

FASHIONING AND REFASHIONING THE CONSTITUTION

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I THE ORIGINAL MODEL

The centenary of the *Australian Constitution* ('Constitution') on 1 January 2001 was an occasion for celebration by Australians.¹ Although the Constitution took force by virtue of an enactment of the Parliament of the United Kingdom ('UK') and a subsequent proclamation issued by Queen Victoria,² it was in all essential respects the handiwork of Australians, assembled in a series of conventions over the last decade of the 19th century. Their task had been to prepare a constitution to bring the six Australian colonies, henceforth to be known as States, (and perhaps New Zealand) into a federal union.

It was accepted that a federation of the colonies would involve the establishment of national institutions of government: a federal Parliament, a federal executive and a federal judicature. It would also involve delineation of the powers of the governments of the federation.

The draft of the Constitution that was finally agreed upon³ made provision for a federal Parliament, the members of whose two Houses would be elected. All the original States of the federation would be equally represented in the Parliament's Upper House, the Senate. The Constitution also included provisions concerning the relationships between the two Houses; for example, in relation to Money Bills, and the resolution of deadlocks between them.

The provisions in the Constitution regarding the executive branch of government were somewhat spare, though to some extent they reflected provisions of a kind that already appeared in the colonial constitutions. Section 61 declared that the executive power of the Commonwealth was vested in the Queen, and was exercisable by the Governor-General as the Queen's representative. There were to be federal ministers of state, formally appointed by

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1 The centenary of the enactment by the United Kingdom Parliament of the *Commonwealth Of Australia Constitution Act 1900* (Imp) had been celebrated in London the year before.

2 The Constitution came into force by virtue of a proclamation by Queen Victoria, advised by the Privy Council, which had been issued under covering cl 3 of the *Commonwealth Of Australia Constitution Act 1900* (Imp). The proclamation was made on 17 September 1900.

3 The draft of the Constitution was eventually approved by electors in the six colonies.

the Governor-General to administer Commonwealth departments. The ministers were to be or become members of the federal Parliament.

They were to be members *ex officio* of the federal Executive Council, a body whose function was to advise the Governor-General.⁴ It was implicit, in the several provisions in relation to the executive branch of government, that ministers would be accountable to the Parliament, but no attempt was made to spell out constitutional conventions regarding formation of ministries and their dismissal. No mention was made of the office of Prime Minister or of Cabinet.

The third branch of Commonwealth government for which the Constitution made provision was the judicature. The framers of the Constitution recognised that there would need to be at least one central federal court and that some matters could arise for judicial decision which should be treated as federal matters. The one essential federal court was the High Court of Australia ('High Court'), to be established by the Parliament. Once established, that court would have an entrenched original jurisdiction in five matters, among them matters between States, and matters in which the Commonwealth was a party.⁵ The Parliament was authorised to grant the High Court additional original jurisdiction in four other matters, including matters arising under any of the laws of the Commonwealth.⁶

The federal Parliament was also authorised to establish other federal courts and to grant them jurisdiction in any of the federal matters. Jurisdiction in federal matters might also be granted to the courts of the States.⁷

The central and essential federal court, the High Court, was not only to be a court with jurisdiction in federal matters. Under s 73 of the Constitution, it was also to be a court of appeal to which people might resort when dissatisfied with judgments of State courts, even in non-federal matters. That provision has enabled the High Court to develop a uniform body of common law within the federation.

The Constitution for the Australian federation was one under which the legislative powers of the federal Parliament were limited to specified subjects, a number of them being ones affecting commercial activities and dealings.⁸ The Parliaments of the States were to retain concurrent power to legislate with respect to most of the matters in the federal list, subject to the important proviso, expressed in s 109, that if a State law was inconsistent with a federal law, the latter should prevail. Some of the federal legislative powers were qualified by a requirement that they not be used so as to discriminate between States (or parts thereof) or give preference to only one or some of the States.⁹

It was clearly intended that the Commonwealth should be a free trade zone. States were stripped of their power to levy customs duties. The power to levy

4 Australian Constitution ss 62, 64.

5 Australian Constitution s 75.

6 Australian Constitution s 76.

7 Australian Constitution ss 71, 77.

8 Australian Constitution s 51.

9 Australian Constitution s 51(ii) (taxation); s 51(iii) (bounties on the production and export of goods); s 99 (trade, commerce and revenue).

taxes of that kind, and also excise duties, was reposed exclusively in the federal Parliament.¹⁰ The customs duties imposed by the Commonwealth had to be uniform and once they were imposed, 'trade, commerce and intercourse among the States', s 92 declared, 'shall be absolutely free'. Section 92 was to prove to be a section on which litigants would frequently rely when challenging the validity of legislation.

The decision by the framers of the Constitution that the Commonwealth alone should have power to levy customs and excise duties presented problems about the extent to which the Commonwealth should levy taxes by these means, and how it should deploy the revenues so derived. Chapter IV of the Constitution, entitled 'Finance and Trade', included provisions that seemed to assure to the States a share of the revenues derived from such taxes. Among them was a provision, s 96, which was designed to allow the Commonwealth to deal with problems which could arise from strict application of the formulas for distribution of the revenues among the States. Section 96 stated that:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

The federal Parliament has not otherwise provided. Section 96, in combination with the Commonwealth Parliament's general taxation power under s 51(ii) of the Constitution, was to become a power by which the federal government could both dictate the uses that the States could make of their own revenue raising capacities, for example to levy income taxes, but also exert considerable leverage over the uses that the States might make of their exclusive legislative powers.¹¹

While economic considerations figured prominently in the deliberations of the framers of the Constitution, they were not the only ones. Another concern was the inability of the individual Australian colonies to defend themselves against attacks or threatened attacks by foreign nations which had, of late, made excursions into the south-west Pacific region. That particular concern was addressed in the Constitution by a provision that gave the federal Parliament power to make laws with respect to the 'defence of the Commonwealth and of the several States', and which effectively ensured that the defence of the nation would be primarily the responsibility of the federal government.¹²

II PROPOSALS FOR CHANGE

Although the Constitution was enacted as a section in a statute of the UK Parliament – s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp) – it included a provision whereby the Constitution could be amended within

10 *Australian Constitution* s 90.

11 See Cheryl Saunders, 'Towards a Theory for Section 96' (1987) 16 *Melbourne University Law Review* 1, 1, 699.

12 *Australian Constitution* ss 51(vi), 69, 114, 119.

Australia, without the need for any further enactments of the Parliament at Westminster.¹³

The method by which the Constitution might be altered was prescribed by s 128. Broadly, this section provided that the Constitution could be amended if a Bill for amendment was passed by both Houses of the federal Parliament, and was subsequently approved by an overall majority of electors and by a majority of electors in a majority of States voting at a referendum. Section 128 also made provision whereby an Amending Bill passed by only one of the Houses could eventually be submitted to the electors.¹⁴

In fact, alterations to the Constitution have been few. Since Federation, there have been only 19 occasions on which constitutional referendums have been held. On these occasions, a total of 43 Bills have been submitted to the electors. But only eight of the proposed alterations have been approved by the requisite electoral majorities. Seven of those changes were endorsed by majorities in all six States.¹⁵ Five of the proposed changes submitted to referendum were approved by an overall majority of electors, but not in a majority of States.¹⁶ Thirteen proposals were supported by 47 per cent to 49 per cent of all Australian electors.¹⁷ In one case, a Bill for alteration of the Constitution was supported by 62.2 per cent of all electors, but by majorities in only three of the States.¹⁸

The number of proposals for constitutional amendment submitted to electors does not reflect the number of changes that have been proposed in Bills, introduced in the federal Parliament. Up to the 1983-84 session of the Parliament, a total of 109 such Bills had been introduced.¹⁹ Twenty-six of them were submitted to the electors but were rejected. Of the remaining 83 Bills, four lapsed, usually at the second reading stage. Seven Bills were passed by both Houses, but the Government of the day decided not to submit them to

13 At the time of Federation, there could have been doubts about whether the Constitution could be amended within Australia so as to create a unitary polity, or to make the Commonwealth a republic.

14 In 1914, six Bills for alteration of the Constitution were passed only by the Senate, but the Government of the day declined to advise the Governor-General to issue writs for a referendum. In 1974, four Bills were submitted to referendum even though they had not been passed by the Senate. None of the four Bills was approved by the electors. Indeed the only State in which the Bills were approved was New South Wales.

15 These concerned: Senate elections (s 13) in 1906, State debts (s 105A) in 1928, social services (s 51(xxiiiA)) in 1946, Aboriginal people (ss 51(xxvi) and 127) in 1967, casual vacancies in the Senate (s 15) in 1977, Territorial votes in constitutional referendums (s 128) in 1977, and retirement of federal judges (s 72) in 1977.

16 These concerned: aviation in 1936, marketing in 1946, industrial employment in 1946, and simultaneous elections in 1977 and 1984.

17 These concerned: finance in 1910, trade and commerce in 1913, corporations in 1913, industrial matters in 1913, railway disputes in 1913, trusts in 1913, legislative powers in 1919, monopolies in 1919, communists in 1951, simultaneous election in 1974, amendment of the Constitution in 1974, democratic elections in 1974, interchange of powers in 1984.

18 This concerned simultaneous elections in 1977.

19 The statistics provided below are based on Constitutional Commission, *Final Report* (1988) app N. See also Enid Campbell, 'Changing the Constitution - Past and Future' (1989) 17 *Melbourne University Law Review* 1.

referendum.²⁰ In seven other cases, a writ for referendum was issued but was subsequently revoked.²¹

The matters which have been the subject of Bills for alteration of the Constitution have been various. A little over 60 of the Bills introduced up to the 1983-84 session covered the distribution of legislative powers. (They included four Bills providing for interchange of powers.) Only two of the Bills in this category were approved at referendums: one to enlarge the federal Parliament's power to legislate with respect to social services (1946); the other to enable the Parliament to legislate specifically for Aboriginal people (1967). Other Bills introduced up to the 1983-84 session included several relating to electoral matters, the terms of Parliament, and relationships between the two Houses. The last occasion on which changes to the Constitution were approved by the requisite majorities of electors was in 1977. Other post-1945 proposals for change that were approved related to the method by which casual vacancies in the Senate were to be filled, participation of Territory electors in constitutional referendums, and the age of retirement for federal judges.²²

The record of constitutional referendums has clearly demonstrated that the process of amendment prescribed by the Constitution makes it difficult for federal governments to secure the constitutional changes they desire. The record also suggests that proposals for change are unlikely to be approved by electors unless they have received bipartisan support. When electors are presented with a 'no' as well as a 'yes' case, a significant number of them will probably vote 'no'. Many of those who vote 'no' may do so simply because they are bamboozled by the material put before them. This includes not only the 'yes' and 'no' cases but the full text of the proposed amendment.²³

Very few electors will be familiar with the provisions of the Constitution. A survey conducted on behalf of the Constitutional Commission in April 1987 indicated that only 53.9 per cent of those surveyed (approximately 1 100) knew that there is a written federal Constitution. The survey showed that the respondents most aware of the existence and significance of this Constitution were males over the age of 35 years who had left school at 17 years of age or over and who were in full-time employment as white-collar workers. Nearly 70 per cent of the respondents in the 18-24 age group were not even aware of the existence of a written Constitution.²⁴

20 In 1965, the Menzies Government decided not to submit two Bills to referendum, though one (for the repeal of s 127) was later reintroduced and was approved at the 1967 referendum. In 1983, the Hawke Government decided not to put to referendum a Bill to give the High Court an advisory jurisdiction, a Bill for interchange of federal and State powers, a Bill on the term of the federal Parliament and a Bill for removal of outmoded and expended provisions.

21 The Bills had been passed in 1915 and were mainly ones to increase federal legislative powers. The writs were withdrawn after State Premiers had agreed to introduce Bills in their State Parliaments to refer powers to the federal Parliament under s 51(xxxvii) of the *Australian Constitution*. The *Referendum (Constitution Alteration) Act (No 2) 1915* (Cth) was passed to overcome doubts about whether the writs could be revoked. State Acts to refer the relevant powers to the Commonwealth were never passed.

22 The changes were to ss 15, 72 and 128 of the *Australian Constitution*.

23 The conduct of constitutional referendums is regulated by the *Referendum (Machinery Provisions) Act 1984* (Cth).

24 Constitutional Commission, above n 19, [1.56].

A lack of familiarity on the part of most Australian electors with the Constitution and its significance can be attributed in large part to the character of that Constitution. It does not, as does the *Constitution of the United States of America*, include a Bill of Rights that declares the rights of individuals *vis-à-vis* agencies of government.²⁵ Its language, it has been observed,

is less straightforward than that of most constitutions. This makes the Constitution difficult or impossible to teach in schools or to become an acknowledged part of the political culture of the nation, as constitutions can in other societies. Our Constitution remains too much a mystery to those who should be its masters.²⁶

III REVIEWS OF THE CONSTITUTION

The Constitution is, one may assume, much less of a mystery to those on whose activities it has an immediate impact; that is to say, agents of the governments of the federation. That some of these agents have not been altogether satisfied with the Constitution as originally enacted is evidenced by the fact that from time to time they have commissioned general reviews of its provisions. In 1927, the Federal Government appointed a royal commission to conduct such a review. The commission reported in 1929 but nothing came of its report. In 1942, federal and State ministers conferred on a variety of matters concerning the Constitution. In May 1957, both Houses of the federal Parliament appointed a Joint Parliamentary Committee on Constitutional Review. That committee held hearings in all States and presented its report in November 1959. Again, no steps were taken to implement the recommendations for constitutional change. In 1973, an Australian Constitutional Convention was convened, on the initiative of the Parliament of Victoria. It comprised delegates from all the Australian Parliaments and political parties, and representatives of local governments. There were meetings of the Convention in all State capitals between 1973 and 1985. Between sessions, there were meetings of committees and sub-committees. The committees and sub-committees were assisted by papers prepared by consultants.²⁷

On 19 December 1985, the Acting Prime Minister and Attorney-General, the Hon Lionel Bowen MP, announced that the Federal Government had decided to establish a commission to undertake a far reaching review of the federal Constitution.²⁸ The members of the Constitutional Commission were to be Sir Maurice Byers CBE QC, a former Solicitor-General of the Commonwealth; the Hon Sir Rupert Hamer KCMG, a former Premier of Victoria; the Hon Justice J L

25 See also *Canadian Charter of Rights and Freedoms* 1982.

26 Constitutional Commission, above n 19, [1.31] (quoting from the report of the Advisory Committee on Executive Government).

27 Ibid [1.22].

28 The terms of reference are set out in app B of the Commission's *Final Report: Constitutional Commission*, above n 19.

Toohy AO, then a judge of the Federal Court of Australia;²⁹ the Hon E G Whitlam AC QC, who had been Australia's Prime Minister between 1972 and 1975; Professor Leslie Zines, a professor of law at the Australian National University; and myself, then a professor of law at Monash University. Sir Maurice Byers was appointed chairperson.

The Commission was assisted by five advisory committees, the members and chairs of which were to be appointed by the Attorney-General.³⁰ These advisory committees were to report to the Commission on the following broad topics: the Australian judicial system; distribution of powers; executive government; individual and democratic rights under the Constitution; and trade and national economic management. Lawyers were strongly represented on these advisory committees.³¹ The Commission and the advisory committees were assisted by a secretariat based in Sydney.³²

The Commission and its advisory committees did their utmost to encourage members of the general public, and also of governmental agencies, to express their views on the matters on which they were commissioned to inquire. The advisory committees conducted public hearings in a number of venues throughout the nation. Approximately 4 000 written submissions were received. The only State government that responded by way of a substantial written submission was that of Queensland. The parties then represented in the federal Parliament chose not to make submissions.³³

In late January 1988, the Attorney-General asked the Commission to provide him with a report on a number of matters that had already been considered by the Commission and upon which their views were more or less concluded. That first report was sent to the Attorney-General on 28 April 1988. It included 17 Draft Bills for alteration of the Constitution. In May 1988, the Attorney-General introduced four of the Bills into the House of Representatives.³⁴ They had, by early June 1988, been passed by both Houses of the federal Parliament. All four proposals were resoundingly rejected by electors voting at a referendum held on 3 September 1988.

It may be wondered why the Federal Government decided in 1988 to seek a few amendments to the Constitution before it had received the final report of the Constitutional Commission, and before there was adequate opportunity for that final report to be considered by interested persons and organisations. The terms of reference of the Commission required that a final report be presented on or

29 Justice Toohy resigned from the Commission at the end of December 1986 before taking up his appointment as a Justice of the High Court.

30 The members of the advisory committees are listed in app A of the Commission's *Final Report*. The terms of reference of the committees are set out in app C: Constitutional Commission, above n 19.

31 Members of the advisory committee included five judges, three of them being judges of the Federal Court of Australia.

32 The staff of the secretariat are listed in app D of the Commission's *Final Report*: Constitutional Commission, above n 19. The Bills included in the report were prepared by former parliamentary counsel, Mr J Q Ewans and Mr J Finemore.

33 The processes of consultation employed are described in the Commission's *Final Report*: Constitutional Commission, above n 19, [1.49]-[1.78].

34 The four Bills were on parliamentary terms, fair elections, local government and rights and freedoms.

before 30 June 1988. The Commission met that deadline and its final report dealt with considerably more matters than had been dealt with in its first report. It was, indeed, the most comprehensive review of the Constitution that had ever been undertaken. The Federal Government's decision to seek amendments to the Constitution, based on only some of the Commission's recommendations in the Commission's first report, seems to have stemmed mainly from a desire that the Australian electorate should have an opportunity to vote on some proposals for constitutional change, thought to be of a relatively uncontroversial nature, in the year of the bicentenary of European settlement in Australia. The Federal Government clearly did not anticipate the extent to which the four proposals for amendment in 1988 would be opposed by those in a position to influence public opinion. Following the defeat of all of the four proposals submitted to referendum in 1988, the Federal Government made no attempt to seek implementation of any of the other proposals made by the Constitutional Commission. Though published, the Commission's report was effectively shelved.

IV THE CONSTITUTIONAL COMMISSION

It would have been open to the Constitutional Commission to propose an entirely new federal constitution, but from the outset the members agreed that it was not appropriate for them to do so.³⁵ They were satisfied that 'for the most part, the Constitution has served Australia well', and many of its provisions did not need to be altered or removed.³⁶ The Commission did, however, recommend removal from the Constitution of many provisions that were clearly outmoded or expended.³⁷ Were provisions of those kinds to be removed, the Constitution would become a somewhat shorter document and, for that reason alone, more comprehensible. A number of the recommendations of the Commission related to what may generally be described as the machinery of government and to democratic rights and processes.³⁸ Some such recommendations would, if adopted, have had an impact on the governance of the States and the Territories.

Several of the Commission's recommendations concerned the distribution of legislative powers between the Commonwealth and the States and would, if adopted, have resulted in an increase in the Commonwealth's powers. It seemed to the Commission that some provisions of the Constitution relating to distribution of powers were 'out of step with the economic, social and political needs and realities of Australian life or with the role Australia plays as an independent sovereign nation'.³⁹ Some of the proposed changes involved extension of existing Commonwealth legislative powers; for example, in relation to means of communication, intellectual property, family law matters, industrial

35 Constitutional Commission, above n 19, [1.24].

36 *Ibid* [1.26].

37 *Ibid* [1.40].

38 *Ibid* chh 4, 5, 6.

39 *Ibid* [1.41].

relations, provision of social welfare, trade and commerce, and corporations.⁴⁰ Other recommendations involved addition to the federal list of entirely new subjects; for example, defamation, accident compensation and rehabilitation, and nuclear material, nuclear energy and ionising radiation.⁴¹ The so-called 'races power'⁴² would have been displaced by a provision authorising the federal Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples, rather than to persons of any race. None of these changes involved diminution of the concurrent legislative powers of the States, though they would have enhanced the capacity of the federal Parliament to enact laws that would override inconsistent State laws by force of s 109 of the Constitution.

Two recommendations of the Commission would, if adopted, have removed from the federal Parliament its exclusive power to make laws in respect of two matters, being the power to make laws for places acquired by the Commonwealth for public purposes⁴³ and the power under s 90 to levy duties of excise. High Court interpretations of s 90, both before and after 1988, have tended to debar States from levying a wide variety of indirect taxes. States might well have favoured the amendment proposed by the Commission.⁴⁴ On the other hand, States might have opposed other recommendations the effect of which would have been to subject State Parliaments to the same limitations on the exercise of their legislative powers as apply to the federal Parliament. Some such limitations related to democratic rights and processes,⁴⁵ some to the tenure of judicial officers,⁴⁶ and some to individual rights and freedoms.⁴⁷

It seemed to the Constitutional Commission that one of the matters they were expected to address was whether the Constitution should be amended to include a comprehensive charter of individual rights and freedoms of the kind contained in many modern constitutions. One of the advisory committees had, after all, been charged to consider that very question. The Commission was well aware of the fact that the pros and cons of an entrenched Bill of Rights was a matter on which opinions have differed, not least because of the powers that such instruments confer on unelected judiciaries to strike down legislation enacted by democratically elected legislatures.

The Commission received the report of the Advisory Committee on Individual and Democratic Rights in July 1987. That committee advised adoption of an entrenched Bill of Rights and presented a draft of such a document. The Commission did not, however, find this draft altogether satisfactory and they decided to consider the whole matter more or less afresh. The Bill of Rights they eventually recommended was a modified version of the *Canadian Charter of*

40 Ibid [10.29], [10.130], [10.140], [10.154], [11.11], [11.87], [11.119].

41 Ibid [10.50], [10.81], [10.251].

42 *Australian Constitution* s 51(xxvi).

43 *Australian Constitution* s 52(i).

44 Constitutional Commission, above n 19, [11.242]. This recommendation preceded the High Courts decision in *Ha v State of New South Wales* (1997) 189 CLR 465, in which the Court gave a broad interpretation of the concept of excise duties.

45 Constitutional Commission, above n 19, [4.16], [4.102], [4.160].

46 Ibid [6.204].

47 Ibid [9.703]-[9.707], [9.747], [9.794]-[9.796].

Rights and Freedoms 1982. There was, however, a difference of opinion among the five members of the Commission as to whether the provisions of the proposed Australian Bill of Rights should, like the Canadian Charter, include a provision which would enable legislatures to enact legislation which was expressed to operate notwithstanding the substantive provisions of the Charter. Three members of the Commission considered that there should be no such override provision.⁴⁸

Although Australian electors have not, to date, had an opportunity to vote on whether the federal Constitution should be amended so as to incorporate an entrenched Bill of Rights, binding all Australian governments, the proposed amendments submitted to them in 1988 included ones which, had they been approved, would have expanded three existing rights and freedoms. Those three rights and freedoms bind the Commonwealth only.⁴⁹ The amendments proposed in 1988 would simply have extended them so as to bind the States and the Territories. The 'no' case presented to electors in respect of these amendments was not, some may think, entirely well-informed or rational.

V THE AMENDMENT PROCESS

In the last chapter of their report (ch 13), the Constitutional Commission proposed changes to the provisions regarding amendment of the Constitution. The changes recommended would preserve existing arrangements under which proposed alterations have to be submitted to electors at referendums, but would make it possible for proposals for amendment to be initiated by State Parliaments as well as by the federal Parliament. Under the proposed new arrangements, the Governor-General would be obliged to submit to the electors a proposed alteration to the Constitution that had been approved by the Parliaments of no fewer than half of the States, within a two month period, so long as the approving State Parliaments represented a majority of Australian electors overall. In addition, proposed alterations to the Constitution would take effect, by whomsoever the proposals were initiated, if they were approved by a majority of all electors and a majority of electors in at least half of the States. A majority of the Commission (Sir Maurice Byers, Mr Whitlam and Professor Campbell) did not, however, recommend an alteration of the Constitution which would allow for citizen or elector initiated constitutional referendums.

While the Commission clearly did not endorse any changes in the Constitution that would allow its provisions to be altered by parliamentary majorities – even special ones – it did see merit in the existing provision in s 51(xxxvii) of the Constitution, whereby the federal Parliament may acquire additional legislative powers in respect of matters not within the federal list, and do so upon reference

48 Professors Campbell and Zines (in dissent) considered that there should be an 'override provision', similar to that found in the *Canadian Charter of Rights and Freedoms 1982*: Constitutional Commission, above n 19, [9.212], [9.228]–[9.234].

49 The proposed extensions related to trial by jury, protection of property rights and freedom of religion.

by State Parliaments of powers invested exclusively in them. The Commission considered it desirable that the reference power be counterbalanced by a constitutional provision that would allow the federal Parliament to designate any of the matters within its exclusive legislative powers as matters with respect to which the State Parliaments may make laws.⁵⁰

VI THE AUSTRALIAN REPUBLIC?

The terms of reference of the Constitutional Commission were wide enough to permit consideration of the question of whether Australia should remain a constitutional monarchy under which the Queen is the Head of State of the Commonwealth of Australia, or whether Australia should become a republic whose Head of State is, howsoever titled, elected. The Advisory Committee on Executive Government, chaired by a former Governor-General,⁵¹ received evidence and considered submissions on this issue, but decided not to recommend that Australian electors be required to vote upon it in the very near future. The Committee advised that there was 'no prospect of a change in public opinion in the near future which would result in there being a majority support for a republic'.⁵² The issue was, the Committee advised 'for many people an emotionally charged one'. The Commission accepted the advice of the Advisory Committee in this regard. They agreed that to hold a referendum on this issue at this time 'would detract from other aspects of' the Commission's recommendations'.⁵³

Some years after the Constitutional Commission had reported, the question of whether Australia should remain a constitutional monarchy was re-activated. A peoples' convention – the 1998 Constitutional Convention – was assembled to consider the issue.⁵⁴ Those attending the convention were generally in favour of Australia becoming a republic, though there were differences of opinion among them on how the new Head of State – a President – should be chosen. At the ensuing constitutional referendum, electors were afforded an opportunity to express their views. The proposed alterations to the Constitution put before them were extensive and they may have been perplexing to many electors. Electors could not, however, have been left in doubt about the central issue to be decided by them: it was, essentially, whether they wished Australia's Head of State to be a President, chosen for a term of five years, by two-thirds of the members of federal Parliament.⁵⁵ An overall majority of the electors voted 'no'; but among them there would certainly have been some who, though pro-republican, thought that the President should be elected directly by electors, rather than by their elected representatives.

50 Constitutional Commission, above n 19, [10.564].

51 The Rt Hon Sir Zelman Cowen AK GCMG GCVO K St J QC.

52 Constitutional Commission, above n 19, [5.21].

53 *Ibid* [5.26].

54 Some members of the Convention were elected and some were appointed.

55 See Constitutional Alteration (Establishment of Republic) 1999 (Cth).

The republican cause is certainly not dead and it is very likely that electors will, in the near future, have another occasion to vote on the monarchy-republic issue.

VII CHANGE WITHOUT AMENDMENT

It cannot be said that overhaul of the Constitution ranks high on the agenda of the major political parties. The history of constitutional referendums certainly suggests that there will be little point in seeking amendments unless the proposals for change are assured bipartisan support. It may even be thought unwise to ask the electors to vote on a large number of disparate proposals at the one time.

Of the changes recommended by the Constitutional Commission, the ones that might be given high priority are those for removal of outmoded and expended provisions and for alteration of the process for amendment of the Constitution. Some of the difficulties arising from the current division of legislative powers between the Commonwealth and the States may, to an extent, be surmounted by reference of State legislative powers to the Commonwealth (pursuant to s 51(xxxvii) of the Constitution), or by cooperative arrangements that result in the enactment of complementary federal and State legislation. But without constitutional amendments, nothing can be done to overcome some other difficulties presented by the Constitution. For example, short of constitutional amendment, nothing can now be done to counter the High Court's recent decision in *Re Wakim; Ex parte McNally*⁵⁶ that the Constitution does not permit the State jurisdiction of State courts to be cross-vested in federal courts, even if the federal Parliament approves such an arrangement.

It is possible (perhaps even likely) that over the next decade there will be further public debate about whether the Constitution should be amended so as to incorporate a charter of fundamental rights and freedoms. No doubt there will continue to be opposition to the entrenchment of such an instrument in the Constitution, mainly on the ground that it would greatly enhance the powers of unelected judiciaries. It is nonetheless open to the federal Parliament, in exercise of its external affairs power,⁵⁷ to enact legislation to incorporate into domestic law provisions designed to implement Australia's obligations under a number of international instruments, for example the *International Covenant on Civil and Political Rights* ('ICCPR').⁵⁸ The UK's *Human Rights Act 1998* (UK) might

⁵⁶ (1999) 198 CLR 511.

⁵⁷ *Australian Constitution* s 51(xxix).

⁵⁸ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Bills were introduced in the federal Parliament in 1973 and 1985 to implement the ICCPR. The first Bill lapsed on the dissolution of the Parliament in 1974. The 1985 Bill proved highly controversial: see Constitutional Commission, above n 19, [9.55]-[9.62].

serve as a model for such legislation.⁵⁹ Yet another model which might be thought worthy of emulation is the *New Zealand Bill of Rights Act 1990* (NZ). Neither of these enactments, it should be said, allows courts to hold parliamentary legislation invalid. Both, however, require courts to have regard to certain norms in their interpretations and applications of domestic laws.

Australian judges are, I surmise, less likely to be discomforted by having to apply enactments of the kind exemplified by the UK's *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990* (NZ) than they would be if the Constitution incorporated a charter of rights and freedoms, contraventions of which would oblige them to hold government acts (including legislation) to be unconstitutional. Justices of the High Court, in particular, should by now be acutely sensitive to the criticisms that their judgments may attract when they adjudge legislation to be invalid on the ground that it infringes some right or freedom which they have found to be implied in the Constitution.⁶⁰

The High Court does not, of course, have any official role to play in the processes that may result in formal amendment of the Constitution. But, in the discharge of its functions, the Court must rule on what the Constitution means: what it permits, what it requires and what it prohibits. Issues which the Court has to decide may sometimes concern the constitutionality of government measures that have been adopted to deal with developments that could not have been envisaged by the framers of the Constitution. Generally, however, the Court has interpreted the grants of legislative power to the federal Parliament in a generous fashion, and without regard to what could and could not have been within the contemplation of the framers of the Constitution. Indeed, some rulings of the Court have suggested that some amendments that federal governments had sought in earlier years were not necessary to arm the federal Parliament with the powers which were sought.⁶¹

One of the legislative powers originally given to the federal Parliament, which has proved to be one that enables that Parliament to enact legislation on matters not otherwise within its powers, is the power conferred by s 51(xxix) to make laws with respect to 'external affairs'. This provision has been interpreted by majorities in the High Court in such a way as to permit the federal Parliament to enact legislation to implement Australia's international obligations, even when these obligations relate to the content of Australian domestic laws, including State laws, on subjects which otherwise fall within the exclusive province of the

59 This Act is designed to implement the UK's obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). Prior to the enactment of this Act there had been many cases in which the European Court on Human Rights had held UK laws or practices to have violated the Convention.

60 The implied freedom of political communication in the federal Constitution was not 'discovered' by the High Court until as late as 1992. The effect of this implied freedom was considered by the High Court most recently in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

61 Notably by a broad interpretation of the corporations power conferred by s 51(xx) of the *Australian Constitution*, beginning with *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 ('*Concrete Pipes Case*'). In that case, the Court rejected the narrow reading of the corporations power in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330.

States.⁶² The States have, not surprisingly, been concerned about the uses which may be made of this power, particularly since they have no constitutionally assured role in determining whether Australia should become a party to international instruments. By its ratification of international instruments, the executive branch of the Commonwealth can effectively enlarge the legislative powers of the federal Parliament, and by force of s 109 of the Constitution, ensure that its legislation is paramount.⁶³

The federal Constitution has imposed some express inhibitions on the uses that State Parliaments might make of their legislative powers.⁶⁴ But to those express inhibitions the High Court has added some implicit inhibitions. For example, in *Kable v Director of Public Prosecutions (NSW)*,⁶⁵ a majority of the Justices of the Court held that the Constitution prohibits State Parliaments from enacting legislation that invests in State courts powers or functions of a non-judicial character if the powers or functions so invested are incompatible with the exercise by State courts of any of the judicial powers of the Commonwealth. The impact of this implied constitutional limitation on State legislative powers is somewhat uncertain, but it may necessitate review of State legislation under which powers which are not, strictly speaking, of a judicial character have been invested in bodies recognisable as State courts.

In the performance of its role as Australia's ultimate constitutional court – sometimes as the first and last court to decide issues arising under the Constitution – the High Court has put flesh upon the bare bones of that Constitution. Though it has done so only when justiciable issues have been raised before it, and typically only when the constitutionality of some governmental measure has been challenged by a party, the Court has, by reason of its role as the ultimate constitutional court, shown that it has a capacity to reshape the Constitution, albeit without formal amendment of the text. Absent such formal amendments, there may be increasing pressures on the Court to adopt interpretations of the text that are perceived to be in tune with contemporary circumstances and needs. But among the Justices of the Court at any one time there may be quite sharp differences of opinion about the extent to which it is proper for them to be guided by considerations such as what are thought to have been the intentions of the framers of the Constitution⁶⁶ and

62 The leading case is still *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

63 The Constitutional Commission did not recommend amendment of the external affairs power: Constitutional Commission, above n 19, [10.461]. Since the Commission reported, arrangements have, however, been adopted under which the Houses of the federal Parliament are afforded an opportunity to consider whether Australia should ratify international agreements: see Brian R Opeskin, 'Constitutional Modelling: The Democratic Effect of International Law in Commonwealth Countries' (Pt 2) [2001] *Public Law* 97, 103.

64 *Australian Constitution* ss 92, 117. The High Court substantially revised its previous interpretations of these provisions in *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*') (s 92) and in *Street v Queensland Bar Association* (1989) 168 CLR 461 ('*Street*') (s 117). In *Cole*, the revised interpretation was such as to diminish the impact of the constitutional prohibition, but in *Street*, the revised interpretation was such as to enlarge the impact of the prohibition.

65 (1996) 189 CLR 51.

66 See, eg, *New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*').

assumptions implicit in the text of the Constitution, including ones about the 'proper' balance between federal and State powers.⁶⁷

VIII FUTURE REVIEWS

While judicial interpretations (and reinterpretations) of the Constitution sometimes indicate that there is no need for the Constitution to be amended to enable governments to adopt particular courses of action which they consider necessary, or desirable, there may be other occasions on which court rulings may underscore a case for constitutional amendment, whether it be one for extension of governmental powers, or for imposition of limitations on such powers. Future reviews of the Constitution of the kind committed to the Constitutional Commission in the 1980s must necessarily have regard to High Court pronouncements on federal constitutional issues since 1988.

The experience of that Commission may, however, suggest to some that, in future, reviews of the Constitution (or some aspects of it) should not be assigned to bodies established solely by the Commonwealth executive, but rather should be assigned to a body established pursuant to enactments of all the Australian legislatures, including those of the self-governing Territories of the Commonwealth. Governments would surely find it less easy to ignore or shelve recommendations for constitutional change emanating from something recognisable as a peoples' constitutional convention than they would the recommendations of a body like the Constitutional Commission, the members of which were appointed solely by the executive government of the Commonwealth – and likewise the members of the Commission's advisory committees.

Those who favour the establishment of what are broadly described as peoples' conventions to review the Constitution, or aspects of it, may seek to advance their arguments by reference to the several conventions that were assembled in the last decade of the 19th century to consider a constitution for a federal union of the Australian colonies. Viewed in retrospect, those conventions cannot be regarded as truly representative ones. Moreover, analyses of the recorded debates at those conventions reveal that the main architects of the Constitution were politicians, many of them lawyers, elected to political offices under a restrictive franchise.

The Constitutional Commission that deliberated between late 1985 and 1988 was certainly unlike those assemblies at which a constitution for a federation of the Australian colonies was forged. None of its members was elected. None of the statements made by its members in the course of meetings are recorded by verbatim reports of what they said, in public sessions. Meetings of the Commission were held *in camera* and reports of those meetings were recorded only in minutes (deposited ultimately in federal archives). The minutes, and also the published reports of the Commission's deliberations will, however, reveal

67 See, eg, *Tasmanian Dams Case* (1983) 158 CLR 1. See generally Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996).

very few differences of opinion among members (including among members who were identifiable as persons associated with particular political parties).

Any further review of the Constitution which is undertaken in the near future must surely take the *Final Report* of the Commission as a starting point. That report provides a valuable overview of the Constitution as it stood in 1988 and of the ways that it has been interpreted. It also provides information about previous proposals for constitutional change. Many of the Commission's recommendations could not be regarded as contentious or opposed on any rational grounds. In this 21st century, the case for some refashioning of the Constitution may be increasingly hard to resist.