THE REVISION OF THE COMMONWEALTH CONSTITUTION

From time to time since the early days of federation, attention has been drawn by political leaders to the need for some amendment or overhaul of our constitutional system; on many occasions the necessary parliamentary processes have been initiated with a view to securing some amendment; on rather fewer occasions, totalling twenty-four in all, the Commonwealth Parliament has approved of particular constitutional alterations which have been submitted to referendums; of the proposals so submitted only four have received the necessary majorities to become effective and, of these, two only are of significance.[1] Reasons for the failure to achieve any greater degree of constitutional amendment are not difficult to find.[2] First, there is in some fields a resistance to any amendment; conservative thought will generally reject any tendency towards change, particularly where (as has generally been the case) the change proposes giving increased powers to the central government. Secondly, the request for a grant of power is regarded as implying a threat that the power will be abused or exercised in some manner adverse to the best interests of the electorate.[3] Thirdly, the implications of, or even the necessity for, a constitutional amendment are seldom fully appreciated, and any constitutional amendment is usually viewed with the same favour or prejudice as an election issue. Fourthly, most referendums proposing amendments to the Constitution are usually given a party political slant by one or both of the major political parties, and voting on them, in consequence often follows party lines, particularly when the referendum is held at the same time as a general election. Other considerations sometimes obtrude, but it can be broadly asserted that the failure of each of the twenty rejected referendums was due in some substantial way to one or more of these reasons.[4]

The failure of so many proposals to amend the Constitution will not evoke any feelings of regret in some quarters. There is still a large body of opinion, not only amongst the electors, but in political and parliamentary circles, that the Constitution was formulated by men of wisdom and experience to meet the needs of this continent forever and is virtually sacrosanct. So, too, another body of opinion will be found which on principle is opposed to any increase in the power of the central government, conscious, no doubt, that divided sovereignty must necessarily give rise to weak government.

The force of these views can be appreciated in some fields of legislative power; it would, for example, be nonsensical to claim any virtue for local building regulation, sanitation and similar services being brought under the control of the Commonwealth Parliament; these are matters of a purely local character which are best dealt with at local level and in respect of which centralized rule or administration would have no virtue except to satisfy a fetish for uniformity. On the other hand, however, one could enumerate and possibly

[1] The four alterations approved are Senate Elections (No. 1 of 1907), State Debts (No. 3 of 1910), State Debts (No. 1 of 1929) and Social Services (No.81 of 1946); the last two are the significant ones.

[2] For an analysis of referenda up till 1949 and of the factors militating against their approval by the electors see R. S. Parker, "The People and the Constitution", in *Federalism in Australia* 135-189 (papers read at the Summer School of the Australian Institute of Political Science, 1949). See also P. H. Partridge, "The Politics of Federalism", in G. Sawer (ed.), *Federalism, An Australian Jubilee Study* 174ff.

[3] J. V. Barry, *Wider Powers for Greater Freedom* (1944) 18.

[4] R. E. Mitchell (ed.), *Essays on the Australian Constitution* (1952), esp. J. G. Latham

multiply subjects in which the case for central control or uniform regulation within the Commonwealth is very convincing. Not at least in these times of advanced scientific knowledge is the control of nuclear fission; other subjects of which much the same can be said are aviation, television, scientific research, long-distance road transport, restrictive trade practices, company law, capital issues control in some form, and possibly hire-purchase and credit finance. One feature in common will be observed in this list of subjects. Each stems from some development which was not present or of consequence when the Commonwealth Constitution was drafted; but there is the same justification for their being the subject of national power in 1958 as there was in 1901 for telegraphic services, light-houses, astronomical observations and some other subjects comprised in s. 51 of the Constitution.

This, however, is only part of the present problem of constitutional amendment: within recent times the national development of the Commonwealth has been phenomenal and has been accompanied by a change in the pattern of the economy from one in which the emphasis was on primary production to one in which industrial production has become a major feature. This change in pattern has shown the desirability for an extension of Commonwealth power in fields of finance, commerce and industrial relations. Furthermore, judicial decisions of the High Court and the Privy Council have given to some provisions of the Constitution an effect rather different from what the Founding Fathers envisaged. Not the least of these is the construction accorded to s.92 as a guarantee of free inter-State trade, a construction which has nullified road transport legislation in all States[5] and organised marketing schemes, both Commonwealth and State.[6] Of possibly more importance to the federal system itself is the supremacy of Commonwealth fiscal powers which has been demonstrated in the Uniform Tax Scheme.[7]

In the years since the Second World War, there has been a growing consciousness of these problems and of the inadequacy of our present constitutional system, which has at odd times inspired constitutional lawyers and political leaders to make pleas for a constitutional convention to consider what steps should be taken to amend the Constitution.[8] With the lesson of past referendums and the Royal Commission of 1927-1929 in mind, it has been evident that any steps towards amendment must be initiated in the political forum where they can be formulated along lines likely to be accepted by the major political parties and the electors. This was done in the year 1956 in both the Commonwealth and New South Wales Parliaments by the appointment of Joint Committees of both Houses to review such aspects of the working of the Constitution as the respective Committees considered they could most profitably consider, and to make recommendations for such amendments as each Committee thought necessary in the light of experience. The terms of reference of the Commonwealth and the State Committees were practically identical, but the scope of the respective reports is very different, mainly because of the different approach to the problem which the Commonwealth and a State would naturally be expected to adopt.[8a]

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at 2, A. J. Hannan at 279.

[5] *Cf.* McTiernan, J., in *Hughes and Vale Pty. Ltd. & Anor.* v. *N.S.W. (No. 2)* (1955) 93 C.L.R. 127 at 183.

[6] *Cf.* G. Sawer in G. W. Paton (ed.), *The British Commonwealth — The Commonwealth of Australia*, vol. ii, p. 78. This volume is hereafter cited as "The British Commonwealth".

[7] *S. Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373; *Victoria and N.S.W.* v. *The Commonwealth* (1957) A.L.R. 761.

[8] E.g. Sir Robert Garran and Professor K. H. Bailey at the Seventh Legal Convention of the Law Council of Australia, 1951, on the subject "Fifty Years of the Australian Constitution". See report in 25 *A.L.J.* 314, 339. See also Sir R. R. Garran, *Prosper the Commonwealth* (1958) c. xvi.

[8a] For the *Commonwealth Report* (hereinafter referred to as such) see *Report from Joint Committee on Constitutional Review*, 1958. The Committee consisted of the Prime Minister and Leader of the Opposition, Messrs. Calwell, Downer, Drummond, Hamilton,

Before turning to examine briefly the major recommendations made by the two Committees in their Reports; it is worth quoting a passage from a statement of the former Commonwealth Attorney-General, Senator Spicer, in which he explained the purpose of the Commonwealth Joint Committee. He said:[9]

> Its purpose is to have a number of members of both Houses of this Parliament, and from both sides, devote themselves to the task of reviewing the Constitution with a view to seeing if there are means by which it might be usefully amended in certain respects on which both parties could agree. From time to time over the years we have had agitations for the creation of a constitutional convention. They have never come to anything. In many ways I do not regard that as very surprising because the truth is that if we have anything like an elected constitutional convention we shall have merely a replica of this Parliament. What is overlooked these days is the fact that this Parliament is in truth a continuing convention of the people of Australia to consider amendments to the Constitution. The great difficulty for a number of members is to find time to devote to a consideration of the kind of amendment which the years have shown to be desirable. Therefore, it seems to me to be a very wise course to commence the process by creating a committee of this Parliament drawn from all sides of both chambers to concentrate on that task. If, as a result of our deliberations, we reach agreement on matters upon which no doubt it will be necessary to be in agreement, then we shall have gone a long way indeed along the road to getting a desirable constitutional reform, because those decisions will have been reached by a committee comprising members of both Houses of the Parliament; and it must always be remembered that the consent of both Houses of Parliament is a necessary step in the process of constitutional alterations which, after being approved by this Parliament, must be approved by the people by way of referendum.

The force and wisdom of these views cannot be questioned, but, whilst the Commonwealth Parliament as a body representative of the whole continent could adopt this attitude, the State Parliaments are in a different position and, as will be seen, the State Committee took the view that a constitutional convention, representative of every cross-section in the Australian community should be the first step in constitutional reform.

I. *The Commonwealth Committee's Report*

The Commonwealth Committee's Report is a valuable document containing a discussion of many of the problems of constitutional amendment and a review of the matters which, in its opinion, warrant some measure of reform; not the least of these in point of importance is the analysis made of the present national development of the Commonwealth and the change in the pattern of the economy — matters which have already been adverted to in this Note.

The first recommendations made by the Commonwealth Committee relate to the modification of the legislative machinery and seem to flow from the fact that the Senate has failed to fulfil its function as a States House; it has become instead a mere second chamber reflecting — but not accurately — the political division of the electorate. The most important proposals are, firstly, that the number of members of the House of Representatives shall no longer be tied as nearly as practicable to double the number of Senators;[10] secondly, that in the

Joske, Pollard, Ward and Whitlam; and Senators Kennelly, McKenna, Spicer and Wright. Senator O'Sullivan later replaced Senator Spicer. For the *State Report* (hereinafter referred to as such) see Parliament of N.S.W., *Report of the Joint Committee of the Legislative Council and Legislative Assembly upon the Australian Constitution*, 1958. R. R. Downing, M.L.C., the N.S.W. Minister of Justice, was Chairman of the Committee.

[9] *Commonwealth Report*, para. 17.

[10] *Id.*, para. 39, Senator Wright dissenting.

event of disagreement between the Senate and the House of Representatives the Governor-General should be empowered to convene a joint sitting of the members of both Houses as an alternative to a double dissolution;[11] and, thirdly, that Senators should hold office until the expiry or dissolution of the second House of Representatives after their election, instead of a period of six years.[12] These recommendations, if implemented, would result in the House of Representatives having more power than hitherto; the Senate would more closely reflect the political division of the House of Representatives and in the event of disagreement, its disagreeing members could be readily out-voted by the Government majority in the House of Representatives, the total members of which could be more than double the total number of Senators.

It is , of course, a matter for regret that the Senate has failed to achieve its original conception as a States house, but it is another question whether it should be reduced to a state where its resistance can be broken by a joint sitting of both Houses without a fresh election.[13] But in the history of the Commonwealth Parliament all parties have been impeded at one time or another from carrying out their policies by a hostile Senate,[14] and, on the whole, modern democratic thought has shown a trend away from the bicameral legislature with a powerful second chamber.

More general interest will be shown in the recommendations of the Committee in favour of increased Commonwealth powers. The Committee's report discusses many of the matters already mentioned in this Note in support of its view that the Commonwealth's concurrent legislative powers should be enlarged in several respects: first, several new subjects should be added to the Commonwealth's existing legislative powers, including navigation and shipping, whether intra-State or inter-State, aviation, scientific and industrial research, nuclear energy and some allied matters, television and electro-magnetic services, restrictive trade practices (so found by the Inter-State Commission), capital issues, hire-purchase and certain interest rates;[15] secondly, the existing powers of the Commonwealth over industrial disputes and corporations should be extended to avoid the limitations which have been indicated by judicial decision and to confer power to regulate the terms of employment;[16] thirdly, the Commonwealth should have power to make laws for an organized scheme for the marketing of primary products if approved by a poll of producers and any such law should not be subject to s.92.[17]

The Report recommends that s.92 should be limited in another respect to avoid the effect of the High Court's decisions in some of the recent Transport Cases.[18] The proposal is that the charges which a State can impose upon Inter-State road transport operators may take into account the capital cost of providing new roads, as distinct from mere maintenance charges, provided that the charges are approved by the inter-State Commission as being fair and reasonable and do not discriminate against Inter-State trade.[19]

A further function is envisaged for the Inter-State Commission which the Committee recommends should be re-established. It should be empowered to investigate restrictive trade practices and Parliament's power to make laws with respect to such practices should be conditional upon their being found by the Commission to be, or to be likely to be, contrary to the public interest.[20]

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[11] *Id.* para. 43, Senator Wright dissenting.
[12] *Id.* para. 49, Senator Wright dissenting.
[13] *Cf.* Senator Wright's dissenting observation: "The Senate would be better abolished than exist as an echo of the Federal Executive Government" (Annexure "B").
[14] Note in particular the rejection of the Labour Government's Transport Workers Regulations in 1931, and the rejection of the Liberal Government's Banking Bills in 1957.
[15] *Commonwealth Report*, paras. 110, 112, 116, 120, 125, 142, 152, 155, 157, Senator Wright dissenting as to the last three paragraphs.
[16] *Id.*, paras. 131, 135, Mr. Downer and Senator Wright dissenting on different aspects.
[17] *Id.*, para. 148.
[18] *Hughes & Vale Pty. Ltd.* v. *N.S.W. (No. 2)* (1955) 93 C.L.R. 127; *Armstrong* v. *Victoria* (1957) A.L.R. 889.
[19] *Commonwealth Report*, para. 161. [20] *Id.*, paras. 140, 142.

The position of the States under the Constitution is discussed in two connections in the Report, but on the first, namely the all-important subject of Commonwealth-State financial relations, no recommendation is made because the matter lies largely in the hands of the States who must formulate some general policy with regard to their financial responsibilities. The Report adds, however, that it "believes that a conference of the political leaders of the Commonwealth and the States is needed to discover whether any substantial adjustment of the relative financial positions of the Commonwealth and States could be achieved".[21]

The second matter directly pertaining to the States' position is the creation and admission to the Commonwealth of new States. Despite fairly virile New State movements, s. 124 had, in the Committee's view, prevented the creation of new States because it requires the consent of the Parliament of the State from which the territory of the new State is to be taken. The Committee recommends that the creation of new States should be a matter for the electors of the State concerned and that the Commonwealth should be able to legislate for referendums of electors in any State and to give effect to them by creating a new State without the consent of the State Parliament if approved by the electors of the State and those in the territory of the new State.[22]

II. *The State Committee's Report*

The State Joint Committee presented a progress report in February 1957, which condemned the Uniform Tax Scheme as unsatisfactory on several grounds and recommended the repeal of the relevant Commonwealth legislation. This progress report may have been made substantially for the purposes of the Uniform Tax litigation in 1957, when the State of New South Wales joined Victoria in a challenge to the validity of the Scheme, a challenge which failed in its major objective, although it resulted in the invalidation of one aspect of the legislation.[23]

The State Committee's main Report, is by no means as comprehensive as the Commonwealth Report, but it is nevertheless valuable as a manifestation of the attitudes of a State Government and parliamentary parties at State level to constitutional amendment. The major recommendation favours a Commonwealth Convention to consider such matters as the amendment of s.92 in any substantial way and of the Commonwealth's power over industrial disputes (s.51(xxxv)).[24] Such questions, as the Report indicates, raise important political issues on which general agreement should first be reached by responsible persons representing the main cross-sections of the community; not the least of the political issues so involved is whether power should reside in the Commonwealth to provide by legislation for the nationalisation of any trade or activity, a course which is at present not open in relation to some industries in consequence of the decision in the *Banking Case*.[25]

The effect of s.92 is discussed in the Report more specifically in relation to two matters — road transport and organized marketing. As to the first of these, the Committee considered that, in view of the decision in *Armstrong* v. *Victoria*, allowing States to impose a maintenance charge for the use of roads, a referendum to give the States wider powers on this subject would not be successful.[26] In order to deal with the second matter, organized marketing of primary products, the Committee recommended that a provision should be

[21] *Id.*, para. 164.
[22] *Id.*, para. 167.
[23] *Victoria and N.S.W.* v. *The Commonwealth* (1957) A.L.R. 761.
[24] *State Report*, para. 3.
[25] *Commonwealth* v. *Bank of N.S.W.* (1950) 79 C.L.R. 497.
[26] *State Report*, para. 5.

introduced excluding the application of s.92 to any laws of the Commonwealth or a State with respect to the organized marketing of such products.[27] Except for the inclusion of the States, the terms of the amendment proposed for this purpose are very similar to the Constitution Alteration (Marketing) which was rejected at a referendum in 1937 after *James* v. *The Commonwealth*.[28]

Oddly enough, it may appear, the State Committee reached rather similar conclusions to those of the Commonwealth Committee with respect to the creation of new States, namely that a new State may be formed from the territory of an existing State if that course is approved by majorities of electors in the existing State and the area of the proposed new State. But a limitation has been proposed on the size and population of any new State so that no area smaller than Tasmania nor with a population less than that of the least populous State may be created as a new State.[29]

Finally, though it is not in sequence, by the last recommendation of the Committee, it is proposed that the High Court should have the same powers as the Canadian Supreme Court to give advisory opinions on the validity of any Commonwealth or State law.[30] This is not the place to debate the merits of such a proposal, but two comments might be made in its favour: first, it was recommended by the Royal Commission on the Constitution in 1929,[31] and, secondly, if advisory opinions were made binding, the odd position of a statute being held valid at one time and invalid at a later time could be avoided.[32]

III. *Conclusion*

This brief review of the Reports of the two Joint Committees on the Constitution shows that there are fields in which agreement can be reached not only between the major political parties but also between States and Commonwealth. It is no doubt true that the States will oppose the enlargement of Commonwealth legislative power in most directions, but it is difficult to conceive that they would wish to retain power over some subjects which can be effectively dealt with only on a continent-wide basis; television and other similar services provide perhaps the best illustration of subjects of this class. Moreover, there are other respects in which the Commonwealth and States have a common interest; both are equally concerned to throw off the yoke of s.92 so as to authorise organised marketing schemes and a more effective control of inter-State road transport. Finally, there are other fields in which the present division of power between Commonwealth and States would be conceded by both to be unsatisfactory and wasteful; the industrial relations of employer and employee fall into this category, even though there may not at present be agreeable as to where the power should reside. However the argument for some one Parliament having power over this subject is unanswerable.[33]

The two Reports are therefore to be commended; not only do they show that agreement on some important issues can be achieved at political level, but they manifest a consciousness of the problems to which our constitutional system is giving rise. Whether a constitutional convention is the next step in seeking approval of amendments to the constitution or not, it is

[27] *Ibid.* [28] (1936) 55 C.L.R. 1. [29] *State Report*, para. 7

[30] The High Court has held that as the Constitution stands the Court cannot be invested with power to give advisory opinions on the validity of legislation: *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

[31] *Report*, 255.

[32] *Cf.* the consequences of invalidation in 1954, of the State Transport (Co-ordination) Act, 1931 which had previously survived attack, discussed in *Antill Ranger & Co. Pty. Ltd.*, v. *Commissioner for Motor Transport* (1955) 93 C.L.R. 83 at pp. 100, 102.

[33] Note Senator Wright's observation: "I particularly justify the power our industrial terms of employment set out in paragraph 131 of the Report. It is an exceedingly wide power, but unless some *Parliament* is given this power, Parliamentary Government in respect of it is in danger. In my opinion, there is no alternative to recognizing that the Commonwealth Parliament should have this power" (Annexure "B").

important that the work already done by the two Joint Committees should not be forgotten by the new Parliaments which will soon take office in the Commonwealth and in the State of New South Wales. A concerted effort on the part of the major political parties in the Commonwealth Parliament and some support from the States would go far to producing a substantial measure of constitutional reform in the not too distant future.

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