

CAUTIOUS CONSTITUTIONALISM: COMMONWEALTH LEGISLATIVE INDEPENDENCE AND THE STATUTE OF WESTMINSTER 1931-1942

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This paper considers the thesis that Australia was practically independent in 1931. It criticises this argument by showing that the Commonwealth was dependent in various ways on the British Parliament between 1931 and 1942. The evidence of the period used in the paper includes archival material, parliamentary sources, legal cases and statutes. The reasons for the reluctance to adopt the Statute of Westminster, as well as the reasons for adoption in 1942, are explained. The conclusion is that legal and political opinion during this period drew a distinction between political and legal independence and that the actors of the 1930s were cautious constitutionalists.

I INTRODUCTION

Australia has no declaration of independence nor does it have an independence act, unlike most of the other former British colonies.¹ Despite this, several writers have written about Australia's independence, most notably Anne Twomey in her major study of the States in *The Australia Acts: Australia's Statutes of Independence* (2010).² This paper addresses a precise question: was the Commonwealth Parliament independent of the British Parliament with the passage of the *Statute of Westminster 1931* (UK) (the 'Statute')? There is an argument that Commonwealth legislative independence was effectively achieved in 1931. The paper will criticise this argument by identifying the British legislative restrictions that applied to the Commonwealth in 1931, show how they operated between 1931 and 1942, and support the critique by arguing that judges, commentators and senior legal officers in the 1930s took the view that the Commonwealth remained dependent on the British Parliament to make laws affecting the Commonwealth. Moreover, the restrictions that remained between 1931 and 1942 were significant and could not be ameliorated by constitutional conventions.

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¹ But see Robert Menzies, 'The Statute of Westminster' (1938) 11 *Australian Law Journal* 368, 371, who refers to '...the independence declared by the Balfour Declaration...' See also, *Tagaloa v Inspector of Police* [1927] NZLR 883, 900 where Ostler J referred to the 1926 conference as showing '[t]he older conception of subordination to a central legislative authority has been superseded by the conception of a partnership of independent nations...' Formally the Balfour declaration did not have legislative status: *References re The Weekly Rest in Industrial Undertaking Act* [1936] SCR 461, 476 (Duff CJ). The word independence did not appear in the Balfour Declaration apparently at the insistence of the Canadians: Denis Judd, *Balfour and The British Empire* (MacMillan, 1968) 330.

² First written about in her paper Anne Twomey, 'Sue v Hill: The Evolution of Australian Independence' in A Stone and G Williams (eds), *The High Court at the Crossroads* (Federation Press, 2000) 77–108.

The paper treats constitutional law as an amalgam of law, politics and history.³ This means that the law should be located in its context, especially in this case, since the paper seeks to explain the state of the law in the 1930s. That a later generation might take a different view of what the law should have been in the 1930s is not disputed, and one of the matters addressed in the paper is why certain constitutional powers available in the 1930s, in the opinion of 21st century writers, were not relied upon. This failure might puzzle a 21st century lawyer, but it will be argued that the law of the time only makes sense when it is remembered that Australian lawyers, including judges, in the period 1931 to 1942 lived in a different era with different problems. It was a time dominated by the Imperial connection to Britain, the Great Depression, the crisis in Europe, and the onset of war. But above all, the law was different in the 1930s to what it is today in that the British Parliament had the capacity to legislate for the Dominions by virtue of paramount force, a doctrine that was abrogated with the adoption of the *Statute* by the Commonwealth Parliament in 1942. This means that in the period before adoption the British Parliament had the power ‘...to legislate for the Colony, although a local legislature had been given’.⁴

The first issue is whether it makes sense to identify a date for independence at all. The initial problem is conceptual since most of the case law refers to sovereignty rather than independence. However, it is accepted by many writers that sovereignty and independence are interchangeable terms and they will be used as such in this paper.⁵ Certainly, the *Statute* was seen at the time and later as establishing the equal sovereign status or independence of the Dominions,⁶ even though the word independence does not appear anywhere in the *Statute*. Indirect support for this view is to be seen in s 6 of the *Indian Independence Act 1947* (UK), which relieved the legislatures of India and Pakistan from the same limitations that were dealt with in the *Statute*. In other words, independence in 1947 entailed, amongst other things, legislative independence in the form provided for in 1931.

For Australia, the question is: did it acquire independence by stages or was it like the majority of British colonies in the 20th century that could point to a specific date on

³ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 37 [12] (Gleeson CJ, Gummow and Hayne JJ).

⁴ *R v Marais, ex parte Marais* [1902] AC 51, 54 (Lord Halsbury LC), also cited in *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148, 166 (Isaacs J).

⁵ International law supports treating the two terms as alternatives: See, *German/Austrian Customs Case* [1931] PCIJ (ser A/B) No 41, 36, 57.

⁶ See General Smuts, ‘Memorandum on The Constitution of the British Commonwealth’ in J Van Der Poel (ed), *Selections from the Smuts Papers* (Cambridge University Press, first published 1966, 1973 ed) vol 5, 67–77; Government of the Free Irish State, *Memorandum by the Irish Free State Delegation to the 1926 Imperial Conference, ‘Existing Anomalies in the British Commonwealth of Nations’* (2 November 1926), [1]; <http://www.difp.ie/docs/1926/Existing-anomalies-in-the-British-Commonwealth-of-Nations/772.htm>; Thomas Mohr, ‘The Statute of Westminster, 1931: An Irish Perspective’ (2013) 31 *Law & History Review* 749–61; H Duncan Hall, ‘The Genesis of the Balfour Declaration of 1926’ (1963) 1 *Journal of Commonwealth Political Studies* 169, 175, 178; W N Harrison, ‘The Statute of Westminster and Dominion Sovereignty Pt 1’ (1944) 17 *Australian Law Journal* 282: ‘The object of the Statute of Westminster was to give legal expression to the legislative independence which the Dominions had already achieved in political practice’; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1948, 1060, 1067 (Mr Calwell); *In re Brassey’s Settlement* [1955] 1 WLR 192, 196 (Danckwerts J); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722C–D (Lord Reid).

which independence was acquired?⁷ In practice, Australia succeeded to British sovereignty over the continent as Windeyer J put it in 1969: ‘... because Australia has grown into statehood. With the march of history, the Australian colonies are now the Australian nation.’⁸ To decide upon a date of when Australia attained independence runs the risk of asking the wrong question as it may lead to the wrong answer. Since independence was attained by degrees and by different parts of the federation at different times, no single date will do.⁹ In this paper, the focus is on the legislative independence of the Commonwealth, not political independence, executive independence, judicial independence or the position of the States.

II THE AUSTRALIAN INDEPENDENCE THESIS

The real matter in dispute is whether a date for Commonwealth legislative independence can be identified. At least two historians¹⁰ and three legal writers¹¹ have settled upon 1931 as the date when the Commonwealth achieved legislative independence. The premises of the argument for 1931 are:

1. That independence includes either the *capacity* to enter into relations with other states¹² or *freedom from external restraint*.¹³

These characteristics are not the same and will be analysed separately. Australia had entered into relations with other states, albeit in the limited way before 1942,¹⁴ but this ignores the issue of whether the Commonwealth exercised *legislative* power within Australia free from external restraint. The capacity to enter into relations with other states refers to the exercise of common law (ie prerogative) executive power and thus does not reach the question of legislative power, except to the extent that legislation was

⁷ See, eg, *Indian Independence Act 1947* (UK); *Ghana Independence Act 1957* (UK).

⁸ *Bonser v La Macchia* (1969) 122 CLR 177, 223. For other statements of the gradual nature of the emergence of Australia as an independent nation, see *Commonwealth v Kreglinger & Fernau Ltd* (1925) 37 CLR 393, 414 (Isaacs J); *Sue v Hill* (1999) 199 CLR 462, 467 [50] (Gleeson CJ, Gummow and Hayne JJ); *Shaw v MIMA* (2003) 218 CLR 28, 38 [13]–[14] (Gleeson CJ, Gummow and Hayne JJ), 83 [171] (Callinan J). See also Lord McNair, *The Law of Treaties* (Clarendon Press, 1961) 648; ‘...the acquisition by the British Self-governing Dominions of independent statehood was a process rather than an event...’ in *White v New Zealand Stock Exchange* [2001] 1 NZLR 683, 701 [89] (CA) and *R v Mason* [2012] 2 NZLR 695, 704 [34] (HC) the same process of gradualism, but with different dates for the New Zealand case, was set out.

⁹ *Shaw v MIMA* (2003) 218 CLR 28, 41 [24], where Gleeson CJ, Gummow and Hayne JJ warn that ‘[t]o ask when Australia achieved complete constitutional independence ...is to assume a simple answer to a complex issue...’.

¹⁰ W H Hudson and M P Sharp, *Australian Independence* (Melbourne University Press, 1988), 138.

¹¹ Anne Twomey, above n 2, ‘Sue v Hill’, 77–108; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 116; George Winterton, ‘The Acquisition of Independence’ in R French et al (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31 and Geoffrey Lindell, ‘Further Reflections on the Date of the Acquisition of Australia’s Independence’ in R French et al, 54, 59. cf Anne Twomey, *The Australia Acts: Australia’s Statutes of Independence* (Federation Press, 2010) 460, where a more nuanced view is taken as she accepts that ‘...no single date will provide a complete answer for each constitutional question concerning independence.’

¹² Twomey, *The Constitution of New South Wales* n 11, 115. In *The Australia Acts*, n 11, 2 Twomey wrote ‘[a]lthough Australia did not immediately take steps to exercise its independence, it had the capacity to do so’.

¹³ Winterton, above n 11, 32; Twomey, *Sue v Hill*, n 2, 79.

¹⁴ Robert B Stewart, *Treaty Relations of the British Commonwealth of Nations* (MacMillan, 1939) 201–203, 250–255.

necessary to implement an international agreement. As will be discussed later, this necessitated British legislation for Australia between 1931 and 1942. The second sense of independence, meaning the absence of external restraint, is consistent with legal definitions of independence.¹⁵ In the classic statement on the subject, Judge Anzilotti wrote in the *German/Austrian Customs* case in 1931 that an independent ‘... State has over it no other authority than that of international law.’¹⁶ In contrast, he noted that dependent states are ‘subject to the authority of one or more other States’. On the basis of this criterion it will be argued that Australia was not legislatively independent between 1931 and 1942 because it remained dependent on the authority of the British Parliament.

2. The *Statute* conferred legislative independence on the Commonwealth.¹⁷

This is largely but not wholly true since certain restrictions remained.¹⁸ In any event, the *Statute* made plain in s 10 that in Australia ss 2–6 of the *Statute* would not take legal effect until adopted by the Commonwealth Parliament. It is clear as a matter of law that most of the *Statute* did not apply to Australia during the period before 1942, as pointed out by several judgments of the High Court during this period.¹⁹ This means that British legislative limitations on the Commonwealth Parliament, apart from the *Constitution* itself, continued to apply to the Commonwealth until the adoption of the *Statute* in 1942. As one Canadian commentator put it, referring to the Dominions that did not adopt the *Statute*, ‘...their former subordinate position remained after 1931, no less real because it was henceforth removable’.²⁰ On the other hand, once the *Statute* came into effect in Australia, Commonwealth legislative power no longer flowed from a higher Imperial source.²¹ At that point the Commonwealth Parliament was legislatively independent of the British Parliament.

¹⁵ Charles Rousseau, ‘L’Independence De L’Etat Dans L’Ordre International’ (1948) 73 *Receuil De Cours* 167, 217, 220; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 62–66; Stephen Hall, *Principles of International Law* (Oxford University Press, 3rd ed, 2011) 198–99; H J Schlosberg *The King’s Republics* (Stevens & Sons, 1929) 20–24. For cases see *The Schooner Exchange*, 11 US (7 Cranch) 116, 133 (1810) (Marshall CJ); *Island of Palmas Case (Netherlands/USA)* (1928) 2 RIAA 829, 838 (Max Huber): ‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State’ (emphasis added); *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250, 255–56 (Darley CJ); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1121 (Griffith CJ).

¹⁶ [1931] PCIJ, (ser A/B) No 41, 36, 57, also cited in *R v Hape* [2007] 2 SCR 292, 317 (SCC) (Le Bel J).

¹⁷ Twomey, *Sue v Hill*, n 2, 102 and Twomey, *The Australia Acts*, n 11, 1, ‘It had full legislative power...’

¹⁸ See text at footnote 31–34 below. See also *R v Foreign Secretary, ex parte Indian Association* [1982] 1 QB 892, 917F–G (Lord Denning): ‘The Statute of Westminster 1931 gave considerable independence to the Dominions’. At 918A–B he notes that this independence was not complete and only became complete in Canada’s case with the *Canada Act 1982* (UK): 918E–F; *Manuel v Attorney-General* [1983] 1 Ch 77, 100G (Slade LJ): ‘The Statute substantially gave legislative independence....’

¹⁹ *The Trustees Executors and Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, 233 (Evatt J); *Crowe v Commonwealth* (1935) 54 CLR 69, 85 (Starke J); *R v Burgess ex parte Henry* (1936) 55 CLR 608, 635 (Latham CJ); *Frost v Stevenson* (1937) 58 CLR 528, 603 (Evatt J); *South Australia v Commonwealth* (1942) 65 CLR 373, 422 (Latham CJ). Later judges were of the same view: *R v Sharkey* (1949) 79 CLR 121, 136 (Latham CJ); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 364 (Gibbs CJ); *Joosse v ASIC* (1998) 73 ALJR 232, 236 (Hayne J).

²⁰ F R Scott, ‘The End of Dominion Status’ (1944) 38 *American Journal of International Law* 34, 38.

²¹ *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 410 (Brennan J).

3. That it did not matter that Australia had not adopted the *Statute* before 1942, because what counted was that the Commonwealth Parliament could have adopted the *Statute* but chose not to do so, and that the voluntary retention of various legislative restrictions '[did] not detract from [Australia's] effective independence.'²²

This argument for the 1931 date is rather threadbare as it contends that, because the Commonwealth could have adopted the *Statute*, the acceptance of continued British legislative restrictions was an indication of independence. This entails accepting the paradox that the retention of legal restrictions nevertheless indicated their practical absence, and confuses *potential* legislative power with *actual* legislative power. In turn this amounts to saying that the refusal to remove legislative restrictions before 1942 was on a par with the decision to adopt the *Statute* in 1942. This argument rather awkwardly ignores the actual state of the law and, in fact, two proponents of 1931 skate over this and prefer the term 'effective' independence.²³ The preference for practicality over the law obscures the difference between constitutional practices or conventions and the law itself. The argument for 1931 also necessarily treats the learned opinion in the 1930s, that real legislative restrictions still applied to the Commonwealth, as unimportant. As we shall see, the preponderance of Australian legal opinion during the 1930s and 1940s supports the view that British legislative restrictions on the Commonwealth remained after 1931, and these restrictions were regarded at the time as serious matters.

III THE STATUTE OF WESTMINSTER: INDEPENDENCE IN LEGISLATIVE MATTERS

The Balfour Declaration in 1926²⁴ declared of the Dominions that: '[t]hey 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'.²⁵ Following the Balfour Declaration it was agreed that a committee of legal experts would meet to identify specific legal obstacles to equality and this committee met in 1929.²⁶ The report of the committee was then taken to the Imperial Conference of 1930, which produced draft clauses for a bill that resulted in the *Statute* in which most of the restrictions on Dominion legislative power were swept away.

²² Winterton, n 11, 43; Twomey, *Australia Acts* above n 11, 2 refers to the capacity of the Commonwealth in 1931 to 'take steps to exercise its independence' as she did in *Sue v Hill*, n 2, 102.

²³ Winterton, n 11, 43; Twomey, *The Australia Acts*, n 11, 479, where she refers to 'de facto and effective independence'. Of course, de facto by definition is not de jure. See also G G Phillips, 'The Dominions and The United Kingdom' (1932) 4 *Cambridge Law Journal* 164, 172 who refers to 'practical independence'.

²⁴ The Imperial Conference of 1926 was chaired by the British Prime Minister Stanley Baldwin. But a sub-committee of the conference on inter-imperial relations chaired by Lord Balfour came up with the famous formula, hence the name the Balfour Declaration. This is not to be confused with the Balfour Declaration of 1917.

²⁵ Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 10. The Dominions were defined in s 1 of the *Statute of Westminster 1931* (UK) as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

²⁶ Commonwealth, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929*, Parl Paper No 102 (1929–30) ('1929 Report'). See also Commonwealth, *Report of the Royal Commission on the Constitution*, Parl Paper No 16 (1929–30–31) 71–72 where the restrictions identified in the 1929 report are noted.

Five legislative restrictions were removed by the *Statute*:

1. Section 2(1) removed the fetter of the *Colonial Laws Validity Act 1865* (UK);
2. The doctrine of repugnancy to the laws of England was removed by s 2(2);
3. The rule that a Dominion could not make laws of an extra-territorial nature, unless given such a power by British legislation, was removed with s 3;²⁷
4. Relief from the restrictions in ss 735 and 736 of the *Merchant Shipping Act 1894* (UK) was provided by s 5; and
5. Finally, the reservation requirement in the *Colonial Courts of Admiralty Act 1890* (UK) was removed by s 6.²⁸

The operative sections of the *Statute* were confined to legislative powers and did not cover the prerogative powers over foreign relations, war and peace, the title of the King,²⁹ and the royal succession. Nor did these sections directly deal with appeals to the Judicial Committee of the Privy Council, except to the extent that the *Statute* endowed the jurisdiction with legislative powers generally that could be used to legislate for appeals to the Privy Council.³⁰

Although the *Statute* was intended to relieve the Commonwealth of most of the British legislative restrictions on the Commonwealth Parliament, four remained in 1931:

1. Nothing in the *Statute* conferred a power to repeal or alter the *Commonwealth of Australia Constitution Act 1900* (UK) otherwise 'than in accordance with the law existing before the commencement of the Act'.³¹ In other words, although the *Statute* conferred a wide legislative power on the Commonwealth by relieving it of the restrictions mentioned in s 2, s 8 made it plain that the *Statute* did not confer a new power to amend the *Commonwealth Constitution*;³²
2. The requirement that future British legislation would only be passed at the request of and with the consent of the Parliament of the Commonwealth, and such request and consent had to be expressed in both Commonwealth and British legislation, though this section of the *Statute* was removed from Australian law in 1986;³³
3. The bar on using the *Statute* to legislate for matters exclusively the province of the states;³⁴ and
4. That according to s 10 of the *Statute*, ss 2–6 would only apply to the Commonwealth if adopted by Commonwealth legislation. It is clear from this

²⁷ *R v British Columbia Electric Railway Co Ltd* [1945] SCR 235, 247 (SCC) (Rand J).

²⁸ *Tropwood A.G v Sivaco Wire and Nail Company* [1979] 2 SCR 157, 161 (SCC) (Laskin CJ).

²⁹ This was discussed in Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 11 and provided for in the *Royal Style and Titles Act 1927* (UK) which authorised a change and when made separated Ireland from Great Britain at the insistence of the Irish: R P Mahaffy, *The Statute of Westminster 1931* (Butterworth, 1932) 6. For the new title see Order in Council Approving the Proclamation altering the Style and Titles of the Crown, 1927 No 422 in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol II, 1949–52) 802–803.

³⁰ C J Burchell, *The Statute of Westminster and Its Effect on Canada* (South African Institute of International Affairs, 1945) 12. Burchell was a Canadian delegate to the Imperial Conferences in 1926 and 1929 and later the High Commissioner to Canberra.

³¹ *Statute of Westminster 1931* (UK) s 8.

³² *Contra Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 405 (Brennan J).

³³ *Australia Act 1986* (Cth) s 12.

³⁴ *Statute of Westminster 1931* (UK) s 9.

that, apart from s 7, which applied to Canada alone, the rest of the *Statute*, that is, the preamble, and ss 1, 8, 9, 10, 11 and 12, did apply to the Commonwealth upon enactment.

This meant that the various legislative disabilities that the *Statute* was intended to remove nevertheless remained applicable to the Commonwealth until the *Statute* was adopted in 1942. In the case of New Zealand, Newfoundland and Australia, the *Statute* required specific adoption of the *Statute* by their legislatures.³⁵ While the *Statute* conferred legislative independence, the terms of s 10 withheld this independence from Australia because the *Statute* did not apply to the Commonwealth immediately. Section 10(1) of the *Statute* stated that ss 2–6 would not apply to the Commonwealth of Australia unless the Commonwealth Parliament adopted legislation to that effect.³⁶ When it did so, the Commonwealth legislation made the *Statute of Westminster (Adoption) Act 1942* (Cth) retrospective from 3 September 1939, the beginning of World War Two.³⁷

Despite a dissenting view by Justice Murphy that the Commonwealth was not bound by some of the restrictions dealt with in the *Statute*, because full independence was conferred by the Constitution in 1901,³⁸ the Commonwealth of Australia was not independent in 1901 since the British insisted that the new Commonwealth *Constitution* was still subject to the *Colonial Laws Validity Act 1865* (UK) ('the 1865 Act'),³⁹ and that Act 'reaffirmed the superior power of the Westminster Parliament...'.⁴⁰ In 1925, the High Court held that the 1865 Act applied to Commonwealth legislation when it concluded that the *Navigation Act 1912* (Cth) ('the 1912 Act') was a colonial law within the meaning of the 1865 Act. The Court also held that the provisions in the 1912 Act that were repugnant to Imperial legislation were void and inoperative.⁴¹

The prevailing judicial view was stated by Justice Stephen in 1979 that:

[f]or eleven years, until 1942, the Commonwealth was content, despite the enactment of the *Statute*, to defer its adoption and to permit the respective

³⁵ *Statute of Westminster 1931* (UK) s 10. Newfoundland never adopted the *Statute* because it reverted to Crown Colony status: *Newfoundland Act 1933* (UK); *Re Newfoundland Continental Shelf* [1984] 1 SCR 86, 104–07. However, when Newfoundland joined the Canadian federation in 1949, art 48 of the agreement stated that the *Statute of Westminster* applied there as it did to the other provinces: *British North America Act (No 1)* (UK), SC 1949, sch.

³⁶ An idea first suggested by New Zealand in July 1931. See New Zealand, *Parliamentary Debates*, House of Representatives, 21 July 1931, 549; *Evening Post* (Wellington), 22 July 1931, 8.

³⁷ Commonwealth, *Gazette*, No 274, 15 October 1942, 2449.

³⁸ *Bisticic v Rokov* (1976) 135 CLR 552, 566–67 (Murphy J), but this was rejected by Gibbs J in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 194. See also Barwick CJ at 181 who said of the 1901 claim that it also was in flat contradiction to historical fact and Stephen J at 208 noted that Murphy J's views were in a dissenting judgment were not accepted by any other member of the court and were contrary to settled authority.

³⁹ See 'Memorandum of Australian Delegates', 23 March 1900 in Victoria, *Papers Relating to the Federation of the Australian Colonies*, Parl Paper No 20 (1900) 29–30 and in the 'Memorandum of the Objections of Her Majesty's Government to Some of the Provisions of the Draft Commonwealth Bill', 29 March 1900. The insistence that the Constitution was a colonial law for the purposes of the 1865 Act was also stated by Joseph Chamberlain, the Secretary of State for the Colonies in United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, col 87.

⁴⁰ *Al Sabah v Grupo Torras SA* [2005] 2 AC 353, 342–343 [12] (PC).

⁴¹ *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 141 (Knox CJ); 147–151 (Isaacs J).

standing of its laws and of Imperial laws to remain as they had ever been since federation, still governed by the *Colonial Laws Validity Act 1865* and by notions of repugnancy'.⁴²

As Stephen J pointed out in the *China Shipping Co v South Australia*, the problem with the argument that British law ceased to operate in Australia in 1901 was that it would have created a legal vacuum. He gave as the example copyright law, which in 1901 was based on a British enactment, and between 1901 and 1907, when the first Commonwealth *Copyright Act* was proclaimed, there would have been no copyright law or protection in Australia at all.⁴³ Thus, it was clear to the court in the 1930s that the Commonwealth *Constitution*, though part of a later Imperial Act than the *Colonial Laws Validity Act 1865* (UK) and later than Imperial legislation of the 1890s on shipping and admiralty matters, did not impliedly repeal those acts for the Commonwealth under the principle of the implied repeal of earlier acts by later acts. As a Canadian judge pointed out in 1933, the *British North America Act 1867* (UK) did not limit the supreme power of the Imperial government and did not abrogate the earlier *Colonial Laws Validity Act 1865* (UK).⁴⁴ Once the *Statute* was adopted, the legal position changed, and judges after 1939 accepted that subsequent Commonwealth legislation might impliedly amend Imperial legislation.⁴⁵ Similarly, once the doctrine that some Imperial legislation applied to the Commonwealth by paramount force was lifted, the High Court gave s 76(iii) of the Commonwealth *Constitution*, which conferred on the High Court an original jurisdiction in admiralty and maritime matters, a much wider reach than it had in the 1920s.⁴⁶

The only caveat to notice is that some judges have commented that some of the restrictions existing before the adoption of the *Statute* were 'real or supposed'.⁴⁷ In other words, although it might be argued, as it has been in later cases, that some of the restrictions removed by the *Statute* were not real at all,⁴⁸ they were treated as real legal restrictions at the time and the legislation to remove them both in the United Kingdom and in the Commonwealth proceeded on that basis.

IV THE DIFFERENCE BETWEEN CONSTITUTIONAL CONVENTIONS AND THE LAW

The advocates of effective or de facto independence are obliged to refer to the practice of the British Parliament of seeking Australia's consent before passing legislation that affected the Commonwealth as evidence of effective independence. There is no doubt that a constitutional convention to this effect emerged in the 1920s,⁴⁹ and was stated as such in the Balfour Declaration in 1926, where the British indicated that they would not

⁴² *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 211. See also to the same effect *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 418 (Dixon CJ, McTiernan J, Williams J).

⁴³ (1979) 145 CLR 172, 213.

⁴⁴ *Canada Steamship Lines Ltd v Emile Charland Ltd* [1933] Ex CR 147, 149–50 (Demers LJA).

⁴⁵ *Bice v Cunningham* [1961] SASR 207, 210–11 (Mayo J), where the court held that the *Navigation Act 1958* (Cth) impliedly amended the *Merchant Shipping Act 1894* (UK).

⁴⁶ *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 423–25.

⁴⁷ *Bonser v La Macchia* (1969) 122 CLR 177, 223 (Windeyer J).

⁴⁸ *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 300 (Menzies J), who refers to the extraterritorial restriction on Commonwealth legislation as a 'misconception'. Also cited in: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 633 (Dawson J).

⁴⁹ *1929 Report*, above n 26, 14 [54]. See also Peter W Hogg, 1 *Constitutional Law of Canada* (Carswell, 5th ed, 2007) 3.3.

legislate for a Dominion, such as Australia, without the consent of the Dominion concerned.⁵⁰

Although one commentator thought that this was a considerable innovation at the time,⁵¹ the better view is that the convention was well established by 1926. One judge even described it as a 'long tradition' by 1931,⁵² while Latham CJ noted in 1936 that '[t]his 'established position' is recognised rather than created by the *Statute*.'⁵³ Although before 1914 legislation passed for the empire included provisions that did apply to the Dominions, other British legislation before World War One allowed for a measure of Dominion autonomy. Thus, bankruptcy courts in the Empire were regarded as bankruptcy courts for the purposes of British legislation,⁵⁴ while British legislation on the Geneva Convention applied to 'His Majesty's Possessions.'⁵⁵ A greater measure of autonomy was permitted by the *Naval Discipline (Dominion Naval Forces) Act 1911* (UK) ('the 1911 Act'), which applied to Dominion legislation made both before and after the 1911 Act came into force, and which allowed Dominion statutes to have effect by applying the *Naval Discipline Act 1866* (UK) to the Dominions with some necessary adaptations.⁵⁶ In contrast, the *Copyright Act 1911* (UK) did not apply to the self-governing Dominions 'unless declared by the Legislature of that Dominion to be in force therein either without any modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the Dominion as may be enacted by such Dominion.'⁵⁷ Within limits, the Dominions were allowed to depart from some aspects of this British legislation, which Australia did in 1912.⁵⁸ A second example was the passage of nationality legislation that only applied to a Dominion after adoption by the Parliament of the Dominion.⁵⁹ But none of this amounted to a request and consent condition, though a commitment was made in 1917 for 'continuous consultation in all important matters of common Imperial concern'.⁶⁰ Rather, these acts allowed limited departures from Imperial legislation, a situation in which the Dominion could either adopt the relevant Imperial Act as its own, or, within severely modest limits, depart from it. But it could not exceed the limits in the British Act altogether.

⁵⁰ Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 13.

⁵¹ Manley O Hudson, 'Notes on the Statute of Westminster' (1932–33) 46 *Harvard Law Review* 261, 269–270. cf K C Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, 5th ed, 1953) 82 who thought that the convention was established by 1926.

⁵² *Manuel v Attorney-General* [1983] 1 Ch 77, 85H (Sir Robert Megarry V-C).

⁵³ *R v Burgess, ex parte Henry* (1936) 55 CLR 608, 635.

⁵⁴ *Bankruptcy Act 1914* (UK) s 122 retained by the *Bankruptcy Act 1966* (Cth) s 29(2) but removed in the *Bankruptcy Amendment Act 1980* (Cth). See also *Re Clunies-Ross Ex parte Totterdell* (1988) 82 ALR 475, 482–83 [19]–[21].

⁵⁵ *Geneva Convention Act 1911*(UK) s 1(2). A term that included the self-governing Dominions: *Interpretation Act 1889* (UK) s 18.

⁵⁶ *Naval Discipline Act 1910* (Cth).

⁵⁷ Section 25(1). Section 29(1)(b) listed the self-governing Dominions as including the Commonwealth of Australia. For the Commonwealth legislation see *Copyright Act 1912* (Cth) ss 8–9. See the history set out in *Phonographic Performance Co of Australia Ltd v Commonwealth* (2012) 246 CLR 561, 572–74 [14]–[23] (French CJ, Gummow, Hayne and Bell JJ).

⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1912, 4861.

⁵⁹ *British Nationality and Status of Aliens Act 1914* (UK) s 9 adopted in the *Nationality Act 1920* (Cth) s 17(1) and sch 1.

⁶⁰ Imperial War Conference, 20 March–27 April 1917, Article IX extracted in F Madden and J Darwin (eds) *The Dominions and India Since 1900* (Greenwood Press, 1993) 42.

The terms of the convention as it was understood in the late 1920s were intended to be placed on record as a statement ‘embodying the conventional usage’⁶¹ and appeared as a recital in the *Statute*.⁶² The third recital of the preamble to the Act provided that ‘...it is in accord with the *established* constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of the Dominion *otherwise than at the request and with the consent of that Dominion*’.⁶³ It was the opinion of the committee in 1929 that if this proposition were adopted, ‘the acquisition by the Parliaments of the Dominions of full legislative powers will follow as a necessary consequence.’⁶⁴ It seems to follow as a matter of logic that the non-adoption of this approach (ie the Commonwealth position between 1931 and 1942) would mean that such a Dominion did not have full legislative powers. As to the legal status of the conventions in the recital, Owen Dixon pointed out in 1936 that the recitals did not change the constitutional law of the Empire and ‘they are not the prime concern of lawyers’.⁶⁵

To their credit, the British adhered to this convention and this was made clear by the very manner in which the *Statute* was constructed. As a first step in 1929, a committee that included two Australian representatives produced a report on the technical aspects of the inter-imperial relationship.⁶⁶ At the Imperial Conference in 1930 the main terms of the *Statute* were set out in a schedule to the report of the Conference.⁶⁷ It was agreed that the Dominions were each to signify their agreement to the Bill and to forward any suggested clauses for the Bill by 1 July 1931 and, if that was not possible, not later than 1 August 1931.⁶⁸ At Australia’s request, one amendment of practical importance was made, namely, that the signification of Australia’s request and consent to British legislation was to be indicated by the Commonwealth Parliament and not merely by the executive.⁶⁹ One suggested clause by the States, that the Commonwealth could not seek British legislation on matters relevant to the States without the concurrence of the States, was not included

⁶¹ 1929 Report, above n 26, 14 [54].

⁶² *The Statute of Westminster 1931* (UK) did not have retrospective effect: *Croft v Dunphy* [1933] AC 156, 167 (PC); *Re Offshore Mineral Rights of British Columbia* [1967] SCR 792, 815 (SCC); *R v Lay Tung-sing* [1989] 1 HKLR 490, 497 (CA).

⁶³ Italics added for emphasis. The recitals had no legal effect: K H Bailey, ‘The Statute of Westminster Pt 1’ (1932) 5 *Australian Law Journal* 362, 365, but were intended at the time to be evidence of existing constitutional practice: W Ivor Jennings and C M Young, *Constitutional Laws of the British Empire* (Clarendon Press, 1938) 106.

⁶⁴ 1929 Report, above n 26, 15 [57].

⁶⁵ Owen Dixon, ‘The Statute of Westminster 1931’ (1936) 10 *Australian Law Journal Supplement* 96, 97–98. As he explained, that covered the matters in the *Statute* itself. See also the comment by Sir Lyman Duff CJ in *Reference Re Power of Disallowance and Power of Reservation* [1938] SCR 71, 78: ‘We are not concerned with constitutional usage. We are concerned with questions of law....’

⁶⁶ Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 325. They were Robert Garran, Solicitor-General of the Commonwealth, 1916–32 and Francis Brennan, Attorney-General of the Commonwealth, 1929–32.

⁶⁷ See Commonwealth, *Imperial Conference 1930: Summary of Proceedings*, Parl Paper No 293 (1929–30–31) 12–14; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3415; W P M Kennedy, ‘The Statute of Westminster’ (1933) 45 *Juridical Review* 330, 333. The Kennedy view was cited with approval in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 211 (Stephen J).

⁶⁸ For the Australian resolutions see Commonwealth, *Journal of the Senate*, No 123, 29 July 1931, item 5, 345–47; Commonwealth, *Journal of the Senate*, No 138, 28 October 1931, item 7, 409, 411; *Votes and Proceedings of the House of Representatives*, No 178, 28 July 1931, item 8, 774–77.

⁶⁹ Commonwealth, *Votes and Proceedings of the House of Representatives*, No 178, 28 July 1931, 775.

in the draft of the *Statute*. Apparently the British thought that it was unnecessary but later admitted that they had misunderstood the Australian situation.⁷⁰

Once the views of the Dominions were ascertained, the British introduced the legislation, during the passage of which the Solicitor-General noted that the Bill was ‘...the product of the mature consideration of the representatives of all of the Dominions...’.⁷¹ He also warned the House of Commons against making amendments to the Bill, ‘which would go contrary to the expressed desire of any of our Dominions.’⁷² In short, though enacted by the Imperial Parliament, the *Statute* was the product of the Convention announced in 1926. This process undermines the claim that 1931 is the date of effective independence since as a practical matter independence in this sense really dates from 1926 not 1931.

After the passage of the *Statute*, the British continued to apply the convention to Australia since Australia had not adopted the *Statute*. The fact that the convention was relied upon is evidence that neither the British nor the Australians thought that the *Statute* itself applied. In 1933, for example, when the West Australian Parliament petitioned the British Parliament to amend the Commonwealth *Constitution* in order to permit the State to secede from the federation, the Joint Committee of the House of Lords and the House of Commons decided that Western Australia did not have standing to present the petition, thereby adroitly avoiding entanglement in internal Australian affairs.⁷³ Two paragraphs in the Committee’s report referred to the *Statute* and the convention that the British Parliament would not intervene in the affairs of a Dominion save at the request of the government or Parliament of the Dominion. This was, the committee wrote, a rule ‘well established before 1900’,⁷⁴ though it gave no examples of this. The comment may have been an allusion to the process by which the Commonwealth Constitution was drafted in Australia and then negotiated and passed in London. After all, the Australians secured nearly everything they wanted in that process.⁷⁵ Since the petition concerned the Commonwealth *Constitution*, the Committee held that only the Commonwealth government or Parliament could be heard on the matter. In paragraph 10, the committee referred to the preamble of the *Statute* as supporting the view that the United Kingdom Parliament would not pass any law extending to a Dominion except at the request of the Dominion. Since the term Dominion in s 1 of the *Statute* meant the Commonwealth, not the States, the request would have to come from the Commonwealth, not Western Australia.⁷⁶

⁷⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1931, 1927; Twomey, above n 10, 52–53. The British misunderstanding of the Australian position was pointed out by Robert Garran in James Faulkner and Robert Orr (eds) *Opinions of the Attorneys-General of the Commonwealth of Australia* (AGPS, 2013) 276–77.

⁷¹ United Kingdom, *Parliamentary Debates*, House of Commons, 20 November 1931, col 1244. See also 24 November 1942, cols 639–40: ‘The terms of the Statute of Westminster were approved in advance, before its passage through Parliament here, by the Parliaments of all the Dominions’.

⁷² *Ibid* col 1247.

⁷³ David Maugham, ‘The Statute of Westminster’ (1939) 13 *Australian Law Journal* 152, 164, quotes Dominion Office officials who told him: ‘Their whole attitude is to leave the Dominions to settle these things amongst themselves’.

⁷⁴ Commonwealth, *Report by the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia in relation to Secession*, Parl Paper No 153 (1934–35) 3 [7].

⁷⁵ Except the removal of appeals to the Judicial Committee: J L La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 254–69.

⁷⁶ The Commonwealth opposed secession: Commonwealth, *Parliamentary Debates*, Senate, 4 July 1934, 145.

To bolster its position, the committee sought an opinion on the issue by the law officers in Britain who not only referred to the convention but also dated it to 1926, if not earlier. Although in strict law, the British Parliament could legislate for Australia in 1934 without the consent of the Commonwealth, because it had not adopted s 4 of the *Statute*, the issue was whether this would be in accordance with ‘constitutional practice.’⁷⁷ The law officers advised that, while in strict theory the *Commonwealth of Australia Constitution Act 1900* (UK) could be amended or repealed in the ordinary way, the declaration of 1926 established a ‘constitutional practice that was conclusive and the change would only be made with the consent of the Dominion concerned’.⁷⁸

The third example of the reliance on convention rather than on law arose out of the abdication crisis in 1936.⁷⁹ Each of the Dominions was consulted, and while each gave its consent, the differing legal position of each Dominion required a different legal approach. Canada passed legislation that invoked s 4 of the *Statute* and gave its consent under that provision,⁸⁰ while Australia and New Zealand merely gave their consent via parliamentary resolutions since they had not yet adopted the *Statute*.⁸¹ In Australia’s case, it was pointed out that since the *Statute* had not yet been adopted, s 4 was not available, nor was legislation under the Commonwealth *Constitution* possible because it was thought at the time that there was no head of Commonwealth legislative power that dealt with succession to the throne.⁸²

However, a convention is a practice, and, unless embodied in the operative sections of a statute, is not a law.⁸³ It exists by being adhered to and the breach of a convention, or a reordering of its terms, does not break a law, although, of course, it may provoke a political crisis.⁸⁴ There were parliamentary observations in 1942 on the possibility that the British would go ahead and ignore the convention, but the likelihood of this was discounted.⁸⁵ Even the arch monarchist Robert Menzies warned in 1936 that, if it did

⁷⁷ Dominions Office to Law Officers of the Crown, 3 September 1934 in D P O’Connell and Anne Riordan (eds), *Opinions on Imperial Constitutional Law* (Law Book Co, 1971) 409.

⁷⁸ Law Officers of the Crown to Dominions Office, 25 September 1934, *ibid* 416.

⁷⁹ Paul Weidenbaum, ‘British Constitutional Law and the Recent Crisis’ (1936–37) 14 *New York University Law Quarterly* 341–357; G G Phillips, ‘Since the Statute of Westminster’ (1938) 6 *Cambridge Law Journal* 182, 190–91.

⁸⁰ *Succession to the Throne Act*, SC 1937, c 16. See also R I Edward and F C Cronkite, ‘Canada and the Abdication’, (1938) 4 *Canadian Journal of Economics and Political Science* 177–191. South Africa also passed abdication legislation: *His Majesty King Edward the Eighth’s Abdication Act 1937* (South Africa).

⁸¹ For the Australian resolutions see Commonwealth, *Votes and Proceedings of the House of Representatives*, No 147, 11 December 1936, 805–06; Commonwealth, *Journal of the Senate*, No 95, 11 December 1936, 323–24.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 December 1936, 2908–2909.

⁸³ Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1986) 13. The conventions in the Balfour Declaration of 1926 were of course given statutory force by the Statute of Westminster 1931: *Al Sabah v Gruppo Torras SA* [2005] 2 AC 333, 342–43 [12] (PC).

⁸⁴ See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723A–D (Lord Reid), also cited in *Ukley v Ukley* [1977] VR 121, 127 (Young CJ, Barber & Nelson JJ); *Re Constitution of Canada* [1981] 1 SCR 753, 882–83 (Martland, Ritchie, Beetz, Chouinard & Lamer JJ). See also W Anstey and J J Bray, *Opinion on the Statute of Westminster*, 22 July 1937, 3 in South Australian State Library, PRG 1098/29/8.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1400 (Evatt). See also *Bisticic v Rokov* (1976) 135 CLR 552, 567 (Murphy J). A New Zealand writer thought that the Boston Tea Party was the best sanction against the repeal of the Statute. R O McGechan, ‘Status and

happen, Australia would ignore any British law passed without Australia's assent and, by repealing the *Statute*, 'it [Britain] would create a state of revolution among the Dominions themselves.'⁸⁶ One Canadian commentator wrote in 1932 that it would lead to an immediate declaration of independence in that country.⁸⁷ The British also thought that it was unthinkable that 'Parliament could or would reverse that statute.'⁸⁸ It is worth noting that, while the adoption Bill introduced by Menzies in 1937 did not include the *Statute* as a schedule in that Bill, the 1942 legislation did. This means that the *Statute* is a statute embodied in a Commonwealth Act and that any unilateral British amendments to the British version would not affect the status of the *Statute* in the Commonwealth law.

Now, this body of constitutional practice on one view does support the effective independence thesis. But on another view it does not, for it is both evidence that conventions were necessary, because the Commonwealth lacked the legal capacity that adoption of the *Statute* would have secured, and testament to the continuing legal dependence on the British parliament.

V BRITISH LEGISLATION FOR AUSTRALIA 1931–1940

Evidence that the conventions of 1926, and those embodied in the preamble to the *Statute*, did not remove British legislative restrictions on the Commonwealth before 1942 may be found in the various statutes passed by the British Parliament that extended Commonwealth legislative powers between 1931 and 1942.⁸⁹ Although these statutes were passed with Australia's consent, they were necessary because the Commonwealth lacked the legal capacity to legislate for these matters itself. In some cases, changes were made to existing British acts that had applied to Australia before 1931, while others were new. Most of the legislation dealt with the extra-territorial reach of legislation. Since Australia had not adopted the *Statute*, this legislative limitation on the powers of the Commonwealth Parliament necessitated British legislation on the Commonwealth's behalf. In part, this arose out of the legal requirement to legislate for mandate territories and because of the acquisition of external territory such as the Antarctic Territory in 1933.

A *The Extra-Territorial Limitation*

British Acts were passed between 1931 and 1942 to give Australian legislation extra-territorial reach on the basis that the Commonwealth Parliament did not have this power itself without British legislative authority. This applied to legislation on the army via the *Army and Airforce (Annual) Acts 1931–41* (UK). Each of these covered the Dominions, although the *Army Act 1932* (UK) included references to the *Statute* and the Commonwealth of Australia (sch 2 amending s 187B). In 1940 the British Parliament

Legislative Inability', in J C Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, 1944) 104.

⁸⁶ Robert Menzies speaking at a legal convention and commenting on Owen Dixon, above n 65, 108.

⁸⁷ W P M Kennedy, 'The Imperial Conferences, 1926–1930, The Statute of Westminster' (1932) 48 *Law Quarterly Review* 191, 206.

⁸⁸ *Blackburn v Attorney-General* [1971] 2 All ER 1380, 1382h (Lord Denning MR).

⁸⁹ These same acts also applied to New Zealand for it too had not adopted the Statute of Westminster and only did so in 1947: *Statute of Westminster Adoption Act 1947* (NZ). For a list see A E Currie, *New Zealand and the Statute of Westminster* (Butterworth, 1944) 38–39 or his paper A E Currie, 'New Zealand and the Statute of Westminster 1931' (1944) 20 *New Zealand Law Journal* 174–77.

included a provision in the *Army and Airforce (Annual) Act 1940* (UK) in order to give extra-territorial force to Australia's wartime legislation.⁹⁰ Another war-related statute passed by the British Parliament was the *Emergency Powers (Defence) Act 1939* (UK), which conferred on the Parliament of the Commonwealth of Australia extra-territorial application in respect of ships and aircraft registered in the Commonwealth.⁹¹

Similarly, the *Extradition Act 1932* (UK), legislation on extradition that extended the reach of Commonwealth powers, was passed in 1932. Not all British acts that applied to Australia between 1931 and 1942 specifically mentioned Australia, but the record shows that the Commonwealth and New Zealand were both consulted over the passage of this Act, which added drug offences to the list of extraditable offences. Australia had no objection to the Act, but New Zealand did. An opinion of the law officers made it clear that the third recital of the *Statute* was relied upon to consult the three Dominions that had not yet adopted the *Statute*. The reason for not mentioning the Dominions in the *Extradition Act 1932* (UK) was that the Act would not, by virtue of s 4 of the *Statute*, apply to those Dominions to which the *Statute* applied.⁹² Strictly speaking, the British Parliament could have legislated without consulting the Dominions that had not yet adopted the *Statute*, but decided that constitutional practice required it.⁹³ The subsequent Commonwealth Act was necessary both to update the British extradition legislation that applied in Australia and to apply Australian extradition law to Papua and Norfolk Island.⁹⁴ After the Commonwealth passed the *Extradition Act 1933* (Cth), the British government procured an Order in Council stating that the Commonwealth act extended to Papua and Norfolk Island, and that it would have effect 'as if it were part of the *Extradition Act 1870* (UK).'⁹⁵

The extra-territorial limitation arose in part because, although Australia administered mandates, it held them by virtue of Britain's accession to them. In the *Geneva Convention Act 1937* (UK), special provision was made in s 2 to allow the Commonwealth to pass a law to give effect to art 28 of the Convention and to extend that law to any mandate administered by the Commonwealth of Australia. The following year the Commonwealth Parliament, acting on that power, passed the *Geneva Convention Act 1938* (Cth) ('the 1938 Act'). This Act modified the *Geneva Convention Act 1911* (UK) ('1911 Act'), which had applied to all Dominions. One effect of the 1938 Act was that the 1911 Act no longer applied to the Commonwealth.⁹⁶ Had Australia adopted the *Statute* it could have accomplished this without special legislative assistance from the United Kingdom parliament.

⁹⁰ *Army and Air Force (Annual) Act 1940* (UK) s 3(1) adding s 187C. See also Commonwealth, *Parliamentary Debates*, Senate, 16 May 1939, 340–41, where the continuing reliance on the British Army legislation was acknowledged and explained as a consequence of not having adopted the Statute of Westminster.

⁹¹ *Emergency Powers (Defence) Act 1939* (UK) s 5(1).

⁹² See Dominions Office to Law Officers, 18 August 1932; Law Officers to Dominions Office, 20 October 1932 in D P O'Connell and Anne Riordan above n 77, 404–07.

⁹³ *Ibid* 407.

⁹⁴ *Extradition Act 1933* (Cth).

⁹⁵ Order in Council, 14 August 1934; 1934 No 917 in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol ix, 1949–52) 485–86.

⁹⁶ Commonwealth, *Parliamentary Debates*, Senate, 4 May 1938, 743; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1938, 2987.

B *The Merchant Shipping Limitation*

The Commonwealth was not free of the restrictions in the *Merchant Shipping Act 1894* (UK) or the *Colonial Courts of Admiralty Act 1890* (UK) in 1931. One example was the *Merchant Shipping (Safety and Load Line Conventions) Act 1932* (UK), which implemented the load line convention. Provision was made in s 36(3)(b) for its extension to the Dominions, which was done in Australia's case by an Order in Council in 1936.⁹⁷ The *Whaling Industry (Regulation) Act 1934* (UK) dealt with both shipping and the extra-territorial limitation. This Act was extended to the Commonwealth of Australia⁹⁸ to give extra-territorial effect to laws governing ships registered in Australia. In the following year the Commonwealth took advantage of this extension of its legislative powers to pass the *Whaling Act 1935* (Cth). Section 4(1) gave extra-territorial effect to the Act. The background was that, with the assignment of the Antarctic territory to the Commonwealth in 1933 and the signing of an international agreement to regulate whaling, Australia needed the legal capacity to permit its legislation to regulate whaling to operate extra-territorially.⁹⁹ The power to issue any commission to constitute a Prize Court or to establish a Vice-Admiralty Court under such a commission was extended in 1939 to allow the Commonwealth of Australia to exercise such powers in a mandate territory.¹⁰⁰

C *Succession to the Crown and Abdication*

Lastly, since s 4 of the *Statute* did not apply to the Commonwealth, legislation on the abdication of the King in 1936 was handled via the convention of not passing legislation for the Commonwealth, except at the request and consent of the Commonwealth. The main Act here was *His Majesty's Declaration of Abdication Act 1936* (UK), an Act to which Australia gave its consent, as did New Zealand, Ireland and South Africa. Each Dominion dealt with the abdication in a different manner. The Irish, for example, included the abdication proclamation in the schedule to the *Constitution (Amendment No 27) Act 1936* (Ireland) in which they took the opportunity to eliminate the role of the Crown in internal Irish affairs. In contrast, as the preamble says, Canada gave its consent under s 4 of the *Statute* and passed its own legislation to signify that consent.¹⁰¹ But this power could not be invoked in respect of the Dominions that had not adopted the *Statute*. As the Commonwealth Parliament had not adopted the *Statute*, s 4 was not available to the Commonwealth in 1936. The Commonwealth Parliament expressed its consent to the abdication by resolution¹⁰² because it was thought at the time that the Commonwealth Parliament did not have power under s 51 of the Constitution to pass a law on the succession of the Crown.¹⁰³ In short, both Britain and Australia relied upon the convention, enunciated in the second recital of the preamble to the *Statute*, that any

⁹⁷ Order in Council, 1936 No 563, in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol xiv, 1949–52) 416.

⁹⁸ *Whaling Industry (Regulation) Act 1934* (UK) s 15(2).

⁹⁹ Commonwealth, *Parliamentary Debates*, Senate, 30 October 1935, 1104–1106.

¹⁰⁰ *Prize Act 1939* (UK) s 2(1)(b).

¹⁰¹ *Succession to the Throne Act*, SC 1937, c 16.

¹⁰² Commonwealth, *Votes and Proceedings of the House of Representatives*, Parl Paper No 147 (1936) 805–06; Commonwealth, *Journal of the Senate*, Parl Paper No 95 (1936) 323–24.

¹⁰³ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 December 1936, 2908–2909, where Attorney-General Menzies explained the legal position. It is now arguable that this was incorrect, see Anne Twomey, 'Changing the Rules of Succession to the Crown' [2011] *Public Law* 378, 393–94.

alteration in the succession to the Crown or royal style and titles would require the consent of the Parliaments of all the Dominions.¹⁰⁴ Now, while some of this legislation has been noticed previously,¹⁰⁵ most of it was not subject to analysis and its significance seems to have been overlooked.

VI WHY DID AUSTRALIA NOT ADOPT THE STATUTE BEFORE 1942?

There appear to be four reasons for the reluctance to adopt the *Statute*. First, in the years after 1931 there were no apparent or urgent practical reasons to do so.¹⁰⁶ Existing arrangements seemed to work well though, as Commonwealth Attorney-General Brennan warned in July 1931 ‘...in certain respects existing constitutional law does place definite limitations on the Dominion status which nothing but British legislation can remove.’¹⁰⁷ He went on to point out that several British Acts, including the *Merchant Shipping Act 1894* (UK), extended to Australia and that there was ‘great uncertainty’ as to how far they extended. The other example of legislative inability Mr Brennan gave was the continued extension of the doctrine of repugnancy, which, after citing from the case, had been applied to Commonwealth legislation in the *Union Steamship Co of Australia v King* case in 1925.¹⁰⁸ In opposition, Mr Brennan continued to campaign throughout the 1930s for the adoption of the *Statute*, charging the government in a debate in 1935 with a grave dereliction of duty for not adopting the *Statute*.¹⁰⁹ Despite the apparent contradiction between the promised autonomy and equality of the Balfour Declaration, and the practical legislative restrictions identified in 1929 and dealt with in the *Statute* in 1931, the view that there was no urgency prevailed in 1933, when Attorney-General Latham recommended to Cabinet that an adoption Bill be introduced. But Cabinet decided that there was no practical advantage to be obtained in adopting the *Statute*.¹¹⁰

Second, and of greatest importance, since it delayed the process by half a decade, several States were opposed to adoption fearing that the Commonwealth would use the powers given in the *Statute* to expand Commonwealth powers and to weaken the States.¹¹¹ Even before the *Statute* was passed, the Commonwealth gave an undertaking to consult the States and invited them to present their views.¹¹² Although the Commonwealth thought that State concerns were addressed in the *Statute*, as s 9(1) protected laws within the

¹⁰⁴ Ibid 2908, where the recital is cited.

¹⁰⁵ Twomey, *Constitution of New South Wales*, n 11, 116 fn 277.

¹⁰⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1935, 2055, where the Prime Minister, Mr Lyons, pointed out that: ‘This is not an urgent matter, although it is, of course, an important one’.

¹⁰⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3417 (Mr Brennan).

¹⁰⁸ Ibid 3417–3418, citing (1925) 36 CLR 130, 140.

¹⁰⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1935, 993.

¹¹⁰ Memorandum by the Attorney-General, John Latham, 2 October 1933, 6 [8] in NAA: A 432/85, 1930/181 pt 2. At page 8 he wrote that it was undesirable that different Dominions operate on a different legal basis. See also Memorandum by the Attorney-General, Robert Menzies, 21 January 1935, 1 [2], reviewing the events of 1933 in NAA: A 432/85, 1930/181 Part 2.

¹¹¹ See, eg, Western Australia, *Parliamentary Debates*, Assembly, 28 June 1931, 4060–4064. Twomey, *The Australia Acts* above n 11, 23–37 covers the concerns of the States during this period. The most thorough analysis at the time of the likely impact of the *Statute* on the States is in K H Bailey, *The Statute of Westminster, 1931* (Government Printer, 1935) an opinion of 49 pages with 10 pages of documents giving the opinions of a number of States.

¹¹² Commonwealth, *Record of the Conference of Commonwealth and State Ministers, Melbourne, 10–14 August and 1–12 September 1931*, Parl Paper No 269 (1931) 15.

exclusive authority of the States from being altered by the Commonwealth Parliament,¹¹³ State objections continued well into the 1930s and were a major reason for the delay in the adoption of the *Statute* by the Commonwealth. Since members of the Commonwealth Parliament from the States concerned were not afraid to stand up for the interests of their States, this pressure prevented forward movement. Even as the *Statute* was being negotiated, the States made their concerns known and these were acknowledged at successive conferences between Ministers of all governments. At the conference of the Premiers and the Prime Minister in February 1934, the Prime Minister reiterated the undertaking given in 1931 that adoption would not occur until there had been full consultation with the States.¹¹⁴ This drawn-out process finally ended when the States sent the Commonwealth their views in 1937. These show that New South Wales, Victoria and Queensland wanted both a recital and a declaratory clause that it would not be proper for the Commonwealth, without the concurrence of a State, to request and consent to any amendment of the *Statute* affecting the legislative powers of a State.¹¹⁵ South Australia and Tasmania had no objections to adoption, while Western Australia opposed adoption altogether because it would create too many uncertainties concerning the effect of adoption on the States.

Third, many Australians were deeply attached to the Empire and saw the *Statute* as a weakening of the British connection,¹¹⁶ and, although this was acknowledged by supporters of the *Statute*, it was contended that the *Statute* did not have this effect at all.¹¹⁷ Nevertheless, the attachment was strong and this psychological element distinguishes attitudes in the 1930s from those in the 21st century. The overwhelming concerns during the period were after all not legal, but economic, given the Great Depression and later in the decade, the approach of war in Europe. Fourth, many senior legal luminaries were opposed to adoption, an attitude that emerged during discussions of the adoption question at several of the legal conferences in the 1930s.¹¹⁸

Despite the reluctance to adopt the *Statute*, even conservative figures recognised that the *Statute* should be adopted. Robert Menzies, the Commonwealth Attorney-General 1934–39, who was a strong proponent of the Imperial connection,¹¹⁹ thought that the *Statute* should be adopted. He argued, in and out of Parliament, that it would be better to adopt the *Statute* in the absence of any urgent requirement to do so as to make for a calmer

¹¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1935, 2033. Mr Brennan thought that the trifling amendments to secure the rights of the States were unnecessary.

¹¹⁴ Commonwealth, *Conference of Commonwealth and State Ministers on Constitutional Matters, 16th–28th February 1934*, Parl Paper No 134 (1934–35) 69.

¹¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1937, 1152–1153, where a summary of the position of each State is provided.

¹¹⁶ See J G Latham, *Australia and the British Commonwealth* (MacMillan & Co, 1929) 92: ‘...there is no desire for this complete independence in Australia or New Zealand’. Robert Garran in a note ‘The Statute and Australia’ (1932) 13 *British Yearbook of International Law* 116–17 refers to the ‘fear of endangering the organic unity of the British Commonwealth’.

¹¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3421 (Mr Brennan).

¹¹⁸ David Maugham, above n 73, 162, 164–5. Mr Hannan KC of South Australia at 162 thought that the statute was ‘entirely mischievous’.

¹¹⁹ See his comment ‘Australia sees no future outside the British Empire or outside the British Commonwealth of Nations...’ in R G Menzies, ‘Australia’s Place in the Empire’ (1935) 14 *International Affairs* 480, 485, though he went on to criticise the British opinion that Australia’s requests for access to the British market were ‘mere parochial selfishness’.

and more mature debate on the matter.¹²⁰ At the beginning of 1935, he noted a shift in opinion in favor of adoption and argued that adoption would free Australia of the restrictions imposed by the *Merchant Shipping Act 1894* (UK).¹²¹ He pressed the States, at the conference between Commonwealth and State Ministers in 1936, to agree to adoption so that Australia could take up its international responsibilities, as had the other Dominions.¹²² He thought at the time that it was important that the Commonwealth have the power ‘to pass a law having extra-territorial effect’,¹²³ and that Australia should have the same capacity as the other Dominions.¹²⁴ After an adoption Bill¹²⁵ lapsed in November 1936 because the Parliament was prorogued,¹²⁶ another Bill was introduced in August 1937.¹²⁷ In his second reading speech on the Bill, Menzies stressed that in practice, after 1918, British interference was ‘substantially unknown, and that in ‘theory, complete independence of the self-governing [D]ominions should be assured’.¹²⁸ He went on to add that the adoption of the *Statute* by the Commonwealth Parliament would deal with what he called the legal aspects of independence,¹²⁹ in contrast to political independence, of which he said: ‘I know it is here’.¹³⁰ He later added that ‘[i]n point of practice the real and administrative legislative independence of Australia has never been challenged since the Commonwealth was created’.¹³¹ This somewhat undermined the argument for adoption in the absence of any great emergency. Nevertheless, there remained practical limitations to Australia’s independence, such as its inclusion in most favored nation clauses in trading agreements as a part of the British empire, which allowed Australia to keep out foreign goods and secure privileged access to the British market. There was also a doubt about whether Australia could be neutral in a war declared by the British. Despite these arguments, no adoption legislation was passed because the Parliament was dissolved a month later in September 1937 and the Bill therefore lapsed.¹³² Further progress was blocked by Menzies’ successor as Attorney-General. W H Hughes was opposed to adoption on the ground that he could not see ‘any practical advantage’ in adoption.¹³³

¹²⁰ Menzies, above n 1, 373.

¹²¹ Robert Menzies, ‘Memorandum’, 21 January 1935, 2–3 [9] in NAA: A 432/85, 1936/296.

¹²² Commonwealth, *Conference of Commonwealth and State Ministers, Adelaide, 26–28 August 1936*, Parl Paper No 268 (1934–35–36) 9.

¹²³ *Ibid* 77.

¹²⁴ Robert Menzies, ‘Statute of Westminster’, 5 February 1936, 4–5 [14]. in NAA: A 461, H327/1. A view shared by Evatt during the same period: Dixon, above n 65, 107. Evatt’s views appear at the end of the Dixon paper.

¹²⁵ Commonwealth, *Votes and Proceedings of the House of Representatives*, No 138, 24 November 1936, 752.

¹²⁶ Commonwealth, *Gazette*, No 26, 27 May 1937, 915.

¹²⁷ For the text of the bill see NAA: A461, H327/1 or K C Wheare, *The Statute of Westminster and Dominion Status*, (Oxford University Press, 5th ed, 1953) 324–25.

¹²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 August 1937, 84.

¹²⁹ *Ibid* 92.

¹³⁰ *Ibid* 93.

¹³¹ *Ibid* 94.

¹³² Commonwealth, *Gazette*, No 53, 21 September 1937, 1605.

¹³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 1941, 522.

VII THE ARGUMENTS FOR ADOPTION IN 1942

When World War Two broke out in 1939, the Commonwealth already had common law executive powers in relation to peace and war.¹³⁴ In his important speech on the Statute of Westminster Adoption Bill in October 1942, the Commonwealth Attorney-General Herbert Evatt made it clear that the executive power of the Crown to declare war, to conclude a peace and to enter into treaties, was exercised by the King in relation to Australia on the advice of his Australian Ministers.¹³⁵ In short, even before the passage of the adoption legislation, Australia enjoyed full sovereignty in such executive matters as evidenced by the declaration of war against the axis powers. Although Australia relied upon the British declaration of war in 1939 to indicate that a state of war existed, in order to invoke the powers given in the *Defence Act 1903-1939* (Cth),¹³⁶ Australia made its own declarations of war in 1941.¹³⁷ The declarations did not require British approval nor did they require any of the powers conferred by the *Statute*. In another indication of Australia's emerging international status before the adoption of the *Statute*, Australia separately signed the *Declaration by the United Nations and the Atlantic Charter* in 1941.¹³⁸ But none of this removed the Imperial fetters that restrained Commonwealth statutes.¹³⁹

A decision was made in late 1941¹⁴⁰ to adopt the *Statute* and a Bill was drafted by May 1942.¹⁴¹ During the parliamentary debate on the adoption of the *Statute* in October 1942, Attorney-General Evatt¹⁴² explained that the existing restrictions of the *Colonial Laws Validity Act 1865* (UK) meant that important Commonwealth legislation on shipping and defence might be held invalid unless the Commonwealth Parliament passed an adoption Act. In the same debate he went on to say that the doubts about the validity of Commonwealth legislation in turn might impede the war effort, which was why the act was made retrospective to the beginning of World War Two.¹⁴³ He expanded his argument by issuing a 22 page monograph, which was circulated to members of

¹³⁴ Commonwealth, *Imperial Conference 1937*, Parl Paper No 80 (1937) 29: 'One of the most conspicuous features of the period since the last Imperial Conference has been the increasing participation in international affairs by the Dominions as sovereign nations'.

¹³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1389–1390.

¹³⁶ Commonwealth, *Text of Documents exchanged between the United Kingdom and German Governments*, Parl Paper No 173 (1937–38–39) 19 for the British declaration of war. For the subsequent Australian announcement a few hours later that a state of war existed see the Commonwealth, *Gazette*, No 63, 3 September 1939, 1849.

¹³⁷ See Commonwealth, *Declaration of Existence of State of War with Finland, Hungary, Rumania and Japan, 8 December 1941*, Parl Paper No 66 (1940–41–42–43) 3. The formal proclamations appeared in Commonwealth, *Gazette*, No 251, 8 December 1941, 2725 and No 252, 9 December 1941, 2727.

¹³⁸ 14 August 1941, in force for Australia 3 September 1942, in *Australian Treaty Series 1942* No 4.

¹³⁹ See Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1942, 1334–1336; Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1387–1400.

¹⁴⁰ Curtin to Scully, 26 November 1941 in NAA: A461, H327/1/1; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1941, 1127.

¹⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 1942, 1500.

¹⁴² Evatt was a member of the High Court from 1931 to 1940: Commonwealth, *Gazette*, No 2, 8 January 1931, 3, No 184, 31 August 1940, 1905. He was elected to Parliament a month later: Commonwealth, *Votes and Proceedings of the House of Representatives*, No 1, 20 November 1940, 3 and became the Attorney-General and Minister for External Affairs in October 1941: Commonwealth, *Gazette*, No 200, 7 October 1941, 2234.

¹⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1399.

Parliament, setting out the case for adopting the *Statute* into Commonwealth law.¹⁴⁴ His argument was in effect a plea of urgency given wartime conditions and, as the long title to the *Statute of Westminster (Adoption) Act 1942* (Cth) indicates, the two main concerns were to allay doubts about the validity of certain Commonwealth legislation and to ‘obviate delays occurring in its passage’. The monograph focused on the impediments of repugnancy, extra-territoriality, and the reservation requirements imposed on Commonwealth shipping legislation.

VIII THE REPUGNANCY DOCTRINE STILL OPERATED IN 1942

Once the war was under way, Australia found that British, rather than Australian, law applied in certain military situations. The Australian ships and sailors that were transferred to British fleets became subject to British, not Australian, naval legislation, as the High Court pointed out in a decision made on 8 July 1942.¹⁴⁵ Two sailors on HMAS Sydney, then part of a Royal Navy squadron, were convicted for the murder of a stoker named Riley, and sentenced to death following a court martial under British naval law. After their transfer to New South Wales to await their sentence of death by hanging, they sought a writ of habeas corpus to secure their release on the ground that they had been wrongly tried and convicted under British not Australian law. The application for the writ failed, as the High Court held that British legislation, not Commonwealth defence statutes, applied. While the applicable Commonwealth statute provided for the death penalty, the penalty could only be applied in such cases after the sentence was confirmed by the Governor-General,¹⁴⁶ who would, of course, act on the advice of his Australian Ministers. The applicable Commonwealth legislation permitted the sentence to be commuted. The central issue in the case was whether a Commonwealth Act applied or whether a British Act prevailed. The court held that s 45 of the *Naval Discipline Act 1866* (UK) applied notwithstanding s 98 of the *Defence Act 1903-1941* (Cth). As Starke J pointed out, the *Statute* was irrelevant because it had not yet been adopted.¹⁴⁷ It was clear that the doctrine that a British Act prevailed where a colonial Act was found to be repugnant to a British Act applied in this case.¹⁴⁸ The British then advised the Commonwealth government to directly approach the King to ask him to exercise the prerogative of mercy and, following Australian diplomatic intervention, the sentences were commuted to life imprisonment.¹⁴⁹

IX COMMONWEALTH LEGISLATION AND EXTRA-TERRITORIALITY

As many of the British statutes mentioned above show, Commonwealth legislation did not have an extra-territorial reach without British legislative assistance. The extra-territorial limitation followed from the principle that legislation is primarily territorial, and as Isaacs J put it in 1913: ‘...the grant of powers of self-government to a component

¹⁴⁴ H V Evatt, *Statute of Westminster Adoption Bill: A Monograph* (Government Printer, 1942). There are copies in the National Library, the Commonwealth Parliamentary Library, the Australian War Memorial, the Australian Archives, NAA: A.981, IMP 48 Pt 3 and at Flinders University in the Evatt Collection. Few Australian scholars have cited it but W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Sweet & Maxwell, 3rd ed, 1962) 93, fn 14 and Twomey, above n 2, 44 fn 179, 56 fn 243 do. It was also relied upon by McGechan, above n 85, 89 fn 27.

¹⁴⁵ *R v Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452.

¹⁴⁶ *Ibid* 464.

¹⁴⁷ *Ibid* 471.

¹⁴⁸ *Ibid* 472 (Starke J), 479 (McTiernan J), 486 (Williams J).

¹⁴⁹ H V Evatt, above n 144, 8–9 [43]–[45].

portion of the Empire connotes, primarily, restriction on their exercise to the limits of the local territory and its adjacent sea limit as recognised universally and by statute.’¹⁵⁰

In the early 1930s, this was not regarded as a serious problem for the Commonwealth, since it mainly affected criminal law and then principally the domain of State law, and the States were not included in the *Statute*. But after September 1939 the extra-territorial restriction became a serious problem for the Commonwealth. As islands were taken from the Japanese, Australia would have to install a temporary administration, and this raised the problem of whether Australian regulations had extra-territorial effect.¹⁵¹ There were doubts about the exact nature of the limitation. The 1929 committee described the subject as full of obscurity and noted the conflict in the opinions of jurists,¹⁵² while the judicial committee said that it was ‘a doctrine of somewhat obscure extent.’¹⁵³ There were also doubts in Australia. Two barristers in 1937 described extra-territoriality as vague in nature in an opinion for a pro-Empire society.¹⁵⁴ Despite a decision by the judicial committee in 1933, on appeal from Canada, that, even before 1931, the doctrine did not apply to a Dominion,¹⁵⁵ concerns about the validity of Australian legislation were raised by the Solicitor-General of the Commonwealth George Knowles, and communicated to the Attorney-General.¹⁵⁶ This and other problems prompted the Government to move a Bill to adopt the *Statute* as Commonwealth law.¹⁵⁷ It is clear that the removal of the extra-territorial disability operated in Commonwealth law from the passage of the adoption Act in 1942, as Dixon J pointed out in 1959,¹⁵⁸ and as two justices of the High Court pointed out in 1991.¹⁵⁹

¹⁵⁰ *Merchant Services Guild of Australasia v Commonwealth Steamship Owners Association* (1913) 16 CLR 664, 690. See also *Merchant Services Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737, 744 (O’Connor J).

¹⁵¹ For an account of the military takeover of the civilian administration in Papua see Brian Jinks, ‘Blaming the Victim: Leonard Murray and the suspension of civil administration in Papua’ (1982) 28 *Australian Journal of Politics and History* 44–55.

¹⁵² *1929 Report*, above n 26, 12 [38]. Cited also in H V Evatt, above n 144, 11–12 [61].

¹⁵³ *British Coal Corporation v The King* [1935] AC 500, 520 (Lord Sankey LC), a remark also referred to in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 12 but criticized in *Shaw v MIMIA* (2003) 218 CLR 28, 82–3 [170] (Callinan J dissenting).

¹⁵⁴ W Anstey and J J Bray, above n 84, 6.

¹⁵⁵ *Croft v Dunphy* [1933] AC 156. The case commenced in Nova Scotia in March 1930 some 21 months before the passage of the *Statute of Westminster*: [1930] 3 DLR 70. cf *Semple v O’Donavan* [1917] NZLR 273, 281 (Stout CJ), where New Zealand was held to be able to make laws beyond the three mile limit in order to defend the country. The court had in mind the war effort to take German Samoa. Similarly in *Trenholm v McCarthy* [1930] 1 DLR 674 a court in Nova Scotia held that customs regulations could operate beyond the 12 mile limit.

¹⁵⁶ H V Evatt, above n 144, 16 [94]. George Knowles was the Solicitor-General of the Commonwealth from 1932 to 1946.

¹⁵⁷ Curiously Evatt took the view when a member of the High Court in 1933 that the Commonwealth was not constrained by the extra-territorial limitation, even though it had not yet adopted the *Statute of Westminster*. See *Trustees, Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, 233.

¹⁵⁸ *R v Foster, ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 267. See also McTiernan J at 279 to the same effect. At 300 Menzies J described the doctrine as a misconception.

¹⁵⁹ *Polyukovich v Commonwealth* (1991) 172 CLR 501, 633 (Dawson J), 713 (McHugh J).

X THE SPECIAL PROBLEM OF SHIPPING LEGISLATION

Of special concern in the 1920s was the problem posed by Imperial shipping and admiralty laws. It was British policy to achieve uniformity in these matters,¹⁶⁰ something that they had insisted upon from an early date.¹⁶¹ By the late 19th century consistency was accomplished through the *Merchant Shipping Act 1894* (UK) and the *Colonial Courts of Admiralty Act 1890* (UK). Both Acts applied to 'British Possessions' and the Commonwealth was held to be such a possession by the High Court in 1924 and in later cases.¹⁶² These acts permitted the self-governing colonies to pass shipping and admiralty laws and, on their face, seemed to exempt the colonies from the repugnancy doctrine to the extent that they authorised departures from Imperial shipping legislation.¹⁶³ However, in a series of cases, it was established that any colonial shipping statutes could not exceed the bounds laid down in the *Merchant Shipping Act 1894* (UK).¹⁶⁴ In practice, this meant that Dominion lawyers had to hunt through the British statute book to ascertain the precise state of the law so that it could be applied in their own jurisdiction.¹⁶⁵ Doubts were expressed in 1924 whether the true foundation for navigation laws was to be found in the *Colonial Courts of Admiralty Act 1890* (UK), when Starke J pointed out that the admiralty jurisdiction of the High Court lay in s 76 of the *Constitution*, though he did not press the point, and agreed that the *Colonial Courts of Admiralty Act 1890* (UK) also sustained the powers given to the Court by ss 30 and 30A of the *Judiciary Act 1903* (Cth).¹⁶⁶

The complaints about the merchant shipping laws were the subject of a special committee of experts in 1929. The committee recommended that uniformity be achieved through agreement, not legislation, and that given the complexity of the issue, further work was needed to achieve equality between the Dominions.¹⁶⁷ Despite claims by a

¹⁶⁰ *ASN Co v Smith* (1886) 7 NSW 207, 237 (Windeyer J); B J McGrath, 'Admiralty Jurisdiction and the Statute of Westminster' (1932) 6 *Australian Law Journal* 160.

¹⁶¹ *The Australia* (1859) 15 ER 50, 60. A policy agreed to by the Dominions in Commonwealth, *Imperial Conference 1911*, Parl Paper No 68 (1911) 15.

¹⁶² *John Sharp and Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420, 424–5 (Knox CJ, Gavan Duffy J); *Hume v Palmer* (1926) 38 CLR 441, 449 (Knox CJ); *McArthur v Williams* (1936) 55 CLR 324, 337–38 (Latham CJ); *McIlwraith McEachern Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 189 (Latham CJ).

¹⁶³ See the Opinion by Robert Garran, 15 January 1906 in Commonwealth, *Report of the Royal Commission on the Navigation Bill*, Parl Paper No 30 (1906) lxxx, app E, [11]. But not wholly. The British objected to the Navigation Bill 1911 on these grounds: Commonwealth, *Navigation Bill*, Parl Paper No 11 (1911) 1045–1047.

¹⁶⁴ *The Camosun* [1909] AC 597, 608; *The Yuri Maru* [1927] AC 906, 915 affd in *Nagrind v The Ship "Regis"* (1939) 61 CLR 688, 692 (Dixon J); *F Kanamatsu & Co Ltd v The Ship "Shamada"* (1956) 96 CLR 477, 483–484 (Taylor J); *Lewmarine Pty Ltd v The Ship "Kaptayanni"* [1974] VR 465, 468 (Pape J); and referred to in *Empire Shipping v Shin Kobe Maru* (1991) 32 FCR 78, 87 (Gummow J).

¹⁶⁵ Herbert A Smith, 'Admiralty Jurisdiction in the Dominions' (1925) 41 *Law Quarterly Review* 423, 426–27.

¹⁶⁶ *John Sharp and Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420, 433 (Starke J) ('*The Katherine Mackall*'). Isaacs J at 428–9 alludes to the same issues but along with the rest of the court decided the matter on the basis of the 1890 Act. References were made to ss 51(xxxix) and 76(iii) of the *Constitution* as supporting shipping and admiralty legislation by Dixon J in *Nagrind v The "Regis"* (1939) 61 CLR 688, 696 but after citing *The Katherine Mackall* case his honour concluded that the jurisdiction was founded on the *Colonial Court of Admiralty Act 1890* (UK).

¹⁶⁷ *1929 Report*, above n 26, 9 [13]. In fact, one day before the *Statute* became law an extensive agreement on Merchant Shipping matters was agreed to by the Dominions and Britain. For the agreement see Canada, *Statutes 1932*, Preface, ix–xv.

specialist in merchant shipping matters that Australia would benefit by adopting the *Statute*, and thereby free itself of the *Merchant Shipping Act 1894* (UK), the official position in the 1930s was that it would be a very large task to enact shipping laws for itself. The Solicitor-General warned that the task of drafting and enacting local shipping legislation looked like ten years of work.¹⁶⁸ In 1942, Attorney-General Evatt made it plain that since the *Colonial Laws Validity Act 1865* (UK) still applied to Commonwealth Acts, the government wanted to remove doubts about the validity of Australian shipping regulations in particular.¹⁶⁹ Despite the passage of the *Statute of Westminster (Adoption) Act 1942* (Cth), Australia continued to rely on British shipping legislation until the coming into force of the *Admiralty Act 1988* (Cth) on 1 January 1989. At that point s 76(iii) of the *Constitution*, which confers an admiralty jurisdiction on the High Court, was to be ‘no longer...read against the background of concurrently applicable Imperial law’.¹⁷⁰

XI RESERVATION OF THE ASSENT STILL OPERATED UP TO 1942

One of the British controls over Australian legislation was the doctrine that certain Bills had to be reserved for the assent in London. This was built into the instructions to the Governor-General in 1900¹⁷¹ and was also imposed by particular Imperial statutes. There was a requirement that colonial legislation passed pursuant to the *Colonial Courts of Admiralty Act 1890* (UK), for example, had to be reserved for the assent in London.¹⁷² This requirement was observed in 1913 but inexplicably ignored a year later.¹⁷³ In 1914 the Governor General assented¹⁷⁴ to an amendment to the *Judiciary Act 1920* (Cth) to constitute the High Court as a Colonial Court of Admiralty within the meaning of the *Colonial Courts of Admiralty Act 1890* (UK).¹⁷⁵ As the legislation was authorised by the *Colonial Courts of Admiralty Act 1890* (UK), and as s 4 of that Act required all such colonial legislation to be reserved for the assent in London, it was deemed invalid because it had not been reserved.¹⁷⁶ Once the mistake was discovered, the Act was then sent to London for the assent, which was only given in November 1916.¹⁷⁷ Aside from the delay, the real problem was that under s 60 of the Constitution, reserved legislation had to receive the assent within two years of being passed by the Parliament and in this case the assent was given 18 days after the expiry of the two-year limit. Despite the assent to the Act in London, there remained a question about the validity of the Act and in 1924 the High Court considered the matter. Isaacs J expressed doubts about the Act on the ground that since the Governor-General had given his assent he was *functus officio* and

¹⁶⁸ Solicitor-General Knowles to East, 6 February 1935 in NAA: 432/85, 1936/296.

¹⁶⁹ Evatt, above n 144, 3–6. The problem had been raised in 1929 and was thought to be the only matter ‘in which the Commonwealth had seriously encountered the supremacy of British legislation...’ See *1929 Report*, above n 26, 33 [19].

¹⁷⁰ *Empire Shipping Co Ltd v Owners of the Ship Shin Kobe Maru* (1991) 32 FCR 78, 87 (Gummow J).

¹⁷¹ Instructions to the Governor-General, 29 October 1900 in Australia, *Statutory Rules made under Commonwealth Acts from 1901–1956* (Butterworth & Company, vol v, 1960) 5311, cl vii.

¹⁷² *Colonial Courts of Admiralty Act 1890* (UK) s 4. The reservation requirement also applied to colonial legislation authorized by the *Merchant Shipping Act 1894* (UK) s 735(1).

¹⁷³ See the detailed statement on the reservation of the Navigation Bill 1913 in Commonwealth, *Gazette*, No 70, 24 October 1913, 2896.

¹⁷⁴ Commonwealth, *Gazette*, No 91, 7 November 1914, 2472.

¹⁷⁵ *Judiciary Act 1914* (Cth) s 3, inserting s 30A.

¹⁷⁶ Colonial Office to Law Officers, 27 January 1915, in D P O’Connell and Anne Riordan, above n 77, 245–46.

¹⁷⁷ Commonwealth, *Gazette*, No 166, 16 November 1916, 3133.

could not reserve the Bill at all.¹⁷⁸ The other members of the Court did not agree, holding that the legislation was sustained by the *Colonial Courts of Admiralty Act 1890* (UK).¹⁷⁹ Dixon J followed the majority view in 1939,¹⁸⁰ and in any case the 1914 Act was repealed and replaced in the same year.¹⁸¹ It was explained at the time that the 1939 Act was passed to allay any doubts about the validity of the 1914 Act and also to ensure that both State and Commonwealth courts could exercise an admiralty jurisdiction.¹⁸²

Although it was accepted in 1929 that the requirement under certain legislation that the assent be reserved for the Queen or King was obsolete,¹⁸³ it nevertheless persisted in the absence of the adoption of s 6 of the *Statute* that removed the reservation requirement imposed by the *Colonial Courts of Admiralty Act 1890* (UK). In 1939, for example, an amendment to the *Judiciary Act 1903* (Cth) was reserved for His Majesty's pleasure on 9 September, but the Royal Assent was only given on 23 November.¹⁸⁴ As the war went on, the sense of urgency increased, while the British proved dilatory in giving their assent to reserved Commonwealth enactments. Attorney-General Evatt complained in October 1942 that although the Navigation Bill had been passed on 4 June 1942,¹⁸⁵ it was not yet in force four months later because it was awaiting the assent in London.¹⁸⁶ Indeed, it was only seven months after the Bill passed through the Commonwealth Parliament that it finally received the assent in London.¹⁸⁷

Unsurprisingly, Evatt thought that the doctrine served no useful purpose for, in practice, the King would never refuse his assent. Therefore, he urged the Parliament to adopt the *Statute* to remove this obstacle to the efficient exercise of Commonwealth legislative power.¹⁸⁸ This, and earlier examples of the legal constraints on Commonwealth law making, demonstrates that there were significant legal and therefore practical limitations to the legislative independence of the Commonwealth before 1942. These limitations were real, not illusory, and given the Australian commitment to constitutional legality, they tell against the argument that the Commonwealth was practically or effectively independent in legislative matters between 1931 and 1942. In short, practical or effective legislative independence was not an adequate substitute for legal independence.

XII CONCLUSIONS

This paper has argued that in both law and in practice the Commonwealth lacked legislative independence from the United Kingdom before 1942. It showed not only the actual legislative limitations on the Commonwealth parliament in the 11 years between

¹⁷⁸ *John Sharp Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 429–31.

¹⁷⁹ *Ibid* 425 (Knox CJ and Gavan Duffy J), 433 (Starke J)

¹⁸⁰ *Nagrind v The Ship "Regis"* (1939) 61 CLR 688, 692.

¹⁸¹ *Judiciary Act 1939* (Cth) s 3.

¹⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 162.

¹⁸³ *1929 Report*, above n 26, 11 [33].

¹⁸⁴ *Judiciary Act 1939* (Cth). For other acts between 1931 and 1942 that were reserved see the *Navigation (Maritime Conventions) Act 1934* (Cth) and the *Navigation Act 1935* (Cth).

¹⁸⁵ Commonwealth, *Votes and Proceedings of the House of Representatives*, Parl Paper No 86 (3 and 4 June 1942) 367.

¹⁸⁶ H V Evatt, above n 144, 14 [76]. See also at page 21 app F where he attaches a chart documenting the delay in securing the assent to reserved acts between 1912 and 1942.

¹⁸⁷ Commonwealth, *Gazette*, No 31, 10 February 1943, 431; *Navigation Act 1942* (Cth).

¹⁸⁸ H V Evatt, above n 144, 13 [69].

1931 and 1942, but also how the conventions established in the period 1926–1931, while useful, did not solve all of the legal problems faced by the Commonwealth, especially after 3 September 1939. A formidable array of Australian legal talent was brought to bear on the *Statute* from 1926 to 1942 and their arguments in the context in which they found themselves should not be lightly dismissed. No one at the time supposed that as a matter of law the Commonwealth enjoyed legislative independence between 1931 and 1942.

The errors of the advocates of 1931 as the date of Commonwealth legislative independence were legal, historical and conceptual. First, they may have not appreciated the state of the law between 1931 and 1942 and the significance of the problems that arose, in both a legal and practical sense, of not adopting the *Statute* before 1942. The noteworthy characteristic of the process of formulating and implementing the *Statute* was the steadfast, methodical and cautious adherence to legality and the rule of law. Even the Irish, who were anxious to reduce the legal connection with Britain, did so by legal means, as did the other Dominions. In short, the law mattered and as events showed, especially after 1939, the legal restrictions proved to be onerous and obstructive. Second, the proponents of 1931 supposed that constitutional conventions were an adequate substitute for the formal adoption of the *Statute*, when in fact learned opinion at the time and actual experience held otherwise. Third, their view embodies a rather odd paradox: that the retention of legislative fetters on a voluntary basis was somehow evidence of independence, when in law and in fact it denoted continuing dependence. This view was the result of confusing potential independence with actual legislative independence. In the light of the history and the law, the safest conclusion is that the adoption of the *Statute* in 1942, made operative from 3 September 1939, marked the true legislative independence of the Commonwealth. Thereafter, the Commonwealth did not need, with rare exceptions provided for in the *Statute* itself, British legislative help to pass legislation for the Commonwealth.
