Submission to the Joint Select Committee on
Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples
by
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The Expert Panel's report on *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* was presented to the then Prime Minister, The Hon Julia Gillard MP, on 16 January 2012. Subsequently, the incumbent Prime Minister, The Hon Tony Abbott MP, on Australia Day this year, re-iterated his strong belief that recognising Australia's first people would be completing the constitution more than changing it.

Constitutional change is never a guaranteed event; historically, the people of the Commonwealth have only agreed to 8 out of the 44 referenda that have been submitted to them. Many commentators suggest that bi-partisan support will garnish the required result in respect of indigenous constitutional recognition. That said, there have been two referenda which received bipartisan support but never passed muster. They are the ***simultaneous elections -1977*** and the ***aviation - 1937*** referenda.

Additionally, the lowest percentage formal vote of 54.39% for the bottom rung of the successful referenda so far, along with the constitutional double majority requirement, already starts to raise the hurdle to a level that will be difficult to achieve - not impossible though, just difficult! It would also seem, that to reach the highest percentage formal vote of 90.77% as was the case with the 1967 referendum, could be nothing more than a pipe dream. None-the-less, such known difficulties should never be allowed to get in the way of trying to achieve the aim. Dreams may not always be obtainable, but as it says in a well known song - "you gotta have a dream, if you don't have a dream, how you gonna have a dream come true?".

The intent of this submission is to offer possible alternatives to those proposed in the Expert Panel's report for consideration by the committee.

On the face of it, the present writer submits that there are two aspects of the Expert Panel's report which would ensure undeniable failure at a referendum, they are:

- The last paragraph of Item 2 as it now stands, and

- Item 3 in toto.

The last paragraph of Item 2, while commendable in its aspiration, gives a never ending power to one group of Australian people. That will not work well with many Australians and could, in itself, be enough to kill off the referendum in the first place. A sunset clause may well help garnish more support from the Australian people at large.

Item 3 consists of two parts. Section 116A (1) is deficient in two ways. The present writer believes that is should more correctly read "***The Parliament of*** the Commonwealth, ***of*** a State or ***of*** a Territory shall not discriminate on the grounds of race, colour, ***creed***, ***class*** or ethnic or national origin". It is the various parliaments of each jurisdiction that has the legislative power to pass laws. Discrimination can occur elsewhere other than what Section 116A(1) now states. If there is to be such a law it should also include class and creed. Section 116A(2) would certainly open up Pandora's box as it now stands, and once again, would ensure defeat at a referendum. Section 116A(2) should only be applicable to Aboriginal and Torres Strait Islander peoples and should also be subject to a sunset clause if the intent is to reach out to the Australian people for their approval.

The approach now is to show some alternatives that may assist the committee in its deliberations.

The first step is to try and seek a way to get access to the existing preamble of the Commonwealth of Australia Act 1900. As is well documented by Professor Anne Twomey and others, Section 128 of the Australia Constitution (at clause 9 of the Constitution Act) is not available as it now stands to amend the existing preamble of the Constitution Act. However, if the Statute of Westminster 1931 and both of the Australia Acts 1986 are entrenched within the Constitution as shown at ANNEX A, then Section 128 should then become available to make changes not only within the Constitution itself but also to the Constitution Act as well. The entrenchment of these documents should do two things:

- Firstly, it should give absolute sovereignty to the Australian people over their constitutional arrangements. The people of the Commonwealth were never asked to approve of the Australia Acts at a referendum, which historically, doesn't match the processes undertaken to federate the various Australasian colonies in 1900 (with effect 1901). Sovereignty as it now stands is questionable because Section 15(1) of both the Australia Acts may possibly allow for changing the constitution without reference to the people. The late Richard McGarvie, in his book "DEMOCRACY - choosing Australia's republic" believed that the Australian Parliament, at the request of or with the concurrence of all the State Parliaments, can now amend or repeal the Constitution Act or The Constitution (See also the document *Is Our Constitution Safe?* which is attached at the end of this document).

- Secondly, and once the aforementioned process has been undertaken, access to the preamble of the Commonwealth of Australia Act 1900 should then become available for amendment and, therefore, allow for inclusion of a statement about the Aboriginal and Torres Strait Islander people.

Attached at ANNEX B, are proposed changes to the Commonwealth of Australia Constitution Act 1990 preamble. There are no changes to the first two paragraphs. Paragraphs three to seven inclusive could not be made until such time the proposed change to 127A has been accomplished. Some time lag will accompany this process, but the writer strongly believes that this process is more important so that the Aboriginal and Torres Strait Islander stuff can be included up front and centre in Australia's premier document. No further deliberation on this issue will be written here as it is believed that the notes in this annex sufficiently help explain the writer's intentions.

ANNEX C details the writer's recommendation in respect of Section 116A (1) as outlined in the Expert Panel's Item 3.

Finally, ANNEX D details the power the Parliament will have to make laws for the Aboriginal and Torres Strait Islanders. However, rather than make a new section 51A, this proposal would make use of the vacated Section 51(xxvi) should it be repealed. It better fits the form and style of the Constitution. This also has a generous sunset clause. Hopefully, this will help garnish support from more Australians to vote positively to help make the proposed changes.

That said, most of the Expert Panel's changes could be conducted alongside a referendum to give total sovereignty to the people of the Commonwealth. The proposed changes to the preamble of the Commonwealth of Australia Constitution Act would have to wait until such time the proposed Section 127A was successfully entrenched in the Constitution.

Yours sincerely,

M. Hobson

ANNEX A - Commonwealth of Australia Constitution Act - Proposed Changes

Proposed Changes to the Chapter VII

MISCELLANEOUS - Add New Section 127

125 Seat of Government

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

126 Power to Her Majesty to authorise Governor-General to appoint deputies

The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies[21] within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall as proposed not affect the exercise by the Governor-General himself of any power or function.

127A Method of Repeal or Amendment of the Australia Act 1986 (Commonwealth) and the Australia Act 1986 (United Kingdom) or the Statute of Westminster

The Australia Act 1986 (Commonwealth) and the Australia Act 1986 (United Kingdom) or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may only be repealed or amended in accordance with the procedures outlined in Section 128 of this Constitution. The Statute of Westminster 1931 at Schedule 2, the Australia Act 1986 (Commonwealth) at Schedule 3, and the Australia Act 1986 (United Kingdom) at Schedule 4, along with Schedule 1, form part of this Constitution.

127B Recognition of Languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages and form part of Australia's national heritage.

Appropriate changes to Section 15 of both of the Australia Acts would be required. Section 42 and The Schedule would need changes. The Schedule to be renamed to Schedule 1.

ANNEX B - Proposed Changes to Constitution Act Preamble

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:	***1.*** *No change.*
And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:	***2.*** *No Change. Allows for Western Australia and any other future acquisitions.*
And whereas on 9 July 1900 the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, enacted the Commonwealth of Australia Constitution Act (63 & 64 Victoria, CHAPTER 12) to federate the several Australasian Colonies:	***3.*** *Remains principally the same but now becomes an historical fact indicating the federation of the several Australasian colonies rather than the enacting words.Subject to proposed Section 127A.*
And whereas the People of the Commonwealth freely recognise that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples; acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; respect the continuing cultures, languages and heritage of Aboriginal and Torres Islander peoples and acknowledge the need to secure the advancement of Aboriginal and Torres Strait Islander peoples:	***4.*** *Statement of recognition along the lines of the elements contained in item 3 of the recommendations contained in the Expert Panel's report of January 2012. This part to be subject to the success of a Bill which allows for the proposed Section 127A to take effect.*
And whereas, and in concert with King George III's instructions to Governor Arthur Phillip, the People of the Commonwealth enjoin with the Aboriginal and Torres Strait Islander people to live in amity and kindness with them and, in doing so, form one contiguous and harmonious Australian body politic:	***5.*** *Shows the initial intent of the British Government and formalises Australia as a contiguous body politic. This part is also subject to the proposed S127A as detailed at "4" above.*
And whereas the Queen of Australia, on 2 March 1986, signed the Proclamation bringing both the Australia Act 1986 *Cwlth* and the Australia Act 1986 *UK* into operation on 3 March 1986 and which brought constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation:	***6.*** *Inserted to give attention to proposed Section 127A which deals with the change to the method of repeal or amendment of the Statute of Westminster and both of the Australia Acts (Cwlth & UK). Confirms total Sovereignty. Subject to proposed Section 127A.*
Be it therefore enacted by the Queen of Australia, the Senate, and the House of Representatives, and with the approval of the People of the Commonwealth, as follows:	***7.*** *The new enacting words. Subject to proposed Section 127A.*
1. This Act may be cited as the Commonwealth of Australia Constitution Act	***8.*** *No Change - all 9 covering clauses to remain the same.*

ANNEX C - Proposed Changes to Section 117

117 Rights of residents in States and Territories	
A. A subject of the Queen, resident in any State or Territory, shall not be subject in any other State or Territory to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State or Territory.	***1.*** *No Change*
B. The Parliament of the Commonwealth, of a State or of a Territory shall not make a law which discriminates against any of the Queen's subjects on the grounds of class, colour, creed, race, and ethnic or national origin.	***2.*** *New item under 117 dealing with rights. This is a variation of the Expert Panel's 116A (1) in item 4. The additional words of class and creed have been added as well as including the word "Parliament".*

ANNEX D - Proposed Alteration to Section 51 (xxvi)

(xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) (a) the Aboriginal and Torres Strait Islander peoples to:

(1) secure their advancement,

(2) overcome any disadvantage they may have,

(3) ameliorate the effects of past discrimination, and

(4) protect their cultures, languages and heritage.

(b) Section 117B does not preclude making any laws in respect of subsection (xxvi) (a).

(c) With the exception of (xxvi) (a) (4), any law made in respect of (xxvi) (a), will cease to have any effect after 25 January 2038.

(d) After 25 January 2038, and pursuant to sub section (xxvi) (a) (4), the Parliament of the Commonwealth may continue to make laws to protect the cultures, languages and heritage of the Aboriginal and Torres Strait Islanders but any such law shall not prevent the ordinary law of the land from operating in Aboriginal and Torres Strait Islander communities and elsewhere within the Commonwealth of Australia.

(xxvii) immigration and emigration;

(xxviii) the influx of criminals;

(xxix) external affairs;

(xxx) the relations of the Commonwealth with the islands of the Pacific;

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) railway construction and extension in any State with the consent of that State;

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;y

Is our Constitution Safe?

An article that examines whether or not the Australian Constitution could be changed without the will of the people.

NICK HOBSON*

* See Annex A for biographical details.

What some have said

"It seems quite clear that the constitution can be altered by means other than Section 128 Referendum – against, I'm sure, the intentions of the founders and against, I'm equally sure, the expectations of the Australian people."

Tony Abbott MP (Member for Warringah, House of Representatives)

"I find no fault in [the] logic and [the] material will credibly add to the literature on this subject." and " … I think [we] should be aware of the potential for plebiscites to fulfil the moral dictate of the popular will, but avoiding the perils of referenda and Section 128. In the scenario [that is implied], the Court and the Howard governments could fall to Labor, a plebiscite 'Do you want a republic' could get a majority, and the Labor States and Commonwealth Parliaments could then combine to vote in a Republican model similar to that which has just been rejected, with the plebiscite as authority. As a direct electionist that is not an appealing prospect to me."

Senator Andrew Murray (Senator for Western Australia)

"I read with interest the Hobson article *Is our constitution safe?* " and "My opinion was that the Australia Act 1986 fudged, without any convincing intellectual or logical basis, the referendum issue which its draftsmen pretended to avoid. It was assumed that the necessary referendum approvals for changing the Constitution would not be available or would probably not be available. So it was decided that the need for referendum approval could be avoided by the simplistic device of not making any new amendment of the Constitution as set out in s.9 of the Constitution Act: the 1986 Act did not say 'and the Constitution as set out in s.9 of the Act (and as hitherto amended in accordance with the prescribed amendment procedure) is further amended as follows …' Instead, the words of the constitution were left unchanged; and it was considered that amendment procedure and referendum approval were therefore unnecessary. According to that 'barrack-room lawyer's view' referendums were not required because no change was being made in the wording of the 'constitution'. That view treated form as triumph over substance. I advised and believed that, as everyone knew that the 1986 Act was making profound and fundamental constitutional change, and was intended to do so, form could not be relied on as prevailing over substance; and that the High Court would prefer substance to pathetic reliance on form. (Alas the argument was never taken to court.)"

Leolin Price QC (10 Old Square, Lincoln's Inn, London)

"This is a considerable debate now as to whether the ultimate foundation for the Australian Constitution is the will of the people. What [is] written collects much of the relevant material."

The Hon Justice Michael Kirby AC CMG (The High Court of Australia)

Pause for Thought

"As an instrument of Government, it has no equal in the world for the purpose of giving democratic government to the people."

" ..... that while it is not too pliant and cannot be easily altered, it provides the machinery for doing anything the people of the continent may desire."

"We have no flag that has braved the battle and the breeze for over a thousand years. We have this Commonwealth infant in our arms, nurturing and tending it, strengthening and developing it, and if we are to do our duty correctly we shall remember the lessons of the past and observe the watchword of freedom and justice to all."

The Hon W Trenwith, Minister for Public Works (Victoria) on the Constitution and the Federation at a luncheon held in Sydney on 5 January 1901 to celebrate the Federation of the Commonwealth of Australia. [1]

BACKGROUND

In 1986, G J Craven - a lecturer in Law at the University of Melbourne at the time - wrote an article about the possibility of the Commonwealth Parliament amending the Constitution without a referendum.[2] Amongst other things he concluded:

> "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 abhorrent as a subversion on 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."

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[1] J.J. Keenan, *The Inaugural Celebrations of the Commonwealth of Australia*, William Applegate Gullick, Government Printer (NSW), 1904.
[2] G.J. Craven, *The Kirmani Case-Could the Commonwealth Parliament Amend the Constitution Without a Referendum*, The Sydney Law Review, March 1986, pp. 64-72.

For whatever reason, G J Craven did not attend to the existence of the Australia Act 1986.[3]

In their book, *Australian Constitutional Law and Theory* [4], Tony Blackshield and George Williams wrote:

> The *Australia Act* was assented to on 4 December 1985 and came into operation on 3 March 1986 when it was proclaimed by Elizabeth II, who travelled to Canberra for that purpose to make it clear that she was acting in her capacity as Queen of Australia. Section 15 of the Act laid down a mechanism for amending or repealing *the Australia Act* and the *Statute of Westminster*. It has been suggested that on a literal reading of the *Australia Act*, s15 appears to allow s8 of the *Statute of Westminster* to be amended or repealed so as to enable the Constitution, and particularly s 128 (see Chapter 28), to be amended or repealed otherwise than by referendum. This reading, while literally plausible, runs counter to the emerging notion of popular sovereignty (see Chapter 1). Of course, if the *Australia Act* did have such an effect, neither the *Australia Act* 1986 (Cth), nor the *Australia (Request and Consent Act) Act* 1986 (Cth) would be constitutional as they would breach s128, which provides that: "This Constitution shall not be altered except in the following manner…. ."

Before proceeding further on the discussion itself, it will help to focus on various definitions that are instrumental to this argument.

THE CONSTITUTION ACT VERSUS THE CONSTITUTION OF THE COMMONWEALTH

The Commonwealth of Australia Constitution Act [5] is an Act of the Parliament of the United Kingdom of Great Britain and Ireland. The Act consists of a Preamble and 9 clauses; the 9th clause contains The Constitution of The Commonwealth[6]. The Constitution is that part of the Imperial Act comprehended in Clause 9 and divided into chapters, parts and sections being numbered from 1 to 128 inclusive. The Schedule is also part of the Constitution.[7]

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[3] Act No. 142, 1985; assented to 4 December 1985 and came into operation on 3 March 1986 at 5.00 a.m. Greenwich Mean Time (see Gazette 1986, No. S85, p.1).

[4] Tony Blackshield and G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p156.

[5] An Act of the Parliament of the United Kingdom of Great Britain and Ireland, 63 and 64 Victoria, 9 July 1900, Proclaimed by Queen Victoria on 17 September 1900 and establishing the Commonwealth of Australia on 1 January 1901.

[6] "The Commonwealth" shall mean the Commonwealth of Australia as established under the Act.[5]

[7] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition reprinted by Legal Books, Sydney, 1995, p. 989.

The Australia Act 1986 offers the following definitions:

> "the Commonwealth of Australia Constitution Act" means the Act of the Parliament of the United Kingdom known as the Commonwealth of Australia Constitution Act, and
>
> "the Constitution of the Commonwealth" means the Constitution of the Commonwealth set forth in section 9 of the Commonwealth of Australia Constitution Act, being that Constitution as altered and in force from time to time;

G J Craven in *The Kirmani Case* [8] states "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)[9] ". Additionally, P H Lane[10] probably offers the best and most apt description viz. "Since the Commonwealth of Australia Constitution Act includes "the Constitution of the Commonwealth", a reference to the former includes the latter.[11] However, at times a law may refer to both phrases, presumably for greater caution. For that matter, cl V (of the Constitution Act) refers to "This Act" and "the Constitution"."

Finally, and as recent as July 2000, Cheryl Saunders indicates "the Constitution still is encased in the original British act of parliament and is preceded by a preamble and eight introductory sections to that act." [12]

In other words, *the Constitution* is part of the *Constitution Act* but the *Constitution Act* is not part of *the Constitution.* An analogy could be "all sultanas are raisins but not all raisins are sultanas". Therefore, there is clear and reasonable support for the view that *The Constitution* is an integral and, for the moment, an inseparable part of the *Constitution Act.* Accordingly, if the *Constitution Act* in toto were to be repealed then *The Constitution* itself would also be automatically repealed.

POWERS OF THE COMMONWEALTH PARLIAMENT

Section 51 of the Constitution defines those areas in which the Commonwealth Parliament, subject to the Constitution, has power to make laws for the peace, order, and good government of the Commonwealth. Specifically, s51 (xxxviii) states:

> "The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the states

[8] G.J. Craven, *The Kirmani Case-Could the Commonwealth Parliament Amend the Constitution Without a Referendum?*, The Sydney Law Review, March 1986, p. 67.
[9] of the Statute of Westminster, 1931.
[10] P.H. Lane, *Lane's Commentary on The Australian Constitution*, Second Edition, LBC Information Services, 1997.
[11] Eg the *Constitution Act* 1902 (NSW), s 5 refers to the Commonwealth of Australia Constitution Act alone.
[12] Cheryl Saunders, 'Founding blueprint has faded with time', *The Australian*, 5 July 2000, p15.

> directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia."

S51 (xxxviii) is important for the discussion in this paper because it allows the Commonwealth Parliament to assume any power that was previously exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia[13] at the establishment of the Constitution.

The power can, however, be exercised only at the request or with the concurrence of the Parliaments of all the States directly concerned. The power is also expressed to be subject to the Constitution, so any law made pursuant to it which conflicts with the Constitution is invalid.[14]

To date, the Parliament of the Commonwealth of Australia has on three occasions passed Acts requesting and consenting to the enactment by the Parliament of the United Kingdom of Acts extending to Australia. The Acts of the Parliaments of the Commonwealth and of the United Kingdom, respectively, are as follows: [15]

Australia	United Kingdom
Australia (Request and Consent) Act 1985	Australia Act 1986
Christmas Island (Request and Consent) Act 1957	Christmas Island Act, 1958
Cocos (Keeling) Islands (Request and Consent) Act 1954	Cocos Islands Act, 1955

Clearly, these three Acts have met all the necessary requirements and, in themselves, do not conflict with s51 (xxxviii) of The Constitution. Specifically, the High Court's decision in Port MacDonnell Professional Fishermen's Association Inc v South Australia (1989) 168 CLR 340 has put at rest any doubts as to the validity of the Australia Act 1986 (Cth). In the unanimous opinion of the court, s 51(xxxviii) of the Constitution should be given a broad interpretation reflecting its 'national purpose of a fundamental kind', which is that of 'plugging gaps which might otherwise exist in the overall plenitude of the legislative powers exercisable by the Commonwealth and State parliaments under the Constitution': 168 CLR at 378, 379.[16]

CHANGING THE CONSTITUTION

s128 of the Constitution requires that any proposed amendment to the Constitution must first be passed by an absolute majority of both House of Parliament, or at least one House if the other House refuses. s128 also imposes a double majority system for change by the people: firstly a majority of electors in a majority of States must approve of the change and, secondly, a majority of all electors nation-wide must also

[13] Clause 7 of the Constitution Act repealed the Federal Council of Australasia Act, 1885 so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.
[14] Constitutional Commission 1988, Final Report, vol 1, p121 para 3.108.
[15] AGPS, *The Constitution as altered to 31 October 1993*, Canberra, 1995, p50.
[16] P. Hanks & D Cass, *Australian Constitutional Law: Materials and Commentary*, Butterworths, Sydney, 1999, p320.

approve of the change. Up to and including 6 November 1999, only 8 out of 44 proposals placed before the Australian people to change the Constitution have received the necessary approval under s128 of the Constitution.

From the outset of federation in 1901, any change to the Constitution was subject to these requirements thus preventing the Commonwealth Government itself from making changes to the Constitution without reference to the people. In other words, the Constitution was protected from any undue and unwanted change by the Australian Parliament without approval by the people at a referendum.

In theory, the United Kingdom Parliament, to, could amend the Constitution which was contained in an Act of that Parliament, the Commonwealth of Australia Constitution Act.[17] The Constitution Act itself – of which the constitution was section 9 – could be altered only by the parliament of the United Kingdom, which could also, as a matter of law, alter the constitution itself if it chose to do so.[18] This was also recognised by Quick and Garran in their discussion on restrictions of the amending power in respect of depriving equal representation of the States in the Senate and the minimum number of representatives in the "National Chamber". Quick and Garran indicated that "If unanimity cannot be secured, there yet remains the possibility of resort to the Imperial Parliament for an amendment of the Constitution, dispensing with the necessity for obtaining the consent of all the States".[19] Quick and Garran also assert that "the Commonwealth (of Australia) is only *quasi*-sovereign, and the amending power, though above the State Governments and above the Federal Government, is below the Imperial Parliament" and that "The amending Power can amend the Constitution, but the Constitution Act is above its reach".[20]

However, since the introduction of the Australia Act 1986 (Cth) that is no longer the case as Section 1 of that Act states:

> "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory."

However, the aforementioned section could possibly be repealed. Cheryl Saunders, in a recent article writes, amongst other things, on Australia's independence: "It was formalised in the passage of the Australia Acts 1986, which made it clear that the British parliament could, or at least would, no longer legislate for Australia."[21] Also, P. H. Lane has indicated:

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[17] P.H. Lane, *An Introduction to the Australian Constitution*, Fifth Edition, LBC The Law Book Company, 1990, p3.
[18] K.C. Wheare, *The Constitutional Structure of the Commonwealth*, Oxford at the Claredon Press, 1960, p60.
[19] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition reprinted by Legal Books, Sydney, 1995, p. 991.
[20] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition reprinted by Legal Books, Sydney, 1995, p. 994.
[21] Cheryl Saunders, 'Founding blueprint has faded with time', *The Australian*, 5 July 2000, p15.

> ".. If we wanted to scrap the existing document[22] altogether – for instance, to become a republic or to end the Federation by abolishing the States – first the Federal Parliament, at the request or with the concurrence of all State Parliaments, should qualify so much of the Australia Acts 1986 (Cth & UK) as stand in the way. Then these Parliaments should request and consent to the United Kingdom Parliament repealing the whole Constitution Act."[23]

The view that the United Kingdom could have amended the Constitution prior to 1986 is also supported by Professor George Winterton. However, Professor Winterton has also indicated that the United Kingdom may not be legally limited to Section 1 of the Australia Act 1986 (UK).[24]

The High Court of Australia also plays a part in the constitutional process. It fills in the details for the day-to-day running of the country, and it adapts the Constitution to the present day.[25] The High Court, for example, has decided that the Commonwealth's power in s. 51(v) over "postal, telegraphic, telephonic, and other like services", given in 1901, now allows the Commonwealth to control broadcasting (in 1935) and television (in 1965). Thus the High Court has updated the postal power.[26]

However, the Constitution should not be read in isolation. Apart from various Acts of the Commonwealth Parliament, State Constitutions and High Court dicta that add further to the constitutional picture, there are two other very important Acts that impinge on our constitutional arrangements. The Statute of Westminster 1931 (UK) and the Australia Act 1986 (UK) (the latter is mirrored in the Australia Act 1986 (Cth)) are two English Acts that affect Australian constitutional law.[27]

STATUTE OF WESTMINSTER, 1931

The Statute of Westminster, 1931 (UK), assented to on 11 December 1931, was enacted by the Parliament of the United Kingdom to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930. S 10 of this Act provided that sections 2, 3, 4, 5 and 6 of the Act shall not extend to a Dominion unless that section is adopted by the Parliament of the Dominion. The option for any such adoption to have effect either from the commencement of this Act or some later date as specified was also given. S 10(3) of the Act included the Commonwealth of Australia as a dominion for the purposes of s 10.

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[22] The Commonwealth of Australia Constitution Act.
[23] P.H. Lane, *An Introduction to the Australian Constitution*, Fifth Edition, LBC The Law Book Company, 1990, pp 3-4.
[24] Email to the present writer from Professor George Winterton, 16 September 1999 (Annex B).
[25] P.H. Lane, *An Introduction to the Australian Constitution*, Fifth Edition, LBC The Law Book Company, 1990, p 5.
[26] P.H. Lane, *An Introduction to the Australian Constitution*, Fifth Edition, LBC The Law Book Company, 1990, p 6.
[27] P.H. Lane, *Lane's Commentary on The Australian Constitution*, LBC Information Services, 1997, p3.

The Australian parliament enacted the Statute of Westminster Adoption Act 1942 (assented to on 9 October 1942) adopting Sections 2, 3, 4, 5 and 6 of the Imperial Act (Statute of Westminster, 1931) taking effect from 3 September 1939. The purpose of the Adoption Act was to 'remove doubts as to the validity of certain Commonwealth legislation, to obviate delays occurring in its passage, and to effect certain related purposes, by adopting certain sections of the Statute of Westminster, 1931, as from the commencement of the war between His Majesty the King and Germany.'[28]

Sections 4, 9 (2) and (3) and 10 (2) of the Statute of Westminster, in so far as they are part of the law of the Commonwealth, of a State or of a Territory, have subsequently been repealed by section 12 of the Australia Act 1986.

In the book *The Constitutional Structure of the Commonwealth*, the author, K.C. Wheare, provides us with an explanation regarding the autonomy of Commonwealth nations.[29] The following is a summary of part of that section as it relates to Australia:

> In discussions among members of the Commonwealth at the Imperial Conference of 1926 leading up to the enactment of the Statute of Westminster, 1931, it was agreed that the principal of equality should govern their relation.
>
> One consequence of this was that the Parliaments of the overseas Members should be empowered to repeal or amend acts of the parliament of the United Kingdom extending to them. To that end, the clause that was eventually to become section 2 of the Statute of Westminster was drafted. That draft proposed that the Colonial Laws Validity Act of 1865 be repealed and that the powers of the parliament of a Dominion should include the power to repeal or amend any act of the parliament of the United kingdom in so far as the same part was part of the law of the Dominion.
>
> But the repeal of this Act did more than remove the rule of construction by which an act of a colonial legislation was void if it was repugnant to an act of the parliament of the United Kingdom. It also contained some important provisions about certain requirements about the powers and procedure in amending colonial constitutions as follows:
>
> > Every Colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have and be deemed at all times to have had, full power to make laws respecting the constitution, powers,

[28] Preamble, *Statute of Westminster Adoption Act 1942*, Act No 56, 1942, assented to on 9 October 1942.
[29] K.C. Wheare, *The Constitutional Structure of the Commonwealth*, Oxford at the Claredon Press, 1960, Chapter III.

> and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any act of parliament, letters patent, order-in-council, or colonial law for the time being in force in the said colony.

Before the enactment of the Statute of Westminster, the Australian Constitution could be altered in two ways: firstly, by the provisions contained in s128 of the Constitution, and secondly, by the Parliament of the United Kingdom. It was of fundamental importance to Australia that the constitution should be supreme over the legislatures and it was feared that the repeal of the Colonial Laws Validity Act may allow the Australian Parliament to alter the Australian Commonwealth Constitution Act and thereby amend or repeal the Constitution itself. Accordingly, an elaborate provision was inserted at S 8 to deny the Australian Parliament any power to repeal or amend the Constitution Act or the Constitution itself. A similar provision was made at s 9 protecting the status quo in respect of the States.

Accordingly, it was clear that the framers of the Statute of Westminster, and particularly the governments and parliaments in Australia at the time, believed that in the absence of any such safeguards, there was at least a strong presumption that the Australian parliament would acquire a power to alter the Constitution which it did not already posses. But there is another view. That view is that section 2 (2) of the Statute of Westminster did not increase the area of the powers of the Australian parliament beyond those laid down in the Australian constitution. Rather, it provided that any act passed by that parliament within the area of its powers should not be void through repugnancy to an imperial act extending to Australia.

So section 8 of the Statute did no more than preserve the existing law about how the Constitution and the Constitution Act could be altered.[30] The effect is to confine the operation of the Statute to matters within the sphere of competence of the Australia Federal authorities.[31] At least it ensured that the Federal Parliament could not use the powers given to it by section 2 of the Statute to make laws in disregard of the requirements of section 128 of the Constitution.[32] In other words, The Commonwealth Parliament could not, by itself, amend or repeal either the Constitution Act or the Constitution contained at clause 9 of the Constitution Act after the enactment of the Statute of Westminster, 1931.

AUSTRALIA ACT 1986

The Australia Act 1986 is an Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth

[30] Constitutional Commission 1988, Final Report, Vol 1, p122 para 3.117.
[31] Geoffrey Sawer, *The Australian Constitution*, AGPS, Canberra, 1988, p72.
[32] Tony Blackshield & G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p1218.

of Australia as a sovereign, independent and federal nation. The Australia Act 1986 (Act No. 142, 1985) was assented to on 4 December 1985 and came into operation on 3 March 1986 at 5.00 A.M. Greenwich Mean Time[33] when it was proclaimed by Queen Elizabeth II, who travelled to Canberra for that purpose to make it clear that she was acting in her capacity as Queen of Australia. In addition to this *Australia Act 1986* an *Australia Act 1986*, in substantially identical terms, was enacted by the United Kingdom Parliament (1986 Chapter 2) pursuant to a request made and consent given by the Parliament and Government of the Commonwealth in the *Australia (Request and Consent) Act 1985 and* with the concurrence of all States of Australia (see the Australia Acts Request Act 1985 of each State).[34] The suffixes *(Cth)* and *(UK)* are often added to the titles of the respective Acts so as to differentiate one from the other. The UK Act has its source in the Statute of Westminster (s4, then available), the Cth Act in the Constitution (s.51 (xxxviii)). The former was passed in case the latter was found to be invalid.[35]

By joint action of all the Parliaments of Australia and the United Kingdom, the legislative, executive and judicial institutions of the United Kingdom ceased to have any power, responsibility or jurisdiction in respect of Australian affairs.[36] Accordingly, the United Kingdom Parliament has implicitly "abandoned" its Constitution Act of 1900 to the Commonwealth, States and their Territories for their local handling.[37]

A High Court decision of 1989 has also put at rest any doubts as to the validity of the Australia Act 1986 (Cth).[38]

DISCUSSION

So far, this paper has established that:

- There has been, from time-to-time, comment on the possibility of the Constitution being changed by processes other than those contained at s128 of the Constitution.

- The Constitution forms an integral and, for the moment, an inseparable part of the Commonwealth of Australia Constitution Act.

- The principal way of changing the Constitution is by the resource contained at s128 of the Constitution.

[33] See Commonwealth Gazette 1986, No. S85, p. 1.
[34] AGPS, *The Constitution as altered to 31 October 1993*, Canberra, 1995, p58, Note 1.
[35] P H Lane, Lane's Commentary on The Australian Constitution, LBC Information Services, 1997, p3, note 6.
[36] Constitutional Commission 1988, Final Report, Vol 1, p77, para 2.141.
[37] P H Lane, Lane's Commentary on The Australian Constitution, LBC Information Services, 1997, p4.
[38] P Hanks & D Cass, *Australian Constitutional Law: Materials and Commentary*, Butterworths, Sydney, 1999, p320.

- At the establishment of the Constitution and up to the introduction of the Australia Act 1986, the United Kingdom Parliament could also have amended the Constitution because it is part of an Act of that Parliament.

- The enactment of the Statute of Westminster, 1931 gave the Commonwealth Parliament additional powers to repeal or amend acts of the parliament of the United Kingdom extending to Australia but denied any power to amend or repeal the Constitution or the Constitution Act.

- The enactment of the Australia Act 1986 finally confirms the status of the Commonwealth of Australia as a sovereign, independent and federal nation and that the United Kingdom Parliament has "abandoned" its Constitution Act of 1900 to the Commonwealth and the States for local handling.

The Commonwealth of Australia Constitution Act 1900 (including the Constitution) remains part of our law.[39] Accordingly, and because this act has now been "abandoned" by its author, the sole responsibility for its future rests entirely with Australia and its institutions. Additionally, the Statute of Westminster, 1931 and the Australia Act 1986 (Cth), as amended and in force from time to time, in so far as they are part of the law of the Commonwealth, of a State or of a Territory, provide additional constitutional nuances for our deliberation.

Assuming the constraints of Section 1 of the Australia Acts remain valid, the United Kingdom can no longer amend the Constitution since the enactment of those Acts. That being the case, does this mean that the United Kingdom's former power to do so has simply been extinguished and that the only way the Constitution can now be changed is through s128 of the Constitution? Or does this mean that the United Kingdom's former power has been inadvertently or covertly transferred to some other authority?

Returning to the Statute of Westminster, 1931, section 8 of that statute leaves the machinery of constitutional amendment exactly as it was before the enactment of the Statute; so "any [existing] power to repeal or alter" the Commonwealth Constitution or the enveloping Constitution Act survives[40] even though s.2 (2) of the Statute of Westminster authorises the use of Commonwealth legislative power to repeal or amend any such English Act, order, rule or regulation in so far as the same is part of the law of the Dominion.[41] However, both saving provisions (on the Constitution Act with the Constitution, and on the federal division of authority) may be overturned by action under s.15 of the Australia Act.[42]

Section 15 of the Australia Act deals with the method of repeal or amendment of that Act and the Statute of Westminster. That section is divided into three subsections as shown below:

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[39] Constitutional Commission 1988, Final Report, Vol 1, p123, Para 3.122.
[40] P H Lane, *Lane's Commentary on The Australian Constitution*, LBC Information Services, 1997, p3.
[41] P H Lane, Lane's Commentary on The Australian Constitution, LBC Information Services, 1997, p3.
[42] P H Lane, Lane's Commentary on The Australian Constitution, LBC Information Services, 1997, p4.

- This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

- For the purposes of subsection (1) above, an Act of the Parliament of the Commonwealth that is repugnant to this Act or the Statute of Westminster 1931, as amended and in force from time to time, or to any provision of this Act or of that Statute as so amended and in force, shall, to the extent of the repugnancy, be deemed an Act to repeal or amend the Act, Statute or provision to which it is repugnant.

- Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.

Put simply, the Australia Act and what remains of the Statute of Westminster 1931 can be repealed or amended only by:

- a Federal Act which has the concurrence of all the State Parliaments, or

- alteration to the Constitution, under section 128, conferring power on the Commonwealth.[43]

The third subsection mitigates the threatened rigidity, by specifying another method of amending or repealing the provisions of the Statute of Westminster or the Australia Act.[44] The correct view of section 15 (3) is that it not only qualifies the exclusiveness of section 15 (1), but also positively allows a subsequent alteration under section 128 [of the Constitution] to enable Parliament to do any of the things that can be done by the alternative procedure under section 15 (1) read with section 15 (2).[45]

Because the application of subsection 3 calls on the people of Australia for approval to amend or repeal the Statute of Westminster and/or The Australia Act in accordance with the provisions of s 128 of the Constitution, it needs no further discussion at this time.

Subsection 2 of section 15 of the Australia Act is, in effect, a definition section.[46] We can ignore this subsection because it is a technical legal instruction to the courts about the way they should handle a federal statute which tries to do something contrary to the Statute of Westminster or the Australia Act.[47]

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[43] Constitutional Commission 1988, Final Report, Vol 1, p78, Para 2.142(l).
[44] Geoffrey Sawer, *The Australian Constitution*, AGPS, Canberra, 1988, p76.
[45] Dennis Rose QC, *An Australian Republic : the Options*, AGPS, Canberra, c1993, Vol 2, Appendix 8, p301.
[46] P H Lane, *Lane's Commentary on The Australian Constitution*, LBC Information Services, 1997, p4.
[47] Geoffrey Sawer, *The Australian Constitution*, AGPS, Canberra, 1988, p76.

Accordingly, it is no longer necessary to consider subsections 2 and 3 of section 15 of the Australia Act for the purposes of this paper. That said, we now consider s 15 (1) of both the Australia Act 1986 (Cth) and the Australia Act 1986 (UK) in turn.

AUSTRALIA ACT 1986 (Cth)

This act has s 51(xxxviii) of the Constitution as its source.[48] Like all subsections of Section 51, s 51(xxxviii) is subject to "the Constitution".

Earlier in this paper we noted that "It has been suggested that on a literal reading of the *Australia Act*, s15 appears to allow s8 of the *Statute of Westminster* to be amended or repealed so as to enable the Constitution, and particularly s 128 (see Chapter 28), to be amened or repealed otherwise than by referendum. This reading, while literally plausible, runs counter to the emerging notion of popular sovereignty (see Chapter 1). Of course, if the *Australia Act* did have such an effect, neither the Australia Act 1986 (Cth), or the Australia (Request and Consent Act) Act 1986 (Cth) would be constitutional as they would breach s128, which provides that: "This Constitution shall not be altered except in the following manner…. ." [49] There are two points to consider here. One is the issue of popular sovereignty; the other is whether or not s 15(1) of the Australia Act 1986 (Cth) allows for the repeal or amendment of the Constitution without breaching s128 of the Constitution.

Popular Sovereignty:

Most dictionaries describe sovereignty as "supreme power'. Ruth Lapidoth, when interviewed about recent Israel/Palestine negotiations, said "sovereignty is an abstract notion that makes people's feelings very strong".[50] Tony Blackshield and George Williams in their book 'Australian Constitutional Law and Theory'[51] state:

> "Geoffrey Lindell, in 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 Federal Law Review 29, developed the view that the Constitution is binding because the Australian people accept it as their fundamental constitutional document. This view was based on the idea that all law applicable in Australia now has an Australian rather than a British source.'
>
> The High Court has begun to develop this approach. Recent decisions have seen acceptance of the notion that the sovereignty of the Constitution now lies with the Australian people, but not

[48] P H Lane, *Lane's Commentary on The Australian Constitution*, LBC Information Services, 1997, p3, note 6.
[49] Tony Blackshield and G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p156.
[50] Cox Newspapers, *A solution from heaven: give sovereignty to God*, The Sydney Morning Herald, 29 July 2000.
[51] Tony Blackshield and G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p157.

> without qualification. One important qualification is based on s 128 of the Constitution (see Chapter 28)."

The major premise of popular sovereignty is the acquiescence of the Australian people in the constitutional system established by the Commonwealth of Australia Constitution Act 1900 (Imp). [52] However, the hierarchies established by such a system are not acquiesced in by all people, nor is Australia's constitutionalism strictly limited to that Act. [53]

Broad statements as to the reposition of 'sovereignty' in the 'people' of Australia, if they are to be given legal rather than popular or political meaning, must be understood in the light of the federal considerations contained in s 128. Those statements must also allow for the fact that none of the Australia Acts, Imperial, Commonwealth or State followed approval at a referendum, in particular, any submission to the electors pursuant to s 128 of the Constitution. Moreover, in s 15 thereof, the Australia Acts provide their own mechanism for amendment or repeal by statute and without submission to the electors at State or Commonwealth level.[54]

To think of the Constitution as a legally binding compact of the people rests upon the notion of their tacit consent – a consent that is difficult to prove or disprove. The people have not voted on the transfer of the ultimate authority over the Constitution away from the British Parliament and into their hands and their power to alter the Constitution under the terms of Constitution s128 cannot be exercised on their own initiative – their 'agreement' may in part be a product of lack of opportunity to disagree.[55]

Section 15(1) of the Australia Act 1986 (Cth) versus Section 128 of the Constitution:

It should be noted here that Blackshield and Williams contained their argument of whether or not the application of the *Australia Act* s15 could be used to breach s128 of the Constitution solely to the application of the Australia Act 1986 (Cth). They did not present the same argument under the application of the Australia Act 1986 (UK).

The Constitution is not the sole source of rules for constitutional government in Australia. However, with the exception of the Australia Act 1986 (UK) the other sources either rest on power authorised by the

[52] Tony Blackshield and G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p157.
[53] Tony Blackshield and G Williams, *Australian Constitutional Law and Theory*, The Federation Press, 1998, p157-8.
[54] J Gummow, *McGinty v Western Australia*, 1996, 186 CLR 140.
[55] K Booker, A Glass & R Watt, *Federal Constitutional Law, Butterworths*, Sydney 1998, p341.

Constitution or are sources of law that could be controlled by means of appropriate alterations of the Constitution.[56]

Under section 15 (1) the Commonwealth Parliament, at the request or with the concurrence of each State Parliament (and without any referendum), could now repeal or amend section 8 of the Statute of Westminster in so far as the Constitution Act is concerned.[57]

With the repeal or amendment of section 8 of the Statute of Westminster to the necessary extent, the Parliament might then have the power, under section 2 (2) of the Statute of Westminster, to repeal or amend the preamble and covering clauses in the Constitution Act (see paragraph 15 above) without the need to obtain any further powers. [58]

Confirmation of this process can be found in the *Constitution (Requests) Bill 1999* introduced into the Queensland Parliament.[59] This Bill contained 2 schedules. Schedule 1 provided for an amendment to include a further sentence at the end of section 8 of the Statute of Westminster 1931 viz:

> Nothing in this section prevents the amendment of the Commonwealth Constitution Act by omitting the Preamble or by repealing section 2 to 8.

While Schedule 2 allowed for an amendment to the Commonwealth of Australia Constitution Act of the Parliament of the United Kingdom viz:

> **Amendment of Imperial Act**
>
> The Commonwealth of Australia Constitution Act of the United Kingdom is amended as set out in this Schedule, so far as that Act is part of the law of Australia or of an external Territory.
>
> **Preamble**
>
> Omit the Preamble
>
> **Sections 2,3,4,5,6,7 and 8**
>
> Repeal the Sections

The end result would have culminated in a revised Constitution Act consisting only of section 1 (the Short Title) and Section 9 (the Constitution). However, this Bill, and a similar Bill introduced into the Victorian Parliament never saw the light of day.

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[56] K Booker, A Glass & R Watt, *Federal Constitutional Law, Butterworths*, Sydney 1998, p341.
[57] Dennis Rose QC, *An Australian Republic : the Options*, AGPS, Canberra, c1993, Vol 2, Appendix 8, p300.
[58] Dennis Rose QC, *An Australian Republic : the Options*, AGPS, Canberra, c1993, Vol 2, Appendix 8, p300.
[59] P D Beattie, Hansard, Queensland Parliament, 8 June 1999, p2184.

The Commonwealth Parliament could pass the legislation requested pursuant to section 51 (xxxviii) of the Constitution and section 15 (1) of the Australia Acts 1986 only if all the States passed requesting Acts. As there was not complete agreement between all the Sates, most of the States decided not to introduce a Bill into their Parliaments.[60]

If the aforesaid validly establishes that the Constitution Act (but not the Constitution) may be amended or repealed without a referendum, could this also mean that there may be scope to do the same with the Constitution itself given that the Constitution is part of the Constitution Act?

A High Court judgement[61] summarises the effect of s 51 (xxxviii) of the Constitution as it was interpreted in Port MacDonnell Professional Fishermen's Assn Inc v South Australia (1989) 168 CLR 340 thus:

> The effect of s 51 (xxxviii) is to empower the Parliament "to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies". It represents an actual enhancement of the legislative powers of the States because "it confers, by implication, power upon the Parliament of a State to participate in the legislative process which the paragraph requires, namely request (or concurrence) by a State Parliament and enactment by the Commonwealth Parliament". There is a potential enhancement of State legislative powers because the Parliaments of the States are the potential recipients of legislative power under a law made pursuant to the paragraph. Any room for an inhibition against giving to the grant in s 51 (xxxviii) its full scope and effect by reason of what was once the status of the Commonwealth itself within the British Empire no longer applies.

Now, s 51 (xxxviii) is subject to the Constitution. That being the case, does s 51 now have the effect to void any law made to amend or repeal the Constitution under s 15 (1) of the Australia Act 1986 (Cth) given the High Court has now put to rest any doubts as the validity of this Act?[62] If the answer is 'Yes', could a similar effort under s 15 (1) of the Australia Act 1986 (UK) overcome this technicality?

AUSTRALIA ACT 1986 (UK)

The Australia Act 1986 (UK) is a British statute. It is a fundamental or higher law which prevails over ordinary laws and it cannot be altered by any one Australian

[60] Letter to the present writer from John Olsen, Premier of South Australia, 28 March 2000 (Annex C).
[61] High Court of Australia, Sue v Hill [1999] HCA 30 (23 June 1999), para 62.
[62] P Hanks & D Cass, *Australian Constitutional Law: Materials and Commentary*, Butterworths, Sydney, 1999, p320.

legislature acting unilaterally. Its force in Australia now must rest on the authority of the Australian legislatures empowered to alter the Act under S 15 of the Act.[63]

This act has its source in the Statute of Westminster (section 4 of the Statute was then available) and was passed in case the Australia Act 1986 (Cth) was found to be invalid.[64]

Theoretically, the combination of Parliaments specified in s 15 (1) of the Australia Act (UK) may not be bound by the opening words of s 128[65] (of the Constitution), as may apply to the Australia Act 1986 (Cth), to enact legislation to repeal or amend section 8 of the Statute of Westminster, 1931. Such Commonwealth legislation would technically be an amendment to the Australia Act (UK) and thus, being a later enactment with the same force as British legislation applying by paramount force, would effectively amend or repeal the provisions of the Constitution Act.[66] Whether or not the High Court would or could conclude this is not possible is yet to be determined.

THE AUSTRALIA ACT 1986 (Cth) and THE AUSTRALIA ACT 1986 (UK)

There are other views on these acts. The late Richard McGarvie believed that the Australian Parliament, at the request of or with the concurrence of all the State Parliaments, can now amend or repeal the Constitution Act or The Constitution.[67] This assertion is confirmed in Mr McGarvie's book *DEMOCRACY - choosing Australia's republic*.[68]

Legal language is also a source for discussion and interpretation in respect of the Australia Acts. In his advice to the Republic Advisory Committee[69], Dennis Rose uses the words "…power to repeal or amend Section 8 of the Statute of Westminster to the extent necessary for the purpose of repealing or amending the preamble or covering clauses of the Constitution Act…' It could be argued that the use of the words 'extent necessary' could also allow for a wider interpretation than that indicated if there was a desire or need to do so. Accordingly, this approach could possibly assume a greater extent of power to repeal, in toto, the Constitution Act or the Constitution itself.

Professor George Winterton[70] has also indicated that the preamble and the covering clauses of the Constitution Act could be amended or repealed either by Commonwealth legislation enacted at the request, or with the concurrence, of all state parliaments pursuant to s 15(1) of the Australia Act 1986 (UK) or pursuant to s

[63] K Booker, A Glass & R Watt, *Federal Constitutional Law, Butterworths*, Sydney 1998, p342.
[64] P H Lane, *Lane's Commentary on The Australian Constitution*, LBC Information Services, 1997, p3, note 6.
[65] Email to the present writer from Professor George Winterton, 16 September 1999 (Annex B).
[66] G Winterton, *The States and the Republic: A Constitutional Accord*, 1995, 6 Public Law Review 107.
[67] Return facsimile to the writer from The Hon Richard McGarvie, 27 August 1999 (Annex D).
[68] Richard McGarvie, *Democracy*, Melbourne University Press, Carlton South, 1999, Page 257.
[69] Dennis Rose QC, *An Australian Republic: the Options*, AGPS, Canberra, c1993, Vol 2, Appendix 8, p303.
[70] G Winterton, *The States and a Republic: A Constitutional Accord*, 1995, 6 Public Law Review 107.

51(xxxviii) of the Constitution; the latter being subject to the Constitution. If the latter is stated as being subject to the Constitution then it must be implicit that the former is not. Indeed, the Australia Act 1986 (UK) is a British statute and is a fundamental or higher law which prevails over ordinary laws.[71] However, when the Constitution (Requests) Bill 1999[72] was introduced into the Queensland Parliament it was not only done so pursuant to both of the Australia Acts (Cth and UK) but also pursuant to the section 51(xxxviii) of the Constitution. It would appear from this diversity of views, that there is considerable scepticism within the constitutional legal fraternity about the scope of the powers of the Australia Acts.

There is argument that s 128 (of the Constitution) may, by inference, have been itself restricted in operation by the British Act.[73] Although, as a practical matter, it might be said, it is unlikely that any amendment to the Australia Act would ever be sought.[74] However, there is now evidence that the argument that any amendment to the Australia Act would not be sought is now void.

In 1999, the New South Wales Parliament enacted legislation[75] - in accordance with Section 15 (1) of the Australia Acts – requesting the Commonwealth Parliament to amend both the Australia Act 1986 (Cth) and the Australia Act 1986 (UK) to add the following at the end of section 7 of each of those Acts:

> (6) The Parliament of a State may make a law providing that the preceding subsections do not apply to the State.
>
> (7) Upon the coming into effect in a State of a law referred to in subsection (6), this section ceases to apply to the State as provided by that law.

In other words, the additional sub-paragraphs to section 7 would allow for the any or all of the States to become republics in their own right with or without a Commonwealth referendum.

Similar legislation was enacted in all of the other 5 States. As well as providing for the changes outlined above, these Acts also provided for the commencement day to be fixed by proclamation. That day could not be before the day on which the *Constitution Alteration (Establishment of Republic) 1999* [76] received Royal Assent. Because the 6 November 1999 republic referendum failed to gain the approval of the Australian people, that Act could then not receive Royal Assent.

Accordingly, each state Act requesting the Australia Acts 1986 (Cth) and (UK) be amended was left in limbo. In 2000, New South Wales[77], Queensland[78] and South

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[71] Booker, Glass & Watt, *Federal Constitutional Law*, Butterworths, Sydney 1998, p342.
[72] P D Beattie, Hansard, Queensland Parliament, 8 June 1999, p2184.
[73] L Zines, The High Court and the Constitution, Butterworths, Sydney, 1997, p306.
[74] L Zines, The High Court and the Constitution, Butterworths, Sydney, 1997, p306.
[75] Australia Acts (Request) Act 1999, No 11, Introduced 12 May 1999, Assented 9 June 1999.
[76] An Act of the Commonwealth Parliament.
[77] New South Wales *Statute Law (Miscellaneous Provisions) Act 2000*.
[78] Queensland *Justice and Other Legislation (Miscellaneous Provisions) Act 2000*.

Australia[79] repealed their respective *Australia Acts (Request) Act 1999*. Victoria, Western Australia and Tasmania have not repealed their respective *Australia Acts (Request) Act 1999*. Additionally, Western Australia[80] and Tasmania[81] have indicated that there are no current plans to repeal these Acts.

However, nothing in law is immutable.[82] Technically, there would be nothing to stop Victoria, Western Australia and Tasmania from amending their respective request Act to alter the commencement date to another date in the future and for New South Wales, Queensland and South Australia to re-introduce similar legislation – with the same commencement date as that of the other three States - without the will of the Australian people.

Most Australians only have a scant knowledge of their Constitution. At most, it might be said that just under one in five Australians have some idea of what the Constitution contains while just over one in two Australians are aware that we have a written Constitution at all.[83] If most Australians do not understand their Constitution itself, then, it would not be too hard to visualise that most voters were probably not aware of the proposed changes to both of the Australia Acts prior to the 6 November 1999 republic referendum.

Accordingly, it wouldn't be too difficult to contemplate a future and "silent" attempt to re-introduce such changes.

For example, in 2000 the New South Wales Parliament amended the Constitution Act 1902.[84] Section 13A of that act was amended in relation to the vacation of seats of Parliament following conviction for certain offences. The Bill relating to this Act travelled at break-neck speed. It was introduced in both the Legislative Assembly and the Legislative Council on 7 June 2000 and sent to the Governor on 8 June 2000 who assented to it "in the name and on behalf of Her Majesty" on 9 June 2000! The assent thereof was reported in the New South Wales Legislative Assembly on the same day.

Of course, it will be argued by some that, because this part of the New South Wales Constitution is not subject to referendum, it is just simply an administrative change to be implemented by the Parliament alone. Not many people would understand this quaint anachronistic arrangement given that any Incorporated Association or Company can only change its rules by a vote of all its members at a special general meeting. The New South Wales voters have no control over these and other aspects of their state Constitution; only a few sections are subject to referendum process.

[79] Letter to Author from *Micahel Atkinson, Attorney-General for South Australia*, 5 September 2002.
[80] Letter to Author from *Jim McGinty, Attorney-General for Western Australia*, 26 August 2002.
[81] Letter to Author from *Jim Bacon, Premier of Tasmania*, 1 October 2003.
[82] M Kirby, *The Australian Referendum on a Republic – Ten Lessons*, 2000 Menzies Memorial Lecture, London, 4 July 2000.
[83] G Williams, The High Court and the People, *Tomorrow's Law*, Federation Press, 1995, 271.
[84] Constitution Amendment Bill 2000, Act No 30,2000, assented to on 9 June 2000.

Fundamental rules about the acquisition of public power cannot confidently be left to those who presently hold power or who have regular prospects of doing so.[85]

Up until the enactment of the Constitution (Parliamentary Reform) Act 2003, the situation in the state of Victoria was even less democratic because the Constitution of that state was not subject to any referenda requirements at all. Victoria could not alter the constitution of its Parliament, or either House, at that time unless the amending bill was passed by an absolute majority in each House.[86] Given this, and a possible scenario of further action under the Australia Acts similar to the one conducted in 1999, the people of Victoria could find themselves with a Constitution that, while they may not wish to acquiesce to by 'popular sovereignty', they are blindly forced to accept without having given opinion. That said, the Constitution (Parliamentary Reform) Act 2003 now provides for important core provisions to be changed only after the Victorian people vote at a referendum. This requirement does not extend to Part 1 of The Constitution Act 1975 which deals with the Crown. Nor does it apply to Section 15 of that Act which describes the Victorian Parliament as consisting of Her Majesty, the Council, and the Assembly. Accordingly, and despite those democratic enhancements, the Victorian Parliament alone could, with appropriate changes made to the Australia Acts, turn that State into a republic without the will of the people.

Such parliamentary luxuries may even be more detrimental to Australia's democracies in respect of the Australia Acts if all Australian legislatures were under the control of one political party.

POLITICAL DISPOSITION CIRCA 1985-86

The following table shows the political disposition of the Australian Parliaments circa 1985-1986:[87]

PARLIAMENT	POLITICAL PARTY	POLITICAL LEADER
Commonwealth	Labor Party	Bob Hawke
New South Wales	Labor Party	Neville Wran
Victoria	Labor Party	John Cain
South Australia	Labor Party	John Bannon
Western Australia	Labor Party	Brian Burke
Queensland	National Party	Joh Bjelke-Petersen
Tasmania	Liberal Party	Robin Gray

[85] Cheryl Saunders, Updating our Democracy, Sydney Morning Herald, 19 January 2001.
[86] P H Lane, *An Introduction to the Australian Constitution*, 5th edition, The Law Book Company Limited, 1990, p188.
[87] Parliaments of the Territories are not included as they have no jurisdiction in respect s 15 of the Australia Acts.

From this table we can see that one political party, while not in control of all legislatures, did, in fact, have significant representation at the time of the enactment of the Australia Acts. Could this aspect have played a part in repatriating the remnants of Australian constitutional authority by the politicians rather than by the will of the people?

The repatriation process in this case was not consistent with the involvement of the people in establishing the Constitution in the late 1890s. While only 52% of the people supported the Australian Constitution then, and despite that most women and many aboriginals were excluded from voting, [88] the people were, nonetheless, involved. The true spirit of sovereignty allowed to be exercised by the framers of our Constitution in the 1890s was not mimicked by Australia's politicians of the 1980s with the repatriation of the final elements of constitutional authority.

If the make-up of the Australian parliaments circa 1985-86 was fundamental to the way in which the repatriation process took place then, could there be a misuse of the powers under s15 (1) of the Australia Acts sometime in the future? If, say, the Liberal Party was to have control of all the legislatures at some time in the future and given Robert Hughes' assertion that "With the '80s came a true plutocratic overclass" and that "No politician can hope to get elected to national office without the support of these highly placed Mates",[89] could we not see the "ruling elite" impose their will over a political party? Dr Carmen Lawrence, the federal member for Fremantle and former premier of Western Australia, is right about the "Byzantine power-focused behaviour" of the major parties and their "disquieting alliance" with corporations and large organisations. There is a relationship, Dr Lawrence says, between the amount of money the privileged minorities provide the big parties and the influence they are able to wield with party leaders.[90] David Humphries[91] further sums up this dilemma:

> "The problems of money in politics are not isolated to the US," reported Damian O'Connor, Labor's left-wing assistant NSW State secretary. "Private money is rarely strings-free."
>
> His report refers to his US hosts negatively and helplessly raising the pivotal role of fundraising. A congressman, pursuing a $3 million re-election purse for his safe seat, devoted two hours a day to fundraising and "there was a strong impression that fundraising was the central task in obtaining public office".
>
> O'Connor argues the US trip highlighted the need here to halt what he says is the risk of our political system being "captured by corporate interests to the exclusion of the needy or our positive goals".
>
> "The influence of the corporate dollar in State politics is increasing at a disturbing rate and NSW Labor ought to take the lead in working on ways to curb its influence," he said. He thinks expenditure and donation limits should be considered and electronic media advertising restricted.

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[88] G Williams, The High Court and the People, *Tomorrow's Law*, Federation Press, 1995, 271.
[89] Robert Hughes, "Essays and Observations on the Land I love, *Official Souvenir Program Sydney 2000 Games*, Sports Illustrated, New York, September 2000.
[90] Editorial, Sydney Morning Herald, 29 August 2000.
[91] David Humphries, Sydney Morning Herald, 10 October 2000.

Unfortunately, successive parliaments have failed to implement reforms that have been repeatedly proposed over recent years by the Australian Electoral Commission. Unless Federal and State governments act to fix deficiencies in the electoral laws, the perception that the system is open to shady fundraising practices, hidden gifts and the buying of influence and government favours will continue to erode already low confidence in the integrity of the political process.[92]

Following on from that we should note the words of Richard McGarvie:

> Once Cabinet was the linchpin of the systems of government but now in the Commonwealth it is the Prime Minister and in a state the Premier. Through its control of Parliament, the political party in power makes the important decisions Parliament once made itself. There is an extensive system of political parties that enforce a tight discipline over party members. The Prime Minister or Premier can usually exert a considerable degree of control over his or her whole party. Through that control - the ability to have Parliament dissolved and the patronage the office gives - the Prime Minister or Premier has extensive control over members of cabinet and members of the government party in Parliament. The Prime Minister or Premier also has substantial control over the great administrative resources of the Public Service.[93]

This recent and undemocratic trend is no better demonstrated that when the Whitlam government was elected in 1972. Initially, there were only two Queen's Ministers of State for the Commonwealth to advise the Governor-General; they were Prime Minister and one other Minister!

Another, and perhaps disturbing, aspect is that “the trend toward younger members of parliament means that pensions are paid for a longer period as retirees are younger” and that “politics was once viewed as something people aspired to after they had made their mark as lawyers or teachers or community workers. Today, it is a first career. This means that federal and state parliaments are increasingly being filled with people with very little experience in the wider world.”[94] Therefore, their ability to make mature and sensible judgements will never be tempered with the benefit of that worldly experience. This could lead to their decision making processes being manipulated by more powerful and influential members of the public at large rather than their arriving at well reasoned and stand alone decisions that reflect the needs of the nation and not that of the powerful and wealthy.

THE HIGH COURT OF AUSTRALIA

The framers (of the Constitution) did not seek to establish a Constitution that would set the ground rules for all time but a document that would evolve. The Constitution can be reinterpreted by the High Court, and more important, amended by the Australian people. Where there has been significant updating, this has been done by the judges of the High Court. They have generally been willing to reinterpret the Constitution to meet their perceptions of the needs of the Australian society. This is

[92] Editorial, Sydney Morning Herald, 13 June 2000.
[93] Richard McGarvie, Democracy, Melbourne University Press, Carlton South, 1999, Page 35.
[94] George Megalogenis, *O’Chee legacy for Latham*, The Australia, 14 February 2004.

distinctly second-best solution to that of Australians undertaking the task. It risks further alienation of the people from their government by suggesting that the task of renewal is not their responsibility but that of the High Court.[95] On the issue of 'precedent', Emeritus Professor Leslie Zines, writes:[96]

> "The High Court has never regarded itself as bound by its own decisions and in the area of constitutional law the principle of *stare decisis* is regarded as having somewhat less force than in other areas of the law, for the obvious reason that parliament cannot rectify the consequences of a decision of the High Court on the Constitution."
>
> "The High Court has on a number of occasions overruled its earlier decisions in constitutional law."

Whatever room there may be for debate about the meaning of what the framers of the Constitution said, either expressly or by implication, and subject to the possibility of constitutional change, [the High Court is] bound by their choice not to say certain things. We can interpret what they provided, and we can make implications from what they said, where that is appropriate. But if they remained silent on a matter, and legitimate techniques of interpretation cannot fill the gap they left, then we are bound by their silence.[97]

The 2000 US presidential election has highlighted the possibility of the stacking of the courts. That the (US) Supreme Court has been the object of political stacking by both sides has been obvious for years. In Australia, we are rapidly going down the path to similar politicisation of the courts. The High Court has obviously been highly political for years, no more so that when Chief Justice Sir Anthony Mason, after his Pauline conversion to activism, led it into all kinds of capers. But Mason was never partisan, even though quite a few judges have been and are. One classic case was Justice Eddie McTiernan who held onto his place on the High Court into advanced senility so as to ensure that he was succeeded by a Labor appointment.[98] To be sure, our system occasionally produces a judge who is non-conformist to the point of quirkiness, or anti-government to the point of anarchy.[99]

No one can predict the make-up of the Australian Parliaments in 2050 and, noting that the Justices of the High Court are appointed by the Governor-General-in-Council[100] on the advice of the Government, nor can anyone predict the make-up of the High Court either. Accordingly, no one is able to state with absolute confidence as to whether or not that, some time in the future, outside and unconstitutional influences on these institutions could take place. Any possibility of misusing powers under s 15 (1) of the Australia Acts should have cause for concern. Even the remote

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[95] George Williams, The Australian, page 33, 26 September 2000.
[96] Leslie Zines, *The High Court and the Constitution*, 4th edition, Butterworths, Sydney, 1997.
[97] Murray Gleeson, *Law and Liberty, partners sharing the same goals*, Sydney Morning Herald, 20 November 2000.
[98] Padraic P. McGuinness, Our High Court dons the same political garb as US, Sydney Morning Herald, 16 December 2000.
[99] Murray Gleeson, High Court can't escape being seen as controversial, Sydney Morning Herald, 18 December 2000.
[100] The Constitution, Section 72 (I).

possibility of circumventing s128 (of the Constitution) should be closed off.[101] Could our current constitutional arrangements allow us to tread the pathway to the slippery slope of anarchy in the future?

THE FUTURE IS OUR RESPONSIBILITY

If there is any lesson to be learned from the journey into this debate it can be said that it is very clear that nothing is clear about the extent of the powers of the Australia Acts. Had the residual constitutional authority been retrieved with the will of the people in 1986, then the problems relating to this situation would, in the main, have been automatically resolved. There can be no argument about the constitutionality of the Statute of Westminster and the Australia Acts. There can be no argument that the people do not have supreme control over these documents as they should in a democratic society. Accordingly, any decision as to the validity of these acts should not be left to the High Court which the make-up of changes from time to time. It is now time for the people to use their democratic right to assert their authority over the Australian Parliaments to gain total control over their constitutional arrangements. How can this been done?

GAINING CONTROL

There maybe numerous ways for the people to gain total control of their constitutional arrangements. Some suggestions follow:

- The Commonwealth Parliament could simply put a proposal to the people in accordance with Section 128 of the Constitution to amend the first line of Section 128 of the Constitution to read:

    - This Constitution, The Commonwealth of Australia Constitution Act 1900 (UK), The Statute of Westminster 1931 (UK), The Australia Act 1986 (Cth) and The Australia Act 1986 (UK) shall not be altered except in the following manner: - (Note: Attendant changes to Section 15(1) of the Australia Acts 1986 (Cth & UK) may also be required):"

- The Commonwealth Parliament could seize its authority under section 15(3) of the Australia Acts to seek a power to:

    - Rename the existing schedule to the Constitution to “Schedule 1” with an attendant change to section 42 of the Constitution,

    - Add Schedule 2 consisting of the Statute of Westminster,

    - Add Schedule 3 consisting of the Australia Act 1986 (Cth),

    - Repeal Section 15 of the Australia Acts, and

[101] Email to the present writer from Professor George Winterton, 16 September 1999 (Annex B).

- Include a provision in s128 of the Constitution so that any repeal or amendment of any or all of the schedules is subject to the existing amendment provisions of s128 of the Constitution.

- The Commonwealth Parliament could seize its authority under section 15(3) of the Australia Acts to seek a power to:
  - Amend section15(1) of the Australia Acts to read:

    This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States, *with such provisions having been approved by a majority of voters in each of the States*, and, subject to subsection (3) below, only in that manner.

- The Commonwealth Parliament could seize its authority under section 15(3) of the Australia Acts to seek a power to:
  - Amend section15 of the Australia Acts to read:

This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth in accordance with the provisions of s128 of the Constitution of the Commonwealth, and only in that manner.

- The Commonwealth and State Parliaments, under the existing authority of section 15(1) of the Australia Acts, amend section 15(1) of the Australia Acts to read:

  This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States, *with such provisions having been approved by a majority of voters in each of the States*, and, subject to subsection (3) below, only in that manner.

- Each State parliament could include a new Chapter/Section in their State Constitution along the lines of the following example (The example shown is based on the Queensland Constitution):

CHAPTER ? — SPECIAL PROCEDURE TO CHANGE CERTAIN CONSTITUTIONAL MATTERS

Certain measures to be supported by referendum

1. A Bill that expressly or impliedly provides for the repeal or the amendment of any or all of:
   (a) the Australia Act 1986 of the Parliament of the Commonwealth of Australia,

   (b) the Australia Act 1986 of the Parliament of the United Kingdom,

(c) the Statute of Westminster 1931 of the Parliament of the United Kingdom, or

(d) the Commonwealth of Australia Constitution Act of the Parliament of the United Kingdom,

must not be presented for assent by or in the name of the Sovereign unless it has first been approved by the electors in accordance with this section and a Bill assented to after its presentation in contravention of this subsection has no effect as an Act.

2. On a day not sooner than 2 months after the passage through the Legislative Assembly of a Bill of a kind referred to in subsection (1) the question for the approval or otherwise of the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly under the Electoral Act 1992.

3. The day is to be appointed by the Governor in Council by Order in Council.

4. When the Bill is submitted to the electors the vote must be taken in the manner the Parliament of Queensland prescribes.

5. If a majority of the electors voting approve the Bill, it must be presented to the Governor for its reservation for the signification of the Sovereign's pleasure.

6. Any person entitled to vote at a general election of members of the Legislative Assembly is entitled to bring proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the provisions of this section either before or after a Bill of a kind referred to in subsection (1) is presented for assent by or in the name of the Sovereign.

7. This section does not affect the operation of the Constitution Act Amendment Act 1934.

Making one of above-mentioned changes would ensure that:

1. No further approach could be made back to the United Kingdom without the consent of the people regardless of the Australian High Court acceptance that constitutionally speaking, in relation to Australia, the United Kingdom is now a "foreign power",[102]

2. No further argument that the Constitution or the Constitution Act could be legally changed without the will of the people could be entertained,

3. Supreme sovereignty of the people of Australia over their constitutional arrangements would be finally achieved in writing, and

4. The unrealistic and academic notion of "popular sovereignty" – a concept that wouldn't cut much chop with the average "bloke" or "sheila" – would be consigned to the rubbish bin forever.

[102] M Kirby, *The Australian Referendum on a Republic – Ten Lessons*, 2000 Menzies Memorial Lecture, London, 4 July 2000.

WHEN COULD SUPREME SOVEREIGNTY OF THE PEOPLE BE ACHIEVED

On 10 May 2001, the Commonwealth Parliament assembled at the Victorian Parliament House, Melbourne, where it sat for 27 years beginning in 1901. As in 1901, the House of Representatives sat in the Legislative Assembly and the Senate sat in the Legislative Council. This Sitting, under the direct control of the Commonwealth Parliament was seen to be a major focus of the importance of Victoria in the development of the Federal Parliament and indeed the Nation.[103]

There was, of course, much said about the attainment of the Centenary of Federation in a congratulatory and celebratory manner during that sitting. Not that there was anything wrong with that! But it could have been even more significant for the Nation if the sitting had been used, in part, to either commence or finish with the finalisation of control of all constitutional authority by the people. It could have be an act of coming together regardless of being indigenous or non-indigenous, regardless of religion, regardless of political affiliation, regardless of gender and regardless of any other belief or alignment. We could have been essentially as one for a very important celebration and that celebration should have been done in no lesser a form. It would have ordained our current elected public servants with the same distinction and aura that we now place on the founders of our magnificent constitution.

However, that was not to be. But this issue should not be allowed to die; we should all take responsibility to do what we can to move public thinking to ensure that the people attain total sovereignty of their constitution. It is something that can be easily done. All that is needed is the will of our parliamentary representatives. If we can do this, then the spirit of the framers would be better commemorated by having the courage to look at Australia's constitutional arrangements with a degree of prescience about the demands of the new century, as they did[104] and we will have done our duty correctly and remembered the lessons of the past and observed the watchword of freedom and justice to all![105]

HOW CAN YOU HELP?

Contact your local Commonwealth and State elected public servants and let them know that you want total sovereignty of all of Australia's constitutional documents. Time is precious, so do it **NOW**!

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[103] Centenary of Federation Website.

[104] Cheryl Saunders, *Founding blueprint has faded with time*, The Australian 5 July 2000, p15.

[105] J J Keenan, *The Inaugural Celebrations of the Commonwealth of Australia*, William Applegate Gullick (Government Printer), Sydney 1904, P175.

ANNEX A

BIOGRAPHICAL DETAILS

NICK HOBSON DFC AFC

Nick Hobson was born in Devonport, Tasmania in 1944. On completion of his education at Devonport High School in 1960 he was employed with the Bank of New South Wales (now Westpac).

In 1966 he joined the RAAF where he graduated as a pilot with the rank of Pilot Officer. On graduation he undertook an Iroquois helicopter conversion and later served with No. 9SQN in South Vietnam as a helicopter pilot where he was awarded the Distinguished Flying Cross (DFC). In 1970, Nick was selected to undertake an instructor's course with the RAF in the United Kingdom. On return to Australia he took up helicopter instructional duties at No 5SQN in Canberra. In 1971, he was involved in extensive rescue operations during the great floods in the Darling River district of NSW for which he was later awarded the Air Force Cross (AFC).

In 1972, Nick was selected for a tour of duty as an exchange officer to fly and instruct on helicopters with the USAF at bases in Florida and Arizona. Other highlights of Nick's RAAF career include a two-year term as ADC to the Governor of Victoria and several tours (including two tours in Command) of peacekeeping duties with the United Nations and the Multi-National Force and Observers based in Egypt. After 20 years of service Nick retired from the RAAF with the rank of Wing Commander.

In 1986 Nick took up the position of Senior Projects officer with the NSW Directorate of Bicentennial Events after which he was employed as the General Manager of the Westpac SLSA Helicopter Rescue Service. Due to the formation of the Australian Republican Movement Pty Ltd in 1991, Nick became involved in the republican debate and remains strongly committed to the retention of Constitutional Monarchy as the best form of government suited for Australia and its people for the foreseeable future.

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