

COMMENT

SECTION 51 (xxxviii) OF THE CONSTITUTION AND AMENDMENT OF THE “COVERING CLAUSES”

BY
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The end of many years of frustration by Australian nationalists appeared to be in sight when, on 25 June 1982, a Premiers' Conference decided to sever residual constitutional links with the United Kingdom, excluding the Monarchy. The various Attorneys-Generals' Departments are now studying the manner in which this historic decision should be implemented.¹ Some of the proposed reforms — such as the repeal of section 59 of the Commonwealth Constitution (which authorises the Queen to disallow Commonwealth legislation)² — would require amendment of the Commonwealth Constitution and, since one means of implementation contemplated is “simultaneous and parallel Commonwealth legislation at the request of the States pursuant to [section 51 (xxxviii)] of the Constitution”,³ it is appropriate to consider briefly whether that placitum authorises the Commonwealth Parliament to amend the Constitution⁴ and/or the “covering clauses”.⁵

In a recent article,⁶ Sir Arnold Bennett effectively demolished the notion that the Commonwealth *Constitution* can be amended pursuant to section 51 (xxxviii) of the Constitution. As he noted, all section 51 powers are “subject to this Constitution”, one provision of which is section 128, which commences with the injunction that “This Constitution shall not be altered except in the following manner”.⁷ Indeed, the generality of this injunction has led the Commonwealth Solicitor-General, Sir Maurice Byers, to argue that section 128 is a “manner and form” provision binding even the United Kingdom Parliament, which, accordingly *cannot* amend the Constitution.⁸ (While this proposition is legally doubtful, it certainly represents the practical position. As the recent Canadian “patriation” saga demonstrated, the United Kingdom would be extremely reluctant to enact any legislation relating to Australia unless there was no practical alternative to its doing so.)

Sir Arnold Bennett argued also that section 51 (xxxviii) cannot be employed to amend or repeal the “covering clauses”, but he did not really distinguish between

amendment of the *covering clauses* and amendment of the *Constitution*. However, whether section 51 (xxxviii) applies to the covering clauses is a more complicated question than whether it authorises amendment of the Constitution because the phrase, “this Constitution”, in sections 51 and 128 may not include the covering clauses. Since, with respect, Sir Arnold’s conclusion that section 51 (xxxviii) does not extend to amendment of the covering clauses is correct, but some of his reasoning unconvincing, a brief comment on that question is apposite.

1. If, as I submit is the case, the covering clauses can be (and in 1901 could have been) amended or repealed pursuant to section 128 of the Constitution — as has been argued by Professors Campbell and Lumb, Mr Justice Murphy and, perhaps, Sir Samuel Griffith⁹ — amendment or repeal of the covering clauses does not fall within section 51 (xxxviii), since the power to do so is not one “which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom”. However, many leading commentators, including Sir Robert Garran, Professors Sawyer and Harrison Moore, and Dr Wynes, have argued that section 128 does not extend to the amendment of the covering clauses.¹⁰
2. If the latter view regarding section 128 were correct, amendment or repeal of the covering clauses would, *prima facie*, fall within section 51 (xxxviii). However, the power conferred by that placitum was, like all other Commonwealth legislative powers, subject to the Colonial Laws Validity Act (1865) (Imp.) section 2,¹¹ so that it would not have authorised the enactment of legislation repugnant to United Kingdom legislation applying in Australia by paramount force — which includes the covering clauses. The limitation on the enactment of legislation repugnant to Imperial legislation was removed by the Commonwealth Parliament’s adoption of the Statute of Westminster 1931 (U.K.) section 2, by the Statute of Westminster Adoption Act 1942 (Cth) section 3,¹² but this did not extend to the covering clauses because section 8 of the Statute of Westminster provided that

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia. . . otherwise than in accordance with the law existing before the commencement of this Act.

Since the general removal of the “repugnancy doctrine” by section 2 of the Statute of Westminster did not extend to the covering clauses, they cannot be amended or repealed pursuant to section 51 (xxxviii).

3. Finally, if, contrary to what I believe to be the better view on both questions, the phrase “this Constitution”, in sections 51 and 128 does not include the covering clauses and section 51 (xxxviii) was *not* (in 1901) subject to section 2 of the Colonial Laws Validity Act 1865,¹³ section 51 (xxxviii) would authorise the amendment or repeal of the covering clauses unless either of Sir Arnold Bennett’s two arguments (neither of which is addressed specifically to the covering clauses) were accepted. These are:
 - (a) the covering clauses were enacted by the United Kingdom Parliament; hence they can be amended only by that Parliament:
[N]o parliament amends or can amend or repeal the Act of any other parliament. It may enact a different law which is repugnant to, inconsistent

with, or indeed the same as the Act of the other parliament — if it has the power. Any attempt to amend or repeal the Imperial Act, therefore, is meaningless. All that is attempted is an amendment of the Constitution by a method not open to the Parliaments. But plainly, the Commonwealth Parliament is not amending the United Kingdom Act — it is amending the Constitution, though this is embedded in the language of amending the United Kingdom Act. This is not open to the Parliament except by the democratic machinery of s.128.¹⁴

With all respect, this argument is unconvincing, and is, indeed, contradictory, since Sir Arnold concedes (as he clearly must) that the Australian legislature constituted by section 128 of the Constitution can amend or repeal the Constitution — part of a British statute. Even if section 51 (xxxviii) be regarded merely as a provision delegating legislative power to the Commonwealth Parliament, the fact that Australian legislation enacted thereunder would be amending or repealing British legislation (the covering clauses) is clearly no impediment to Commonwealth legislation having that effect.

(b) Sir Arnold's second argument is that:

Reading the [Constitution] Act as a whole, including s.9, therefore, it seems reasonably clear that the intention of the whole Act is to prevent the Commonwealth Parliament rising above the Constitution and becoming an equal power with the United Kingdom Parliament to amend the Constitution. Section 51, pl. (xxxviii), therefore, cannot be regarded as creating a power to repeal or amend the covering clauses and the Constitution that goes with it.¹⁵

Although this argument is stronger than the first, it is not persuasive in view of the unique nature of section 51 (xxxviii), as demonstrated by the fact that (*ex hypothesi*) it alone, of all the powers conferred by section 51, was not subject to section 2 of the Colonial Laws Validity Act (1865) (Imp.). Accordingly, on this view of section 51 (xxxviii) it would authorise amendment or repeal of the covering clauses.

However, it is submitted that only the first or second points above are tenable, and that the arguments outlined there constitute a firmer basis than Sir Arnold Bennett's for concluding that section 51 (xxxviii) does not extend to the amendment or repeal of the covering clauses.

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FOOTNOTES

- 1 For a discussion of some of the constitutional issues involved, see G. Sawyer, "Dealing with residual problems of Australia's imperial tie", *The Canberra Times*, 7 July 1982, 2, and "'Unamendable' parts of Constitution Act pose a patriation puzzle", *id.*, 21 July 1982, 2.
- 2 Attorney-General Senator Peter Durack, "Abolition of Residual Constitutional Links With Britain Other Than the Crown", Press Release 37/82, 25 June, [1982] 1 *Press Releases by the Attorney-General* 135, 136.
- 3 *Id.*, 137.

- 4 The Commonwealth Constitution is contained in the Commonwealth of Australia Constitution Act 1900 (U.K.) s.9.
- 5 The "covering clauses" are ss.1-9 of the Commonwealth of Australia Constitution Act 1900 (U.K.).
- 6 "Can the Constitution be Amended Without a Referendum?" (1982) 56 *A.L.J.* 358.
- 7 See also K. Booker, "Section 51 (xxxviii) of the Constitution" (1981) 4 *U.N.S.W.L.J.* 91, 96, 110 note 34.
- 8 M. H. Byers, "Current Constitutional Problems" in C. Saunders *et al.*, *Current Constitutional Problems in Australia* (1982), 51, 55, and "Conventions Associated with the Commonwealth Constitution" (1982) 56 *A.L.J.* 316, 318.
- 9 See K. Booker and G. Winterton, "The Act of Settlement and the Employment of Aliens" (1981) 12 *F.L. Rev.* 212, 215 note 22.
- 10 See *ibid.*
- 11 Booker, note 7 *supra*, 97.
- 12 See *id.*, 100; G. Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 39 *A.L.J.* 39, 45-46.
- 13 As argued in R. Graycar and K. McCulloch, "Gilbertson v. South Australia — The Case for S.51 (xxxviii)?" (1977) 6 *Adel. L. Rev.* 136, 150-151.
- 14 Note 6 *supra*, 360-361.
- 15 *Id.*, 362.