HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Apr 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M122/2020
File Title:	Chetcuti v. Commonwealth of Australia
Registry:	Melbourne
Document filed:	Form 27C - Intervener's submissions
Filing party:	Intervener
Date filed:	15 Apr 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM
A SINGLE JUDGE OF THE HIGH COURT

BETWEEN:

FREDERICK CHETCUTI
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (South Australia) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. The Crown is a significant component of the *Commonwealth Constitution*. That significance applies as much to the States as to the Commonwealth, as political entities within the Australian Federation.[1] Under the South Australian Constitution, the Queen of Australia is the head of the State of South Australia.[2]

5. At a point in time between 1 January 1901 and 3 March 1986, the Australian Crown came to exist separately from the United Kingdom Crown and Australia became independent of the United Kingdom for all purposes.[3] The process by which the Crown came to be divided is a matter of constitutional significance, not only to the Commonwealth, but also to the States.

6. South Australia accepts that the division of the Crown may have been brought about by the enactment of legislation with paramount force, such as the *Statute of Westminster 1931* (UK), or by legislation enacted by the Commonwealth pursuant to s 51(xxxviii) at the request or with the concurrence of the Parliaments of the States, such as the *Australia Act 1986* (Cth).

7. However, South Australia submits that because the division of the Crown altered the constitutional arrangements of the States it could not have been brought about by

---

1 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 304 (Dixon J); *Commonwealth v Mewett* (1997) 191 CLR 471, 498 (Dawson J); A Twomey, "Changing the Rules of Succession to the Throne" [2011] *Public Law* 378, 394.

2 *Minister for Works for Western Australia v Gulson* (1944) 69 CLR 338, 365-366 (Williams J); *Liquidators of Maritime Bank of Canada v Receiver General of New Brunswick* [1892] AC 437, 443-444; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 223 (Mason J), 266 (Aickin J), 278-280 (Wilson J); *Bradto Pty Ltd v Victoria* (2006) 15 VR 65, 77-78 [55]-[59]; B Selway, "The Constitutional Role of the Queen of Australia" (2003) 32 *Common Law World Review* 248, 265-273; B Selway, "The Constitution of South Australia" (1992) 3 *Public Law Review* 39, 44. As the Queen's direct representative in and for the State, the Governor is the officiating constitutional head of the State: *R v Governor of South Australia* (1907) 4 CLR 1497, 1510-1511.

3 *Sue v Hill* (1999) 199 CLR 462, 492 [65] (Gleeson CJ, Gummow and Hayne JJ); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 48 [51] (McHugh J); *Southern Centre of Theosophy v South Australia* (1979) 145 CLR 246, 261 (Gibbs J).

ordinary legislation enacted unilaterally by the Commonwealth Parliament. A Commonwealth law that purported to alter the States' constitutional arrangements in that way would be contrary to s 106 of the *Constitution* and would offend the *Melbourne Corporation* principle.[4]

8. Justice Nettle concluded that the division of the Crown was brought about by the enactment of the *Statute of Westminster Adoption Act 1942* (Cth) (Adoption Act). South Australia submits that this conclusion may only be supported if the Adoption Act is understood as drawing its authority from a paramount source, rather than taking the form of ordinary legislation enacted unilaterally by the Commonwealth Parliament.

10

Limitations on Commonwealth power to alter State constitutional arrangements

9. Section 106 of the *Constitution* provides for the continuation of the States' constitutions and contemplates that their alteration is to occur "in accordance with the Constitution of the State". State parliaments lack legislative power to affect the *Constitution*.[5] Similarly, the incursions that may be made by the exercise of Commonwealth legislative power upon the State constitutions are limited.

10. The ordinary powers of the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth are conferred "subject to" the *Constitution*, including s 106. While the continuation of the State constitutions is itself

20 expressed to be "subject to" the *Constitution*, in South Australia's submission that does not have the effect of subjecting the State constitutions to any and all *laws* made by the Commonwealth Parliament in the purported exercise of its legislative powers. Rather, in South Australia's submission, subjecting the State constitutions to the *Constitution* allows only for the possibility that a Commonwealth law may alter the State constitutions where it is enacted pursuant to a legislative power of a kind the *Constitution* itself intends to be capable of having that effect.[6]

---

4 B Selway, "The Constitutional Role of the Queen of Australia", (2003) 32(3) *Common Law World Review* 248, 272; A Twomey, "Changing the Rules of Succession to the Throne" [2011] *Public Law* 378, 394.

5 *Unions NSW v New South Wales* (2013) 252 CLR 530, 553 [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 165 (Deane J).

6 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 353-354 (Isaacs CJ), 389 (Starke J), 391-392 (Dixon J); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 242 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140, 173 (Brennan CJ), 208-209 (Toohey J, Gaudron J agreeing). See also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 83 (Dixon J).

11. In *Port MacDonnell Profession Fishermen's Assn Inc v South Australia*,[7] this Court held that s 51(xxxviii) is a power of that kind, having regard to its purpose of ensuring that a plenitude of residual legislative power is vested in the Commonwealth and exercisable by co-operation of the Parliaments of the Commonwealth and the States. While South Australia does not deny the possibility that there may be other legislative powers of this kind,[8] save for those exceptional cases, s 106 of the *Constitution* denies the Commonwealth Parliament the power to alter the State constitutions.

12. Additionally, the Commonwealth's ordinary legislative powers are constrained by the *Melbourne Corporation* principle, "unless a given legislative power appears from its content, context or subject matter so to intend".[9] That principle has been expressed in varying terms.[10] Most recently it was described as "requir[ing] consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments".[11] Whether the principle is infringed requires "consideration not only of the form but also 'the substance and actual operation' of the federal law".[12]

13. The principle has been held to limit the Commonwealth's ability to legislate so as to burden the capacity of the States to determine the number and identify of, and the terms and conditions of engagement of, high-level public servants,[13] judges,[14] and

---

7 (1989) 168 CLR 340, 381 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

8 For example, s 51(xxxvii) of the *Constitution* confers legislative power with respect to matters referred by the State Parliaments and so, like s 51(xxxviii), requires the co-operation of the Parliaments of the Commonwealth and the States.

9 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 232-233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 83 (Dixon J).

10 See e.g., *Austin v The Commonwealth* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ); *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 299 [34] (French CJ), 307 [66] (Gummow, Heydon, Kiefel and Bell JJ); *Fortescue Metals Group Ltd v The Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ).

11 *Spence v Queensland* (2019) 93 ALJR 643, 673 [108] (Kiefel CJ, Bell, Gageler and Keane JJ), citing *Fortescue Metals Group Ltd v The Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ). See also *Spence v Queensland* (2019) 93 ALJR 643, 715 [308] (Edelman J).

12 *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ), citing *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 249-250 (Deane J); *Industrial Relations Act Case* (1996) 187 CLR 416, 500 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

13 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 232-233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

14 *Austin v Commonwealth* (2003) 215 CLR 185, 219 [28] (Gleeson CJ), 260-262 [152], 263 [161]-[162] (Gaudron, Gummow and Hayne JJ), 283 [229] (McHugh J). See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

politicians.[15] In South Australia's submission, the *Melbourne Corporation* principle would also limit the Commonwealth's ability to legislate to effect an alteration of the identity of the head of state to the State governments.[16] Such a law would necessarily burden the capacity of the States in the determination of the identity of their head of state. It would be no answer that the States' capacity in that regard needs to be exercised co-operatively with the Commonwealth Parliament.[17] The co-operation of the Commonwealth and State Parliaments is a feature of the constitutional capacity of the States, rather than a denial of it.[18]

14. Accordingly, South Australia submits that the division of the Crown, having affected the constitutional arrangements of the States, must have been authorized by legislation of the United Kingdom Parliament with paramount force, or co-operative legislation enacted pursuant to s 51(xxxviii) of the *Constitution.*[19] The division of the Crown does not lie within the independent sphere of authority of the Commonwealth.

Two approaches to determining the question of national independence

15. The Appellant submits that the time at which the Crown divided is to be ascertained by reference to the date on which Australia gained independence.[20] The Appellant

---

15 *Clarke v Federal Commissioner of Taxation* (2009) 20 CLR 272, 299-300 [35]-[36] (French CJ), 305 [62] (Gummow, Heydon, Kiefel and Bell JJ), 315-316 [101]-[102] (Hayne J).

16 B Selway, "The Constitutional Role of the Queen of Australia", (2003) 32(3) *Common Law World Review* 248, 272; A Twomey, "Changing the Rules of Succession to the Throne" [2011] *Public Law* 378, 394.

17 As was done in the case of the *Australia Act 1986* (Cth), the *Australia Act 1986* (UK), *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Tas); *Australia Acts (Request) Act 1985* (Vic); *Australia Acts (Request) Act 1985* (WA). Section 51(xxxviii) was also used in respect of changes to the laws of succession: see e.g., *Succession to the Crown Act 2015* (Cth); *Succession to the Crown (Request) Act 2014* (SA); A Twomey, "Changing the Rules of Succession to the Throne" [2011] *Public Law* 378, 394.

18 See the observations of Wilson J in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 294 made in the context of the participation of the United Kingdom government in the government of the State.

19 See footnote 17 above.

20 Appellant's Written Submissions, [47], [56]. Although Twomey has expressed the view that the Crown might divide upon receiving advice from multiple governments, the preponderance of authority supports the view that the Australian Crown did not divide until the time that Australia achieved national independence: *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); B Selway, "The Constitutional Role of the Queen of Australia", (2003) 32(3) *Common Law World Review* 248, 253-254; G Winterton, "The evolution of a separate Australian Crown", (1993) 19(1) *Monash University Law Review* 1, 3-4. Cf A Twomey, "*Sue v Hill* – The Evolution of Australian Independence" in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 102; M Stokes "Are There Separate State Crowns?" (1998) 20 *Sydney Law Review* 127; G Taylor, *The Constitution of Victoria* (2006), 67-68; G Carney, *The Constitutional Systems of the Australian States and Territories* (2006), 263-265. As to the indivisible nature of the Australian Crown, see e.g., *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 135-136 (Mason and Jacobs JJ); *Northern Territory v Skywest Airlines Pty Ltd* (1987) 48 NTR 20, 39 (O'Leary CJ, Kearney and Asche JJ agreeing).

submits that Australia became independent, such that the Crown divided or "bifurcated", on the commencement of the *Australia Act 1986* (UK) and the *Australia Act 1986* (Cth) (collectively, the Australia Acts).[21]

16. The Commonwealth submits that to focus on the question of what date the Crown divided is a distraction, and contends that the real issue is when Australia attained "a sufficient measure of independence" such that British subjects could be regarded as aliens for the purposes of s 51(xix).[22] If the Court accepts that contention, South Australia agrees it is unnecessary for the Court to go on to consider the date on which the Crown can be said to have divided. The Commonwealth submits that Australia was sufficiently independent (in the sense used above) at a date prior to 1948, and potentially as early as the date of the Balfour Declaration in 1926, the commencement of the *Statute of Westminster*, or the commencement of the Adoption Act.[23] South Australia makes no submissions about when the Commonwealth may have acquired "sufficient independence" for the purposes of British subjects becoming aliens within the meaning of s 51(xix).

17. The Commonwealth alternatively submits that the Commonwealth Parliament under s 51(xix) acquired full powers to legislate as to membership of the Commonwealth as a new body politic and to treat British subjects as aliens.[24] This alternative contention does not turn on the process of attaining independence or of division of the Crown, and South Australia does not seek to be heard on this point.

18. The parties appear to draw upon two competing approaches to the determination of how national independence was achieved. The Commonwealth draws upon the notion that independence was attained when Australia became *capable* of exercising all powers independent of foreign control.[25] On this approach, Australian independence could be achieved by the conferral, from a paramount source, of a power on Australian

---

21 Appellant's Written Submissions, [56].

22 Respondent's Notice of Contention filed 17 December 2020; Commonwealth's Written Submissions, [31]-[32], [38].

23 Commonwealth's Written Submissions, [32]; Commonwealth's Notice of Contention, Ground 1.2. The Commonwealth also submits that independence was achieved, as a matter of political reality, by the making of the Balfour Declaration in 1926. South Australia makes no submissions about whether the Crown might divide upon the occurrence of a political event, and, if so, whether the Balfour Declaration had this effect.

24 Commonwealth's Written Submissions, [42]-[44]. Cf *Nolan v Commonwealth* (1988) 165 CLR 178, 183-184; *Barbosa v Minister of Home Affairs* [2020] 1 WLR 169, 176-179 [26]-[34].

25 Commonwealth's Written Submissions, [33]; A Twomey, "*Sue v Hill* – The Evolution of Australian Independence" in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 78-79, 102. Cf D Clark, "Cautious Constitutionalism: Commonwealth Legislative Independence and the Statute of Westminster 1931-1942" (2016) 16 *Macquarie Law Journal* 41.

institutions to cease the United Kingdom's control over the exercise of their powers, irrespective of whether that power was actually exercised.

19. The appellant draws upon the alternative notion that independence was not attained until the United Kingdom's control over the exercise of Australia's powers had actually ceased.[26] On this approach, Australian independence could not be achieved until all residual control of the United Kingdom Parliament was terminated irrevocably through the collective operation of the Australia Acts.

The 'capacity' approach – the *Statute of Westminster*

20. Drawing upon the first approach, the Commonwealth's submission that Australia gained independence by virtue of the passage of the *Statute of Westminster* focuses upon the *capacity* Australia thereafter had to exercise powers without foreign control. Critically, the conclusion that Australia became *capable* of exercising all powers independently of the United Kingdom by virtue of the passage of the *Statute of Westminster* is open because the United Kingdom's continuing control over both Commonwealth and State powers was then within the Commonwealth and the States' own (collective) control. To understand how this was so, it is necessary to have regard not only to what the *Statute of Westminster* did, but also to what it enabled.

21. By the *Statute of Westminster*, the United Kingdom Parliament declared it would not legislate for Australia in the absence of a request from the Commonwealth Parliament (other than on matters within the authority of the States and not being matters within the concurrent powers of the Commonwealth).[27] It also provided that the *Colonial Laws Validity Act 1865* (UK) did not apply to any law made by the Commonwealth Parliament after its enactment, and it empowered the Commonwealth Parliament to repeal or amend any Act of the United Kingdom Parliament, or any order, rule or regulation made thereunder, in so far as they form part of the law of Australia.[28] Although this self-denying ordinance and conferral of power only had effect as part of Australian law upon the enactment of adoption legislation,[29] the *capacity* to enact that

---

26 Appellant's Written Submissions, [56]; *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 442 [153] (Gummow and Hayne JJ).

27 *Statute of Westminster 1931* (UK) ss 4, 9(2). As there was no complete renunciation of all legislative power, it was said to leave open the theoretical possibility that the United Kingdom Parliament could legislate regardless of the presence or absence of a request: *British Coal Corporation v The King* [1935] AC 500, 520 (Viscount Sankey); *Manuel v Attorney-General* [1983] Ch 77, 88 (Megarry V-C), 104-107 (Cumming-Bruce, Eveleigh and Slade LJJ).

28 *Statute of Westminster 1931* (UK) s 4.

29 *Statute of Westminster 1931* (UK) s 10(1).

legislation and thereby give effect to the renunciation in Australia resided with the Commonwealth Parliament and was not contingent on any further act of the United Kingdom.[30]

22. The *Statute of Westminster* did not make similar provision with respect to the States.[31] The United Kingdom Parliament could, therefore, continue to make laws on matters within the authority of the States (not being matters concurrent with powers of the Commonwealth) and the laws of State Parliaments could be rendered void or inoperative for repugnancy to laws of the United Kingdom extending to the State. That position came to an end only on the commencement of the Australia Acts on 3 March 1986.[32]

23. From the perspective of legislative *capacity*, however, the *Statute of Westminster* had the effect that the Commonwealth was no longer bound by United Kingdom legislation applying by paramount force, even though the States still were. The consequence was that, together with the legislative power conferred by s 51(xxxviii) of the *Constitution*, the Commonwealth Parliament could thereafter legislate, at the request of or with the concurrence of the State Parliaments, to amend or repeal laws of the United Kingdom in so far as they have force in Australia and with which State laws would otherwise be repugnant.[33] Accordingly, the Commonwealth and the States would have acquired the collective *capacity* to enable the States to exercise their powers free of United Kingdom control.[34]

---

30 *Statute of Westminster 1931* (UK) s 10(2).

31 Section 9(2) of the *Statute of Westminster* provided that nothing in that Act shall be deemed to require the concurrence of the Commonwealth Parliament or Government in any law made by the Parliament of the United Kingdom with respect to any matter with the authority of the States. Section 2(2) of the *Statute of Westminster* provided only that the *Colonial Laws Validity Act 1865* (UK) shall not apply to a law of the Commonwealth Parliament enacted after its commencement.

32 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 257 (Gibbs J); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 458 (Dawson J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 172 (Brennan CJ), 230, 237 (McHugh J); *Sharples v Arnison* [2002] 2 Qd R 444, 448 [24] (McPherson JA); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 41-42 [25] (Gleeson CJ, Gummow and Hayne JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 84 [217] (Gummow, Crennan and Bell JJ). There was, however, a strong presumption that any future legislation of the United Kingdom Parliament would not apply to the Australian States or colonies in general: *Ukley v Ukley* [1977] VR 121, 125-130; *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, 343 [13].

33 South Australia acknowledges that the reasoning in some of the judgments in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 indicate that the Commonwealth Parliament could repeal at least some United Kingdom legislation applying in the States in reliance on s 2(2) of the *Statute of Westminster* read together with the external affairs power: 377, 381-382 (Mason J), 441 (Deane J).

34 A Twomey, "*Sue v Hill* – The Evolution of Australian Independence" in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000), 88-94; *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 372-373 (Gibbs CJ); *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 377-379 (Mason CJ, Brennan,

24. On that basis, the fact that the *Statute of Westminster* did not itself exclude States from the operation of the *Colonial Laws Validity Act* would not have presented an insurmountable obstacle incapable of being addressed by (collective) domestic legislation.

The 'cessation of authority' approach – the Australia Acts

25. Drawing upon the second approach, the appellant's submission that Australia only gained independence upon the commencement of the Australia Acts focuses upon when United Kingdom control over Australia's exercise of powers actually ceased.

26. Regardless of the effect of the *Statute of Westminster* on the powers of the Commonwealth Parliament, the institutions of the United Kingdom continued to retain a significant authority in relation to the States. That continuing role was sufficient for it to be recognised as "difficult" to classify the United Kingdom as a "foreign power" before 1986 for the purposes of s 44(i) of the *Constitution*.[35]

27. Until the commencement of the Australia Acts in 1986, the United Kingdom's control over the exercise of power by the States as constituent entities in the Australian federation had not ceased. The legislative authority of the United Kingdom Parliament to affect the States until 1986 was noted earlier. Further, in exercising functions in relation to the States, the Queen acted on the advice of Her Ministers in the Government of the United Kingdom, not the Ministers of the Crown in the States. That applied to matters such as the appointment and dismissal of Governors, the reservation of certain Bills for the signification of Her Majesty's Assent, and the making of orders, proclamations, or Letters Patent in relation to the States.[36] The involvement of the

---

Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Sue v Hill* (1999) 199 CLR 462, 491 [62] (Gleeson CJ, Gummow and Hayne JJ). The fact that a State would not itself have power directly to repeal legislation applying by paramount force would not preclude the State Parliament simply *requesting or consenting* to *the Commonwealth* enacting legislation under s 51(xxxviii): see *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 372-373 (Gibbs CJ); *Sharples v Arnison* [2002] 2 Qd R 444, 448, [24] (McPherson JA).

35 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 41-42 [25] (Gleeson CJ, Gummow and Hayne JJ); *Sue v Hill* (1999) 199 CLR 462, 490 [59] (Gleeson CJ, Gummow and Hayne JJ).

36 *Sue v Hill* (1999) 199 CLR 462, 494 [72], 495-496 [76] (Gleeson CJ, Gummow and Hayne JJ); *Dooney v Henry* (2000) 74 ALJR 1289, 1295 [21] (Callinan J). The current Letters Patent concerning the Governor of the State of South Australia are dated 14 February 1986 and are expressed to have been made by the Queen of the United Kingdom of Great Britain and Northern Ireland ("and of Our other Realms and Territories"). The text of s 8(b) of the *Constitution Act 1934* retains the statement that certain Acts must be reserved for the signification of the sovereign's pleasure, although this is no longer effective: Australia Acts, ss 8, 9.

United Kingdom Government in these affairs of the States did not come to an end until the commencement of the Australia Acts.

28. As such, while the Governor of a State would act on the advice of the Ministers of the Crown for that State, there remained a range of matters relating to the States on which local Ministers were not the source of formal advice, as well as matters on which the United Kingdom Parliament could legislate and affect the States. It could be said that the Queen, Government, and Parliament of the United Kingdom remained part of "the legal and political constitution" of the State.[37] Accordingly, while the Commonwealth had earlier obtained a level of legislative independence, it was nevertheless the case that constituent members of the Australian federation remained linked to the authority of the United Kingdom as part of their own constitutional arrangements.

The conclusion of Justice Nettle – the Adoption Act

29. South Australia submits that whether independence was achieved by the commencement or the adoption of the *Statute of Westminster* or upon the commencement of the Australia Acts turns on which theory of independence is to be preferred – that of capacity or that of final cessation of all involvement by the United Kingdom in the affairs of both the Commonwealth and the States.

30. In the decision below, Justice Nettle concluded that:[38]

> [A]t least by reason of the enactment of the *Statute of Westminster Adoption Act*, Australia became sufficiently independent of the United Kingdom to be regarded as an independent sovereign nation and that the relevant constitutional conception of the Crown (as opposed to the statutory description of it which persisted until the *Royal Style and Titles Act 1973* (Cth)) thereupon became the Crown in right of Australia.

31. The correctness of the conclusion arrived at by Justice Nettle may turn, for the reasons set out above, on the source of the legislative authority possessed by the Commonwealth Parliament to enact the Adoption Act.

32. If the source of the power of the Commonwealth Parliament to enact the Adoption Act is understood to be the ordinary legislative power conferred on the Commonwealth pursuant to the *Constitution*, that can be exercised unilaterally, then for the reasons set out above, South Australia submits that the Adoption Act could not have had the effect of dividing the Crown without offending s 106 of the *Constitution* and the *Melbourne Corporation* principle.

---

37 Cf *R v Sharkey* (1949) 79 CLR 121, 135-136 (Latham CJ), 164 (Webb J).

38 *Chetcuti v Commonwealth* [2020] HCA 42, [49].

33. If, on the other hand, the source of the power of the Commonwealth Parliament to enact the Adoption Act is understood to be the *Statute of Westminster*,[39] then for the reasons set out above, the Adoption Act may have divided the Crown without offending s 106 of the *Constitution* and the *Melbourne Corporation* principle.

34. The reasons of Justice Nettle are silent on this issue. If the Court confirms the conclusion arrived at by Justice Nettle, then South Australia submits that it should do so on the basis that the power of the Commonwealth Parliament to enact the Adoption Act was drawn from a paramount source, namely the *Statute of Westminster*.

Part V: TIME ESTIMATE

35. It is estimated that 30 minutes will be required for the presentation of South Australia's oral argument.

Dated 15 April 2021

.....

M J Wait SC

Telephone: (08) 8207 1563

Email: Michael.Wait@sa.gov.au

.....

J F Metzer

Telephone: (08) 8226 3847

Email: Jesse.Metzer@sa.gov.au

---

[39] *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 367 (Gibbs CJ), 398 (Brennan J), 443 (Deane J).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

FREDERICK CHETCUTI
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

ANNEXURE
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

No.	Description	Date in Force	Provision
Constitutional Provisions			
1	*Commonwealth Constitution*	Current	ss 44(i), 51(xix), 51(xxxvii), 51(xxxviii), 106
Statutes			
2	*Australia Act 1986* (Cth)	3 March 1986	ss 8, 9
3	*Australia Act 1986* (UK)	3 March 1986	
4	*Australia Acts (Request) Act 1985* (NSW)	27 September 1985	
5	*Australia Acts (Request) Act 1985* (Qld)	16 October 1985	

6	*Australia Acts (Request) Act 1985* (SA)	31 October 1985	
7	*Australia Acts (Request) Act 1985* (Tas)	6 November 1985	
8	*Australia Acts (Request) Act 1985* (Vic)	6 November 1985	
9	*Australia Acts (Request) Act 1985* (WA)	6 November 1985	
9	*Colonial Laws Validity Act 1865* (UK)	29 June 1865	
10	*Constitution Act 1934* (SA)	Current	
11	*Judiciary Act 1903* (Cth)	Current	s 78A
7	*Statute of Westminster 1931* (UK)	11 December 1931	ss 2, 4, 9, 10
8	*Statute of Westminster Adoption Act 1942* (Cth)	9 October 1942	s 9
9	*Succession to the Crown Act 2015* (Cth)	24 and 26 March 2015	
10	*Succession to the Crown (Request) Act 2014* (SA)	26 June 2014	