CONSTITUTIONAL ISSUES RELATING TO THE REPUBLIC AS THEY AFFECT THE STATES

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The move towards a Republic, if successful, will culminate in an alteration of the Australian Constitution. It has been generally assumed that the change to a Republic can be simply achieved by an alteration of the Constitution under s 128 and, further, that the alteration requires no more than approval of the proposed law at a referendum by an overall majority of voters and, as well, a majority of voters in a majority of States, that is, in four out of six States. As both these assumptions have been challenged, I shall discuss them, dealing first with the requirements of s 128. The questions are intricate: it is impossible to make them enthralling.

I. SECTION 128

The penultimate paragraph of s 128 is the cause of the problem. It says:

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

The effect of the paragraph is to prescribe, in the case of the four categories of constitutional alteration which it describes, an additional requirement over and above the basic s 128 requirement of approval by a majority of voters and a majority of voters in a majority of States. The additional requirement is that such alterations must be approved by a majority of voters in the relevant States, that is, the States affected. The four categories of alteration in question are:

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(1) alterations diminishing the proportionate representation of any State in either House of Parliament;

(2) alterations diminishing the minimum number of representatives of a State in the House of Representatives;

(3) alterations of the boundaries of the State; and, [the critical category]

(4) alterations "in any manner affecting the provisions of the Constitution in relation thereto".

You might well ask: What on earth does the fourth category refer to? The problem is what do the words "in relation thereto" mean? To what do they refer? In the past, it was suggested that the words referred back either to all three previous categories or to the third and immediately preceding category, that is, an alteration of the boundaries of the State.

The new and novel suggestion is that the words "in relation thereto" simply refer back to the words "the State" where it appears in the category (3) alteration. The suggestion, if it be right, is that any constitutional amendment, which in any manner affects the provisions of the Australian Constitution in relation to a State, requires the approval of the people of that State. That would mean that a constitutional alteration to a Republic, which would seem to affect the provisions of the Constitution in relation to all States, would require the approval of the peoples of every State.

There are some very strong arguments against this interpretation. The history of how the provision developed in the Constitutional Conventions is against it. As it stood at the end of the Melbourne Convention in 1898, the final Convention, the paragraph referred only to the first two categories, which dealt with representation of the States. Subsequently at a Premiers' Conference in 1899 it was agreed that the third category relating to alterations of boundaries should be added. The Premiers' Conference did not adopt the fourth category, yet it was added in the drafting process. This history does not suggest that the critical fourth category was intended to introduce a new requirement, extending way beyond the earlier categories, having an application to a very wide range of constitutional changes and necessarily including the first two categories of alteration mentioned in s 128. Some idea of the extent of the operation of the fourth category, according to this broad interpretation, can be gleaned from the fact that most constitutional alterations affect every State. It would be a case of a very powerful tail wagging an extremely emaciated dog.

One extraordinary result of this interpretation would be that the constitutional amendment made in 1928 in the era of the Great Depression, which enabled the Commonwealth to take over State debts, was not validly made. The amendment, though approved by the peoples of other States, was not approved by the people of New South Wales. Yet no constitutional expert then said, "Hold on! The amendment does not comply with s 128". That is not surprising. This radical interpretation never occurred to the early commentators on the Constitution, notably Quick and Garran, who were very conscious of the history of the Constitution and the deliberations of the Conventions. They considered that the critical fourth category related only to alterations of the Constitution which

affected in any manner whatsoever the preceding matters, that is, representation and boundaries of States. They also assumed that a proposed law, if it complied with the basic requirements of s 128, could amend State Constitutions.

Professor Harrison Moore,[1] another highly regarded early commentator on the Constitution, considered that the fourth category was intended as a double entrenchment of the penultimate paragraph itself so that it could not be amended except by the same method because it is a provision of the Constitution relating to the representation of their States and their boundaries. Despite criticism of this interpretation,[2] the strong consensus of opinion is that the words "in relation thereto" relates to alterations of the Constitution which affect provisions of the Constitution relating to the representation and boundaries of the States.

What I have said so far draws heavily on an article by Anne Twomey, "State Constitutions in an Australian Republic".[3] In that article the author says:

> [T]he better view is the penultimate paragraph of s 128 of the Constitution would not require majorities in every State to approve a referendum to become a republic, as long as the referendum did not affect the representation of the States in the federal parliament or the boundaries of the States, or perhaps the penultimate paragraph of s 128 itself.[4]

That statement is a fair summary of what we know of the provision. However, in the case of *McGinty v Western Australia*, two judges, McHugh[5] and Gummow JJ,[6] appear to have expressed a contrary view, namely that it does require the approval by the people of a State of an alteration which in any manner affects a constitutional provision in relation to that State. It should be said, however, that the comments made by the two justices were *en passant*. They do not refer to the history of the section or take account of the opinions of the commentators or the 1928 amendment. On that account it would be unwise at this stage to take too much notice of them.

II. CAN A SECTION 128 AMENDMENT OVERCOME ALL THE PROBLEMS?

The second question to be considered is whether a constitutional alteration passed under s 128 of the Australian Constitution is sufficient:

(1) to amend the Preamble and covering clauses of the Constitution;

(2) to amend State Constitutions; and

(3) to overcome the effect of s 7 of the *Australia Acts* of 1986.

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1 W H Moore, *The Constitution of the Commonwealth of Australia*, Maxwell (2nd ed, 1910), p 604.

2 C Howard, *Australian Federal Constitutional Law*, Law Book Company (2nd ed, 1972), p 508; Constitutional Commission, *Final Report of the Constitutional Commission, 1988*, AGPS (1988) at 885-7.

3 (1997) 23 *Monash University Law Review* 312.

4 *Ibid* at 322.

5 (1996) 186 CLR 140 at 237.

6 *Ibid* at 275.

To convey what is involved in this question, I need to point out that s 128 confers a power to alter what the section terms as "[t]his Constitution". The *Commonwealth of Australia Constitution Act* (the *Constitution Act*) was a statute of the United Kingdom Parliament. It consists of a preamble and nine covering clauses followed by the Constitution. The ninth and final covering clause states: "The Constitution of the Commonwealth shall be as follows:-".

So the argument is that the power of alteration does not extend to the Preamble and the covering clauses because they do not form part of the Constitution; they merely introduce it. That was the view of Sir Robert Garran, the first Solicitor-General for the Commonwealth and a noted early commentator on the Constitution.

The significance of the argument is that, if it be right, then the Preamble which recites that the peoples of the States "have agreed to unite in one indissoluble Federal Commonwealth under the Crown" is beyond the power of alteration in s 128. It is then argued that the Preamble and the covering clauses can only be amended by the Commonwealth Parliament legislating to that effect, pursuant to s 51(xxxviii) of the Constitution, at the request or with the concurrence of the Parliament of all the States.

This argument reflects a somewhat narrow interpretation of s 128. There is a strong argument that, in the light of its purpose, the section should be read as extending to the alteration of any provisions of the *Constitution Act* that expressly or impliedly affect the frame or scope of the Constitution itself, including s 128. The section can be interpreted so that it has a dynamic operation; in other words, so that it is capable of expanding in the light of Australia's emergence as a fully independent nation to extend to alteration of Australia's relationship with the Crown of the United Kingdom.[7] So interpreted, s 128 would extend to the elimination of the "under the Crown" provision in the preamble and to the references to the Monarchy in the preamble and the covering clauses.

The contrary narrow interpretation would produce the grotesque result that recourse to s 128 could bring about the substitution of a President for the Monarch in the operative provisions of the Constitution - the Constitution proper - but leave us with an unamended preamble and covering clauses proclaiming a monarchical form of government - a veritable constitutional camel. This would be a very strange outcome and all the more so when it is considered that by means of s 128 legal as well as political sovereignty resides in the Australian people.[8]

At this point it is necessary to notice an argument that s 8 of the *Statute of Westminster* 1931 (UK) in combination with s 2 of the *Colonial Laws Validity Act* 1865 (UK) prevented the amendment of the Preamble and the covering clauses. For present purposes, I shall assume that this argument is correct, though I have distinct reservations on that score.

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7 See G Lindell and D Rose QC, "A Response to Gageler and Leeming 'An Australian Republic: Is a Referendum Enough?'" (1996) 7 *Public Law Review* 155 at 159-60.

8 *McGinty v Western Australia* note 5 *supra* at 237, per McHugh J.

The question then is whether s 15 of the *Australia Acts* overcomes that difficulty. Section 15(1) provides that the *Australia Act* and the *Statute of Westminster* may be repealed or amended by an Act of the Commonwealth Parliament passed at the request or with the concurrence of all State Parliaments and subject to sub-s (3) only in that manner. Section 15(3) provides that nothing in sub-s (1) limits or prevents the exercise by the Commonwealth Parliament of any powers that may be conferred upon the Parliament by any alteration of the Constitution made in accordance with s 128.

In conformity with s 15(3), it would be possible, by amendment of the Constitution pursuant to s 128, to give power to the Commonwealth Parliament to amend the preamble and the covering clauses. On the assumption I am presently making, the conferring of that power would be repugnant to s 8 of the *Statute of Westminster*. It would therefore be an Act to repeal or amend the Statute within the meaning of s 15(2) of the Statute. But it would also fall within s 15(3). Although this view of s 15(3) has been challenged,[9] the view seems to me to be correct. On this view of s 15(3), an amendment dealing with the preamble and the covering clauses would take the form of a provision which confers power on Parliament to amend those provisions so far as they provide for a Commonwealth under the Crown and refer to the Monarchy.

It may well be that s 15(3) can be read as authorising a direct amendment of those provisions by resort to s 128 without taking the intermediate step of authorising Parliament to amend. That reading depends upon treating the words "in accordance with" as referring to legislation enacted in accordance with the procedure specified in s 128.[10]

Other amendments to the substantive provisions of the Constitution are necessary in order to delete references to the Monarchy and to substitute appropriate references to the President but they do not raise the problems presented by the Preamble and the covering clauses.

Next, it is necessary to consider whether the power of alteration in s 128 extends to the amendment of State Constitutions so as to compel States to adopt a Republic. As State Constitutions contain their own provisions governing amendment of those Constitutions, it may seem strange that recourse to s 128 of the Australian Constitution could bring about a similar result. The point is that s 106 of the Australian Constitution provides:

> "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth ... until altered in accordance with the Constitution of the State."

The words "subject to this Constitution" are sufficient to bring in s 128 with its power of alteration. The power of alteration, it has been said by early commentators, "extends to the structure and functions of the Governments of the States".[11]

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9 S Gageler and M Leeming, "An Australian Republic: Is a Referendum Enough?" (1996) 7 *Public Law Review* 143.

10 G Lindell and D Rose QC, note 7 *supra* at 157.

11 J Quick and R Garran, *The Annotated Constitution of the Commonwealth of Australia*, Angus and Robertson (1st ed, 1901), p 930.

Although that means that a s 128 referendum could amend State Constitutions, a complication arises from the *Australia Acts* of 1986, those Acts being enacted to patriate Australia's constitutional arrangements. Section 7 of the Acts provides that Her Majesty's representative in each State shall be the Governor and that the Governor shall exercise the powers and functions of Her Majesty. It is argued that this provision entrenches the Monarchy. The contrary argument is that all the section does is to provide that, while there is a Queen of Australia, her representative shall be the Governor. That is what the section is concerned to provide rather than to provide for the establishment or continuation of the Monarchy in each State. Accordingly, there is a strong argument to the effect that s 7 does no more than make a provision for the office of Governor and for the exercise of Her Majesty's powers *while the Monarchy continues in Australia.* That would be the preferred view.

What I have said so far would suggest that the Commonwealth Parliament could, if it so desired, achieve a constitutional change to a Republic without the concurrence of the States, so long as the necessary alterations were approved at a referendum by a majority of voters and a majority of voters in a majority of States. The necessary alterations could be achieved by both direct amendment and indirectly by conferring power upon Parliament.[12]

It would, however, be desirable if agreement were reached between the Commonwealth and the States as to steps which should be taken to implement a Republic. It would be a pity if the move to a Republic were to degenerate into a series of legal controversies to be determined by the courts. For what it is worth, legislation could be enacted under s 51(xxxviii) at the request or with the concurrence of all the States, though I have doubts as to the efficacy of such legislation on the ground that the power in s 51(xxxviii) is expressed to be subject to "this Constitution", an expression which, in my view, makes the power subject to the operative terms of the Constitution as interpreted in the light of the covering clauses and the Preamble, that is, to the Constitution proper with the meanings given to "the Queen" and "the States" as defined by covering clauses 2 and 6 as well as the Preamble. If that be right, s 51(xxxviii) is a power which cannot be exercised to undo that element in the Constitution.

III. COULD THE STATES RE-ESTABLISH THE MONARCHY?

One final question is whether a State could effectively re-establish the Monarchy at State level if it were so minded at some time in the future. I am not at all sure what is meant by retention or re-establishment of the Monarchy at State level in an Australian Republic. Ignoring that difficulty, I do not see how a State could re-establish the Monarchy at State level, once it was removed by Commonwealth legislation under s 128, assuming that legislation to be effective to eliminate the Monarchy at State level. If, however, we assume that a State of

12 The Federal Attorney-General has expressed the view that the necessary amendments can be achieved under s 128.

its own motion amends its Constitution to delete the references to the Monarchy, then it would be possible for the State to amend its Constitution so as to embrace the Monarchy again. On the other hand, that amendment would be subject to the capacity of the Commonwealth to legislate under the external affairs power to determine it, quite apart from the possibility of resorting to s 128 to amend the State Constitution to bring it back to a non-Monarchical frame.

In my remarks on this question, I have assumed that the adoption of a Republican form of Federal government would not of itself eliminate the Monarchical element that exists at State level. Whether that assumption is well founded depends upon legal and practical considerations. We need to remember that the States are part of the Commonwealth and the form of government adopted by the Commonwealth applies to the States as part of the Commonwealth. A State Monarchy within a Commonwealth would be a "constitutional monstrosity", to repeat the words of the present Federal Attorney-General. Indeed, there must be a question whether the Monarch would be prepared to accept such a subordinate position, that is, subordinate to a Presidential Head of State. Further, there remains the question of whether the Monarch would want to accept such a position when at the level of the nation the Monarchy is rejected by a majority of Australians and in a majority of States, for that is the hypothetical situation I am addressing.