THE KIRMANI CASE—COULD THE COMMONWEALTH PARLIAMENT AMEND THE CONSTITUTION WITHOUT A REFERENDUM?

*G. J. CRAVEN**

Some years ago, Australia was described as a "frozen continent" when it came to constitutional amendment.[1] That description, apt enough when it was coined, has been given even greater force by the recent rejection of two eminently reasonable proposals for constitutional reform, which were put to a referendum during the 1984 Federal election.[2] If anything, the ice-age described by Professor Sawer has deepened, and the constitutional neanderthals who rejoice in its frigid wastes are filled with the deepest satisfaction.

In these circumstances, it is hardly surprising that occasional attempts have been made to find a means of by-passing the rigid referendum requirements imposed by s. 128 of the Constitution. Probably the most notable of these attempts was the suggestion by Professor Colin Howard that the Constitution might be amendable to amendment pursuant to its own rather shadowy s. 51(38).[3] The debate that has followed this suggestion has been long, furious and largely inconclusive. It would appear that because the power conferred by s. 51(38) is granted "subject to this Constitution", it could not be used (in light of the presence of s. 128) for the amendment of the Constitution proper.[4] The position with regard to the covering clauses of the Constitution Act, however, may well be very different.[5]

In any event, dicta emanating from a number of judges in a recent decision of the High Court seem to indicate that there may be no need to look to s. 51(38) as a means of evading the requirements of s. 128. Indeed, the logical implication to be drawn from these dicta is that for

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* LL.M., B.A. (Melb); Lecturer in Law at the University of Melbourne.

[1] G. Sawer, *Australian Federalism in the Courts* (1967) 208.

[2] The proposals were contained in the Constitution Alteration (Interchange of Powers) Bill 1983 and the Constitution Alteration (Simultaneous Elections) Bill 1983.

[3] C. Howard, "Constitutional Amendment; Lessons from Past Experience" (1973) 45 *Aust. Q.* 35.

[4] See e.g. A. Bennett, "Can the Constitution be Amended Without a Referendum?" (1982) 56 *A.L.J.* 358.

[5] The covering clauses are not subject to the power of amendment contained in s. 128; see e.g. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 989. The Constitution therefore provides no pre-eminent procedure for their amendment.

the past forty years the Commonwealth Parliament has possessed the power to amend the Constitution unilaterally without any necessity of resorting to s. 128 and its cumbersome procedure of State and national referanda. The decision concerned is that of *Shawar Kirmani* v. *Captain Cook Cruises Pty Limited*,[6] and the alleged source of this novel power of constitutional amendment is sub-s. 2(2) of the Statute of Westminster.

The *Kirmani* decision is long and complicated, and deals with a number of other important issues quite apart from the construction of s. 2 of the Statute of Westminster. Notably, the case has significant implications concerning the use of the external affairs power of the Commonwealth (s. 51(29).[7] Nevertheless, this piece will concentrate upon the comments made in that case concerning the scope of s. 2, and particularly upon the possible use of that section (in the light of these comments) for the purpose of constitutional amendment in Australia.

The actual facts of *Kirmani* are not particularly significant in the present context, except as providing the basis for a discussion of matters of profound constitutional interest. Briefly, Mrs. Kirmani was a passenger on the defendant company's ferry in Sydney Harbour. While on board, she was injured. She commenced an action in negligence against the defendant in the District Court of New South Wales. The defendant argued that its liability was limited by s. 503 of the Merchant Shipping Act 1894 (Imp). The plaintiff countered by arguing that s. 503 of the Imperial Act had been repealed in so far as it was part of the law of New South Wales by s. 104(3) of the Navigation Amendment Act 1979 (Cth). After the removal of the case to the High Court, the defendant took no further part in the argument. The Commonwealth intervened in support of s. 104, while the States of New South Wales, Queensland and Western Australia sought to argue that the section was invalid.[8] The central question before the Court was thus whether the Commonwealth Parliament possessed the necessary legislative power to repeal s. 503 of the Merchant Shipping Act to the extent that it was part of the law of New South Wales, and one argument advanced by counsel for the Commonwealth was that sub-s. 2(2) of the Statute of Westminster conferred such a power. The terms of sub-s. 2(2) are as follows:

> 2(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

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[6] Unreported, 27 February 1985, High Court. This decision is hereafter referred to as the *Kirmani Case*. All page references are to the authorized pamphlet judgment.

[7] Three judges in that case, Mason, J. (at 21-25), Murphy, J. (at 28-29) and Deane, J. (at 84-91) held that s. 51(29) authorised the repeal of Imperial Acts which apply as part of the law of the Commonwealth.

[8] A full statement of the facts in *Kirmani* appears in the judgment of Gibbs, C.J. at 1-3.

In seeking to apply sub-s. 2(2), the first issue facing the court was the meaning of the phrase "as the part of the law of a Dominion", or more particularly (through the operation of s. 1 of the Statute)[9] of the phrase "as part of the law of the Commonwealth of Australia". Whatever the scope of the power conferred by sub-s. 2(2), it only applies to Imperial Acts which fall within this somewhat obscure description.

Historically, sub-s. 2(2) has been regarded as open to two conflicting interpretations on this point. The first, is that the phrase "the law of the Commonwealth of Australia" comprehends all of the law applying within the territory of the Australian Commonwealth. Such an interpretation would incidentally include within the ambit of sub-s. 2(2) laws dealing with matters which are beyond the legislative powers of the Commonwealth, either because they are exclusively within the legislative province of the States, or because they are subject to the power of neither the Commonwealth, nor the States.[10] The second possible interpretation, is that the phrase denotes only that area of the law with respect to which the legislature of the "Commonwealth of Australia" (namely the Commonwealth Parliament) may itself make laws. Under this interpretation, sub-s. 2(2) would only apply to Acts of the Imperial Parliament which related to subjects within the legislative competence of the Parliament of the Commonwealth. This would appear to have been the view of Sir Owen Dixon,[11] and was the interpretation for which the States of New South Wales, Queensland and Western Australia contended in *Kirmani*.

Four judges in the *Kirmani Case*, Gibbs C.J., Mason, Brennan and Deane, JJ., were seemingly of the view that sub-s. 2(2) would apply to any Imperial Act having force within the territory of the Commonwealth.[12] Mason, J. perhaps put this view most succinctly, when he stated that "... there can be no doubt that the words chosen were designed to refer to the law in force in the territory constituting the Dominion".[13] However, Wilson and Dawson JJ. apparently disagreed with this view. Wilson, J., in considering the phrase "as part of the law of the Commonwealth" where used in s. 103 of the Commonwealth Act in question, clearly saw it as referring only to that part of the law which is subject to the legislative power of the Commonwealth Parliament,[14] and his Honour would presumably have applied the same reasoning to sub-s. 2(2) of the Statute of Westminster. Dawson, J. specifically held that sub-s. 2(2) applied only to Imperial laws relating to subjects which were within the legislative competence of the Commonwealth Parliament.[15] Murphy, J. did not consider the question.[16]

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[9] By s. 1 of the Statute of Westminster, the expression "Dominion" means, in the case of Australia, "The Commonwealth of Australia".

[10] The amendment of the covering clauses of the Commonwealth of Australia Constitution Act, for example, is a matter which is outside the powers of both Commonwealth and State Parliaments.

[11] Sir Owen Dixon, "The Statute of Westminster 1931" (1936) 10 *A.L.J.* Supp. 96, 101.

[12] *Per* Mason, J. at 16; *per* Brennan, J. at 50; and *per* Deane, J. at 70-71. Gibbs, C. J. (at 3-4) took such a view of the words "as part of the law of the Commonwealth" where used in s. 103 of the Navigation Amendment Act 1979 (Cth), and said that these words "echo those of s. 2(2) of the Statute of Westminster 1931 (Imp)".

[13] *Id.*, at 17.

[14] *Id.*, at 31-33.

[15] *Id.*, at 100-101.

[16] His Honour did not consider the Statute of Westminster to be relevant; see *infra* n. 24.

Nevertheless, it seems clear that a majority of the Court was of the opinion that sub-s. 2(2) would apply to any Imperial law having force within the territorial limits of the Commonwealth of Australia. In the context of the present discussion, it should therefore be noted at this stage that the Commonwealth of Australia Constitution Act (including the Constitution proper) is apparently "part of the law of the Commonwealth" for the purposes of sub-s. 2(2).

The next question which fell to be determined by the Court concerned the nature of the power conferred by sub-s. 2(2). Specifically, the Court had to decide upon the meaning of the concluding words of the sub-section, namely that "the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation". Ever since the enactment of the Statute of Westminster, a muted controversy has raged over the exact construction to be put upon these words.

In the opinion of Sir Owen Dixon, these words are "no more than explanatory and exegetical" of the preceding parts of s. 2.[17] In other words, all that they purport to do is to amplify the abolition of the rule contained in s. 2 of the Colonial Laws Validity Act, which abolition is effected by sub-s. 2(1) of the Statute, and elaborated by the first part of sub-s. 2(2). Under this view, sub-s. 2(2) grants no novel legislative power to the Parliament of the Commonwealth, but merely frees its existing powers from the fetter of repugnancy; if that Parliament possessed no power with respect to a certain subject matter before the passage of the Statute of Westminster, then sub-s. 2(2) gives no new power thereafter to repeal or amend an Imperial Act concerning that subject.

The opposite school of thought attributes a far wider operation to sub-s. 2(2). To adherents of this school, the bald words of the sub-section mean precisely what they say. Sub-section 2(2) gives to the Commonwealth Parliament the power to repeal or amend *any* Imperial Act, provided only that the Act concerned is "part of the law of the Commonwealth of Australia". The question of whether the subject matter of that Act is otherwise within the legislative powers of the Commonwealth is irrelevant. Supporters of this view of sub-s. 2(2) included Sir Kenneth Wheare and Sir Ivor Jennings,[18] and it is lent some degree of support by the highly ambiguous and equally complicated decision of the Privy Council in *Moore* v. *The Attorney-General for the Irish Free State.*[19] Further support is derived from an examination of other provisions of the Statute of Westminster. Section 8 of the Statute specifically excludes the Commonwealth of Australia Constitution Act from the scope of the amending power conferred upon the Commonwealth Parliament by sub-s. 2(2), while sub-s. 9(1) achieves a like result in the case of Imperial Statutes dealing with subjects within the exclusive authority of the States. As the repeal or amendment of any of those statutes would patently have been beyond the legislative power of the Commonwealth Parliament before the passage of the Statute of Westminster, it would seem that the drafters of the Statute

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[17] Dixon, *op. cit.* 101.

[18] K. Wheare, *The Statute of Westminster and Dominion Status* (5th ed., 1963) 162-163; W. I. Jennings, *The Constitutional Laws of the Commonwealth* (3rd ed., 1962) 132-134.

[19] [1935] A.C. 484.

assumed that sub-s. 2(2) would indeed extend to the repeal or amendment of any Imperial Statute having force within the Commonwealth of Australia.[20] The only other explanation would be that these two provisions were inserted merely through an excess of caution.[21]

However, precisely because of the inclusion of s. 8 and sub-s. 9(1), any controversy over the scope of sub-s. 2(2) has always been regarded as being largely academic. Given that the position of the Constitution Act is safeguarded by s. 8, and that matters within the sole authority of the States are protected by sub-s. 9(1), it has hitherto been difficult to conceive of circumstances in which the difference between the two views of sub-s. 2(2) would be material. That such circumstances could arise, however, particularly in relation to the Constitution Act, will shortly be seen.

In the *Kirmani Case*, the Chief Justice Sir Harry Gibbs came to no concluded view on this question. His Honour noted the existence of the two contending schools of thought regarding sub-s. 2(2), and also noted that the decision in *Moore* seemed to have proceeded upon the wider view, "although it is not clearly expressed in the judgment".[22] However, the Chief Justice went on to state that the question did not seem to be of great importance for Australia, in view of the existence of s. 8 and sub-s. 9(1).[23]

To Murphy, J., the question was even less important. In the opinion of that judge, "the Senate of Westminster 1931 (U.K.) and the Statute of Westminster Adoption Act 1942 (Cth) did not affect the legislative powers of the Commonwealth Parliament at all. That legislation dealt with form not substance".[24] Accordingly, for Murphy, J., the correct interpretation of sub-s. 2(2) was entirely irrelevant.

In a careful judgment, Wilson J. likewise arrived at no concluded view regarding the sub-section. His Honour seemed to prefer a narrow construction,[25] but admitted that the decision in *Moore* posed some difficulties.[26] Wilson, J. also noted that the presence in the Statute of ss. 7, 8 and 9 seemed to militate against the acceptance of a narrow view of sub-s. 2(2), but devoted some time to showing that these provisions were, in reality, merely inserted out of an abundance of caution.[27]

Dawson, J. was the only judge to opt specifically for a restrictive interpretation of the sub-section. Arguing from the purpose of s. 2 as a provision designed to remove fetters from the existing legislative powers of Dominion Parliaments, his Honour stated:

> . . . the words "and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation to the extent that it is part of the law of the dominion" are added for the purpose of elucidating the words which precede them and not for the purpose of conferring additional power[28]

[20] Wheare, *op. cit.* 162.
[21] See the judgment of Dawson, J. at 102-103.
[22] *Id.*, at 7.
[23] *Ibid.*
[24] *Id.*, at 28.
[25] *Id.*, at 33-40.
[26] *Id.*, at 36.
[27] *Id.*, at 36-38.
[28] *Id.*, at 101.

Dawson, J. went on to explain ss. 8 and 9 of the Statute as having been intended simply to allay the fears of those who thought that s. 2 might otherwise have the effect of substantively conferring a novel legislative power upon the Parliament of the Commonwealth. His Honour did not consider the decision in *Moore* to be determinative of the question of the nature of the power contained in sub-s. 2(2).[29]

However, it is the remaining three judgments in the *Kirmani* decision—those of Mason, Brennan and Deane, JJ.—which are of the greatest interest in the context of the amendment of the Constitution. All three of these judges were prepared to hold that sub-s. 2(2) of the Statute of Westminster gives the Commonwealth Parliament an independent power to amend or repeal any Imperial statute which has force within the territory of the Commonwealth, provided only that the statute concerned does not fall within one of the exceptions created by s. 8 and s. 9.

The judgment of Mason, J. dealt most briefly with this point. His Honour was of the opinion that a broad interpretation of sub-s. 2(2) "gives effect to the language of the sub-section according to its natural and ordinary meaning, and attributes to it an operation which makes it part of a coherent statutory scheme".[30] While acknowledging that ss. 7, 8 and 9 may have been inserted merely out of an abundance of caution, Mason, J. was still persuaded in favour of a wide construction.[31] His Honour did not purport to rely upon *Moore*, but stated that the decision in that case nevertheless had the effect of vindicating a broad interpretation of the sub-section.[32]

Brennan, J. was also of the view that sub-s. 2(2) authorises the repeal or amendment of any Imperial Act which is "part of the law of the Commonwealth of Australia", even where the true subject of such an Act is outside the powers of the Commonwealth Parliament.[33] His Honour was particularly influenced by the decision of the Privy Council in *Moore*,[34] which he saw as confirming the view that sub-s. 2(2) granted to the Dominion Parliaments "an independent and additional power to repeal and amend imperial laws".[35]

Deane, J. embarked upon a comprehensive review of the arguments in favour of each of the contending views of the sub-section. After completing this review, his Honour remarked that "had the matter been free of authority, the arguments favouring the competing constructions of the provision in the second part of s. 2(2) might perhaps be seen as uncompelling in either direction".[36] However, like Brennan, J., Deane, J. saw the decision in *Moore* as being determinative of the point. His Honour said of that case:

> The effect of the decision was seen and accepted in this country and in other parts of the Commonwealth and Empire as establishing that the provision in the second part of s. 2(2) of the Statute of

[29] *Id.*, at 102-105.
[30] *Id.*, at 19.
[31] *Ibid.*
[32] *Id.*, at 20.
[33] *Id.*, at 56.
[34] *Ibid.*
[35] *Ibid.*
[36] *Id.*, at 77.

> Westminster constituted an independent grant of legislative power to the Parliament of a Dominion.[37]

Thus, the view of Deane, J. was essentially similar to that of Brennan, J. in this respect.

In the specific context of the Constitution Act, both Brennan and Deane JJ. were at pains to stress that the amendment or repeal of that Act pursuant to the general enlargement of Commonwealth legislative power which they saw as following from sub-s. 2(2) was precluded by the operation of s. 8 of the Statute,[38] and it may be presumed that Mason, J. would have concurred in this opinion.[39] Thus, Brennan, J. carefully noted that s. 8 "removes the Constitution and the Commonwealth of Australia Constitution Act from the reach of the power to repeal or amend",[40] while the judgment of Deane, J. was to similar effect.[41] Accordingly, the position of Mason, Brennan and Deane JJ. insofar as it pertains to the Constitution Act is comprised of two limbs: first, that sub-s. 2(2) gives the Commonwealth Parliament a general power to amend and repeal Imperial Acts which are part of the law of the Commonwealth, and secondly, that the Constitution Act is preserved from this general effect by the operation of s. 8. On the surface, this position does not seem to offer any immediate hope of a unilateral amendment of the Constitution Act or the Constitution proper by the Commonwealth Parliament.

However, further consideration quickly reveals that this initial reaction is very far from representing the truth. The starting point for this consideration must be to note that the only reason advanced by Brennan and Deane JJ. as to why sub-s. 2(2) does not permit the amendment of the Constitution Act is the presence in the Statute of Westminster of s. 8.

The Statute of Westminster is itself "an Act of Parliament of the United Kingdom". In light of the decision in *Kirmani*, it would also seem clear that the Statute applies "as part of the law of the Commonwealth of Australia" within the meaning of sub-s. 2(2). This follows from the fact that the Statute has force within the territorial limits of the Commonwealth, which is apparently all that would be required by Gibbs, C.J., Mason, Brennan and Deane, JJ. before they would be prepared to hold an Imperial Statute subject to the power contained in the sub-section.[42] Accordingly, under the view taken by the three last-named judges concerning the nature of the power conferred by the closing words of sub-s. 2(2), the Statute of Westminster itself could prima facie be amended by the Commonwealth Parliament. One possible amendment would be the repeal of s. 8.

Given that s. 8 was the only bar to the amendment of the Constitution Act pursuant to sub-s. 2(2) of the Statute of Westminster envisaged by Brennan, Deane and (apparently) Mason, JJ., what would be the position were that section to be repealed? The answer surely is that the Constitution Act could then be repealed or amended in the same way as any other

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[37] *Id.*, at 78.
[38] *Id.*, at 57-58 and 80-81 respectively.
[39] Mason, J. refers to the existence of s. 8 at 19.
[40] *Id.*, at 57.
[41] *Id.*, at 80-81.
[42] See *supra* 4.

Imperial Statute having force within the Commonwealth, that is, in the exercise of the ordinary legislative power of the Commonwealth Parliament as augmented by sub-s. 2(2) of the Statute of Westminster. It would follow from this that the Commonwealth Parliament could unilaterally amend both the covering clauses and the Constitution proper, without any necessity to first hold a referendum as required by s. 128. In short, the amendment of the Constitution Act would be entirely in the hands of the Commonwealth Parliament, and any constitutional arrangement could be varied at its whim. Thus, while the reasoning of the three judges does not countenance the direct amendment of the Constitution Act, it would seem to provide a very simple method by which such an end might indirectly be accomplished.

Are there any means by which such a conclusion might be avoided consistently with the reasoning of Mason, Brennan and Deane JJ.? The most obvious course in this respect would be to deny that sub-s. 2(2) of the Statute of Westminster authorizes the amendment of the Statute itself, and this argument was very briefly advanced by Brennan, J., although apparently without his Honour having adverted to the specific line of reasoning currently under discussion. Having decided in favour of the wide interpretation of sub-s. 2(2), Brennan, J. went on to say

> One exception [to the scope of the power conferred by the sub-section] flows from s. 8 and from the words "any existing or future Act" in s. 2(2) of the Statute. The power to repeal or amend an imperial law . . . does not authorize the amendment of the organic laws of the Commonwealth, the Constitution, the Commonwealth of Australia Constitution Act and the Statute itself.[43]

His Honour's view seems to have been that the words "any existing or future Act" in sub-s. 2(2) preclude its use for the amendment of the Statute of which it is a part. In adopting this stance, Brennan, J., appears to have relied upon a statement made by Sir Kenneth Wheare in 1953, in his *The Statute of Westminster and Dominion Status.*[44]

However, his Honour's view is (with respect) quite untenable, and so much was later recognized by Wheare, when in 1961 he wrote:

> The better opinion seems to be that it [the power of amendment contained in sub-s. 2(2)] does include the Statute, for the power conferred comes into operation "after the commencement of this Act", and by that time the Statute is an existing act of Parliament of the United Kingdom.[45]

Again with respect, Wheare's later reasoning is virtually self-evident, and it therefore seems clear that the words "any existing or future Act" where used in sub-s. 2(2) do not prevent the use of that provision for the amendment of the Statute itself. The only other plausible argument against the use of the sub-section by the Commonwealth Parliament for the purpose of amending the Statute of Westminster, would presumably be to the effect that the power conferred by sub-s. 2(2) does not permit the amendment of Imperial Acts otherwise outside the scope of the legislative

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[43] *Id.*, at 63.
[44] Wheare, *op. cit.* 163.
[45] Wheare, *Constitutional Structure of the Commonwealth* (2nd ed., 1961) 32-33.

power of the Commonwealth Parliament, and that the Statute itself comprises just such an Act. However, it is precisely the rejection of such a view of sub-s. 2(2) which has placed Mason, Brennan and Deane, JJ. in the rather curious position which they now apparently occupy.

It may, perhaps, be doubted whether the three judges concerned fully adverted to the logical consequences of the line of reasoning which they adopted. It is also possible to doubt whether they would be prepared to accept these consequences once appreciated, and it certainly seems unlikely that a majority of the High Court would currently embrace them with any great degree of enthusiasm. Nevertheless, the logical implication to be drawn from the remarks in the *Kirmani Case* is that through a simple amendment of the Statute of Westminster, the Constitution Act could be made subject to the legislative power of the Commonwealth Parliament. Whether this prospect is greeted with delight or recoiled from in horror depends largely upon one's point of view. To some, this possibility would represent a welcome means of achieving wide-ranging constitutional reform without the likelihood of repeated and depressing defeat at the hands of the referendum requirements of s. 128. To others, it would be abhorent as a subversion of one of the fundamental principles of the Constitution, that a constitutional amendment cannot take place without the consent of a majority of the electors of the Commonwealth, and majorities of electors in a majority of States. Whichever view one takes, the dicta in *Kirmani* hold some fascinating possibilities for the future of constitutional amendment in Australia.