BOOK REVIEW

JOHN PYKE*

Anne Twomey, *The Chameleon Crown; the Queen and her Australian Governors*

(Federation Press 2006) 272 pp

When I studied law in the 1970s I was shocked to be taught that this country, which I had assumed to be independent at least since I was born[1], was still subject to the paramount power of the United Kingdom Parliament – then still referred to in anachronistic terms as the 'Imperial' Parliament. The alleged consequences were that, in theory at least (whatever 'in theory' was supposed to *mean*), the UK Parliament could repeal the Commonwealth Constitution and the Statute of Westminster, and that, in some sense that was rather more than theory, the States were still British colonies. Now, thanks to the *Australia Acts 1986* (Cth and UK) ('the Acts') we don't have to teach this nonsense to our students – indeed some of them were born since the Acts commenced on 3 March 1986 and they are certainly entitled to take Australia's independence for granted.

Dr Twomey's book is principally about the history of the negotiations leading up to the passage of the Acts. The book starts with a few chapters about the development of responsible government in Australia and the history of the appointment, and sometimes dismissal, of State Governors, and the role played by the United Kingdom government in those appointments and dismissals. Then the rest of the book tells the story of the above negotiations, in more-or-less chronological order. Though the subtitle makes it seem as if it is simply about the position of the State Governors, the book covers *all* of the problems that annoyed State governments before 1986 – the impossibility of repealing 'Imperial' laws that applied by paramount force, Privy Council appeals and the channel of communication with the Palace in respect of the appointment or dismissal of Governors.

The writing of the book is a historical tale in itself. In order to tell the main tale, the author needed access to the archives of all the governments involved in the negotiations – six States, the Commonwealth and the United Kingdom. As some of the documents

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[1] Murphy J notoriously held, in *Bistricic v Rokov* (1976) 135 CLR 552, that Australia including the States had been independent since the commencement of federation. He is reported to have confessed to Professor Tony Blackshield that he had been tempted when writing the judgment to put the date of independence as his own date of birth. Though not logically defensible, I can understand the intuition behind this – he must have felt, like myself, that the country he grew up in had been independent at least as long as *he* had been there to observe it.

were less than 30 years old, she had to ask governments to agree to the release of Cabinet documents before the expiry of the 30-year embargo. The United Kingdom government and most of the States readily agreed, but the Commonwealth refused – rather pointlessly, because copies of relevant Commonwealth correspondence were in the files of the other parties anyway. One has to ask, from what level within the Commonwealth government does this spirit of non-cooperation and pointless secretiveness originate?

The governments that did cooperate were somewhat 'courageous' (in Sir Humphrey Appleby's usage of the word) because the records revealed a degree of confusion and pettiness, not only on the part of the Commonwealth, but on the parts of all the governments involved. The United Kingdom government was concerned for the position of the Queen; concerned not only that she should not receive conflicting advice from both State and Commonwealth governments – which is quite understandable – but also that she should not be advised to assent to a reserved bill that might be unconstitutional – which reveals an inability to understand that under Australia's written Constitution the constitutionality of an Act is determined by the courts and that executive assumptions about validity can be wrong and are, in the end, irrelevant. As to the State governments, while one must have sympathy for their position, their constant harping on their 'sovereignty' indicates that they, likewise, did not fully understand their own situation as creatures of the Commonwealth Constitution. The States also managed not to understand that the United Kingdom government did not see itself as merely a 'channel of communication' for advice from State Premiers to the Queen, but felt that it had an active responsibility for giving the Queen advice as to what *it* thought was best. It is hard to blame either the UK or the States for this situation. If a State Premier had ever asked the Foreign Secretary "Why didn't you tell me?", the reply could well have been "You never asked" – it seems that until the late 1970s each 'side' simply operated on the basis of inconsistent and uncommunicated assumptions.

The Commonwealth government, especially in the early parts of the story, also comes across as quite petty. Under Gough Whitlam it refused to agree to quite reasonable requests from the States because Whitlam was concerned that removing Imperial paramountcy would increase States' powers. Since the Commonwealth has the advantage of a very centralist Constitution – 40 express heads of power in s 51 (including a general taxation power with no subjects of taxation reserved to the States and one excluded from them and an external affairs power with both a treaties and an external matters aspect), a necessarily-implied 'nationhood' power, the conditional grants power under s 96, the appropriations power in s 81, the power to override inconsistent State laws under s 109 *and* the power to appoint the High Court Justices who interpret the Constitution – what did it have to lose by freeing the States from the constraints of a few paramount British laws? (Admittedly the breadth of the appropriations and nationhood powers was not made clear until two weeks before the Dismissal[2], and the Commonwealth's power over coastal waters not until a week after the election that confirmed the dismissal[3], but Whitlam's determination to beat down the States on *every* little issue does not reflect well on him.)

[2] *Victoria v Commonwealth* (the *AAP case*) (1975) 134 CLR 338, decided 29 October 1975.
[3] *New South Wales v Commonwealth* (the *Seas and Submerged Lands case*) (1975) 135 CLR 337, decided 17 December 1975.

Happily the Commonwealth became more cooperative in the years after 1975, and negotiations slowly made progress (just how slowly is made clear by the number of chapters needed to tell the story – 15 of them). Attorney-General Senator Durack and then the Hawke government moved from a position of automatically opposing the States to being prepared to agree with any reasonable request, though as the author points out (at pp 240-41) the Commonwealth and States would still, on occasions, misrepresent each others' stance to the British. In the last year of the negotiations the sticking point became the Foreign Office's, and the Palace's worry, that Her Majesty might receive conflicting advice from a State and the Commonwealth. At this point a perhaps unlikely hero stepped in – expatriate Australian, theorist of natural law and States'-rights-oriented constitutional adviser Professor John Finnis of Oxford, who pointed out that if Her Majesty's *only* remaining role with respect to the States was the appointment and dismissal of Governors, and if the Commonwealth could be persuaded that that was something they had no right to interfere in, there would be *no* conflicting advice. (Perhaps this shows that sometimes only a philosopher can see a blindingly obvious point that everyone else is missing – because in retrospect it is so obvious that one wonders why anyone thought there was a problem.) Eventually everyone was persuaded that this was true, the final drafting was agreed on, eight parliaments passed complementary legislation and the two Acts commenced on 3rd March 1986.

Now where, you might ask, is the "Chameleon Crown" in all of this? It seems to me that the title, though alliterative and catchy, does not really represent the theme of the book. If we mean by 'Crown' the Queen and her advisers in the Palace, the Crown remains throughout the story an extremely visible bejewelled object. If its nature was camouflaged at all, it was through the earnest endeavours of the Foreign Office to protect it, and through its failure to explain to the States how it saw its protective role. To the extent that the role of the Foreign Office was kept hidden from the States, *it* is the chameleon in the story – though as noted above, the misunderstanding may have been more a matter of two parties not communicating their assumptions than of one party using camouflage to hide itself among the trees. The role of 'the Crown' remains as it has been ever since 1837 – to act on advice from responsible Ministers. What the story is about and what the Australia Acts achieved, is the change in identity of these Ministers from British ones to the ones in the States of Australia. Though the title and subtitle both misrepresent the contents, it is a significant story and generally well told (though a few of the departures from chronological order irritated me). The young students mentioned in the first paragraph above would probably not find it very interesting, but as someone who had lived through those times I found it quite absorbing.