exercise.) These legislative restrictions, then, were a second qualification on Australian power and were sufficient in themselves to prevent Australian being independent. A third qualification was that appeals could be brought from State courts, and to some degree from the High Court, to the Privy Council.

Privy Council appeals

If the existence of Privy Council appeals were the only supposed barrier to Australian independence, it would be so slight as not to be a barrier at all. The Privy Council was in a sense a non-Australian court. But it was applying Australian law, and in many

Works Guarantee Acts 1893 to 1895", and Chamberlain's Despatch on that subject to the Governor of Queensland: Greenwood and Grimshaw Documents in Australian Constitutional Affairs 1901-1918 pp 388-389. Though the power to reserve Commonwealth legislation did become obsolete, the British Government did not regard its powers in relation to State legislation as having lapsed before the Australia Acts, for it considered advising the Governor to refuse assent to, or disallow, State legislation until quite a late stage (for example in relation to a New South Wales bill to abolish Privy Council appeals in 1979).
fields Australian and English law were the same. In general the members of the Privy Council were the Law Lords who heard English and Scottish appeals. In general they were lawyers of high calibre, neither significantly more nor significantly less able than their contemporaries on the High Court. On the whole the quality of their work was high. It was, however, better in fields where ignorance of Australian conditions\(^\text{24}\) did not matter – general common law and legislation in substantially the same form as United Kingdom legislation. It was not so good on federal constitutional questions.\(^\text{25}\)

The strongest argument for seeing the Privy Council appeal as qualifying Australian independence is that it was the only major issue between the colonial delegates and Joseph Chamberlain in their negotiations with him in London in 1900. Section 74 of the Constitution evolved as a compromise between his desire for extensive Privy Council appeals (shared by some influential Australians such as Griffith CJ and Way CJ) and the desire of the

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\(^{24}\) Complaints had been made about this ignorance before federation, eg *Tooth v Power* (1889) 10 LR (NSW) (Eq) 143 at 158-159 per Windeyer J, suggesting that judges "acquainted with Australian topics of legislation" should sit on the Privy Council. However, particularly in the period up to 1880, before the standards of colonial courts rose, the Privy Council unquestionably performed a valuable service: Howell "Joseph Chamberlain and the Amendment to the Australian Constitution Bill" (2001) 7 The New Federalist 16 at 22.

\(^{25}\) Griffith CJ, Barton and O'Connor JJ made an early complaint about this in *Baxter v Commissioners of Taxation, New South Wales* (1907) 4 CLR 1087 at 1105-1117.
delegates for a limitation on them. Chamberlain's position was not news in 1900: he had asserted it at the 1897 Colonial Conference. He unashamedly based his position on a desire to protect the interests of British investors: a large slice of British foreign investment was in Australia, itself comprising a large slice of all investment in Australia. These desires rested on assumptions which, if correct, would have been discreditable to Australian judges and to the Privy Council, and to accept them did not reflect much credit on Chamberlain himself. However, whatever his motives, it is very difficult to identify decisions of the Privy Council which are favourable to British financial interests but could not be defended on general legal reasoning. Its work has also been praised by distinguished Australian lawyers.

The numbers of Privy Council appeals more than halved in the years after federation. It is hard, then, to see the existence of the Privy Council appeal as affecting Australia's status as an independent country. The Privy Council did not "function solely as a court of the United Kingdom, but as an integral part of the

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constitutional structure" of Australia.\(^{28}\) In any event, there was no restriction on Australian legislation abolishing Privy Council appeals from the High Court at any time,\(^{29}\) and no restriction on Australian legislation abolishing Privy Council appeals from State Supreme Courts after the Statute of Westminster.\(^{30}\) Most Privy Council appeals from the High Court were in fact abolished by degrees before appeals from State Supreme Courts were abolished by the Australia Acts in 1986.\(^{31}\) It remains theoretically possible that an

\(^{28}\) (eds) Jennings and Watts *Oppenheim's International Law* (9th ed, 1992) para 78. See also *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 259.

\(^{29}\) Except that s 74 of the Constitution required that laws limiting the matters in which appeals could go from the High Court to the Privy Council were to be reserved by the Governor-General for Her Majesty's pleasure. The difficulties that existed in relation to Canada – see the next footnote – did not exist for Australia in view of the express terms of s 74.

\(^{30}\) Apart from the effect of s 51(xxxxviii) of the Constitution, to have abolished them before that would have infringed the Crown's prerogative to hear appeals, operated extraterritorially, and been repugnant to the 19th century legislation setting up Privy Council appeals, and hence would have required an Imperial statute to do so: *Attorney General (Commonwealth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 179-180. The necessary statute was the State of Westminster 1931 (UK) ss 2 and 3. It has been argued that appeals from State courts could have been abolished without the need for any Imperial Statute by reason of s 51(xxxxviii) of the Constitution: Howell "Joseph Chamberlain and the Amendment of the Australian Constitution Bill" (2001) 7 The New Federalist 16 at 29-30.

\(^{31}\) The Privy Council (Limitation of Appeals) Act 1968 (Cth) s 3 removed the right to appeal from the High Court to the Privy Council in all matters save those not involving the Constitution or the exercise of Federal jurisdiction. The Privy Council (appeals from the High Court) Act 1975 (Cth) s 3 removed the right to appeal from the High Court to the Privy Council in all other matters except s 74 matters. The Judiciary Act 1903 (Cth) s 39(2)(a), in investing State courts with Federal

Footnote continues
appeal from the High Court to the Privy Council could be brought on any decision as to the limits inter se of the constitutional powers of the Commonwealth and a State, or two States, but it would require a certificate from the High Court, and in 1985 the High Court said it would never grant one again.\footnote{22}

But the case against 1901 being the date of Australian independence rests on stronger foundations than the Privy Council appeal.

\textit{Australia's capacity to deal with the world up to 1919}

\textit{Capacity to enter treaties before 1901}. What international dealings could the colonies have before 1901? If the United Kingdom entered a commercial treaty, the colonies could decide whether or not to be bound by it.\footnote{33} Even if they elected not to be bound by it, any law which they enacted inconsistent with it could

\footnote{32} \textit{Kirmani v Captain Cook Cruises Pty Ltd (No 2) (1985) 159 CLR 461 at 465.}

be reserved by the relevant Governor for the assent of the monarch in the United Kingdom, and assent could be refused.\textsuperscript{34}

The colonies could also enter agreements relating to lesser matters, eg postal conventions.\textsuperscript{35}

Any higher international agreement could only be entered by the United Kingdom. Sometimes, but not always, the United Kingdom representatives who negotiated them would be assisted by colonial delegates.\textsuperscript{36}

The colonies had no diplomatic representatives. Foreign powers had consular representatives in Australia to deal with matters affecting their nationals, but that was by arrangement between the relevant foreign nation and the United Kingdom.

\textsuperscript{34} Twomey "Sue v Hill - The Evolution of Australian Independence" in (eds) Stone and Williams The High Court at the Crossroads p 81 ("would").


In the 1890's, it was assumed that treaties could only be entered by sovereign States, and all references to "treaties" in the draft Constitution were removed, save one. That one reference appears in s 75(i) of the Constitution, which gives the High Court original jurisdiction in all matters arising under any treaty. It is true that s 51(xxix) of the Constitution gave Federal Parliament the power to make laws with respect to "external affairs". Nowadays the making of treaties is seen as a central aspect of external affairs. However, a reference to "treaties" in s 51(xxix) was removed in 1897-1898.

The basis for the view that Australia could not enter treaties is that before 1901 the sole treaty making power lay in the Crown, to which British subjects in the United Kingdom and Ireland, and in colonies like the Australian colonies, owed allegiance.

Capacity to enter treaties after 1901. Similarly, it was the view of contemporaries, and in particular international lawyers, that after federation Australia lacked full sovereignty. Thus according to Oppenheim, a leading international lawyer, writing in 1912, Canada and Australia were "Colonial States" having "no international position whatever ... : they are ... nothing else than colonial portions of the mother-country, although they enjoy perfect self-
government, and may therefore in a sense be called States". That this position had a certain practical unreality is indicated by the reasons given:

"The deciding factor is that their Governor, who has a veto, is appointed by the mother-country, and that the parliament of the mother-country could withdraw self-government from its Colonial States and legislate directly for them."

Soon after Federation the first proposition came to be true only in a very limited sense for the Governor-General. The second proposition was technically true, but it never crossed the mind of any British politician to withdraw self-government and legislate directly for the Australian colonies either before or after 1900.

The first paragraph of the Preamble to the Constitution provided that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania had agreed to unite in one indissoluble Federal Commonwealth under the crown of the United Kingdom of Great Britain and Ireland. It remained the same crown, and nothing in the Constitution took away from that crown the possession of the sole power to make treaties which it had before 1901.

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What, then, is the meaning of the grant to Federal Parliament of the power to legislate on "external affairs" in s 51(xxix) of the Constitution? If "external affairs" includes treaties, the power to legislate about them would appear to imply a power to enter them. Two authors have attempted to avert this outcome by the following reasoning. Section 51(xxix) was likely to be narrow in scope, because it was followed by s 51(xxx), which gave Federal Parliament power to legislate on "the relations of the Commonwealth with the islands of the Pacific." Most of these islands were colonies ruled from London and from foreign capitals. Any treaties between Australia and the other metropolitan powers would be a matter for the United Kingdom. Hence, it is suggested, s 51(xxix) was intended merely to give the Commonwealth the power to enact legislation with a view to facilitating Australian performance of treaties entered on its behalf by the United Kingdom – not to enter treaties on its own behalf which, once they were entered, attracted constitutional powers to legislate even if no other could be found. The High Court disagrees.\textsuperscript{38}

\textsuperscript{38} W J Hudson and M P Sharp \textit{Australian Independence: Colony to Reluctant Kingdom} pp 32-33. As is explained below, Australia later acquired the power to enter treaties. But, if an originalist approach to the construction of the Constitution is adopted, that cannot affect the meaning of s 51(xxix). Wide modern, and not so modern, meanings given to s 51(xxix), said to validate federal legislation on the subject-matter of any treaty, would thus be incorrect. On this view, the Federal Government can enter treaties freely, but only enact them as part of Australian law if there is some other head of constitutional power to be found in s 51 or elsewhere. However, Barwick CJ considered that s 51(xxix) was "a clear recognition ... that, by uniting, the people of Australia were moving towards nationhood": \textit{New South
The movement to war. After 1901, despite its lack of treaty making power, and despite the fact that it had no diplomatic representatives anywhere in the world, Australia behaved, like some of the other Dominions, to a degree as an independent State.

A key indicator of sovereign independence is control over immigration, and the Commonwealth lost no time in enacting restrictive legislation in the tradition of colonial legislation, in particular, in 1901, legislation containing the dictation test, which

Wales v The Commonwealth (1975) 135 CLR 337 at 373. This view is radically different from that of Hudson and Sharpe. Their narrow view of s 51(xxix) was rejected by the High Court in Victoria v The Commonwealth (1996) 187 CLR 416 at 476-484. There it was pointed out that before 1900 the Imperial Government followed a practice of consulting those colonies that, like the Australian colonies, had advanced towards constitutional independence, before concluding commercial treaties that applied to them. There was also a practice of including in those treaties a clause providing for the voluntary adherence of a colony. The number and range of treaties entered by the Imperial Government had increased and was continuing to increase. There also existed international organisations in which constituent parts of the British Empire like the Australian colonies had the vote. There was also a practice of leaving legislatures free to determine whether it was necessary to legislate to give effect to a treaty entered by the Imperial Government. Thus contemporary lawyers would have foreseen that Commonwealth legislation of that kind would be needed in relation to the same type of treaty, whether with nation States or international organisations, after 1900. The fact that Commonwealth legislation now implements only treaties entered into by the Executive of the Commonwealth, rather than, as was the case in the early years after 1900, treaties largely entered into by the Imperial authorities, is merely a "fresh denotation" of s 51(xxix) arising out of the development of Australia’s international personality. See XYZ v The Commonwealth of Australia [2006] HCA 25 at [156].
had been taken up by some of the Australian colonies in 1898 from Natal in 1897.

In 1908, Deakin, as Prime Minister, invited the American "Great White Fleet" to visit Sydney.

From 1910 Australia had a High Commissioner in London, and by 1911 all the Dominions did. The main role of the Australian High Commissioner was to borrow money and purchase government stores: political activity continued to take place largely between the Governor-General and the Colonial Office, although over time the office of High Commissioner reduced the importance of the Governor-General as a channel of communication.\(^39\)

In 1911 Australia decided to build a small, but far from contemptible, Royal Australian Navy, separate from the Royal Navy, rather than to contribute ships for absorption into the Royal Navy in the manner of New Zealand. By 1913 defence expenditure was about a third of federal revenue.

Colonial conferences attended by Premiers had taken place in London in 1887, 1894 and 1897, and similar conferences took place

\(^{39}\) Cunneen *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* pp 87 and 95-96.
there in 1902, 1907 and 1911, the last being called "Imperial". At
the 1911 Imperial Conference the Committee of Imperial Defence
admitted the Dominion Premiers to a meeting, the first occasion on
which outsiders had attended. Sir Edward Grey, the British Foreign
Secretary gave a briefing which convinced Andrew Fisher, the
Australian Prime Minister, that war was likely. Sir Edward Grey did
not disclose one matter which made the possibility of war even
stronger – the fact that since 1906 the Liberal Government had been
having secret military conversations with France, which made it
probable that if France were involved in a European war, the United
Kingdom would come in as its ally. Its failure to do this is less
culpable than it might seem. Not all the members of Liberal
Cabinets, either in 1906 or in later years, had been told of the
conversations. Lloyd George, the Chancellor of the Exchequer, a
man who was to be Prime Minister in the last two years of the

40 Judging by the calibre of those attending, these were not
treated by governments as unimportant occasions. The
Australian team was Andrew Fisher (Prime Minister), Senator
Pearce (Defence Minister) and E L Batchelor (Minister for
External Affairs). The British representatives were Asquith
(Prime Minister), Lewis Harcourt (Colonial Secretary), Churchill
(Home Secretary), Lloyd George (Chancellor of the Exchequer),
Crewe, Haldane and Herbert Samuel: apart, perhaps, from the
second-named, the ablest representatives fielded by Britain in
the 20th or any other century. The Canadian team was led by
Sir Wilfred Laurier, who had been Prime Minister for 15 years.
The New Zealand team was Sir Joseph Ward (Prime Minister)
and J G Findlay. The South African team was Louis Botha
(Prime Minister), Sir David de Villiers Graaf, and F S Malan (who
was in future to act as Prime Minister on three occasions).
coming war, and according to his own say so "the man who won the war", had not been told of them at that time.\textsuperscript{41}

\textit{The First World War.} The unitary nature of the Imperial Crown was recognised when war broke out in 1914. Britain's declaration of war on Germany automatically brought Australia and the other Dominions into a state of war with Germany. The rest of the world dealt with the British Empire – the United Kingdom, the Dominions, India, the other colonies, the protectorates and the other units which comprised it – as if it were one nation.

But the Dominions occupied a curious position. Each was at war, but it depended on the will of each Dominion government how far, if at all, it would support the United Kingdom. The United Kingdom Government could raise great armies from volunteers, as it did in 1914-1916, and by conscription, as it did from 1916-1918. But it had no power to raise a single soldier from a Dominion. It was open to the Dominions to decline the slightest participation in the war. As war moved nearer in late July and early August 1914, a federal election was taking place. On 31 July 1914 the Leader of the Labor Opposition, Andrew Fisher, shortly to become Prime Minister again, said: "Australians will stand beside the mother country to help and defend her to our last man and our last

\textsuperscript{41} Souter \textit{Lion and Kangaroo} pp 162-163.
shilling. It did not come to that. Australia in fact supplied many
men and many more shillings; but it did not have to supply any. As
Mr Kim Beazley recently pointed out in his address to the Lowy
Institute on 18 April 2005, it supported the war effort because it
saw British victory as being in its national interest; from the
1880's it had disliked German expansion in the Pacific; from 1902
its possession, Papua, shared a border with German New Guinea;
and it feared that a German victory would bring territorial gains in
Africa, the Middle East and the Pacific which would damage its
position.

One aspect of Australian independence revealed itself from the
start of the war. Australia sent more than 300,000 troops abroad –
al volunteers because, after two bitter and divisive referenda in
1916 and 1917, it, unlike New Zealand and Canada, refused to
introduce conscription. Australia imposed conditions on the dispatch
of those troops. The Australian Government persuaded the United
Kingdom Government to amend the British Army Act so as to permit
section 98 of the Defence Act 1903 (Cth) to override it. Section 98

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provided that no member of the Australian Defence Force was liable to sentence of death by court-martial except for mutiny, desertion to the enemy or traitorous conduct. This was in sharp contrast to the system for British troops, and for Canadian and South African troops, who were subject to the British legislation imposing the death penalty much more widely, in particular for desertion behind the front.

Senior Australian officers, together with the British Corps and Army commanders under whom the Australian Divisions fought, considered that the more lenient punishment regime increased ill-discipline among Australian troops and that in turn affected the other Imperial troops. They and Field Marshal Haig caused the British Government to ask the Australian Government to take steps to have Australian soldiers placed under the British Army Act. The first request was made on 9 July 1916. It was repeated on 3 February 1917. Through Senator Pearce, the Minister for Defence, the Australian Government declined. A further application was made on 22 May 1917. Then New Zealand agreed to sanction the death penalty. Yet a further application was made from the military authorities, supported by Major General Monash himself. The Australian Government again declined it.

In England over the last 20 years there has been controversy about the level of executions in the British Army. 3080 men were sentenced to death by court-martial. Of these, 11.23 percent (346)
were executed. 25 Canadians, 1 South African and 5 New Zealanders were executed.\textsuperscript{45} One result of Australian immunity from the death penalty was much higher desertion rates (ie other than desertion to the enemy). In the first half of 1917, 34.2 Australian soldiers per thousand were convicted of desertion, 8.87 in the other British and Dominion Armies, and 8 in the New Zealand forces. Another result was that non-Australian forces suspended imprisonment sentences much more. In March 1918, 9 Australians per thousand were in field imprisonment; 1 per thousand in British Forces; and less than 2 per thousand in Canadian, New Zealand and South African forces. However, Bean said that when on parades of Australian soldiers reports of the infliction of the death penalty on other Imperial soldiers were read out, this aroused in the soldiers "only a sullen sympathy and a fierce pride that their own people were strong enough to refuse this instrument to its rulers." Whether or not Australia was independent, she was not servilely dependent.

The sacrifices of the Dominions led to greater British consultation with their leaders, particularly those from Canada and South Africa. So far as Australia was concerned, in 1916, the Prime Minister, W M Hughes, attended meetings of the British Cabinet. He was of Welsh origins and at those Cabinet meetings made fiery and dramatic speeches. There was a celebrated newspaper cartoon by

\textsuperscript{45} Peaty "Haig and Military Discipline" in (eds) Brian Bond and Nigel Cave Hague: \textit{A Reappraisal Seventy Years On} pp 199-200.
David Low showing the Ministers cowering behind the furniture while Hughes hurled a frenzied tirade of words and objects at them, and Asquith, the Prime Minister, saying to his Welsh colleague, David Lloyd George: "Speak to him in Welsh, David, and pacify him."

In 1917 an Imperial War Conference was held at which the Dominions called for "full recognition of the Dominions as autonomous nations of an Imperial Commonwealth". Australia was not represented, W M Hughes being unavailable by reason of political strife at home, although he attended the equivalent meeting in 1918. In these years Dominions influence increased partly because Jan Christiaan Smuts, former Boer General and future South African Prime Minister, known to his fellow Afrikaners as "slim Jannie" – crafty Jannie – rose high in allied counsels. He overplayed his hand when he asked for Lloyd George’s support in becoming Commander of the American Army in France, on the ground of his self-perceived superiority to General Pershing. The even more crafty Lloyd George did not reply to the letter.

*The Treaty of Versailles.* In August 1918 Lloyd George agreed to President Wilson's pre-Armistice demands on Germany without Australian consent. This angered Hughes, who considered them too light. He demanded and got separate representation for the Dominions at the 1919 Versailles Peace Conference. Australia obtained mandates over Northern New Guinea (which was not
merged with her existing colony, Papua), the Bismark Archipelago and the Northern Solomons. She also obtained a joint mandate over Nauru, and acted as administrator. Thus her international position was complicated by the fact that although she remained in a sense a British colony, she added to her own existing colony what were in substance further colonies of her own. The Treaty of Versailles was signed by the British delegates, led by Lloyd George and Balfour, on behalf of the whole Empire. Australia, the other Dominions, and India signed the peace treaty in an indented space just below the British signatures as constituent parts of the Empire. But this did not necessarily indicate that Australia was signing independently of Britain. On the other hand, when King George V later ratified the Treaty on behalf of the Empire, he did so only after consent to that course was sought and obtained from the Parliaments of the Dominions, including Australia. Australia also became a founding member of the League of Nations. But that, too, did not necessarily indicate independence: the Covenant of the League permitted the admission of fully self-governing States, Dominions and colonies. It did evidence movement towards independence, though. As has been seen above, the second edition of Oppenheim's *International Law* had excluded Australia from having any international position. By 1920, the date of the third edition, the editor considered that the presence of Australia and the other Dominions at Versailles within the British Empire delegation, and the fact that they became original members of the League of Nations, at which they were capable of voting independently of the United Kingdom, gave them "a position
in International Law". But it was a position which defied "exact
definition". That was because of their "special status" within the
British Empire, which Viscount Grey in 1920 described thus: "Free
communities, independent as regards all their own affairs, and
partners in those which concern the Empire at large." Oppenheim
said: "the written law inaccurately represents the actual
situation".46

But the negotiations at Versailles revealed a looming problem:
how far could the Empire continue to have a single foreign policy?
France wanted her Allies to give a military guarantee against future
German aggression. Were the Dominions to be bound by this?
General Louis Botha, the South African Prime Minister, the man who
had negotiated the end of the Boer War in 1902, and triggered off
an Afrikaner revolt in 1914 by invading South West Africa just after
South Africa entered the war, refused. He said on 15 May 1919,
contrary to the 1914 position, that Britain could be at war while a
Dominion stayed neutral: "that result is inevitable and flows from
the status of independent nationhood of the Dominions." Lord
Milner, his old foe in the Boer War, protested at this on 28 May
1919, on the ground that the Crown was indivisible. On 26 June

Roxburgh (3rd ed, 1920) p 170. The history of how Australia
gained the power to enter treaties is traced by Twomey "Federal
Parliament's Changing Role in Treaty Making and External
Affairs" in (eds) Lindell and Bennett Parliament: The Vision in
Hindsight pp 37-92.
1919 Lloyd George accepted Botha's point of view.\textsuperscript{47} The Franco-British Treaty of 28 June 1919 provided that it would not impose obligations on any Dominion unless it were approved by the Parliament of the Dominion concerned. A similar provision appeared in the Locarno Treaty of 1925.

\textit{The move to independence between 1919 and 1931}

Australia was dragged along by the Irish Free State, by South Africa and by Canada in the move towards the degree of independence achieved by 1931. The military struggle in Ireland to set up an independent republic had ended in stalemate in the Treaty of 1921, and from 1922 the Irish Free State operated as a Dominion. It did, however, tend to push constantly towards complete independence. South Africa, characterised by sharp internal divisions between the English and the Boer inhabitants, was led by the strongly anti British former Boer General, Hertzog, from 1924. He had defeated Botha's imperially minded successor, Smuts, in an election fought on issues of greater independence. As for Canada, it had a large French minority, it felt no threat from her large American neighbour to the south, and it tended towards non-involvement in international affairs in the same manner as that neighbour. Hence Canada had very different interests from those of

\textsuperscript{47} Frank Owen \textit{Tempestuous Journey} pp 545-546.
Australia, quite isolated in the south-west Pacific. The Australian view was that anything that disturbed Imperial unity was potentially damaging to her interests.

The move to independence can be analysed in three phases up to 1931.

Separate diplomatic services and power to make treaties. First, Britain permitted the Dominions to establish their own diplomatic services and to enter their own treaties. This was achieved both before and in the course of the Imperial Conferences of 1923 and 1926.

On 3 August 1920 the Australian Cabinet resolved to appoint a "High Commissioner" in Washington with full diplomatic status. This followed a similar decision by Canada. But the necessary Australian legislation was not enacted. Apart from questions of expense and expertise, it was thought that separate diplomatic representation would destroy the unity of the Empire, and hence damage the security of all its parts, in particular Australian. The first Dominion diplomatic representative in Washington was not appointed until 1924, from the Irish Free State. The first Canadian was not sent until 1927. The first Australian was not sent until 1940.
Australia was represented at the Washington Naval Disarmament Conference of 1921-2 by a small delegation. Senator Pearce, the Defence Minister, led it. Formally they were part of the British Empire delegation led by Balfour (who, on the strength of Pearce's performance, later said to Bruce that Pearce was "the greatest natural statesman he had ever met"), a statement which, if sincere, was a handsome tribute in view of his vast experience, stretching back to the Congress of Berlin in 1878). But Pearce signed the relevant treaties on behalf of Australia.

In September 1922 the United Kingdom issued a summons to the Dominions for military support against the Turks at Chanak. Unfortunately, this unpleasant reminder of Gallipoli, which was not far away, appeared in the Australian newspapers before the official cable reached W M Hughes. He strongly complained, and complained further when the Colonial Office told the Dominions that they would not be attending the Lausanne Conference to negotiate a new peace treaty between the Allies and Turkey.

Just before the 1923 Imperial Conference, Canada negotiated a treaty about halibut fisheries directly with the United States. It was signed by a Canadian Minister holding full powers from the Crown and without any role being played by the United Kingdom Government. At the 1923 Conference, under pressure from Canada, the United Kingdom Government indicated and the Conference agreed that the Dominions were no longer to be bound by treaties
signed only by the United Kingdom Government, that they could sign treaties on their own behalf, but that all governments should keep each other informed. That position was confirmed at the Imperial Conferences of 1926, 1930 and 1937, at which more detailed procedures were developed.\textsuperscript{48}

This trend towards Dominion independence culminated in the Balfour Declaration of 1926. The Imperial Conference held that year, at the insistence of General Hertzog, the South African Prime Minister, set up an inter-imperial relations committee of Dominion Prime Ministers chaired by the aged Lord Balfour. The formula devised, quoted above, had the characteristic ambiguity of that statesman, but also his characteristic ability to bridge differences: it recognised the South African and Irish demands for a public recognition of independence, and the British and Australian desire for an appearance of unity.

Despite this policy of non-resistance by the United Kingdom to the demands of some Dominions, and despite irritating events like those relating to Washington, Chanak and Lausanne, Australia did not favour an independent foreign policy. Nor did it seek independent diplomatic representation until the 1930's. By 1929 Canada, South Africa and the Irish Free State each had several

diplomatic posts, and some other countries had diplomatic missions in those Dominions. The only Australian move was to send the young R G Casey to London as an Australian Liaison Officer with the British Foreign Office.

*Reduction in powers of Governors-General.* The second aspect of the movement towards independence, culminating in 1926, was the giving up by Britain of control over the executive governments (the Governors-General) of the Dominions. This never had been the most onerous aspect of Australian dependence. In 1918, Balfour, then Foreign Secretary, agreed with Hughes' demand at the Imperial War Conference that the old practice of Dominions communicating only through Governors-General and with the Colonial Office, which he had increasingly disregarded by dealing directly with Lloyd George, should cease.\(^49\) Increasingly the Australian Governor-General was bypassed, and the Ministers in Melbourne and London communicated direct.\(^50\) At the 1926 Imperial Conference, the United Kingdom accepted a Canadian suggestion that henceforth Governors-General would represent only the sovereign, not the United Kingdom Government, would act on the advice of the relevant Dominion government, not the United Kingdom

\(^{49}\) Cunneen *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* pp 144-146.

\(^{50}\) Cunneen *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* p 179.
Government, and would no longer serve as a channel of intergovernmental communication. From 1920 the United Kingdom Government did not directly select the Australian Governor-General; rather it presented some names to the Australian Prime Minister, who would select the preferred candidate. By 1930 it was accepted that the Australian Governor-General would be appointed by the King only on the advice of the Australian Prime Minister, and the Imperial Conference of that year resolved that the King in appointing Governors-General should always act on the advice of the relevant Dominion Ministers.

**Abdication of legislative control.** Thirdly, Britain gave up her control over the Dominion legislatures. Although this was not achieved until 1931, it was contemplated in 1926 and the first steps towards it were taken then.

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51 Cunneen *Kings’ Men: Australia’s Governors-General from Hopetoun to Isaacs* p 168.

52 Cunneen *Kings’ Men: Australia’s Governors-General from Hopetoun to Isaacs* pp 151-153 (Lord Forster in 1920: indeed Lord Milner, the Colonial Secretary, asked W M Hughes if he had a name to suggest) and 164-165 (Lord Stonehaven in 1925).

53 *Sue v Hill* (1999) 199 CLR 462 at 495 [74].

54 Cunneen *Kings’ Men: Australia’s Governors-General from Hopetoun to Isaacs* p 179.
Despite the power of the monarch to disallow Australian legislation conferred by s 59 of the Constitution, Chamberlain had said in 1900 that it would never be exercised, and it never was.\textsuperscript{55}

That left, as the primary restrictions on Australian legislative independence, the Colonial Laws Validity Act, the doctrine of repugnancy and the lack of power to legislate extraterritorially.

As the Irish Free State pointed out at the 1926 Conference, these forms of legislative control over the Dominions survived the Balfour Declaration. J G Latham, the Australian Attorney-General, said that the matter was complicated for Australia by its Federal Constitution, which was difficult to amend. The complexity of the issues led the Conference to set up an expert committee to report to a future conference. That committee - the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation - met in 1929. Australia aimed to prevent the enactment of United Kingdom legislation which conflicted with either the Federal Constitution or the Constitutions of the States. The Committee reported to the 1930 Imperial Conference, and it recommended the enactment of the Statute of Westminster. That took place in 1931.

\textsuperscript{55} Howell "Joseph Chamberlain and the Amendment of the Australian Constitution Bill" (2001) 7 The New Federalist 16 at 28. See however p 17 n 23 above.
The principal provisions of the Statute of Westminster were as follows. First, neither the Colonial Laws Validity Act, nor any doctrine of repugnancy between Dominion and English law, was to apply to Dominion legislation (s 2). Secondly, Dominion parliaments were recognised as having full power to make laws with extraterritorial operation (s 3). Thirdly, the limits on federal power as against the Australian States were maintained (ss 8 and 9). Fourthly, in the Preamble there was a recital that no law of the United Kingdom Parliament made thereafter would extend to any of the Dominions except at the request and with the consent of the Dominions: the same appeared in s 4, and reflected a convention predating the Statute. Finally, the principal provisions were not to apply to Australia, New Zealand or Newfoundland unless their legislatures adopted them.

The Commonwealth Parliament did not in fact adopt the Statute of Westminster until 1942 – partly because there was no public pressure for change, partly because the statement in the Preamble removed any urgency, partly because of the continuing lack of provocativeness on the part of the United Kingdom Government, partly because of the lack of any local equivalent to Afrikaner or Irish grievances, partly because public opinion valued the last shreds of a unitary empire over independence, and partly
because of a dislike by the States of a rise in the standing of the Federal Government.\textsuperscript{56}

When the Statute of Westminster Adoption Act was enacted, it was made retrospective to the start of the war because there were doubts about the validity of extraterritorial legislation and legislation which may have been repugnant to the Merchant Shipping Act 1894 (UK); and because there were delays in obtaining appropriate British legislation, or enacting shipping legislation which had to be reserved for King George VI's assent.\textsuperscript{57}

\textit{The Australia Acts 1986 (Cth and UK)}

Although the Statute of Westminster achieved legal autonomy for the Dominions, it did not do so completely for Australia, since it left the Colonial Laws Validity Act and the other restrictions applying to the States. Newfoundland, New Zealand, the Union of South Africa and the Irish Free State were not federations, and hence for them s 2 was sufficient to overcome the restrictions. Canada was a

\textsuperscript{56} W J Hudson and M P Sharp \textit{Australian Independence: Colony to Reluctant Kingdom} pp 123-129; Darwin "A Third British Empire? The Dominion Ideal in Imperial Politics" in (eds) Brown and Louis \textit{The Oxford History of the British Empire: Vol IV: The Twentieth Century} pp 71 and 73.

\textsuperscript{57} See Twomey "Sue v Hill - The Evolution of Australian Independence" in (eds) Stone and Williams \textit{The High Court at the Crossroads} p 95.
federation, but s 7(2) extended s 2 to the Canadian provinces. For Australia there was no equivalent to s 7(2).

What the 1926 Imperial Conference and the Statute of Westminster did for the Federal Government was done for the States by the Australia Acts 1986 (Cth and UK). It is possible that even between 1931 and 1986 the States and the Commonwealth, using s 51 (xxxviii) of the Constitution, could have released the States from the Colonial Laws Validity Act. At all events that head of power was used for the Australia Act 1986 (Cth). The legislation provides that no Act of the United Kingdom Parliament was to extend to the Commonwealth, to a State or to a Territory (s 1). The States were given powers to legislate extraterritorially (s 2). The Colonial Laws Validity Act and the doctrine of repugnancy ceased to apply (s 3). Advice to the Queen in right of each State was to be tendered only by the relevant State Premier (s 7). Powers of suspension and disallowance were abolished (ss 8 and 9). Privy Council appeals from State courts were abolished (s 11). It is noteworthy that the Preambles to the Act described Australia as already being a "sovereign, independent" nation.

58 Twomey "Sue v Hill - The Evolution of Australian Independence" in (eds) Stone and Williams The High Court at the Crossroads pp 91-94.

59 The significance of this is discussed by Winterton "The Constitutional Position of Australian State Governors" in Lee and Winterton (eds) Australian Constitutional Perspectives pp 299-301.
Although some see the Australia Acts as the last stage on a journey to independence, they unquestionably lack drama – the drama of the American Declaration of Independence, of the fall of the Bastille in France, of the Italian Risorgimento, of the founding of the German Empire at Versailles in 1871, dominated as it was by angry scenes between Chancellor, Kaiser and generals. The Australia Act 1986 (Cth) came into force during a visit by the Queen to Australia in March 1986. As she and Duke of Edinburgh moved down a line of dignitaries assembled for the ceremony, she became engaged in conversation and stopped, leaving Senator Gareth Evans lower down the line opposite the Duke of Edinburgh. At high speed and with considerable erudition the former Attorney-General explained to his Royal Highness the history of federation, of the Balfour Declaration, of the Statute of Westminster, and of the need to complete the progress to a glorious independence by enacting the Australia Acts. The procession remain stalled and his Royal Highness was forced to continue listening to the voluble lecture. When finally the Senator finished, Prince Phillip leaned forward and said in contemptuous tones: "Big deal".

In a way he was right. Like all the earlier stages of the journey to independence after 1901, the Australia Acts were quintessentially uncolourful, gradualist and Fabian, tending to reflect earlier changes to reality rather than bringing them about. But before surveying the
whole journey, it is desirable to glance at Australia's international activities after 1931.

*International activities from 1931*

*Before the Second World War.* In 1935 the Department of External Affairs was established as an autonomous foreign office, separate from the Prime Minister's Department. From 1936 there were regular intakes of diplomatic cadets. In 1937 a counsellor was sent to Washington, to be attached to the British Embassy. By that time Ireland, Canada and South Africa had separate missions in Washington. In 1939 it was decided to open legations in Washington, Tokyo and China. In 1940 R G Casey went to Washington, and Chief Justice Latham to Tokyo. In 1940 Australia set up its first diplomatic post in another Dominion – Canada. In 1941 Sir Frederick Eggleston went to Chungking.

In general Australia did not pursue an independent foreign policy. But it and other Dominions were consulted by the British Government as particular crises arose, and their thoughts played a role in the decisions, for example, not to resist Germany's reoccupation of the Rhineland in 1936, to force King Edward VIII from the throne in 1936, and not to fight for Czechoslovakia in 1938.
When Joseph Chamberlain's younger son, Neville Chamberlain, announced that Britain was at war with Germany on 3 September 1939, the Australian Prime Minister was R G Menzies. Because he did not believe in the divisibility of the Crown, he took the view, which had been universal in 1914, that the British declaration of war automatically put the Dominions in a state of war. Shortly after Chamberlain's announcement, Menzies told the nation that Britain was at war and "as a result, Australia is also at war". It was a view shared by John Curtin, Leader of the Opposition, but is now generally thought unsound. (In 1941, unlike what happened in 1939, however, Australia declared war on Finland, Rumania, Hungary and Japan. It did so after a request to King George VI to assign power to do so to the Governor-General under s 2 of the Constitution.) The New Zealand Prime Minister declared war a few hours after Menzies' speech, after consulting his Cabinet and obtaining a proclamation from the Governor-General formally declaring war. In South Africa there could scarcely have been greater division. The South African Prime Minister, General Hertzog, proposed neutrality; the Deputy Prime Minister, General Smuts, favoured war. Cabinet supported Smuts by a majority of one. The Union Parliament supported him by the narrow vote of 80-65. General Hertzog requested a general election on the issue, which the Governor-General, Sir Patrick Duncan, refused. As a result General Smuts became Prime Minister and he advised the Governor-General to declare a state of war with Germany. Canada did not declare war
until 10 September 1939, after a favourable vote in the Canadian House of Commons.

Ireland remained neutral — so neutral that when Hitler committed suicide at the end of the war, the Prime Minister, Eamon de Valera, called at the German Legation in Dublin to offer his condolences to the German Minister and to convey his grief and regret at the lamented death of the distinguished German Chancellor and Head of State. In war time, medals are awarded for acts of conspicuous gallantry in the field. Sir John Maffey, the United Kingdom representative in Dublin, said that de Valera's call was "an act of conspicuous neutrality in the field".⁶⁰

Since 1945. Since the Second World War Australia has established diplomatic missions in most countries of the world, entered thousands of treaties and adopted its own foreign policy – sometimes identical with Britain's, sometimes not.

Conclusion

To ask when Australia achieved independence "is to assume a simple answer to a complex issue". The answer depends on the purpose for which the question is asked.

If it is asked in relation to the powers of the Governor-General, Australia was independent of the Governor-General considered as a British envoy from at least 1926, when the Imperial Conference agreed that his powers should be limited.

If the question is asked in relation to Australia's international personality, Australia was probably independent from 1920, when Britain ceased to object to treaties being made or diplomats appointed, or 1926, when it was accepted that the Australian Governor-General could act only on the advice of the Australian Government. Although Australia did not act on the powers gained by default for some years, it was certainly independent when it opened diplomatic missions in Washington, Tokyo and Chungking in 1940-1941, and when it declared war on Finland, Rumania, Hungary and Japan in 1941.

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If the question is asked in relation to Australia's capacity to legislate without regard to United Kingdom law, the relevant date is 1931, for then Australia had the relevant power, although its exercise depended on the enactment of the Statute of Westminster Adoption Act, which did not happen until 1942. Thereafter Australia was legislatively independent: its component States paradoxically remained in a sense British colonies, but the Preamble to the Statute probably protected them from any exercise of British legislative power.

If the question is asked in relation to the legislative power of the States, the answer is 1986. Some analysts declined to identify particular dates: they see the movement to independence, though real, as imperceptible, leaving it difficult to identify crucial stages, and particularly the final stage. To some extent that point of view is supported by the tendency of practice to anticipate legal change: for example, the Balfour Declaration was anticipated by his own speech on 6 July 1914 and by Viscount Grey's in 1920.

It is arguable that de facto, as opposed to de jure, independence existed in 1901: for Chamberlain made it plain that Britain would not oppose Australian wishes, and if he said that, his less formidable successors would have been even more likely to accede to any...firmly...pressed...Australian...demand....Australian independence was not achieved by Australian rebellion, but by British abdication in the face of determined requests from others. If
the requests had come earlier, and from Australia, so would the abdication.

III The loss of British independence

This sad chapter can be dealt with briefly. From the mid 1950's Britain began considering whether to join the European Economic Community. In the early 1960's it began negotiations for entry, but General de Gaulle vetoed the application. In 1972, after his retirement, she succeeded.

No doubt this has brought her benefits. It certainly did for Eire, which joined later. As the Dublin taxi drivers like to tell their passengers, Eire is now wealthy for three reasons: educational standards are high, the company tax rate is twelve and a half percent, and "we're robbing the Germans blind".

But Britain's present position is that large parts of her domestic law are at risk of being struck down by a foreign court, the European Court of Justice, on the ground that they are invalid to the extent that they are inconsistent with Community law; and much of her economy is regulated by laws made by foreign bodies in Brussels and Strasbourg. Those bodies have exclusive power in customs, trade, competition policy, much environmental protection and consumer protection, and primary power in many other fields. As Hugh Gaitskell, Leader of the British Labour Party in the early
1960's, said, Britain has turned her back on a thousand years of history. She has an independent foreign policy, but is not independent in legislative or economic policy. She is only a province in a large, highly regulated and highly bureaucratic supranational state. She is much more under foreign control than the Australian colonies were before Federation.

IV Threats to Australian Independence

Some threats to Australian independence have recently emerged as a result of its international dealings. One relates to the ICC Statute. Others relate to the rise of international law as a means of construing Australian statutes, developing the Australian common law and construing the Constitution: the vice in all these trends is that they compel Australian courts to apply principles that are not part of our law and may never have been approved by our Parliament. Another threat relates to the expansion of Commonwealth legislative power at the expense of the States by reason of treaties entered into by Australia. Another is the "Teoh doctrine" which, however, appears to have stalled.

The ICC Statute

The background: In July 1998, 120 nations at a conference in Rome agreed to establish an international criminal court – the "ICC" – by means of a document called the "ICC Statute." Australia
signed the ICC Statute on 9 December 1998. In 2002 Australia ratified the ICC Statute, and in that year Parliament enacted the International Criminal Court Act 2002.\textsuperscript{63}

The ICC is not strictly, or at least solely, a court. Apart from judicial functions, it carries out investigative and prosecution functions through what is called "The Office of the Prosecutor". In this it is wholly alien to Australian conceptions of "courts" – in our system the police and the judiciary have quite distinct functions.

At the same time as it enacted the International Criminal Court Act 2002, parliament also enacted the International Criminal Court (Consequential Amendments) Act 2002. That inserted Chapter 8 into the Criminal Code. Chapter 8 renders criminal genocide, crimes against humanity, war crimes and "crimes against the administration of the justice of the International Criminal Court." These are all defined at considerable length and in considerable detail over about 75 pages.

\textsuperscript{63} It did so after the matter was considered by the Commonwealth Parliament’s Joint Standing Committee on Treaties, whose members reflected various shades of political opinion. Interesting arguments for and against are described in its Report: \textit{Report No 45: The Statute of the International Criminal Court} (2002). I am greatly indebted to Professor G de Q Walker for his valuable suggestions on this subject.
What follows is not intended to dilute the importance of deterring and preventing crimes of that kind by national legislation. Nor is it intended to oppose all treaties seeking to deal with the subject. It merely raises some questions about the suitability of the ICC Statute for Australia.

The ICC Statute and the legislation enacted in fulfilment of Australia's ratification of it have raised questions about its impact on Australian sovereignty from several points of view.

The critics are not referring to the mere fact of entering a treaty, for while most treaties involve a limitation on the power of a given State to act as freely as it could before entering it, this regime goes further.

In traditional international law, neither a State nor an international court may try a person for an alleged crime unless:

(a) the crime occurred in that State (the territorial principle);

(b) that person is a national of the State (the active personality principle);

(c) the victim is a national of the State (the passive personality principle);
(d) the crime affected the welfare of the State (the protective principle); or

(e) the crime is a war crime or a crime against humanity.

Normally, also, no foreign officials or judges have power to seek to investigate or adjudicate on allegations of crime on the soil of the State in question.

It is true that extradition treaties commonly exist, under which one State will surrender persons whom a second State wishes to try. But normally these treaties do not require surrender unless the act charged is criminal under the laws of both States, and unless the person surrendered is tried and punished only for the offence for which extradition was requested and granted.

The result of the traditional international law principles is that if the citizen of a State is accused of crimes against the laws of that State committed within the territory of that State, it is that State which has the primary jurisdiction to try the accused – not the courts of any other State, nor any international court. And it is that State which has exclusive powers both of investigation and of adjudication in its own territory.

Under the ICC Statute, sovereignty is adversely affected in three ways:
(a) the ICC can claim jurisdiction to try accused persons even if none of the traditional principles apply;

(b) in limited circumstances, the ICC Statute authorises an international body to intrude onto the territory of other States in order to apprehend suspects;

(c) the ICC Statute permits the ICC to sit in Australia.

It is for reasons of this kind that two former High Court judges, Sir Harry Gibbs and Sir Ninian Stephen, have said that ratification of the ICC Statute creates an inroad in Australian sovereignty.\(^{64}\)

*The primacy of Australia?* Assume that an Australian soldier, or some other Australian citizen, is suspected of one of the crimes proscribed by Chapter 8 of the Criminal Code, and that the Australian Government wishes to prosecute that suspect. Can it do so? Or must the suspect be tried by the International Criminal Court?

Section 268.1(2) and (3) of the Criminal Code provide:

"(2) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(3) Accordingly, the *International Criminal Court Act 2002* does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences created by this Division that are also crimes within the jurisdiction of the International Criminal Court."

And s 3 of the International Criminal Court Act 2002 provides:

"(1) The principal object of this Act is to facilitate compliance with Australia's obligations under the Statute.

(2) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

Note: The crimes within the jurisdiction of the ICC are set out as crimes in Australia in Division 268 of the *Criminal Code*.

So the contemplation is that Australia has a right to exercise its jurisdiction in primacy to the ICC. This is achieved by Article 17.1(a) and (b), which provide:

"1 Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;"
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;"

The trouble with this regime is that it will be the ICC – not an Australian court – which determines whether Australia is or has been unwilling "genuinely" to investigate or prosecute a case. The word "genuinely" can cover a very wide range of application. In substance it is arguably the ICC, not Australia, which has primacy, for it is the ICC, not Australia, which decides the issue of "genuineness". Will the ICC find a lack of genuineness, for example, in decisions by Australian police officers not to prosecute for want of sufficient evidence to prove guilt beyond a reasonable doubt?

It must be remembered that the judges of the ICC are elected at meetings of the Assembly of States Parties: those who secure the highest number of votes by two-thirds majority. The States Parties are to take into account the need for representation of the principal legal systems of the world, equitable geographical representation, a fair representation of female and male judges, and judges with expertise on specific issues such as violence against women or children (Articles 6-8). It is unlikely that an Australian will often be elected on these bases.

The Preamble of the ICC Statute has a very strong anti-war crime tendency without any countervailing references to the protection of the rights of accused persons. It is true that there are
numerous provisions in the ICC Statute itself purporting to protect accused persons: for example, the need for strict construction of crimes in a manner favourable to suspects (Article 22.2); the need for the prosecution to prove guilt beyond reasonable doubt (Articles 66.3 and 67.1(i)); and the right to remain silent without penalty (Article 67.1(g)). There is a natural tendency in courts to amplify their own jurisdiction. Here it is likely to be reflected in a process of interpreting the loosely worded crimes in question widely – and the wording in the ICC Statute is much more loose than the equivalent language of the Criminal Code. It is also likely to be reflected in exploitation of the absence of jury trial. And it is likely to be reflected in attempts to avoid the criticism which courts often attract if they acquit seemingly unsavoury people. Against this background Article 17 is a feeble barrier against invasions of Australian sovereignty by permitting Australian nationals whom Australia wishes to try to be tried by the ICC. So is that part of the Preamble to the ICC Statute which emphasises that nothing in it authorises a State Party to intervene in the internal affairs of any State. The ICC judges are likely to be elected, on the whole, by States which are, like most States in the world and unlike Australia, not liberal democracies, and which are not friendly to Australia. Certainly constant hostility is shown to Australia by the "international community" in the form of committees operating under the auspices of the United Nations or established by treaties.65

65 Sir Harry Gibbs "The Erosion of National Sovereignty"

Footnote continues
**ICC investigations on Australian soil.** The traditional principle that sovereign States conduct police investigations in their own territories to the exclusion of foreign agencies is undercut by s 107 of the International Criminal Court Act 2002. Section 107 provides that the Prosecutor of the ICC may conduct investigations:

(a) in accordance with Part 9 of the ICC Statute;

(b) as authorised by the Pre-Trial Chamber under Article 57(3)(d) of the ICC Statute.

Part 9 of the ICC Statute (ie Articles 86-102) obliges States who are Parties to cooperate with the Court in its investigation and prosecution of crimes – in arresting and surrendering suspects, questioning persons, taking evidence and the like. That is one thing. But Article 57(3)(d) provides that the Pre-Trial Chamber may authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured its cooperation under Part 9 of the ICC Statute if the Pre-Trial Chamber has determined that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any

component of its judicial system competent to execute the request for cooperation under Part 9.

So an Australian statute permits a foreign police official to conduct investigations in Australia against the will of Australia on the ground that Australia is unable to comply with the request. If that inability is not a real possibility, this provision is unnecessary; if it is a real possibility, parliament has made an admission of that shameful fact.

**ICC hearings on Australian soil.** Further, by s 108 of the International Criminal Court Act 2002, the ICC may sit in Australia – it may there take evidence, conduct or give judgments in proceedings, and review sentences. This is a highly unusual state of affairs. It is particularly unusual in that Australian Federal courts, under Chapter III of the Constitution, can only exercise judicial, not legislative or execute power, and Australian State and Territory courts in practice operate similarly – yet the ICC goes beyond what they can do by carrying out both executive and judicial functions.

**New crimes without Australian consent.** Another source of potential disquiet lies in the possibility of new crimes being created against Australia's will.

First, the crimes described in the ICC Statute already go beyond those recognised in traditional international law, but Article
121 provides that they can be widened, since the ICC Statute can be amended by a two-thirds majority of States Parties. Australia can only be bound by an amendment on ratification by the Australian Government – but this is an executive action only: no parliamentary approval is necessary.

Secondly, more insidiously, among the sources of "law" to be applied by the ICC are "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" and "general principles of law derived by the [ICC] from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime ..." (Article 21.1(b) and (c)). The ICC may also "apply principles and rules of law as interpreted in its previous decisions" (Article 21.2). This permits the applicable law to be developed, among other ways, through the ICC itself applying its own questionable decisions in future cases. The effect of these provisions, taken with s 108 of the International Criminal Court Act 2002, is that Parliament has delegated to a non-Australian body the power to make laws operating in Australian territory. Both the wisdom and the constitutionality\(^{66}\) of this course must be left for the judgment of others.

\(^{66}\) *In re the Initiative and Referendum Act* [1919] AC 935 at 945; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 121; *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 485-487.
65.

If one thinks that Australians commit few war crimes, few crimes against humanity and little genocide, or that there are only few persons in Australia who have carried out this conduct elsewhere, then the ICC Statute is an example of only a very small loss of sovereignty; if one takes a different view, it is a larger loss.

Australia can escape the obligations of the ICC Statute, but only by giving one year’s notice (Article 127).

Less direct effects on independence

It is a basal principle of Australian law that while the executive is at liberty to enter any treaties with other States which it wishes to, no treaty operates directly in domestic law unless legislation is enacted having this result. In short, treaties are not self-executing. That operates as an extremely important democratic safeguard. In contrast, one covert threat to Australian independence may be found in reasoning which seeks to dilute or sidestep that safeguard, because it exposes Australia to the reception of rules devised by foreigners without either popular consent within Australia or an express intention on the part of the Government to apply them in Australia.

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67 Some quasi-exceptions are listed in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex p Lam* (2003) 214 CLR 1 at 33 [100].
Construing Australian statutes by reference to international "law". It is an established rule for the construction of Australian statutes that, if they are ambiguous, they should be construed:

(a) so as not to be inconsistent with Australia's obligations under existing or contemplated treaties;  

(b) so as not to be in conflict with the established rules of international law (ie international law other than treaties).  

There are modern tendencies to push this rule too far. One tendency detects ambiguity too readily. Another tendency broadens unduly the expression "the established rules of international law". Traditionally that referred to the system of law which governed relations between nation States. It referred to practices generally recognised among States as obligatory and general principles of law recognised by civilised nations. Modern international lawyers are far more aggressive. States are sometimes said to be bound by conventions which they have not signed or ratified, or which they may even have opposed, on the basis that customary international

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69 Polites v The Commonwealth (1945) 70 CLR 60 at 68-69, 77 and 80-81.
law is changed by treaties to which many States are parties, particularly treaties purporting to protect human rights. Further, appeal is made to principles, purportedly of law, which are recognised by nations, many of whom are not particularly civilised, and recognised by international organisations or non-government organisations which are not themselves nations.

*The development of the common law by reference to international "law".* An equally pernicious tendency is to state common law rules so that they are consistent with rules of what are said to be international law.

*The construction of the Constitution by reference to international "law".* An even more strange approach is to construe the Constitution by reference to the principles of international law, at least so far as they postdate 1900, as many do. That is an approach advocated by Kirby J\(^70\) but opposed by other High Court judges.\(^71\)

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The expansion of the external affairs powers. Another respect in which Australian independence can be affected is by the international activities of the Executive in making treaties. As was seen above, s 51(xxix) of the Constitution gives to the Commonwealth power to legislate over "external affairs". In R v Burgess; ex p Henry\textsuperscript{72} Dixon J said that a law to secure obligations under a treaty about "some matter indisputably international in character" was valid as legislation about external affairs. But a law to enforce obligations under a treaty which relates only "to a matter of internal concern, apart from the [treaty] obligation undertaken by the Executive" was not valid: it was not about external affairs. This assumes that it is for the court to decide objectively what is "indisputably international in character" and what is only "a matter of internal concern".

In \textit{The Commonwealth v Tasmania}\textsuperscript{73} Mason J took a different view. After saying that "international concern" was an "elusive concept",\textsuperscript{74} he said it was not for the court to decide whether the subject-matter of a treaty was of "international character or concern"; that the matter was one for the judgment of the Executive and Parliament; and that the mere fact that the Executive entered

\textsuperscript{72} (1936) 55 CLR 608 at 669.
\textsuperscript{73} (1983)158 CLR 1.
\textsuperscript{74} The Commonwealth v Tasmania (1983) 158 CLR 1 at 123.
into and ratified a treaty, and the mere fact that Parliament enacted legislation bringing it into effect in domestic law, evidenced judgments that the treaty was of international character and concern.\(^{75}\)

The effect of this reasoning is that even if, apart from s 51(xxix) there is no power to enact a law on a particular subject, the government can give itself that power by entering a treaty on that subject. The mere fact that it has done so reveals that the subject is one of international character or concern. Thus in *The Commonwealth v Tasmania* the subject of heritage protection of the Franklin River was said to be of international character or concern because the Commonwealth had entered a treaty relating to it. This course is evidently open even though a State (in that case Tasmania) chose to follow a different policy in relation to the Franklin River, namely building a dam on it. *The Commonwealth v Tasmania* took this reasoning to the furthest point so far achieved. It did so by a bare majority of 4-3, and even within the majority there were differences. However, this type of reasoning, pushed too far, is plainly subversive of the powers of the States by the importation of international standards to which neither the States nor the electorate at large ever agreed.

\(^{75}\) *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 125.
International treaties as a source of "legitimate expectations".
Another extension of international law into domestic law took place in *Minister for Immigration and Ethnic Affairs v Teoh.*\(^76\) Teoh was a Malaysian who married an Australian wife. They had three children, and cared for four other children earlier borne by the wife. He was then convicted of drug dealing and sentenced to six years' imprisonment. The Minister's delegate refused his application for a permanent entry permit into Australia because of the convictions. A majority of the High Court (Mason CJ, Deane and Toohey JJ)\(^77\) held that ratification by Australia of the United Nations Convention on the Rights of the Child was a positive statement to the world and to the Australian people that the Executive Government would act in accordance with the Convention, and this generated a legitimate expectation in the Teoh children that their best interests would be taken into account, and that they would not be separated from their parents unless this was in their best interests. It was also held that if the Minister's delegate proposed to make a decision inconsistent with that legitimate expectation, procedural fairness required the children to be notified, and given an opportunity of presenting a case against that course being taken.


\(^77\) Gaudron J reached the same conclusion but by a different route.
As McHugh J explained in his dissenting judgment, the decision has problems. It is strange to say that ratification of a treaty is a statement to the Australian people that the Executive will thereafter act in accordance with it in its domestic conduct, when it could only be bound to do so if the treaty were enacted as a statute. The ratification is, rather, only a statement to other States who have signed the treaty that Australia regards itself as bound internationally. Further, it is fictitious to say that a legitimate expectation has been generated in people by a treaty of which they have never heard. It is also strange that ratification of a treaty creates a legitimate expectation that a decision-maker will follow a particular course, when the decision-maker is not obliged to follow that course. Finally, if ratification by the Executive of a treaty creates a legitimate expectation that it will be complied with, and non-compliance with the treaty invalidates decisions unless a hearing has been given, then the rule that treaties have no force in domestic law unless enacted by statute will have changed, and Australian law will have been altered by the mere making of a treaty by the Executive without parliamentary sanction.

It is for reasons of this kind that Teoh's case has been criticised and departed from in a later case: *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex p Lamb*.78

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78 (2003) 214 CLR 1 at 27 [81]-34 [102] per McHugh and Gummow JJ; 37 [120]-39 [122] per Hayne J; and 45 [139]-48 [148] per Callinan J. A valuable analysis of the impact of these
V Conclusion

In the Acts of the Apostles, Chapter 22, verses 24-28, the following incident in Paul's dealings with the Roman authorities in Jerusalem is recorded:

"The chief captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him.

And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned?

When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest: for this man is a Roman.

Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea.

And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was free born."

May we not lightly lose the freedoms we were born with.

dev-developments in relation to Australian domestic law is to be found in Justice Callinan's Sir John Latham Memorial Address delivered on 3 May 2005.