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Altering the Constitution

Introduction

2.1 This chapter discusses the ways in which the operation of Australia's Constitution has been altered over the years, highlighting the three principal mechanisms:

- amendments to section 128;
- judicial review; and
- inter-governmental negotiations and referral of State powers.

2.2 The chapter also discusses the appropriateness of these mechanisms for change and the constraints they may place on the possibilities for Constitutional renewal.

2.3 Although the main issues discussed at the roundtable focussed on amendments to section 128 and the machinery of referenda, for completeness, this chapter also reviews the other mechanisms of change.

Amendments via referenda

Background

2.4 Section 128 provides for the initiation and ratification of proposals to alter the Constitution. It arose from the Convention negotiations of the 1890s as a compromise between the States and the Commonwealth, and between the electorate and politicians.[1]

2.5 The section stipulates the following stages:

- a Bill is submitted to the Commonwealth Parliament proposing an amendment to the Constitution;
- the Bill is passed and a referendum is held;
- for the amendment to be ratified a majority of voters must agree in a majority of the States, and there must also be an overall majority nationwide (Territory votes are included in the national vote but not in the state figure.)

2.6 Parliament prescribes the machinery by which referendum votes are taken. Usually each elector receives a pamphlet containing separate arguments in favour and arguments against the proposal. These arguments must be authorised by a majority of those parliamentary members who voted for or against the proposed law.

Success of referenda

2.7 During the roundtable Professor Williams stated that Australia was 'going through the longest drought in our history when it comes to constitutional change.' He noted that only eight of the 44 referendum proposals since Federation had succeeded. Indeed, the rate of change had slowed over time and no referendum had succeeded since 1977.

2.8 This period of 31 years was 'the longest period of no constitutional change in Australia's history.' Professor Williams also suggested that the rate at which referenda were being put had also slowed and it was

1 S Bennett and S Brennan, 'Constitutional Referenda in Australia', Information and Research Services *Research Paper, No. 2, 1999-2000*; Parliamentary Library, August 1999; S Bennett, 'The Politics of Constitutional Amendment', Information and Research Services *Research Paper, No. 11, 2002-03*, Parliamentary Library, June 2003.

likely that the present decade would be 'the first decade of Australian history where no referendum has been put to the Australian people.'[2]

2.9 Roundtable participants identified several factors underpinning successful referendum outcomes. These were:

- bipartisanship—although not a guarantee of success, 'no referendum has been passed without it'
- adequate popular education—this enabled Australians to feel confident they understood the issues and could make a considered choice[3]
- popular ownership of a proposal— for example, the 1967 referendum deleting discriminatory references in the Constitution had resulted from a popular campaign conducted over several years[4]
- substance of the proposal—the public had to consider the proposal useful and 'a real addition to our constitutional arrangements.' Proposals seen as promoting a short-term political agenda tended to be viewed with suspicion[5]

2.10 Regarding the number of proposals put at one time, Professor Blackshield felt the public was able to discriminate between individual proposals in a package. For example, in 1946 only one proposal out of several was agreed to; in 1977 there was again mixed success; and in 1988 all proposals failed but by very different majorities. Professor Blackshield considered, however, 'that it is better and more reasonable to put up not too many but, say, four proposals at a time.'[6]

2.11 Professor Williams concluded that the lessons to be learnt from the high failure rate of referenda in Australia was that there had been:

> … a conspicuous failure to learn the lessons of the past and, indeed, what we see in referendums are the same mistakes being repeated again and again when proposals are put to the Australian people.[7]

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2 Professor Williams, *Transcript of Evidence,* p. 3.
3 Professor Williams, *Transcript of Evidence,* p. 4.
4 Dr O'Donoghue, *Transcript of Evidence,* p. 12.
5 Professor Saunders, *Transcript of Evidence,* p. 8.
6 Professor Blackshield, *Transcript of Evidence,* p. 11.
7 Professor Williams, *Transcript of Evidence,* p. 4.

Amending section 128

2.12 Participants at the roundtable discussed ways by which the success rate of referenda could be improved. It was suggested that two aspects could be changed: the terms of section 128 itself and the way in which proposals were determined and presented to the people.

2.13 Section 128 has two main components. First, it requires there to be a Bill for the alteration of the Constitution which is passed by an absolute majority of at least one House of the Parliament.[8] There follows a referendum which to succeed must receive approval from a majority of the electorate nationwide and a majority in a majority of the States—the so-called 'double majority'.

2.14 Professor Williams considered that it was only worth considering changing one aspect of section 128, that being the broadening of the scope for initiating proposals.[9] Professor Blackshield also commented that the Bill for change emanated from politicians and so often failed the test of public ownership. He added that the solution occasionally raised was for citizen-initiated referenda. This would entail a certain percentage of the electorate putting up a suggestion for a referendum.[10] The concept was supported by Professor Zines.[11]

2.15 Two objections to citizen-initiated referenda were raised. Professor Blackshield felt it was a good idea but noted that many thought:

> … that the people will come up with stupid proposals, as they do seem to do in California. I do not believe that the rest of the world is like California. I think we can trust our electorate better than that.[12]

2.16 A second objection raised by Professor Flint was that it tied up the legislative process of the Federal budget:

8 If both Houses pass the Bill the referendum is to be conducted within two and six months of passage through both Houses. If only one House passes the Bill it can be resubmitted after three months. If subsequently passed by the House which originally passed it, irrespective of its success or failure in the other House, the Governor-General may submit the proposed change to the people.

9 Professor Williams, *Transcript of Evidence,* p. 15.

10 Professor Blackshield, *Transcript of Evidence,* p. 12.

11 Professor Zines, *Transcript of Evidence,* p. 17.

12 Professor Blackshield, *Transcript of Evidence,* p. 12.

> Imagine if the Rudd Government came in and they found that they were forced to spend about 30 per cent of the budget on particular things because of [citizen-initiated referenda].[13]

2.17 An alternative way in which to involve the public in referendum proposals was the introduction of constitutional conventions. This is discussed later in the chapter.

2.18 Regarding the double majority requirement, it was noted that four of the failed referenda would have been passed on a national majority. One of these, Professor Williams advised, was a referendum to remove the 'majority in the majority of States' requirement. He added that this may have been due to voters in the smaller States not wishing to lose their influence.[14]

2.19 By and large, participants did not support removing the double majority requirement, although Professor Zines noted that if the requirement was changed to require a majority in just half of the States (ie three States), the number would return to the current situation of four States if, as he believed likely, the Northern Territory were to become Australia's seventh State.[15]

Adjusting the machinery of referenda

2.20 Section 128 states that 'when a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.'

2.21 The usual procedure adopted for referenda in Australia is the production of a booklet putting forward the yes and no cases. Professor Saunders considered this provided a fair opportunity to state the opposing positions in a referendum, but should only be a first step because it was not a good mechanism to promote understanding.[16]

2.22 Professor Zines agreed:

> I think the yes and no cases have sometimes been an absolute disgrace. If you look back into the past, particularly the no but also the yes cases have often just been pretty scurrilous political tracts. That has often been the case were perhaps

13 Professor Flint, *Transcript of Evidence,* p. 16.
14 Professor Williams, *Transcript of Evidence,* p. 9.
15 Professor Zines, *Transcript of Evidence,* p. 17.
16 Professor Saunders, *Transcript of Evidence,* p. 17.

> only a minority of people in the parliament are opposed to it. There have also been other occasions in which the public could not possibly get a clear, objective view as to what the issues were about. That is because it is left to those persons in the House who are opposed or in favour of it to draft them.[17]

2.23 Professor Blackshield agreed and suggested that if it was not possible to take the drafting of the cases out of the hands of politicians at least 'you could take the second reading speech and the reply from the opposition and simply reprint them in an intelligible format.'[18]

2.24 The preparation of the yes and no cases by politicians in the Commonwealth jurisdiction contrasts with that in New South Wales. As Professor Twomey stated, in that jurisdiction opposing arguments are prepared by bureaucrats and subsequently checked by constitutional lawyers and others to prevent bias. She added that the resulting referendum booklets were seen to be more 'educational' and referenda in that state had a higher success rate. She acknowledged, however, that there might be other factors contributing to the success rate in NSW. Notably, issues were more confined to the State and, unlike Commonwealth referenda, did not focus on providing more power to the Commonwealth.[19]

2.25 In contrast, Professor Flint felt that it was appropriate for politicians to write the opposing cases in the pre-referendum booklet:

> I think that the yes/no case should be written by those who are responsible for it—that is, the members of parliament. They are the ones we rely on in elections to put out their agendas and so on. I think it is perfectly proper and appropriate to have them write a yes/no case, rather than have some other body do it and who would purport to be objective but who would have the same prejudices as members of parliament.[20]

2.26 Professor Williams felt that while people have enough understanding of the referendum proposal to come to a decision, more should be done to address the serious problem in Australia of 'a lack of understanding and engagement with the basic political and

17 Professor Zines, *Transcript of Evidence,* p. 8.

18 Professor Blackshield, *Transcript of Evidence,* p. 11.

19 Professor Twomey, *Transcript of Evidence,* pp. 12–13.

20 Professor Flint, *Transcript of Evidence,* p. 16.

governmental processes.'[21] He considered there was a lack of imagination in relying solely on a booklet with the opposing cases. For example, not one of his constitutional law students had read the booklet produced for the republic referendum.[22]

2.27 Professor Saunders agreed and suggested New Zealand could provide a model of creativity as they had reviewed arrangements and imaginatively considered ways to assist people to understand the proposals and be properly involved.[23]

2.28 Professor Lavarch also argued that a yes/no booklet would not adequately engage the public and advantage should be taken of advances in technology such as those which enable social networking opportunities.[24] Mr Black added that 'digital natives' should be engaged via recent technological innovations:

> [Digital natives] spend more of their recreation time each week surfing the net than they do watching television, let alone any other recreational activity. They have grown up in this environment. The ability to make the case through YouTube or Facebook applications, or through a range of other online tools, should be an important part of any education and public ownership process.[25]

2.29 Several participants suggested that holding conventions was a way to educate and engage citizens in constitutional change.

The use of conventions

2.30 Professor Williams suggested that regular constitutional conventions should occur every decade. They should become:

> … a regular feature of our public life that engages with questions of constitutional reform—not something that must necessarily lead to outcomes but, if you like, part of our civic life that involves a regularity in dealing with these issues that means that people see it as an ongoing, continuous process,

21 Professor Williams, *Transcript of Evidence,* p. 14.
22 Professor Williams, *Transcript of Evidence,* p. 5.
23 Professor Saunders, *Transcript of Evidence,* p. 8.
24 Professor Lavarch, *Transcript of Evidence,* p. 13.
25 Mr Black, *Transcript of Evidence,* p. 13.

> not just a matter of a referendum being put up every few years that they tend to vote no to.[26]

2.31 Support was provided by Professor Behrendt who noted that the successful 1967 referendum resulted from a 20 year process of engaging the public.[27]

2.32 Professor Zines reminded the Committee that during the 1970s and 1980s there had been a regular review of the Constitution by the Australian Constitution Convention.[28] Professor Saunders highlighted the strengths and weaknesses of these conventions:

> [E]ach of the delegations had to comprise government and opposition. Some of them worked better than others in involving both sides of politics … one of the weaknesses of that exercise was that the Commonwealth never adequately committed itself to the outcomes of convention recommendations, and one of the consequences of that was that the Commonwealth itself did not take many of the convention deliberations seriously enough.[29]

2.33 Professor Flint also noted the value of government commitment saying that Australia 'would not have federated had the colonial parliaments not promised to put the decisions of the convention to the people.' A second factor which ensured federation, Professor Flint noted, was that most of the conventions comprised of elected delegates. However he preferred 'a convention partially elected and partially ex officio.'[30]

2.34 Support for partially elected conventions was also provided by Professor Williams, Professor Craven, and Professor Behrendt.[31]

2.35 Nevertheless, Professor Craven emphasised that just convening a convention was insufficient to ensure a successful outcome:

> [I]f you were really going to look at something at a constitutional convention, you would have a clearly thought out discussion program of epic proportions before you began.

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26 Professor Williams, *Transcript of Evidence,* p. 5.
27 Professor Behrendt, *Transcript of Evidence,* p. 14.
28 Professor Zines, *Transcript of Evidence,* p. 7.
29 Professor Saunders, *Transcript of Evidence,* p. 7.
30 Professor Flint, *Transcript of Evidence,* p. 9.
31 *Transcript of Evidence,* pp. 6, 10, 14.

> You would not just launch a convention into the ether and have it talking about anything …
>
> The second thing is that it would have to go for a long time. …
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> The third thing is that, once you come up with your model on anything, you would adjourn for a significant period of time. That would enable what you have come up with to go to the people to be debated. Then it would come back with thoughts and improvement, you would debate it again and your improved referendum machinery would come back.[32]

Judicial interpretation

2.36 Given the lack of success of constitutional referenda over the years, by default the primary method by which the Constitution has evolved is through judicial interpretation by the High Court.

2.37 Resulting changes to the Constitution have not been systematic, but have been driven by the issues brought before the bench by various litigants, by the preferences of individual judges, and by the High Court's understanding of the 'spirit of the times.'

2.38 Over time High Court decisions have changed interpretations of the Constitution without any referendum altering the wording of the Constitution. Changed interpretation has resulted in an expansion of Commonwealth powers, altering the power of the Commonwealth in its relationship with the States. Examples include:

- the 1920 *Engineers* case from which emerged the principle that grants of Commonwealth legislative power in the Constitution should be given a broad interpretation in accordance with the ordinary English meaning;
- the interpretation of section 96 allowing the granting of financial assistance to the States on such terms and conditions as the Commonwealth Parliament thought fit; and
- the 1983 *Tasmanian Dam* case which allowed the Commonwealth to halt work on the Gordon below Franklin Dam on environmental

32 Professor Craven, *Transcript of Evidence,* pp. 10-11.

grounds under the external affairs power because it was subject to a treaty—the World Heritage Convention.[33]

2.39 In some instances High Court decisions have achieved outcomes which had been rejected at a referendum. Such decisions have extended Commonwealth powers over corporations and telecommunications, and made changes in the areas of aviation, marketing schemes for primary products, and freedom of speech.[34]

2.40 On the other hand, the public's view demonstrated at a referendum can confirm a High Court's decision. This occurred in 1951 when the public rejected a referendum proposal to ban the Communist Party, confirming the High Court's rejection of legislation enacted by the Menzies government.

Inter-governmental negotiations and referral of State powers

2.41 Since the 1990s Commonwealth, State, and Territory jurisdictions have become progressively entwined. Negotiated solutions with the States and Territories to address financial and political objectives are extremely difficult. The low success rate of referenda, however, has provided significant motivation for negotiations to establish practical arrangements to, in essence, circumvent some constitutional provisions.

2.42 For example, when in 1990 the High Court negated a single national corporations law, rather than seeking constitutional amendment, the Commonwealth negotiated with other jurisdictions resulting in the creation of 'mirror' legislation to achieve the same result. This strategy was jeopardised by a subsequent High Court ruling, but the States and Territory governments countered by using sections 51 (xxxvii) and (xxxviii) of the Constitution which allow them to refer powers to the Commonwealth.[35]

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33 *Commonwealth vs Tasmania* (The Tasmanian Dam case) (1983) 158 CLR 1.

34 M Coper, 'The People and the Judges: Constitutional Referenda and Judicial Interpretation', in G Lindell , ed., *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines*, Federation Press, Sydney, 1994, pp. 78–80.

35 T Blackshield and G Williams, *Australian Constitutional Law and Theory, Commentary and Materials*, 2nd edn, Federation Press, Sydney,1998, p. 1194.

2.43 Other recent instances when State and Territory powers have been referred to the Commonwealth have been in the areas of regulatory standards for goods and occupations, anti terrorism laws, and financial matters relating to the breakdown of de facto relationships.

Committee comment

2.44 On the face of it, the history of defeated referenda and the length of time since any referenda on constitutional change suggest caution on the part of Australians about enacting change to the Constitution.

2.45 The Committee also notes that the section 128 constitutional requirements for change through referenda set a high bar in order to effect change. Despite some criticism of these requirements, the Committee does not consider changes to section 128 as feasible or necessarily desirable.

2.46 Instead, the Committee supports examining the process of how arguments are framed and debated in referenda and how this process may impact on referenda as well as the mechanisms for bringing issues to referenda.

2.47 The Committee supports the suggestion of regular constitutional conventions. The process should be measured and deliberate with opportunities for the public to engage in the debate. It would be important for such conventions to be seen as effectual and not to follow the course of history as described by Professor Saunders in her research paper:

> On average, there has been one comprehensive review of the Australian Constitution every 25 years since Federation. Each has identified a large number of proposals for change. Each also has been largely ineffective in securing sufficient consensus on change, within either Parliament or the electorate. Very little has followed from any of them, as a result.[36]

2.48 Judicial interpretation and intergovernmental agreements are both practical means by which problems in the Constitution can be overcome. However the framers of the Constitution intended that the

36 C Saunders, 'The Parliament as a Partner: A Century of Constitutional Review', in G Lindell and R Bennett, eds, *Parliament – The Vision in Hindsight,* Federation Press, Sydney, 2001, p. 483.

Constitution itself be changed to meet challenges and issues which arise. The Committee has reservations if judicial interpretation and intergovernmental agreements become the primary means of resolving constitutional issues as these avenues remove public engagement, certainty of interpretation and transparency of process. For these reasons, formal change of the Constitution should remain a viable mechanism for resolving issues.

2.49 As discussed in the following chapters, there are a number of areas of the Constitution which warrant consideration for reform. Any consideration of reform also necessitates further consideration of the processes by which Australians engage in the debate for reform and potentially give effect to constitutional amendments.