

# Government dies with the sovereign no more

## Legal history of the demise of the Crown

by David Townsend



On 8 September 2022, the Queen of Australia died at her holiday home in Aberdeenshire, Scotland. Ceremonial observances and statements of condolence followed from many quarters, but private and public business was transacted on that day without significant disruption.

The passage from one reign to the next was not always so smooth. In the Middle Ages and into the Early Modern Era, to a great degree government died with the sovereign, and was paused until it could be restarted by the heir. The transition between this system of 'government dies with the sovereign' to 'government endures the death of the sovereign, and send its condolences to the heir' occurred piece by piece over centuries of British and Australian constitutional development.

### Continuation of Legal Actions

Before 1547, the death of the sovereign caused public and private actions in the Royal Courts to fall vacant, on the basis that the writs by which they had been initiated were issued in the name and authority of the sovereign now deceased. The practice emerged of allowing a plaintiff to re-commence their action under the new sovereign – but only after paying for the issue of a new writ, a laborious and expensive process of manual engrossment in chancery hand. The death of King Henry VIII, who had reigned for close to 40 years, brought to a head the inefficiency of this practice, requiring for the first time in almost four decades all suits to be recommenced and all

writs to be reissued at once. This 'was not only to [Plaintiffs'] great Costs, Charges, Expences, Hindrances and Delay of their Causes and Suits, but also a great Let and Hindrance of Justice', and prompted the passage of the *Justices of the Peace Act 1547* (Eng),<sup>1</sup> which provided that actions between private litigants were henceforth to continue on their original writs, unaffected by the demise of the Crown.

Public actions, such as criminal prosecutions and fiscal proceedings involving the Crown, would need to wait a further 155 years for the *Demise of the Crown Act 1702* (Eng) s 4 to save them from lapsing on the demise of the Crown.

In Australia, importing the law of England as it applied on colonisation, it never formed

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part of the law that the private proceedings in the courts lapsed on the death of the sovereign, nor did public actions so lapse. The latter finds its contemporary expression in, for example, the *Crown Proceedings Act 1988* (NSW) s 8(1), which confirms that '[n]o proceedings (whether civil or criminal) involving the Crown shall abate or be affected by the demise of the Crown'. Indeed, on the morning of 9 September 2022, Chief Justice Bell confirmed that, notwithstanding the death of the Queen, 'Supreme Court sittings will continue as scheduled'.<sup>2</sup>

#### Royal Office Holders

Until the late 18th century, the position of all high officers under the Crown, such as ministers, judges and military officers, formally fell vacant on the death of the sovereign, as the commissions by which such persons had been appointed were issued in the name of the reigning sovereign only. The ousting of King James II & VII (and his infant son) from the thrones of England and Scotland in 1688 in favour of his eldest daughter and her husband as co-rulers Queen Mary II and King William III & II, created a situation where the further demise of the Crown would be contested between descendants of different branches of the Stuart family. This became all the more acute when, in late 1694, Queen Mary predeceased her husband without issue, such that the succession after William would need to pass collaterally to his sister-in-law, Anne. If King William were to die suddenly (such as, due to assassination by the supporters of the ousted claimant), any challenge to the succession from the deposed King James could not be effectually opposed if all the high officers of the Crown, and particularly the commissioned officers of the armed forces, had lost their position instantly upon King William's death. In response, the English Parliament passed the *Security of King and Government Act 1695* (Eng), s 20 of which provided that no commission, civil or military, was to lapse on the demise of the Crown but was to continue for six months after the sovereign's death (or until earlier terminated by the new legitimate sovereign).

This practice, shorn of the six-month limitation, has continued into the contemporary period, and in NSW is now

embodied in the *Constitution Act 1902* (NSW) s 49A.<sup>3</sup> This ensured that we did not awaken on the morning of 9 September 2022 to the anarchy of finding ourselves without any senior police officers, officers of any branch of the armed forces, Territorial administrators, State governors, Commonwealth Governor-General, justices, judges, magistrates and any ministers of any government whatsoever!

#### Perseverance of Parliament

From the 13th century onwards, parliaments were summoned as an advisory body to the reigning King of England, particularly for the purpose of consenting to the levying of taxes to fund wars against the neighbouring states of Wales, Scotland and France. The writs summoning members to Parliament were issued in the name of the King, the advice embodied in resolutions of parliament was given to the King to follow or, if he durst, not follow. As such, on the death of the sovereign, any sitting Parliament would be dismissed and fresh writs of summons (whether for elected members or hereditary lords) would be issued under the next sovereign in due course. This automatic liquidation of parliament on the demise of the Crown continued until the threat of civil war forced its modernisation.

In the early years of the 18th century, with Queen Anne soon to die without heir of the body, there was great apprehension that the Protestant heir appointed by parliament pursuant to the *Act of Settlement 1701* (Eng) and the *Union with England Act 1707* (Scot), Sophia, Electress of Hanover (and her heirs and successors), would likely be in central Germany at the time when Queen Anne died – much further away than the rival claimant James Stuart, who lived across the water in France. Upon the death of Queen Anne, if there were a 'race to the throne' between James Stuart and Sophia of Hanover, the power vacuum in Great Britain would make it difficult for anyone to stop the Pretender from winning that race.

In response, one of the first Acts of the newly-merged Parliament of Great Britain was to pass the *Succession to the Crown Act 1707* (GB), which provided that any parliament sitting at the time of the sovereign's death would be able to continue to sit for a further six months (unless earlier dissolved by the legitimate successor);

similarly, if the parliament were not sitting at the time of the sovereign's death, it would immediately re-convene on the above terms. Further, if the new sovereign were overseas at the time of the demise of the Crown, pending the entry into the kingdom of the legitimate successor, the executive government would be run by a committee of Lords Justices.

While the six-month limit on the continuation of Parliament has since been removed, and the provision for Lords Justices to administer the kingdom has since been repealed, the operative parts of this Act remain in force in the UK today and, as part of the firmament of British law, they were carried forward into Australian legislation. In the present day, the *Constitution of the Commonwealth of Australia* s 28 and ss 7 and 13, and *Constitution Act 1902* (NSW)<sup>4</sup> s 24 and ss 22A–22B, respectively stipulate the duration of the relevant Lower Houses and the duration of terms of service of members of the Upper Houses<sup>5</sup> without reference to the demise of the Crown.

#### MPs' Oaths and Affirmations of Allegiance

Even despite it forming part of Australian law from the early colonial days that parliament is not dissolved by the death of the sovereign, for many decades there were provisions of constitutional law which required MPs to re-swear an oath or affirmation of allegiance in the name of the new sovereign at the demise of the Crown before they may proceed to participate in parliamentary business.

As originally passed, the *Constitution Act 1902* (NSW) s 12 required that before any Member of the NSW Parliament sit or vote, they take an oath/affirmation under the *Oaths Act 1900* (NSW) to 'be faithful and bear true allegiance to His Majesty King Edward VII, His Heirs and Successors according to law'; this was required not only on commencement as an MP but also, specifically, after each demise of the Crown. At first blush, it appears strange that an MP should be required to re-swear allegiance to the heir, given that the original oath or affirmation specifically extended to the then-sovereign's heirs and successors. The reason for this seeming superfluity of swearing may be not only a desire, which may have been considered appropriate in that era, to show conspicuous devotion to a new King-Emperor, but also to forestall any possibility that an individual MP might decide that the true heir was someone other than the one officially propounded. As alluded to above, this was the very situation which had obtained when rival branches of the Stuart Dynasty each propounded their own legitimate heir to the Crown in the late 17<sup>th</sup> and early 18<sup>th</sup> centuries.

By the time of Queen Elizabeth II's

death, however, this concern had sufficiently receded that the requirement to re-swear allegiance had been removed in all other Australian jurisdictions save Victoria, where the persistence of *Constitution Act 1975* (Vic) s 23(2) on the statute books required MPs to swear fresh allegiance to King Charles III before proceeding with parliamentary business. On 13 September 2022, Victorian MPs did so in a special joint sitting of Parliament. Opinions of MPs at the time ranged from ceremonial enthusiasm to bemusement to criticism of the persistence of this anachronism; how long this provision endures in Victoria's *Constitution Act* remains to be seen.

### Ripples of Ceremonial Change Yet to Come

As at the date of writing, the official title and lyrics of Australia's Royal Anthem (as distinct from the National Anthem, 'Advance Australia Fair'), have not yet been altered from 'God Save the Queen',<sup>6</sup> although the Royal Anthem was sung with the regal, rather than reginal, lyrics at the Proclamation Ceremony in Canberra on 11 September 2022.

Western Australia celebrated the King's

Birthday Public Holiday on 26 September 2022, but, perhaps unsurprisingly, Queensland ran one more 'Queen's Birthday' Public Holiday on 3 October 2022<sup>7</sup> before changing over the descriptor for 2023. (It is not expected that the State itself will follow suit and become 'Kingsland', despite social media's brief infatuation with the proposition.)

Finally, and most tangibly perhaps, the Royal Australian Mint will start circulating coins with the newly-approved portrait of King Charles III on the obverse some time in 2023. His head will be facing the opposite direction from Queen Elizabeth II's, which, although officially part of a tradition going back to the mid-17th Century, to modern eyes does resemble a sort of intergenerational recreation of the famous choreography of ABBA's 1975 *Mamma Mia* music video. Perhaps it will already be in readers' pockets in time for ANZAC Day 2023, to be employed in a game duly sanctioned by s 6 of the *Gambling (Two-up) Act 1998* (NSW) – one of the last practical uses for physical coinage. **BN**

### ENDNOTES

- 1 The long title of the Act is perhaps more useful than in most instances: *An Act for the continuance of Actions after the death of any King of this Realm*; it is sometimes also short-titled the *Demise of the Crown Act 1547* (Eng).
- 2 The issue of whether criminal proceedings already underway in the name of 'The Queen' would be renamed is addressed in Daniel Yazdani's article in this edition, 'It has been an honour to serve as the Queen's Judges'.
- 3 Before 1986, it was embodied in the *Demise of the Crown Act 1901* (NSW) s 2.
- 4 See also the predecessor provisions in the *New South Wales Constitution Act 1855* (Imp) s 21 (Legislative Assembly to sit for five years, no reference to demise of the Crown) and s 3 (Legislative Council members appointed for life unless earlier resigned or terminated).
- 5 As Houses themselves, they continue without being dissolved (otherwise than by double-dissolution at the Federal level).
- 6 As proclaimed by then-Governor-General Sir Ninian Stephen in Commonwealth of Australia, *Gazette: Special* No S 142, 19 April 1984.
- 7 Under the *Holidays Act 1983* (Qld), the holiday's official title is simply 'Birthday of the Sovereign', but the informal designation 'Queen's Birthday' is nevertheless widely employed in official government sources.



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