THE DIVISION OF POWERS BETWEEN THE BRITISH EMPIRE AND ITS AUSTRALIAN SELF-GOVERNING COLONIES, 1855-1900

Richard Lucy

The view that the Australian political system is best described as a mixture of American federalism and British responsible government rests on the older belief that the *Commonwealth of Australia Constitution Act* of 1900 (henceforth C.A.C.A.) is such a mixture. The plausibility of this belief rests partly on the proposition expounded by Griffith (see below) that Australians in the 1890s had had no experience of federation. If this proposition were true, a heavy reliance on the constitutions of the English speaking federations of North America would not have been surprising. And once the Canadian constitution of 1865 (henceforth B.N.A.) attracted the disapproval of the small states, the U.S. constitution (henceforth U.S.C.) would have dominated the stage. Where else could Australians have found a model for their federation?

There was another federal constitution, written in English, which influenced the Australian founding fathers. It was the constitution of the de facto British imperial federation. The British empire had federal aspects. In particular, there was a division of powers between the Australian self-governing or "responsible government" colonies and the imperial parliament. In principle this was a division between matters of local (domestic) concern and matters of imperial concern. Matters of imperial concern were listed in the royal instructions to governors, that is, they were instructed to reserve all bills on those subjects, except in certain circumstances. The imperial authorities reserved the right to

disallow any colonial Act, but only because they could not foresee the reach of imperial concern. The fact that colonial constitutions gave self-governing colonies the power to pass laws for, for example, the good government of Victoria, was interpreted to invalidate laws extending beyond that colony (extra-territorial legislation). In other words, extra-territorial matters (including treaties) were exclusive imperial powers. In 1855, then, there were powers which could be called concurrent and others which could be called exclusive, but none which were legally protected from imperial encroachment. The political relationship between the imperial authorities and the Australian colonies did not flow entirely within these furrows. The colonies enjoyed a substantial degree of local autonomy; the imperial authorities accepted many colonial bills on subjects mentioned in the instructions to governors; and, as the century progressed, "exclusive" imperial powers tended to become de facto concurrent powers. Thus the exclusive-concurrent-residual framework sits oddly on the relationship between the imperial and Australian colonial parliaments in the second half of the nineteenth century. However, it is not a reliable guide to the relationship between the federal and state parliaments in the second half of the twentieth century either.

Except for the declining authority of the centre, the imperial-colonial relationship was a good preparation for the federal-state relationship of the twentieth century; the more so because the basic rule which governed imperial-colony demarcation disputes (the *Colonial Laws Validity Act* of 1865, s.2) was essentially the same as that which governed federal-state demarcation disputes (C.A.C.A. s.109). Of Sawer's six U.S.-based federal principles, the late nineteenth-century British empire fails to conform to two.[1] First, even the most basic provisions of the imperial constitution could, legally speaking, be amended by the imperial parliament. The British imperial constitution was not rigid. This first objection to the empire's federal status is pedantic. It does not matter whether legal or political factors restrain the centre from crushing the regions' measure of autonomy. What does matter is that it is restrained, that both the centre and the regional governments are powerful. In any case, those who would deny the British empire federal status on those grounds would have to deny it to Australia in the 1990s. The commonwealth parliament's expansionist ambitions are now restrained more by political than constitutional considerations.

The contrast between the flexibility of the British constitution and the rigidity of the Australian one is sometimes overstated. Sawer's cautious insistence on "... a fair degree of rigidity ..." in a constitution's "... basic terms ..." was put in a more forthright manner by Elaine Thompson. Supporting her view that "Our system ... has a quite different basis than the English one ..." she argued that "... our Constitution is both a written one and a rigid one".[2] That is not entirely true.

1 G. SAWER, MODERN FEDERALISM 1 (Pitman Australia 1976).

2 Thompson, *The Washminster Mutation*, in RESPONSIBLE GOVERNMENT IN AUSTRALIA 33 (P. Weller and D. Jaensch eds Drummond 1980).

There are 23 "until the parliament otherwise provides" clauses - not 22 as Quick and Garran asserted.[3] They, and Lane, missed s.93.[4] A number of other sections contain flexible elements in that they assert that, in effect, the commonwealth may fill in the blank space how it chooses, and subsequently replace that choice with another. These sections include C.A.C.A. ss.9, 13 (criteria for dividing senators), 14, 49, 50, 71, 73 (in addition to the "otherwise provides" part of this section), 74, 76, 77, 78, 79, 94, and 101. Thus there are at least 34 sections - over one quarter of C.A.C.A. - which are wholly or partially flexible. The most flexible chapter in C.A.C.A. is that concerning the judiciary (chapter 3). There are obvious similarities between this chapter and U.S.C. s.3; but, unlike U.S.C. s.3, C.A.C.A. chapter 3 gives parliament power to increase, and then to diminish, the original jurisdiction of the High Court; to invest any state court with federal jurisdiction and to deprive it of such jurisdiction; and to define the extent to which the jurisdiction of a federal court is exclusive of that of state courts. The greater flexibility of C.A.C.A. chapter 3 is doubtless a reflection of the Australian colonial tradition as confirmed by the *Colonial Laws Validity Act* s.5.

The second of Sawer's federal principles to which the British empire failed to conform was the existence of a court policing the division of powers by means of judicial review. Imperial-colony demarcation disputes were only partially policed by judicial authorities. Much policing was performed by colonial courts. But at the centre (in the U.K.) the main review of legislation was administrative rather than judicial. A High Court exercising judicial review is not essential to a federal state. It is only a means to an end. Administrative review by the Colonial Office was substantially review by lawyers. Both they and High Court judges were appointed by their respective central governments. And while it was easier to remove a Mr Mother Country than a High Court judge, not many High Court judges have experienced Damascus Road conversions.

The fact that the founding fathers were politicians is sometimes overlooked. Their discourse should be studied with the same scepticism with which we greet present-day politicians. Thus Griffith's speech to the 1891 convention in which he stressed the "essential condition" of American federalism which was "... absolutely new to us in Australia ... absolutely new to us in the British empire ..."[5] was essentially a persuasive claim for power. He was arguing that colonial political experience was not sufficient for the task in hand; that what was needed was something he happened to have - expert knowledge of "federal" constitutions. But we should not be persuaded by Griffith. He and his colleagues lived in a political system characterised by power divided between the centre and the regions. Unlike the model of the American federation, that division of power was sustained more by

3 J. QUICK and R.R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 647-48 (Legal Books 1976).

4 P.H. LANE, LANE'S COMMENTARY ON THE AUSTRALIAN CONSTITUTION 251 (Law Book Co. 1986).

5 Reprinted in M. CLARK, SELECT DOCUMENTS IN AUSTRALIAN HISTORY 1851-1900, 489 (Angus and Robertson 1979).

political than by legal considerations; but it was a federation nonetheless. That system facilitated Australian federation partly because Australians were accustomed to federation (although under another name), partly because the centre (imperial) yoke had been a light one, and partly because the magnitude of the commonwealth's defence and external affairs powers were obscured by the fact that they were then primarily in imperial hands.

The view that the British empire in the nineteenth century was a federation is not generally accepted among Australian political scientists due to widespread adherence to two constitutional cliches: the existence of an unwritten British constitution and the sovereignty of the British parliament. Moreover there is much support, within and beyond the political science community, for the view that a division of powers must be ensconced in a written constitution if it is to endure.[6] Thus some importance is attached by those who stress the difference between the U.K. political system, on the one hand, and the U.S. and Australian systems, on the other, to the belief that the U.K. has, and had, an unwritten constitution. Elaine Thompson, for example, asserted that:

> Here then is an absolute difference between Australia and England: the existence of a written constitution that puts written limits on the powers of the central and state governments ...[7]

A novice might assume from this that the U.K. constitution is entirely unwritten. If so, he or she would be puzzled by Jaensch's statement that "... the British 'Constitution' is ...the aggregate of all Acts of Parliament ...".[8] If this is so, and if length is the criterion, then the British constitution is the most written constitution in the world. The aforementioned novice would doubtless become more confused upon reading Summers' claim that the British constitution was both unwritten and said to partly consist of Acts of Parliament.[9] Perhaps it would be simpler if the term "constitution" were used only to denote certain documents; and the term "political system" were used to include political customs, conventions and the like.

The U.K. constitution was not unique in being composed of several documents. Constitutional material is also found in several Acts pertaining to each of the Australian colonies which were passed well before their "constitutions" came into existence.[10] Nor was the fact that its constitution did not adequately describe its political system unique.[11] It would be surprising to find a constitution which did.

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6 *E.g.* P. HYNDMAN, CONSTITUTIONAL LAW AND GOVERNMENT 6 (School of Administrative Studies, C.C.A.E. 1980).

7 Thompson, *supra* note 2, at 32. See also H. EMY and O. HUGHES, AUSTRALIAN POLITICS: REALITIES IN CONFLICT 299 (Macmillan Australia 1988).

8 D. JAENSCH, GETTING OUR HOUSES IN ORDER 21 (Penguin Books 1986).

9 Summers, *Parliament and Responsible Government in Australia*, in GOVERNMENT, POLITICS AND POWER IN AUSTRALIA 8 (D. Woodward, A. Parkin and J. Summers eds. Longman Cheshire 1985).

10 HYNDMAN, *supra* note 6, at 5.

11 *See, e.g.* EMY and HUGHES, *supra* note 7, at 299.

The nineteenth century British imperial constitution should be regarded as being composed of those Acts of the imperial and colonial parliaments which describe the more significant aspects of the nature, powers and mechanisms of governmental institutions in the empire and the relationships between them. It should also be regarded as including certain documents referred to in such Acts. In saying this I do not intend to deny the force of conventions, or the existence of judge-made constitutional law, such as William Blackstone's *Commentaries*, were regarded as legal authority.

Sovereignty

One reason that few Australian political scientists have looked for a division of power in the British empire may be the belief that, in Elaine Thompson's words, in "... England parliament is legally sovereign ...".[12] As this is assumed (presumably) to have been no less true in the nineteenth century it would follow that all power worth the name was concentrated at Westminster, leaving none for the colonies. But, as Fieldhouse pointed out, parliamentary sovereignty was not the only principle guiding the governing of the empire. Nor were all other principles in harmony with it. Specifically the "... doctrine of parliamentary supremacy was inconsistent with the principle of colonial - or dominion - autonomy".[13]

It is easy to see, from a statement of the minister for colonies in 1839, that the division of powers between the parliaments of self-governing ("responsible government") colonies and the British imperial parliament conflicts with the principle of the absolute sovereignty of the latter:

> ... parliamentary legislation, on any subject of exclusively internal concern, in any British colony possessing a representative assembly, is, as a general rule, unconstitutional. It is a right the exercise of which is reserved for extreme cases, in which necessity at once creates and justifies the exception.[14]

Colonies without representative assemblies were another matter. Thus in 1842 two Van Diemen's Land Acts on water supply were disallowed (6 Vic. Nos. 13 and 14), and in 1844 an Act on the "Brewing, &c., of Beer for Sale" was disallowed.[15] Castles found that, after responsible government, a progressive, and sometimes rapid "... diminution in British interference in local, colonial affairs" took place.[16] But, in the case of Van Diemen's Land, the decline may have commenced earlier. If a

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12 Thompson, *supra* note 2, at 32.

13 D.K. FIELDHOUSE, THE COLONIAL EMPIRES 65 (Macmillan 1986). See also Archer, *The Theory of Responsible Government in Britain and Australia*, in Weller and Jaensch, *supra* note 2, at 25-26.

14 Quoted by A. TODD, PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES 173 (Longmans, Green 1880).

15 TASMANIA, THE STATUTE INDEX 24 (1877).

16 A. CASTLES, AN AUSTRALIAN LEGAL HISTORY 401 (Law Book Co. 1982).

government statute index is a better guide to disallowances than to reservations, eight Acts were disallowed between 1835 and the end of 1844; only two between then and the end of 1854.[17]

The principle of the sovereignty of the imperial parliament was also inconsistent with the principles, reaffirmed in Campbell v. Hall (1774) Lofft 655; 1 Cowp. 204; 98 E.R. 1045, that, in the case of a conquered country, the monarch "... is entrusted with making the treaty of peace; ..." and that the articles "... of capitulation and articles of peace on which colonies are surrendered or ceded are inviolable".[18] Quite clearly the imperial parliament could be constrained by the terms of a treaty which it did not make. So the imperial parliament was not even legally sovereign.

Archer, who queried the sovereignty of the U.K. parliament, argued that, although:

> ... parliamentary government existed in England from the late seventeenth century ... it was not until the second half of the nineteenth century that parliamentary sovereignty was made an integral part of some prominent British governmental theories.[19]

However it was a legal principle at least a century earlier. In Campbell v. Hall Lord Mansfield asserted that the law-making powers of both the king and the colonial legislatures were subordinate to those of the imperial parliament.[20] But, like many other legal principles, it was a principle to which there were exceptions and a principle which might legitimately be weighed against other conflicting principles. In the second half of the nineteenth century, however, the principle became entwined with a normative theory of responsible government, and became part of an exercise in role formation by identity definition. Parliament is sovereign; therefore it should always act in a sovereign manner. Or, as Archer put it "[r]esponsible ministers in a sovereign parliament should not, according to these theories, share their power with outside bodies".[21] This was quite at variance with what actually happened in the nineteenth century. The imperial parliament shared power with monarchs, courts and, in particular, with colonies.

The legal principle of the sovereignty of a central government does not always threaten local autonomy. Nor does a legally rigid constitution policed by a High Court always protect it. In the second half of the nineteenth century, under a flexible imperial constitution, the power of the Australian colonial parliaments grew. In the first half of the twentieth century, under a predominantly rigid national constitution, the power of the Australian state parliaments declined.

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17 TASMANIA, THE STATUTE INDEX 19-29 (1877).

18 E. CRESSY, THE IMPERIAL AND COLONIAL CONSTITUTIONS OF THE BRITANNIC EMPIRE, INCLUDING INDIAN INSTITUTIONS 168, 171 (1872).

19 Archer, *supra* note 13, at 23-24.

20 CRESSY, *supra* note 18, at 170-171.

21 Archer, *supra* note 13, at 24.

Diarchy

Of Davis' ten definitions of "federation", six include the concept of a division of power between two or more levels of government.[22] There was such a division in the British empire. The division was inspired by an intention, characteristic of some other federations,[23] that the authority of regional (colonial) governments should embrace matters of regional concern, whereas that of the central (imperial) government should cover matters which affected the whole federation (empire).[24]

The intention of the imperial parliament to retain control only of matters which concerned the whole empire may also be seen in a despatch from the British colonial secretary to the governor of Victoria in 1855. Commenting on the imperially-altered Victorian constitution, Lord John Russell assured Sir Charles Hotham that:

> ... no alteration has been made in any of those provisions which are simply of a local character. It has been the conviction of Parliament, that the Legislature must itself be trusted for all the details of local representation and internal administration.[25]

According to D.K. Fieldhouse, two new principles of colonial self-government were adopted after 1837: responsible government and diarchy. Diarchy was based on the view:

> ... that the subject matter of government could be divided into compartments. In the colonial context this implied a distinction between "imperial" and "colonial" interests. The former could remain under the exclusive control of the governor and the British government; the latter could be transferred to a cabinet of colonists.[26]

Thus diarchy was "... the division of colonial government into reserved and transferred subjects ...".[27] Legislation on reserved subjects was to be reserved for Her Majesty's pleasure. The reserved bill would remain inoperative unless the monarch gave her assent. Before that stage was reached, the reserved bill, like bills which had received a vice-regal assent, would undergo a complex review process which included scrutiny by the colonial office.[28] Subsequently reserved bills either did or did not receive the royal assent, and some of the other bills may have been disallowed. In some cases the royal assent was withheld pending negotiation or amendment. Governors were instructed to reserve all bills which contained provisions from a bill which had been disallowed or had failed to obtain the royal assent.

22 S.R. DAVIS, THE FEDERAL PRINCIPLE 214-215 (U. of California Press 1978).

23 See B.N.A. 91 and 92: 16. Note also the World Federalists' slogan of local government for local affairs, national government for national affairs and world government for world affairs.

24 *See e.g.* TODD, *supra* note 14, at 161.

25 Despatch No. 36, 20 July 1855.

26 FIELDHOUSE, *supra* note 13, at 256.

27 *Id.* at 256.

28 D.B. SWINFEN, IMPERIAL CONTROL OF COLONIAL LEGISLATION 1813-1865, chap. 1 (Clarendon Press 1970).

To circumvent this provision some colonies passed temporary legislation calculated to expire just as the white cliffs of Dover appeared on the horizon.[29]

The reality of the division of powers between the imperial parliament and the parliaments of self-governing colonies was re-affirmed in a number of cases decided by the Privy Council, including one on appeal from the Supreme Court of New South Wales. In Powell v. Apollo Candle Company (1885) their Lordships referred to a previous case in which they had judged that provincial legislatures:

> ... are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the *British North America Act* enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by sect. 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament.[30]

Their Lordships therefore concluded (in the New South Wales case) that a colonial legislature "... is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate".[31] There seems little difference between this judgment and the Federal Constitution of the Swiss Confederation as amended to 1890, article 3, which stated that "The cantons are sovereign, so far as their sovereignty is not limited by the federal constitution ...".

Nevertheless the definition of imperial concern was not always clear. Apart from the inevitable differences of opinion between the imperial authorities and the colonies, British colonial policy was not homogeneous.[32] Much depended on the circumstances of the colony in question and the year.[33] Being white, self-governing, North American and late in the century would seem to maximise a colony's degree of autonomy and minimise imperial concern.[34] Nor did the Colonial Office confine itself to matters of imperial concern. They also sought to exert their authority in the area of local humanitarian issues.[35] This did not greatly affect most Australian states, however, because the two main issues - ex-convicts moving between colonies and Chinese immigration - were also ones which had implications for the empire as a whole. However in Western Australia the imperial authorities took an active interest in Aboriginal welfare, and s.70 of the 1890 *Constitution Act* placed an Aboriginal welfare fund at the governor's disposal.

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29 *Id.* at 17.
30 Powell v. Apollo Candle Company 10 App. Cas. 282, 289-290 (1885).
31 *Id.* 290.
32 *See* SWINFEN, *supra* note 28, at 116.
33 *Id.* at 116-117.
34 *Id.*
35 *Id.* at 123.

The Victorian and New South Wales constitution bills had restricted the subjects on which a governor could reserve bills, or a monarch could disallow them, to a short list of matters of imperial concern. The imperial government rejected these provisions primarily because, McMinn and Swinfen assure us, of the difficulty it saw in distinguishing imperial from local affairs on other than a case by case basis.[36] However, this reason could only have applied to disallowance, as the instructions to governors also contained a list of subjects which should be reserved. Doubtless the imperial authorities considered that the New South Welshmen and Victorians had not listed some things which they ought to have listed, and had proposed a thing which they ought not to have proposed. The latter, which was also in the South Australian constitution bill of 1853, was a radical provision which would have given the Judicial Committee of the Privy Council the role of arbiter in imperial-colony demarcation disputes. Three and a half decades before that federal conference whose centenary we celebrated in 1990, three colonies were crying out for "federal" judicial review. But that falls within the scope of another paper.

The lists deserve some attention because they are the most authoritative early attempts of the two largest colonies to say what the national (imperial) government (as opposed to regional governments) in their political system should be concerned with. The two lists were virtually identical except for the seventh item on the Victorian list, which did not appear in that of New South Wales. The Victorian bill stated that bills be reserved, or Acts disallowed, on the following matters:

> 1. Bills relating to the allegiance of the Inhabitants of the Colony of Victoria to Her Majesty's Crown.
> 2. Bills relating to the Naturalization of Aliens.
> 3. Bills relating to Treaties between the Crown and any Foreign Power.
> 4. Bills relating to Political intercourse and communications between the Colony of Victoria and any Officer of a Foreign Power or Dependency.
> 5. Bills relating to the employment command and discipline of Her Majesty's Sea and Land Forces within the Colony of Victoria and whatever relates to the Defence from Foreign Aggression including the command of the Municipal Militia and Marine.
> 6. Bills relating to the Crime of High Treason. And also
> 7. Bills relating to the Law of Divorce.[37]

By implication, this was a complete list of matters of imperial concern. All other powers were in the local (domestic) domain. The constitution bill would have prevented the inclusion in the royal instructions to Victorian governors of any instructions related to bills of a local nature.[38] By implication it would also have prevented the disallowance of Acts on local matters. But it would not have

36 W.G. McMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 5 (Oxford U.P. 1979); SWINFEN, *supra* note 28, at 96.

37 An Act to establish a Constitution in and for the Colony of Victoria, 25 March, 1854, s.38.

38 *Id.* s.43.

prevented the governor reserving bills on local matters, nor the Queen from failing to give her assent to such reserved bills.[39] In other words the governor could not reserve bills in his role as an imperial agent; but he could reserve bills in his role as the local sovereign. The New South Wales constitution bill would not have permitted the governor to reserve bills on local matters in either of his roles. Nor would the imperial authorities have had the right to disallow Acts on local matters.[40] The South Australian constitution bill reserved on 10 November 1856 did not list the subjects of imperial concern. But it did imply that the governor was not to be influenced by his royal instructions when deciding whether he should reserve bills on local matters.[41] Like the Victorians, then, the authors of the South Australian constitution bill thought it reasonable that a governor could reserve a bill on a local matter in his role of local sovereign.

These aborted provisions in the New South Wales and Victorian constitutions sought to divide power within the imperial state by listing matters of imperial concern and leaving the residue to the regions. This, of course, was the pattern apparently followed in C.A.C.A. Thus, one should not assume that C.A.C.A.'s apparent location of residual power in the states was a response to the call to draft what was then regarded as a federal constitution, and was therefore copied from U.S.C. As we have seen, it arose much earlier in response to the position these colonies wished to occupy in an imperial state - a state they would not have deemed to be federal. In like manner New South Wales, South Australia and Victoria all proposed in these constitution bills that the Privy Council should police the imperial division of powers by the exercise of judicial review. Again one should not assume that the High Court was necessarily a response to the federal task when these bills, and another draft bill in 1871,[42] indicate that some sort of High Court was desired as a reform of the imperial political system.

This list includes items similar to C.A.C.A. ss.51vi, xix, xxii and xxix. The New South Wales governor's instructions in 1855 were to reserve bills on a wider range of subjects. Naturalisation of aliens was not included, but certain types of bills on currency and coinage, customs duties, trade, shipping, the monarchy, corporations, political institutions, property, public worship, lotteries, gifts to the governor, temporary bills and bills containing provisions from a disallowed bill or one to which Her Majesty's assent had been refused, were. Thus, the list included subjects similar to C.A.C.A. ss.51i, vi, xii, xx, xxii, xxix, to ss.88, 90 and 98, and other matters not included by C.A.C.A. among the powers of the commonwealth. In other words, as far as reservation was concerned, the main characteristic of the Victorian list which would have offended the Messrs Mother Countries of the colonial office was its

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39 *Id.* ss.37 and 43.

40 An Act to confer a Constitution on New South Wales and to grant a Civil List to Her Majesty, 22 December, 1853, ss.1-3.

41 An Act to establish a Parliament in South Australia, 10 November, 1853, s.31.

42 J.M. BENNETT and A. CASTLES, A SOURCE BOOK OF AUSTRALIAN LEGAL HISTORY 236-241 (Law Book Co. 1979).

brevity - not (as McMinn and Swinfen claim) the difficulty of distinguishing local from imperial matters.

The royal instructions to governors were an important part of the constitutional division of powers between the imperial parliament and the self-governing Australian colonies. But, if we are looking at the political education in federalism which a political career within the empire provided, we must look further. In particular, the way the instructions to governors were interpreted must be examined. The right of governors to reserve bills and of the crown to refuse assent to them and to disallow Acts suggests a sovereign imperial thumb in every colonial pie. But the reality was, apparently, otherwise. McMinn assured his readers that:

> Up to the end of the century only fifteen of the hundreds of Bills passed by the New South Wales Parliament had been reserved, and all of them had been given the royal assent in London; only five Bills passed by any Australian legislature were disallowed.[43]

McMinn was mistaken about the number of bills reserved in New South Wales between "responsible government" in 1855 and the end of the century. The figure is 19 (20 Vic. Nos. 10, 15, and 23; 24 Vic. No. 27; 25 Vic. No. 20; 26 Vic. Nos. 19 and 20; 35 Vic. No. 7; 36 Vic. Nos. 30 and 31; 39 Vic. No. 38; 40 Vic. No. 21; 42 Vic. Nos. 3 and 28; 44 Vic. No. 31; 51 Vic. No. 15; the numberless bill listed after 55 Vic. No. 36; 60 Vic. No. 41; and 1899 No. 32). Todd, or more likely his son (who obtained his figures from an assistant under secretary of state) was also mistaken on the number of New South Wales bills reserved between 1855 and the end of 1890 - possibly because his figures did not include bills which had been reserved but were not presented for Queen Victoria's assent.[44] According to Todd's figures, eight Australian bills which were reserved between responsible government and the end of 1890 failed to receive the royal assent in London, and four Australian Acts were disallowed in the same period.[45]

The bills reserved between the date of responsible government in each colony and the end of the century included those listed in Appendix B. Looking at that list in terms of commonwealth powers in C.A.C.A., it impinges on C.A.C.A. s.51i (read in the light of C.A.C.A. s.98), vi, xii, xviii, xix, xx, xxi, xxii, xxvi, xxvii, xxviii; and C.A.C.A. ss.84, 90 and 92. It also mentions matters which are not listed among commonwealth powers in C.A.C.A. Of course, it is not a complete list of the imperial powers which were operative in Australia in the second half of the nineteenth century. One would also have to include imperial acts which operated in Australia by paramount force.

There was certainly a division of power between the British empire and the Australian "self-governing" or "responsible government" colonies in the second half

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43 McMinn, *supra* note 36, at 90.

44 A. Todd, Parliamentary Government in the British Government in the British Colonies 157-8 (2nd. ed., edited by his son, Longmans, Green 1894).

45 *Id.* at 158.

of the nineteenth century. Both central and regional parliaments exerted real and substantial authority in Australia. There was broad agreement that colonial parliaments should control matters of local concern and that the imperial parliament should control matters of imperial concern. This division of power lasted about as long as the German imperial federation. This was the political reality. The fact that a federal relationship lasted so long without the machinery thought necessary to preserve one, without a legally rigid constitution and without an imperial court with the primary responsibility of policing the division of powers, does not mean that it was not a federation. It simply means that a division of powers may be preserved by political as well as legal constraints.

The implication of the federal nature of the British empire is that one should not assume that the Australian federation owes its origin to its American counterpart. It may rather be the successor to the de facto federal relationship between the self-governing Australian colonies and the British imperial state. Certainly the founding fathers saw it as such a successor in at least some respects in C.A.C.A. s.51xxxviii and C.A.C.A. s.73.

No doubt the American founding fathers did influence their Australian counterparts in some respects, and to some extent. But the fact that influence is a relationship should not be overlooked. Even charismatic words can fall on stony ground. Experiences which predispose people to be influenced in certain directions may be more responsible for their behaviour than an "influential" figure who triggers it. Thus, before assuming that Australian federalism is American, the federal relationship between the self-governing Australian colonies and the imperial parliament in the second half of the nineteenth century should be borne in mind.

Appendix A

Non-residual state powers may be found in C.A.C.A. ss.9, 12, 15, 51xxxiii, 51xxxiv, 51xxxvii, 51xxxviii, 91, 95, 100, 111, 112, 113, 123, 124, and in the following "until the parliament otherwise provides" sections: 7, 10, 29, 30, 31, 41 and 73.

Appendix B

Aborigines (W.A. 61 Vic. No. 5 - also entered under Constitution.)

Armed forces (Vic. 35 and 36 Vic. No. 417.)

Public worship (N.S.W. 26 Vic. No. 19.)

Supreme court (Tas. 59 Vic. No. 56.)

Supreme court, appointment of extra judge (Tas. 50 Vic. ? This is an unnumbered bill, listed after the 35 other bills passed in 1885.)

Limitation of actions and suits (S.A. 1861 No. 13 purported to amend several sections of an imperial Act on this subject.)

Judges equity (S.A. 33 and 34 Vic. No. 23.)

Patents (W.A. 64 Vic. No. 39.)

Trusts and trustees (Vic. 28 and 29 Vic. No. 234.)

Shipping (N.S.W. 35 Vic. No. 7; Tas. 56 Vic. No. 57; S.A. 37 Vic. No. 6; S.A. 1878 No. 130; S.A. 1881 No. 237; S.A. 54 and 55 Vic. No. 541; Vic. 52 Vic. No. 965; Vic. 58 Vic. No. 1357; Vic. 58 Vic. No. 1360; Vic. 62 Vic. No. 1557; Q. 41 Vic. No. 3; W.A. 60 Vic. No. 25.)

Navigation (N.S.W. 36 Vic. No. 30; 1899 No. 32; S.A. 57 and 58 Vic. No. 614.)

Real estate executed outside of colony (N.S.W. 20 Vic. No. 23.)

Intestacy (N.S.W. 26 Vic. No. 20; Q. 41 Vic. 24.)

Companies, foreign (Tas. 59 Vic. No. 17.)

Customs duties, inter-colonial (N.S.W. 25 Vic. No. 20; Tas. 34 Vic. No. 43 failed to gain royal assent in London; S.A. 35 Vic. No. 4.)

Races other than the Aboriginal race and immigration (Chinese restriction Act applied to other coloured races) (N.S.W. 60 Vic. No. 41; Tas. 60 Vic. No. 55; Tas. 62 Vic. No. 69; S.A. 59 and 60 Vic. Nos. 6, 72.)

Immigration of convicts and felons (S.A. 1857-58 No. 18. See also, Races.)

Introduction of Indian native labour in NT (S.A. 1879 No. 163; S.A. 1882 No. 240.)

Aliens (S.A. 1857-58 No. 20; S.A. 1863 No. 26; Vic. 26 and 27 Vic. No. 146.)

Promissory oaths (N.S.W. 36 Vic. No. 31.)

Oaths (S.A. 59 and 60 Vic. No. 671.)

Constitution, colonial (N.S.W. 20 Vic. No. 10; Tas. 48 Vic. No. ? - an unnumbered bill listed after the private acts for 1884; Tas. 57 Vic. No. 9; Tas. 60 Vic. No. 54; Tas. 62 Vic. No. 67; S.A. 37 Vic. No. 5; S.A. 1881 No. 236; S.A. 1882 No. 278; S.A. 1892 No. 561; S.A. 57 and 58 Vic. No. 613; S.A. 1899 No. 731; Vic. 22 and 23 Vic. Nos. 89, 90, and 91; Vic. 45 Vic. No. 702. Vic. 58 Vic. No. 1359 - reduction of salaries of certain officers under the *Constitution Act Amendment Act* of 1890, and certain other officers; W.A. 58 Vic. No. 37; W.A. 60 Vic. No. 18; W.A. 61 Vic. No. 5 - also entered under Aborigines; W.A. 63 Vic. No. 19; see also Elections.)

Parliamentary privilege (S.A. 35 and 36 Vic. No. 14.)

Pensions of responsible officers (Vic. 28 and 29 Vic. No. 235.)

Elections (Tas. 62 Vic. No. 68; S.A. 33 Vic. No. 18; S.A. 35 and 36 Vic. No. 15; S.A. 51 and 52 Vic. No. 450 - parl. rep. of N.T.; Vic. 46 Vic. No. 745; W.A. 63 Vic. No. 20.)

Ineligibility of public contractors for parliamentary candidacy (S.A. 33 Vic. No. 19.)

Colonial government, claims against (N.S.W. 20 Vic. No. 15; N.S.W. 39 Vic. No. 38.)

Crown, claims against (N.S.W. 24 Vic. No. 27.)

Currency and coinage (W.A. 59 Vic. No. 12.)

Marriage (Tas. 37 Vic. No. 7; S.A. 1857-58 No. 19; S.A. 1863 No. 27; S.A. 33 and 34 Vic. Nos. 4 and 21; Vic. 36 and 37 Vic. No. 453; Vic. 55 Vic. No. 1204; Q. 41 Vic. No. 25.)

Divorce and or matrimonial causes and sometimes deserted wives and children (N.S.W. 40 Vic. No. 21; N.S.W. 42 Vic. Nos. 3 and 28; N.S.W. 44 Vic. No. 31; N.S.W. 51 Vic. No. 15; N.S.W. unnumbered bill listed after 55 Vic. No. 36; Vic. 48 Vic. No. 787; Vic. 54 Vic. No. 1056.)

Marriage and divorce and deserted wives and children (Vic 28 and 29 Vic. 268.)

Audit of public accounts (S.A. 1882 No. 241.)

Offenders punishment (Tas. 27 Vic. No. 20 disallowed.)

Treason and felony (S.A. 37 and 38 Vic. No. 25.)

State aid commutation (Tas. 32 Vic. No. 30.)

Governor's salary, allowances and benefits (Tas. 32 Vic. No. 31 failed to gain royal assent in London; Tas. 35 Vic. No. 25; Tas. 36 Vic. No. 22; Tas. 37 Vic. No. 31; Tas. 56 Vic. No. 11; S.A. 1866-67 No. 28; S.A. 58 and 59 Vic. No. 623; Vic. 27 Vic. No. 189; Vic. 59 Vic. No. 1393.)

Land grants in fee simple and minerals (S.A. 40 and 41 Vic. No. 88.)

Real property, conveyancing (Vic. 27 Vic. No. 210.)

Religion, state aid to (Vic. 34 Vic. No. 391.)

Church of England, government of (Vic. 36 and 37 Vic. No. 454.)

Reduction of salaries of responsible ministers and others (Vic. 57 Vic. No. 1308; Vic. 58 Vic. No. 1358; Vic. 59 Vic. No. 1394; Vic. 61 Vic. No. 1485.)

Cattle, slaughtering of (Q. 41 Vic. No. 1.)