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COMMONWEALTH OF AUSTRALIA.

REPORT

FROM THE

JOINT COMMITTEE

ON

CONSTITUTIONAL REVIEW,

1959.

By Authority:
A. J. Arthur, Commonwealth Government Printer, Canberra.
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REPORT FROM THE JOINT COMMITTEE ON CONSTITUTIONAL REVIEW, 1959.

PART ONE.—INTRODUCTION TO THE CONSTITUTIONAL REVIEW.

CHAPTER 1.—APPOINTMENT AND PROCEEDINGS OF THE COMMITTEE.

The Joint Committee on Constitutional Review was first appointed by the two Houses of the twenty-second Parliament to review such aspects of the working of the Commonwealth Constitution as the Committee considered it could most profitably consider and to make recommendations for such amendment of the Constitution as the Committee thought necessary in the light of experience.

2. The Committee had the honour to present a first Report, in summary form, to the Parliament on 1st October, 1958, in which it made recommendations covering a wide range of subjects.

3. The Committee mentioned in its first Report that insufficient time had prevented it from including a full exposition in support of its recommendations and it expressed the hope that there would be an opportunity for tabling a full report on its recommendations after the summoning of the present Parliament, the twenty-third Parliament of the Commonwealth.

4. On 30th April, 1959, the House of Representatives resolved, on the motion of the Attorney-General, Sir Garfield Barwick, as follows:—

(1) That, subject to the concurrence of the Senate in the terms of this Resolution, the Joint Committee known as the Joint Committee on Constitutional Review that was constituted by resolution of the House of Representatives passed on the 27th day of February, 1958, and a resolution of the Senate passed on the 12th day of March, 1958, be re-constituted under the name of the Joint Committee on Constitutional Review with the same membership as the first-mentioned Committee had immediately before the dissolution of the House of Representatives on the 14th day of October, 1958, namely:—

House of Representatives—

The Prime Minister and the Leader of the Opposition, as *ex officio* members, and Mr. Calwell, Mr. Downer, Mr. Drummond, Mr. Hamilton, Mr. Joske, Mr. Pollard, Mr. Ward and Mr. Whitlam.

Senate—

Senator O'Sullivan (Chairman), and Senators Kennelly, McKenna and Wright.

(2) That the function of the Committee be to prepare a report or reports to each House of the Parliament setting forth, so far as the Committee thinks it desirable to do so—

(*a*) further explanation of the recommendations and other matters contained in the Report of the Joint Committee on Constitutional Review laid before each House of the Parliament on the 1st day of October, 1958; and

(*b*) further information with respect to the considerations and reasons on which those recommendations were based.

(3) That the Chairman of the Committee may, from time to time, appoint another member of the Committee to be the Deputy Chairman of the Committee, and that the member so appointed act as Chairman of the Committee at any time when the Chairman is not present at a meeting of the Committee.

(4) That, in the absence of both the Chairman and the Deputy Chairman from a meeting of the Committee, the members present may appoint one of their number to act as Chairman.

(5) That the Committee have power to send for persons, papers and records, to adjourn from place to place and to sit during any adjournment or sittings of either House of the Parliament.

(6) That the Committee have power to consider and make use of the Records of the Joint Committees on Constitutional Review appointed during the Twenty-second Parliament.

(7) That the Committee have leave to report from time to time, and that any member of the Committee have power to add a protest or dissent to any report.

(8) That six members of the Committee constitute a quorum of the Committee.

(9) That, in matters of procedure, the Chairman, or person acting as Chairman, of the Committee, have a deliberative vote and, in the event of an equality of voting, have a casting vote, and that, in other matters, the Chairman, or person acting as Chairman, of the Committee have a deliberative vote only.

(10) That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

(11) That a Message be sent to the Senate acquainting it of this resolution and requesting that it concur and take action accordingly.

5. On 6th May, 1959, the Senate, on the motion of the Leader of the Government in the Senate, Senator Spooner, agreed as follows:—

(1) That the Senate concurs in the Resolution transmitted to the Senate by Message No. 41 of the House of Representatives relating to the appointment of a Joint Committee on Constitutional Review.

(2) That the Resolution, so far as it is inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

(3) That the foregoing resolutions be communicated to the House of Representatives by Message.

6. The Committee, as constituted by the above-mentioned resolutions, sat on 23 days during the year in the preparation of this Report.

7. The Prime Minister and the Leader of the Opposition in the House of Representatives, the *ex officio* members of the Committee, did not attend the Committee's sittings or participate in the work of preparing the Report.

8. The Committee appointed the following officers, each of whom was an officer of the former Committee:—

J. E. Richardson, Attorney-General's Department—Legal Secretary.
K. O. Bradshaw, Usher of the Black Rod—Clerk of the Committee.

CHAPTER 2.—NATURE AND SCOPE OF THE REPORT.

9. The purpose of this Report, as indicated in the Committee's terms of reference, is to supply the reasons in support of the recommendations which the Committee made in 1958. In consequence, the Report is confined to the treatment of the various subjects on which the Committee made its recommendations.

Grouping of Recommendations.

10. For the purpose of reporting, the Committee has divided its recommendations into three groups.

11. Part Two of this Report contains the reasons in support of the first group of recommendations. The recommendations affect the Commonwealth legislative machinery, that is to say, they are concerned with the composition and functioning of the Federal Parliament as constituted under Parts I.-III. of Chapter I. of the Constitution and the relationships of the two Houses of the Parliament with each other.

12. The second group of recommendations consists of those in support of increased concurrent legislative powers for the Commonwealth Parliament. Most, but not all, of the Commonwealth Parliament's substantive legislative powers are listed in the forty paragraphs of section 51 which appears in Part V. of Chapter I. of the Constitution. The Committee's reasons for its recommendations appear in Part Three of the Report.

13. Part Four of the Report provides the reasons in support of recommendations on three subjects which have been grouped merely for convenience of reporting. The subjects are a State financial matter, namely charges on interstate road transport; a proposed alteration to the new State provisions of Chapter VI. of the Constitution; and the method of altering the Commonwealth Constitution under Chapter VIII. of the Constitution.

Reservations.

14. Mr. Downer's signature is subject to a reservation relating to industrial relations dealt with in Part Three, Chapter 15 of this Report. Mr. Downer's views on industrial relations are set out in Appendix A to this Report.

15. Senator Wright's signature is subject to reservations affecting, particularly, Part Two, Chapters 3, 4, 5 and 9; Part Three, Chapters 16, 18 and 19; and Part Four, Chapter 22 of this Report. Senator Wright's observations are included in a dissenting report set out in Appendix B to this Report.

16. Apart from the exceptions mentioned, the Committee's recommendations are unanimous.

References to the 1958 Report.

17. The introductory parts of the first Report described the background to the Committee's work of constitutional review. In particular, Part III. of the first Report described the mode of altering the Constitution under section 128 of the Constitution. Part IV. described the nature of the constitutional review and emphasized the need for the Constitution to serve future, as well as present day, requirements of the community. Part VI. contained the Committee's recommendations on Commonwealth legislative machinery and set out in the introductory paragraphs some general considerations underlying the Committee's recommendations, and in Part VII., the Committee commented on developments since Federation affecting the division of legislative powers between the Commonwealth and the States. The observations are as relevant to the present Report as they were to the first Report.

18. The text of the Committee's 1958 Report appears in Appendix C to this Report.

The Commonwealth Constitution.

19. The text of the Commonwealth Constitution is set out in Appendix D to this Report.

Draft Constitutional Alterations.

20. The Committee wished to include in its Report draft sections to illustrate the nature of the constitutional alterations which would give effect to its recommendations on all subjects. To this end, the Committee, as last constituted by the twenty-second Parliament, sought the assistance of the Parliamentary Draftsman. The Draftsman and his staff have greatly helped the Committee by preparing drafts covering the Committee's recommendations affecting the structure and functioning of the Federal Parliament and its two constituent Houses. In July, 1959, however, the Draftsman intimated that he was unable to submit drafts to the Committee on all subjects in time to include them in a Report to the Parliament this year. The Draftsman's advice came too late to enable the Committee to make alternative arrangements for the preparation of drafts. Rather than postpone the presentation of the Report, the Committee decided to proceed with the exposition in support of all its recommendations even though some have not been translated into draft constitutional alterations. Fortunately, most of the recommendations for which there are no drafts, that is those set out in Parts Three and Four of the Report, should leave little doubt as to the nature of the constitutional alterations which would make them effective. The Committee would be pleased to have the drafts prepared for presentation to the Parliament in 1960.

Persons and Organizations who Submitted Views to the Committee.

21. The Committee acknowledged in the first Report the assistance it received from the many persons and organizations who submitted views to it. Annexure "C" of the first Report contained a list of the persons who attended meetings.

22. In writing its reasons in support of its recommendations, the Committee has referred at times to the views of some persons and organizations but it has by no means expressed the viewpoints of all those persons and organizations who favoured it with written or oral submissions. Indeed, the Committee derived much benefit in the formulation of its recommendations on specific subjects from persons and organizations whose views are not expressly acknowledged.

23. Again, therefore, the Committee wishes to express its appreciation and thanks to the persons and organizations who assisted it as indicated.

24. The Committee recommends that each House of the Parliament expressly authorize the persons and organizations, to which it has referred, to disclose or publish the submissions they made to the Committee.

The Convention Debates.

25. The Constitution of the Commonwealth appears in the pages of the Commonwealth of Australia Constitution Act, 1900, passed by the Imperial Parliament at Westminster. A Proclamation by Her Majesty the Queen under the Act brought the Commonwealth into being, and the Constitution into effect, as from 1st January, 1901. Although the Constitution is part of an Act of the Parliament at Westminster, the task of drafting the instrument of government fell primarily to the representatives of the Australian colonies who thrashed out the provisions of a Constitution for a Federal Commonwealth in a series of Convention Debates in the 1890's.

26. There is much to be learnt from a study of the official reports of the Convention Debates and the Committee will, throughout this Report, refer frequently to them in the course of describing the historical background to the subjects it is reviewing.

27. The first of the Conventions was the National Australasian Convention held at Sydney in 1891 under the presidency of Sir Henry Parkes of New South Wales. Forty-five delegates, seven from each Australian colony and three from New Zealand, attended.

28. On 9th April, 1891, after a session of nearly six weeks, the Convention adopted a draft bill to constitute the Commonwealth of Australia.

29. The 1891 Convention recommended that the various colonial Parliaments should submit the proposed Constitution to referendum but the bill did not succeed in obtaining the approval of the New South Wales Parliament, and the other colonies, who were not prepared to move without New South Wales support, shelved the question. Shortly afterwards, the onset of a general financial depression caused a further decline in Federal fervour. After a lull of a few years, the Federal cause captured the public imagination more than in previous years and non-party Federation Leagues were established in the colonies. A conference of the six colonial Premiers in Hobart in 1895 resolved there should be a further convention comprising ten representatives from each colony to draft a Constitution. The colonial Parliaments proceeded to take steps to arrange for the election of convention delegates.

30. In 1897, the National Australasian Convention assembled at Adelaide attended by ten representatives from each colony, except Queensland, with Charles Cameron Kingston, Premier of South Australia, as President. Within the colony of Queensland, deep-seated differences of view as to how the colony should be represented resulted in that colony not sending delegates. A second session of the Convention was held at Sydney in 1897 and there was a third session at Melbourne in 1898. The Convention drafted another bill to constitute the Commonwealth of Australia.

31. The draft Constitution was then submitted to the vote of the people of four colonies, New South Wales, Victoria, South Australia and Tasmania, but, although there was a majority for the bill in each of the four colonies, the total affirmative vote in New South Wales was below the minimum which the Parliament of that colony required. To meet objections raised in the New South Wales Parliament, the Premiers of all six colonies met in Melbourne in 1899 and modified the draft Constitution in a few respects. The draft instrument, as modified, was then submitted to referendum in five colonies, in each of which an overwhelming majority supported the proposed Constitution. Details of voting were as follows:—

Colonies.	For.	Against.
New South Wales	107,420	82,741
Victoria	152,653	9,805
South Australia	65,990	17,053
Tasmania	13,437	791
Queensland	38,488	30,996
Total	377,988	141,386

32. A delegation, including a member from each colony, then went to England to seek the passage of the bill through the United Kingdom Parliament. With but one modification of substance, relating to appeals to the Privy Council, the two Houses of the United Kingdom Parliament passed the bill. It received the Royal assent on 9th July, 1900, and came into force on 1st January, 1901.

33. The colony of Western Australia, which had not accepted the Constitution, decided, on 31st July, 1900, by a vote of its residents of 44,800 to 19,691 to enter the Federation as an original State.

34. The Committee will refer to the reports of the Convention Debates in its Report as follows:—

Official Report of the National Australasian Convention Debates, Sydney, 1891—Convention Debates, Sydney, 1891.

Official Report of the National Australasian Convention Debates, Adelaide, 1897—Convention Debates, Adelaide, 1897.

Official Record of the Australasian Federal Convention, Second Session, Sydney, 1897—Convention Debates, Sydney, 1897.

Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898—Convention Debates, Melbourne, 1898.

Interpretation of the Constitution.

35. The Committee mentioned in paragraph 105 of the first Report that the Constitution provided for judicial review of most of its provisions, including the sections setting out the legislative powers of the Commonwealth Parliament. Most decisions interpreting the Constitution have been those of the High Court of Australia, constituted under Chapter III. of the Constitution, but some appeals involving constitutional questions have found their way to the Privy Council in England, notably, for the Committee's purposes, appeals involving the application of section 92 of the Constitution.

36. Since decisions of the Courts help to explain the scope and limitations of various sections of the Constitution, the Committee has had cause to refer to them frequently in the exposition of its recommendations in Parts Three and Four of this Report.

37. Cases decided in the High Court of Australia are reported in the Commonwealth Law Reports. The Commonwealth Law Reports also include relevant decisions of the Privy Council. The Argus Law Reports also publish High Court and Privy Council decisions. The Commonwealth Law Reports are cited as C.L.R. and the Argus Law Reports as A.L.R.

The Royal Commission on the Constitution.

38. In August, 1927, the Commonwealth Government appointed a Royal Commission, with J. B. Peden as Chairman, to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation. Other members of the Commission were P. P. Abbott, T. R. Ashworth, E. K. Bowden, Sir Hal Colebatch, M. B. Duffy and D. L. McNamara.

39. The Commission presented a Report, in September, 1929, containing a wide range of recommendations but also revealing quite substantial differences of opinion among its members The Commission's Report did not bring positive results but it includes most useful source material on many constitutional subjects and, for this reason, the Committee will refer fairly extensively to it in this Report.

40. The Commission reported in the twenty-ninth year of Federation, two years before the United Kingdom Parliament passed the Statute of Westminster and 30 years before the presentation of this Report. Thus, the Commission reported in the middle stages of Federal history. It is interesting to reflect on the many developments indicative of a maturing Commonwealth which have since taken place and to compare our contemporary national life with that depicted in the pages of the Commission's Report.

PART TWO.—COMMONWEALTH LEGISLATIVE MACHINERY.

INTRODUCTION.

41. Part I. of Chapter I. of the Constitution provides for the exercise of the legislative power of the Commonwealth by a Federal Parliament consisting of the Queen, a Senate and a House of Representatives. Part II. of the Chapter contains those sections which relate specifically to the Senate, as, for example, those dealing with the composition of that House, terms and rotation of senators and the occurrence of casual vacancies. Part III. of Chapter I. makes express provision for the House of Representatives. Thus, the Part deals with the constitution of that House, number of members, division of States into electoral divisions and the maximum term of the House. Part IV. of the Chapter includes sections relevant to both Houses of the Parliament, for example, it prescribes the conditions under which persons are disqualified from being chosen as senators or members of the House of Representatives.

42. The Committee has made several recommendations affecting Parts II., III., and IV. of Chapter I. and, in this Part of the Report, it deals with them in separate Chapters as follows:—

Chapter 3.—Number of Senators and Members of the House of Representatives.
Chapter 4.—Disagreements between the Senate and the House of Representatives.
Chapter 5.—Terms of Senators.
Chapter 6.—Rotation of Senators.
Chapter 7.—Casual Vacancies in the Senate.
Chapter 8.—Division of States into Electoral Divisions.
Chapter 9.—Reckoning of Population.

CHAPTER 3.—NUMBER OF SENATORS AND MEMBERS OF THE HOUSE OF REPRESENTATIVES.

RECOMMENDATIONS OF THE COMMITTEE.

43. The Committee pointed out in its 1958 Report that section 24 of the Constitution stated that the number of members of the House of Representatives should be as nearly as practicable twice the number of senators. This meant that any substantial increase in the size of the House of Representatives necessitated, in the first instance, an increase in the number of senators, at present ten for each State, of sufficient order to preserve the ratio which section 24 prescribes.

44. The Committee has recommended (paragraph 39 of the 1958 Report) that the Constitution should be amended to provide as follows:—

(1) The number of members of the House of Representatives should be no longer tied to being as nearly as practicable twice the number of senators.
(2) The Parliament should have power to determine the number of senators, provided equal representation of the original States is maintained, but there should be not less than six nor more than ten senators for each original State.
(3) The Parliament should continue to have power to make laws for increasing or diminishing the number of members of the House of Representatives, and the number of members chosen in the several States should remain in proportion to population. However, the power of the Parliament to determine the number of members of the House of Representatives should be subject to the qualification that the number of members to be chosen in any State should be determined by dividing the population of the State by a figure determined by the Parliament which is the same for each State and is not less than 80,000, thus providing that there should be on average at least 80,000 people for every member. Where, upon a division, there is a remainder greater than one-half of the divisor, there should be an additional member to be chosen in the State concerned.
(4) The power of the Parliament referred to in sub-paragraph (3) above should be subject to the present constitutional provision that there should be no less than five members chosen in each original State.

COMPOSITION OF THE SENATE.

45. The composition of the Senate is dealt with in section 7 of the Constitution. The section provides in substance that—

(1) the Senate should be composed of senators for each State;
(2) senators are to be directly chosen by the people of the State voting, until the Parliament otherwise provides, as one electorate;
(3) until the Parliament otherwise provides, there should be six senators for each original State;
(4) the Parliament may make laws increasing or diminishing the number of senators for each State but the equal representation of the original States must be maintained and there cannot be less than six senators for each original State; and
(5) senators are to be chosen for six year terms.

46. The section reads—

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

47. The number of senators for each State stood at the original figure of six until 1948. In that year, the Parliament passed the *Representation Act* 1948 to increase the number for each State to ten and since the elections for senators in 1949 there have been ten senators for each State providing a Senate of 60 members. Senators have always been chosen by the people of each State voting as one electorate.

48. Section 8 of the Constitution states that the qualification of electors of senators shall be as prescribed by the Constitution or by the Parliament as the qualification for electors of members of the House of Representatives.

49. The qualifications of electors for the Senate and the House of Representatives are now uniformly prescribed in Part VI. of the *Commonwealth Electoral Act* 1918-1953.

50. Section 16 of the Constitution provides that the qualifications of a senator shall be the same as those for a member of the House of Representatives. The qualifications of members of the House of Representatives are specified in section 69 of the Commonwealth Electoral Act passed under the provisions of section 34 of the Constitution.

COMPOSITION OF THE HOUSE OF REPRESENTATIVES.

51. The composition of the House of Representatives is mainly dealt with in section 24 of the Constitution.

52. The first paragraph of that section is important as requiring that—

(1) the House of Representatives should be composed of members directly chosen by the people of the Commonwealth; and
(2) the number of members must be, as nearly as practicable, twice the number of senators. This is commonly known as the two to one ratio.

53. Section 24 also provides that—

(1) the number of members chosen in the various States should be in proportion to their population;
(2) five members at least must be chosen in each original State; and
(3) until the Parliament otherwise provides, the number of members chosen in the several States should be ascertained according to a formula laid down in the second paragraph of the section.

The substance of the constitutional provision now appears in the *Representation Act* 1905-1938.

54. Section 24 of the Constitution reads—

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

55. Section 27 is also relevant. It empowers the Parliament, subject to the Constitution, to make laws for increasing or diminishing the number of members of the House of Representatives. The section has to be read, among other things, subject to the operation of the two to one ratio outlined in section 24.

Relative Size of the Two Houses.

56. Plainly, the Constitution does not sanction an increase in membership of either House independently of the number of members in the other House. The starting point in obtaining increased numbers in the House of Representatives is to increase the number of senators equally for each original State to give a total number of senators which on an application of the two to one ratio will give the number of members it is wished to provide in the House of Representatives.

57. In 1948, the Parliament provided for an increase in the number of members of the House of Representatives from the figure of 74, at which it had remained for many years, to 121 (excluding members for the Territories). In the first Commonwealth Parliament there had been 75 members of the House of Representatives which meant that there was on average, one member for about every 50,000 persons in the Commonwealth. By 1948, by reason of the fact that the population had doubled since Federation, there was on average only one member for about every 102,000 persons. To make provision for 121 members of the House of Representatives as from the date of the 1949 elections, it was constitutionally necessary for the Parliament to increase the number of senators from six to ten for each State, which it did in the *Representation Act* 1948.

Parliamentary Representation in the Light of an Expanding Population.

58. Section 7 of the Constitution provided, in effect, for a Senate composed of 36 senators when the first Parliament of the forthcoming Commonwealth was convened. It was also necessary for the Founders to determine in advance the number of members of the House of Representatives. Section 26 was framed on the basis of the provisions of section 24, including those provisions of the section for determining the number of members, based on the population of the States, to be chosen in each State until the Parliament otherwise provided. Section 26 provided for the original House of Representatives to comprise 75 members. The position by States was as follows:—

State.	Population on 31st December, 1899.*	Number of Members.	Average Number of Persons for each Representative.
New South Wales	1,348,400	26	51,862
Victoria	1,162,900	23	50,561
Queensland	482,400	9	53,600
South Australia	370,700	7	52,957
Western Australia	171,000	5	34,200
Tasmania	182,300	5	36,460
Total	3,717,700	75	49,569

* Quick and Garran—The Annotated Constitution of the Australian Commonwealth, at page 459.

59. It is of interest that, on the estimated population of the States as at 31st December, 1958, if the Parliament wished to make provision that there should be one representative for an average of about 50,000 persons in a State, as was the position during the first Parliament, the House of Representatives would comprise some 198 members and this would necessitate a Senate of no less than 96 members.

60. The average annual increase in population from 1891 to 1900 was of the order of 61,400. In the years immediately following the inception of the Commonwealth, the annual average rate of increase in population was not substantially greater than before Federation but the average annual increase for the ten years from 1911 to 1920 was nearly 99,000 and in the following decade almost 109,000. By the end of 1947 the total population of the six States had increased from 3,717,700 shortly before Federation to more than double at 7,550,881 persons which meant, as mentioned earlier, that there was only one member of the House of Representatives for about every 102,000 persons.

61. The position in detail as at 31st December, 1947, was as follows:—

State.	Population as at 31st December, 1947.*	Number of Senators.	Number of Representatives.	Average Number of Persons for each Representative.
New South Wales	2,983,810	6	28	106,565
Victoria	2,053,916	6	20	102,696
Queensland	1,105,882	6	10	110,588
South Australia	646,686	6	6	107,781
Western Australia	502,951	6	5	100,590
Tasmania	257,636	6	5	51,527
Total	7,550,881	36	74	102,039

* Commonwealth Bureau of Census and Statistics.

62. The immediate consequence of the increase in the number of members of the House of Representatives as from the general election in 1949 was to reduce from 102,000 at the end of 1947 to a little over 66,000 the average number of persons for each member of the House of Representatives elected in the States.

63. Although the adjustments made in 1948 might be thought by some to have provided more members than was necessary at that time, the subsequent annual rate of increase of the population has fully justified the action that was taken. In the years following the adjustment, the increase in population of the States until the end of 1958 was as follows:—

Year,	Total Increase in Population of States.
1949	249,164
1950	259,328
1951	218,917
1952	208,625
1953	160,313
1954	185,612
1955	219,375
1956	216,329
1957	211,189
1958	199,701

64. As at the end of December, 1957, the total population of the six Australian States stood at 9,689,842 and there were, as there are now, 122 members of the House of Representatives chosen in the several States, which meant that there was on average, one member for every 79,400 persons. By the end of 1958, when the population of the States totalled 9,889,543, there was one member for an average of about every 81,000 persons.

65. Opinions will differ as to how many members there should be in the House of Representatives at any given time. The Founders provided for a first House of Representatives of 75 members, or one member for about every 50,000 persons, but no doubt the observance of the two to one ratio in conjunction with the constitutional minimum of six senators for each State and the requirement that at least five members of the House of Representatives must be chosen in each State were decisive in determining the number. But there are probably few who will deny that by 1948, 74 members in the House of Representatives were too few to provide adequate representation for a population approaching 8,000,000 people. Besides, the size of ministries had increased and in that year fourteen members of the House of Representatives were also members of the Cabinet compared with an average of seven in the first ten years of Federation. After providing additionally for the various parliamentary officers, such as the Speaker and the Chairman of Committees, there were insufficient private members to provide a representative forum for debate in the national Parliament and from whom to draw future Ministers.

66. The Committee considers it reasonable to provide for representation in the House of Representatives in the proportion of an average of one member for about every 80,000 persons.

67. The Committee is of opinion that it should always be legally possible for the Parliament to increase the membership of the House of Representatives up to the point that for every member there are, on average, not fewer than 80,000 persons. This would be equivalent to approximately 46,000 electors for each member. This, the Parliament has the power to do now but, of course, increases in the size of the House of Representatives must be accompanied by an increase in the number of senators in accordance with the two to one ratio.

68. Little assistance is to be derived from the examples of other countries in ascertaining the point at which representation becomes excessive in a parliamentary democracy. There are many features to be taken into account including the size of a country, its geographical and topographical nature, distribution of population and the structure of government. It is of interest to note, however, that in the United Kingdom, from which we have inherited the system of parliamentary government and its many conventional understandings, there is at present one member of the House of Commons for about every 81,000 persons. In Canada, where circumstances are perhaps more comparable with Australia because there is a federal system of government and the country has a large area but a relatively small population, there is an average of one member of the House of Commons for about 64,000 persons. The examples of these countries show, if anything, that a House of Representatives determined in number by reference to an average of one member for at least 80,000 persons should, both now and in the foreseeable future, be regarded as reasonable.

Increases in the Number of Senators.

69. A fundamental question arises whether any further increase in the size of the House of Representatives should be accompanied by an increase in the number of senators.

70. The Committee's view is that the number of senators for the original States is already sufficient. The Committee has not, however, arrived at its conclusion lightly and has taken the opportunity to review the purposes for which the Senate was constituted in the light of experience since the formation of the Commonwealth.

Dual Conception of the Senate at Federation.

71. It is an historical truth that the Senate was created for two main purposes, although one of the purposes undoubtedly overshadowed the other. The first was that the Senate should serve as a chamber of review. The second, and more dominant purpose, was that the Senate should represent the States and protect the interests of the States as partners on equal terms with each other in the Federation.

72. As to the first-mentioned purpose, Sir Henry Parkes, when introducing his Federal resolutions at the commencement of the Convention discussions at Sydney in 1891, said in the course of explaining his proposals to establish a Federal Parliament consisting of a Senate and a House of Representatives:—

> What I mean is an upper chamber, call it what you may, which shall have within itself the only conservatism possible in a democracy—the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character—which are the only qualities we can expect to collect and bring into one body in a community young and inexperienced as Australia is.
>
> —(*Convention Debates*, Sydney, 1891, at page 26.)

73. The conception of the Senate as a states house has probably not been more emphatically described than by the writers, John Quick and Robert Garran, both of whom were actively associated with the Convention discussions. In 1901, Quick and Garran wrote—

> The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the Constitution, using the word federal in the sense of linking together and uniting a number of co-equal political communities, under a common system of government. The Senate is not merely a branch of a bicameral Parliament; it is not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of federal legislation which they may consider to be in excess of the jurisdiction of the Federal Parliament. In addition to the legal remedy it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.
>
> That the Senate is the Council of States in the Federal Parliament is proved by the words of this section. There are to be six senators for each Original State. That the States, and not the people, are actually represented in the Senate is shown by the requirement that the "equal representation of the several Original States shall be maintained". Equality of representation, it is argued, is a natural corollary of State representation, because the colonies were, prior to federation, politically equal; equal in constitutional power and status, although not necessarily equal in territory and population. Territory and population afford no absolute test of political status. The true test is the power to govern. Crown colonies would not have been admitted members of the Federal Partnership, on terms of equality with the responsible-government colonies. Further, it was one of the terms of the federal bargain that, in consideration of the transfer of general powers to the Commonwealth, each colony represented in the Convention should, on becoming a State, maintain its original relative equality and individuality unimpaired. That could only be done by equality of representation in the Council of States. Without the adoption of that principle the federation of the Australian colonies would not have been accomplished.
>
> After prolonged and exhaustive debates the Federal Convention, by decisive majorities, accepted the principle of equal representation of Original States in the Senate, as a positive and indispensable condition of the Federal scheme. The question had to be considered, not so much from its logical and symmetrical aspect—not so much as a principle capable of satisfactory dialectical analysis and vindication—but rather as one of the terms of the Federal compact, which is based on compromise. The problem to be solved in the case of the Australian colonies desiring to federate was similar to that which had to be solved by the framers of the American Constitution; it was—how to reconcile the creation of a strong national government with the claims and susceptibilities of separate, and, in their own eyes, quasi-sovereign States. The solution of the problem was found in a Parliament partly national and partly Federal. The national part of the Parliament is the House of Representatives—the organ of the nation. The Federal part of the Parliament is the Senate—the organ of the States, the visible representative of the continuity, independence, and reserved autonomy of the States, linking them together as integral parts of the Federal union. As quasi-sovereign entities, it was contended that they were entitled to equal representation, because they were constitutionally and politically equal; inequality in the number of people within their jurisdiction did not constitute inequality in their quasi-sovereignty; in sovereignty there were no degrees. This was the only logical ground suggested. Whether it was sound or unsound is not so material as the fact that a majority of the Australian communities affirmed that they would not agree to transfer a part of their political rights and powers to a central Legislature except on the condition that, as States, they should be equally represented in one of the Chambers of that Legislature.
>
> —(Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, at pages 414-415.)

74. Edmund Barton, who was to become the first Prime Minister of the Commonwealth, also thought of the Senate as paramountly a states house. He said during the Adelaide Debates in 1897:—

> I take it there must be two Houses of Parliament, and in one of these Houses the principle of nationhood and the power and scope of the nation, as constituted and welded together into one by the act of Federation, will be expressed in the National Assembly, or House of Representatives, and in the other Chamber, whether it is called the Council of the States, the States Assembly, or the Senate, must be found not the ordinary checks of the Upper House, because such a Chamber will not be constituted for the purposes of an Upper House; but you must take all pains, not only to have a Parliament consisting of two Chambers, but to have it constituted in those two Chambers in such a way as to have the basic principle of Federation conserved in that Chamber which is representative of the rights of the States; that is, that each law of the Federation should have the assent of the States as well as of the federated people. In reference to this, I wish to illustrate what I said at the beginning—that I am endeavouring to refrain from pushing my views regarding some matters into definite expression in the terms of the resolutions. There are some of us who think we may secure an effective Federation, although we may not have equality of representatives of the States in the Senate. I am fully and definitely of opinion that the States should be represented equally in the States Assembly. I hold that opinion because I believe that the object of that States Council is to preserve the individuality of the several States, and if it is once conceded that by having only one Chamber, and that elected on the proportionate basis of representation, you are so constituting your Parliament that you are in danger every day of derogating from the individuality of the States, it follows that there should be a Second Chamber for the preservation of that individuality in the most effective way possible. But if you must have two Chambers in your Federation, it is one consequence of the Federation that the Chamber that has in its charge the defence of State interests will also have in its hands powers in most matters co-ordinate with the other House.
>
> —(*Convention Debates*, Adelaide, 1897, at pages 21-22.)

75. It is the Committee's view that inexorable historical processes of the twentieth century have precluded the Senate from becoming the practical expression of the Founders' intentions.

76. The final terms of the Federal compact were not infrequently the result of extensive compromise between the separate colonies and experience has since shown that, though providing an immediate solution, they have not always produced the generally expected results. Their substance was mainly determined by compromise between the advocates of a strong Commonwealth and those who disliked any suggestion of Federal paramountcy. The powers of the Senate and the method of its constitution were both matters of extensive compromise.

77. In the opinion of the Committee, the influences at work in the course of the Federation Debates which led to the attempt to constitute the Senate as a states house and an independent chamber of review elected by the same body of electors who were to choose members of the House of Representatives were oblivious of the inevitability that the party political system would permeate both Houses of the Federal Parliament. Many of the representatives of the colonies did not foresee, furthermore, the rising importance and increased number of national issues which would overshadow the immediate interests of the States as propounded by many of the Founders in the course of the Debates. These considerations have affected the role of the Senate both as a states house and a house of review, as the Committee will show.

The Senate as a States House.

78. Questions of deadlock aside, a proposed law cannot be submitted for the Royal assent unless it has been passed by the Senate as well as the House of Representatives. The Senate's legal powers alone mean that many matters must come before it which are of vital concern to the States. Even so, the cases in which the fate of a bill has been determined by reason of offending a particular State's interest are, to say the least, uncommon. There would be few to-day prepared to maintain that the role of the Senate as a type of states assembly has had a material influence on the history of Commonwealth parliamentary government.

79. There are relatively few issues which can be isolated as being peculiarly an interest of such importance to a State that an unequivocal attitude is adopted by individual senators for a State on that account. The instances of senators of different parties voting together as representatives for the States are not only rare but have not involved major legislation on which the parties represented in the Parliament hold opposing views.

Growth in National Interests.

80. More significantly, however, the balance of the Federal compact has been profoundly influenced by the growth during the century in number and importance of the subjects of national concern under the stimulus of an expanding and vigorous national life and the pressure of world events. By comparison, the importance of State issues has either tended to diminish or else matters which were at Federation either exclusively or primarily the domain of the States have since assumed a national guise. It is not a criticism of the Founders to say that much of what has taken place in the twentieth century was not predicted. A concomitant of the developing nationalism has been the increasing interest of the major political parties in winning Federal elections.

81. The Committee had cause to refer, in paragraphs 77-104 of the Report it submitted in 1958 in connexion with the concurrent legislative powers of the Commonwealth Parliament, to some of the trends which had played a part in binding the people of the Commonwealth into a homogeneous community, and provided evidence of the expansive nature of the national unity attained since Federation. A study of the themes and issues which have aroused national interest would go well beyond the scope of this Report but of the many illustrations, a relevant few are as follows:—

(1) There have been two costly world wars in the first half of the century and the people of Australia are aware of the dangers of external aggression from powerful forces linked by common philosophies or policies. The provision of adequate means of defence requires the continuous expenditure of enormous sums of money and other resources. The conception of world-wide total war in which the whole of a nation's manpower, material and financial resources are directed to common defensive purposes hardly existed in 1900.

(2) Internationally, the Commonwealth of Australia has become an independent country negotiating agreements in its own right and maintaining an active interest in the course of world events. Developments in British Commonwealth relations since 1900, which have been largely responsible for the early attainment of independent national status by Australia and other units of the old British Empire, would have been difficult to foresee in 1900. Australia's position of independence and responsibility in the affairs of South-East Asia and the Pacific area has become apparent only in recent years.

(3) The Australian economy has developed a national character and can no longer be assessed in terms of six separate economies. The various components of the economy are interdependent and the condition of one affects others. For example, the level of prosperity in the community depends substantially on the state of Australia's overseas trade balances. External trade has become a national matter.

(4) The Australian economy is becoming increasingly industrialized and the process has been accompanied by an intensive use of various Commonwealth powers. For example, in the determination of terms and conditions of industrial employment, Commonwealth awards and determinations now cover directly almost one-half of the total number of male employees in Australia and Federal determination of industrial conditions has pronounced effects on State regulation of wages and other conditions of employment.

(5) The growth in population, which has within it a steady flow of migrants from other countries who have no traditional State ties, and the movement towards a more diversified economy has made it necessary to undertake national works and promote development through the exercise of financial, economic, defence and other powers vested in the Commonwealth Parliament under the Constitution.

(6) Rapid progress in the evolution of present day methods of transport and communication has broken down the isolation of States, led to an increase in the volume of interstate trade, commerce and intercourse and fostered an appreciation by residents of one State of the activities and problems of other States.

(7) In common with many other countries, the Commonwealth has assumed direct responsibility for the provision of a wide range of social service benefits available to all persons in the community irrespective of their place of residence.

(8) The Commonwealth has become the financially dominant member of the Federation with sources of revenue at its disposal far greater than those of the States.

(9) Increasing Commonwealth commitments are reflected in the relative size of the Commonwealth and State budgets. In the first full year of Federation, the Commonwealth spent approximately £4,000,000 on its own services. In the financial year ended 30th June, 1958, Commonwealth expenditure out of the Consolidated Revenue Fund on the provision of its own services exceeded £1,000 million. State expenditure has also risen since Federation but whereas in the early years of Federation total expenditure by the States on their own services was several times greater than Commonwealth expenditure, total Commonwealth expenditure on its own services now substantially exceeds that of the States. In 1957-58 total State expenditure from their respective Consolidated Revenue funds was about £610,000,000 and taking into account net loan expenditure on State services, it was about £770,000,000.

Emergence of the Senate as a Party House.

82. There were not many in 1900 who openly predicted that party rivalry in the Senate would overshadow the functioning of the Senate as a house of the states. One of the few was Alfred Deakin who prophesied during the Convention at Sydney in 1897 that—

> the contentions in the senate or out of it, and especially any contention between the two houses, will not and cannot arise upon questions in regard to which states will be ranked against states . . . in the United States, and also in Switzerland, and in Canada, as here, the whole of the states will be divided into two parties. Contests between the two houses will only arise when one party is in possession of a majority in the one chamber, and the other in possession of a majority in the other chamber. We have had it submitted to us that probably the senate will be the more radical house of the two. I am willing to accept that suggestion for the purposes of my argument, though the argument is equally good either way. The house of representatives would then be the more conservative body, and it is possible that a more conservative party in the house of representatives would be confronted by a more radical party in the senate. In both cases the result after a dissolution would be the same. The men returned as radicals would vote as radicals; the men returned as conservatives would vote as conservatives. The contest will not be, never has been, and cannot be, between states and states . . . it is certain that once this constitution is framed, it will be followed by the creation of two great national parties. Every state, every district, and every municipality, will sooner or later be divided on the great ground of principle, when principles emerge.
>
> —(*Convention Debates*, Sydney, 1897, at page 584.)

83. Even before the outbreak of the Great War in 1914 senators almost invariably voted according to the policies of their political party and not individually as representing the State for which they were returned. The division of government and opposition in terms of parties now finds as ample expression in the proceedings of the Senate as it does in the House of Representatives. In fact, in the history of the Parliament, the number of independent senators has been far fewer than the number of independent members of the House of Representatives.

84. It has been a characteristic of the Australian political scene that there have been only a few political parties of major importance in the Commonwealth and State Parliaments. The parties occupying the government benches of the Federal Parliament, first at Melbourne and later at Canberra, have always been the major political forces in the State Parliaments. This state of affairs appears to the Committee to be so strongly entrenched that, even if change were desirable, it would be unrealistic to think that it could be achieved. The major party system has undoubtedly assisted in maintaining more stable government in Australia than in those democratic countries where representation in the legislatures is shared by many separate groups.

85. The growth of nationally organized parties has been the counterpart of the increase in the number of matters of national interest to which the Committee has referred in paragraphs 80-81 above. The parties fashion their policies for submission to the electors mainly in respect of national matters. Policies which aspiring candidates for the Senate and the House of Representatives advocate on the election platform are the national policies of the parties to which they belong. It is on the popular appeal of these policies, and not on particular State interests, that senators as well as members of the House of Representatives are almost invariably elected. A resident of a State who votes for a candidate for the Senate according to the party ticket usually has more in common with a resident of another State who votes for a Senate candidate of the same party than he has with a resident of his own State who votes for a candidate of a rival party.

86. The predominance of party political considerations in the election of senators is exemplified by reference to past electoral returns on the occasions on which elections for senators have been held concurrently with an election for members of the House of Representatives. Almost invariably, the party or coalition of parties forming the government following the elections has won a majority of the Senate vacancies. The position since 1910 has been as follows:—

NUMBER OF SENATORS AND MEMBERS OF THE HOUSE OF REPRESENTATIVES OF MAJOR PARTIES ELECTED AT SIMULTANEOUS ELECTIONS FOR SENATORS AND THE HOUSE OF REPRESENTATIVES.

Date of Election.	Party.	Number of Representatives.	Number of Senators.
4th Parliament, 13th April, 1910	Labour	42	18
	Fusionist	31	Nil
	Other	2	Nil
5th Parliament, 31st May, 1913	Liberal	38	7
	Labour	37	11
6th Parliament, 5th September, 1914	Labour	41	31
	Liberal	33	5
	Other	1	Nil
7th Parliament, 5th May, 1917	Nationalist	53	18
	Labour	22	Nil
8th Parliament, 13th December, 1919	Nationalist	36	18
	Country	11	Nil
	Labour	26	1
	Other	2	Nil

Date of Election.	Party.	Number of Representatives.	Number of Senators.
9th Parliament, 16th December, 1922	Labour	29	11
	Nationalist	27	8
	Country	14	Nil
	Other	5	Nil
10th Parliament, 14th November, 1925	Nationalist	37	19
	Country	15	3
	Labour	22	Nil
	Other	1	Nil
11th Parliament, 17th November, 1928	Nationalist	29	9
	Country	13	3
	Labour	31	7
	Other	2	Nil
13th Parliament, 19th December, 1931	U.A.P.*	41	12
	Country	15	3
	Labour	13	3
	Other	6	Nil
14th Parliament, 15th September, 1934	U.A.P.	32	14
	Country	15	4
	Labour	18	Nil
	Other	9	Nil
15th Parliament, 23rd October, 1937	Labour	29	16
	U.A.P.	28	3
	Country	17	Nil
16th Parliament, 21st September, 1940	Labour	36	3
	U.A.P.	23	13
	Country	13	3
	Other	2	Nil
17th Parliament, 21st August, 1943	Labour	49	19
	U.A.P.	15	Nil
	Country	8	Nil
	Other	2	Nil
18th Parliament, 28th September, 1946	Labour	43	16
	Liberal	17	2
	Country	12	1
	Other	2	Nil
19th Parliament, 10th December, 1949	Liberal	55	18
	Country	19	5
	Labour	47	19
20th Parliament, 28th April, 1951	Liberal	52	26
	Country	17	6
	Labour	52	28
22nd Parliament, 10th December, 1955	Liberal	57	13
	Country	18	4
	Labour	47	12
	D.L.P.†	Nil	1
23rd Parliament, 22nd November, 1958	Liberal	58	14
	Country	19	2
	Labour	45	15
	D.L.P.	Nil	1

* United Australian Party. † Democratic Labour Party.

87. If further evidence should be required of the party nature of the Senate it may be found in the atmosphere in which proceedings are conducted in the Senate and the adherence of senators to the policies of their parties when voting on vital measures. In paragraphs 145-147 of Chapter 4, there is a discussion of the two occasions on which double dissolutions have taken place following the existence of a deadlock between the two Federal Houses. Paragraphs 164-177 also deal with the relationships which have obtained between the Senate and the House of Representatives since the general election in 1949. The observations made therein leave no doubt as to the supremacy on these occasions of party politics in determining the fate of legislation which has been passed by the House of Representatives. The strength of the opposition parties in the Senate has been sufficient to bring about the defeat of the government's legislation.

Conclusions as to the Role of the Senate as a States House.

88. The Committee's conclusion, which it regards as inescapable, is that the original notion of the Senate as a states house was not realized and, therefore, does not justify further increases in the number of senators even though future increases in the number of members of the House of Representatives will probably occur. To the extent that the Senate should represent State interests, as distinct from Commonwealth interests, those interests are sufficiently safeguarded by a Senate of 60 comprising ten senators from each of the original States.

89. It has at times been observed that, although the Senate does not give practical expression to the theory of a states house, the influence of senators in the councils of their parties cannot be ignored. The principle of equality of representation of the original States in the Senate admittedly makes it possible for the interests of the smaller States to be voiced with more weight than might otherwise be the case, as for example, if the number of senators for each State was fixed according to its population. But the extent, in practice, to which the interests of a State as a State have been pressed by the whole body of senators for that State, should not be over-emphasized and the argument of party room influence provides little valid basis for increasing the number of senators every time it is wished, for reasons of responsible government, to increase the size of the House of Representatives.

90. The application of the two to one ratio has always produced some curious results as the following table comparing original and present membership by States in the Parliament shows:—

State.	Number of Senators.		Number of Representatives.	
	1901.	1958.	1901.	1958.
New South Wales	6	10	26	46
Victoria	6	10	23	33
Queensland	6	10	9	18
South Australia	6	10	7	11
Western Australia	6	10	5	9
Tasmania	6	10	5	5

Every government feels its responsibility to the electors most keenly by the strength of its numbers in the House of Representatives and ever since Federation the Prime Minister and the great majority of members of successive ministries have held seats in the House of Representatives. Yet the effect of the two to one ratio has been to allot two States four extra members in the House of Representatives and an equal increase in their numbers in the Senate while in one other State the number of senators has increased by four without any increase in representation in the House of Representatives. By contrast, an increase of four senators in another State has been accompanied by an increase of twenty members in the House of Representatives. So far as the Senate expresses the notion of equality between the States, the proportionate strength of one State to the whole is the same whether the Senate comprises six, ten or twenty members for each original State.

THE SENATE AS A HOUSE OF REVIEW.

91. It was mentioned in paragraphs 71 and 72 above that the Senate was also intended to perform the traditional functions of a house of review. Before Federation, there were examples elsewhere of second chambers which performed this function, as for example, the House of Lords in the United Kingdom and the Senate in the United States of America. In bicameral systems of government in countries possessing political traditions which have a good deal in common with our own, usually the conception of an upper house as a house of review has had as its sequel a system of election or selection peculiar to that House. Until 1913, the United States' Senate was directly elected by the State Legislatures although now senators are directly elected by the people of the States. In some cases upper houses are not elected at all. A senior example is the House of Lords. In Canada, senators are appointed for life by the Governor General. In some of the Australian States—South Australia, Western Australia and Tasmania—Upper House members are elected on a restricted franchise. In one instance, New South Wales, the two Houses voting as a single electoral body at simultaneous sittings of both Chambers elect persons to fill vacancies in the Legislative Council. Under the Commonwealth Constitution, however, the electors are the same for both Houses.

92. The main feature that the Senate shares with the second chambers or upper houses in general is continuous existence. The Senate is normally not subject to dissolution and only one-half the total number of senators retire every three years.

93. The fact that the same body of electors who choose members of the House of Representatives also choose the senators for a State has meant that senators are elected on the same party tickets as members of the House of Representatives and, therefore, represent the same political interests and hold political persuasions similar to those of members of the same party who take their seats in the House of Representatives.

94. The Committee has already, in paragraphs 80-81 above, referred to the post-Federation developments which have been destructive of the Senate's position as a states house. The same developments have restrained a full expression of the process of review which many of the Founders envisaged.

95. As indicated in paragraph 87, the major conflicts between the two Houses have arisen not because senators have voiced their individual qualities of maturity, experience and personal judgment but because the government, whilst commanding a majority in the House of Representatives, has not had the requisite numbers in the Senate to ensure the passage of its legislation. The weapon

of rejection has, in other words, always been in party hands. In ordinary circumstances, where the government has a majority in both Houses, experience has shown that the Senate cannot be expected to exercise an independent role.

96. The Committee considers, therefore, that the reflection in the Senate of a party structure corresponding to that which exists in the House of Representatives has also been decisive in determining the extent to which that House is able or prepared to review the legislation of the other House.

97. There can be no end to this situation unless another basis is found for constituting the Senate. In this connexion, however, the Committee has no doubt that the reconstitution of the Senate in a way which fails to provide for direct election by adult suffrage would be quite unacceptable to the Australian people now or in the future just as it was in 1900. It is quite inconceivable to-day that the will of a popularly elected house from which the Prime Minister and most members of the ministry are chosen, should be obstructed by a house not elected on the basis of adult suffrage. Where upper houses are not so elected there have usually been severe strictures imposed upon their legal powers. The absolute right of veto is, for example, denied to the House of Lords by the Parliament Acts of 1911 and 1949.

98. The Committee does not think that the Senate is incapable of functioning as a reviewing chamber, but it considers that the extent to which that House may so function is governed substantially by the political developments referred to in the preceding paragraphs of this Report. That is to say, the Committee's view is that the Senate can perform the orthodox functions of review only within the permissible limits of the party system of Federal politics.

99. The Committee's conclusion is that the functions which the Senate performs or may perform as a house of review do not justify any further increase in the number of senators chosen for each of the States.

100. The effective performance of the function of review does not rest on numbers and, indeed, larger numbers could, as for example, by the need to impose restrictions on debate, impair the effectiveness of an upper house in the discharge of functions. Even in the United States, which has a population of more than 170,000,000 and 50 States and where senators, by reason of the legal powers, some exclusive, of their House and their comparative freedom from party discipline, are frequently able to vote independently, there are only 100 senators.

Examination of Other Grounds for Further Increase in the Number of Senators.

101. The Committee considered whether there were other reasons which would make it desirable for further increases in the representation of the original States in the Senate to be allowed by the Constitution.

102. In a bicameral legislative system the preservation of the prestige and standing of either house is important. At Federation, one of the purposes in linking the size of the House of Representatives with the number of senators at the ratio of two members for each senator was to avoid the possibility of serious diminution of the influence of the Senate which might otherwise result in the event of substantial increases in the size of the House of Representatives being made by the Federal Parliament under the provisions of section 27 of the Constitution.

103. The Committee considers that a Senate comprising ten senators for each original State should always retain its prestige and standing. Dignity does not rest on numerical strength. Nevertheless, it is proposed that the present power of the Parliament to increase, at its discretion, the number of members of the House of Representatives should be made subject to a constitutional restriction which will prevent the number of members of the House of Representatives being increased arbitrarily at the expense of the Senate. It is proposed that a provision should be written into the Constitution providing that the maximum number of members of the House of Representatives should be such that there are on average not fewer than 80,000 persons in the community for every member. On this ratio, the average electorate would comprise some 46,000 electors.

104. Proposed laws which do not appropriate revenue or moneys or impose taxation may originate in the Senate. It is constitutionally possible, therefore, for bills dealing with a wide range of subjects to be introduced in the Senate in the first instance and it may be asked whether future possible exercise of constitutional power would justify further increases in the number of senators.

105. The Committee's conclusion is that it is most unlikely that the volume of legislation originating in the Senate will ever be substantial by comparison with legislation originating in the House of Representatives.

106. The number of bills first introduced in the Senate and subsequently becoming law has never exceeded twenty in any year since Federation. In the last quarter century, ending at the end of 1958, the annual average was nine bills compared with an annual average in the same period of 72 bills first introduced in the House of Representatives and then becoming law. The number of bills

originating in the Senate has increased over the last few years but still constitutes only a small proportion of the whole number of bills which pass in any year. The position in detail since 1950 has been as follows:—

BILLS PASSED BY THE PARLIAMENT.

Year.	Where Originated.		Total.
	Senate.	House of Representatives.	
1950	7	73	80
1951	5	77	82
1952	5	104	109
1953	18	78	96
1954	11	72	83
1955	10	61	71
1956	14	99	113
1957	17	86	103
1958	20	63	83

107. It was always expected that most legislation would originate in the House of Representatives. The intention of the Founders finds expression in section 57 of the Constitution which provides the machinery for settlement of deadlocks between the two Houses. The section applies only to proposed laws which originate in the House of Representatives.

108. Every ministry since the inception of the Commonwealth has included a few senators and the number of members of ministries has increased considerably since the early formative years of the Commonwealth. This suggests the possibility of more senators being members of future ministries than in the past. It is not, however, in the opinion of the Committee, at all likely that the call upon individual senators to occupy ministerial office will leave too few senators for the effective performance of the functions of the Senate itself.

109. Reference to the composition of past Federal ministries, not only shows that members of the House of Representatives have held a substantial majority of portfolios but also that later increases in the size of ministries have not led to any substantial increase in the number of senators appointed as Ministers. The tenth Federal Ministry ended towards the end of 1915. Up until that time there were never more than three senators included in a ministry while members of the House of Representatives who were Ministers did not, at any time, number less than six. When the twenty-third Ministry ended in October, 1941, the number of Ministers had increased to as many as nineteen but at no stage were there more than five senators in a ministry. The number of senators in any ministry since 1941 has, in fact, remained constant at five. At the present time the total number of Ministers is 22.

Recommendations.

110. Accordingly, the Committee has recommended that the Constitution be amended to provide as follows:—

(1) The number of members of the House of Representatives should be no longer tied to being as nearly as practicable twice the number of senators.

(2) The Parliament should have power to determine the number of senators, provided equal representation of the original States is maintained, but there should be not less than six nor more than ten senators for each original State.

(3) The Parliament should continue to have power to make laws for increasing or diminishing the number of members of the House of Representatives, and the number of members chosen in the several States should remain in proportion to population. However, the power of the Parliament to determine the number of members of the House of Representatives should be subject to the qualification that the number of members to be chosen in any State should be determined by dividing the population of the State by a figure determined by the Parliament which is the same for each State and is not less than 80,000, thus providing that there should be on average at least 80,000 people for every member. Where, upon a division, there is a remainder greater than one-half of the divisor, there should be an additional member to be chosen in the State concerned.

(4) The power of the Parliament referred to in sub-paragraph (3) above should be subject to the present constitutional provision that there should be no less than five members chosen in each original State.

Draft Constitutional Alterations.

111. Several amendments would be necessary to implement the Committee's recommendations.

Number of Senators.

112. An alteration to the third paragraph of section 7 is needed to give effect to the Committee's recommendation as to the number of senators for each original State. The alteration involved is the omission of the words "no Original State shall have less than six senators" and the insertion in their stead of the words "no Original State shall have less than six senators or more than ten senators".

Number of Members of the House of Representatives.

113. It is convenient, in translating the Committee's proposals affecting the House of Representatives into draft alterations, to repeal sections 24-27 inclusive of the Constitution and to replace them by a new section. A draft alteration to this end is as follows:—

Constitution of House of Representatives.

24.—(1.) The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth.

(2.) The numbers of members of the House of Representatives to be chosen in the several States shall be declared by the Parliament from time to time in accordance with this section. The numbers of members for all the States shall be declared at the one time.

(3.) The number of members to be so declared in respect of a State shall be the number ascertained by dividing the number of the people of the State by a number prescribed by the Parliament from time to time, being not less than eighty thousand and being the same number for each State. If, on such a division, there is a remainder greater than one-half of the divisor, the number of members shall be increased by one, but otherwise any remainder shall be disregarded.

(4.) In the application of the last preceding sub-section in relation to a law declaring the numbers of members to be chosen in the several States, the respective numbers of the people of the States shall be taken to be the numbers declared by that law to have been those numbers, according to statistics of the Commonwealth, at a specified date, not being earlier than the date as at which the latest census of the people of the Commonwealth was taken under a law of the Commonwealth.

(5.) Notwithstanding anything contained in this section, the number of members of the House of Representatives to be chosen in an Original State shall not be less than five.

(6.) Where an alteration is made to the number of members to be chosen in a State, the alteration does not apply in relation to any election before the first general election takes place after the Governor-General in Council has by Proclamation declared that there is an appropriate number of electoral divisions for the purpose of the election of the altered number of members.

(7.) The Parliament may make laws for carrying this section into effect.

114. The above draft does not call for much detailed comment. It provides, as the Constitution at present provides, that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth and that five members at least shall be chosen in each original State.

115. Sub-section (2.) authorizes the Parliament to declare the number of members of the House of Representatives there should be at any time.

116. In so declaring, the Parliament must have regard to sub-section (3.) which provides that the number of members of a State shall be ascertained by dividing the number of people of the State by a number which the Parliament prescribes but which is not less than 80,000. If Parliament wished, for example, that there should be one member for every 90,000 persons of a State, then it could prescribe the number 90,000 as the figure by which the population of each State should be divided in order to ascertain the number of members for the State.

117. Where upon a division there is a remainder greater than one-half of the dividing figure which the Parliament has chosen, the State is to be allotted an extra member. Precedent for this provision is to be found in the second paragraph of the present section 24 of the Constitution and also in section 10 of the *Representation Act* 1905-1938.

118. Sub-section (4.) requires the Parliament to take the population of each of the States as revealed by the statistics of the Commonwealth at a specified date not earlier than the date on which the latest census was taken. The provision should ensure the use of up-to-date statistics without imposing an obligation on the Parliament to adopt the latest statistics which may, for example, be subject to revision or available for some States but not others.

119. Sub-section (6.) is purely machinery. An alteration to the number of members to be chosen in a State may become effective only at the first general election which takes place after the division of States into electoral divisions has been adjusted to take account of the altered number of members.

Constitution, Sections 25 and 26.

120. The proposed new section 24 does not re-enact any part of sections 25 and 26 of the Constitution, the repeal of which the Committee proposes.

121. Section 25 reads—

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

122. Quick and Garran observed in relation to section 25—

This section is based on the fourteenth Amendment of the Constitution of the United States, . . . That amendment was passed after the Civil War, in order to induce the Governments of the States to confer the franchise on the emancipated negroes, who were declared citizens of the United States. It was designed to penalize, by a reduction of their federal representation, those States which refused to enfranchise the negroes.

The effect of the section in this Constitution is that where, in any State, all the persons of any race—such, for instance, as Polynesians, Japanese, &c.—are disqualified from voting at elections for the popular Chamber in the State, the persons of that race resident in that State cannot be counted in the statistics used for ascertaining the quota.

—(*The Annotated Constitution of the Australian Commonwealth*, at page 456.)

123. Section 25 has never operated to affect the reckoning of the number of people of any State. A State could, if it wished, in any event, easily circumvent its provisions as, for example, if its law barred from voting at the State elections almost all, but not all, of the people of a particular race. Moreover, the Committee considers that since the qualifications of electors of members of the House of Representatives are now defined by the Federal Parliament under section 30 of the Constitution, a person who is qualified to vote at Federal elections should not be disregarded in fixing the number of people of a State for the purpose of determining the number of members of the House of Representatives to be chosen in that State.

124. The Founders inserted section 26 in the Constitution because it was necessary to fix, in advance, the number of members of the House of Representatives in the first Federal Parliament.

125. Section 26 reads—

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:—

New South Wales	twenty-three;
Victoria	twenty;
Queensland	eight;
South Australia	six;
Tasmania	five;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales	twenty-six;
Victoria	twenty-three;
Queensland	nine;
South Australia	seven;
Western Australia	five;
Tasmania	five.

126. The operation of the section is now completely exhausted.

127. Whilst the Committee considers it appropriate to repeal sections 25 and 26, in the course of giving effect to its recommendations affecting the membership of the House of Representatives, the matter is not of any great importance and either or both sections could be retained without affecting the substance of the other recommendations.

CHAPTER 4.—DISAGREEMENTS BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES.

RECOMMENDATION OF THE COMMITTEE.

128. Section 57 of the Constitution deals with disagreements between the Senate and the House of Representatives and provides, in short, that the Governor-General may dissolve both Houses simultaneously in the event of a deadlock occurring.

129. After a great deal of consideration, the Committee decided that the section was no longer appropriate to modern conditions of parliamentary government and should be modified to draw a distinction between money bills and other bills and to provide the government with more than one possible means by which the resolution of a deadlock might be obtained.

130. The Committee has recommended (*1958* Report, paragraph 43) that the Constitution be amended by the repeal of section 57 and its replacement by a new section which will provide, in substance, for the following:—

(1) A deadlock should be deemed to arise in respect of a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the government if, during any session of the Parliament, the Senate has not, at the expiration of a period of 30 days after receipt of the measure from the House of Representatives, passed the proposed law or the proposed law with any amendments it has requested and which the House of Representatives has accepted. It should not be necessary for that House to have to pass the bill for a second time before a deadlock can arise.

(2) In respect of other proposed laws, the House of Representatives should be required, as at present, to pass for the second time a bill which the Senate has resisted and the Senate should be given a further opportunity to consider the measure before a deadlock arises. Conditions of deadlock should be deemed to arise if—

(a) during a session, the Senate has not, at the expiration of 90 days after receiving the proposed law from the House of Representatives for the first time, passed the proposed law as transmitted to it or with amendments in respect of which the House of Representatives has expressed its concurrence;

(b) the House of Representatives again passes the proposed law in the same or the next session either with or without any amendments made by the Senate; and

(c) after receiving the proposed law for the second time, the Senate either again rejects it or has not, at the expiration of 30 days during the session, passed either the proposed law or the proposed law with amendments which the House of Representatives has found acceptable.

(3) When a deadlock arises, the Governor-General, acting on the advice of the Federal Executive Council, should have power to dissolve both Houses except that a dissolution should not be possible within six months of the expiry of the House of Representatives by effluxion of time.

(4) As an alternative to double dissolution, however, the Governor-General in Council should be empowered to convene a joint sitting of the members of the two Houses to deliberate and vote upon the proposed law in dispute together with any amendments which have been made by one House but not agreed to by the other. A disputed bill may only be presented for the Royal assent if at the joint sitting it is approved by an absolute majority of the total number of members of the two Houses and by at least one-half of the total number of members of the two Houses chosen for and in a State in at least one-half of the States.

(5) If a deadlock is not resolved at a joint sitting, or if a bill passed by the House of Representatives is rejected at a joint sitting, the Governor-General in Council should also be authorized to dissolve both Houses provided that, as at present, the double dissolution does not occur within six months of the expiry of the House of Representatives by effluxion of time.

(6) As a further alternative to double dissolution, either without a joint sitting being held or where disagreement persists after a joint sitting, if the House of Representatives should be dissolved within twelve months of the deadlock first arising, for the purposes of the proposed section the dissolution of the House of Representatives should be treated as a stage in the settlement of deadlocks in similar manner to a double dissolution, as to which *see* sub-paragraph (7) hereunder.

(7) If after a double dissolution, or if after a general election of members of the House of Representatives has occurred as contemplated in sub-paragraph (6) above, the House of Representatives again passes the proposed law within six months of the commencement of the first session of the new Parliament and the Senate either rejects the law or otherwise has not, at the expiration of a period of 30 days after the transmission of the bill to it, passed the law or the law with any amendments acceptable to the House of Representatives, the Governor-General in Council may convene a joint sitting. If the proposed law together with any of the amendments in dispute is affirmed by an absolute majority of the total number of members of the two Houses, then the bill should be deemed to have been duly passed and must be submitted for the Royal assent.

Application of Section 57.

131. The section has been the subject of a good deal of controversy since its provisions were first applied in 1914. On the one hand, there is the view that the section is either contrary to or impairs the principle of responsible democratic government; on the other, it has been argued that the section offers protection to the States, in particular to the smaller States, against Federal encroachment and thus helps to maintain a principle of Federation that laws of the Commonwealth should have the assent of the States as represented in the Senate as well as of the people directly represented in the House of Representatives. Moreover, the Senate, as a chamber of review, is in a better position to exercise the ordinary checks of an upper house in its review of legislation passed by the lower house if its constitutional position is protected by a section such as section 57.

132. The section has become more prominent in the political scene since the adoption of the system of proportional representation for the election of senators, because membership in the Senate is now more evenly divided between the parties than hitherto. Proportional representation was introduced by the *Commonwealth Electoral Act* 1948 and first applied to the election of senators at the end of 1949.

133. In 1950, the newly formed Liberal-Country Party Coalition Government experienced difficulty in obtaining the passage of legislation through the Senate. A double dissolution occurred in 1951 after the Senate had failed to pass the Commonwealth Bank Bill [No. 2] 1950. The Senate had amended an identical measure in a manner unacceptable to the House of Representatives more than three months earlier. In the life of the twenty-second Parliament the Government twice failed to obtain the passage of its banking legislation but a double dissolution did not occur and the Parliament continued for a normal term.

Meaning of Section 57.

134. Section 57 reads as follows:—

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and Houso of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

135. It may be helpful to state the substance of section 57 in the following terms:—

(1) The section applies to any proposed law passed by the House of Representatives. It is not restricted to financial measures.

(2) The section does not apply to proposed laws which are first passed by the Senate.

(3) The Senate must first reject or fail to pass a proposed law or pass it with amendments which the House of Representatives will not accept. The Senate cannot, of course, by reason of section 53 of the Constitution, amend a bill imposing taxation or appropriating moneys for the ordinary annual services of the government, although it may reject such a measure or suggest amendments to the House of Representatives. Neither can the Senate amend any bill so as to increase any charge or burden on the people but, again, it may reject the bill or suggest amendments.

(4) The House of Representatives may then, after an interval of three months, in the same or the next session, again submit the proposed law to the Senate either with or without any amendment or suggested amendment of the Senate.

(5) If the Senate again rejects or fails to pass the bill or makes amendments unacceptable to the House of Representatives, the Governor-General may dissolve both Houses simultaneously provided that the dissolution does not take place within six months of the expiration of the term of the House of Representatives.

(6) If the House of Representatives, after the double dissolution and the ensuing general election, again submits the proposed law, whether with or without amendments or suggested amendments, to the Senate and the disagreement still persists, the Governor-General may convene a joint sitting of the two Houses.

(7) The joint sitting should vote, after deliberation, on the proposed law as last passed by the House of Representatives and any amendments made by one House which have been unacceptable to the other. Requests by the Senate for amendment, as for example, in respect of bills which it may not amend, cannot be dealt with at a joint sitting.

(8) If the proposed law, with or without amendments, is carried by an absolute majority of the total number of members of the two Houses at the joint sitting, it is taken to have been passed by both Houses and must be presented for Royal assent.

Section 57 and the Electors.

136. Leaving aside for the moment the practical effects that section 57 has so far had in the functioning of the machinery of government, the Committee considers that the section as framed at 1900 is out of touch with the conditions in which parliamentary government now operates. When the electors of the Commonwealth go to the polls, they do so, in the Committee's belief, with the consciousness that the result of the Australia-wide vote should be the establishment of a government whose policy meets with the will of the majority as expressed in the election results and further, that that government should have a life of approximately three years during which time it should be capable of giving effect to the policies it advocated on the election platforms. But section 57 is capable of disrupting continuity in government. The rejection by the Senate of a bill which has passed through the House of Representatives will, unless the government chooses to accept the frustration of its policy, inevitably require a double dissolution and a fresh election if the deadlock is to be solved and this could take place even so early as to be within a year of the previous general election at which the government was returned. These circumstances, in the opinion of the Committee, engender a widespread feeling of dissatisfaction among the Australian electors and do little to promote the prestige of the national Parliament. The factors associated with the operation of section 57, however, are far deeper than this. To appreciate the full significance of the section it is necessary to have regard to its origin.

Origin of Section 57.

137. The constitution of a Senate with equal representation for each of the original States and power to reject any proposed laws received from the House of Representatives, was responsible for the understanding, which arose during the Convention Debates in 1897-1898, that provisions would have to be inserted for securing an appropriate subordination of State interests to the national interest by setting up machinery which would impose some limitation on the Senate's power of absolute veto.

138. Many proposals were put forward in the course of the Debates. There was strong support for a provision under which the issue in dispute between the Houses should be submitted to a referendum of the electors for decision. There were, however, two views as to the nature of the referendum which would be held. One view was that there should be what was then called a "mass" or "national" referendum in which the disputed issue would be resolved by a simple majority of votes of the electors. The other view was that there should be a "dual" referendum in which, not only an over-all majority of electors was required, but separate majorities of electors in a majority of States were also to be obtained if the disputed measure was to become law.

139. Other proposals involved the use of the dissolution procedure being either a consecutive dissolution of the Houses, that is to say first a dissolution of the House of Representatives and, if the disagreement persisted, then a dissolution of the Senate or both Houses; or a simultaneous dissolution of both Houses in the first instance. There was also support for the settlement of deadlocks by a joint sitting of the two Houses without resort to either referendum or dissolution. It was further proposed that special majorities should be required at a joint sitting. Others attempted to combine the processes of dissolution and referendum as steps in the settlement of a deadlock.

140. The deadlock debates were not only fruitful of suggestion but exhaustive. The original suggestion for a deadlock clause was placed before the Convention of 1891 and the subject was before all three sessions of the Convention which sat first at Adelaide in 1897, then at Sydney in the same year and finally at Melbourne in 1898. The Sydney session lasted three weeks during which several days were taken up in the consideration of section 57. More than one-third of the entire reported Debates of that session are devoted to the deadlock proposals.

141. As a result of the Convention discussions, and the subsequent Premiers' Conference in 1899, section 57 finally emerged as a provision which was very much the result of compromise and quite unique in the British tradition of parliamentary government.

142. It is clear from the Debates that the constitutional powers accorded the Senate went hand in hand with the conception of the Senate as a states house. The terms upon which agreement was reached were dictated mainly by the varying degrees of interest which the respective colonies had in the formation of the Senate as a states house. The proposals involving special majorities are evidence of state outlook, as for example, the dual referendum. Again, when the Convention Debates concluded, section 57 provided that a three-fifths majority should be required to obtain passage of a disputed proposed law at the joint sitting following a double dissolution. The need for the special majority was only abrogated by decision of the Premiers in 1899 upon the insistence of New South Wales where a referendum to approve the draft Constitution had failed to gain the requisite number of votes in favour to enable its carriage in that colony.

143. Section 57 is also linked with the original position of the Senate as a chamber of review. The legal powers vested in the Senate were greater than those of the upper houses of the colonial Parliaments and experience of disagreements between upper and lower houses of the colonial Parliaments, as for example, in Victoria and South Australia, pointed to the need for some machinery to settle deadlocks.

144. In paragraphs 78-90 of Chapter 3 of this Report, the Committee has, in connexion with determining the number of senators in relation to the size of the House of Representatives, examined the history of the Senate as a states house. In paragraphs 91-100 it has also had regard to the effectiveness of the Senate in carrying out second chamber functions of review. The Committee's conclusion was that the Senate has for long been a House divided on party political lines and that the loyalty of senators to their political parties has substantially governed the exercise of its functions.

The Double Dissolutions of 1914 and 1951.

145. It has already been mentioned that double dissolutions have been invoked on two occasions with a view to achieving the settlement of a deadlock. The first occasion was in 1914 not long after a Liberal Government had taken office though lacking a working majority in the House of Representatives in addition to being outnumbered in the Senate. The House of Representatives passed the Government Preference Prohibition Bill which abolished preference for unionists in employment with the Commonwealth. The bill was twice rejected by the Labour controlled Senate. The Prime Minister obtained a double dissolution. In the ensuing elections the stand taken by the Senate was justified insofar as Labour took office. That section 57 resolved the deadlock cannot be disregarded, but the point which the Committee makes is that the Senate's rejection of the Preference Prohibition Bill was caused solely by the strength of the Labour Opposition. It is also on record that the Governor-General granted the double dissoluton in spite of protests at the time from the Senate.

146. The occurrence of the second double dissolution in 1951 is almost too well known to require comment. The failure of the Government's banking legislation to pass in the Senate, after being passed by the House of Representatives, was brought about by the Government being outnumbered in the Senate by the Labour Opposition. The subject of the disputed legislation was undoubtedly of national interest and once again a double dissolution resulted in the settlement of the dispute without the need for a joint sitting.

147. The two double dissolutions were, therefore, in each case a direct outcome of a trial of strength in the Senate between members of the opposing political parties. In the opinion of the Committee, it is quite unlikely that section 57 will be invoked for any reason other than that the government of the day has insufficient support to secure the passage in the Senate of legislation which has already been passed by the House of Representatives.

148. In 1958, the Government failed for a second time to obtain the passage through the Senate of fourteen bills relating to banking which had been passed by the House of Representatives. On these occasions, the voting again followed strictly party lines. The efforts by the parties to secure the necessary numbers in the Senate for the purpose of voting revealed little consciousness of the Senate as a states house or an independent house of review.

Undesirable Features of Section 57.

149. The Committee considers it to be quite inconsistent with the principle of responsible government at the Commonwealth level that a party or a coalition of parties returned with a clear majority in the House of Representatives and, for that reason, fully entitled and expected to form an effective government, may almost at once be unable to give effect to its policies because of party political opposition in the Senate, unless it either threatens or obtains a double dissolution. One particularly adverse consequence is that a government may choose to forego the implementation of its legislative policy rather than face another general election. In these circumstances, there is a danger that there will be government only in name and such a possibility is harmful to democracy.

150. The Committee, having agreed that the necessity for a double dissolution for the settlement of a deadlock is not in the best interests of responsible government, has also concluded that the section should be modified to obtain a more equitable balance between the conception of the Senate as a chamber of review and a states chamber in a federal system and the principle of responsible government which requires the government in office, by reason of its strength in the House of Representatives, to be answerable to the electors. At the same time, the Committee has only reached this further conclusion after satisfying itself that the problem is of sufficient practical importance in the light of experience and likely developments in Federal parliamentary government.

Practical Importance of the Problems of Section 57.

151. The most potent illustrations of the disruption in government which section 57 is capable of causing have, in the opinion of the Committee, been provided by the relationship which has existed between the two Houses since the introduction of the system of proportional representation in Senate elections.

152. Section 9 of the Constitution empowers the Parliament of the Commonwealth to make laws prescribing the method of choosing senators provided that the method is uniform for all the States. It is the Parliament, and not the Constitution, which has prescribed proportional representation as the Senate election system.

153. In the earliest years of Federation, senators were elected by a system commonly known as "first past the post". The system was abandoned as from the Senate elections in 1919 in favour of the "preferential block majority" method of counting votes. The feature of both the methods

adopted before the introduction of the current method was the dis-proportion between the representation of the parties in the Senate and the number of votes that were obtained by the parties' candidates. For example, after the double dissolution in 1914, Labour won 31 of the 36 Senate seats although the Opposition had obtained almost half the votes that were cast. Three years later Labour failed to win a Senate seat and in 1919 won only one seat. From 1947 to 1950 Labour held 33 seats and the Opposition only three. In these circumstances, not only did the state of the parties in the Senate fail to provide true representation of the general body of electors but debates and other proceedings in the Senate suffered from the lack of an effective opposition.

154. The Committee considers that, even if the present Senate voting system should undergo some modification, it is most unlikely that the Parliament will ever revert to either of the systems which operated in the first forty-nine years of Federation. It may be, therefore, that too much significance should not be attached to the experience of those years.

155. Nevertheless, the Committee considers that experience under the two previous systems unequivocally demonstrates the possibility of deadlocks arising under different systems of electing senators.

156. One of the main reasons why governments on taking office have not had a majority in the Senate is that, under the principle of continuity provided for in sections 13 and 14 of the Constitution, only one-half of the total number of senators retire at any one time. Thus, when a new government comes into office following a general election of members of the House of Representatives, one-half of the senators who will hold their places during the life of the new Parliament, have been elected on the political issues and in the political atmosphere of elections usually held some three years earlier. It is not the Committee's intention to make any recommendation for the abolition of the principle of continuity which has been a feature of second chambers in other countries as well, but it does wish to draw attention to the fact that as long as the system is maintained, there is always a likelihood of a government commanding a majority in the House of Representatives being opposed by a hostile Senate.

Operation of Section 57 Before Proportional Representation.

157. There were examples of governments lacking a majority in the Senate before 1910, as for instance, the Watson and the Reid-McLean Ministries which held office during the life of the second Parliament from 1904 to 1906, but little is to be learnt from the experience of the earliest years of Federation because it was not until the general election in 1910 that the two party division of the Federal Parliament became evident.

158. In 1910, the Labour Party obtained a majority in both Houses. It won 42 of the 75 seats in the House of Representatives and gained all eighteen vacant Senate seats to give it a total of 23 seats compared with thirteen held by the Fusion Party senators.

159. In 1913, the Labour Government was narrowly defeated at the general election for members of the House of Representatives but it continued in control of the Senate mainly by reason of the complete success enjoyed at the previous elections for senators. The Labour Party also won eleven seats compared with the Liberal Party's seven seats at the Senate elections held in 1913 simultaneously with the election for the House of Representatives because, although the Liberals gained more votes than Labour, their success was limited to majorities in two States. It was during the life of this, the fifth Parliament, that Liberal Prime Minister Cook obtained the first double dissolution.

160. As mentioned earlier, the change in the method of electing senators to the block preferential system in 1919 did not have any significant effects. Until the abolition of this system of voting in 1948 the number of seats won by the parties showed little relationship to the number of votes obtained. For example, in 1925 the Nationalist and Country Parties together won all the vacant Senate seats. In 1943, Labour gained all the vacant seats.

161. It was perhaps from luck as much from anything else that during this period governments usually had majorities in the Senate as well as in the House of Representatives. However, in the election held in 1929 following the defeat of the Bruce-Page Government, the Scullin Labour Government took office. There was no Senate election since the previous elections for senators had been held less than a year earlier. The Government was greatly outnumbered by the United Australia Party-Country Party Opposition in the Senate during the entire period of its office to the end of 1931. Numerous bills were defeated in the Senate but they were not presented for the second time.

162. In 1940, the United Australia Party-Country Party Government was returned to office with a narrow majority. Nevertheless, on this occasion Labour candidates won only three seats in the Senate giving a total of seventeen seats compared with nineteen held by the Government. In 1941, following the resignation of the Fadden Government, the Curtin Labour Government took office with support in the House of Representatives from two Independents. It was not until July, 1944, several months after the commencement of the seventeenth Parliament, that the Labour Government obtained a majority in both Houses.

163. It is clear, therefore, that the prospect of a deadlock occurring between the Senate and the House of Representatives is not peculiarly a feature of the current method of electing senators and, further, that nothing but the alignment of parties in the Senate caused or threatened to cause a deadlock situation to arise between the two Houses.

Position Since the Adoption of Proportional Representation.

164. The present system of voting for Senate candidates was adopted in 1948 in the hope of gaining representation in the Senate more in proportion to the votes cast for candidates of the various parties.

165. The following is a summary account of the procedure for counting votes under the system:—

The total number of first preference votes for all candidates is divided by one more than the number of candidates to be elected, and the resulting quotient, plus one, is taken as the quota necessary for each candidate to obtain in order to become elected. When the number of first preference votes received by an elected candidate is greater than the quota, and there are still vacancies to be filled, his votes in excess of the quota (surplus votes) are transferred in the following manner to the continuing candidates in proportion to the voters' preferences. The number of the elected candidate's surplus votes is divided by the number of his first preference votes, the resulting fraction representing the transfer value of his surplus votes. The totals of the elected candidate's ballot papers, after the latter have been arranged in parcels according to the next available preference for continuing candidates, are multiplied by the transfer value. This determines the number of the elected candidate's votes to be transferred to each continuing candidate, the method being to transfer, after random selection, the appropriate number of ballot papers which bear the next available preference for that candidate.

After the surplus votes of all candidates elected on the count of first preferences have been so transferred, any continuing candidate who has received a number of votes equal to or greater than the quota is elected.

This procedure of the transfer of surplus votes of elected candidates is continued, while there are vacancies to be filled, until the stage is reached where no continuing candidate has received the quota of votes. Then the candidate with the lowest votes is excluded, and the whole of his ballot papers are transferred to the continuing candidates according to preferences. Any continuing candidate thereby obtaining the quota is elected, and if there are still vacancies his surplus votes are transferred.

The process of exclusion and transfer of ballot papers is repeated until remaining vacancies are filled by candidates obtaining the quota, or, in respect of the last vacancy, by obtaining a majority of votes, even if this is less than the quota.

When transferring the surplus votes of elected candidates other than those elected on the count of first preference votes, only those ballot papers which have been transferred to the elected candidates at the last preceding count are considered. Similarly, in the transfer of surplus votes of a candidate elected during the exclusion procedure, only the ballot papers transferred from the candidate last excluded are taken into account.

The exclusion of the candidate with the lowest votes and the distribution of his ballot papers operate also immediately after the count of first preference votes, where no candidate has obtained the quota.

—(*Year Book of the Commonwealth of Australia*, No. 38, at pages 82-83.)

166. In an election for five senators the proportion of the formal votes which a party's candidates would usually, though not always, be required to obtain at such an election to secure the representation indicated, is considered to be approximately as follows:—

	Of the Votes per cent.
For one seat	16.67
For two seats	33.34
For three seats	50.01
For four seats	66.67
For five seats	83.34

—(J. R. Odgers, *Australian Senate Practice*, Second Edition, at page 26.)

167. The Committee considers that experience since the inception of the current system of voting for Senate elections has shown that the likelihood of a deadlock arising is much greater than in the past and could become a recurrent feature of future Parliaments. Although proportional representation produces results more in accordance with the number of votes obtained by the candidates of the respective parties than under any other system, political opinion is normally so nearly evenly divided in Australia that the members of the opposing parties in the Senate are quite likely to be equal or nearly equal in number. By reason of section 23 of the Constitution, questions in the Senate are determined by a majority of votes and when the votes are equal the question passes in the negative.

168. The present Liberal-Country Party Coalition has held office since the general election in December, 1949, that is, for a period of more than nine years. Besides the election in 1949 the Government was successful at the three general elections occurring before the last general election in November, 1958. Leaving aside the members for the Territories, who only possess limited voting rights, the Government was not returned on any occasion with a majority in the House of Representatives of less than seven. At the general election in December, 1955, its majority was 28. Yet throughout this period the Government did not at any time have a nominal majority of more than

tour in the Senate and this majority endured for only two years. For the remainder of the time the Government had a Senate majority of no more than two or was without a majority. The double dissolution of 1951 and the reverses suffered by the Government in the Senate in 1958, were not, therefore, surprising. A majority which is as small as two may, in practice, be insufficient on occasions to ensure the passage of legislation because, as the proceedings in the Senate during 1958 demonstrated, there is always the risk of senators being absent for ill health or other reasons in circumstances in which there can be no assurance that a "pair" will be granted.

169. The impact of the new system of voting was immediately obvious at the elections in 1949 at which seven senators were required to be elected for each State as a result of the increase in the size of the Parliament. The Liberal-Country Party Coalition obtained a substantial majority of the seats in the House of Representatives. It also won 23 of the 42 vacant places in the Senate compared with Labour's nineteen seats. This was in marked contrast to the sixteen seats won by Labour compared with three won by the Opposition at the previous elections. As a result, the position of the Houses as at 1st July, 1950, was as follows:—

NINETEENTH PARLIAMENT, 1ST JULY, 1950.

State.	Senators.		Representatives.	
	Government.	Labour.	Government.	Labour.
New South Wales	4	6	24	23
Victoria	4	6	20	13
Queensland	7	3	15	3
South Australia	3	7	6	4
Western Australia	4	6	5	3
Tasmania	4	6	4	1
Total	26	34	74	47

170. If the system of proportional representation had been adopted for the Senate elections in 1946 the position would have resulted in the Labour strength in the Senate as at 1st July, 1950, being reduced by four and the Liberal-Country Party members increased by four thus giving an equally divided House.

171. It is of some interest that shortly before the double dissolution in 1951, the Government introduced the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill in the belief that following a double dissolution it could well happen that the government and the opposition would be returned in the Senate in equal numbers. The alteration proposed in the Bill was to provide that following a double dissolution there should be two elections for senators in each State, one for those to fill six year vacancies and the other to fill three year vacancies. The Bill, after passing through the Representatives, was referred by the Senate to a Select Committee for inquiry and report. The Government did not persist with the measure.

172. As it eventuated, in the elections for the two Houses following the double dissolution of 1951, the Government was returned with a majority in both Houses, the Senate majority being four. A small reduction in the number of votes cast for the Government candidates in Queensland and Western Australia would have brought about an equally divided Senate. The position after the general election was as follows:—

TWENTIETH PARLIAMENT, 28TH APRIL, 1951. (DATE OF ELECTION).

State.	Senators.		Representatives.	
	Government.	Labour.	Government.	Labour.
New South Wales	5	5	23	24
Victoria	5	5	18	15
Queensland	6	4	14	4
South Australia	5	5	5	5
Western Australia	6	4	5	3
Tasmania	5	5	4	1
Total	32	28	69	52

173. It was necessary to hold Senate elections in 1953 during the life of the twentieth Parliament because the terms of six senators elected for the shorter terms following the double dissolution expired at the end of June in that year. Elections were held for 32 vacant places and resulted in seventeen seats being won by Labour compared with fifteen seats won by the Government parties. As a result, the Government's over-all majority in the Senate was reduced to two for the

remainder of the life of the Parliament. This position remained unaltered after the general election for members of the House of Representatives in May, 1954, at which the Government was again returned, this time with a majority of seven. There were no Senate elections on this occasion.

174. The Government was returned again at the general election held in December, 1955. The Government parties also succeeded in winning seventeen of the 30 Senate vacancies at the elections for senators which, on this occasion, were held simultaneously with the House of Representatives election, the House of Representatives full maximum term of three years not having expired as at the date of the elections. However, Labour gains made at the preceding Senate elections in 1953, though small, had a decisive effect and the Government lost its majority in the Senate. The state of the parties in the twenty-second Parliament at 1st July, 1956, was—

TWENTY-SECOND PARLIAMENT, 1ST JULY, 1956.

State.	Senators.			Representatives.	
	Government.	Labour.	Democratic Labour.	Government.	Labour.
New South Wales	5	5	..	25	21
Victoria	4	5	1	23	10
Queensland	6	4*	..	13	5
South Australia	5	5	..	5	6
Western Australia	5	5	..	6	3
Tasmania	5	4	1	3	2
Total	30	28*	2	75	47

* In 1957, a Queensland senator ceased to be a member of the Labour Party and became a member of the Queensland Labour Party.

175. At the last elections for senators in November, 1958, Government senators won sixteen of the 32 vacant places and the state of the Senate as from 1st July, 1959, has been as follows:—

	Senators.
Government	32
Labour	26
Democratic Labour	2
Total	60

176. Thus the Government has a clear majority of four in the Senate. The next elections of senators will, in the ordinary course of events, occur late in 1961 or early in 1962 when there will be no less than seventeen Government held places falling vacant compared with thirteen held by Opposition senators. The loss of two seats by the present Government could result in an evenly divided Senate again in 1962.

177. The Committee's survey of the relative party strengths of the two Houses during the current decade leaves it in no doubt that under the system of proportional representation in Senate elections there is usually a very real prospect of a party or coalition of parties successful at the most recent general election having to take up the reins of government without a majority in the Senate.

178. Accordingly, the Committee considers that section 57 needs to be amended in such a way as to maintain the principle of responsible government and to ensure the precedence of national interests over other interests. The Committee has sought a modification of the structure of section 57 rather than more drastic solutions which could involve, for example, the imposition of restrictions on the power of the Senate to reject bills passed by the House of Representatives. The Committee thinks that the legal power of the Senate in relation to legislation, which is set out in section 53 of the Constitution, need not be altered, provided section 57 is suitably amended to achieve the purposes which the Committee has in mind.

PROPOSED AMENDMENTS TO SECTION 57.

Conditions of Deadlock on Financial Measures.

179. The Committee's first recommendation in relation to section 57 is that a distinction should be drawn between proposed laws which impose taxation or appropriate revenue or moneys for the ordinary annual services of the government, and other proposed laws. The Senate is precluded, by section 53 of the Constitution, from amending proposed laws of the first-mentioned category but it has a constitutional right to amend other proposed laws except that it may not amend a proposed law so as to increase any proposed charge or burden on the people.

180. At present a deadlock arises under section 57 only when the Senate for the second time rejects, fails to pass or passes with amendments to which the House of Representatives will not agree, a proposed law which has been passed for a second time by the House of Representatives after an interval of three months.

181. The provision of finance by the Parliament is essential for the maintenance of responsible government. The Commonwealth is called upon to provide moneys for multifarious purposes; and the inability of the government to obtain the passage of its financial legislation, except perhaps by use of the leisurely processes of the existing section 57, could produce most unfortunate and harmful consequences, particularly in view of the interlocking of the finances of the Commonwealth and the States. Section 83 of the Constitution inhibits the withdrawal of money from the Treasury of the Commonwealth except under appropriation made by law.

182. The Committee considers that it should not be necessary for the House of Representatives to have to pass financial measures for a second time following a failure to obtain the approval of the Senate to the measure submitted in the first instance. It also considers that the time which has to elapse under the provisions of the present section before a deadlock arises is unduly long in the case of financial measures.

183. The Committee recommends that a deadlock should be deemed to arise in respect of a proposed law dealing with financial matters if, during any session of the Parliament, the Senate has not, at the expiration of thirty days from the receipt of the measure from the House of Representatives, passed the proposed law or the proposed law with any amendments it has requested and which the House of Representatives has accepted. At the end of the period of thirty days it should be immediately possible to initiate action with a view to obtaining a resolution of the deadlock.

184. A draft sub-section to give effect to the Committee's recommendations would read substantially as follows:—

(2.) A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where the House of Representatives, in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of thirty days after the date on which the proposed law is transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended.

The above draft sub-section does not in terms provide for the acceptance by the House of Representatives of requested amendments. This matter is, however, dealt with below in paragraphs 196-200.

Conditions of Deadlock on other Proposed Laws.

185. The Committee considers that a deadlock should not arise in respect of other proposed laws unless the House of Representatives passes for the second time a bill which the Senate has resisted and the Senate is given a further opportunity to consider the measure. In this respect, therefore, it does not consider there should be any change in the present position.

186. But there are substantial doubts as to the meaning of some of the language now used in the first paragraph of section 57 which provides the conditions to be fulfilled before the House of Representatives can pass a disputed bill for the second time or the Governor-General may dissolve both Houses following continued resistance by the Senate.

187. If the Senate having received a bill from the House of Representatives rejects the bill or passes it with amendments unacceptable to that House, the House of Representatives may proceed to pass the measure for a second time. The House of Representatives may also proceed to pass the bill again if the Senate "fails to pass it". On the second occasion of a failure to pass the Governor-General may also dissolve both Houses. It is not clear, in some circumstances, as to the stage at which the Senate can be considered to have failed to pass the bill.

188. In 1951, the view was taken, in the prevailing circumstances, that the Senate had failed to pass a bill which it had not rejected but had referred to a Select Committee for consideration and report.

189. A kindred difficulty arises by reason of the fact that the House of Representatives may proceed to pass a bill for a second time if the Senate "passes it with amendments to which the House of Representatives will not agree". The Governor-General is also empowered to dissolve both Houses if the Senate having received a bill from the House of Representatives for the second time "passes it with amendments to which the House of Representatives will not agree". Doubts arise as to the stage in the proceedings of the House of Representatives it can be considered that that House "will not agree".

190. This question also arose in 1951 after the Senate amended the Commonwealth Bank Bill which had first been passed in the House of Representatives.

191. A further difficulty of meaning arises from the expression "after an interval of three months", the period required to elapse before the House of Representatives can pass a bill for the second time as a step in the procedure before a disagreement is finally established. There is room for various opinions. For example, does time commence to run from the date on which the House of Representatives first passes the bill or at some later stage, as for instance, when the Senate rejects the bill or fails to pass it?

192. The Committee considers that certainty is essential in the operation of the procedural requirements of the section, and that whilst the House of Representatives, consistently with the constitutional powers of the Senate, should be required to pass for the second time proposed laws which do not deal with the financial matters of the kind already mentioned, the section should be amended to leave no doubt as to when the conditions necessary for the establishment of a deadlock have been fulfilled. At the same time, it is important that the Senate be given adequate opportunity to consider a proposed law which has been transmitted to it by the House of Representatives.

193. The Committee recommends that conditions of deadlock should be deemed to arise if—

(1) during a session, the Senate has not at the expiration of 90 days after receiving the proposed law from the House of Representatives, passed the law as transmitted to it or the proposed law with any amendments in respect of which both the Senate and the House of Representatives are in agreement;

(2) the House of Representatives again passes the proposed law in the same or the next session either with or without any amendments made by the Senate; and

(3) after again receiving the proposed law, the Senate either again rejects the proposed law, or has not at the expiration of 30 days during the session, passed either the proposed law or the proposed law with amendments which the House of Representatives has found acceptable.

194. In substance, therefore, the Senate must be allowed at least 90 days to make up its mind on a bill which it has received for the first time from the House of Representatives. That period of time must elapse before the House of Representatives again passes the bill even though the Senate should reject the bill within the prescribed time. Upon the submission of the disputed measure to the Senate for the second time, the conditions of deadlock arise immediately upon rejection of the measure, or otherwise at the expiration of a period of 30 days.

195. A draft sub-section to give effect to the Committee's recommendations is as follows:—

(3.) A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law other than a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where—

(a) the House of Representatives, in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of ninety days after the date on which the proposed law is so transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended; and

(b) the House of Representatives, in the same or the next session, again passes the proposed law, either as originally passed by that House or with such amendments only as are amendments that were made, requested or agreed to by the Senate, and transmits it to the Senate for the concurrence of the Senate, and—

(i) at the expiration of a period of thirty days after the date on which the proposed law as passed again by the House of Representatives is transmitted to the Senate, the Senate has not passed the proposed law and the session in which the proposed law was so passed again has not ended; or

(ii) before the expiration of that period,

the Senate rejects the proposed law.

The above draft seems, on its face, to require the Senate to pass a proposed law transmitted to it without amendment. In paragraphs 199-200 hereunder, however, it is made clear that the deadlock conditions do not apply in cases in which the Senate and the House of Representatives are in agreement as to amendment.

Amendments and Suggested Amendments to Proposed Laws passed by the House of Representatives.

196. It has been indicated in paragraphs 183-184 above, in dealing with proposed laws which the Senate may not amend, that where the Senate, in accordance with section 53 of the Constitution, requests an amendment to the House of Representatives and that House concurs with the suggestion and makes the amendment, there should be no call for the application of section 57.

197. Moreover, amendments made by the House of Representatives upon return of a bill with a request for amendment may differ from the amendments requested by the Senate under section 53 of the Constitution. The Committee considers that the Senate should, in such circumstances, if it wishes, not be prevented from passing the bill in its original form and so avoid conditions of deadlock.

198. Under the Committee's proposal, a deadlock arises in relation to bills which the Senate may not amend at the expiration of 30 days from the date of the receipt of the bill from the House of Representatives. Since part of this time can be taken up in awaiting a reply from the House of Representatives to a request for an amendment even though the Senate might not intend to press the request if it were rejected, a situation could occur where the conditions of deadlock arose merely because the Senate had not received a reply from the House of Representatives. In these circumstances, it is recommended that if the Senate should return the proposed law to the House of Representatives not less than fourteen days before the expiration of the period of 30 days and does not have the proposed law returned to it at least seven days before the expiration of the period of 30 days, a deadlock shall not be deemed to arise.

199. As to other proposed laws, it should also be made plain that section 57 is not involved where the House of Representatives and the Senate are not in dispute as to an amendment made, or for that matter suggested, by the Senate in the exercise of its constitutional power. Again, the Committee considers that the Senate should not be precluded from passing the bill in its original form if the House of Representatives should further alter the proposed law which the Senate has amended and the Senate finds the further alterations unacceptable.

200. Draft sub-sections which will give effect to the foregoing are as follows:—

(12.) For the purposes of this section, the Senate shall be taken to have passed a proposed law before the expiration of a particular period where, before the expiration of that period, the Senate passed the proposed law with amendments, if every such amendment had been made by the House of Representatives, or has been agreed to by the House of Representatives either before or after the expiration of that period.

(13.) For the purposes of this section, the fact that the Senate did not pass a proposed law before the expiration of a period referred to in this section shall be disregarded if—

(a) not less than fourteen days before the expiration of that period, the Senate returned the proposed law to the House of Representatives in pursuance of section fifty-three of this Constitution; and

(b) the House of Representatives did not, at least seven days before the expiration of that period, return the proposed law, with or without amendments, to the Senate.

Settlement of a Deadlock.

201. When a deadlock has arisen the only action which the government can now obtain with a view to settlement is a double dissolution of the two Houses granted by the Governor-General.

(1) *Double Dissolution.*

202. The Committee recognizes that, in some circumstances, a double dissolution could be a desirable course of action, as for example, in the position which prevailed in 1914 when the Government did not have a working majority in either House. It is proposed, therefore, to retain provision for a double dissolution substantially as the section at present provides, except that it should be expressly provided that the Governor-General should act on the advice of the Federal Executive Council.

(2) *Joint Sitting without Dissolution.*

203. The Committee's further recommendation, which it makes in the light of its observations made in paragraphs 136 and 145-178 of this Chapter, is that a government should have the choice of possible courses of action following the occurrence of a deadlock which will not necessitate immediate resort to electors who, only at the most recent election, will have been responsible for the government holding office.

204. The Committee recommends that, upon a deadlock arising, it should be within the power of the Governor-General, acting on the advice of the Federal Executive Council, to convene a joint sitting of the members of the two Houses as an alternative to double dissolution. The joint sitting should deliberate and vote upon the proposed law in dispute together with any amendments which have been made by one House but not agreed to by the other.

205. The Committee recommends that a disputed bill should not be affirmed at such a joint sitting unless it is approved by an absolute majority of the total number of members of the two Houses. This is the position which at present obtains if a joint sitting should be held after a double dissolution.

206. Although the Committee does not think it is likely to happen, apart from rare occasions, it is possible that cases will occur of a closely balanced conflict between Commonwealth and State interests to which expression is given in the Senate. In this event, the attainment of a simple majority alone would perhaps not sufficiently recognize the State interest involved or the constitution of the Senate by an equal number of senators for each State. The Committee has sought a solution which will be consistent with the Senate's position, in the light of the proposal to fix a maximum number of senators and the continuing likelihood of numbers in the Senate being fairly evenly shared by the parties. In the opinion of the Committee, the Senate's position can be preserved by expressly recognizing the composition of the Senate by senators for each of the States.

207. It is recommended that a disputed measure must also be affirmed at a joint sitting by at least one-half of the total number of members of the two Houses chosen for and in a State in at least one-half of the States.

208. The imposition of the double requirement as to voting, in order to obtain the affirmation of a disputed measure at a joint sitting, will mean that a government which is well down in numbers in the Senate will usually be unlikely to obtain the passage at the joint sitting of the measure which has given rise to the deadlock but, where the Senate is equally divided, the formula appears to offer a reasonable prospect of an equitable solution. To have set a more rigid second voting requirement, as for example, to need at least one-half of the votes of the total number of members in and for a majority of States instead of one-half of the States, would, in the opinion of the Committee, after an analysis of the voting on several major measures introduced in the Commonwealth Parliament since 1950, usually make the holding of a joint sitting purposeless.

209. It may become apparent, even before a vote is taken, that there is no possibility of the joint sitting succeeding. Moreover, discussion could be prolonged at a joint sitting with a view to avoiding the possibility of a double dissolution occurring. Hence the Committee also recommends that provision be made which will empower the Governor-General in Council to terminate a joint sitting, and further proceed to dissolve both Houses.

210. Sub-sections to give effect to the above-mentioned recommendations would read substantially as follows:—

(4.) Where a deadlock is deemed to arise between the two Houses in relation to a proposed law, the Governor-General in Council may—

(a) convene a joint sitting of the members of the Senate and of the House of Representatives to deliberate and vote together upon the proposed law as passed by the House of Representatives or, if it was passed more than once by that House, as last passed by that House, and upon any amendments of the proposed law that have, since the proposed law was so passed or last passed, been made by one House but have not been agreed to by the other House; or

(b) without convening such a joint sitting, dissolve the Senate and the House of Representatives simultaneously.

(5.) If the Governor-General in Council convenes a joint sitting of the members of the two Houses under the last preceding sub-section and the proposed law is affirmed, with or without any of the amendments referred to in the last preceding sub-section, at the joint sitting, the proposed law, as so affirmed, shall be deemed to have been duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

(6.) A proposed law shall be deemed to be affirmed, with or without any amendment, at a joint sitting of members of the two Houses if it is so affirmed—

(a) by an absolute majority of the total number of the members of the two Houses; and

(b) in the case of each of at least one-half of the States, by at least one-half of the total number of the members of the two Houses chosen in or for the State.

(7.) The Governor-General in Council may at any time terminate a joint sitting convened under sub-section (4.) of this section (whether or not the joint sitting has voted on the proposed law) and, where a joint sitting is so terminated without having affirmed the proposed law, with or without any amendment, the Governor-General in Council may dissolve both Houses of the Parliament simultaneously.

(8.) A dissolution of the two Houses under sub-section (4.) or sub-section (7.) of this section shall not take place within six months before the date of expiry of the House of Representatives by effluxion of time.

(3) *General Election without a Double Dissolution.*

211. The Committee also proposes a second alternative course of action to a double dissolution which simply consists of utilizing an approaching general election as a stage in the settlement of a deadlock. It seems to the Committee that, if the government is unable to obtain the passage of its legislation through the Senate and a general election occurs within twelve months of the occurrence of a deadlock, the electors should remain sufficiently seised of the issues when casting their votes at the election for members of the House of Representatives.

212. It is recommended that if a general election for members of the House of Representatives occurs within twelve months of a deadlock first arising and the House of Representatives, in the new Parliament, again passes the proposed law which was the subject of the dispute, and the dispute still persists, the question should be dealt with in the same manner as the continuance of a deadlock following a double dissolution. That is to say, a joint sitting should be convened and if the proposed law, together with any amendments which have been passed by the one House but not agreed to by the other, is affirmed by an absolute majority of the total number of members of the two Houses, the proposed law should be presented for the Royal assent.

213. Usually, although not invariably, a general election of members of the House of Representatives is accompanied by elections for half the total number of senators. If the general election for the House of Representatives occurs within twelve months of a deadlock arising, the government which is formed as a result can, in the opinion of the Committee, properly claim the right to give expression to the confidence which the electors place in it, even though elections for senators did not take place at the same time as the general election.

214. However, in making its recommendation, the Committee has been influenced by a further proposal, which it will deal with in Chapter 5, that the places of one-half of the number of senators should become vacant at each general election of members of the House of Representatives instead of senators having fixed six year terms with one-half retiring every three years. Although the Committee's present recommendation is not conditional upon acceptance of the further recommendation, it would obviously be a better test of public opinion if the elections were simultaneous.

215. The Committee considers that its present proposal is consistent both with the interests of responsible government and with the principle of continuity of existence of the Senate which, of course, a double dissolution violates. The most recently elected senators, that is those senators whose terms commenced during the life of the Parliament in which the deadlock occurred, will retain their places whereas the senators whose terms commenced in the life of the preceding Parliament will, even if there should be no change in the constitutional provisions as to senators' terms, ordinarily have to face the electors at the same time as members of the House of Representatives.

Joint Sitting following a Double Dissolution or a General Election.

216. Section 57 now provides that if, following a double dissolution, the House of Representatives again passes the measure which has been in dispute and the Senate again "rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree", the Governor-General may convene a joint sitting of the members of the two Houses to deliberate and vote upon the bill and any amendments to the bill which are in dispute. If the proposed law and any of the amendments are affirmed by an absolute majority of the total number of members of the two Houses then the bill is deemed to have been duly passed and must be submitted for the Queen's assent.

217. There has not been a joint sitting after a double dissolution because the intervening election results have removed any doubts as to how the dispute between the two Houses would be resolved. But some machinery is necessary and the Committee recommends the retention of the substance of this method of dealing with a deadlock which persists even though there has been a double dissolution or a general election has occurred.

218. It considers, however, that the House of Representatives should be enjoined to act promptly once the electors have been consulted and that the House of Representatives should be required to pass again the proposed law within six months of the commencement of the first session of the Parliament following a double dissolution or a general election.

219. Consistently with its observations in paragraphs 186-192 of this Chapter, the Committee considers that amendments should also be made to overcome the difficulty caused by use of the expressions "fails to pass" and "amendments to which the House of Representatives will not agree".

220. It recommends that it should be competent for the Governor-General in Council to convene a joint sitting upon the rejection of the proposed law by the Senate or otherwise upon the expiration of 30 days during session from the date on which the bill was transmitted to the Senate.

221. It should also be made plain that a joint sitting should not be convened where the Senate has obtained the concurrence of the House of Representatives to its requests for amendment or amendments made to bills which have been transmitted to it by the House of Representatives. The observations and draft provisions set out in paragraphs 196-200 above also apply to the proposed law being submitted again by the House of Representatives after a double dissolution or a general election.

222. Since the ordinary functioning of Parliament is impossible while a joint sitting continues, it is also recommended that the Governor-General in Council be empowered to terminate a joint sitting.

223. It is further recommended that questions of procedure arising at either joint sitting contemplated by the proposed new section be determined by a majority of the members present.

224. The following draft sections are inserted to illustrate the type of provision which would be made to give effect to the Committee's above-mentioned recommendations:—

(9.) Where a dissolution of the two Houses takes place under sub-section (4.) or sub-section (7.) of this section, or the dissolution or expiry of the House of Representatives next following a deadlock between the two Houses occurs within one year after the deadlock has arisen and, in the next session of the Parliament and within six months after the commencement of that session, the House of Representatives again passes the proposed law, either as originally passed by the House of Representatives or with such amendments only as are amendments that were at any time made, requested or agreed to by the Senate, and transmits it to the Senate for the concurrence of the Senate, and—

(a) at the expiration of a period of thirty days after the date on which the proposed law as passed again by the House of Representatives is transmitted to the Senate, the Senate has not passed the proposed law and the session in which the proposed law was so passed again has not ended; or

(b) before the expiration of that period the Senate rejects the proposed law,

the Governor-General in Council may convene a joint sitting of the members of the two Houses to deliberate and vote together upon the proposed law as last passed by the House of Representatives and upon any amendments of the proposed law that have, since the proposed law was last passed by the House of Representatives, been made by one House but have not been agreed to by the other House.

(10.) If, at the joint sitting, the proposed law is affirmed, with or without any such amendments, by an absolute majority of the total number of the members of the two Houses, the proposed law, as so affirmed, shall be deemed to have been duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

(11.) The Governor-General in Council may at any time terminate a joint sitting convened under sub-section (9.) of this section, whether or not the joint sitting has voted on the proposed law.

(12.) For the purposes of this section, the Senate shall be taken to have passed a proposed law before the expiration of a particular period where, before the expiration of that period, the Senate passed the proposed law with amendments, if every such amendment had been made by the House of Representatives, or has been agreed to by the House of Representatives either before or after the expiration of that period.

(13.) For the purposes of this section, the fact that the Senate did not pass a proposed law before the expiration of a period referred to in this section shall be disregarded if—

(*a*) not less than fourteen days before the expiration of that period, the Senate returned the proposed law to the House of Representatives in pursuance of section fifty-three of this Constitution; and

(*b*) the House of Representatives did not, at least seven days before the expiration of that period, return the proposed law, with or without amendments, to the Senate.

(14.) Questions of procedure arising at a joint sitting of members of the two Houses of the Parliament under this section shall be determined by a majority of the members present.

Proposed Draft Section 57.

225. It is now convenient to set out in full the draft section embodying the Committee's recommendations. It is as follows:—

Disagreement between the Houses.

57.—(1.) Where, in accordance with the provisions of sub-section (2.) or sub-section (3.) of this section, a deadlock is deemed to arise between the two Houses of the Parliament in relation to a proposed law the provisions of sub-sections (4.) to (14.) of this section shall apply.

(2.) A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where the House of Representatives, in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of thirty days after the date on which the proposed law is transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended.

(3.) A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law other than a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where—

(a) the House of Representatives in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of ninety days after the date on which the proposed law is so transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended; and

(b) the House of Representatives, in the same or the next session, again passes the proposed law, either as originally passed by that House or with such amendments only as are amendments that were made, requested or agreed to by the Senate, and transmits it to the Senate for the concurrence of the Senate, and—

(i) at the expiration of a period of thirty days after the date on which the proposed law as passed again by the House of Representatives is transmitted to the Senate, the Senate has not passed the proposed law and the session in which the proposed law was so passed again has not ended; or

(ii) before the expiration of that period,

the Senate rejects the proposed law.

(4.) Where a deadlock is deemed to arise between the two Houses in relation to a proposed law, the Governor-General in Council may—

(a) convene a joint sitting of the members of the Senate and of the House of Representatives to deliberate and vote together upon the proposed law as passed by the House of Representatives or, if it was passed more than once by that House, as last passed by that House, and upon any amendments of the proposed law that have, since the proposed law was so passed or last passed, been made by one House but have not been agreed to by the other House; or

(b) without convening such a joint sitting, dissolve the Senate and the House of Representatives simultaneously.

(5.) If the Governor-General in Council convenes a joint sitting of the members of the two Houses under the last preceding sub-section and the proposed law is affirmed, with or without any of the amendments referred to in the last preceding sub-section, at the joint sitting, the proposed law, as so affirmed, shall be deemed to have been duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

(6.) A proposed law shall be deemed to be affirmed, with or without any amendment, at a joint sitting of members of the two Houses if it is so affirmed—

(a) by an absolute majority of the total number of the members of the two Houses; and

(b) in the case of each of at least one-half of the States, by at least one-half of the total number of the members of the two Houses chosen in or for the State.

(7.) The Governor-General in Council may at any time terminate a joint sitting convened under sub-section (4.) of this section (whether or not the joint sitting has voted on the proposed law) and, where a joint sitting is so terminated without having affirmed the proposed law, with or without any amendment, the Governor-General in Council may dissolve both Houses of the Parliament simultaneously.

(8.) A dissolution of the two Houses under sub-section (4.) or sub-section (7.) of this section shall not take place within six months before the date of expiry of the House of Representatives by effluxion of time.

(9.) Where a dissolution of the two Houses takes place under sub-section (4.) or sub-section (7.) of this section, or the dissolution or expiry of the House of Representatives next following a deadlock between the two Houses occurs within one year after the deadlock has arisen and, in the next session of the Parliament and within six months after the commencement of that session, the House of Representatives again passes the proposed law, either as originally passed by the House of Representatives or with such amendments only as are amendments that

were at any time made, requested or agreed to by the Senate, and transmits it to the Senate for the concurrence of the Senate, and—

(a) at the expiration of a period of thirty days after the date on which the proposed law as passed again by the House of Representatives is transmitted to the Senate, the Senate has not passed the proposed law and the session in which the proposed law was so passed again has not ended; or

(b) before the expiration of that period the Senate rejects the proposed law,

the Governor-General in Council may convene a joint sitting of the members of the two Houses to deliberate and vote together upon the proposed law as last passed by the House of Representatives and upon any amendments of the proposed law that have, since the proposed law was last passed by the House of Representatives, been made by one House but have not been agreed to by the other House.

(10.) If, at the joint sitting, the proposed law is affirmed, with or without any such amendments, by an absolute majority of the total number of the members of the two Houses, the proposed law, as so affirmed, shall be deemed to have been duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

(11.) The Governor-General in Council may at any time terminate a joint sitting convened under sub-section (9.) of this section, whether or not the joint sitting has voted on the proposed law.

(12.) For the purposes of this section, the Senate shall be taken to have passed a proposed law before the expiration of a particular period where, before the expiration of that period, the Senate passed the proposed law with amendments, if every such amendment had been made by the House of Representatives, or has been agreed to by the House of Representatives either before or after the expiration of that period.

(13.) For the purposes of this section, the fact that the Senate did not pass a proposed law before the expiration of a period referred to in this section shall be disregarded if—

(a) not less than fourteen days before the expiration of that period, the Senate returned the proposed law to the House of Representatives in pursuance of section fifty-three of this Constitution; and

(b) the House of Representatives did not, at least seven days before the expiration of that period, return the proposed law, with or without amendments, to the Senate.

(14.) Questions of procedure arising at a joint sitting of members of the two Houses of the Parliament under this section shall be determined by a majority of the members present.

CHAPTER 5.—TERMS OF SENATORS.

Recommendation of the Committee.

226. The Committee has recommended (1958 Report, paragraph 49) that the Constitution be altered to omit the provision now made for senators to be chosen for terms of six years and to provide instead that senators should hold their places until the expiry or dissolution of the second House of Representatives after their election, unless the Senate should be earlier dissolved under the provisions of section 57 of the Constitution.

Constitutional Provisions.

227. Section 7 of the Constitution provides, in part, that senators shall be chosen for a term of six years. The relevant paragraph reads—

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

228. The third paragraph of section 13 prescribes the date of commencement of senators' terms. It states that the term of service of a senator should begin on the first day of July following the date of his election. After a dissolution of the Senate, however, which may occur under section 57 of the Constitution, the term of a senator is taken to begin on the first day of July preceding the day of his election.

229. Sections 13 and 14 of the Constitution provide for the retirement of senators by rotation instead of all retiring at the one time.

230. The first paragraph of section 13 requires, in substance, that one-half, or as near to one-half as practicable, of the total number of places in the Senate, should become vacant every three years. It reads—

As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

231. Section 14 makes provision for further rotation of senators following a change in the total number of senators for a State by empowering the Parliament of the Commonwealth to "make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation."

Convention Discussions on the Terms of Senators.

232. It was agreed as early as at the conclusion of the Convention Debates in 1891 that senators should be chosen for six year terms, that is to say, for a period twice the maximum term of the House of Representatives. The draft Commonwealth of Australia Bill also provided, at the same time, for the retirement of one-half of the number of senators every three years. A later proposal to reduce senators' terms from six to four years was negatived in the Adelaide Debates in 1897 but otherwise there was no formal attempt to change the proposals as they appeared in the Bill of 1891.

233. In noting that the legal term of a senator was twice the potential term of a member of the House of Representatives, Quick and Garran stated that—

The reason for this difference in length of term is that, in theory, the Senate is designed to be a continuous body, and that Senators ought to have a longer duration of membership, in order to give them greater independence and better opportunities for deliberation in dealing with proposed legislation, so that they may, if necessary, even protect the people themselves.

—(*The Annotated Constitution of the Australian Commonwealth*, at page 422.)

As Sir Henry Parkes said, when first putting to the Convention in 1891 the proposals for a Commonwealth, it was intended to have a Senate—

securing to the body itself a perpetual existence combined with definite responsibility to the electors.

—(*Convention Debates*, Sydney, 1891, at page 23.)

Bicameral Legislatures.

234. The Committee is of opinion that the existing structure of the Federal Parliament requires the Senate to retain the distinguishing characteristic of continuous existence so commonly found in countries where upper houses still exist. The Committee also believes that senators should have longer terms than members of the House of Representatives in the system of two chamber government. Accordingly, it acknowledges the considerations which were to the fore during the Convention Debates in framing the provisions dealing with the terms of senators.

235. Nevertheless, as long as the principle of continuity is maintained and senators can be assured of a term of service extending over the entire terms of two successive Parliaments, there is, in the opinion of the Committee, no compelling reason why senators should have fixed terms of six years.

Disadvantages of the Allotment of Fixed Terms for Senators.

236. There are, to the Committee's way of thinking, reasons why one-half the number of senators should retire at every general election of members of the House of Representatives which are sufficiently cogent to justify a constitutional amendment.

237. Section 28 of the Constitution provides that the House of Representatives should continue for three years from the first meeting of the House and no longer, but that the House may be sooner dissolved by the Governor-General. The Crown's constitutional right to dissolve the House before it has served its full term of three years is necessary for the maintenance of responsible government. As a result, however, it is always possible for a general election of members of the House of Representatives to take place without being accompanied by an election for senators.

238. A position of this kind arose in 1929 when the eleventh Parliament, which had lasted less than a year, was dissolved following a defeat of the Government on the floor of the House over the Maritime Industries Bill. It was only because the twelfth Parliament was dissolved two years later that the next election for senators was able to be held simultaneously with the election for members of the House of Representatives.

239. Even without a premature dissolution of the House of Representatives, it is quite possible for elections for the House of Representatives and the Senate to occur at different times because of the fixed terms which senators have under the Constitution.

240. Since senators' terms are fixed they have to begin on a specified date. As mentioned earlier, section 13 provides that the terms of senators elected at elections for one-half of the Senate places should commence on the 1st July following their election. Circumstances could make it quite inappropriate to hold a general election shortly before the expiration of senators' terms. At one time, a senator's term began on the 1st January following his election but the date was changed to the present date by the first constitutional amendment to be made, which was carried at a referendum in 1906. Members of the Commonwealth Parliament pointed out in 1906 that it was desirable to hold elections for the House of Representatives and for Senate vacancies at the same time but since the terms of senators began on the 1st January after election, elections would usually have to be held in the preceding months of November or December. In 1906, this was regarded as inconvenient especially in agricultural districts where harvesting was in operation. For this reason, a constitutional alteration was submitted to the electors and carried by a substantial majority in every State of the Commonwealth.

241. The allotment of fixed terms for senators may have pronounced effects if a double dissolution of the two Houses occurs. Section 13 of the Constitution provides that the terms of senators next elected after a double dissolution should commence on the 1st July preceding the day of election. This day might be just before the elections taking place after a double dissolution but it could, on the other hand, be the greater part of a year earlier than the elections. In such circumstances, it may be necessary to hold the next elections for senators long before the House of Representatives has run the full term of three years which the Constitution contemplates,

242. The events following the double dissolution of 1951 are themselves a sufficient commentary on the position which may arise after a double dissolution. The ensuing elections took place in April, 1951, and senators' terms commenced, therefore, in July, 1950, which meant that the terms of one-half of them expired at the end of June, 1953, and the terms of the remainder expired at the end of June, 1956. Obviously, Senate elections had to be held before the middle of 1953, that is, at a time falling substantially in the middle of the working life of the House of Representatives. The Senate elections were held in May, 1953, and the election for the House of Representatives, which practically served its full term of three years, was not held until a year later. Since the terms of senators allotted six year terms following the double dissolution expired at the end of June, 1956, further separate elections of senators were necessary if the House of Representatives was to be accorded anything near a three year term. Only an early dissolution of the House of Representatives, occurring less than seventeen months after the previous election in 1954, made it possible to conduct elections simultaneously.

243. The Committee concludes from Parliamentary experience since Federation, firstly that the existence of fixed senatorial terms has increased the number of elections and secondly, that the number of occasions on which there would have been separate elections for senators and members of the House of Representatives would have been greater unless the House of Representatives had been dissolved before the expiration of its full term.

244. The Committee believes that the weight of public opinion is opposed to the holding of separate elections for the two Houses of the Federal Parliament. The Australian people already have to vote frequently because they are also called upon to elect members to the Parliaments of their States, in some States, for two Houses at different times.

245. Separate elections also tend to emphasize the component parts of the Parliament at the expense of the Parliament itself. The work of the modern Parliament is accomplished through the system of political parties. In paragraph 136 of Chapter 4, in dealing with double dissolutions, the Committee observed that the electors customarily expect that the party or combination of parties returned with the support of a majority of electors will form a responsible government. As was observed in paragraph 86 of Chapter 3, the party returned with a majority of seats in the House of Representatives almost invariably obtains most of the Senate vacancies when Senate elections are held simultaneously with the election for members of the House of Representatives. Separate elections for the two Houses may produce results at variance with these customary features of the Australian political scene. Separate elections for senators, for example, do not, in practice, affect the formation of a government, and while, on the one hand, it is possible that the Senate election results may give the government gains in the Senate, it is equally possible that the results may embarrass the government. It is not conducive to sound government that the future of a recently elected government should depend upon the eventualities of elections for senators which take place during the normal life of the House of Representatives.

246. The Committee concluded, in paragraph 243 above, that an increased number of Senate elections has been avoided by obtaining the dissolution of the House of Representatives before the expiration of its normal life of three years. But the cost of this course of action can be heavy in terms of constructive government. A premature election brought about by the need to synchronise general elections with elections for senators makes it difficult to obtain constructive government. If separate elections for senators are held, work of the Parliament is completely disrupted. Members of the House of Representatives, as well as senators, must devote their energies to the task of obtaining the best possible results for their respective parties at the elections.

247. The disadvantages caused by the allotment of fixed terms for senators, to which the Committee has referred, would be overcome if one-half of the number of senators were required to retire at every dissolution of the House of Representatives.

Benefits of Simultaneous Elections.

248. Apart from overcoming difficulties caused by separate elections or the threat of separate elections, the Committee considers that the abolition of six year terms for senators in favour of the rule requiring elections for one-half the number of senators at every general election of members of the House of Representatives would be to the benefit of responsible government in other ways.

249. As mentioned, when simultaneous elections for senators and members of the House of Representatives have occurred, the party or coalition forming the government after the elections has usually won either a majority or at least one-half of the vacant seats in the Senate.

250. The Committee's examination, in paragraphs 151-177 of Chapter 4, of the operation of section 57 shows, moreover, that usually governments without a majority of supporters in the Senate have found themselves in that position because of the number of senators in opposition who were elected, not at the last general election at which the government was returned, but on a previous occasion when the opposition enjoyed more success at the polls. The Committee's unequivocal view was that this state of affairs offered little encouragement to government in accordance with the most recent expression of popular will. The Committee considers that a dissolution of the House of Representatives, which carried with it the retirement of the senators who had held their places for the longer period, would be an inducement not to use weight of numbers in the Senate to bring about capriciously the downfall of legislation first passed by the House of Representatives following a general election for that House.

251. The Committee found no difficulty in agreeing that there was, in view of the Senate's legal powers, always a possibility of deadlocks occurring but that the chances of deadlock were much greater under proportional representation than at any other time in Federal history.

252. The Committee has recommended, in paragraphs 211-215 of Chapter 4, that, if a deadlock occurs, the government should have the opportunity to test public opinion at a general election of members of the House of Representatives, provided that the election is held within twelve months of the deadlock first occurring. If such a general election intervenes then, according to the Committee's recommendation, the House of Representatives may again pass the measure which has been in dispute and if the Senate continues to resist, a joint sitting of the two Houses may be convened for the purpose of resolving the deadlock according to the vote of an absolute majority of the total number of members of the two Houses. The view was expressed, in paragraph 214, that the proposal was likely to enhance the prospects of a government being able to give expression to the confidence which electors have, according to the election results, reposed in it, particularly if elections for one-half of the number of senators, that is the earlier elected senators, were to occur simultaneously with the election for members of the House of Representatives taking place after the deadlock. If the general election following a deadlock should, on the other hand, produce unfavourable results for the government this would also be likely to be reflected in the voting returns for senators. In other words, the retirement of senators on a dissolution of the House of Representatives appears to the Committee to be thoroughly consistent with the principles of democratic government.

253. It sometimes happens that, even though elections for members of the two Houses are held simultaneously, this does not bring together the newly elected members of the Parliament at the same time. For instance, if a general election is held towards the end of a calendar year, it is likely that a new Parliament will be convened some months before the terms of newly elected senators commence. Accordingly, the first weeks or months of the term of the House of Representatives will pass during which the Senate continues to be composed of senators all of whom were elected at either of two previous elections, ordinarily one three years earlier and the other six years earlier. Elections took place in November, 1958 for members of the House of Representatives and also to fill Senate vacancies but the senators elected to replace senators whose terms had expired did not take their places until the 1st July, 1959.

254. The carry-over of senators' terms into the life of a freshly elected Parliament, depending upon the chance of an election date, is, in the opinion of the Committee, anachronistic. It could also fetter the effectiveness of the new Parliament. For example, although the Labour Party, which held office immediately before the general election for the seventeenth Parliament in August, 1943, was returned with an increased majority and its candidates also won all the Senate vacancies, it was not until July, 1944, that the Government had a majority in both Houses. Although the House of Representatives lasted the full three years allowed by the Constitution, the Government had a majority in both Houses for only the last two years of the three year period.

Recommendation and Draft Constitutional Alterations.

255. The Committee recommends that the Constitution be altered to omit the provision now made for senators to be chosen for terms of six years and to provide instead that senators should hold their places until the expiry or dissolution of the second House of Representatives after their election.

256. The Committee's recommendation will require, in the first instance, an alteration to section 7. This section will, in view of the Committee's earlier recommendations, need to be amended to make provision for fixing the number of senators. It is proposed that it be further altered by omitting the words—

> The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

and inserting in their stead the words—

> The names of senators chosen for each State shall be certified by the Governor of the State to the Governor-General.

257. The Committee will recommend, in Chapter 6 of this Report, the repeal of section 13 of the Constitution dealing with the rotation of senators and its replacement by a new section. It is convenient to provide for the terms of senators in a draft sub-section (1.) of the proposed new draft section. This sub-section would read substantially as follows:—

Terms of service of senators.

13.—(1.) Subject to this Constitution, a senator shall hold his place until—

(a) the expiry or dissolution of the second House of Representatives to expire or be dissolved after he was chosen; or

(b) the dissolution of the Senate,

whichever first happens.

258. The implementation of the Committee's recommendation also involves consequential amendments.

259. The first concerns the issue of writs by State Governors. Section 12 of the Constitution provides as follows:—

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

260. It is proposed that section 12 be repealed and the following draft section inserted in its stead:—

Issue of Writs.

12.—(1.) The Governor of a State may cause writs to be issued for elections of senators for the State.

(2.) The writs shall be issued—

(a) in the case of elections to fill the places of senators whose places became vacant upon the expiry of a House of Representatives—within ten days from the date of the expiry; or

(b) in the case of elections resulting from a dissolution of the Senate—within ten days from the date of the dissolution.

261. The second ancillary amendment is to provide for the coming into operation of the Committee's proposal without affecting the terms of senators who have been elected for fixed six year terms. The draft section set out hereunder is intended to deal with the matter. Sub-sections (1.) to (3.) of the draft do not need particular comment. The reasons for the inclusion of sub-sections (4.) and (5.) are expressed in paragraphs 297-299 of Chapter 7 which deals with the subject of casual vacancies in the Senate. Sub-sections (4.) and (5.) deal with contingencies which may arise and have been included for the sake of completeness. The draft section is as follows:—

Senators holding places at commencement of *Constitution Alteration* (1960.

13A.—(1.) Notwithstanding the last preceding section but subject to the other provisions of this Constitution, senators holding places at the commencement of the *Constitution Alteration* ( ) 1960 shall continue to hold their places until the expiration of their unexpired terms of service.

(2.) Senators chosen (otherwise than following a dissolution of the Senate) to succeed senators referred to in the last preceding sub-section shall not commence to hold their places until the expiration of the terms of service of the senators whom they have been chosen to succeed.

(3.) Elections to fill the places of any of the senators referred to in sub-section (1.) of this section upon the expiration of the terms of service of those senators shall be held within one year before the expiration of those terms of service.

(4.) Section fifteen of this Constitution shall apply in relation to a senator to whom sub-section (2.) of this section applies and who dies or resigns his place, or whose place becomes vacant in accordance with section forty-five of this Constitution, before he commences to hold his place in accordance with that sub-section.

(5.) Section forty-five of this Constitution shall apply in relation to a senator to whom sub-section (2.) of this section applies as if he had commenced to hold his place forthwith upon his election.

CHAPTER 6.—ROTATION OF SENATORS.

Recommendation of the Committee.

262. The Committee has recommended (1958 Report, paragraph 55) that section 13 of the Constitution be amended to provide that—

(1) the Senate should, when first meeting after a dissolution, divide the senators chosen for each State into two classes in such a way that the terms allotted to the senators chosen for each State accord with their relative order of success at the elections resulting from the dissolution; and

(2) the Parliament should have power to make laws providing for the manner in which the relative success of senators at an election is to be ascertained for the purposes of the section.

Legal Provisions.

263. The Constitution not only provides that senators should have six year terms but also that there should be continuity in membership of the Senate by the retirement of one-half of the number of senators for each State, or as near to one-half as practicable, every three years. This is known as the rotation of senators.

264. The regular rotation of senators was originally provided for upon the Senate first meeting in 1901. A double dissolution, however, breaks the continuity of the Senate and it becomes necessary to arrange again for the rotation of senators. The first paragraph of section 13 entrusts to the Senate the function of arranging for the rotation of senators. The paragraph has already been quoted in paragraph 230 above in connexion with the terms of senators but it is convenient to set it out in full again. It reads—

As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

265. Section 14 of the Constitution makes further provision for the rotation of senators when the number of senators for a State is increased or diminished. In this instance, the function is vested in the Parliament as a whole. Section 14 reads—

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

266. Section 13 does not restrict the Senate as to the means which it may adopt in dividing senators into two classes, first those whose places will become vacant after three years, and second, those whose places will become vacant after six years, from the beginning of their terms of service. The Senate could, if it wished, divide its senators by lot, or, it could allot the longer terms to senators belonging to the party having a majority of members in the House.

The Convention Discussions.

267. It was first agreed in the Convention Debates that the division of senators into classes should be by lot, the practice adopted in the United States Senate under the Constitution. It was decided, however, at Melbourne in 1898 that either the senators lowest in the poll should retire first or the Senate should manage the matter itself, whichever the Drafting Committee should choose. That Committee incorporated the second alternative in Section 13. The attitude taken in 1898 was explained by Quick and Garran in the following historical note:—

In the Draft Bill of 1891, as well as in the Bill as settled in the Adelaide and Sydney sessions, the Senate was authorized to divide the senators into two classes by lot. At the Melbourne session, the words "by lot" were omitted. The Senate has now, therefore, the unrestricted right to divide the senators for each State into two classes in such manner as it thinks fit. The purpose of the amendment is shown by the following extracts from the debates of the Convention:—

> The amendment I suggest need not occupy more than a moment or two in discussion. It is a blot on the face of a measure of this kind to require that the division of the senators into two classes after the first election shall be made by lot. I could understand that device being adopted in the absence of any other means of determining which senators should have the longer period. But the poll itself ought to afford, or be taken to afford, a reasonable indication of the wishes of the electors in this respect, and it is a probable injustice, as well as a mistake, to fall back on the antique method of settling questions of the kind. I move, therefore, the omission of the words "by lot", which will leave it absolutely at the discretion of the Senate itself to determine, after it meets, on what method the division shall take place. If the Drafting Committee think fit, they can adopt the method of providing that the three highest on the poll should have the six years' tenure. If that be the sense of the Convention, I will now simply submit my motion. (Mr. Alfred Deakin, Conv. Deb., Melb., p. 1928.)
>
> I think a great deal can be said in favour of the view the Hon. Mr. Deakin has placed before the Convention. In a constitutional matter of this kind we ought not to resort to deciding a question by lot unless there are no other means of determining the matter. If the Convention are willing to agree to the amendment, it might be left to the Drafting Committee to decide whether any provision for the division of the Senate should take place, or whether the matter should be left to the senators themselves. (Mr. R. E. O'Connor, id. p. 1928.)
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> —(*The Annotated Constitution of the Australian Commonwealth*, at page 432.)

History of the Rotation of Senators.

268. The division of senators into classes under section 13 has taken place three times since Federation, the first occasion being the one which the section contemplated after the Senate met for the first time in 1901 and the other two being when the Senate first met again after the double dissolutions of 1914 and 1951.

269. The first election of senators was by the "first past the post" method under which electors cast votes for the number of candidates to be returned and the candidates recording the highest number of votes were elected. In 1901, the Senate resolved, in effect, without opposition being voiced, that the three senators for each State returned by the highest number of votes should be allotted the six year terms and the remaining three senators for the State should be given the three year terms. After the double dissolution of 1914, the Senate divided senators into classes in the same manner as in 1901. The resolution was agreed to without debate and without division. In that year, senators were also elected according to the "first past the post" method.

270. There was some speculation in 1951 whether senators elected following the double dissolution would be divided into two classes according to their order of election or whether senators belonging to the Government parties who together held 32 of the Senate seats would obtain the longer terms. However, the practice of the earlier occasions was followed without debate, and the Senate was divided into classes in such a way as to allot the six year terms to the five senators first elected for each State.

271. The *Representation Act* 1948 provided for an increase in the number of senators from six to ten for each State. In the exercise of its powers under section 14 of the Constitution, the Parliament provided in the Act for the regular rotation of senators according to their order of election.

Amendment of Section 13.

272. In Chapter 4 of this Report, the Committee recommended certain alterations to section 57, but it is still possible under the Committee's proposed alterations for a double dissolution to take place. Accordingly, the provisions of section 13 of the Constitution, so far as they deal with the rotation of senators after a double dissolution has occurred, would remain applicable even though section 57 should be amended according to the Committee's recommendation.

273. The Committee freely acknowledges that the Senate's exercise of its functions under section 13 have been strictly in accordance with democratic principles but it considers that it would be desirable to write into the Constitution, provisions to require the division of senators into classes to be in accordance with their relative success at the Senate elections. This would afford constitutional recognition of the hitherto unbroken practice. It would also be a safeguard against the possibility that senators belonging to a party with a majority in the Senate might wish to depart from established precedent or else that the Senate, by reason of being equally divided, might be unable to reach agreement as to how senators should be divided. On the first two occasions on which section 13 was applied, the possibility of candidates, who were the most successful candidates at the elections, being deliberately denied the allocation of longer terms was remote. The adoption of proportional representation for elections of senators means, however, in the opinion of the Committee, *that the Senate will usually be fairly evenly divided and the question becomes*, therefore, much more vital. It is unnecessary in this section of the Report, to retrace the history of the relations between the Senate and the House of Representatives since 1949 and it is sufficient to refer back to paragraphs 164-177 which deal with the matter. Those paragraphs show only too clearly the very decisive effects that a closely divided Senate can have on responsible government.

274. The Committee agreed, therefore, that it should be obligatory for the Senate to divide senators into classes according to their relative order of success at the elections after a double dissolution.

275. In the case of elections by the "first past the post" method, there could be no doubt as to which candidates should be allotted the long terms and which allotted the short terms. Nevertheless, section 9 of the Constitution vests in the Parliament of the Commonwealth a power to make laws prescribing the method of choosing senators and, since 1901, the Parliament has, as the Committee has mentioned in paragraphs 151-153, so far adopted three different methods for choosing senators. Under proportional representation, the allotment of terms would depend on the order in which candidates are elected. Any amendment of section 13 has to take into account the various possible methods of choosing senators.

276. The Parliament itself is already, under section 14 of the Constitution, responsible for the maintenance of regularity in the rotation of senators when the number of senators for a State is increased or diminished. Since the Parliament is also responsible for determining the method by which senators are elected, the Committee regards it as appropriate for the Parliament to determine relative success of the candidates for the Senate who have been chosen in accordance with the method of election which the Parliament itself has prescribed. If the Parliament should fail, or not wish to deal with the division of senators' terms, the Committee considers that, in these circumstances, the Senate should be authorized to handle the matter.

Recommendation.

277. It is recommended that section 13 be re-drafted to provide that—

(1) the Senate should, when first meeting after a dissolution, divide the senators chosen for each State into two classes in such a way that the terms allotted the senators chosen for each State accord with their relative order of success at the elections resulting from the dissolution;

(2) the Parliament should have power to make laws providing for the manner in which the relative success of senators at an election is to be ascertained for the purposes of the section; and

(3) in the absence of a law of the Parliament, the manner in which the relative success of senators at an election is to be ascertained should be determined by the Senate.

The Inclusion of Senators in a Class.

278. It is doubtful, as section 13 now reads, whether a person who has been validly chosen as a senator for a State at the election which takes place after a double dissolution can be included in a division if he dies, resigns or becomes disqualified from sitting as a senator under the provisions of section 45 of the Constitution before the division of senators into classes. The Committee thinks it is advisable to clarify the situation.

279. Section 45 of the Constitution provides, so far as relevant, that the place of a senator *shall become vacant if the senator*—

(1) becomes subject to any of the disabilities mentioned in section 44;

(2) takes the benefit of any law relating to bankrupt or insolvent debtors; or

(3) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or rendered in the Parliament to any person or State.

Section 44 refers to various disabilities, including allegiance to a foreign power, foreign citizenship, attainder for treason, conviction and under, or subject to, sentence for more serious criminal offences, being an undischarged bankrupt or insolvent, holding an office of profit under the Crown, being in receipt of certain pensions from the Crown and having an interest in agreements with the Public Service of the Commonwealth.

280. The Committee recommends that the name of any senator chosen for a State who has died, resigned or been disqualified before the division of senators into classes, should be included among the names of the senators which are to be placed by the Senate on a list, in order of relative success at the election, and an allotment made to one of the two classes of senators in accordance with the requirements of the proposed new section 13. The recommendation does not affect persons who, by virtue of sections 43 and 44 of the Constitution, are incapable of being chosen or of sitting as a senator; it is concerned solely with senators who were validly elected in the first instance.

281. It follows from the Committee's recommendation that a vacancy caused by the death, resignation or disqualification of a senator before the division of senators into two classes, should be treated as a casual vacancy and dealt with in accordance with procedure laid down in section 15 of the Constitution. An express provision should, in the opinion of the Committee, be included in a constitutional alteration to make it plain that section 15 applies in connexion with a vacancy arising in the circumstances mentioned before the division of senators into two classes.

Draft Constitutional Alterations.

282. It would be convenient, in order to give effect to the Committee's recommendations, to repeal the whole of section 13 of the Constitution and replace it by a fresh section.

283. The Committee recommended in Chapter 5 that, instead of senators holding their places for fixed terms of six years, the Constitution should provide that they hold their places until the expiry or dissolution of the second House of Representatives after their election. A draft clause to give effect to the recommendation was set out in paragraph 257 above. The clause could be written into a redrafted section 13 as sub-section (1.). The Committee wishes to emphasize, however, that it is possible to draft constitutional alterations to express independently the Committee's recommendations on the terms of senators and the rotation of senators respectively. The grouping of the two subjects in one section is purely a convenient arrangement.

284. A draft section which would give effect to the Committee's recommendations reads as follows:—

Terms of service of senators.

13.—(1.) Subject to this Constitution, a senator shall hold his place until—

(a) the expiry or dissolution of the second House of Representatives to expire or be dissolved after he was chosen; or

(b) the dissolution of the Senate,

whichever first happens.

(2.) As soon as may be after the first meeting of the Senate following a dissolution of the Senate, the Senate shall, in accordance with the succeeding provisions of this section, divide the senators for each State into two classes.

(3.) In the case of each State, where the number of senators to be divided is an even number, the number of senators in each of the two classes shall be equal, and, where the number of senators to be divided is an odd number, the number of senators in the first class shall be one more than the number in the second class.

(4.) For the purposes of the division of the senators for a State into classes—

(a) the Senate shall cause the names of the senators to be placed on a list in order of their relative success at the election resulting from the dissolution, beginning with the name of the most successful senator; and

(b) the senators to be included in the first class shall be ascertained by taking names in order from the list, beginning with the first name on the list, until the required number of senators to be included in that class is obtained, and the remainder of the senators shall be the senators to be included in the second class.

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(5.) Sub-section (1.) of this section shall apply to senators included in the first class, but senators included in the second class shall hold their places only until the expiry or dissolution of the first House of Representatives to expire or be dissolved after they were chosen.

(6.) Where, since the election of senators for a State following a dissolution of the Senate but before the division of the senators for that State into classes in pursuance of this section, a senator chosen at that election has died or resigned his place, or the place of such a senator has become vacant in accordance with section forty-five of this Constitution, the division of senators shall be made as if that senator had not died or resigned his place, or the place of that senator had not become vacant, as the case may be, and, for the purposes of section fifteen of this Constitution, the term of service of that senator shall be deemed to be, and to have been, the period for which he would have held his place, in accordance with this section, if he had not died or resigned, or his place had not become vacant.

(7.) The Parliament may make laws providing for the manner in which the relative success of senators at an election is to be ascertained for the purposes of this section. In the absence of any such law, the manner in which the relative success of senators at an election is to be ascertained shall be determined by the Senate.

CHAPTER 7.—CASUAL VACANCIES IN THE SENATE.

Constitution: Section 15.

285. In paragraph 58 of its 1958 Report, the Committee referred to section 15 of the Constitution in the following terms:—

Section 15 of the Constitution deals with the filling of casual vacancies in the Senate. It provides, in the first instance, that if a vacancy occurs in the place of a senator before the expiration of his term, the Parliament of the State for which the senator was elected should appoint a person to fill the vacancy. Provision is made if the Houses of Parliament of the State are not in session, for the Governor in Council of the State to make an appointment to hold the place in the meantime. A person appointed by a State to fill a casual vacancy does not necessarily hold the place for the unexpired portion of the vacating senator's term. If, before the expiration of the term, a general election of members of the House of Representatives or an election of senators for the State occurs, whichever is the earlier, a successor must be chosen at the election to hold the place until the expiration of the term.

286. Section 15 reads—

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators *for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the* place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

Recommendation of the Committee.

287. As the Committee has already reported to the Parliament, it sought a constitutional formula to require the Parliament or Governor of a State in making an appointment to fill a casual vacancy arising in the Senate, to choose some one who was a member of the same political party as the senator whose place had become vacant. The Committee could not, however, find suitable language which would have covered all possible contingencies and, at the same time, avoided reference to *political parties in the Constitution. By way of illustration of the difficulties confronting the* Committee, it would have been necessary, in any constitutional alteration, to deal with possible cases of a vacating senator who joined another party after election, became a member of another party because that party succeeded the party in existence at the date of election or who, for that matter, was not a member of any party. The difficulties proved to be insurmountable.

288. A State Parliament or Governor is not bound to choose as a successor to a vacating senator some one belonging to that senator's party or who subscribes to the platform which the senator supported when he was last elected as senator. To this extent, section 15 may be thought to give expression to the concept at Federation of the Senate as a states house. But as the Committee has shown, elsewhere in this Report, the Senate has become primarily a party house and it would be possible for an appointment under *section 15 to disturb the balance* of party strength in the Senate, as for instance, if a State Parliament should replace a former government senator by some one belonging to an opposition party. In the present period of proportional representation for the election of senators, such a choice could be sufficient to deprive a government of its majority in the Senate.

289. There have been instances in past years where State Parliaments have filled a casual vacancy by appointing as a successor senator, some one of quite different political viewpoint to the senator whose place became vacant before the expiration of his term. It is significant that, in the cases which have occurred, the vacancies have been filled by persons sympathetic to the side of politics of the government in office in the State in which the appointment was made. This suggests that the criterion of the Senate as a states house was, in the particular instances, of little significance

in the discharge of State functions under section 15. In 1931, for example, a State Parliament in which a Labour Government held office appointed a Labour successor to a Nationalist senator and, in 1946, a State Parliament, in which voting pursued party lines, appointed a Country Party man to replace a Labour senator.

290. The Committee acknowledges that the instances just referred to have been the exceptions and not the rule and it wishes to make it plain that, since proportional representation has been the system for electing senators, various State Parliaments have been called upon to make appointments to fill a casual vacancy and, in each instance, the State concerned has scrupulously observed the principle which the Committee would have liked to incorporate in the Constitution.

291. At this juncture, the Committee merely reiterates its view, expressed in the first Report, that all members who sat on the Committee thought the principle should continue to be observed without exception so that the matter may become the subject of a constitutional convention or understanding which political parties will always observe.

Other Questions arising under Section 15.

292. Section 15 applies when the place of a senator becomes vacant before the "expiration of his term of service".

293. There is room for doubt whether section 15 is applicable where a senator dies, resigns or becomes disqualified under section 45 of the Constitution before the division of senators into classes under section 13 of the Constitution following a double dissolution. The doubt arises because, *under section 13 of the Constitution, following* a dissolution of the Senate, the Senate has to meet in order to allot terms to newly elected senators. Until this is done, senators do not know whether they will have three year or six year terms. The Committee referred to the application of section 15 in paragraph 281 of Chapter 6, dealing with the rotation of senators. It recommended a draft alteration to the Constitution to make the position clear, as to which see sub-section (6.) of the proposed new section 13 set out in paragraph 284.

294. There is also some doubt whether, in the case of periodical Senate elections, a person validly elected as a senator can be said to have a place which becomes vacant for purposes of section 15 if he dies or resigns before the commencement of his term. As section 13 now reads, the term of a senator ordinarily begins on the 1st July following the day of his election.

295. The Committee recommended in the first Report that the application of section 15 should be clarified by constitutional amendment. The Committee also recommended that the disqualification provisions of section 45 of the Constitution should apply in such a way that a casual vacancy would undoubtedly arise from disqualification under the section even though a newly elected senator's term had not commenced.

296. If the Committee's recommendation affecting the terms of senators, which have been discussed in Chapter 5, should become law, the amendment to section 15 which the Committee has proposed would not be necessary because there would then be no question of a newly elected senator having to await the expiration of a term of a retiring senator before he could take his place in the Senate. Accordingly, the Committee has not, in this instance, thought fit to have a draft constitutional amendment prepared to give effect to its proposals.

Application of Section 15 if Fixed Terms for Senators are Abolished.

297. A question could arise in connexion with the transition from a Senate in which senators have been elected for fixed terms to a Senate in which one-half of the total number of senators will ordinarily retire at each dissolution of the House of Representatives. Under the proposed transitional provision set out in paragraph 261 of Chapter 5, a senator chosen to succeed a senator with a fixed term would not commence to hold his place until the expiration of the place of the fixed term senator he has to succeed. There is a possibility that the newly chosen senator may die or resign or perhaps become disqualified under section 45 of the Constitution before he commences to hold his place in the Senate. To remove any possible doubt as to the existence of a vacancy within the meaning of section 15, in the event of such a happening, the Committee recommends that the following sub-section should be added to the proposed section 13A. The sub-section is already included in the draft set out in paragraph 261:—

(4.) Section fifteen of this Constitution shall apply in relation to a senator to whom sub-section (2.) of this section applies and who dies or resigns his place, or whose place becomes vacant in accordance with section forty-five of this Constitution, before he commences to hold his place in accordance with that sub-section.

298. The reference to section 45 in the sub-section is on the assumption that section 45 applies at once to a senator who is elected to succeed a fixed term senator upon the expiration of the latter's term. Without expressing a view one way or the other as to whether this is the legal position, the Committee proposes that any doubts as to the application of section 45 should be dispelled by the addition of a further sub-section in the transitional section, section 13A, which the Committee proposes should read as follows:—

(5.) Section forty-five of this Constitution shall apply in relation to a senator to whom sub-section (2.) of this section applies as if he had commenced to hold his place forthwith upon his election.

299. As the Committee has already mentioned in paragraph 261, it does not regard the inclusion of the proposed sub-sections (4.) and (5.) as essential but, because questions could arise, the Committee thinks that, on the whole, their inclusion is desirable.

CHAPTER 8.—DIVISION OF STATES INTO ELECTORAL DIVISIONS.

Recommendations of the Committee.

300. The Committee reported that it considered a constitutional amendment should be made to ensure that all electoral divisions for which members of the House of Representatives may be chosen were single member electorates and that the number of electors for each division was, as nearly as practicable, uniform. It has recommended (1958 Report, paragraph 66) an alteration of the Constitution to provide that—

(1) the Parliament may make laws dividing each State into electoral divisions equal in number to the number of members to be chosen in the State with one member to be chosen for each division;

(2) upon the division of a State into electoral divisions, the number of electors in a division in a State should not exceed by more than one-tenth, or fall short of by more than one-tenth, a quota ascertained by dividing the total number of electors in the State by the number of members to be chosen in that State;

(3) the division of a State may be reviewed at any time but the division of every State into electoral divisions should be reviewed at least once in every ten years and where, upon review, the number of electors in a division in a State is found not to be within one-tenth of the quota, there should be a further division of that State into divisions;

(4) for the purposes of the division of each State into electoral divisions and any subsequent division of a State into divisions, including the required decennial review, the Governor-General in Council should be required to constitute an Electoral Commission for each State to make recommendations to the Parliament in connexion with the division of the State into divisions;

(5) the division at any time of a State into electoral divisions should not take place until the Electoral Commission constituted for the State has reported to the Parliament; and

(6) each Electoral Commission should consist of not less than three members and all Electoral Commissions in existence at the one time should have the same number of members.

Constitutional Position.

301. Section 24 of the Constitution states that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth and, further, that the number of members chosen in the several States should be in proportion to the respective numbers of their people, subject to the proviso that at least five members must be chosen for each original State.

302. Further, the section authorizes the Parliament to provide the manner of determining the number of members to be chosen in each State. The section also contains an interim clause for determining the number of members until the Parliament otherwise provides. The *Representation Act* 1905-1938 now prescribes the method, based on the interim provision, of fixing the number of members to be chosen in each State.

303. Section 24 provides for determining the number of members for a State. It is left to section 29 to state, in effect, that the Parliament may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen and the number of members to be chosen for each division. The section states that a division shall not be formed out of parts of different States, which means that the boundaries of the States also become boundaries of electoral divisions. The section reads—

> 29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.
>
> In the absence of other provision, each State shall be one electorate.

304. Obviously section 29 leaves the Commonwealth Parliament unfettered as to the means it may adopt in dividing any State into electoral divisions. As the Committee observed in the first Report, Parliament could cause the number of electors in one division in a State to be twice the number of electors in another division of the same State or it could make some divisions single member divisions and, at the same time, provide that others should return more than one member.

305. The Parliament has exercised its powers under the section in Part III. of the *Commonwealth Electoral Act* 1918-1953.

The Convention Debates.

306. Section 29 did not arouse much controversy among the Founders. The records of the Debates show that, in 1891, the Founders agreed to a clause which provided that the electoral divisions of the several States should be determined from time to time by the Parliaments of those States. During the Adelaide Debates in 1897, however, the initial provision was changed to one under which the State Parliaments were to possess the power only until the Parliament of the Commonwealth otherwise provided and this decision was subsequently confirmed in the Melbourne session of 1898.

307. The sentence "A division shall not be formed out of parts of different States." was added at Melbourne because section 24 of the Constitution had been amended to read that the members of the House of Representatives should be chosen by "the people of the Commonwealth" instead of by "the people of the several States".

308. On the power of the Federal Parliament to take over from the States the right to determine electoral divisions, Quick and Garran commented that the State legislatures in the United States had for many years practised the art of gerrymandering in the exercise of their powers to form Federal electoral divisions. The learned authors wrote—

> The electoral divisions for the House of Representatives, in each State, may, until the Federal Parliament interposes and deals with the subject, be determined by the State legislatures, subject to the one restriction that a division is not to be formed out of parts of different States. In America a similar power has been exercised by the State legislatures without check for many years, and electoral divisions have been, for party purposes, carved out in a manner which led to grave scandal and dissatisfaction. This reprehensible manipulation of constituencies developed the art known as "Gerrymandering", so named because Essex, a district of Massachusetts was, for political reasons, so curiously shaped as to suggest a resemblance to a salamander, and Elbridge Gerry was the Governor of the State who signed the bill. (See Bryce, Am. Comm. 2nd ed. I. p. 121.) The grossly unjust apportionment of population of districts, made by partisan majorities in State Legislatures, eventually led to the intervention of the Courts, and certain State laws which were clearly in violation of the equality enjoined in their respective Constitutions were held invalid.
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> —(*The Annotated Constitution of the Australian Commonwealth*, at pages 465-466.)

The Distribution of States into Divisions under the Commonwealth Electoral Act.

309. As the Committee has already mentioned, the Commonwealth Parliament has, in the Commonwealth Electoral Act, exercised its powers under section 29 of the Constitution.

310. Part III. of the Act requires each State to be divided into the same number of electoral divisions as the number of members to be chosen for the State and one member has to be chosen for each division. There has not, in the history of the Commonwealth Parliament, been any division returning more than one member.

311. For the purpose of distributing a State into divisions, the Act authorizes the Governor-General to appoint three Distribution Commissioners. The function of the Distribution Commissioners is to draw up a proposed distribution of a State into divisions. Of the three Distribution Commissioners for a State, one must be the Chief Electoral Officer or an officer having similar qualifications and, if his services are obtainable, one must be the Surveyor-General of the State or an officer with similar qualifications.

312. The machinery of redistribution under the Act must be set in motion by the Chief Electoral Officer ascertaining a quota of electors for each State by dividing the whole number of electors in a State, as nearly as can be ascertained, by the number of members to be chosen for the State. After the quota for a State has been ascertained, the Distribution Commissioners may proceed to a proposed distribution. In so doing, they are required to have regard to the matters specifically laid down in section 19 of the Act. The section reads as follows:—

> 19. In making any proposed distribution of a State into Divisions the Distribution Commissioners shall give due consideration to—
>
> (a) Community or diversity of interest,
> (b) Means of communication,
> (c) Physical features,
> (d) Existing boundaries of Divisions and Subdivisions,
> (e) State Electoral boundaries;
>
> and subject thereto the quota of electors shall be the basis for the distribution, and the Distribution Commissioners may adopt a margin of allowance, to be used whenever necessary, but in no case shall the quota be departed from to a greater extent than one-fifth more or one-fifth less.

313. Section 24 of the Act provides for a proclamation of divisions if both Houses of the Parliament by resolution approve a proposed redistribution. The section also authorizes the Minister to direct a fresh distribution if either House disapproves the proposed distribution submitted to it by the Commissioners. Thus, Parliament retains the final authority in the matter of redistribution.

314. Section 25 of the Act sets forth the occasions on which the redistribution of a State must be undertaken. The occasions are—

(a) whenever an alteration is made in the number of Members of the House of Representatives to be elected for the State; and

(b) whenever in one-fourth of the Divisions of the State the number of the electors differs from a quota ascertained in the manner provided in this Part to a greater extent than one-fifth more or one-fifth less; and

(c) at such other times as the Governor-General thinks fit.

315. The Committee acknowledges that the redistributions which have occurred since Federation, that is in 1903, 1906, 1912, 1922, 1937, 1948 and 1955, have been strictly in accordance with the Act. Moreover, except for the period during which World War II. intervened, they have been at sufficient intervals to safeguard the parliamentary system of government against abuse.

316. The Committee feels constrained to say, however, that the one-fifth margin on either side of the quota for a State which the Act allows may disturb quite seriously a principle which the Committee believes to be beyond question in the election of members of the national Parliament of a Federation, namely, that the votes of the electors should, as far as possible, be accorded equal value. The full application of the margin each way to two divisions in a State could result in the number of electors in one division totalling 50 per cent. more than the number of electors in the other division. Such a possible disparity in the value of votes is inconsistent with the full realization of democracy.

Desirability of a Constitutional Safeguard.

317. The Committee has, in the course of its constitutional review, been concerned to preserve or increase the flexibility of the Constitution wherever practicable. In this instance, the Committee's proposals impose some restrictions on the power of the Parliament to deal with the determination of the electoral divisions in each State. Yet the Committee feels that developments since Federation now make it provident to include in the Constitution itself provisions to require the regular redistribution of States into single electoral divisions with near uniformity in the number of enrolled voters in each division in a State.

318. The inherent flexibility of the present section 29 may, it seems, have been dictated in part by the consciousness of the Founders that, if more specific or complicated provisions had been included, it would have prejudiced the acceptance of the Constitution at the referenda subsequently held in the various colonies.

319. Another relevant fact is that in 1900 there was no compulsory voting, but compulsory voting has been a feature of Federal elections since 1924 and is, moreover, as far as the Committee is able to foresee, likely to endure.

320. Compulsory voting makes it possible for a government which the electors have returned to claim quite validly that it represents the majority opinion; it also makes all the adult members of the community participants in the affairs of government and acts as a stimulus to the democratic way of life. These purposes tend to be defeated if electorates can be so arranged that some contain far fewer electors than others.

321. The main principles of the Electoral Act, so basic to our form of parliamentary government, have stood practically unchanged despite the many changes which have occurred in the course of the development of the Commonwealth and it is, in the Committee's opinion, fitting that they should have the safeguard now of being written into the Constitution.

322. If the Constitution should be altered, as the Committee recommends, to provide that each division of a State should return one member of the House of Representatives and that the number of electors enrolled in each division in a State should be as nearly as practicable uniform, an important step will have been taken amounting in substance to a constitutional assurance or guarantee to each individual elector of a fair value for his vote.

323. The principles of distribution which the Committee recommends to be inserted in the Constitution do not affect the number of members of the House of Representatives chosen in a State. The Committee's proposals operate purely within the limits of each State, the number of members of which is determined under section 24 of the Constitution with a minimum of five for each original State or, in the case of a new State, by action of the Federal Parliament taken initially under section 121 of the Constitution.

324. The Commonwealth Constitution does not provide many guarantees of individual rights although there are some provisions which afford personal protection. Section 51 (xxxi.), for example, requires the payment of just terms for property acquired for purposes of the Commonwealth and, in this way, a person is protected from arbitrary confiscation of his property or from acquisition at less than just terms. Section 92, as interpreted, accords to individuals the right to engage freely in interstate trade and commerce. Section 116 offers a safeguard to the freedom of religion by preventing the Commonwealth from making any law for the establishment of any religion or for prohibiting the free exercise of any religion.

325 Nevertheless, it remains true, in keeping with the British system of parliamentary government, inherited from the Parliament at Westminster, that there is no charter of individual rights or liberties in the Commonwealth Constitution so commonly found in the written constitutions

of other countries, including many of the new instruments of government which have come into existence since the end of World War II.

326. Since Federation, there has been a marked increase in the authority of governments throughout the world and there have been constant threats in different parts of the world to individual freedoms, including freedoms of person, speech and assembly. In some cases, personal freedom has never been realized and in others there has been mass suppression of individual rights frequently in association with the overthrow of parliamentary institutions. In fact, the major armed conflicts of the present century have largely revolved around the liberties of the individual. Australia's early entry into World War II. was a manifestation of the community's antipathy to the suppression of personal liberties. The freedom of individual expression is much sought after by men and a prized possession of the countries in which it can be realized. The Charter of the United Nations and the Universal Declaration of Human Rights are further signs of international interest in human rights.

327. The Committee was strongly urged to recommend the incorporation in the Constitution of basic human freedoms. Among the representations it received were those of the Institute of Public Affairs (New South Wales) which, through Counsel, put the view that the basic rights of the people should not be capable of abrogation by the act of temporary political majorities. The Institute also observed that, as the years went on, Australia would have a much more mixed population and with the greater complexities of modern government it was important to acknowledge that there were basic rights.

328. The Committee concluded that the absence of constitutional guarantees in the Commonwealth Constitution had not prevented the rule of law from characterizing the Australian way of life. The Committee believes that as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia. The Committee has not chosen, therefore, to recommend the writing into the Constitution of a charter of individual liberties. Instead, the Committee considers it appropriate, at this stage of Federal history and having regard to recent and contemporary world events, to recommend a constitutional amendment to protect the position of the elector and the democratic processes essential to the proper functioning of the Federal Parliament.

329. Thus, the Committee concluded that it should recommend the inclusion in the Constitution of provisions ensuring the regular review of the electoral divisions of each State and also accord near uniformity to the value accorded to the votes of the electors for each of the States.

330. One form of gerrymandering is the creation of electoral divisions in which there are substantial disparities in the number of enrolled voters so securing for a political party greater representation than it should have. In all its forms, the device is thoroughly subversive of the democratic process. In making possible minority governments, the majority can be deprived of the government of its choice and the way is opened for arbitrary action impairing the freedom of the individual even though that action stands condemned by the majority of people who comprise the electors of the Commonwealth.

Proposed Constitutional Alterations to Ensure the Equitable Distribution of States into Divisions.

331. The Committee decided that it could not do better than to take certain long standing principles of the Electoral Act to provide the basic framework of its constitutional proposals.

Role of the Parliament.

332. Section 29 of the Constitution does not permit the Parliament to vacate its power to make laws for determining the electoral divisions in each State and nothing in the Electoral Act relieves the Parliament of the need to approve a proposed division under the Act. Convinced of the inherent strength of parliamentary government, the Committee believes that the legislative body and not an extra-legislative body, lacking in popular responsibility, should continue to be the final repository of legal power. The exercise of power, however, should be subject to the safeguards which the Committee has recommended.

Single Member Divisions.

333. The Commonwealth Parliament has observed the principle that one member of the House of Representatives should be chosen for each division of a State. The Committee believes that any departure from the principle would lessen contact between members and their electors and it is important that this should not occur in a country as large as Australia. The principle also operates to prevent single member and plural member divisions being established in the same State or single member divisions in one State and plural member divisions in another State. Unquestionably, there should be uniform treatment of electoral divisions throughout the Commonwealth.

334. Accordingly, the Committee has recommended that the Constitution should lay it down that one member only must be chosen for each electoral division of a State.

Fixed One-tenth Margins.

335. The crux of the Committee's recommendations is that the Constitution should require the Parliament to exercise its discretion, in making laws for determining electoral divisions, in such a way as to ensure approximate uniformity in the number of electors for each division into which a State is divided. The Electoral Act allows the Distribution Commissioners to submit proposed divisions for a State in which the number of electors in a division may vary as much as one-fifth either way from the State quota. In paragraph 316 above, the Committee stated that a margin of this order was capable of creating serious inequality in the number of electors in particular divisions in a State.

336. Whilst appreciating that complete uniformity in numbers upon redistribution is not practicable, the Committee considers that a permissible margin of one-tenth on either side of the quota for a State should allow sufficient flexibility in determining the electoral divisions for the election of members of the House of Representatives of the Federal Parliament. The adoption of a maximum margin of one-tenth would make a very material contribution towards preventing possible manipulation of the divisional structure of a State for political purposes. Since this aspect of the Committee's proposal involves a restriction of the margin of allowance which the Electoral Act permits, it will be examined at some length in paragraphs 345-364 hereunder.

Decennial Review of Electoral Divisions.

337. The Committee has also recommended that the division of every State into divisions should be reviewed at least once in every ten years, and that where upon the general review being undertaken the number of electors in a division in a State is found not to be within one-tenth of the quota for that State, there should be a further division of that State into divisions.

338. The Act does not, at present, require a review of electoral divisions at fixed periods, but it is important, in the Committee's view, if the objective of avoiding disproportion of numbers in the electoral divisions is to be achieved, that there should be some machinery requiring periodic review. Otherwise electoral divisions originally fixed in conformity with the requirements which the Committee has recommended could, over a period of years, become seriously out of adjustment and yet nothing be done about it. Under the Committee's proposal it would be necessary upon redistribution to bring all divisions within a one-tenth margin of the quota in a State at least once every ten years.

339. It remains open to the Parliament, without being obligatory, under the proposal to make laws for the review of the divisions of individual States to be undertaken at greater frequency.

Formation of Electoral Commissions.

340. The Act now provides for three Distribution Commissioners in each State to undertake the spade work of redistribution. The Committee considers that the practice of having independent Commissioners to do this work should be written into the Constitution and so make it obligatory in connexion with all future redistributions.

341. It is recommended that the Governor-General in Council should appoint an Electoral Commission for each State to make recommendations to the Parliament in connexion with the division of a State into divisions. Each Commission should consist of not less than three members and all Commissions in existence at the one time, as for example when the proposed decennial review is being undertaken, should have the same number of members.

Responsibility of the Parliament.

342. The Committee proposes that the Parliament may authorize the division of a State into divisions only after receiving the report of the relevant Electoral Commission. The Parliament should have the power to refer a proposed distribution back to a Commission. Although no division of a State should be made until the Commission has reported, the Committee does not recommend that the Parliament should be precluded from authorizing a division which a Commission has not recommended.

343. The Committee repeats that the final determination of electoral boundaries should continue to be the Parliament's responsibility. The Committee's concern is that the Constitution should provide the manner in which that responsibility is to be discharged and that the Parliament's power will not be exercised beyond the limits laid down in the proposed constitutional alteration.

344. To sum up, the Parliament's powers to make laws for dividing States into electoral divisions will be governed by the requirements that there must only be single member electorates, the groundwork of distribution and redistribution is to be performed by the Electoral Commissions, there must be a review of the entire divisional structure of every State at least once every ten years, and the boundaries of every division of a State must be so drawn that the number of electors enrolled in each division is within one-tenth of the quota for the State.

SUFFICIENCY OF A ONE-TENTH MARGIN OF ALLOWANCE.

345. The Committee considered the extent of the problems which would arise from inserting in the Constitution a requirement that no division in a State should depart from the quota for that State to a greater extent than one-tenth more or one-tenth less. The Committee was assisted in its task by the then Chief Electoral Officer for the Commonwealth, Mr. L. Ainsworth, who also obtained the views of the Commonwealth Electoral Officer and the Surveyor-General for each of the States. The preponderance of that opinion was clearly in favour of retaining the marginal allowance at the existing one-fifth fraction.

346. Undoubtedly, it would be easier to apply a one-fifth margin than to work within the limits of a one-tenth marginal allowance from quota. Nevertheless, the Committee is satisfied that the problems of applying a one-tenth margin are quite manageable.

347. In order to keep the matter in its proper perspective, it should be appreciated that in the redistribution which took effect in 1937, of the 74 State electoral divisions, only six were determined with an enrolment which departed from the quota for a State by more than one-tenth. Only one of the six divisions exceeded a 15 per cent. margin. In the 1948 redistribution, the quota was exceeded by more than one-tenth in fifteen of the 121 State divisions. In nine of the fifteen divisions, however, the departure from quota did not exceed 12½ per cent. The enrolment departed from the quota by more than 15 per cent. in only one division. In the 1955 redistribution, only eight divisions out of a total of 122 State divisions had an assessed enrolment exceeding the quota by more than one-tenth. Only three of the eight divisions had margins in excess of 12½ per cent. Details, by States, for the redistributions mentioned were as follows:—

State.	Number of Divisions with Variation from Quota Exceeding 10%.							
	10%-12½%		12½%-15%		15%-17½%		17½%-20%	
	More.	Less.	More.	Less.	More.	Less.	More.	Less.
1937 Redistribution.								
New South Wales	..	..	..	..	..	..	..	..
Victoria	2	..	..	..	..	..	..	..
Queensland	..	..	..	..	..	..	..	..
South Australia	..	..	..	1	..	..	..	..
Western Australia	1	..	1	..	..	1	..	..
Tasmania	No Redistribution.							
Total	3	..	1	1	..	1	..	..
1948 Redistribution.								
New South Wales	..	..	..	1	..	..	..	..
Victoria	..	2	..	1	..	..	..	..
Queensland	3	1	..	1	..	..	..	..
South Australia	..	..	..	..	..	..	..	..
Western Australia	2	1	1	1	..	1	..	..
Tasmania	..	..	..	..	..	..	..	..
Total	5	4	1	4	..	1	..	..
1955 Redistribution.								
New South Wales	..	1	..	..	..	..	..	..
Victoria	..	..	..	..	..	..	..	..
Queensland	1	1	..	..	..	..	..	1
South Australia	..	..	..	..	..	1	..	..
Western Australia	..	..	..	1	..	..	..	..
Tasmania	1	1	..	..	..	..	..	..
Total	2	3	..	1	..	1	..	1

The Problem of Large-area Electorates.

348. One of the main problems in the creation of electoral divisions arises from the uneven dispersal of the Australian population. Most people live in the capital cities of the States and large areas are very sparsely populated. As a consequence there are in four States, New South Wales, Queensland, South Australia and Western Australia, rural electorates of greater area than the State of Victoria.

349. In the 1955 redistribution there were, however, only three very large divisions, Darling, Kennedy and Kalgoorlie, outside the one-tenth margin of allowance. Details were as follows:—

State.	Quota.	Division.	Assessed Enrolment.	Percentage Below Quota.
New South Wales	43,482	Darling	38,486	11.5
Queensland	41,309	Kennedy	33,906	17.9
Western Australia	37,378	Kalgoorlie	32,159	14.0

Three other divisions of exceptional size, Grey in South Australia, and Leichhardt and Maranoa in Queensland were 1.1 per cent., 2 per cent. and 9.8 per cent., respectively, below quota.

350. Darling, Kennedy and Kalgoorlie are large divisions by any standard. Kalgoorlie has an area of almost 899,000 square miles out of a total area of 976,000 square miles for the whole of Western Australia; Kennedy occupies 283,600 square miles out of Queensland's total area of 670,500 square miles and Darling occupies 42 per cent. of the total area of New South Wales, which is 309,400 square miles. If a one-tenth margin had to be satisfied there would presumably be some increase in the area of these divisions. Kennedy, for example, which is primarily an inland electorate, would probably include a larger coastal belt than it has at present. In the preparation of a proposed redistribution of a State, the Distribution Commissioners enjoy substantial discretion so that they might achieve the most equitable results possible. They are required to pay regard to the considerations laid down in section 19 of the Act which include community or diversity of interest, means of communication and physical features. But, in the opinion of the Committee, it is quite unrealistic to imagine that in electorates covering more than 100,000 square miles, the reduction of the permissible margin from one-fifth to one-tenth will produce any vastly different results. Community of interest and the other factors mentioned in section 19 can mean a great deal in drawing the boundaries of divisions of small areas, but they become rather unreal in the determination of the boundaries of the mammoth divisions which exist in four States.

351. It is the Committee's view that each large division can be fitted into a marginal allowance of one-tenth without frustration of the purposes of section 19. The same legal considerations have applied to the last three redistributions, but the assessed enrolment of Kalgoorlie, Darling and Kennedy, for purposes of the redistribution in 1937, was, in each case, considerably greater than the quota determined for each of the States concerned for purposes of the redistributions in 1948 and 1955.

352. A steady increase in the population of the undeveloped areas of Australia, accompanied by an increase in the number of members of the House of Representatives to meet the requirements of a general increase in population, is needed to make possible a substantial reduction in the size of the large divisions in Australia. In this connexion, the Committee refers again to its proposal considered in Chapter 3 that the number of members of the House of Representatives should no longer be tied to the number of senators, but that the Parliament should be authorized to increase the number of members of the House of Representatives provided that the total number of members elected in each of the States does not exceed on the average one member for every 80,000 persons.

Effects of Population Changes.

353. A merit of allowing divisions to be fixed within one-fifth limits of the quota for a State is the latitude it allows the Distribution Commissioners in taking account of likely population changes. As the population of each State increases, most electorates will continue to have more electors, but increases do not occur uniformly. Progressive industrialization and the establishment of new areas of settlement can produce very rapid increases in some electorates. Again, sometimes people move away from old-established centres causing a fall in the number of electors in the covering electoral divisions. Quite properly, Distribution Commissioners take account of these factors. They have, in unusual cases, upon redistribution, fixed the assessed enrolment of a division at a figure which departs from the State quota by more than a one-tenth margin.

354. There were two prominent cases in the redistribution of 1955.

355. The assessed enrolment of the division of Bonython in South Australia was 35,310 or 15.3 per cent. below the quota for the State. By the time of the general election in 1958, the number of voters on the roll had increased to 48,655, a figure not only in excess of the quota determined for purposes of the 1955 redistribution, but also exceeding a quota determined having regard to total State enrolment immediately before the election.

356. In excess of a State quota, there was the case of the division of Brisbane in which assessed enrolment was 46,279 or 12.0 per cent. above the State quota of 41,309 in 1955, but at the election in 1958 there were only 41,196 enrolled electors.

357. The Committee mentions too the division of Franklin in Tasmania which numbered 30,570 electors in the 1955 distribution or 11.7 per cent. below the State quota. At the general election in 1958, the number of electors in the division had increased to 35,130 or slightly more than the 1955 quota of 34,611.

358. The Committee considers that the advantages of a one-fifth margin to take account of probable population changes are, at best, qualified.

359. The full utilization of a one-fifth margin above or below a State quota means, as the Committee has already pointed out, that the number of electors in a division of one-fifth above quota will be one-half more than the number of electors in a division determined at one-fifth below the quota. If an election should occur not long after redistribution, a very obvious disparity in the value accorded to votes may result. Instances have occurred in the past. For example, the redistribution in 1948 was followed by a general election in 1949. The division of Gippsland in Victoria had an estimated enrolment of 35,108 or 14.3 per cent. below the State quota of 40,965. Enrolment for the division for the purpose of the election in 1949 was, however, 36,024, which was still 12.1 per cent. below the 1948 quota. At the general election in May, 1954, the number of electors on the rolls was 38,891, still below the quota in 1948.

360. Indeed, the experience of the 1949 election showed that there could be cases where the adoption of a margin exceeding one-tenth has resulted, by the time of election, in a situation of greater disproportion than as at the date of redistribution. For example, the division of Curtin in Western Australia had an assessed enrolment of 42,593 or 13.1 per cent. above the State quota of 37,652 in 1948, but the number of enrolled electors for the election in the following year was 43,559 or 15.7 per cent. above the quota. In the division of Fisher, in Queensland, 1948 assessed enrolment was 10.8 per cent. above quota, but by the time the election came around it was 14.7 per cent. above the quota of the previous year. In the division of Ryan, in the same State, there was an 11.4 per cent. departure from quota at redistribution, but the total number of electors enrolled in that division for the general election in the following year was 20 per cent. above the quota.

361. In the Committee's judgment, it is more equitable and democratic for a division to conform at the outset to a one-tenth margin, even though it may later exceed the margin rather than that the division should initially exceed a one-tenth margin and be made dependent upon subsequent population changes to bring about some adjustment.

Redistribution in Practice.

362. Apart from the occurrence of special features, associated with the creation of a division, of sparseness of population or a rapidly changing population, already discussed, the Committee visualizes that the narrowing of the margin of allowance which it proposes will not materially impede the carrying out of redistributions nor should it make for much more frequent redistributions.

363. As the Committee has mentioned, the factors taken into account in arranging electoral boundaries when there were only 74 divisions in the six States are similar to those which apply now that there are 122 State electoral divisions. In the 1955 redistribution, the estimated number of electors for the division of Eden-Monaro in New South Wales was 41,971, yet enrolment for purposes of the 1937 redistribution was estimated at 50,444. In Victoria, in the division of Gippsland, it was 40,952 in 1955 compared with 48,818 in 1937. Maranoa, in Queensland, comprised 37,262 electors in 1955, but for the 1937 redistribution had an estimated enrolment of 48,313. Hindmarsh, in South Australia, for the same years had an estimated enrolment of 42,152 and 61,537 respectively. In Western Australia, the division of Fremantle had 39,549 in the 1955 redistribution compared with an estimated 56,399 electors in the 1937 adjustment. There is nothing, in the Committee's opinion, to suggest that the criteria applicable in a redistribution are insufficiently flexible to absorb a narrowing of the margin from one-fifth to one-tenth.

364. The Committee repeats, moreover, that, although its proposal requires a redistribution to be conducted in accordance with the narrower margin, a redistribution is obligatory only once in every ten years. If, in the meantime, some divisions in a State should have enrolments in excess of a margin of one-tenth from the quota for a State, it is in the discretion of the Parliament as to whether a distribution should be undertaken. Meanwhile, the existence of the constitutional sanction should discourage governments from allowing anomalies in the size of electorates to continue without adjustment.

RECOMMENDATIONS AND DRAFT CONSTITUTIONAL ALTERATIONS.

365. Accordingly, the Committee has recommended that the Constitution be altered to provide that—

(1) the Parliament may make laws dividing each State into electoral divisions equal in number to the number of members to be chosen in the State with one member to be chosen for each division;

(2) upon the division of a State into electoral divisions, the number of electors in a division in a State should not exceed by more than one-tenth, or fall short of by more than one-tenth, a quota ascertained by dividing the total number of electors in the State by the number of members to be chosen in that State;

(3) the division of a State may be reviewed at any time but the division of every State into electoral divisions should be reviewed at least once in every ten years and where, upon review, the number of electors in a division in a State is found not to be within one-tenth of the quota, there should be a further division of that State into divisions;

(4) for the purposes of the division of each State into electoral divisions and any subsequent division of a State into divisions, including the required decennial review, the Governor-General in Council should be required to constitute an *Electoral Commission for each State to make recommendations to the Parliament* in connexion with the division of the State into divisions;

(5) the division at any time of a State into electoral divisions should not take place until the Electoral Commission *constituted for the State has reported to* the Parliament; and

(6) each Electoral Commission should consist of not less than three members and all Electoral Commissions in existence at the one time should have the same number of members.

366. Implementation of the Committee's recommendations involves the repeal of section 29 of the Constitution. It is convenient to express the Committee's *recommendations, which are,* of course, detailed and explicit, in five separate sections to replace the existing section 29.

367. A new section 29 requires, in sub-section (1.), that the Parliament divide each State into the same number of electoral divisions *as the number of members to be chosen for the State,* with one member for each division.

368. Sub-section (2.) provides that the number of electors in any division of a State should not be greater or less than *one-tenth of a quota for the State determined* by dividing the number of electors in the State by the number of members to be chosen in the State.

369. Sub-section (3.) states that the Parliament shall not divide a State into electoral *divisions unless an Electoral Commission for the State* has reviewed the existing division of the State and made a report to the Parliament. The sub-section also states that the division of a State shall first take effect at the first general election following the making of the division.

370. In observing the requirements of sub-section (2.), the Parliament could scarcely be expected to have regard to the actual number of electors at the date on which it makes the law for the division of each State. The ground work of distribution which is, under the Committee's proposals, entrusted to *Electoral Commissions, will have commenced,* perhaps, several months beforehand. Accordingly, sub-section (4.) of the new section authorizes the Parliament to declare by law the number of electors in a State and in each electoral division of the State as at a base date which the Commission for the State selects for the purpose of undertaking its review. At the same time, the sub-section leaves it open to the Parliament to determine a later date if it wishes. Whilst the Committee contemplates that the Parliament would ordinarily choose the same date as an Electoral Commission, for the purposes of determining the number of electors in a State or part of a *State, the selection* of a later date would give it an opportunity to review the work of a Commission if, for example, for some reason, substantial population changes were to occur after the base date selected by the Commission and before the actual division of States into divisions by the Parliament under sub-section (1.) of the proposed *section.*

371. The new draft section 29, which the Committee proposes, reads—

29.—(1.) For the purposes of the election of members of the House of Representatives, the *Parliament shall, from time to time, divide each State into electoral* divisions equal in number to the number of members to be chosen in the State. One member shall be chosen for each electoral division. Electoral divisions.

(2.) The division of a State into electoral divisions shall be such that the number of persons in each electoral division who are qualified as electors of members of *the House of Representatives*—

(a) is not less than nine-tenths of a quota determined by dividing the number of persons in the State who are so qualified by the number of members of the House of Representatives to be chosen in the State; and

(b) does not exceed that quota by more than one-tenth of the quota.

(3.) A division of a State into electoral divisions—

(a) shall not be made unless an Electoral Commission for the State has, under section twenty-nine B *of this Constitution,* reviewed the existing division and made a report of the results of the review; and

(b) shall first take effect at the general election next following the making of the division.

(4.) For the purposes of a division of a *State into electoral divisions* under this section, the number of persons in the State who are qualified as electors of members of the House of Representatives and the number of such persons in each electoral division shall be taken to be the numbers declared by the law by which the division is made to have been the respective numbers of those persons ascertained, as nearly as practicable, at a *date specified in the law, being a date not earlier* than the date adopted by the Electoral Commission for the State as the base date for the purposes of its review of the existing division.

372. The second new section which the Committee proposes, is to make provision for the periodic review of electoral divisions. *It authorizes the Governor-General in Council to direct a* review of a State divisional structure and requires a direction for the review of the divisions of all States at the same time at intervals not exceeding ten years. It further requires a direction by the Governor-General whenever an alteration is made in the number of members of the House of Representatives to be chosen in a State.

373. The draft section reads—

29A.—(1.) The Governor-General in Council may at any time direct that the division of a State or States into electoral divisions shall be reviewed. Review of electoral divisions.

(2.) A direction under this section in relation to all the States shall be given from time to time, and not more than ten years shall elapse between the giving of one such direction and the giving of the next following *such direction.*

(3.) Whenever an alteration is made in the number of members of the House of Representatives to be chosen in a State, a direction under this section shall be given in relation to that State.

374. Another draft *section, section 29B, deals with the manner of review of electoral* divisions. An Electoral Commission, constituted for each State separately, is charged with the function of carrying out the review of the division of a State. For the purposes of review, the Electoral Commission for a State must, under sub-section (2.), adopt a base date at which the number of electors in the State concerned, or in any division or part of the State, should be ascertained. It is on the figures so ascertained that the Commission is to undertake its review and recommend the division of the State into electoral divisions, none of which may depart from the quota for the State by more than one-tenth.

375. Where, upon review, the Commission finds that the number of electors of an existing division at the base date departs from the State quota by more than one-tenth, it has to report to the Parliament recommending new electoral divisions. The Commission must also report if it considers that for any other reason a new division of the State should be made.

376. The proposed new section reads—

29B.—(1.) A review of the division of a State into electoral divisions shall be carried out by an Electoral Commission constituted for the State, and the Electoral Commission shall report the results of its review to each House of the Parliament. Manner of review of electoral divisions.

(2.) For the purposes of a review under this section, the Electoral Commission shall adopt a date, being as recent a date as is practicable, as the base date for the purposes of the review, and the number of persons in the State, or in a part of the State, who are qualified as electors of members of the House of Representatives shall be ascertained, as nearly as practicable, as at that date.

(3.) Where, upon a review under this section—

(a) the Electoral Commission finds that, at the base date, the existing division no longer complied with the requirements of sub-section (2.) of section twenty-nine of this Constitution; or

(b) *the Electoral Commission is of opinion that, for any other reason, a new division should be made,*

the Electoral Commission shall report that a new division should be made and shall, in its report, recommend electoral divisions into which the State might properly be divided.

377. A further section, section 29C, authorizes the Parliament to make laws for carrying the three preceding sections into effect, including laws with respect to the matters to be taken into consideration by Electoral Commissions and the furnishing of additional Reports by a Commission. *The section also states that each Commission shall consist of not less than three members and all* Electoral Commissions in existence at the one time, as for example, when a decennial review of all States is being undertaken, must have the same number of members.

378. The draft section 29C reads—

29C.—(1.) Subject to this section, the Parliament may make laws for carrying the last three preceding sections into effect, including laws with respect to— Laws to give effect to sections 29, 29A and 29B.

(a) the constitution and procedure of Electoral Commissions;

(b) the matters to be taken into consideration by Electoral Commissions; and

(c) the furnishing of further reports by an Electoral Commission that has made a report.

(2.) Each Electoral Commission shall consist of not less than three members, and all Electoral Commissions in existence at the one time shall have the same number of members.

379. The remaining section, section 29D, which the Committee proposes is merely a transitional provision to deal with the changeover from the present constitutional position.

380. The proposed new section reads—

29D.—(1.) Until the first division of a State into electoral divisions after the date of *commencement of the Constitution Alteration* ( ) 1960, the electoral divisions that would, if a general election of members of the House of Representatives had been held immediately before that date, have been applicable for the purposes of that election shall continue to be the electoral divisions applicable in that State for the purposes of general elections of members of that House. Transitional provision.

(2.) *The first direction in pursuance of sub-section (2.) of section twenty-nine A of this Constitution* shall be given not later than the day of One thousand nine hundred and sixty-four.

(3.) For the purposes of an election to fill a casual vacancy held before the first general election of members of the House of Representatives after the date of commencement of the *Constitution Alteration* ( ) 1960, the electoral division applicable shall be the electoral division for which the member whose place has become vacant was chosen.

CHAPTER 9.—RECKONING OF POPULATION.

Recommendation of the Committee.

381. Paragraph 69 of the Committee's Report tabled in 1958, contains a recommendation that section 127 of the Constitution should be repealed.

Operation of Section 127.

382. Section 127 reads—

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

383. Apart from its statistical significance, the main effect of section 127 is to preclude the aboriginal population of a State from being taken into account when determining the number of members of the House of Representatives to be chosen for the State. Section 24 of the Constitution provides that the number of members chosen in the several States should be in proportion to the respective numbers of the people of each State.

384. The Committee has, in Chapter 3 of this Report, recommended substantial alterations to section 24 but the number of members to be chosen in the several States would remain in proportion to population. Accordingly, the recommended repeal of section 127 is relevant to section 24 as it now stands or as the Committee proposes it should be altered.

385. A draft clause was included, without discussion, in the Commonwealth of Australia Bill of 1891 which read as follows:—

In reckoning the numbers of the people of a State or other part of the Commonwealth, aboriginal natives of Australia shall not be counted.

386. The clause was discussed at the Adelaide session in 1897 when the words "of Australia" were omitted. It was proposed during the Melbourne Debates in 1898 that the clause should also extend to aliens who were not naturalized as well as to aborigines but it appeared that some members of the Convention were under the impression that the clause was connected with the eligibility of aborigines to be electors of the Commonwealth. Edmund Barton said that section 127 was a statistical provision and had "reference solely to the reckoning of the number of people of a state when the whole population has to be counted, and where it would not be considered fair to include the aborigines". (*Convention Debates*, Melbourne, 1898, Vol. I., at page 713.)

387. Before the conclusion of the Convention Debates in 1898 the words "of the Commonwealth, or" were added to the section but otherwise the substance of the provision remained unchanged from its first introduction in 1891.

Justification for the Repeal of the Section.

388. In 1891, there was no accurate information as to the number of aborigines in each colony. According to Quick and Garran, the number of aborigines enumerated or believed to exist in each colony in that year was as follows:—

Colony.	Males.	Females.	Total.
Victoria	325	240	565
New South Wales	4,559	3,721	8,280
Queensland (1881)	10,719	9,866	20,585
South Australia	14,510	9,279	23,789
Western Australia	3,516	2,729	6,245
Tasmania	73	66	139
Commonwealth	33,702	25,901	59,603

—(*The Annotated Constitution of the Australian Commonwealth*, at page 984.)

The learned authors observed that the number was probably higher. They wrote—

In most, if not in all, of the colonies, this enumeration was incomplete. In Victoria, whilst only 565 (including half-castes) were enumerated, 731 are believed to be in existence. In Queensland no attempt was made to enumerate or estimate the number of aborigines, therefore the number returned in 1881—which is believed to

understate the truth—has been repeated. In South Australia the aborigines were not regularly enumerated, the figures given being derived from estimates. In Western Australia only civilized aborigines were enumerated. In the numbers given for that colony 575 are half-castes. In Tasmania there are no longer any aborigines of unmixed race, the last male having died in 1869 and the last female in 1876. There are, however, a few half-castes.

—(*The Annotated Constitution of the Australian Commonwealth*, at page 984.)

389. According to the latest available statistics of the Commonwealth Bureau of Census and Statistics, the aboriginal population, including half-castes, of the States as at 30th June, 1947, was 58,570. Including the Northern Territory and the Australian Capital Territory, which, in 1891, were parts of South Australia and New South Wales respectively, it was 73,817. Details were as follows:—

State or Territory.	Aboriginal Persons Full Blood.	Aboriginal Persons Half-caste.	Total.
New South Wales	953	10,607	(a) 11,560
Victoria	208	(a) 1,069	(a) 1,277
Queensland	(b) 9,100	(a) 7,211	16,311
South Australia	(b) 2,139	(a) 2,157	(c) 4,296
Western Australia	(b) 20,338	(a) 4,574	(c) 24,912
Tasmania	..	214	(a) 214
Northern Territory	(b) 13,900	(a) 1,247	15,147
Australian Capital Territory	..	100	(a) 100
Total	46,638	27,179	73,817

(a) Census figures. (b) Furnished by the Protectors of Aboriginals. (c) In addition to these totals, the Protectors of Aboriginals estimated that there were 826 half-caste and mixed bloods in South Australia and 1,322 in Western Australia, presumably living in the nomadic state. In Western Australia, the Department of Native Welfare estimated that as at 30th June, 1956, there were 21,300 aborigines in the State, comprising 8,400 full-bloods and 6,900 caste people living within the confines of civilization and some 6,000 tribal natives.

390. In the first Commonwealth Parliament there was an average of one member for about every 50,000 persons in the States of the Commonwealth and at present the average is one member for about every 81,000 persons. The number of aborigines in any State is obviously insufficient to make any change in the number of members of the House of Representatives chosen in that State unless it should happen, under the present provisions of the Representation Acts, enacted under the powers conferred upon the Parliament by section 24 of the Constitution, that a remainder greater than one-half of the quota for a State should occur as a result of taking into account the aboriginal population of a State which would then give the State an additional member in the House of Representatives.

391. A similar result could occur under the Committee's proposed alterations to the sections of the Constitution dealing with the number of senators and members of the House of Representatives which have been discussed in Chapter 3 of this Report. The Committee has proposed constitutional alterations to enable the Parliament to provide for the number of members of the House of Representatives in any State by dividing the total population of each State by a figure of not less than 80,000. If, upon such a division, a remainder of greater than one-half of the divisor should result, another member has to be chosen in the State concerned.

392. Since the aborigines of a State must be taken into account for governmental purposes, a State can rightly assert that they should form part of its population for constitutional purposes.

393. At Federation, the available means of communication made it almost impossible to obtain an accurate count of the aboriginal population of a State. Some difficulty will continue to be experienced in counting the number of aborigines who do not live in proximity to settlements but the means of communication and available sources of contact with aborigines of nomadic habit have improved so much since Federation that the Committee believes that there are no longer insuperable barriers to the carrying out of a satisfactory census of the aboriginal population of the States.

394. Many aborigines live or work in proximity to settlements. To ignore all of them in the taking of a census because some are tribal or nomadic in their habits, is, at this stage of our national development, an injustice to many. This view was expressed by representatives of the Western Australian Native Welfare Council Incorporated. In the course of an appearance before the Committee, the representatives said—

The only reason for dealing with census returns at all in the Constitution is that they are used in calculating the number of seats each State should have in the House of Representatives, which are allocated in accordance with the proportions of the populations of the various States, the calculation being made afresh after each census. It is therefore an interesting sidelight on this section that if it were deleted, the proportions of the populations of the States would be altered after the next census, and this could conceivably result in some of the States, including Western Australia, obtaining an extra seat in the House of Representatives at the expense of New South Wales and Victoria. However, this sidelight does not interest us. We are of opinion that the continuation of this section is a continuation of an insult to the Aborigines and that if more statistics were available, more logic could be brought to bear on their problems. It may be that when the Constitution was originally drafted, statistical information

concerning the Aborigines could not be obtained. However, we have no doubt that the opening up of Australia and the development of statistical methods during the last fifty-seven years has rendered it quite a simple matter for the appropriate statistics to be obtained. We are therefore in favour of this section being struck out.

395. Representatives of the Australian Federation of Women Voters referred to the Universal Declaration of Human Rights which was adopted and proclaimed by the General Assembly of the United Nations in 1948. They considered that the repeal of section 127 would be a practical manifestation of Australia's belief in the principles of the Declaration. The Committee does not consider that the existence of section 127 violates the principles of the Declaration but the repeal of the section would be consistent with the objectives of the Declaration and would receive international approbation. As it is, section 127 is liable to be misconstrued abroad.

396. The Committee should point out that section 127 has no direct bearing on the question of the eligibility of aborigines to vote at Federal elections. The Commonwealth Parliament has, under section 30 of the Constitution, power to deal with the qualification of electors of members of the House of Representatives and under section 8 of the Constitution, the qualification of electors of senators is as prescribed by the Parliament for electors of members of the House of Representatives. The Parliament has exercised its powers under these sections in section 39 of the *Commonwealth Electoral Act* 1918-1953. For all practical purposes, the section provides that no aboriginal native of Australia shall be entitled to vote at any Senate election or House of Representatives election unless—

(a) he is so entitled under section forty-one of the Constitution;

(aa) he is an aboriginal native of Australia and—

(i) is entitled under the law of the State in which he resides to be enrolled as an elector of that State and, upon enrolment, to vote at elections for the more numerous House of the Parliament of that State (or, if there is only one House of the Parliament of that State, for that House); or

(ii) is or has been a member of the Defence Force;

Section 41 of the Constitution states that an adult person who acquires a right to vote at elections for the more numerous House of the Parliament of a State cannot be prevented, while the right continues, by any law of the Commonwealth, from voting at elections for either House of the Federal Parliament. If aborigines are to become qualified as electors then, as a matter of principle, they should be recognized as forming part of the population of the State in which they live. The repeal of section 127 is consistent with the idea that there should not be fundamental barriers to aborigines becoming qualified as Federal electors. The repeal does not, however, create entitlement.

397. When the Committee ceased its deliberations in 1958, it had given some consideration to the very important question as to whether the Commonwealth Parliament should have an express power to make laws with respect to aborigines, and representations from various quarters advocated the adoption of a recommendation to this effect. The Committee had, however, not completed its inquiries on all the issues involved and consequently no recommendation has been made. It wishes to make clear, however, that the recommendation to repeal section 127 does not necessarily affect the broader and more vital question of Commonwealth power over aborigines.

Recommendation.

398. For the reasons stated, the Committee has recommended the repeal of section 127 of the Constitution. Since the repeal only of the section is involved, a draft illustrative constitutional alteration is unnecessary.

PART THREE.—CONCURRENT LEGISLATIVE POWERS.

INTRODUCTION.

399. In this Part of the Report, the Committee will set out the reasons in support of its recommendations to add to the specific subjects on which the Commonwealth Parliament may make laws concurrently with the State Parliaments. The recommendations do not involve vesting any subject of legislative power exclusively in the Commonwealth Parliament.

400. As to the nature of Commonwealth concurrent legislative power, the Committee should repeat its observations contained in the first Report. The Committee there said—

> 70. It seems to be a widespread misconception that the grant of an additional legislative power to the Commonwealth Parliament necessarily involves a withdrawal of power from the States. Most of the legislative powers vested in the Commonwealth Parliament are known as concurrent powers, that is to say, they do not belong exclusively to that Parliament but are also retained by the States. Where the powers are concurrent, section 109 of the Constitution accords paramountcy to Commonwealth laws over State Laws. This means that State laws may be displaced in so far as they are inconsistent with valid Commonwealth laws. Nevertheless, States may, and in fact continue to, legislate in respect of subjects upon which the Commonwealth Parliament may also pass laws.

401. In many quarters, a contemplated increase in Commonwealth legislative powers provokes criticism that the Commonwealth Parliament is already the repository of sufficient or too much power. Yet, the Commonwealth Parliament is confined to legislating on a limited number of subjects. By contrast, there are few legislative powers which the States do not have. Section 107 of the Constitution declares that every power of the Parliament of a State shall, unless the Constitution exclusively vests it in the Parliament of the Commonwealth or withdraws it from the State, continue to reside in the State. There are a few powers which only the Commonwealth Parliament has under the Constitution, as for example, the power to impose duties of customs and excise, but for the most part the Constitution neither vests powers exclusively in the national Parliament nor withdraws them from the States.

402. Again, as the Committee observed in its first Report, criticism of increased legislative power for the central Parliament frequently fails to acknowledge that each House of the Federal Parliament comprises members directly chosen by the people. The electors who elect members of the House of Representatives also elect the senators for a State. Fundamentally, the question of increased Commonwealth legislative power resolves itself into whether the people wish to have their will expressed through the national Parliament or whether they choose to have a divided expression of will through the separate State Parliaments.

403. Developments affecting the division of powers between the Commonwealth and the States, including the growth since Federation in number and importance of matters affecting the people of the Commonwealth as a whole rather than the States individually, were described in paragraphs 77-105 of the Report which the Committee has already presented and the Committee does no more than invite reference to the paragraphs. Some of the developments have been mentioned again in paragraph 81 of this Report.

404. The Committee's recommendations on concurrent legislative powers are set out as follows:—

CHAPTER 10.—NAVIGATION AND SHIPPING.

Recommendation of the Committee.

405. In its 1958 Report, the Committee observed that the Constitution did not allot to the Parliament a substantive power to deal with navigation and shipping at large and that, for the most part, intra-state navigation and shipping were beyond the constitutional powers of the Commonwealth.

406. The Committee has recommended, in paragraph 110 of the first Report, that the Constitution should be amended to vest the Commonwealth Parliament with an express power to make laws with respect to navigation and shipping.

Constitutional Position.

407. Under section 51 (i.) of the Constitution, the Parliament has power to make laws with respect to trade and commerce with other countries and among the States. Section 98 declares that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping.

408. Before 1910, the view was widely held, and in fact acted upon by the Commonwealth Parliament, that the whole subject of navigation and shipping belonged to the Federal legislature. In 1910, however, the High Court held in *S.S. Kalibia* v. *Wilson* (1910) 11 C.L.R. 689, that section 98 did not enlarge the ambit of the trade and commerce clause but was merely explanatory of the power contained in section 51 (i.). Such power as was conferred by section 98 was subject to the limitations of section 51 (i.) and did not extend, therefore, to dealing with intra-state navigation and shipping but only with navigation and shipping relevant to interstate and foreign commerce. In the *Kalibia Case*, the provisions of the *Seamen's Compensation Act* 1909 purporting to apply in respect of shipping engaged in intra-state trade were held to be *ultra vires* section 51 (i.).

409. Not long afterwards, the Commonwealth passed its first navigation legislation, the *Navigation Act* 1912. The Act, in recognition of the decision in the *Kalibia Case*, did not apply to ships engaged in intra-state trade but it did purport to apply to ships on the high seas or in waters used by ships engaged in interstate and external trade even though the ships might be engaged in intra-state commerce. The High Court held, however, in *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1921) 29 C.L.R. 357, that the provisions of the Navigation Act relating to the manning of, and accommodation on, ships, to the extent that they purported to apply in respect of ships engaged solely in the domestic trade and commerce of a State, were invalid. The mere presence of a ship on the high seas or in shipping lanes used by interstate and overseas vessels did not bring that ship within Commonwealth jurisdiction for all maritime purposes, including those challenged.

410. The Commonwealth power over navigation and shipping, besides enabling the Commonwealth to regulate interstate and overseas navigation, authorizes the making of laws to deal with such matters as the relations of employers and employees engaged in interstate and overseas trade and commerce by sea. Thus, the Commonwealth may legislate on such subjects as seamen's compensation, stevedoring operations and superannuation schemes for seamen. The power also permits the Commonwealth itself to engage in interstate and overseas shipping operations.

411. The Commonwealth has other legislative powers affecting its position in the maritime industry. For example, section 51 (vii.) of the Constitution empowers the Parliament to make laws with respect to lighthouses, lightships, beacons and buoys and this power is not subject to the qualifying conditions found in the substantive power relating to navigation and shipping. The Federal Parliament may, under its powers with respect to defence (as for example, Constitution, section 51 (vi.)) and the power to make laws with respect to the government of the Territories (Constitution, section 122) also legislate with respect to navigation and shipping. Thus, the Parliament may make laws applying to ships in the waters of any Territory of the Commonwealth and has a legislative power over shipping operations to and from a Territory. The Committee also mentions that under covering clause 5 of the Commonwealth of Australia Constitution Act, the laws of the Commonwealth are in force on all British ships, the Sovereign's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

412. But the Committee wishes to observe that, in peace-time, the Commonwealth Parliament has no general legislative power over the subject of navigation and shipping which enables it to legislate in respect of intra-state shipping as it may do for interstate shipping. Legislative power is divided between the Commonwealth and the States. Nor does the Commonwealth power in terms extend to ships which voyage to and from Australia or between States without being engaged in trade and commerce.

413. In respect of interstate shipping, any exercise of Federal legislative power is also subject to the provisions of section 92 of the Constitution which declares that trade, commerce and intercourse among the States shall be absolutely free. The section, as interpreted, postulates the freedom of individuals to engage in interstate trade and commerce without legislative or executive restriction.

414. The constitutional position is affected to some extent because provisions of the Merchant Shipping Act, 1894, passed by the United Kingdom Parliament, apply to the Commonwealth and the States. In general, the States cannot pass legislation which is inconsistent with Imperial enactments forming part of their law but the Commonwealth, by reason of the adoption of the Statute of Westminster in 1942, is not so restricted.

The Convention Discussions.

415. In the original Constitution Bill of 1891, "Navigation and Shipping" was included among the law-making powers of the Federal Parliament. The provision remained in the draft bill following the conclusion of the Adelaide session of the Convention Debates in 1897, but in the following Melbourne session in 1898, there was a discussion about railways leading to the insertion of a declaratory clause stating that the power of the Parliament to make laws with respect to the regulation of trade and commerce should be taken to extend to railways, the property of any State. The object of the clause was apparently to remove doubt as to whether State owned railways were subject to the trade and commerce power. Later, during the Melbourne session, an express reference to navigation and shipping was added to the declaratory clause, which ultimately became the present section 98, and the express reference to navigation and shipping was omitted from the list of legislative powers of the Commonwealth Parliament. It does not seem to have been understood at Melbourne that this amendment had the effect of cutting down the Commonwealth's power over navigation and shipping. For example, the official record of the Melbourne session records the following discussion:—

Mr. Glynn (South Australia).—I desire to ask the leader of the Convention whether he thinks it advisable to strike out of clause 52 the provision in regard to navigation and shipping?

Mr. Barton.—We have provided for it elsewhere.

Mr. Glynn.—Yes; I see that it is provided for in clause 97, which now reads as follows:—

> The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any state.

—(*Convention Debates*, Melbourne, 1898, Vol. II., at page 2,449.)

416. In a memorandum submitted to the Conference of Commonwealth and State Ministers on Constitutional Matters in 1934, the then Solicitor-General, Sir Robert Garran, stated that the fact was overlooked that the trade and commerce power was limited to interstate and external trade and that this limitation would apply to navigation. He wrote—

> It is due to an oversight in the hurried last stages of the drafting of the Constitution that the Federal Parliament has not express and plenary power to make laws with respect to navigation and shipping. Canada has that power. In the Australian draft Constitution of 1891 "navigation and shipping" were included among the specific subject-matters of Federal legislative powers. At the Federal Convention of 1897-8 the same provision was inserted. At a late stage of the sittings of the Convention it was pointed out that in the United States Constitution navigation and shipping were deemed to be implied from the trade and commerce power and the Admiralty jurisdiction and it was suggested that the express mention of navigation and shipping in the Australian Constitution might be construed to limit the trade and commerce power. Accordingly, the subject-matter, navigation and shipping, was omitted and by the declaratory words of section 98 the trade and commerce power was expressed to extend to navigation and shipping.
>
> The fact was overlooked that the trade and commerce power was limited to interstate and external trade and that this limitation also would extend to navigation.

Extent of Intra-state Shipping Operations.

417. The Committee should refer to the relative importance of intra-state shipping under State control and other shipping operations in Australian waters over which the Commonwealth has jurisdiction. The hey-day which intra-state shipping enjoyed in the second half of the nineteenth century and the earlier part of the present century has long since disappeared.

418. At one time there was a fairly considerable passenger traffic between intra-state ports but the passenger trade is now, almost exclusively, confined to South Australia, Western Australia and Queensland and is negligible by comparison with the number of passengers carried by the interstate and overseas shipping services.

419. The volume of intra-state cargo business has also declined although it has remained fairly steady for several years. It is small compared with overseas and interstate cargo movement, which has increased substantially, as the following table reveals:—

CARGO MOVEMENT.

('000 tons.)

Year.	Overseas.(a)		Interstate Shipped.(a)	Intra-state Shipped.(b)
	Discharged.	Shipped.		
1938–39	4,208	5,138	7,221	3,066
1951–52	9,727	4,487	7,697	2,748
1952–53	7,733	6,045	8,447	2,885
1953–54	8,520	5,765	9,105	3,031
1954–55	10,992	6,084	10,212	3,087
1955–56	12,431	6,667	11,632	3,553
1956–57	12,596	8,734	11,899	4,135
1957–58	13,719	7,366	12,614	4,197

(a) Commonwealth Bureau of Census and Statistics. (b) Commonwealth Department of Shipping and Transport.

420. Competition from other forms of transport, in particular road transport, has made extensive inroads on the extent and prosperity of intra-state shipping operations. It has not only reduced the passenger trade to negligible size, it has also brought about a large decline in the volume

of general cargo carried between intra-state ports. Of the 4,197,000 tons of cargo carried intra-state in 1957-58, about 2,066,000, or approximately one-half of the total, was coal carried by the so-called "sixty milers" operating principally from Newcastle to Sydney, and a further 932,000 tons consisted of refined petroleum products carried in overseas owned tankers. Intra-state cargo trade has always been greatest between New South Wales ports. Yet, although total shipments of coal to ports within that State increased from 1,211,000 tons in 1938-39 to 2,066,000 tons in 1957-58, the general cargo carried over the same period fell from 758,000 tons to about 28,000 tons.

421. As at 31st December, 1958, there were 133 ships of more than 200 tons gross totalling some 494,000 tons gross engaged exclusively or mainly in interstate trade and commerce and 31 vessels of more than 200 tons gross totalling some 28,000 tons gross engaged exclusively or mainly in intra-state shipping operations.

422. It is clear, therefore, that the field of maritime regulation now exclusively reserved to the States constitutes only a minor part of the shipping operations conducted in Australian waters and that the bulk of shipping operations falls within the field of Commonwealth power.

The Regulation of Navigation and Shipping in Australia.

423. One result of the division of subject-matter between the Commonwealth and the States has been to make it necessary for each of the States and the Commonwealth to maintain their own marine legislation. A question of whether a State or Federal law covers the navigation of a ship will usually depend on the nature of the voyage on which the ship is engaged. If it is engaged in intra-state trade, State law will apply, but if on a later voyage the ship should be engaged on interstate trade, Federal law is applicable.

424. The principal Commonwealth Act is, as mentioned, the *Navigation Act* 1912-1958, the longest of all Commonwealth Acts at present in force. It deals comprehensively with many matters affecting navigation and shipping. One part of the Act contains provisions relating to the complement of ships' officers and crews; engagement and discharge of seamen; seamen's wages; discipline; health and accommodation on ships; protection of seamen; property of deceased seamen; relief to seamen and their families; the obligations of the master of a ship; and the maintenance of an official log. Another part contains provisions relating to ships and shipping, including surveys of steamships and survey certificates; sailing ships; safety convention certificates; unseaworthy ships; life-saving appliances and fire protection; deck and load lines; distress signals; radio equipment; compasses; collision, boat and fire drills; dangerous cargoes; lights, signals and sailing regulations; and reports of accidents and dangers to navigation. Further parts of the Act include sections relating to passengers; the coasting trade, wrecks and salvage; limitation of liability in respect of government ships; courts of marine inquiry and legal proceedings. The Act is further amplified by many regulations which deal with a wide range of technical subjects and spell out legal requirements in considerable detail.

425. Much of the same ground is covered equally specifically by State Acts and regulations which apply to intra-state navigation and shipping. To take one example, the Navigation Act, 1901-1954 of the State of New South Wales contains a code of provisions relating to navigation; pilots; certificates; safety and prevention of accidents; navigable waters and other matters relating to navigation by sea. Thus one part of the Act deals with steam navigation, including provisions relating to surveys and certificates and the duties of surveyors and owners. Another part deals with examinations and certificates of masters, mates, engineers and marine surveyors. The part of the Act relating to safety and prevention of accidents includes sections dealing with unseaworthy ships; life-saving appliances; wireless telegraphy; dangerous goods; lights, fog signals and sailing rules; and deck and load lines. Other parts of the Act contain provisions relating to seamen, legal procedure and a court of marine inquiry. As in the case of the Commonwealth Act, the State Act is further amplified by regulations.

426. In Victoria, the Marine Act 1928, as amended, covers, among other things, certificates of masters, mates and engineers; unseaworthy ships; cables and anchors; ship's draught and clear side; deck and load lines; equipment; prevention of collision; lights, signals and sailing rules; inspection of ships; survey of steamships; carriage of dangerous cargoes; investigations and inquiries into casualties, incompetency and misconduct; passengers; and pilots and pilotage.

427. The Committee was advised that State legislation does not provide for uniform treatment of similar matters and that there were discrepancies between Commonwealth and State law in cases where the interests of the industry required uniformity. For example, requirements for life-saving equipment and fire prevention varied between the States and, in some instances, lagged behind Commonwealth provisions which, in an endeavour to maintain the highest possible standards, incorporate the provisions of relevant international conventions. The Committee was further advised that the standard of maritime administration varied from State to State, as for example, in the survey and inspection of ships which is integrally related to the important matter of seaworthiness.

428. Experience has shown that while there are seven separate systems of legal control over navigation and shipping in Australian waters, differences and duplication in applicable law and practice will invariably exist. Yet in such matters as the conditions of employment of the crews of

seagoing ships; rules to be observed to ensure the safety and protection of crews and ships; seaworthiness of ships; equipment and loading of ships; and the conditions of carriage of passengers, it would seem that there are unquestionable advantages for both the shipping industry and the general public if legal requirements are uniform and administered under a single system of control.

429. The division of legal control also gives rise to practical problems. The line of demarcation between Commonwealth and State legal powers in matters relating to casualties at sea is, for example, uncertain. Two cases show the curious situation arising from the division of power. In the case of *Hume* v. *Palmer* (1926) 38 C.L.R. 441, a master on an interstate steamship had been convicted under the New South Wales Navigation Act for disobeying, in Sydney Harbour, the Regulations for Preventing Collisions at Sea made under that Act. The High Court held that the proceedings should have been taken under the Commonwealth Navigation Act and the Navigation (Collision) Regulations made under that Act because the State law had been superseded by the Federal law. On the other hand, in the case of *The King* v. *Turner* (1927) 39 C.L.R. 411, a Commonwealth Court of Marine Inquiry was held to have no jurisdiction to inquire into a collision which occurred between two ships engaged in intra-state trade and commerce in the port of Hobart after passing through the course ordinarily used by ships engaged in interstate and overseas trade and commerce. Following *Turner's Case*, Commonwealth and State authorities worked out an unofficial arrangement to determine which authority should constitute a Court of Marine Inquiry if one is required, but the problem does not rest at this point. A Court of Marine Inquiry not only determines the cause of a casualty but may be required to hear any charges in respect of offences which a preliminary inquiry has indicated may have been committed. Further difficulties arise in connexion with the penalties which may be imposed if a person is found guilty of the charge. If a State Court of Marine Inquiry finds that a person holding a Commonwealth certificate of competency is guilty of an offence, it may not withdraw or suspend that certificate although it may deprive the person of competence in respect of intra-state navigation and shipping. Similarly, the Commonwealth Court may not take action in respect of a State certificate such as may be held by a pilot or the master of an intra-state ship.

430. There are many other illustrations where the artificial dividing lines of Commonwealth and State responsibilities have practical consequences not conducive to efficient administration or the best interests of the maritime industry, as for example, in salvage and wreck, handling of cargo on wharfs, standards of medical examination for seamen and the issue and operation of survey certificates, but the Committee considers the examples need not be developed in any detail.

431. The Committee also mentions the apparent hiatus, resulting from the division of constitutional power, in the law applicable to ships engaged in interstate journeys or between an overseas port and an Australian port but which are not engaged in trade and commerce.

432. In 1929, a majority of members of the Royal Commission on the Constitution reported in favour of a constitutional amendment to give the Commonwealth Parliament a concurrent legislative power over navigation and shipping. The members of the Commission believed that the legal requirements for coastal navigation should be uniform irrespective of the voyages on which ships were engaged. The majority members reported as follows:—

> In our opinion the requirements for coastal navigation should be the same whether the ships navigated trade between one or more States or along the coast of one State only. Further, we are of opinion that the administration of the laws relating to navigation should be under one central authority, adequate provision being made for a decentralized administration and the subordinate officers having an adequate discretion. We fully accept the evidence of a number of expert witnesses to the effect that the State and Federal authorities have worked harmoniously, but we think that there should not be the opportunity for friction and for overlapping which must exist under the present method of control. Further, we are of opinion that there should not be any room for the doubts which have arisen as to the laws under which an offence may be punishable, or as to the authority which may appoint courts of inquiry, which have arisen in a number of recent cases referred to by witnesses before this Commission.
>
> We recommend that the Commonwealth Parliament be empowered to legislate with respect to navigation and shipping.

—(*Report of the Royal Commission on the Constitution*, at page 256.)

433. For some years before the Royal Commission reported, unsuccessful attempts were made in discussions between the Commonwealth and the States to bring about some improvement in the situation of different conditions applying to ships depending on whether they were subject to Commonwealth or State law. The matter was again considered at the Conference of Commonwealth and State Ministers on Constitutional Matters which was held in 1934 but agreement was not reached on that occasion.

434. The discrepancies in the navigation laws of the States are probably fewer in number than at the time when the Royal Commission reported. Nevertheless, differences still exist for no apparent cause other than that there is a division of constitutional power.

435. In any event, the Committee believes that it is completely illogical to have legal power divided over a subject which by its nature is undivided. Sir John Latham, Professor Geoffrey Sawer and the Institute of Public Affairs (N.S.W.) observed that the case in favour of Commonwealth power was overwhelming.

436. The Committee does not envisage that a general Commonwealth power over navigation and shipping should lead to Commonwealth absorption of everything pertaining to intra-state shipping or that uniform standards and rules should be imposed without regard to particular circumstances pertaining at various parts of the coastal waters. A general power will, however, make it possible to regulate the shipping industry in Australian waters more effectively and economically from the point of view both of the public interest and the industry.

Registration of Ships in Australia.

437. The national identification of ships through systems of registration underlies the entire structure of the shipping industry of the maritime countries for purposes both of public and private law.

438. For many years in Australia, ships have been registered under the provisions of Part I. of the United Kingdom Merchant Shipping Act, 1894, which is expressed to apply to the Dominions and other places where Her Majesty has jurisdiction. There are registration facilities maintained at seventeen ports in Australia. There are no ships known to the law as Australian ships and all ships on Australian registries are, for all legal purposes, described as British ships and no distinction is drawn between those which engage in intra-state trade and those which do not.

439. Registered ships receive the protection of the British flag and the tonnage disclosed in the Certificate of Registration is accepted in respect of such matters as the calculation of State port and harbour dues and Commonwealth light dues, the determination of the amount of a shipowner's liability and the calculation of the tonnage of the merchant fleet.

440. In 1942, the Commonwealth Parliament adopted the Statute of Westminster Act, 1931, passed by the United Kingdom Parliament. The Statute of Westminster afforded recognition legally to the attainment of Dominion status by various British countries including the Commonwealth of Australia. By adopting the Statute, it became possible, for the first time, for the Commonwealth Parliament to make laws inconsistent with laws of the United Kingdom Parliament which applied to the Commonwealth, including the relevant provisions of the Merchant Shipping Act. The adoption also meant that no Act of the United Kingdom Parliament passed thereafter, including Acts amending the Merchant Shipping Act, should apply to the Commonwealth as part of the law of the Commonwealth unless it was expressly declared in the Act that the Commonwealth had requested and consented to the enactment thereof. The Statute of Westminster did not purport to make any change in the constitutional position of the States.

441. Constitutional limitations no longer prevent the Commonwealth Parliament from setting up a system of national identification of shipping. Parliament could pass a law providing for the registration of ships in Australia as Australian ships. The Commonwealth law could not, however, apply to ships engaged solely in intra-state trade and commerce.

442. The Commonwealth has achieved independent status in the affairs of the world. The British Empire at Federation has grown into the Commonwealth of Nations and it may well be appropriate and advantageous in future to provide for the registration of ships as Australian ships. This course of action would not involve any major departure from the administrative practice now observed in connexion with the registration of British ships in Australia and it would be regarded as a manifestation of the maturity which the nation has now attained. The Committee understands that other Commonwealth countries are considering the establishment of their own registries and it may be foreseen that individual member countries will co-operate with each other and establish reciprocal arrangements under which full recognition would be accorded to each other's registration laws.

Changes in United Kingdom Shipping and Navigation Law since the Adoption of the Statute of Westminster.

443. The Commonwealth Parliament passed the Statute of Westminster Adoption Act in 1942. Since then there have been amendments to the Imperial Merchant Shipping Act.

444. One amendment made by the Merchant Shipping Act, 1954, affects the tonnage measurement appearing in the certificate of registration of a British ship. Obviously, the amendment affects such matters as dues, shipowner's liability and the planning of ships for future construction. The amendments are not part of Commonwealth law nor has the United Kingdom legislation been expressed to apply to the States. The States remain governed by the registration provisions of the 1894 Act as amended up to the time of the adoption of the Statute of Westminster.

445. The Commonwealth Parliament could validly legislate to bring the law relating to the registration of vessels engaged in interstate and overseas trade into line with the present United Kingdom position but, if it did, the law applicable to vessels engaged exclusively in intra-state trade and commerce would no longer be the same.

446. The Registrars of Shipping in Australia have taken the practical course of observing the provisions of the present law of the United Kingdom in matters of registration. The practice does not, however, have a sound legal basis.

447. Other questions involving the application of the Merchant Shipping Act, 1894 arise. Recently, the United Kingdom Parliament passed the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, which substantially increased the limits of liability fixed under Part VIII. of the Merchant Shipping Act from £15 sterling per registered ton for personal injury or loss of life and £8 sterling per ton for damage to property to about £73 and £24 per ton respectively in accordance with limits agreed to at an international convention at Brussels in 1957. It is probable that the Commonwealth will wish to amend its law to increase the limits in accordance with the terms of the convention but, if it should, the old limits of liability under the Act of 1894 would continue to apply to shipping subject to the jurisdiction of the States.

448. Problems of the kind mentioned are by no means theoretical. For example, in *Asiatic Steam Navigation Company* v. *The Commonwealth* (1956) 96 C.L.R. 397, the High Court was concerned with questions of limitation of liability under the Merchant Shipping Act, 1894, arising out of a collision between two ships in Port Jackson. It was held, among other things, in that case that in determining the extent to which liability for damage to property could be limited under the Merchant Shipping Act, 1894, there had to be ascertained the amount in Australian currency which represented eight English pounds for each ton of the vessel's tonnage when ascertained in accordance with that Act.

449. In the regulation of Australian coastal shipping, it is evident that much is to be gained from experience of the United Kingdom, whose navigation and shipping law and practice is based on centuries of experience. However, the division of constitutional power and the adoption by the Commonwealth of the Statute of Westminster have, in some ways, created problems of keeping abreast of changes in the United Kingdom law and other overseas developments, as the position with regard to the registration of ships and tonnage measurement of ships reveals.

450. Although the adoption of the Statute of Westminster enables the Commonwealth to make laws inconsistent with Imperial laws which apply to it, the Colonial Laws Validity Act still applies to the States of the Commonwealth to prevent them enacting laws contrary to Acts of the United Kingdom Parliament which apply to the States.

451. The Merchant Shipping Act, 1894 contains provisions which would enable the States to modify the application of its provisions. For example, under section 735 of the Act, the legislature of any British possession may, by Act confirmed by Her Majesty in Council, repeal wholly or in part most of the provisions of the Merchant Shipping Act. The Federal *Navigation Act* 1912 was confirmed by Order in Council made under the section. Under section 736, the legislature of a British possession may by Act regulate its coasting trade but the Act so doing must contain a suspending clause providing that it shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

452. If each of the States should wish to incorporate the provisions of United Kingdom law relating to tonnage measurement and the limits of shipowner's liability as part of their own law, it seems that they could make use of the special procedures set out in the Merchant Shipping Act. It is the Committee's view, however, that as long as the Imperial Merchant Shipping Act as amended up to the time of the adoption of the Statute of Westminster continues to apply to the States, State law is unlikely to keep pace with overseas developments which may be incorporated in the law of the Commonwealth. Accordingly, divergencies between Commonwealth and State law will not only continue but may, in respect of some vital matters, increase.

453. Having regard to the constitutional relations which pertain between the United Kingdom and the Commonwealth of Australia, the Committee believes that action to rectify the situation has become a domestic responsibility of the Commonwealth and its people. If the Commonwealth were to have the navigation and shipping power which the Committee proposes, the difficulties to which it has referred of adopting appropriate changes in United Kingdom maritime law for general application in Australia would disappear.

454. There may, moreover, be lessons to be learnt from the experience of the other great maritime nations of the world and the customs of the sea observed internationally. A general Commonwealth power over navigation and shipping would again facilitate the general adoption in Australia of developments in other countries and places which would benefit the Australian shipping industry.

Implementation of International Conventions.

455. Maritime matters are commonly brought within the compass of international arrangement and the navigation legislation of both the Commonwealth and the States contains sections applying rules that have been the subject of international agreement.

456. As already mentioned, the Committee has not proposed any amendment of the Commonwealth Parliament's power to make laws with respect to external affairs which is to be found in section 51 (xxix.) of the Constitution, although it acknowledges that there have been differences of judicial opinion as to the scope of the power.

457. More than twenty Conventions of the International Labour Organization deal with matters connected with maritime employment, including the minimum age for employment at sea, accommodation of crews and paid vacations for seamen. In other branches of maritime law there are Conventions dealing with important subjects such as assistance and salvage, collisions, safety of life at sea, and load lines. Another agreement is the British Commonwealth Merchant Shipping Agreement of 1931 entered into by several member countries of the British Commonwealth, including Australia, shortly after the passing of the Statute of Westminster.

458. Many of the international agreements affecting navigation and shipping can only be made fully effective in Australia if their requirements are applied to intra-state shipping as well as to shipping within the jurisdiction of the Commonwealth. In view of the uncertainty which exists as to the precise scope of the external affairs power, where there are doubts whether a particular Convention can be fully implemented by the Commonwealth alone, the practice is, as has been mentioned earlier, to obtain the co-operation of the States to ensure that State law and practice also conform to Convention requirements.

459. The Committee mentions in Chapter 15, dealing with industrial relations, that Australia's rather poor record of ratifications of I.L.O. Conventions is partly attributable to the fact that many of the Conventions affected State law and problems arise in seeking to bring the law of every State into accord with the standards which the Conventions laid down. At present, most I.L.O. Conventions dealing with maritime matters await ratification. A few are inappropriate to Australian conditions and, in some cases, Commonwealth law does not yet fulfil Convention requirements, but the ratification of several is unlikely in the near future because of the need for the States to amend their laws before Australia is in a position to comply fully with the Conventions. Treating the Committee's recommendation as to navigation and shipping independently of its recommendation on industrial matters, there is little doubt that a general power over navigation and shipping would facilitate ratification of several of the I.L.O. Conventions which, as yet, are not ratified.

460. Ratification problems arise in connexion with other maritime Conventions. For example, Australia was represented at the Conference which drafted the International Convention for *the Prevention of Pollution of the Sea by Oil which was held in 1954.* That Convention has now come into operation, but Australia has not ratified it. Briefly, the Convention imposes obligations on contracting governments relating to ships registered in the territory of the contracting State. It seeks to prevent pollution of the sea by oil by prohibiting discharge of oil in certain prohibited zones including, apart from a few exceptions, " all sea areas within 50 miles from land ". The prohibited zones include, therefore, areas of internal waters, territorial waters and the high seas. The Convention also requires ships registered in the territory of a contracting government to be fitted with certain oily water separator apparatus and contracting governments have to ensure, within a certain period, the provision in each of its main ports of facilities for receiving oily residues. Clearly, the Convention imposes requirements which would affect intra-state shipping. The Commonwealth has acted on the assumption that it should obtain the co-operation of the States to the introduction of laws which will give effect to the provisions of the Convention, but Australia is not yet in a position to lodge its ratification. If it had a plenary power over navigation and shipping, the Commonwealth would, doubtless, ratify such a Convention without delay.

461. The division of constitutional power also creates problems in connexion with the carrying out of the provisions of the British Commonwealth Merchant Shipping Agreement. For example, it was agreed that the laws and procedures of the parties attaching to the registration of ships, including the certificate of registry and measurement of ship's tonnage, should be as uniform as possible. The parties also agreed that each should make every endeavour to preserve uniformity and maintain the standards at present in force relating to the safety of ships. It was further agreed that each part of the British Commonwealth should, in the regulation of its coasting trade, treat all ships registered in the British Commonwealth in exactly the same manner as ships registered in that part and that standards of qualification required for certificates of competency should, so far as possible, be alike throughout the Commonwealth. The Agreement does not contemplate the division of the coasting trade along the lines of the legal division which applies in Australian waters and difficulties could arise, therefore, in complying fully with the obligations of the Agreement, particularly, as was mentioned earlier, since the States cannot avail themselves of the Statute of Westminster and provisions of the Imperial Merchant Shipping Act still apply as part of their law.

Ships Registered in Australia which Operate between Overseas Ports.

462. The Committee has mentioned that the scope of the Commonwealth's legal powers over navigation and shipping is substantially determined by the power to make laws with respect to overseas and interstate trade and commerce. There are doubts whether some sections of the Navigation Act of the Commonwealth, such as those dealing with a seaman's right to wages after shipwreck and the property of deceased seamen validly apply to vessels which, though registered in Australia, do not operate in Australian waters but confine their activities to carriage between oversea ports. The Committee's proposal would resolve any doubts as to the application of Commonwealth law by reason of these circumstances.

The Role of Shipping in National Development.

463. The Committee noted in its first Report that the Commonwealth and the States were committed to heavy programmes of national development in pursuance of the common objective of building a strong, prosperous Australia. In this century, tremendous advances have been made in road and air transport which have overshadowed the role of the shipping industry in commerce and development. It remains true that the tonnage of cargo carried between States by ship is far greater than that carried interstate by any other means of transport.

464. An active and efficient coasting trade *is not only important because of its bearing on* the national economy; it also is vital because of the value of merchant shipping in times of emergency. In the second World War, ships engaged in the Australian coasting trade were used as troop transports and for other military purposes. In addition, coastal ships carried essential cargoes between Australian ports at a time when the country was desperately short of adequate transport facilities.

465. The Committee believes that the establishment of a unified jurisdiction for all navigation and shipping in Australia would facilitate the maintenance of an efficient industry.

Application of Section 92 of the Constitution to the Coasting Trade.

466. The Committee's attention was drawn to Part VI. of the Federal Navigation Act which applies to the coasting trade, including trade between ports in different States of the Commonwealth. Section 288 prohibits a ship from engaging in the coasting trade unless licensed by the Minister to do so. Licences are issued subject to compliance with specified conditions, for example, as to the payment of wages. Under section 286, a Minister may issue permits in certain circumstances to unlicensed ships to engage in the coasting trade. Another section provides that a ship shall not engage in the coasting trade if it is in receipt of a foreign subsidy.

467. Doubts were expressed as to the validity of these provisions having regard to recent decisions of the High Court which affirmed the right of individuals under section 92 of the Constitution to engage freely in interstate trade.

468. On the other hand, *it was also pointed out that a licensing system to preserve the* coasting trade to ships which conformed to the Australian standard of wages and manning and accommodation could well be regarded as regulatory. It was the general practice of sovereign States to regulate their coasting trade intensively, even to the point of excluding ships of foreign countries.

469. The Committee decided not to recommend any amendment involving a modification of the operation of section 92 in connexion with the sections of the Navigation Act under discussion.

Recommendation.

470. Accordingly, the Committee has recommended that the Constitution be amended to provide the Commonwealth Parliament with an express concurrent legislative power over the subject of navigation and shipping.

471. The proposed alteration could take the form of an additional paragraph in section 51 of the Constitution.

CHAPTER 11.—AVIATION.

Recommendation of the Committee.

472. The Committee referred, in paragraph 89 of its first Report, to the emergence since 1900 of air transport as a major means of communication between States and as an instrument of geographical development, as for example, in the more remote parts of the Commonwealth. The Committee pointed out that the provision of facilities for the maintenance of air services such as aerodromes and navigational aids was costly and that the burden of providing them had fallen almost entirely on the Commonwealth. The Committee observed, in paragraph 111, that the Commonwealth did not have an express power over civil aviation but maintained its extensive interests in the development of the industry by reason of the national Parliament's powers to make laws with respect to interstate and overseas trade and commerce, external affairs and the Territories of the Commonwealth. There was, however, an area of power which did not belong to the Commonwealth Parliament, namely, intra-state aviation.

473. The Committee has recommended that the Constitution should be amended to confer on the Commonwealth Parliament an express concurrent power to make laws with respect to civil aviation.

The Developing Importance of Aviation in Australia.

474. Aviation did not have a place in the Convention discussions; it was in 1903 when the Wright brothers made their celebrated powered flight and ten years of Federation elapsed before the first powered flight occurred in Australia in 1910. In common with the rest of the world, the

Founders were unaware of the possibilities of aviation as a major means of communication between the colonies. Travel between the more distant colonies was accepted as requiring several days rather than hours. In the eastern colonies there was a well developed railway network, but, in the absence of a transcontinental line, shipping provided the only common link between all the colonies.

475. The first company to fly regular services between State capitals did not commence operations until 1929. Now, 30 years later, more than 2,000,000 passengers a year are being carried on regular airline services within Australia.

476. The ground work for commercial airline operations was laid before the outbreak of the last war, but the large scale development in domestic civil aviation has taken place since the conclusion of the war. In 1938-39, the last pre-war financial year, 95,268 paying passengers were carried on regular domestic air services. In 1947-48, 1,217,178 paying passengers were carried by the regular airlines and in 1957-58, the number of paying passengers carried by public and private airlines had increased to 2,151,613. Figures for air carriage of freight also show the extent of post-war expansion in civil aviation. In 1938-39, 717 short tons of freight were carried compared with 29,160 short tons in 1947-48. By 1957-58 the figure had reached 70,645 short tons. Total mileage flown by aircraft engaged on regular commercial operations was 8,192,305 in 1938-39 compared with 33,315,906 in 1947-48. In 1957-58 the figure had increased to 41,894,571 miles. Carriage of mail has also increased. In 1938-39, only about 70 short tons of mail were carried compared with 1,432 short tons in 1947-48 and again by 1957-58, the figure had reached 2,810 short tons of mail carried.

477. The over-all expansion of commercial operations is shown in the table hereunder giving the total ton-miles performed on Australian regular domestic air services for the years indicated:—

SHORT TON-MILES PERFORMED.

Year Ended 30th June—	Passengers.	Freight.	Mail.	Total.
1939	3,687,832	..	..	..
1947	37,616,334	6,837,099	741,880	45,195,313
1948	51,561,579	13,612,686	809,148	65,983,413
1949	57,970,016	17,338,870	943,543	76,252,429
1950	60,966,525	22,683,348	1,474,810	85,124,683
1951	69,069,399	27,655,780	1,571,817	98,296,996
1952	74,568,191	27,337,303	1,383,350	103,288,844
1953	69,790,600	27,876,205	1,301,465	98,968,270
1954	73,477,600	33,358,398	1,396,805	108,232,803
1955	80,074,240	37,733,231	1,465,197	119,272,668
1956	86,086,760	39,676,379	1,535,494	127,298,633
1957	92,687,860	37,150,527	1,580,012	131,418,399
1958	93,488,630	33,851,844	1,660,324	129,000,798

478. Information is not available separately to compare the volume of interstate and intra-state commercial air operations, but taking passenger traffic by itself, the Department of Civil Aviation advised the Committee that the percentage that interstate passenger traffic bears to total passenger traffic has been between 75 per cent. and 80 per cent. over the whole of the post-war period. Accordingly, the volume of interstate air transport business has constantly been about three or four times greater than intra-state business, including feeder service traffic.

479. One of the most impressive features of the progress of civil aviation in Australia has been the development of air routes. Total unduplicated route mileage was 19,873 in 1938-39 compared with 49,059 in 1947-48 and by 1957-58 it had reached 98,476. Australian civil air services now link all the capital cities of Australia. There is a network of air services linking inland towns to each other and to capital cities so that air travel is now within reach of almost the whole of the Australian population. For example, it is possible to travel to State capital cities by air from such outlying towns as Carnarvon, Marble Bar, Meekatharra, Broome and Wyndham in Western Australia; Oodnadatta, Leigh Creek and Ceduna in South Australia; Bourke and Broken Hill in New South Wales; Cairns, Cloncurry, Hughenden, Longreach and Charleville in Queensland; and Alice Springs, Tennant Creek, Daly Waters, Katherine and Darwin in the Northern Territory. In other words, commercial air services operate within Australia to span a wider area of the continent and to serve more dispersed localities than any other forms of commercial transportation.

480. In short, though the tremendous distances between north and south and east and west of Australia still present many unresolved problems, domestic civil aviation has created a new sense of mobility and been a strong unifying factor in the Commonwealth. It has brought the States and the residents of the States into closer contact with each other, assisted in the promotion of interstate trade and commerce and has already played an important part in promoting the settlement and welfare of the people in the vast undeveloped parts of this country. The limits of expansion are by no means attained and aviation should be even more important in the second half of this century in helping to promote the economic and social development of Australia.

481. Australian aviation activity is not confined to the conduct of domestic air services. Before the war, the Australian international carrier, Qantas, operated on an international route from Sydney to Singapore. Now, however, the airline serves 26 countries in five continents and has an unduplicated route mileage in excess of 60,000 miles. Qantas international traffic has increased as follows during the post-war years:—

Year Ended 30th June—	Passenger-miles Performed.	Freight Ton-miles Performed.	Mail Ton-miles Performed.
1947	33,974,800	700,997	1,819,991
1952	137,403,900	4,788,830	5,187,284
1958	396,562,600	12,526,746	9,056,229

In addition, the Commonwealth shares ownership with the New Zealand Government of Tasman Empire Airways Limited which operates between Australia and New Zealand.

482. At the international level, civil aviation has changed the whole concept of world travel and communication and has become an instrument of national policy with important commercial and strategic implications. This was recognized in the Chicago Convention of 1944 which provided for the formation of the International Civil Aviation Organization. I.C.A.O. plays an important role in fostering the development of international air services between member countries. Australia is a member of the Organization which, as at 20th February, 1959, had 73 member countries, including all the countries maintaining important international air services with the exception of the U.S.S.R.

483. On the international side, Australia numbers among the countries most interested in aviation and plays an active part in the affairs of I.C.A.O.

484. Some reference to a broader aspect of civil aviation will serve to place it in its perspective in world affairs. John C. Cooper of the United States, one of the world's foremost writers on aviation and one time Director of the Institute of International Air Law in Montreal, Canada, made the following observations in 1948 in the course of an address on the fundamentals of air power:—

Air power is the total ability of a nation to fly, to act through the airspace, to use controlled flight, such for instance as the flight of aircraft. Mitchell called it "the ability to do something in the air". Twenty years after Mitchell, General H. H. Arnold, in his last report as Commanding General of the United States Army Air Forces, pointed out that "air power includes a nation's ability to deliver cargo, destructive missiles, and war making potential through the air to a desired destination to accomplish a desired purpose"—that "air power is not composed alone of the war making components of aviation"—that "it is the total aviation activity, civilian and military, commercial and private, potential as well as existing".

Air power is, as I have said before, the total ability of a nation to fly. It provides the air transport of a nation in peace or in war, whether the cargo be passengers, mail, and freight, or airborne troops and destructive missiles. This is the first fundamental of air power.

From it springs a second fundamental—that air power is indivisible. Military air force and civil aviation are supported by the same elements of national power. The same airfields can be used by civil and military aircraft; the same type of airmen can man either; the same brains can design and the same factories can build bombers and transports; the same materials and resources and fuel are required for their construction and operation. So long as a nation continues to possess these basic elements . . ., its potential air power is not impaired, though some uses of its air power may be temporarily limited. For example, the vain effort made in the Treaty of Versailles to abolish German military air force while leaving practically unimpaired its so-called civil aviation, aircraft manufacturing industry, and German control of its own airspace proved tragically futile. One use of German air power was temporarily impaired but its potential air power remained.

485. In the Committee's mind, there can be no doubt but that the undivided subject of aviation is a national matter.

Constitutional Powers of the Commonwealth Parliament.

486. The Parliament's powers to make laws concerning civil aviation fall into three distinct categories.

487. The Parliament has power under section 51 (xxix.) of the Constitution to legislate for the carrying out of international conventions. There are several Conventions dealing with matters affecting international aviation of which the Chicago Convention of 1944 is probably the main one. Among other things, it provides for the observance by member States of standards and recommended practices in relation to aircraft personnel and aircraft of a contracting State engaged in international air navigation. It also specifies conditions to be fulfilled with respect to aircraft and flight over territory of contracting States. Laws of the Commonwealth Parliament for the carrying out of obligations imposed on Australia by a convention must faithfully pursue that objective.

488. Most of the Commonwealth Parliament's legislative activity in respect of domestic civil aviation depends legally on the interstate and overseas trade and commerce power contained in section 51 (i.) of the Constitution. The paragraph enables the Parliament to make laws for the regulation of interstate aviation and flights to and from other countries, providing aviation facilities

such as aerodromes and navigational aids, and establishing public air transport undertakings to engage in interstate and overseas air operations. The paragraph is, therefore, an important source of legislative power.

489. The regulation of aviation between the States is subject to the operation of section 92 of the Constitution. The High Court held in the *Airlines Case* (1945) 71 C.L.R. 29, that the Commonwealth Parliament could validly create the Australian National Airlines Commission to operate interstate air services but that the Parliament could not provide for the establishment of a monopoly of interstate air services in favour of the Commission. Section 92 does not prevent the Commonwealth from providing an air navigation code to be observed with respect to aircraft engaged in interstate flights but the section forbids the introduction of a compulsory licensing system to restrict air services on the interstate routes.

490. The third category of power is provided by the Parliament's power to make laws for the peace, order and good government of the Territories of the Commonwealth under section 122 of the Constitution and the power contained in section 52 to make laws with respect to the seat of government of the Commonwealth. The Commonwealth Parliament has a plenary power to deal with aviation within the Territories and flying operations to or from a Territory of the Commonwealth.

491. There is, however, a substantial area of power beyond the reach of the Parliament. Only the States have the legal power to deal with purely intra-state aviation. The exercise by the national Parliament of its constitutional powers enables some laws to be passed affecting intra-state civil aviation. For example, the implementation of an international convention may necessarily involve control of some aspects of intra-state aviation, but, generally speaking, the Commonwealth Parliament does not have any effective legal control of intra-state air transport operations.

Legislative Regulation of Air Navigation in Australia.

492. The first Australian aviation statute was the *Air Navigation Act* 1920 which purported to authorize the making of regulations for carrying out the Paris Convention 1919 and to provide for the control of air navigation, including intra-state air navigation, throughout the Commonwealth and the Territories. The Premiers' Conference of 1920 resolved that the States should confer on the Commonwealth Parliament, by a reference under section 51 (xxxvii.) of the Constitution, the power to make laws with respect to air navigation, subject to the States own rights to own and use aircraft for governmental and police purposes. The Commonwealth Act anticipated the passing of State legislation referring the matter. The Air Navigation Regulations framed under the 1920 Act purported to cover practically the whole field of domestic aviation. However, most of the States failed to implement the terms of the Premiers' resolution.

493. In 1929, six of the seven members of the Royal Commission on the Constitution reported in favour of a grant of power to the Commonwealth Parliament over air navigation and aircraft. The Commission referred to the evidence taken on the subject of the control of aviation as follows:—

> All the expert witnesses on this subject who appeared before the Commission were agreed that the Commonwealth should have control of aviation, and their views may be summed up in the following extract from the evidence of Captain G. F. Hughes, President of the Aero Club of New South Wales, which was expressly approved by other witnesses:—
>
> > The very nature of aircraft and their uses, and the nature of the regulations required, make utterly impracticable, in my opinion, a control by the Commonwealth the effectiveness of which would only arise contingently on a particular class of journey being undertaken. Where could one draw the line and decide where Commonwealth regulations began to operate? Such an arrangement would, in my view, be hazardous in the extreme, and a menace to all classes of aerial navigation . . .
> >
> > There is absolutely no other industry or means of locomotion in which control necessitates supervision of the product from the drawing board through all the processes of manufacture to the finished article, and then throughout the life of the machine. There is no means of travel which is so unrestricted by physical boundaries. (Evidence, p. 163.)
>
> —(*Report of the Royal Commission on the Constitution*, at pages 206-207.)

494. In the same year, another Premiers' Conference reported that legislative provision in Australia with reference to aviation was defective and that the condition required immediate attention. It was agreed that the Commonwealth Parliament should draft a model bill for submission to the States transferring full power to the Commonwealth Parliament to legislate with respect to aviation. The State Governments undertook to consider whether they would submit the bill to their Parliaments at an early date. The matter was, however, struck out of the preliminary agenda for the 1930 Conference. The question of Commonwealth power was also discussed inconclusively at a Conference of Commonwealth and State Ministers in 1934. At a Premiers' Conference in 1936 it was again agreed that the States should pass legislation to enable the Commonwealth to exercise general aviation power. In the same year, the validity of the Air Navigation Act and Regulations was challenged in the High Court in *The King* v. *Burgess, ex parte Henry* (1936) 55 C.L.R. 608. The Court held that the Commonwealth Parliament had no general control over the subject-matter of civil aviation in the Commonwealth and so much of the Air Navigation Act, as authorized the making of regulations for the purpose of controlling air navigation in the Commonwealth, was invalid.

495. Following this decision, the Commonwealth Parliament passed a proposed law to alter the Constitution to give to the Parliament a specific power over air navigation and aircraft. A total majority of votes was obtained in favour of the proposed law at the referendum but separate majorities were obtained in only two States as against the required majority of four States.

496. After the failure of the referendum proposal, the Commonwealth convened a conference of Commonwealth and State Ministers to consider the question of uniform control and regulation of aviation in Australia. This Conference resolved that there should be uniform rules throughout the Commonwealth applying to all classes of air navigation and aircraft, the licensing and competence of pilots, air traffic rules and the regulation of aerodromes. The Commonwealth already regulated interstate air navigation by regulations made under the *Air Navigation Act* 1920. It was agreed that legislation should be introduced in the Parliament of each State to make provision for the application of the Commonwealth Air Navigation Regulations as in force from time to time to air navigation and aircraft within the jurisdiction of the States. All States later passed Air Navigation Acts, in substantially uniform terms, which applied the Commonwealth regulations applicable to air navigation within the Territories of the Commonwealth, *mutatis mutandis*, to air navigation within the State as if those regulations as so applied were incorporated in the State Act. Each State Act completes the scheme by providing in substance that where any function is vested in a Commonwealth authority, for the purpose of administration of the regulations as Commonwealth law, a like function is vested in the same authority for the purpose of the administration of the regulations in their application as State law. The State legislation should be distinguished from a reference of a matter under section 51 (xxxvii.) of the Constitution. The practical result is that the Air Navigation Regulations passed under the Commonwealth Act apply uniformly to all classes of air navigation and their administration whether as part of Federal law or State law is vested in the Federal authorities. The maintenance of the scheme of control depends, of course, on the continued co-operation of the States. Some States have acted to ensure that they retain some control over aspects of licensing of intra-state services. There are, of course, aspects of intra-state aviation not covered by the Air Navigation Regulations. For example, the liability of an operator for death or injury of passengers or for damage which his aircraft causes to property on the surface does not fall within the ambit of the arrangement and the Commonwealth may deal with these matters only so far as they affect overseas, interstate and territorial operations.

497. The Committee is of the opinion that, since almost complete responsibility for the control of air navigation rests with the Commonwealth, the legal position of the Parliament should be made secure by constitutional amendment vesting an express power over aviation in the Commonwealth Parliament. Moreover, the Committee agrees with the view that since aircraft, irrespective of whether they are engaged in intra-state or interstate flights, make use of the same facilities and air space, it is altogether absurd that legal power should be determined by the physical boundaries of States. As Sir John Latham, Professor G. Sawer, the Institute of Public Affairs (N.S.W.) and others said in Committee, there should be no controversy about vesting in the national Parliament an express legislative power over aviation. The case in its favour was obvious.

Other Commonwealth Responsibilities.

498. Commonwealth responsibilities go far beyond the regulation of aviation by means of the Air Navigation Regulations. They also involve the provision of facilities, the granting of subsidies and assisting airlines to obtain equipment.

Provision of Facilities.

499. The development of air transport services in Australia depends upon the provision of costly items of capital equipment, including aerodromes, air traffic control stations and navigation aids. Without them, any realistic conception of commercial aviation is impossible. The cost of providing capital equipment and the ensuing operating and maintenance charges are an acknowledged Commonwealth responsibility although aircraft engaged in intra-state aviation also make use of the facilities.

500. The Commonwealth maintains a Department of Civil Aviation staffed by some 4,900 persons and, as at 30th June, 1958, owned and operated 168 aerodromes, including all the principal aerodromes in Australia; 50 aeradio stations; 28 air traffic control stations; 52 airport lighting systems; an extensive network of 33 radio ranges; 108 non-directional beacons and 70 distance measuring stations. Total Commonwealth capital expenditure on facilities up to 30th June, 1957, was £52,000,000, and by June, 1958, it increased by a further £4,000,000 to £56,000,000. The annual cost of maintaining and operating facilities, including depreciation of assets, was £9,700,000 in 1957-58 compared with £1,800,000 in 1947-48. In 1957-58, the Commonwealth received, in the form of air navigation charges and aviation fuel taxation, a sum of £1,800,000.

Granting of Subsidies.

501. The Committee has referred to the use of commercial aviation in opening up the sparsely settled areas of Australia. The Commonwealth pays direct subsidies to operators of services which are considered desirable in the national interest for the reason that the locality served is not

reasonably well served by other means of transport and for which the extent of assistance is not disproportionate to the value of the service to the community. Services at present subsidized include those operated north and west of Cairns by Ansett-A.N.A., the Channel and Gulf Country services of T.A.A., the services of Connellan Airways Ltd. in Central Australia and MacRobertson Miller Airlines Ltd. in Western Australia. In 1957-58, subsidy payments for developmental services totalled £345,915.

502. Another form of Commonwealth assistance to aviation is its subsidization of the activities of flying training organizations. In 1957-58, payments totalling £145,000 were made to these organizations for the training of student pilots whilst a further £27,000 was made available to be placed in an aircraft replacement fund. A sum of £3,000 was paid to gliding clubs in recognition of the value of their activities in the training of future flying personnel.

Airline Equipment.

503. For several years the Commonwealth Parliament, relying on its interstate trade and commerce, postal and defence powers, has assisted major airlines to obtain finance for the purchase of new equipment necessary to maintain up-to-date air services. For example, the *Civil Aviation Agreement Act* 1952 authorized the Commonwealth to make provision for loans up to £4,000,000 for the purchase of heavy aircraft by Australian National Airways Proprietary Limited. The most recent legislation, the *Airlines Equipment Act* 1958, provides that the Treasurer may, on behalf of the Commonwealth, guarantee the repayment of loans to the major private operator, Ansett Transport Industries Limited, up to a sum of £5,000,000 to enable the company to buy new aircraft. The Act does not affect the rights of Australian National Airways Proprietary Limited under the agreement in 1952 of which Ansett Transport Industries Limited, by reason of a take-over arrangement, now obtains the benefit. Provision of guarantees means that a company is able to negotiate for loans at a lower rate of interest and a longer repayment period than would otherwise be possible. The *Airlines Equipment Act* 1958 amended the Australian National Airlines Act so as to increase the borrowing powers of the Australian National Airlines Commission from £1,000,000 outstanding at any time to £3,000,000, and, in addition, provided for specific loans totalling some £2,350,000 for the purchase of new aircraft. The Commission has so far received capital advances totalling £5,870,000.

504. As at present advised, the Committee sees little likelihood of the Commonwealth obtaining any substantial relief from heavy financial commitments in seeking the promotion of a soundly established economic air transport industry in Australia. The rate of traffic growth in the industry will probably not be as great as in the immediate post-war years but an annual increase in business of some 5 per cent. should be about the normal order of expansion for many years. Moreover, improved aircraft design and the availability of new navigation aids to make flying even safer will make constant calls for the provision of capital sums to keep Australia abreast of most recent developments. It is a feature common to all countries who wish to provide adequate air services, that their governments are called upon to take active steps to ensure that the objective is attained. The nature and extent of Commonwealth commitments provide another cogent argument, in the Committee's opinion, for the Commonwealth Parliament to have an express power over civil aviation.

AIR TRANSPORT UNDERTAKINGS OPERATED BY THE COMMONWEALTH.

505. One of the two major airlines engaged in commercial operations in Australia is the Australian National Airlines Commission established by Act of the Commonwealth Parliament. The Commission operates interstate and territorial air services but, with the exception of services in Queensland, it does not participate in purely intra-state operations. In Queensland, the Commission's operations take place pursuant to a reference by the State under section 51 (xxxvii.) of the Constitution. Constitutional limitations place the Commission at a disadvantage compared with other commercial undertakings. Moreover, the result may be at times that a demand for air transport in some areas of Australia is not satisfied because the service is an intra-state one which no private operator is willing to provide. Since the Commonwealth's heavy financial expenditure and other commitments in making provision for an economic air transport industry in Australia will continue, the Committee's view is that the Commonwealth should also be authorized to conduct intra-state air services to ensure the most efficient use of its own undertaking.

APPLICATION OF SECTION 92 OF THE CONSTITUTION.

506. In recommending that the Commonwealth Parliament be empowered to make laws with respect to aviation, the Committee also considered whether any area of the law making power should be exempted from the operation of section 92 of the Constitution. The Committee has mentioned that interstate air operations are required to be licensed in the public interest to ensure the satisfaction of prescribed standards of safety but that a licensing system purporting to rationalize interstate services so as to avoid duplication and wasteful competition cannot be maintained consistently with section 92. The Committee was informed that a consequence of the legal position was that an organization could operate a service solely on one of the profitable high density passenger routes in the eastern

States, as for example, between Melbourne and Sydney, to the detriment of major operators who were also prepared to provide non-profit making services between places in outlying parts of the Commonwealth. The Committee believes that problems may lie ahead because the carrying capacity of airlines on interstate routes could become greater than the volume of business requires notwithstanding provisions of the Civil Aviation Agreement and the Airlines Equipment Act directed to the rationalization of air services of the present two major operators. The Committee was not, however, of one mind as to the means by which any such problems should be resolved. Accordingly, the Committee's recommendation for increased Commonwealth legislative power does not involve any modification of section 92.

RECOMMENDATION.

507. Accordingly, the Committee has recommended that an additional paragraph be added to section 51 of the Constitution to vest the Commonwealth Parliament with a concurrent legislative power over aviation.

508. The proposed alteration to give effect to the recommendation could conveniently take the form of an additional paragraph in section 51 of the Constitution naming aviation as a subject of concurrent legislative power.

CHAPTER 12.—SCIENTIFIC AND INDUSTRIAL RESEARCH.

RECOMMENDATION OF THE COMMITTEE.

509. The Committee observed in paragraphs 86 and 87 of its 1958 Report that research which the States and the Commonwealth carried on had been very much to the profit of the Australian community. Further expansion of research programmes would be needed if Australia was to maintain a satisfactory rate of development and its place in the community of nations.

510. Although the Commonwealth was committed to research programmes involving the expenditure of substantial public funds, it did not have an express power to legislate on the subject or to expend moneys for the purpose.

511. To make the position completely clear, and in acknowledgment of the extensive activities of the Commonwealth in research, the Committee has recommended (1958 Report, paragraph 116) that the Constitution should be altered to include in the list of legislative powers of the Commonwealth Parliament, a power to make laws for the carrying on and promotion of scientific and industrial research.

CONSTITUTIONAL ASPECTS OF COMMONWEALTH RESEARCH.

512. In considering the Commonwealth power to engage in research, the main constitutional question does not arise because the activity involves the regulation of the duties, liabilities or conduct of persons, but because research involves the expenditure of public funds, moneys which the Commonwealth Parliament appropriates from the Consolidated Revenue Fund.

513. Section 81 of the Constitution provides for revenues or moneys raised or received by the Executive Government of the Commonwealth to form one Consolidated Revenue Fund "to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution". Section 83, which is relevant, provides in part that "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law".

514. Until 1946, the spending power of the Commonwealth had not been judicially considered but, in that year, individual members of the High Court expressed opinions on the question in the *Pharmaceutical Benefits Case* (1946) 71 C.L.R. 237. On one view expressed in that case, section 81 entrusted the Parliament with the power and responsibility of determining the purposes for which money could be appropriated and expended. However, some members of the High Court considered that, although the position of a national government required a broad view to be taken of the appropriation power, the purposes for which Parliament could appropriate public moneys were not unlimited and sections 81 and 83 of the Constitution required the purposes to be found within the four corners of the Constitution and the distribution of powers and functions between the Commonwealth and the States under the Constitution.

515. The expenditure of money on research, so far as it is incidental to the exercise of the powers and functions expressly vested in the Commonwealth Parliament, would be authorized on either view expressed in the *Pharmaceutical Benefits Case*. For example, there is no doubt that the naval and military defence power and the power to make laws for the government of the Territories enable the expenditure of public funds on research in connexion with those subjects. However, on the specific view last-mentioned, it is doubtful whether the Parliament is unrestricted as to its power to pass laws appropriating moneys for research in any field without regard to the limits of its powers under the Constitution.

Commonwealth Research Activities.

516. The Commonwealth has for many years carried on and promoted research in many branches of science and industry.

517. In many cases, research is carried on as an adjunct of the responsibilities of the Commonwealth departments administered by Ministers of the Crown. By way of illustration, the Bureau of Agricultural Economics, which forms part of the Department of Primary Industry, engages in economic research and investigations which affect the primary industries. The Bureau of Mineral Resources, Geology and Geophysics, of the Department of National Development, carries out research in connexion with geological and geophysical surveys. The Commonwealth Department of Health is responsible for research into various aspects of public health conducted either within its own divisional structure or through instrumentalities for which it is responsible, including the Commonwealth Serum Laboratories, Commonwealth X-ray and Radium Laboratory, Commonwealth Acoustic Laboratories, Commonwealth Bureau of Dental Standards, School of Public Health and Tropical Medicine and the Institute of Child Health. The research and development branch of the Department of Supply is responsible for research and scientific development for defence, including the operation of the Weapons Research Establishment at Salisbury in South Australia and the Woomera Rocket Range, the Defence Standards Laboratories and the Aeronautical Research Laboratories. The Department of Works conducts the Commonwealth Experimental Building Station and the Building Research Liaison Service.

518. The Commonwealth also maintains independent research establishments usually responsible to a minister in charge. One example is the Australian Atomic Energy Commission which operates an experimental nuclear reactor at Lucas Heights near Sydney. This instrumentality is in the charge of the Minister for National Development.

519. From the point of view of the subject now being considered, the most notable example is the well-known Commonwealth Scientific and Industrial Research Organization which was first formed under the name of the Commonwealth Council for Scientific and Industrial Research in 1926. Among the powers and functions which Parliament has conferred on the Organization under the *Science and Industry Research Act* 1949, are the following:—

(a) the initiation and carrying out of scientific researches and investigations in connexion with, or for the promotion of, primary or secondary industries in the Commonwealth or in any Territory of the Commonwealth or in connexion with any other matter referred to the Organization by the Minister;
(b) the training of scientific research workers and the establishment and awarding of scientific research studentships and fellowships;
(c) the making of grants in aid of pure scientific research;
(d) the recognition or establishment of associations of persons engaged in any industry for the purpose of carrying out industrial scientific research and the co-operation with, and the making of grants to, such organizations when recognized or established;
(e) the testing and standardization of scientific apparatus and instruments and the carrying out of scientific investigations connected with the standardization of apparatus, machinery, materials and instruments used in industry;
(f) the collection and dissemination of information relating to scientific and technical matters; and
(g) the publication of scientific and technical reports, periodicals and papers.

520. The Organization's funds are derived mainly from annual appropriations by the Parliament and special funds which the Parliament has established, as for example, the Wool Research Trust Fund established under the *Wool Research Act* 1957. The Organization's expenditure on research and investigations has been rising steadily over recent years because of an expansion in work as well as increased costs. In 1953-54 the Organization's expenditure, excluding capital works and services, was £4,900,000, and its expenditure two years later was £6,300,000. In 1957-58 it had increased to £7,300,000. At the current rate of expansion, the C.S.I.R.O. should double the scale of its activities over the next ten years.

521. Since Federation, many astonishing scientific discoveries and developments have occurred. Present generations live in an age of rapid scientific progress from which communities should be able to derive incalculable benefits. Expansion of research activities in Australia is necessary to promote the expansion of industry and the welfare of the increasing population. The Committee is of opinion that research conducted under the auspices of the Commonwealth must be encouraged if Australia is to keep pace with technological developments in other parts of the world and maintain its position among the nations.

522. Money which the Commonwealth has already spent on scientific and industrial research has proved to be a highly profitable national investment and the annual return is many times greater than the expenditure involved.

523. No one would doubt the value to the Australian community of the research work into sera and vaccines carried on by the Commonwealth Serum Laboratories, the investigations conducted by the X-ray and Radium Laboratory into problems of radiological physics, the work on specifications and standards for dental materials conducted by the Bureau of Dental Standards, or the research into child illnesses which the Institute of Child Health undertakes.

524. In the primary industries, the control of rabbits by the use of myxomatosis developed by the C.S.I.R.O. was estimated to have increased the value of primary production by some £50,000,000 in 1952, the year following its introduction. Veterinary research has led to the conquest of many diseases of microbial or parasitic origin in cattle and sheep, and, as a result, Australian farmers have been able to prevent stock losses which were once heavy because of these afflictions. Further annual losses have been saved by the successful solution of obscure animal nutrition problems. Increased productivity, worth many millions of pounds annually, has resulted from the successful prosecution of research into the mineral and trace element content of soils and the role of these elements in plant nutrition. Discoveries in this field have transformed large tracts of waste land in South Australia into good agricultural country, and have raised the level of soil fertility in many areas of Australia. The pulp and paper industry, based on Australian hardwoods, is an outcome of the work of the Division of Forest Products, which has also improved the use of Australian timbers in many valuable ways.

525. Australia's profit from research into the problems of secondary industry is much more difficult to assess. Successes have been achieved in finding methods of extracting valuable minerals from their ores. Information on the properties of all Australian coals is available to industry from C.S.I.R.O.'s Coal Research Section. The National Standards Laboratory provides a valuable service to secondary industry. Many improvements in the food preservation and building industries have stemmed from research in C.S.I.R.O. laboratories. The Organization's research has also made possible improved woollen products. For example, it has resulted in the development of economic processes for the durable pleating of woollen fabrics, shrink and moth proofing of woollen textiles and for manufacturing wash and wear woollen garments.

526. Any attempt to assess comprehensively the value of C.S.I.R.O. must necessarily be speculative. It has been conservatively estimated, however, that the national gain is of the order of at least £100,000,000 per annum.

527. The results achieved so far in major current research projects are encouraging. Two projects, rainmaking and evaporation control, promise considerable improvements in water conservation. Present research into the nature of wool as a textile fibre make it likely that wool textiles can be given additional desirable properties to enable them to compete successfully with synthetic fibres. The introduction of new species of plants into Australian pastures may bring about a significant increase in Australia's arable acreage.

528. The expenditure of public funds on many of the research activities, which the Commonwealth carries on through its departments and the various instrumentalities, may be supported constitutionally as being related, or incidental, to various heads of legislative power vested in the Parliament itself. For instance, research into nuclear energy and long range weapons would fall within the ambit of the defence power. The Federal trade and commerce power is wide enough to authorize the provision of moneys for research into the major primary industries such as wool and wheat and problems of a general nature such as rabbit control even though benefits are derived in respect of production for consumption purely within State borders as well.

529. Nevertheless, the Committee is concerned that none of the research activities of the C.S.I.R.O. and other Commonwealth departments and authorities should be assailed or curtailed by possible legal doubts as to the validity of the expenditure of public funds for the purpose.

530. The Committee also considers that the Commonwealth's many responsibilities for research must increase and it is appropriate that the Parliament should have a specific legislative power to carry on and promote scientific and industrial research, including medical research. As the Committee has mentioned, research is incontestably a national matter and it is important that Australia should not constitute an exception to the emphasis which other major countries now place on technological progress.

Recommendation.

531. Accordingly, the Committee has recommended that the carrying on and promotion of scientific and industrial research be included in the list of subject matters in respect of which the Commonwealth Parliament may make laws concurrently with the States.

532. The Committee gave some thought to the question whether the Commonwealth Parliament should also have a legislative power to co-ordinate research carried on in Australia with a view to the best utilization of the country's resources. Although co-ordinated research programmes have obvious advantages, the Committee was of the opinion that it was unnecessary for the Commonwealth to have such a power and that, in a matter of this kind, it was sufficient to rely on the co-operation and collaboration of the various organizations engaged in research in Australia.

533. The Constitution could be altered to give effect to the recommendation by adding the subject of scientific and industrial research to those subjects in section 51 in respect of which the Commonwealth Parliament may make laws.

CHAPTER 13.—NUCLEAR ENERGY.

Recommendations of the Committee.

534. In its 1958 Report, the Committee noted that rapid developments had been made in nuclear science and technology which had made possible the application of nuclear energy for practical purposes. At the present stage of nuclear development in Australia, the national Parliament was not without some effective legal powers but it was to be expected that further progress in the use of nuclear energy would reveal serious deficiencies in constitutional power, especially if it should be sought to promote a self-contained integrated nuclear power industry serving the needs of industry and national development as well as defence. It also appeared that the Federal power was insufficient to make proper provision for the protection of the health and welfare of the community as a whole from dangers that could arise from the use of radioactive materials and isotopes.

535. The Committee has recommended (1958 Report, paragraph 120) that the Commonwealth Parliament should be empowered by constitutional amendment to make laws with respect to—

(a) the manufacture of nuclear fuels and the generation and use of nuclear energy; and

(b) ionizing radiations.

Developments in Nuclear Science.

536. No scientific development of the 20th century has aroused as much public interest and disquiet as the discovery that human beings can direct and control the use of nuclear energy.

537. The foundations of nuclear science were laid shortly after Federation following the discovery that certain elements, such as uranium and thorium, which were composed of heavy atoms, possessed the property of emitting radiation. In 1919, these elements were found to emit radioactive nuclei capable of transforming one element into another with the spontaneous release of energy. This meant that the nucleus of an atom of uranium, for example, was itself divisible. From that time onwards, rapid developments were made in nuclear science and shortly before World War II. the stage had been reached when the nucleus of these heavy atoms could be split by nuclear particles and, in the process of splitting, set up a nuclear chain reaction which dissipated an enormous amount of energy. It was then possible to envisage the development of a new source of power. Subsequent investigations have been directed also to the production of nuclear power by a fusion process which, in some respects, is the inverse of the fission process first discovered. It involves the building up of light nuclei into heavier nuclei leading to a release of energy.

538. The practical application of nuclear science was first made known to the world when the first atomic bomb was exploded in 1945. Since then, further progress has been accompanied by a growing realization of the tremendous potential of nuclear power as an instrument of military strategy and in the organization of defensive strength. Already major countries of the world have expended vast sums on research and experiment and the building of nuclear weapons. The destructive qualities of nuclear energy have been harnessed to the extent that the nuclear weapons already available to the three major powers which manufacture them could shatter civilization itself. Other countries can also be expected to solve the technical problems of manufacture within a few years. Unresolved fundamental issues have arisen in the United Nations concerning the use of nuclear power as a weapon of defence in war.

539. Irrespective of what may be the eventual solution reached in regard to the use of nuclear weapons, nuclear power must henceforth be treated as a governing factor in defence planning and the employment of military strategy in the event of a global war. Moreover, as the Committee observed in paragraph 102 of its first Report, countries possessing a self-contained nuclear power industry will have considerable advantages over those which do not. Australia is isolated geographically from the major powers and occupies a position of strategic importance in the Pacific area. The concentration of the Australian population in a few capital cities also makes the country vulnerable in the event of a nuclear attack. The great length of the Australian coastline also creates problems of defence but, in this connexion, nuclear weapons could be important in warding off invasions of hostile forces thus compensating for the almost insuperable difficulty of defending Australian shores by conventional means. Accordingly, the advent of nuclear power is of primary significance to Australia.

540. So far, as was to be expected, the destructive uses of nuclear energy have dominated the applications of nuclear science. Further research has now opened up prospects for mankind of achieving technological and social progress in the remaining years of the 20th century through the use of nuclear energy for peaceful purposes. Advanced industrial countries are now spending large sums of money on research into the use of nuclear energy for constructive as well as destructive purposes. The United Nations maintains an active interest in the peaceful uses of this new source of power.

541. As indicated, the staggering power of the atomic bomb is brought about by the creation of a nuclear chain reaction set up when the nucleus of an atom, such as an isotope of uranium, undergoes fission or splitting. Research into the control of the nuclear chain reaction has made it possible to obtain the controlled release of energy which can be used for the generation of electric power instead of burning coal or other conventional fuels used in generating electricity. Some countries will employ nuclear power for use in remote or undeveloped regions and others will use it to supplement expensive or inadequate supplies of conventional fuels.

542. Already in the United Kingdom, nuclear power produced by a reactor at Calder Hall is being fed into the national electricity grid and the success so far achieved and the prospects of further rapid improvement are so promising that an imaginative British programme for nuclear power, which was laid down in 1955, was revised and expanded in 1957. Total investment was estimated at £A900,000,000 for a ten year period. In the 1955 programme, nuclear capacity was expected to reach 1,500 to 2,000 megawatts by 1965 but the target was raised to 5,000 or 6,000 megawatts. This is equivalent to 18,000,000 tons of coal a year, and represents one-quarter of Britain's estimated electricity requirements. By 1970 nuclear power may account for the greater part of new power station construction. It is possible that by 1975, nuclear power output will be equivalent to some 60,000,000 tons of coal a year.

543. Progress in the United Kingdom rests on the fundamental and applied research carried out by the Atomic Energy Authority, other government instrumentalities, the universities and industry. The Authority has a number of reactor development projects in hand. These include more advanced systems, some of them basically different from the design of Calder Hall. It is hoped that they may lead not only to cheaper power but also to smaller units.

544. In the United States of America, preliminary work is being undertaken on a tremendous scale and over a broad field. The United States has no immediate need for nuclear power because its coal resources are still ample and electricity can be produced very cheaply. The United States Atomic Energy Commission envisages, however, that by 1975 the proportion of electricity supplied by nuclear plants could be in the vicinity of 22 per cent. In France, it is expected that a substantial percentage of the total electricity output will, within the space of twenty years, be from nuclear sources. Other countries such as Canada, Japan and Italy are also keenly interested in the possible industrial uses of nuclear energy. Thus, this source of power offers advanced industrial countries a means of improving their industrial efficiency. It also makes it possible for these countries to develop an export trade in nuclear materials, equipment and skills.

545. Many applications of nuclear energy are being studied apart from its use for electricity production. Experimental work is also being carried out in some countries on the development of smaller reactors to propel ships and locomotives. Nuclear reactors, that is the mechanism required to produce nuclear energy, are being built or planned for other purposes such as space heating in large housing settlements, the supply of processed steam for the paper pulp industry and the commercial production of radioactive isotopes. Radioactive isotopes have been used in medicine and research for several years, as for example, in the treatment of cancer. They can also be used for various industrial purposes, including the testing of metal castings, measurement of wear and gauging the thickness of materials. By so-called "tracer" techniques in which small amounts of radioactive materials are used with ordinary materials, important contributions can be made in the fields of chemistry, metallurgy and biology. For example, they may be used for agricultural research to ascertain soil deficiency and the means by which soil improvement is possible. A marked increase in the use of radioactive materials can be expected.

Connexion between the Peaceful and Military Uses of Nuclear Energy.

546. The Committee wishes to point out that there is no clear dividing line between the practical applications of nuclear energy which put peaceful uses on one side and defensive uses on the other. All uses flow from the same scientific knowledge. The countries which have developed nuclear technology in the interests of their own preservation and safety from aggression are also in the best position to take advantage of the industrial and social benefits which the applied science offers. Conversely, the creation of a capacity to manufacture nuclear power for peaceful purposes also makes it technically possible to manufacture nuclear weapons or to participate actively in defence arrangements based on the use of nuclear power. Indeed, reactors in the process of generating energy for industrial purposes will use a fuel such as uranium and, in so doing, produce a material known as plutonium which may be employed in the manufacture of nuclear weapons, such as the second atomic bomb exploded during the war. The nuclear power station at Calder Hall in England was constructed for the primary purpose of producing plutonium. The first atomic bomb dropped during the last war, the Hiroshima bomb, was made from a separated isotope of uranium and the technology required in its production is quite distinct from that required to produce nuclear power or plutonium. Plutonium is, however, a superior material for the manufacture of atomic bombs and has been used in all subsequent explosions. The Committee believes that further developments in nuclear science will make even plainer the close

connexion between defensive strength and industrial capacity. Nuclear energy and capacity can be directed either to constructive or destructive purposes. The whole subject has an undoubted national character.

Constitutional Position in Australia.

547. The Commonwealth Parliament's defence powers, principally the power to make laws with respect to the naval and military defence of the Commonwealth contained in section 51 (vi.) of the Constitution, enable the Parliament to make laws with respect to promoting and regulating the development and use of nuclear fuels and equipment in the interests of defence. The Parliament's power over *interstate and overseas trade and commerce* (*Constitution, section 51 (i.)*), also enables the Commonwealth to regulate the import and export of nuclear fuel, equipment and other materials. Under section 122 of the Constitution, the Commonwealth Parliament is authorized to exercise very extensive powers with regard to the Territories, and these powers would cover the search for, and acquisition of, uranium ore found in the Territories and the construction, regulation or operation of nuclear reactors to provide power for the generation of electricity for use in the Territories.

548. At present, with the emphasis on the use of nuclear power for defence and the reliance on overseas sources for nuclear fuel, reprocessing of spent fuels, and equipment, including reactors, the Commonwealth has a strong legal voice in the development of nuclear science in Australia. But the totality of constitutional power is insufficient to regulate and promote, in a positive way, the economic development of nuclear energy for all purposes. The power to regulate the use of nuclear energy for industrial and developmental purposes is almost entirely a matter for the States. The limitations of Commonwealth legal power have already influenced the nature of the activity undertaken in Australia.

Creation of the Australian Atomic Energy Commission.

549. In 1949, the Commonwealth Government established the Industrial Atomic Energy Policy Committee to advise on possible industrial applications of nuclear energy in Australia and to suggest a programme of development. This Committee was succeeded by the Atomic Energy Policy Committee set up to advise on defence and policy aspects of nuclear energy, including exploration for uranium ores and the development of the known and discoverable resources of these ores. The Government accepted this Committee's view that the interests of the country would be best served by the creation of a statutory authority to control nuclear energy generally, including the production of uranium. Parliament then passed the *Atomic Energy Act* 1953. The Act established the Australian Atomic Energy Commission. The Commission described its powers and functions in its first report in the following paragraphs:—

> 13. . . . The functions and powers of the Commission are as laid down in Division 2 of Part II. of the Act . . . they contemplate for the Commission two separate but related spheres of activity. On the one hand it is empowered to undertake and organize the search for and mining of uranium, to co-operate with other authorities, including State authorities, to these ends, and to handle on behalf of the Commonwealth matters connected with the purchase and disposal of uranium, its ores and minerals found in association with uranium. On the other, the Commission is given authority in comprehensive terms to develop the practical uses of atomic energy, to construct and operate plant and equipment for this purpose, and to undertake, organize and generally foster scientific research with a view to the advancement of technology in this field.
>
> 14. Special provisions are written into the Act to ensure that these functions are exercised within the strict limits of the Commonwealth's constitutional powers. Except as may be necessary to the defence of the Commonwealth and its allies, the States are left free to develop their own uranium resources. In moving the second reading of the Bill for the Act, the Minister for Supply expressed the hope of the Government that the States would do this. Reference is made later on in this report to discussions with the States in which this hope was re-affirmed, and in which Commonwealth co-operation within the limits of the Act was offered to the States, to assist them in taking their own action for the production of uranium for the vital needs of the free world. Otherwise than by way of co-operation with the States, and subject to the defence power and particular powers in the Act, Commonwealth activities in relation to uranium mining are to be carried on only in or in relation to the Territories of the Commonwealth. It is important to an accurate understanding of the Commission's activities that this fact should be appreciated by the public.
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> —(*First Annual Report of the Australian Atomic Energy Commission*, at page 9.)

Search for Raw Materials in Australia.

550. The primary raw material likely to be used for many years in the production of nuclear energy is the mineral uranium and the search for uranium in various parts of the world has been the object of great productive endeavour.

551. Australia's main participation in nuclear development has so far been in the search for, and production of, uranium which began in 1944 at the instigation of the United Kingdom. In 1949, the State of South Australia directed attention to the existence of workable quantities of uranium-bearing ore at Radium Hill in that State. This was followed by the discovery of the Rum Jungle field in the Northern Territory. The Rum Jungle field has been developed by an Australian mining company acting as agent for the Commonwealth. Other uranium ore deposits have since been found, as for example, at Mary Kathleen near Mount Isa in Queensland and in the South Alligator River area of the Northern Territory, which are being developed by private commercial interests. The Rum Jungle and Radium Hill ores are treated at separate ore concentration plants and the resulting uranium oxide production is sold for defence purposes to the Combined Development Agency, a joint procurement organization of the United States and the United Kingdom Governments under arrangements which have been entered into with the Commonwealth. Uranium oxide from the Mary Kathleen ore deposits will be sold to the United Kingdom Atomic Energy Authority, as also will that from South Alligator River.

552. The Commission advised that, with Mary Kathleen in full production, the total annual Australian output in terms of uranium oxide, which is the stage to which uranium ores are now refined in Australia, will be about 1,000 tons which will place Australia among the major producing countries of the western world. It is important that the development of Australia's uranium resources should continue for, although world production at present exceeds demand, this position is expected to change in the near future as countries' nuclear power programmes get under way. Uranium will be required in increasing quantities for many years notwithstanding possible developments in the thermonuclear and other fields.

553. World uranium resources are still not completely known and it may be that, in the long term, deposits of ores at present regarded as sub-marginal will have to be worked. According to estimates of the United States Atomic Energy Commission, by 1975 the United States power industry alone may require 20,000 to 30,000 tons of uranium oxide annually. Assuming similar requirements for the rest of the western world, but possibly with a faster rate of installation of nuclear power in some countries, this would indicate a total requirement of up to 100,000 short tons of uranium oxide in the 1970's. In 1958, estimated western world production was from 30,000 to 40,000 tons.

554. Australia's international obligations and national requirements clearly require energetic unabated exploration to establish new uranium reserves. For several years, the constitutional position has been a governing factor and the Commonwealth's search for uranium-bearing materials has been confined to the Northern Territory.

555. Another nuclear material of considerable economic importance is thorium which is complementary to uranium and can be substituted for uranium in certain systems. It is also the basis for the development of new types of reactors which will be important in future years. Estimates of world resources of thorium vary widely but it appears to be less plentiful than uranium. In Australia, the only economically important deposits are in beach sands and the possibilities of finding more thorium are strictly limited. In order to conserve thorium resources for Australia's future power requirements, the Commonwealth Government, exercising its constitutional powers, has prohibited the export of monazite, the constituent in which thorium is found.

556. In the Committee's opinion, the Commonwealth should be unrestricted by constitutional considerations in such vital national matters as the discovery and development of nuclear ore reserves, ore recovery and the processing of ores for use in the manufacture of nuclear fuels.

The Establishment of a Nuclear Power Industry in Australia.

557. The establishment of a self-supporting nuclear power industry serving economic purposes in Australia would facilitate the manufacture of nuclear weapons if ever this course should be decided upon as a matter of policy and would otherwise assist in maintaining Australia's position internationally, including arrangements to share any nuclear defence planning.

558. At present, the only nuclear reactor in Australia is the Atomic Energy Commission's experimental reactor at Lucas Heights near Sydney, which was first set in operation in 1958. The economies of nuclear power are, as yet, uncertain, but experiments in the United Kingdom augur well for the economic construction and operation of nuclear reactors for industrial purposes.

559. Electric power needs continue to increase in Australia with the expansion of the economy and the increase in population. Both Federal and State Governments have made strenuous efforts since the war to increase power generating capacity by increased coal production and the development of hydro-electric schemes, including the Snowy Mountains Hydro-electric Authority. Increasing use is also being made of fuel oil obtained from abroad.

560. The Committee was advised that the stage should be reached within the next ten years in which a few reactors, making use of natural uranium fuel of the type currently in use in England, would be capable of providing an economical source of power in Australia in lieu of using coal or hydro-electric plant. The Atomic Energy Commission discussed this matter in its Annual Report for 1956-57 in which it made the following observations on the trend of costs of nuclear power in Australia:—

> A large gas-cooled, graphite-moderated system of reactor using natural uranium fuel has been adopted for the first stage of the British nuclear power programme, and the efficiency of succeeding models is showing a rapid advance. This is being achieved by design and operating improvements. As the nuclear engineering industry becomes established, further economies of large-scale operation may be expected. Standardized components, and continuous processing in place of batch processing of materials, are typical instances. All these are largely matters of engineering technique.

Within the next decade it seems probable that the gas-cooled, graphite reactor will be able to produce power at a cost per kilowatt hour which will compare with all but the most favourably situated Australian coal-burning stations. By then, too, this system will be thoroughly proven in operation. But the capital costs are at present about twice as high for a given capacity as those of a coal-burning station. A nuclear station of this type, therefore, would only be economical where a large output was required and where it could be operated almost continuously. There are few points in the Australian power system at the present day where such stations would fit. In any but the largest systems, too, installation of a nuclear station would mean placing considerable reliance on a single plant.

Under special circumstances, however, such a station might be justified in Australia almost at once. It might furnish the solution to the power problem of an isolated centre such as Mt. Isa, where there is a large and growing need for power.

—(*Fifth Annual Report of the Australian Atomic Energy Commission*, at page 41.)

Referring to later stages of development of nuclear power in Australia, the Commission observed—

Longer range development aims at smaller economical units, and also at a much more effective utilization of the uranium fuel. The gas-cooled, graphite reactor "burns" less than one per cent. of its natural uranium fuel. A great deal of effort is being devoted overseas to the design of "fast breeder" systems planned to use up more than half the fuel. It may be fifteen years or more before stations on this principle have been fully designed, tested and proven in operation. It is hoped that they will result in a substantial reduction in electricity costs, and at that stage it may pay to use nuclear energy for a great deal of the new capacity to be installed in Australia.

—(*Fifth Annual Report of the Australian Atomic Energy Commission*, at page 41.)

561. To these observations, the Committee should add that the development of small scale nuclear power plants would be invaluable in areas of Australia where development is now hampered by lack of power owing to the cost of transporting coal or fuel oil. It is by no means improbable that in the years ahead nuclear power could transform large areas of outback Australia into thriving centres of population and industry. Again, some arid coastal areas may prove capable of economic development by the employment of nuclear power for pumping and desalting sea water.

Production of Nuclear Fuel in Australia.

562. Capital outlay on plant for the production of uranium oxide in Australia now amounts to some £26,000,000.

563. Before uranium can be used as a fuel in a reactor, it must be refined into metallic uranium and then fabricated into an appropriate type of fuel element. The manufacture of fuel elements has not begun in Australia but the Atomic Energy Commission considers there is no technical reason why these processes should not be undertaken in this country. This would be a logical step to take in view of Australia's good raw material resources. Fuel elements which have been used in reactors may be withdrawn and re-processed to recover valuable nuclear materials such as the concentrated material plutonium which is produced by a nuclear reactor or power station using natural uranium fuel. Such materials may be used in other types of reactors.

564. The Commission advised the Committee that it would be quite feasible to set up a plant in Australia for the processing of spent fuel elements in order to recover the valuable fissile elements, uranium and plutonium.

565. If a nuclear power industry should be set up in Australia, the Committee considers that the fabrication of fuel elements and the re-processing of spent fuel elements should, in the national interest, be undertaken in this country. The carrying out of the processes locally instead of abroad would mean less drain on Australia's overseas funds, help to create employment and, in the case of an extensive programme, promote the development of the industry on an economic footing; as for example, by saving costs of transporting fuel elements to and from Australia.

566. The Committee was advised that it would not be economic, however, to establish the processes in Australia, having regard to Australia's likely nuclear power requirements, unless the establishment was able to serve all power stations and this, in turn, meant that the nuclear power stations should use a single standard type of fuel element if the processes were to be economical. Moreover, the trend of development over the next twenty years will probably produce types of reactors whose basic fuel elements will consist in whole or in part of the by-products of fuel burn-up in another class of reactor. According to advice given to the Committee, it is unlikely that a nuclear power industry of sufficient size to take up these factors will develop in any one State.

567. The capital investment required to establish a nuclear power industry is also so great that it would be necessary for nuclear reactors to be used to the full extent of their capacity if the industry is to be maintained at efficient and competitive levels. The Committee foresees the probability of a reactor situated in one State supplying electric power to industry in another State.

568. Another aspect of the matter is the great call which the application of nuclear science makes upon technical man-power. Doubts must arise whether sufficient men with the requisite technological skills will be available to support the agencies of six States for the regulation and inspection of the manufacture and use of radioactive materials, the construction and operation of reactors, and the disposal of waste.

569. In the Committee's view, therefore, it is necessary that there should be an integrated programme if full advantage of nuclear power is to be obtained. Unco-ordinated action leading to the erection of nuclear reactors using different types of fuel or operating at only part of their capacity could produce a situation as inimical to national economic efficiency and defence as the break of gauge in the Australian railways system. The Committee believes that the Commonwealth must perform a positive major role in the establishment of the industry and that it should have sufficient legal powers to achieve such a result directly instead of indirectly by the imposition of restrictions under existing heads of constitutional power.

Governmental Control in Other Countries.

United Kingdom.

570. The Committee feels that it should refer again to United Kingdom experience as showing the international importance which attaches to nuclear energy. The official handbook, "Britain", published in 1958, describes the efforts made to establish nuclear power stations in the following terms:—

A provisional programme of commercial nuclear power stations for the Electricity Authorities was published by the Government in a White Paper (Cmd. 9389) in February, 1955. This envisaged spending £300 million on building 12 nuclear power stations, together with the necessary ancillary services, uranium and prototype development in the ten years 1955-65. Between 1,500 and 2,000 megawatts of electricity would be produced by this means by 1965, saving 5-6 million tons of coal a year.

Since the publication of the 1955 programme, two factors have led to a reassessment of the targets provisionally set: rapid technological advance, which has already made possible stations of more than four times the installed capacity of Calder Hall; and the increase in imports of fuel, chiefly oil, to meet growing energy requirements which has accentuated the burden on the balance of payments.

Accordingly, on 5th March, 1957, the Government announced a revised programme of nuclear power, under which nuclear energy would be providing 5,000-6,000 megawatts of electricity by 1965, instead of 1,500-2,000 megawatts as originally planned, the equivalent of 18 million tons of coal (or ten million tons of oil) a year used in conventional stations for a similar output. During the decade ending in the year 1965-66 the total capital investment by the Electricity Authorities to fulfil the combined nuclear and conventional power station programme (including ancillary transmission facilities) might be of the order of £3,350 million. This would compare with an estimate of £2,600 million during the decade for purely conventional stations; of the difference of £750 million, some £200 million might be accounted for by the procurement of the initial charges of uranium.

—(*Britain: An Official Handbook*, at page 192.)

571. Whilst it is now evident that the United Kingdom target will not be fully realized by 1965, the above programme plainly shows the very heavy capital costs incurred in providing the necessary equipment to produce power and demonstrates, at the same time, how necessary it is for there to be co-ordinated planning if good results are to be achieved. Responsibility for the operation of the nuclear projects rests in the hands of the United Kingdom Atomic Energy Authority established under the Atomic Energy Authority Act, 1954. The wide legal powers vested in the Authority are in contrast to the limited statutory powers of the Australian Atomic Energy Commission. For example, legal powers and functions vested in the Authority by section 2 of the Act include the following:—

(a) to produce, use and dispose of atomic energy and carry out research into any matters connected therewith;

(b) to manufacture or otherwise produce, buy or otherwise acquire, store and transport any articles which in the opinion of the Authority are, or are likely to be, required for or in connection with the production or use of atomic energy or such research as aforesaid, and to dispose of any articles manufactured, produced, bought or acquired by them;

(c) to manufacture or otherwise produce, buy or otherwise acquire, treat, store, transport and dispose of any radioactive substances;

(d) to do all such things (including the erection of buildings, and the execution of works and the searching for and working of minerals) as appear to the Authority necessary or expedient for the exercise of the foregoing powers;.

United States of America.

572. The Atomic Energy Act of 1954 passed by the Congress of the United States is another example of full governmental control over the generation and use of nuclear energy. The Act provides that the Federal Government should be sole owner of all special nuclear or fissile material whether produced in government or private facilities. The material may be leased for private use subject to a licensing system administered by the Atomic Energy Commission established by the Act. The special material is the basic ingredient of nuclear weapons. The Commission is also authorized to acquire source materials and it controls the distribution of source materials by way of licences. The Act further provides that the Commission, as agent of the United States, should have ownership and operation of production facilities for special nuclear materials. Production facilities are, otherwise, subject to control by a licensing system administered by the Commission. Licences are required for all nuclear reactors, isotope separation facilities and chemical processing plants. In the case of reactors, a permit to construct is required in the first instance. In determining whether to issue a construction permit, the United States Atomic Energy Commission considers the applicant's technical qualifications, financial resources and responsibility, and the design and operation

of the proposed reactor. When construction is completed, an operating licence is issued. In providing for the issue of an atomic energy licence, the Commission must be satisfied that any type of utilization or production facility is of sufficient practical value and will serve a useful purpose proportionate to the quantity of nuclear material to be utilized and that prescribed safety requirements are observed.

573. The United States Atomic Energy Act contains several findings made by the Congress concerning the use of atomic energy. The findings which Congress made included the following:—

a. The development, utilization and control of atomic energy for military and for all other purposes are vital to the common defense and security.

b. . . . . .

c. The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

d. The processing and utilization of source, byproduct and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

e. Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

f. . . . . .

g. . . . . .

h. It is essential to the common defense and security that title to all special nuclear material be in the United States while such special nuclear material is within the United States.

574. The United States regulatory system rests mainly on two specific legislative powers, defence and interstate and foreign commerce. In Australia, the position is different even though the Commonwealth has both defence and interstate and overseas trade and commerce powers. Without the manufacture of nuclear weapons in Australia, the defence power would probably not authorize substantially more than the control of exports and imports. Furthermore, the trade and commerce power has been more restrictively interpreted by the High Court of Australia than the corresponding power in the United States Constitution has been interpreted by the United States Supreme Court.

European Coal and Steel Community.

575. In 1957, representatives of the member States of the European Coal and Steel Community, France, West Germany, Italy, Belgium, The Netherlands and Luxembourg, signed a treaty for the setting up of the European Atomic Energy Community, known as Euratom, with a Commission as its primary executive agency, to carry out an integrated programme of nuclear energy development. The arrangement, which is now in operation, provides for special fissile materials to become the property of the Community and a principal aim is the building of common undertakings, such as processing plants, to serve the needs of all members of the Community. The arrangement is an expression of the realization that nuclear energy development has to be integrated over a wide area if it is to be carried out economically and efficiently.

PUBLIC HEALTH AND SAFETY.

576. A problem arises now of safeguarding human health against harm by the use of radioactive materials and isotopes and irradiating apparatus for industrial and medical purposes. Radiation can cause various types of most serious cell damage to human beings.

577. Expected increases in the use of radioactive materials emphasize the need for adequate precautions to be taken. In 1953, the Industrial Hygiene Committee of the National Health and Medical Research Council, a council on which the Commonwealth and the States are represented, prepared a model Radioactive Substances Act. After receiving the approval of the Council, the model legislation was submitted to the States in 1954. It contained provisions for the making of regulations and the establishment of a technical advisory committee to advise the Minister responsible for the administration of the Act in the State concerned. Model regulations, necessary to make the legislation effective, were forwarded to the States in 1957. However, by 1959, not all States had passed operative legislation and no State had given effect to the model regulations.

578. In the Committee's view, it would be much better from the public viewpoint if there were a single set of laws and regulations applied by one authority covering the whole question of the protection of public health. One set of technical experts could combine to have a knowledge and strength which several separate authorities could scarcely be expected to attain. Single legal control would ensure that uniform standards of safety were observed and also facilitate the task of amending legislation to take account of changing knowledge of the use and handling of radioactive substances. Sole responsibility should also make for uniformity in the enforcement of the provisions of the law. Lack of suitable legislation in only one State could seriously impair the control in other States.

579. There are other aspects of the application of nuclear science which put beyond all doubt the national character of the health and safety problems to which they give rise. If a nuclear power industry is established in Australia, it would be possible for dangers to health to occur in one State which would affect other States. If, for example, a nuclear power station were to be located in one State, the spread of radioactive materials following a disaster could penetrate to other States.

580. The storage and processing of waste materials could, in some circumstances, have radioactive effects which could escape to rivers and affect water supplies in other States. Disposal of radioactive waste is an important problem demanding strict control. Waste from one State may need to be stored in another.

581. In the interests of health and safety, complex uniform regulatory standards and conditions are necessary in relation to the construction of reactors; operation of reactors; processing of fuel elements; use of isotopes; transport of radioactive material; and the technical, industrial and medical standards of persons engaged in most of the above-mentioned activities.

INTERNATIONAL OBLIGATIONS.

582. In regard to the question of international obligations, there are two principal aspects. Firstly, it seems inevitable that, in the course of the next two decades, firm rules will be laid down on an international basis to ensure that radioactive materials produced in the operation of nuclear reactors do not contaminate the oceans. This aspect is under discussion in the United Nations. The implementation of international decisions will require control by a single authority in Australia of such matters as the handling and storage of radioactive materials. Secondly, it seems certain, if any progress is to be made in the field of atomic disarmament, that agreement will have to be reached at the international level on a system of strict accountability of all fissionable materials. Any one operating a nuclear reactor will be using and producing fissionable materials. In years to come, the Commonwealth may well have to account to some international body for all fissionable materials used and produced in Australia and to satisfy that body that all the materials are under its control.

583. The Committee believe that there should be no possible legal doubts as to the Commonwealth Parliament's power to give effect to treaty obligations of the kind mentioned. Any doubts would be removed by an express power with respect to nuclear energy.

RECOMMENDATIONS.

584. Accordingly, the Committee has recommended that the Commonwealth Parliament should be empowered by constitutional amendment to make laws with respect to—

(1) the manufacture of nuclear fuels and the generation and use of nuclear energy; and

(2) ionizing radiations.

585. The subjects of recommendation could be appropriately included, as additional paragraphs, in section 51 of the Constitution.

CHAPTER 14.—POSTS AND TELEGRAPHS AND OTHER LIKE SERVICES: BROADCASTING, TELEVISION AND OTHER TELECOMMUNICATION SERVICES.

RECOMMENDATION OF THE COMMITTEE.

586. The Committee has recommended to the Parliament, in paragraph 125 of its first Report, an amendment of the Constitution to make it clear that the Commonwealth Parliament has power to make laws with respect to broadcasting, television and other services involving transmission or reception by electro-magnetic means.

CONSTITUTION, SECTION 51 (v.): BRISLAN'S CASE.

587. The Commonwealth Parliament has, under section 51 (v.) of the Constitution, power to make laws with respect to "Postal, telegraphic, telephonic, and other like services:".

588. The question arose in the High Court of Australia, in 1935, in *The King* v. *Brislan, ex parte Williams* (1935) 54 C.L.R. 262, whether paragraph (v.) conferred a power to legislate with respect to radio broadcasting. The Court, in a majority decision, held that it did.

589. Broadly, the majority Justices agreed that broadcasting was a service which could be classed with telegraphic and telephonic services but they did not all reach this result by precisely the same reasoning. For example, the then Chief Justice stated that legislation with respect to the provision and control of broadcasting facilities for both transmitting and receiving was legislation with respect to a service; that the common characteristic of postal, telegraphic and telephonic services was that they were communication services and this was also the characteristic of a broadcasting service. Accordingly, broadcasting was a like service which could be the subject of legislation by the Commonwealth Parliament, as for example, the *Wireless Telegraphy Act* 1905-1919 under

consideration. The Chief Justice was also prepared to hold that the power to make laws with respect to telephonic services would have enabled the Parliament to regulate the form of wireless telephony known as wireless broadcasting.

590. Two other Justices stated that the object of the constitutional power contained in paragraph (v.) was to place under Federal authority the control of distant communication carried on according to a systematic plan. They said that the constitutional power was intended to provide for the future and was, on its face, an attempt to cover unknown and unforeseen developments. A wide operation had to be given the power. The description "telegraphic and telephonic" carried with it, not by derivation, but by use, a reference to electric means of transmission of signals and speech. Broadcasting, whether conducted by private enterprise or by governmental bodies, was a public service and telephonic in its nature.

591. Another Justice observed that the likeness of a service depended upon the likeness of the means by which the service was performed. There was no material distinction between a telegraphic and a telephonic service because in both cases communication took place by means of a wire acted upon by electricity. In a wireless service, communication took place without a continuous metallic connexion between transmitter and receiver, but, otherwise, the service had much in common with the other services.

592. In a dissenting judgment, the present Chief Justice of the High Court said that postal, telegraphic and telephonic services satisfied in common the demand of the members of the community for means of interchanging intelligence at a distance. The primary requirement they fulfilled was to provide a method by which one individual could communicate with another. The expression "other like services" covered every system of furnishing means of individual intercommunication but there was no such intercommunication in broadcasting. In broadcasting, speeches, music and the like were addressed to the public at large from some central point.

593. The fact that the decision in *Brislan's Case* was a majority decision has led to suggestions, at various times, that it would be advisable for the Commonwealth Parliament to have an express power over broadcasting and now, television.

594 The Parliament may make use of some of its specific powers to regulate or engage in broadcasting and television, as for example, the trade and commerce power contained in section 51 (i) of the Constitution, the external affairs power set down in section 51 (xxix.) and the power to make laws for the government of the Territories under section 122, but section 51 (v.) is the only provision which may be invoked to sustain general Federal control of broadcasting, including the provision by the Commonwealth of national broadcasting stations in each of the States of the Commonwealth. These observations are also true of television.

The Convention Debates.

595. The draft bill to constitute the Commonwealth adopted by the Convention in 1891 conferred power upon the Federal Parliament to make laws with respect to "Postal and Telegraphic Services". The subject came up for further discussion at the Debates in Adelaide in 1897. On that occasion, it was sought unsuccessfully to limit the proposed power to places outside the boundaries of the Commonwealth A substantial majority of the Founders thought, however, that the interests of the States and the people of the Commonwealth would be better served by Federal organization of the postal and telegraphic services. As Alfred Deakin said—

> The arguments used by my hon. friend Mr. Barton with regard to the difficulties arising from a divided control of the telegraph wires appear to be conclusive. It would be almost impossible to make arrangements as perfect and as economical for either postal or telegraphic services within Australia if you retain State boundaries, and it will certainly be more difficult to make arrangements for the extra-Australian services if you are called upon to consider State claims and demands, instead of only considering the real practical wants of the localities immediately concerned. It appears to me a desirable thing as a matter of practical business to transfer both of the services to which I have alluded to the Federal Government. We shall not place too great a burden on the federal authority, and the whole population will be better served than they now are or than remote districts can be by State authority. Placing the means of communication in the hands of the Federal Government will probably permit of that universal reduction of postage and cable rates which is one of the first demands of the commercial interest throughout Australia. The experience of our own colony is that the present cable rates are almost prohibitive, but by a satisfactory combination of the cable and postal services, with unity of administration, we shall be able to secure an immediate reduction in those charges, as well as in postal rates, and give the people of Australia better services than those they now possess.
>
> —(*Convention Debates*, Adelaide, 1897, at pages 770-771.)

596. Later it was moved that the words "telephonic and other like services" should be added to the proposed paragraph. In reply to a question as to what was covered by the words "other like services", Bernhard Wise of New South Wales said—

> There might be a long distance telephone or phonograph. Mr. Peacock's laugh might then be heard in London.
>
> —(*Convention Debates*, Adelaide, 1897, at page 773.)

597. It seems, therefore, that the Founders were aware of possible future developments in long distance communication, although they had little knowledge as to the form that the services would take.

Broadcasting in Australia.

598. About the time of Federation, there had been experimentation in wireless telegraphy which was to be the forerunner of modern radio. Regular wireless telegraphy services did not commence in Australia for some years after Federation and experiments in broadcasting did not begin until after World War I. In 1923, the first organized broadcasts began from stations which were privately owned and controlled. In 1929, in order to provide a more satisfactory service, particularly in the less closely settled areas, the Commonwealth acquired and operated a group of stations thus inaugurating the first national broadcasting service. Since then there has always been in Australia the dual system of national and commercial broadcasting. In 1932, the Australian Broadcasting Commission was constituted. Broadcasting in Australia has, for the whole of its life, been subject to Commonwealth legislative control and administrative supervision. It is, moreover, a subject on which the States have not been concerned to exercise their own legal powers.

599. The present major enactment of the Commonwealth Parliament is the *Broadcasting and Television Act* 1942-1956 which confers on the Australian Broadcasting Control Board extensive powers over the provision of services by broadcasting stations, the maintenance of adequate and comprehensive programmes by commercial stations, and the maintenance of technical standards and practices. The Act also provides for a national broadcasting service in which the Postmaster-General's Department provides the technical services and the Australian Broadcasting Commission is responsible for the broadcast of programmes and other matters relating to the operation of the national stations. The Act further deals with the licensing and control of the commercial broadcasting services and the licensing of listeners.

600. Broadcasting plays an important part in the life of every community, but in Australia it has a special place because of the great distances between the main centres of population and the vast rural areas where the inhabitants are particularly dependent upon their radios for the many purposes which broadcasting serves, including news of current events, social contact, accounts of parliamentary proceedings, religion, culture, children's and other educational services, and information on rural matters ranging from market reports and farming practices to flood and fire warnings. Specially arranged programmes, including lessons in English have assisted in the assimilation of Australia's many migrants. Australian broadcasting conditions have demanded much more than the application of overseas experience and the national and commercial services have together been one of the major integrating factors binding the Commonwealth into one progressive community.

601. Apart from one year, the number of licensed listeners has increased every year since 1924. The total number of licences in force at 30th June, 1959, was 2,263,712, a ratio of nearly 23 licences for every 100 persons, of which 1,312,952 were held by metropolitan listeners and 950,760 were taken out in country areas.

602. At 30th June, 1959, there were 56 medium frequency and eight short wave national stations and 108 commercial stations located in Australia. There is, besides, one medium frequency and one short wave station in Papua. Of the 56 medium frequency national stations, fourteen were in metropolitan areas and the remainder in country districts, including the Northern Territory. The number of national stations has increased very substantially since before World War II. when there were only 24 medium frequency stations and two short wave services. Most of the additional stations since established have been set up outside metropolitan areas. Additional country stations are to be constructed and it will not be very long before clear reception of national programmes will be possible in almost every part of Australia. The total expenditure on the national broadcasting service, excluding capital works and services, was £5,974,000 in 1958-59. Commonwealth expenditure is offset by revenue from listeners' licences which amounted to £5,691,000 in 1958-59.

603. In the commercial broadcasting service, the scale of activity has increased, too. In 1941-42, there were 97 stations with a total revenue of £1,330,000 and an expenditure amounting to £1,248,000. In 1957-58, there were 108 stations and total revenue in that year was £8,548,000 and expenditure was £6,572,000. Commercial stations are widely spread throughout the continent, 82 stations operating in country districts.

604. The Australian Broadcasting Commission also conducts the overseas services, known as Radio Australia, in which special attention is paid to Asian countries and the Pacific area to make better known abroad the Australian way of life.

605. It is obvious that broadcasting is a subject which is of national character and the extensive activities and responsibilities of the Commonwealth will increase as the nation develops. It is appropriate, therefore, in the Committee's opinion, that the Commonwealth's interest should be recognized by constitutional amendment to vest the Commonwealth Parliament with an express power over broadcasting. The proposed amendment would dispel completely, moreover, any doubts which have lingered as to the legal power of the Commonwealth Parliament to make laws with respect to broadcasting and to maintain broadcasting services.

Television in Australia.

606. *Brislan's Case* had nothing to say about television services which were, in 1935, almost as far off as broadcasting was at Federation. Whatever doubts exist as to the Commonwealth Parliament's legal power over broadcasting must, with no less strength, apply to television.

607. Television is a further development of broadcasting and serves a kindred purpose. It, too, is a system of communication in which electro-magnetism is used, but to convey images as well as sounds. The first regular television services commenced in Australia only in 1956 and the industry is, therefore, still in its infancy. It has, since its inception, been treated as a Federal matter and the pattern of administrative control over radio broadcasting was extended to television by the *Broadcasting and Television Act* 1956. The responsibilities of the Australian Broadcasting Control Board relate to the provision of services by television stations as well as broadcasting stations and to the supervision of the programmes of the commercial stations. The present Act also provides for a dual television service. The Australian Broadcasting Commission provides the programmes for the national television service from stations made available to it by the Postmaster-General and commercial stations operate under licence granted by the Postmaster-General on the recommendation of the Broadcasting Control Board. There are, in 1959, three television stations in Sydney and three in Melbourne. In each case one is a national station and the other two are commercial stations. Services have recently begun in the other three mainland State capitals. Hobart should have television in 1960 and services will eventually be provided in the main provincial and country centres.

608. At 30th June, 1957, there were 73,908 television viewers' licences in force and a year later the number had increased to 291,186. At 30th June, 1959, there were 577,502 viewers' licences in force. Of these 300,871 were held in New South Wales and 270,073 in Victoria. Revenue from viewers' licences totalled £2,775,000 during 1958-59. In 1958-59 Commonwealth expenditure in the operation of the national television service was £2,396,000. Expenditure on capital works was £747,671. As in the case of broadcasting, licence revenue enables the Commonwealth to obtain recoupment for most of its outlay and there is, in addition, an excise duty on cathode ray tubes used in television receivers. Commercial stations depend on advertising for their revenue, which totalled £2,978,000 in 1957-58 as against expenditure of £3,035,000.

609. In the United States, United Kingdom and other countries in which television services have been provided for several years, the increase in popularity of this medium has been quite remarkable as the United Nations Educational, Scientific and Cultural Organization has reported. Television is rapidly becoming a major mass communication medium in Australia and substantial increases in the number of viewers will undoubtedly occur in the next few years. Television is a subject of national importance and any lessening of Commonwealth responsibility in this field cannot be seriously contemplated, nor, in any event, would it be practicable for the administration of broadcasting and television to be divided.

610. The Committee considers, therefore, that the Commonwealth's participation in television should be supported by an express power vested in the Commonwealth Parliament to make laws with respect to television services. As in the case of broadcasting, an express reference to television in the Constitution would meet any possible legal doubts as to existing Commonwealth power.

Allocation of Frequency Channels.

611. Every broadcasting and television station has to have a frequency channel for the transmission of its programmes and the number of available channels in the radio spectrum is limited. Only the most carefully planned allocation of frequencies will keep harmful interference between stations at a minimum. Allocation of frequencies is a problem in most countries and in Australia it is made complex by reason of the large area of the country and the widely scattered and unevenly distributed population. There is no satisfactory alternative to a single authority having charge of the allocation of frequencies. Further expansion of broadcasting and television services will occur but even at present it entails much co-ordinated work and detailed planning to avoid interference between stations.

612. Frequency allocation has international as well as national implications and is the subject of international agreement. Under the International Telecommunication Convention 1952, to which Australia is a party, one of the functions of the International Telecommunication Union is to—

> effect allocation of the radio frequency spectrum and registration of radio frequency assignments in order to avoid harmful interference between radio stations of different countries,

Australia and New Zealand have also entered into a regional arrangement providing for the allocation of frequency channels in the bands reserved for broadcasting in the mutual interest of avoiding interference between the stations of the two countries.

Recent and Future Progress.

613. In broadcasting and television, electro-magnetic systems are employed to communicate, in the one case, sound only and, in the other case, visual transient images and sound. Broadcasting involves the transmission of electro-magnetic waves known as Hertzian or wireless waves which are also utilized in the conduct of television services such as those now provided by the national and commercial stations in Australia.

614. Both broadcasting and television may be described as systems of telecommunication. The term "telecommunication" was used in the International Telecommunication Convention 1952 as meaning "any transmission, emission or reception of signs, signals, writing, images and sounds or

intelligence of any nature by wire, radio, visual or other electromagnetic systems". More recently, the International Telecommunication Union has described telecommunication in more general terms, which, it understands, accords with common usage, although it is no different in substance from the definition in the Convention. According to the Union's description, telecommunication is "any process that enables a correspondent to pass to one or more given correspondents, or possible correspondents, information of any nature delivered in any usable form by means of any electromagnetic system".

615. There are many well established systems of telecommunication in Australia in addition to broadcasting and television. They include, for example, the telegraphic and telephonic services well known to the Founders and the radio-telegraph, radio-telephone, cable and photo-telegraph services of the Overseas Telecommunications Commission which is the Commonwealth authority responsible for the maintenance of Australia's public external communications.

616. Recently developed telecommunication services include the establishment in Australia of a teleprinter exchange system in all capital cities and some provincial centres. The service enables direct communication by a teleprinter in one subscriber's office with a similar machine in the office of a subscriber elsewhere. The service is, in effect, the telegraph equivalent of the telephone service with the added virtue of providing a written record at each end. Another major step forward in Australia's external communications occurred recently with the introduction of an international teleprinter exchange service known as the International Telex between Australia and various overseas countries including the United Kingdom, U.S.A., Canada and Japan. The service is available to all subscribers of the teleprinter exchange service in Australia.

617. Within Australia, the Postmaster-General has also introduced a private-wire leased telegraph service and a picturegram service in all States. In the realm of radio, innovations since World War II. have included a large expansion in the number of civil radio-communication stations authorized under the Wireless Telegraphy Act and Regulations. At the end of the 1958-59 financial year there were about 33,000 authorized stations including 9,300 operated by governmental and semi-governmental authorities such as the police, fire brigade and ambulance services, and 8,000 operated by taxi cab companies. There were 3,800 amateur stations. In remote areas of the Commonwealth, 2,000 stations were operating for the exchange of messages with control stations of the Royal Flying Doctor Service and a further 2,000 were used by vessels employed in the various maritime services and industries. The Postmaster-General's Department also operates mobile radio-telephone services and has developed radio-telephone trunk channels and fixed radio-telephone subscribers' exchange services to cater for the requirements of residents in isolated areas where the cost of erecting conventional telephone lines would be prohibitive. By these means, lives are protected or saved, delays can be prevented and unproductive mileage by vehicles reduced. In the allocation of frequencies, the Commonwealth has the responsibility of ensuring the orderly conduct of the radio-telephone services, in particular the avoidance of detrimental interference between stations. Another advance has been the establishment of a facsimile service, a telecommunication system for the transmission of fixed images for reception in permanent form, in the Commonwealth Bureau of Meteorology to enable weather charts to be transmitted simultaneously to major aerodromes in the State of New South Wales.

618. The developments to which the Committee has referred are not exhaustive but they are examples of the wide range of telecommunication services which may be conducted by using electro-magnetic systems. In this respect, the recent developments may be likened to telegraph, telephone, broadcasting and television services. In dealing with the development of telecommunication services, the Postmaster-General's Department advised the Committee as follows:—

> Techniques in the telecommunications, sound broadcasting and television fields are changing progressively and must continue to improve with developments in electronics and the availability of more and more frequency channels in the radio spectrum. However, electrical energy will undoubtedly be the main, if not the sole, medium of power for operating telecommunications services by wire and radio for many years to come, notwithstanding the additional facilities and refinements that may be introduced.

619. The Committee considers that a constitutional amendment to take account of broadcasting and television should leave in no doubt the power of the Commonwealth to make laws with respect to any form of communication service whether currently in use or which will be evolved.

620. At this stage, future progress cannot be predicted with certainty but there are many possibilities. For example, there are many potential uses for radio control. Radio control is a system of telecommunication for controlling mechanism or other apparatus by wireless waves. These applications include the control of movements of rockets, aircraft and other mobile units and the actuation of devices for switching on and off electrical power circuits. There should be also greater use in the years ahead of telemetering, a system of telecommunication by which remote indication is given of electrical quantities. Practical applications of telemetering are the recording of phenomena associated with outer space activities as reflected in results of transmissions from apparatus carried in guided missiles, readings of power loadings of electrical circuits, determination of barometric pressures and temperatures from impulses sent from transmitters attached to balloons and the gauging of river heights. The use of heat and light rays, both electro-magnetic in nature, as means of

communication and transmission of energy by radio, could have future possibilities. It is the Committee's view that all such services fall within the sphere of legitimate Commonwealth interest.

621. Any attempt to distinguish between broadcasting and television as being proper subjects of Commonwealth power and other communication services as not being within the Commonwealth sphere of interest, will lead inevitably to anachronistic situations and an illogical and inefficient division of governmental administration.

622. International telecommunication arrangements lend added weight to the Committee's view that telecommunications should be treated as a single subject of national importance. The Committee has already referred to the International Telecommunication Convention 1952 to which, as at the end of 1958, 96 countries, including Australia, were parties. The Convention states that the purposes of the International Telecommunication Union should be—

(a) to maintain and extend international co-operation for the improvement and rational use of telecommunication of all kinds;

(b) to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services, increasing their usefulness and making them, so far as possible, generally available to the public;

(c) to harmonize the actions of nations in the attainment of those common ends.

Australia would find it impossible to discharge its obligations and hence obtain the benefits of longstanding international arrangements if action could not be taken domestically on a national basis to regulate telecommunications.

623. As in the case of the existing paragraph (v.) of section 51, the Committee considers Commonwealth power should be defined in terms of services rather than subjects. In other words, the Committee does not seek that any additional power should be given to the Commonwealth over the subjects of broadcasting, television and other forms of telecommunications as such, but over services of these descriptions.

RECOMMENDATION.

624. Accordingly, the Committee has recommended that the Constitution should be altered to provide expressly that the Commonwealth Parliament has power to make laws with respect to broadcasting, television and other services which involve the communication, transmission or reception of signs, writing, signals, images, sounds or energy by means of electro-magnetic systems.

CHAPTER 15.—INDUSTRIAL RELATIONS.

RECOMMENDATION OF THE COMMITTEE.

625. The Committee observed, in paragraphs 91-101 of its first Report, that Federation brought together six colonies each possessing its own distinct economy. Since then, a single Australian economy has emerged exhibiting an interdependence between the many activities which it comprised. The general state of the economy was a matter of national importance and concern.

626. At Federation, colonial wealth was derived in the main from rural pursuits whereas the secondary industries now made a very substantial contribution to the national economy. Many more persons were employed in factories and ancillary services such as the transport industries. Along with these developments there had been an increase in the membership and strength of industrial organizations of employers and employees and the use of governmental industrial machinery for the determination of conditions of employment. The Committee stated that one integrating factor in the economy had been the trend towards greater uniformity in industrial conditions, in which Commonwealth industrial machinery had played an important part.

627. The Commonwealth possessed only a narrowly conceived industrial power—the power contained in section 51 (xxxv.) of the Constitution to make laws for the prevention and settlement by means of conciliation and arbitration of industrial disputes extending beyond the limits of any one State. In spite of the limitations of the power, the Committee noted that the number of employees in Australia whose conditions of employment were regulated by Commonwealth awards and determinations was little less than the number whose conditions were determined by the industrial machinery of the six States combined. Commonwealth awards and determinations had, moreover, material effects on the work of State authorities and upon the conditions of employment of persons not covered by awards at all.

628. The Committee has recommended (1958 Report, paragraph 131) that paragraph (xxxv.) of section 51 be repealed and a new section inserted in the Constitution which would provide in substance as follows:—

(1) The Commonwealth Parliament should, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to terms and conditions of industrial employment.

(2) The power to make laws dealing with terms and conditions of industrial employment should include power—

(a) as at present, to make laws with respect to the prevention and settlement of industrial disputes by means of conciliation and arbitration; and

(b) to establish authorities of the Commonwealth, and authorize authorities established by or under the law of a State, to determine terms and conditions of industrial employment and to prevent and settle industrial disputes.

THE INDUSTRIAL POWERS OF THE COMMONWEALTH PARLIAMENT.

629. Section 51 (xxxv.) is the only express power over industrial matters which the Constitution confers upon the Commonwealth Parliament. It provides that the Parliament may make laws for the peace, order and good government of the Commonwealth with respect to—

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

630. Paragraph (xxxv.) does not enable the national Parliament to deal with industrial conditions at large, but is restricted to the prevention and settlement of industrial disputes and only those disputes which extend beyond the borders of a single State. Conciliation and arbitration are the only means which may be employed in the settlement of disputes under the power. Thus, the Federal power is both qualified and technical. Furthermore, it virtually presupposes the creation of authorities to deal with disputes which may be the subject of power.

631. The paragraph has to be read with paragraph (xxxix.). Paragraph (xxxix.), which is known as the incidental power, enables the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament by the Constitution. The two paragraphs together provide the constitutional basis for legislation passed by the Commonwealth Parliament setting up independent machinery for the settlement of industrial disputes by conciliation and arbitration.

632. Although paragraph (xxxv.) is the principal source of the Commonwealth Parliament's authority to legislate in relation to industrial matters, there are other heads of power which will sustain certain industrial laws.

633. Section 51(i.) of the Constitution is probably the most important of the other relevant powers. It confers power to make laws with respect to trade and commerce with other countries and among the States. Section 98 of the Constitution states, by way of amplification, that the power extends to navigation and shipping and State railways. The precise extent to which the trade and commerce power authorizes the making of laws dealing with industrial conditions is not certain. Insofar as persons are employed in interstate or overseas trade and commerce, the Parliament may provide for the determination of their terms and conditions of employment without being restricted to the processes of conciliation and arbitration. Thus, the trade and commerce power is the principal source of constitutional power supporting the *Stevedoring Industry Act* 1956 which constituted the Australian Stevedoring Industry Authority with extensive powers to regulate stevedoring operations and to deal with matters affecting the employment of persons on the waterfront. Nevertheless, in the interpretation of the trade and commerce power, the Court has emphasized the existence of a distinction for constitutional purposes between interstate and intra-state trade and commerce and, in many cases, it may be extremely difficult to define and isolate, as a separate class, persons who are employed in interstate and overseas trade and commerce.

634. The Commonwealth Parliament also possesses a plenary power to regulate the terms and conditions of employment of persons in the Territories of the Commonwealth under section 122 of the Constitution which authorizes the Parliament to make laws for the government of the Territories. Again, insofar as the Commonwealth may itself engage in industrial activities, such as the provision of railway and air services and banking facilities, it can provide for the regulation of industrial matters arising between itself and its employees. The terms and conditions of employment in the Public Service of the Commonwealth are mainly governed by the Public Service Act and the Public Service Arbitration Act. In relation to employees of the Commonwealth, various provisions of the Constitution may be invoked by the Commonwealth Parliament in providing for the fixing of terms and conditions of employment. Examples are section 51(i.), already referred to; the defence power contained in section 51 (vi.); the banking power (section 51 (xiii.)); the incidental power (section 51(xxxix.)), and section 67 which vests in the Commonwealth Parliament the power to appoint officers of the Executive Government.

635. During the last world war, the Commonwealth Parliament made extensive use of its defence power (Constitution, section 51 (vi.)) to legislate at large with respect to industrial matters. In time of peace, however, the defence power will not support any form of general industrial regulation.

636. Federal jurisdiction in industrial matters has, therefore, been mainly, though not exclusively, sustained by the conciliation and arbitration power contained in paragraph (xxxv.) and that power, as indicated, apart from authorizing the creation of specialized industrial machinery to deal with disputes, does not countenance positive legislative intervention in industrial relations.

THE CONVENTION DEBATES.

637. As the Committee will show, many problems arise from the present division of industrial power between the Commonwealth and the States and from the technical and restrictive language of paragraph (xxxv.). It is the Committee's view that it will facilitate an examination of the problems to refer briefly to the historical background provided by the Convention Debates.

638. A proposal was made, as early as the Convention Debates held in Sydney in 1891, that the Commonwealth should have an industrial power. On that occasion, Charles Cameron Kingston of South Australia proposed that the Commonwealth Parliament should have power to establish courts of conciliation and arbitration having jurisdiction throughout the Commonwealth for the settlement of industrial disputes. Later he withdrew the proposal in favour of an amendment to Chapter III. dealing with the Federal Judicature. He proposed that the power of the Parliament of the Commonwealth to establish courts should also extend to the creation of courts of conciliation and arbitration for the settlement of industrial disputes. Several delegates, however, criticized the proposal as an interference with the functions of the States and it was defeated.

639. The case for an express Commonwealth industrial power was taken up during the Adelaide Debates in 1897 by Henry Bournes Higgins, who was afterwards to become a judge of the High Court and President of the Commonwealth Court of Conciliation and Arbitration. Higgins considered that it was necessary for the Commonwealth Parliament to have legislative power to deal with disputes which literally affected more than one State. He said—

> We cannot tell what is in futurity, and I want simply to give the Federal Parliament a power to establish these courts if it think fit. . . . It may be said, "Leave the industrial disputes to the States"; but it is well known that these disputes are not confined in their evils to any one State. If there is a shipping dispute in Sydney it is sure to be felt in Melbourne; if there is a coal dispute in Newcastle it is sure to be felt at Korumburra. Any one State is unable to cope with the difficulty. If it should hereafter be found expedient to have a Court of Conciliation and Arbitration, it must be a Federal Court which can extend its power over the whole Federation.
>
> —(*Convention Debates*, Adelaide, 1897, at page 782.)

He proposed that the Parliament should have power to make laws with respect to industrial disputes extending beyond the limits of any one State but later, in the hope of obtaining wider approval, without intending the language to be settled, he modified the proposal in favour of the form of words which now appear in paragraph (xxxv.). However, the majority of members present took the view that industrial matters fell within the province of the States. Sir Edward Braddon, for example, observed—

> I have the very highest possible opinion of the influence for good of boards of conciliation in matters of industrial dispute, in spite of the fact that in South Australia, I believe, they have been a positive failure. But what we have to consider in framing this Constitutional Bill is that we shall not load the Federal Parliament with duties and obligations which can be better fulfilled by the local Parliaments of the several States. I think if we introduce anything of this sort into our Constitution it can only have the effect of increasing rather than diminishing the difficulties in regard to these industrial disputes. It would have the effect possibly of interfering with trades unionism in some of the colonies, and of interfering largely with both employer and employés and I think that should be in every possible way avoided if we can possibly do so. There is no occasion for our committing to the Federal Parliament or Government any matter whatever that the States can better deal with. These industrial matters, I think, are distinctly more within the province of the States to deal with than of the Federal Parliament.
>
> —(*Convention Debates*, Adelaide, 1897, at pages 791-792.)

640. The question of a Commonwealth arbitration power was again raised in the Melbourne session of the Federal Convention in 1898. On that occasion, Higgins again moved for the insertion of the paragraph in the Constitution. He said—

> Nothing has struck me so much in dealing with the Bill as the want of recognition in it of the momentous change in regard to industrial matters which is now taking place all through the world . . . I do not regard courts of conciliation and arbitration as likely to finally settle all industrial disputes, but I regard them as a very valuable means of mitigating the pain which an era of change will create. A change is going on, whether we approve of it or not, and we should do our best to meet it, and to prevent, even by temporary means, the disaster and distress which must follow upon diversion of trade and industrial disputes. Every morning there appear telegrams in the newspapers dealing with the engineers' dispute in England, or the dispute in the cotton trade, and we are not without our own experience of shearers' disputes and shipping disputes. Of course, I shall be told that this is a matter for the states. I admit that if a dispute is confined to a state, it ought to be dealt with by that state. But I ask this committee, in the name of common sense—suppose you have a shipping dispute, how can any one state deal satisfactorily with that dispute? Suppose you have a dispute of shearers. You have an organization of shearers all through Australia—an organization extending through Queensland, South Australia, Victoria, and New South Wales; and, on the other hand, you have the employers of the shearers all uniting on the opposite side. How, I say, can any state deal with a dispute of that nature which is intercolonial? I do not want to overburden this Constitution with matters which may endanger its acceptance. I cordially agree in that principle, but I draw the line here: If we find a matter which cannot be dealt with so effectively by the states, and we find that it is a matter of grave concern to the people of Australia, why not put it in this Bill?
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> —(*Convention Debates*, Melbourne, 1898, Vol. I., at pages 180-181.)

641. After a protracted debate the paragraph was finally adopted in its present form.

642. It is clear enough from the Reports of the Convention Debates that the Founders had in mind the prevention and settlement of strikes of the kind which afflicted the continent in the 1890's and that the regulation of industrial conditions would continue as primarily a State function.

COMMONWEALTH CONCILIATION AND ARBITRATION LEGISLATION.

643. The first exercise of the arbitration power occurred when the Parliament passed the *Commonwealth Conciliation and Arbitration Act* 1904. The legislation, which came into operation on 15th December, 1904, created a Commonwealth Court of Conciliation and Arbitration consisting of a President appointed from among the Justices of the High Court for a term of seven years to conciliate and arbitrate for the prevention and settlement of disputes extending beyond the limits of any one State. The Court was empowered to enforce its orders and awards.

644. The chief objects of the Act were expressed to be as follows:—

I. To prevent lock-outs and strikes in relation to industrial disputes;

II. To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes;

III. To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties;

IV. In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award;

V. To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;

VI. To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act;

VII. To provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes.

645. Many amendments have since been made to the Act and the Committee considers that some merit a mention at this stage.

646. In 1926, an amendment granted life tenure to Judges of the Court in consequence of a decision of the High Court that the tribunal, as previously constituted by a President, was incompetent to exercise judicial power since the President did not have the tenure of office required by section 72 of the Constitution for Justices of Federal Courts. Another amendment in 1926 authorized, for the first time, the appointment of Conciliation Commissioners to assist the Judges in the work of the Court.

647. By 1928, the prestige and influence of the Federal Court had grown considerably but in that year, when the Bruce-Page Government was in office, the Parliament departed from earlier policies of developing the regulatory machinery and restricted the jurisdiction of the Federal Court. The Court was enjoined not to exercise jurisdiction unless there were circumstances which made it more desirable that it should deal with an industrial dispute in preference to leaving it to a State industrial authority. Before 1928, the Federal Act had prohibited lock-outs and strikes but other amendments in that year contained stringent provisions for making the prohibition more effective.

648. In 1930, the Parliament reversed the policies adopted in the legislation of 1928. An amending Act removed the conception of the primacy of State industrial tribunals by restoring the Federal Court's established jurisdiction of previous years At the same time, the Act made Federal history by repealing provisions which had existed since 1904 forbidding the employment of a lock-out or strike as an industrial weapon.

649. New policies were reflected in amendments made in 1947. General arbitral powers were conferred upon Conciliation Commissioners, the intention being to substitute flexible and informal administrative and conciliative procedures for the more cumbersome and legalistic approach of the Court. The Court's jurisdiction was limited mainly to judicial matters and four matters, standard hours of work, the basic wage, annual leave and minimum rates of pay for adult females, considered to demand uniform treatment because of their overriding importance.

650. Some dissatisfaction arose from the autonomy which the Conciliation Commissioners enjoyed under the 1947 amendments and the different approaches of individual Commissioners in matters in which uniformity of treatment was an advantage. These considerations led, in 1952, to further important amendments which accorded to the Court greater arbitral responsibilities than it was left with under the amendments of 1947. For example, the Act provided for an appeal to the Court from an award of a Commissioner.

651. In 1956, a major re-organization of the Commonwealth industrial machinery was necessitated by the decision of the High Court, later upheld by the Privy Council, in the *Boilermakers' Case* (1956) 94 C.L.R. 254; (1957) 95 C.L.R. 529, in which it was held that the vesting of judicial and arbitral powers in the one body, the Commonwealth Court of Conciliation and Arbitration, was invalid as a contravention of Chapter III. of the Constitution. The *Conciliation and Arbitration Act* 1956 provided two distinct sets of industrial machinery to exercise the powers previously vested in the old Court. It created a Commonwealth Conciliation and Arbitration Commission to perform the functions of conciliation and arbitration and constituted the Commonwealth Industrial Court to deal

with judicial matters such as the interpretation and enforcement of awards. As in the past, extensive functions of conciliation and arbitration were vested in individual members of the Commission and the Act also provided for the appointment of conciliators.

652. The objects of the Conciliation and Arbitration Act were restated in 1956 in the following terms:—

2. The chief objects of this Act are—

(a) to promote goodwill in industry;

(b) to encourage conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;

(d) to provide for the observance and enforcement of agreements and awards made in settlement of industrial disputes; and

(e) to encourage the organization of representative bodies of employers and employees and their registration under this Act.

653. The current legislation is the *Conciliation and Arbitration Act* 1904-1959.

654. It is clear from this short description of Commonwealth legislation that the Parliament has, in legislating under the conciliation and arbitration power, confined itself substantially to the setting up of specialized industrial machinery with power to settle disputes extending beyond the limits of one State by the processes of conciliation and arbitration. For the purpose, the Federal authorities performing these functions have been, and must be, substantially unfettered in the exercise of their discretion to prevent and settle industrial disputes which fall within their jurisdiction. The terms of a Federal award must be the expression of their own judgment. In the absence of direct legislative power over industrial relations, the Commonwealth Parliament has, for the most part, been concerned to reshape the statutory machinery for the prevention and settlement of industrial disputes.

Industrial Powers of the States.

655. The limited Federal power is in marked contrast to the power that the States have to legislate upon the subject of industrial conditions.

656. A State has exclusive power to prevent and settle industrial disputes which do not extend beyond its own borders. It may also deal with an interstate dispute so far as it affects employers and employees within its borders, except to the extent that a Federal award or law has covered a matter in dispute or otherwise operates to prevent the State from dealing with the matter.

657. A State is not limited as to the means which it may adopt in dealing with any type of industrial question. It may set up industrial tribunals or authorities to deal with disputes and it may vest the authorities which it establishes with power to regulate terms and conditions of employment irrespective of the existence of a dispute. Each of the States has, in fact, set up specialized machinery according to its own wishes in the matter. There are two major types, namely, the wages board system adopted in Victoria and Tasmania and the industrial court system of New South Wales, Queensland and Western Australia. In South Australia, there is a combination of the two systems.

658. Under the wages board system, determination of industrial questions does not depend on the existence of disputes. In Victoria, the Labour and Industry Acts establish separate Wages Boards for various trades consisting of an equal number of representatives of employers and employees and an independent chairman. Where there is no Wages Board for a particular trade, a General Board regulates conditions. The Boards have power to determine any industrial matters whatsoever and, although they may hear arguments from parties to an industrial dispute, this power is seldom exercised. The Boards make determinations dealing with such matters as hours of work, rates of pay, margins for skill, holidays, apprenticeship conditions and generally on the subject of the relations of employers and employees. Determinations of a Board have legislative effect and bind all persons in the relevant trade. In Victoria, there may be appeals to an Industrial Appeals Court from Wages Board determinations.

659. The industrial courts system, although varying from State to State, has more in common with Commonwealth industrial machinery, insofar as industrial matters are dealt with primarily through the settlement and determination of industrial disputes and there is provision for the registration of unions and employers' organizations which may register agreements or obtain awards. Although under the industrial courts system a specialized tribunal of the State may determine industrial conditions in the exercise of its own discretion, there are important differences between the Commonwealth system and the State systems. For example, under the New South Wales Industrial Arbitration Act, 1940, as amended, once an award is made by a Conciliation Committee or the Industrial Commission it may bind any one who at any time employs a person to perform work which the award covers, whether or not the employer was involved in the proceedings, and confers benefits upon an employee, irrespective of whether he is a member of the union directly concerned in the making of the award.

660. By contrast to the Federal Parliament, the State Parliaments are unrestricted as to the conditions which they can attach to the exercise of jurisdiction by the tribunals they create. In Queensland, for example, the Industrial Court, established under the Industrial Conciliation and Arbitration Acts, is required, in fixing the basic wage, to ensure that the wage is sufficient to maintain an employee and his wife and family of three children in a fair standard of comfort having regard to the conditions of living in the occupation in respect of which the basic wage is fixed.

661. A State is not confined to handling industrial matters through specialized machinery which it creates for the purpose. A State Parliament may, if it wishes, legislate directly on the subject of industrial conditions and although, in practice, industrial conditions are usually left to be regulated by the machinery provided by the Parliament, State Parliaments also intervene in industrial matters by direct legislation. Matters such as leave of absence, rates of pay, hours of work and workers' compensation have, at times, been the subject of State Parliamentary attention. State legislative power also extends to matters of discipline and the compulsory direction of labour and industry. A State Parliament may exercise industrial power in all its plenitude without limitation as to subject or method.

Application of Commonwealth Awards and Determinations.

662. On its face, the Constitution, section 51 (xxxv.), does not seem to offer a wide avenue for the regulation of employer-employee relations, and yet the percentage of Australian workers subject to Federal awards and determinations is now not far short of the number of persons who are directly covered by State awards. The extension of the application of Commonwealth awards since the passing of the first Conciliation and Arbitration Act in 1904 has, in the opinion of the Committee, been one of the most notable features of Australian constitutional experience since Federation.

663. The Commonwealth Bureau of Census and Statistics conducted a survey of the incidence of awards and other industrial determinations in Australia as at April, 1954. According to the survey, of 1,782,900 male employees included in the estimates, 44.3 per cent. were covered by Commonwealth awards and 44.3 per cent. were subject to State awards. Of 608,900 female employees, 37.2 per cent. were subject to Commonwealth awards and State awards applied to 54.9 per cent. Details by States were as follows:—

INCIDENCE OF INDUSTRIAL AWARDS* BY STATES, APRIL, 1954.

State.	Employees Covered by Estimates.	Not Covered by Awards.	Covered by Commonwealth Awards.	Covered by State Awards.
	'000.	%	%	%
Males.				
New South Wales	698.9	11.1	43.5	45.4
Victoria	509.3	13.2	59.4	27.4
Queensland	230.6	7.1	19.4	73.5
South Australia	161.7	13.1	57.1	29.8
Western Australia	124.2	10.4	12.5	77.1
Tasmania	58.2	15.7	52.6	31.7
Females.				
New South Wales	248.8	7.5	36.5	56.0
Victoria	194.0	7.1	47.7	45.2
Queensland	66.1	4.8	23.1	72.1
South Australia	47.4	13.8	31.9	54.3
Western Australia	34.8	9.5	18.7	71.8
Tasmania	17.8	12.9	34.0	53.1

* The expression, "awards" used in the above table means awards, determinations and registered agreements. Persons working under unregistered agreements were classified as "not covered by awards".

664. It is to be observed from the table set out above that the percentage of employees both male and female covered by Commonwealth awards is much greater in New South Wales, Victoria, South Australia and Tasmania than in the States of Queensland and Western Australia. The last-mentioned States have not, of course, attained the level of industrial development which has occurred in New South Wales, Victoria and South Australia.

665. Further analysis shows that Commonwealth awards have predominated in mining and quarrying, manufacturing and the transport and communication industries, whereas State awards apply to more employees in the building and construction and wholesale and retail trade industrial

groups. Particulars of the incidence of awards by main industrial groups in Australia as at April, 1954, were as follows:—

INCIDENCE OF AWARDS* BY MAIN INDUSTRIAL GROUPS, APRIL, 1954.

Industrial Group.	Employees Included in Estimates.	Not Covered by Awards.	Covered by Commonwealth Awards.	Covered by State Awards.
	'000.	%	%	%
MALES.				
Mining and Quarrying	52.8	20.6	50.6	28.8
Manufacturing..	754.7	10.9	52.0	37.1
Building and Construction	162.5	7.4	28.7	63.9
Transport and Communication	259.3	3.4	68.5	28.1
Banking and Insurance	57.2	30.5	30.7	38.8
Wholesale and Retail Trade	236.2	17.7	21.4	60.9
Public Administration, Professional, &c. ..	205.0	10.0	28.9	61.1
All Other	55.2	18.1	34.9	47.0
Total	1,782.9	11.4	44.3	44.3
FEMALES.				
Manufacturing..	232.7	5.8	60.7	33.5
Transport and Communication	28.5	6.8	69.3	23.9
Banking and Insurance	34.4	11.0	37.6	51.4
Wholesale and Retail Trade	125.2	4.6	11.8	83.6
Public Administration, Professional, &c. ..	124.1	10.0	12.3	77.7
All Other	64.0	16.1	35.1	48.8
Total	608.9	7.9	37.2	54.9

* The expression, "awards" used in the above table means awards, determinations and registered agreements. Persons working under unregistered agreements were classified as "not covered by awards".

666. There is nothing to suggest that the role of the Commonwealth in the industrial field will diminish. Industrial development now taking place should ensure continued Commonwealth regulation of industrial conditions on at least the present scale.

ANALYSIS OF PARAGRAPH (XXXV.): ITS COMPLEXITY AND LEGALISM.

667. *Paragraph (xxxv.) has had a prominent place in the history of industrial relations* because employers and employees, particularly in the more important industries carried on in more than one State, have so organized as to make it possible to have Federal determination of their industrial relations in preference to the separate determinations of the individual States. For the most part, interstate disputes have been created solely for the purpose of attracting the Commonwealth power and not because of major conflict between employers and employees as the Founders envisaged. That the arbitration power has been able to fulfil such an extensive function is attributable also to the judicial interpretation which it has been accorded. The paragraph is the most frequently litigated provision of the Constitution.

668. Nevertheless, the evolution of paragraph (xxxv.) as the major legal source of authority for the regulation of industrial conditions in Australia has been at the price of excessive technicality and complexity. These aspects of the power will be dealt with hereunder.

Prevention and Settlement of Disputes.

669. The focal point of the power is that the Parliament may legislate for the prevention and settlement of disputes. The power is directed, not only to the settlement of existing disputes, but to preventing disputes from arising which means that it also extends to the prevention of threatened, impending or probable disputes. The power can be exercised so as to compel the parties to a dispute to resort to conciliation or arbitration.

670. *Conciliation and arbitration connote the intervention of an independent party to deal* with a dispute and the process of arbitration requires a tribunal to accord to the parties in dispute a right of hearing. This has meant, in practice, that the arbitral activities of Commonwealth tribunals are confined substantially to disputes which have arisen, although it is possible to conceive of arbitration for the settlement of a dispute, the terms of which would prevent the occurrence of another dispute.

671. At one time, arbitration was regarded as bringing about a final settlement so that awards were unalterable for their period of operation, but paragraph (xxxv.) is now construed to permit subsequent variations of awards made following the occurrence of an original dispute.

672. As the Committee observed, in dealing with the historical background to paragraph (xxxv.), the main purpose of the Commonwealth power was to enable the Parliament to provide machinery for dealing with disputes which plainly extended beyond State borders, such as were experienced in the shearing and shipping industries. As also mentioned, however, usually disputes are created merely to attract the jurisdiction of the Commonwealth authorities so that most so-called disputes are more in the nature of claims than disputes of the kind which the Founders had in mind. They are commonly called paper disputes. If a log of demands is served by employees on employers, or by employers on employees, with a request that the demands be acceded to, a refusal brings a dispute into existence.

673. In dealing with the meaning of the expression " industrial dispute ", Higgins *J.* said in the *Felt Hatters' Case* (1914) 18 C.L.R., at page 109—

> In this case, the employees endeavoured to get their employers to bind themselves for a term to the conditions of the log, and the employers would not. There is no need for the employees to strike, or throw the industry out of gear, in order to establish the fact of a dispute . . . *Prima facie*, the request made with the log . . . is to be treated as real, genuine, and intended to be pressed by any appropriate means.

Thus, as long as there is a real and genuine disagreement between employers and employees, a dispute might be of a quite formal character constituted merely by the refusal of one side to accede to a demand made by the other side.

674. As the High Court pointed out in *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* (No. 1) (1930) 42 C.L.R., at page 552—

> . . . to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement.

675. It was suggested to the Committee that the approach to the regulation of industrial conditions through the medium of a dispute, in the first instance, tended to break down harmonious relations between employers and employees and was out of touch with the purposes which the Federal industrial power now served. The Committee believes it is possible to exaggerate the adverse effects of making disputes a pre-requisite to the exercise of jurisdiction by Federal industrial authorities. Conciliators, under the present Commonwealth Act, perform a most useful task of mediation. Again, a number of awards are made with the consent of the parties and, in many instances, disagreement between the parties only involves one or two matters even though the Commission's determination deals with many other matters. Nevertheless, experience of the Federal industrial system shows that there is more emphasis on arbitration than on conciliation. There is also a tendency to force upon the industrial machinery responsibility for fixing or varying conditions of employment rather than for the parties themselves to assume responsibility without a dispute being created. Whilst the Federal power is defined in terms of disputes, opportunities for the employment of alternative means of regulating industrial relations are necessarily more limited and sometimes less effective than they could otherwise be.

676. The definition of Federal power in terms of disputes also produces technical problems. From the need to have a dispute, arises the concept that every dispute has an ambit limited by the claims of the disputants. An arbitration authority is not confined, in settling a dispute, to the alternatives of granting a claim in accordance with the demand made or rejecting the claim but it cannot make an award with respect to matters not in dispute between the parties. Subsequent variations of an award are possible but they have to be confined to matters within the ambit of the original dispute. For this reason, unions customarily make claims for higher rates of pay and more generous working conditions than are within the realm of practical achievement while claims of employer organizations go to the opposite extreme. The object of each side is to keep the ambit of the dispute wide enough to meet future contingencies. Industrial disputes are of general public interest and attract a great deal of publicity. Publication of details of extravagant claims and counter-claims gives these claims a significance out of their context. It disturbs not only employers and employees, who may not understand the necessity for the procedure, but tends to create industrial unrest and misunderstanding in the public mind which helps to engender strained employer-employee relationships. Widespread publicity which dramatizes unrealistic claims accentuates the points of difference between employers and employees.

677. The Committee was informed that, although disputes were sometimes created between parties on a wide range of subject matters with an eye to covering future contingencies by variation of an award instead of having to obtain a fresh award with the consequence of time and expense involved, unforeseen circumstances or situations could arise which were not envisaged by the parties. A dispute could arise in the case of an award made following the service of a log many years beforehand. For example, the present Metal Trades Award arose out of a log served by the unions in 1948. Unless the union had made a claim at that time, in respect of a matter currently in dispute, a further log would have to be served before the Federal authority would have jurisdiction to settle the dispute. An example of the problems which may be experienced arose in connexion with an application by The Ship Joiners' Society of Australia in 1955 to vary the Ship Carpenters and Joiners Award, 1949, in relation to marginal rates of pay for apprentices, and allowances. The Conciliation Commissioner who heard the application fixed increased rates of pay for apprentices in the industry

but, on appeal, the Court of Conciliation and Arbitration held that the Commissioner's order was beyond the ambit of the original dispute. As a consequence of the decision the Society subsequently had to serve on the employers a new log of claims in respect of wages and working conditions for apprentice ship joiners. It was not until 1957, or nearly two years after the Commissioner first gave his decision, that the matter was completed, even though it was a comparatively simple one.

Industrial Disputes.

678. The Commonwealth power applies only to disputes which can be described as industrial disputes. Paragraph (xxxv.) contemplates that a dispute will be collective, such as between groups in industry or between an organization of employees and an employer, and not merely an individual dispute between a particular worker and a particular employer.

679. The dispute must also occur within the sphere of industry but it is not confined to disputes in occupations carried on by manual labour. Theatrical employees and journalists and employees in banks, insurance companies, municipalities and rural industry have been held to be engaged in activities within the sphere of industry. On the other hand, although industrial disputes may arise in connexion with employment by a State, the educational activities of a State have been held not to constitute an industry so as to make an industrial dispute possible within the meaning of the paragraph.

680. A dispute must not only arise in an industry but must be industrial in character, that is to say, it must pertain to the relations between employers as employers and employees as employees. A dispute concerning the private activities of employers would not be industrial. Not all disputes concerned with the business activities of employers would be industrial, for example, the hours of trading of shop keepers would probably not give rise to an industrial dispute within the meaning of the constitutional power.

681. A dispute must arise between employers and employees although it is not necessary for the relationship of contract to exist between the disputants. The industry itself usually provides the link between those engaged in it.

682. Further technical questions and limitations arise from the qualification that a dispute must be industrial. In *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387, the High Court held that the interest which an organization of employees possessed in the establishment or maintenance of industrial conditions enabled it to raise an industrial dispute with its employers and obtain an award binding the employers which regulated the terms and provisions upon which the employers could employ non-unionist labour. Although employees may make such a claim, the High Court has held in *The Queen* v. *Graziers' Association of New South Wales, ex parte Australian Workers' Union* (1956) 96 C.L.R. 317, that an industrial dispute cannot arise out of a claim by employers that a rate be fixed in an award for non-unionists, in the absence of a conflicting claim from the respondent union of employees. As the Court pointed out, to amount to an industrial dispute, the disagreement must be about what one or other of the parties to the dispute is to do or not to do in some relevant aspect. It has also been held that an industrial dispute cannot arise from a demand by one employer upon another employer unconnected except by the fact that their businesses are of the same description. The two employers stand in no industrial relation, one to another. (*The Queen* v. *Portus, ex parte Australian Air Pilots' Association* (1953) 90 C.L.R. 320.)

Industrial Disputes Extending Beyond the Limits of any One State.

683. The Commonwealth Parliament's power under paragraph (xxxv.) is confined to the prevention and settlement of industrial disputes "extending beyond the limits of any one State". Thus, a dispute has to extend to two or more States or to a State and a Territory. Purely intra-state disputes may not be brought within the power.

684. As the Court has interpreted the quoted words, however, it is usually not difficult to create an interstate dispute. It is unnecessary for employers to carry on business in more than one State or for the employees concerned to move from one State to another or that a dispute should begin in one State and later spread to another. It has been held to be sufficient to constitute an interstate dispute if the dispute exists at a given moment between employers in an industry carried on in more than one State and their respective employees. The industry itself creates a sufficient nexus between employers to link up into a single dispute disagreements which might otherwise be regarded as a series of local disputes. Thus, a Federal organization of employees acting on behalf of all its members which creates a dispute with employers in more than one State thereby attracts the Federal power.

685. The limitation on the Commonwealth power together with its beneficial interpretation has been largely responsible for the establishment of organizations of employers and employees on a Federal basis to facilitate the creation of interstate disputes for the purpose of having them settled by Commonwealth industrial machinery.

686. The constitutional power would probably allow Federal intervention in a dispute which, at the time, was purely intra-state in order to prevent a spread of the dispute beyond the borders of the State in which it arose. Nevertheless, it is not easy to decide at what point a local dispute has an interstate implication.

687. Notwithstanding, in some industries, either because of their localized character or because union organization has not been undertaken on a Federal basis, disputes extending beyond the limits of a single State do not arise and, therefore, industrial regulation of those industries falls within the exclusive competence of the States. In the opinion of the Committee, the distinction between intra-state disputes which fall outside the Commonwealth power and interstate disputes which are within the power, is arbitrary and unreal. It has resulted in many workers in Australia being subject to Federal awards whilst many others doing the same kind of work are subject to State awards, as for example, clerical workers. Moreover, the desire to obtain Federal jurisdiction sometimes leads to two-State disputes being created whereas the dispute could be dealt with as an intra-state dispute if it were not for the constitutional position.

Conciliation and Arbitration.

688. Paragraph (xxxv.) requires industrial disputes to be prevented or settled by the processes of conciliation or arbitration. The function of conciliation is aimed at producing agreement between parties in dispute through the mediation of a third party. Arbitration involves the submission of a dispute to an authority empowered to determine issues in dispute irrespective of whether the parties agree with the terms of settlement.

689. At first the view was taken that parties in dispute could not be compelled to submit to arbitration, but in 1910 the High Court held that the concept of arbitration was not so confined and the Parliament could make provision for compulsory arbitration by tribunals not chosen by the disputants.

690. Since disputes have to be prevented or settled by the processes of conciliation or arbitration, there are no other permissible means open to the Parliament of dealing with them. For example, it is not within the competence of the Parliament to set up standing authorities comprising representatives of employers and employees of an industry to deal with disputes in that industry by discussion and decision among themselves. In 1930, the Commonwealth Conciliation and Arbitration Act was amended to empower Conciliation Committees, consisting of an independent chairman and an equal number of representatives of employers and organizations of employees, to make awards in relation to industrial disputes in an industry without providing for a hearing or determination between the parties in dispute. The High Court held that the provision so made was not a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes.

691. Thus, if industrial matters are to be handled at the Federal level, either conciliation or arbitration must be used even though neither may be suited to the circumstances of the industry or particular branch of industry involved.

692. Another result of the limitation of Federal power is that the Commonwealth Conciliation and Arbitration Commission cannot be vested with power to make a determination or an award which is binding on persons not party to a dispute, that is to say, it cannot declare that any term of an award shall be a common rule of an industry in connexion with which a dispute arose.

693. Section 41 (1.) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 provided as follows:—

> 41.—(1.) The Court or a Conciliation Commissioner may, if it appears to be necessary or expedient for the purpose of preventing or settling an industrial dispute which comes before it or him or of preventing further industrial disputes, declare by an order or award that any term of an order or award shall be a common rule of any industry in connexion with which the dispute arose.

694. In 1950, the High Court, in *The King* v. *Kelly, ex parte State of Victoria* (1950) 81 C.L.R. 64, following a decision of that Court some 40 years earlier, held that the sub-section was beyond the power conferred on the Commonwealth Parliament. In a joint judgment, members of the Court observed, at page 82—

> A common rule *does* effect a result which is "foreign to arbitration". The distinction may seem technical, and the practical result of observing it may be, . . ., merely to compel the joining of many additional parties as respondents before the court or commissioner—but any parties so joined would not be bound by an award made in relation to the dispute unless they were parties, not only to the proceedings, but also to the dispute. The distinction has been observed and emphasized throughout the whole series of cases, it is a clear and logical distinction, and, in our opinion, it ought to be observed and the power to make a common rule denied.

A common rule can only be authorized under Commonwealth law made pursuant to other constitutional powers, as for example, in relation to employment by the Commonwealth or in a Territory of the Commonwealth.

695. Accordingly, a Federal award determining an industrial dispute is, under the present Act, binding only upon the following:—

(a) all parties to the industrial dispute who appeared or were represented before the Commission;
(b) all parties to the industrial dispute who were summoned or notified, either personally or as prescribed, to appear as parties to the dispute, whether they appeared or not;
(c) all parties who, having been notified, either personally or as prescribed, of the industrial dispute and of the fact that they were alleged to be parties to the dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the dispute;

(d) in the case of employers, any successor to, or any assignee or transmittee of, the business of a party to the dispute or of a party bound by the award, including any corporation which has acquired or taken over the business of such a party;

(e) all organizations and persons on whom the award is binding as a common rule; and

(f) all members of organizations bound by the award.

696. The inability of the Arbitration Commission to make a common rule was criticized by several persons appearing before the Committee. It was observed that a union had to prepare a log of claims and serve it upon as many employers as could be discovered in order to ensure that such an award would have an adequate area of operation. The object was to create a dispute with as many employers as possible so as to bind as many as possible and this necessitated a great deal of work and expense.

697. The position was explained in a submission to the Committee by the Metal Trades Employers' Association as follows:—

When the Amalgamated Engineering Union in 1948 served its log of claims which led to the present Metal Trades Award, the log was served on over 13,000 employers throughout Australia, of whom approximately one third were in the State of New South Wales. Although this log was served on behalf of a number of Metal Trades Unions, logs were also served on large numbers of employers by other unions as well. Admittedly the unions could have served merely the employers' registered organizations, but the practice has always been to serve individual employers as well, probably because it is not certain whether the employer is a member of the registered organization or not, and because it is known that if the employer resigns from the organization he ceases to be bound by an award which may be made.

It was only after the logs had been served, and the employers had failed to comply with the claims, that a dispute arose which enabled the tribunals, set up under the Conciliation and Arbitration Act, to operate.

698. The difficulties confronting employers were explained in the submission in the following terms:—

From a practical point of view the employers' logs can only be served upon the unions, but an award made as a result of such log only covers employees who were members of the organization which was served. The result, therefore, is that unless the unions of employees sought an award to cover all employees, whether members of their union or not, the award would only apply to union members and other employees would be subject to State awards on a different basic wage and in many cases with differing conditions, although performing the same work in the same workshop.

An award, when made, only binds the parties to that dispute, so that an employer who commences business subsequent to the service of the log, is not bound by the award and unless he joins an organization of employers bound by the award his employees will not be bound by a Federal award unless the unions of employees serve a further log of claims on these employers in more than one State and obtain what is commonly known as a "roping in" award in the form, for example, of the current Metal Trades Award.

699. The Committee is convinced that serious inconvenience does result from the need to effect service on so many persons. Even in the printing industry, the Graphic Arts (Interim) Award, 1957 *named two employers' organizations and 2,492 individual employers as respondents.* It was also pointed out to the Committee that it was not uncommon for awards to remain operative long after the expiry of the period of operation fixed in the award because of the expense and difficulties associated with the service of a fresh log of claims. Many awards were varied frequently. For example, over 50 variations of the Metal Trades Award have been made since 1955 when it was consolidated. The Graziers' Federal Council of Australia, in a submission to the Committee, also observed that in the pastoral industry it was impracticable for the Australian Workers' Union to bring all employers into dispute with it and so give the award application to all employers. In the pastoral industry of Australia, excluding Queensland, there were more than 46,000 individual employers, of whom about 19,000 belonged to registered organizations of employers, leaving about 27,000 who would have to be served individually to be bound by a Federal award.

700. There is the further difficulty, already touched on in paragraph 697, that an employer or employee who belongs to a registered organization, party to an award, will not, in the absence of being served individually with the log of claims, be bound by the award after he ceases to be a member of the organization. Although an organization is a disputant, it is not to be regarded as the agent of its members who do not themselves become parties to the dispute merely by virtue of membership.

Application of Commonwealth Awards to the States.

701. The High Court has held that a Commonwealth award may apply in settlement of an industrial dispute arising in an industry carried on by a State. Although it is not altogether clear as to precisely what State functions are industrial for the purpose of paragraph (xxxv.) there do not appear to be any substantial constitutional difficulties arising from the application of Commonwealth awards to States.

702. Section 109 of the Constitution also operates to accord paramountcy to awards of Commonwealth tribunals over inconsistent State laws. The unrestricted supremacy of decisions of Commonwealth arbitral tribunals over State legislation admittedly presents some problems. For example, State legislation may deal in detail with such matters as factories and shops, the fencing

of machinery, and generally with the safety, health and welfare of employees. It is possible for employers and employees in an industry, by either registered agreement or consent award, to displace State laws dealing with the matters mentioned without regard to their purpose and effectiveness.

703. Section 109 is also known for the practical difficulties it causes in determining the extent to which a State law, award or determination has been overridden by a Federal award, or a subsequent industrial issue at the State level would be predetermined by the operation of an existing Federal award.

EFFECTS OF THE PRESENT DIVISION OF INDUSTRIAL POWER BETWEEN THE COMMONWEALTH AND THE STATES.

704. In paragraphs 667 to 700 above, the Committee dealt with the difficulties arising from the language of paragraph (xxxv.) itself. Independently of this, however, the Committee considers that serious problems have arisen from the existing sharing of legislative power over industrial matters by the Commonwealth and the States.

Disparities between Commonwealth and State Awards and Determinations.

705. In the first place, the Committee's attention was drawn to obvious disparities between Commonwealth and State awards and determinations and to the tendency sometimes for Commonwealth and State awards to compete with each other to the detriment of good employer-employee relationships in particular industries.

706. State industrial authorities, for the most part, take into account relevant awards and determinations of the Federal authorities and on occasions are enjoined by State legislative direction to pay regard to Federal action. Indeed, discrepancies between the work of the Commonwealth and the State authorities would have been far greater if this had not been the case. Nevertheless, State authorities are independent of Commonwealth control. In 1954, for example, the Industrial Commission of New South Wales expressly stated that it should not regard itself as *being bound by the decisions of Commonwealth tribunals. The Commission observed*—

So far as the persuasive authority of decisions of the Commonwealth Court is concerned, all we need to say is that this Commission has always paid due regard to the decisions and the reasons accompanying those decisions of both the Commonwealth Court of Conciliation and Arbitration and the Courts of the States of the Commonwealth that are vested with jurisdiction in relation to industrial matters. In some cases, after examination and consideration of the reasons given, the Commission has been satisfied that in the exercise of its own jurisdiction the Commission should follow the same or a similar course; in others, the Commission has not been so satisfied. . . . The positive duty placed upon the Commission by the Industrial Arbitration Act is to reach its own conclusions and then to give expression and effect thereto.

—(*Industrial Arbitration Reports* (New South Wales), Vol. LIII., at page 618.)

707. Even when State authorities have close regard to the activities of the Federal authorities and endeavour to keep in line with Federal decisions, there is, nevertheless, a time lag between the date of a Federal award or variation of an award and its incorporation in a State award. Moreover, the work of a State industrial authority is subject to the legislative power of the State Parliament and, if particular terms and conditions of employment are prescribed by Act of Parliament, then it may be impossible for a State award and a Commonwealth award operating in the same industry to provide similar terms and conditions of employment.

708. Various examples of the effects of the sharing of industrial power were brought to the Committee's notice.

709. Sometimes, for example, a Federal award deals only with the rates of pay and conditions of work of employees who are members of a union which has been a party to the award. Non-unionist employees may be subject to a State award and the terms of the two awards may not coincide. In these circumstances, an employer, to whom the Federal award applies and who is also subject to the State award in the employment of non-unionist labour, may find that he has to apply the conditions of the Federal award to the unionist employee and the differing State award to the non-unionist employee, even though both employees are engaged on the same work.

710. One organization informed the Committee that this position arose fairly recently in the pastoral industry in New South Wales. In that State there were two pastoral awards, the Federal Pastoral Industry Award and the Pastoral Employees (State) Award, each dealing with casual and regular employment of station hands and seasonal employment of labour on shearing and crutching of sheep. Employers who had obligations under the Federal award were not exempted from the State award. For many years, the Federal award was regarded as setting the standard of conditions in the industry, mainly because four-fifths of the capacity of the industry in New South Wales to give employment was in the hands of employers subject to Federal awards. At October, 1955, the State award was as nearly a counterpart of the Federal award as the New South Wales Industrial Commission could make it. From October, 1955, however, variations in both Federal and State awards gave rise to substantial disparities. In 1956, an interim Federal award reduced shearing and crutching rates. This award applied to members of the Australian Workers' Union. It prescribed the rate of £7 1s. 3d. per 100 sheep for shearers whereas under the State award, the rate for

non-unionist shearers was £7 9s. 6d. per 100 sheep. As at 1st June, 1957, there were still discrepancies between the relevant Federal and State awards, for example, the daily rate of pay for shearers was £4 13s. 10d. under the Federal award and £4 9s. 8d. under the State award whilst the weekly rate of pay for adult station hands was £14 3s. 7d. under the Federal award and £14 8s. under the State award.

711. The application of conflicting Commonwealth and State awards in the same industry for the same classes of work is illogical and, in practice, open to serious objections. Fixing of different working conditions, far from promoting goodwill in industry, provides a potential source of industrial unrest. The existence of disparate awards tends, further, to undermine the stability of organizations of representative bodies of employers and employees registered under the Conciliation and Arbitration Act, contrary to one of the main objects of the Act. In some circumstances, the existence of two competing awards results in the adoption by individual employers in the particular State of the terms of the award carrying the most favourable conditions for employees. On the other hand, experience of the severe economic depression in the 1930's showed that the rates of pay of the award providing the lower rates usually prevailed. Competing awards also create managerial problems, as for example, by imposing on employers the problem of paying different wage rates and according different conditions of work to employees engaged on the same task. It is not always clear to an employer which award applies to a particular employee.

Multiplicity of Awards.

712. Industrial undertakings of quite moderate size usually have to apply several Commonwealth awards. In addition, they must comply with State industrial legislation and awards. The Committee was referred to a typical case of an undertaking employing about 400 persons. Federal awards applied to carpenters and joiners, shipping clerks, engine drivers and firemen, metal trades employees, storemen and packers, timber workers, transport workers, and vehicle and waterside workers. In addition, the company had to apply State industrial legislation and State awards and determinations covering canteen workers, cleaners, commercial clerks, commercial travellers, tractor drivers, plumbers, tinsmiths and watchmen. The multiplicity of Commonwealth and State awards increases problems of management. Interplay of Federal and State awards, although not directly competitive, may also jeopardize good industrial relations because they incorporate different standards and conditions of work.

The Basic Wage.

713. In recent years, there has been much public controversy and industrial disputation arising from the disparity of the Federal basic wage and the basic wage established under the laws of the States. In 1953, the Commonwealth Court of Conciliation and Arbitration suspended the application in its awards of the principle of the quarterly adjustment of the basic wage automatically in accordance with changes in the "C" series of the Commonwealth Statistician's retail price index. In some States automatic adjustment continued to apply; in others it did not.

714. A comparison of Federal and State basic wages for adult males and females in the various State capital cities as at August, 1958, was as follows:—

Capital City.	Male.		Female.	
	Federal.	State.	Federal.	State.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Sydney	13 8 0	13 14 0	10 1 0	10 5 6
Melbourne	13 0 0	13 3 0	9 15 0	9 17 0
Brisbane	12 3 0	12 14 0	9 2 3	8 12 0
Adelaide	12 16 0	12 16 0	9 12 0	9 12 0
Perth	13 1 0	13 12 3	9 15 9	8 17 0
Hobart	13 7 0	13 12 0	10 0 3	10 4 0

715. As a result of the Commission's 1959 basic wage inquiry, there has been an increase in the Federal basic wage for adult male and female employees in all States. A comparison of Federal and State rates as at July, 1959, was as follows:—

Capital City.	Male.		Female.	
	Federal.	State.	Federal.	State.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Sydney	14 3 0	13 16 0	10 12 3	10 7 0
Melbourne	13 15 0	13 15 0	10 6 3	10 6 0
Brisbane	12 18 0	13 3 0	9 13 6	8 19 0
Adelaide	13 11 0	13 11 0	10 3 3	10 3 0
Perth	13 16 0	13 15 1	10 7 0	8 18 10
Hobart	14 2 0	14 2 0	10 11 6	10 11 6

State Legislative Intervention in Industrial Matters.

716. As the Committee has mentioned, the Commonwealth Parliament is, for all practical purposes, precluded from direct legislative intervention in the industrial relations of employers and employees in industry. Considerations of constitutional power do not deter State Parliaments from direct action in industrial matters and the Parliament of each State is able to pass legislation dealing with all relevant subjects, such as hours of work, rates of pay and conditions of leave which are beyond the legislative reach of the Commonwealth Parliament. Whereas the Commonwealth Parliament has, in general, to leave such matters to be dealt with by the specialized industrial machinery of its creation, such as the Commonwealth Conciliation and Arbitration Commission, a State can choose between these things being dealt with by specialized industrial machinery or by the Parliament itself.

717. One result of the inequality in respect of industrial powers of the Commonwealth and State Parliaments is that, even if a State industrial tribunal is disposed to keep its awards in line with those of the Commonwealth Commission, a State Parliament does not necessarily have the same inclination. During 1946 and 1947, the Commonwealth Court of Conciliation and Arbitration was hearing evidence in proceedings arising out of applications for a reduction of weekly standard hours of work from forty-four to forty. Before the proceedings were completed, the New South Wales Parliament passed the Industrial Arbitration (Forty Hours Week) Amendment Act, 1947, reducing ordinary hours to forty for purposes of State awards. It was not within the power of the Commonwealth Parliament to take similar direct legislative action in respect of Federal awards.

718. There are a good many examples of State Parliamentary determination of terms and conditions of employment. Although the New South Wales Parliament reduced the number of weekly working hours in 1947, it legislated during the depression, in 1930, to increase the number of ordinary working hours from forty-four to forty-eight per week.

719. There is, in the Committee's view, a danger in unco-ordinated State action of eventual repercussions which favour neither industry nor the community as a whole but which will prejudice industrial progress in other directions.

720. State industrial legislative power has only a State wide ambit. When one State acts in a particular direction, other States may, for political or other reasons, feel impelled to follow suit. But there are obvious limits to the power of one State to set more advanced industrial conditions than other States. A particular State could find it to its own advantage to make gains in industrial expansion by maintaining lower labour costs than a State interested in the promotion of better working conditions. The grant of special conditions of work in one State could affect the flow of investment to and from the State.

721. State industrial power is not limited to the determination of terms and conditions of employment. As a sequel to a transport dispute in Victoria, the Parliament of that State passed the *Essential Services Act 1948*, which provided that a Minister could operate, control or direct any essential service. The Minister's power included power to direct persons or bodies to operate and maintain an essential service. In 1948, the Queensland Parliament passed an Act which, for the expressed purpose of upholding industrial law, contained a series of provisions directed against picketing.

Confusion of Divided Power.

722. The description which the Committee has given of divided industrial power in Australia —Federal power limited by technical description and concepts in contrast to the generality of State power—should provide a sufficient picture of exotic confusion in the regulation of industrial conditions in Australia. Sir John Latham described the situation to the Committee as follows:—

> The Commonwealth has complete power over foreign trade, exports and imports and foreign balances . . . The Commonwealth has power over banking and foreign exchange through the banking system. It is able to control, through the banking system, the interest charges of banks, and the Commonwealth has very full powers on taxation. All these subjects are of very great significance economically.
>
> The States have powers which the Commonwealth does not possess. The States can control rents, interest —apart from the interest charged by banks—including hire-purchase interest, which has attained such large dimensions in very recent years. The States are able to tax, but as long as uniform taxation exists, only slightly. The States can control prices, capital issues and investments. You see how these economic subjects, all of which I suggest inter-act, are divided between Commonwealth and State authorities. Let me add wages to that list. Wages are a very important element in our economy from the point of view of economics and from a social point of view. How are wages controlled? We have the Commonwealth Conciliation and Arbitration Commission acting under the handicaps to which I have referred. It fixes the wages for, I think, about 39 per cent. of the male workers of Australia. It can deal only with interstate disputes defined in the manner in which I have stated. The Federal Parliament has no power over wages generally. There are six sets of State tribunals also dealing with wages and there are six State Parliaments with power to legislate directly on wages and any other industrial matters. Anything that a State Parliament or State industrial authority does is inoperative to the extent that it is inconsistent with an award of the Commonwealth Arbitration Commission.
>
> So, industry is controlled under this extensive system of governmental regulation, in part by Commonwealth awards, in part by State laws—and the State Parliaments sometimes act when it suits them politically to do so—and in part by the determinations of State industrial tribunals. That is to say, altogether, if one takes the six State

Parliaments, the six sets of State industrial tribunals and the Commonwealth authority, there are 13 industrial authorities in Australia, all deriving their authority from different sources . . . . You have a go in the Federal *Commission If you do not get what you want there, well,* you may be able to abandon the Federal body and try a State tribunal. If the State tribunal proves recalcitrant and reluctant, then there is the possibility of the State Parliament.

723. Again, while industrial affairs are separately regulated under Commonwealth law and the law of six States, uniformity in the treatment of conditions becomes impossible even within the boundaries of a single State. In its decision on the Standard Hours Inquiry in 1947, the *Commonwealth Court of Conciliation and Arbitration observed*—

The facts therefore that four States (i.e., New South Wales, Victoria, Queensland and Tasmania which include the greatest both in population and economic activity) and the Commonwealth have become parties to these proceedings and have pressed the Court to settle all these disputes by granting forthwith a 40-hour week in each case are matters of the greatest import. Is it not a legitimate conclusion that if the constitutional position were otherwise than it is in Australia, then the responsibility of making this decision would have been assumed by the Parliament as it was in New Zealand in 1936? As it is, however, no Parliament in Australia could do what New Zealand did. The Commonwealth because it has *no industrial power adequate for the purpose; the States* because they can legislate only for so much of their industrial field as is not covered by the decisions of this Court. Hence the legislatures remain impotent to secure the industrial uniformity so essential for ordered business and harmonious industrial relations.

—(*Commonwealth Arbitration Reports*, Vol. 26, at pages 588-589.)

Should the Federal Arbitration Power be Repealed?

724. In view of the difficulties and disadvantages which flow from the present division of industrial power between the Commonwealth and the States, the Committee considered the advisability of recommending the repeal of paragraph (xxxv.).

725. This was the course of action recommended by four of the seven members of the Royal Commission on the Constitution which reported to the Governor-General in 1929. The four members (Sir Hal Colebatch and Messrs. Peden, Bowden and Abbott) reported as follows:—

In our opinion, industrial legislation should be regarded as a function of the States. In many matters industrial legislation is experimental, and each State should decide for itself whether it is prepared to test the value of proposed legislation of this character *and to accept the responsibility* for its consequences. We also think that industrial legislation peculiarly requires local supervision, and should be in the hands of the authority which is responsible for the maintenance of law and for the good order of the community. We think, further, that the general power to legislate with respect to industrial matters should be in the hands of the legislature which has *the general power to deal with health*, trade and commerce, mines, lands, public works, and the development of a State. We do not think that it would be for the good of Australia that the Commonwealth Parliament should be occupied with industrial questions or that Federal elections should turn on industrial issues.

In our opinion paragraph (xxxv.) of section 51 of the Constitution, *which relates to conciliation and* arbitration, should be deleted. We think that the Parliament which deals with industrial arbitration and conciliation should be the Parliament which has control of industrial matters generally. For the reasons given above we think that this control should be in the hands of the Parliament of each State.

We think that the history of the decisions on this paragraph shows (1) that the arbitration power, however exercised, should not be dissociated from the power to legislate on industrial matters; and (2) that there would be great difficulty in framing a definition of dispute which would ensure that only real disputes, in the sense in which that term was used in the earlier judgments of the High Court, were brought before the Commonwealth *Court.*

We are of the opinion that the arbitration power should not be exercisable by two authorities, and that it should be in the hands of the States and not of the Commonwealth.

—(*Report of the Royal Commission on the Constitution*, at pages 248-249.)

726. On the other hand, three members of the Commission (Messrs. Ashworth, Duffy and McNamara) believed that full industrial power should be vested in the central government. They reported—

Special reference must be made to industrial powers. The extent of the existing power has been the subject of much legal argument and progressive interpretation. Both the Arbitration Court and High Court decisions have changed with the changing personnel of those bodies. If the power *is removed from the Commonwealth* and vested in the States, an intolerable condition of unfair competition between manufacturers in different States owing to varying rates of pay and conditions of employment will be created. One of the benefits of a central government is that it can remove danger of this character.

—(*Report of the Royal Commission on the Constitution*, at pages 244-245.)

727. The Committee has no hesitation in expressing its opinion that it would be a retrograde step and politically impracticable for paragraph (xxxv.) to be repealed.

728. When the Royal Commission reported, after 29 years of Federation, the great era of industrial development in Australia was some time away. In the 30 years of Federal experience which have elapsed *since the Commission reported, the economic developments* referred to in paragraphs 91-103 of the Committee's Report, submitted to the Parliament in 1958, have taken place.

Conditions of work in an industry in one State are now of concern to persons performing similar work in other States, and the Commonwealth industrial machinery has, in the opinion of the Committee, been largely responsible for achieving substantial uniformity in industrial conditions in cases where uniformity is of benefit to the industry and economy as a whole. As observed earlier in this Chapter, in 1954, Commonwealth awards and determinations applied directly to about 44 per cent. of male employees and about 37 per cent. of female employees in Australia. Even where Commonwealth awards do not apply directly, the activities of Commonwealth arbitral authorities have often set a standard for the guidance of the industrial authorities of the States. With the repeal *of paragraph (xxxv.), these benefits would be lost and it is possible to envisage increased disparity* in working conditions in the various States which would tend to promote industrial unrest and place some States at a disadvantage with other States with the result that the Australian economy itself would suffer adversely.

729. The Commonwealth Parliament has, by virtue of its financial position and other express economic powers, such as the powers to make laws with respect to taxation, overseas trade and commerce, banking and the borrowing of money by the Commonwealth, now assumed greater responsibilities for the general state of the Australian economy than in the years up to 1929. The Committee believes that the Commonwealth's economic responsibilities will continue to increase and that this renders inevitable Commonwealth activity in industrial relations. The wider economic aspects of the regulation of industrial relations will be dealt with in the concluding paragraphs of this Chapter in the course of presenting the case for a wider Commonwealth industrial power.

730. There is, in the Committee's view, little doubt that under the influence of the Federal authorities, working conditions and employer-employee relationships have considerably improved.

731. On the purely political side, the Committee believes that the majority of Australians has come to accept, and look to, Federal interest in industrial matters and Federal leadership in the determination of terms and conditions of employment. For example, the interest of employees in Federal industrial action is borne out by statistical information relating to industrial organizations. According to the Commonwealth Statistician, as at 31st December, 1958, there were 370 unions in *Australia with a total membership of 1,811,000 persons. Ninety-six of the unions were organized on* a Federal basis and operated in more than four States and the total membership of those unions was 1,273,000 or more than two-thirds of total union membership. In all, 141 unions operated in more than one State covering 1,576,000 members or rather more than five-sixths of total union membership. The number of organizations operating in two or more States rose from 72 in 1912 to the abovementioned figure of 141 in 1958. The ratio of the membership of such organizations to the total membership of all organizations rose from 65 per cent. to 87 per cent. during the same period.

732. Vacation by the Commonwealth of the industrial power has not been seriously advocated for many years. On the other hand, proposals for constitutional alterations involving an extension of the Commonwealth's industrial power have been submitted to the people on six separate occasions, namely in 1911, 1913, 1919, 1926, 1944 and 1946. Although no proposed alteration has received the requisite majorities prescribed by section 128 of the Constitution, an over-all majority of persons voted in favour of the extension of Commonwealth power proposed in 1946 under which the *Commonwealth Parliament was to be vested with legislative power to make laws with respect to terms* and conditions of employment in industry. On that occasion, however, separate majorities were obtained in only three States whereas four separate State majorities were required to obtain the carrying of the alteration. On no occasion has a proposal been put to the people to reduce Commonwealth industrial powers. In 1928, however, the Government of the day amended the Commonwealth Conciliation and Arbitration Act with a view to restricting the industrial activities of the Federal tribunal. Under the amendment, the Court was required to consider, *in the case of every industrial dispute, whether there was anything which made it more desirable that* it should deal with the dispute in preference to leaving it to a State industrial authority. About the time the Royal Commission reported in 1929, the same Government proposed that the whole industrial power, except in reference to the maritime industries, should revert to the States. The Maritime Industries Bill was introduced in August, 1929, to give effect to the policy, but the Government was defeated not only in the Parliament, but at the ensuing elections at which its policy on industrial matters was a vital part of its election platform.

733. In the Committee's opinion, the deficiencies of the existing arbitration power and the technicalities surrounding its exercise and the problems that arise from seven separate systems of industrial law in Australia (leaving aside the Territories) make it imperative that some constitutional change be made to strengthen the role of the Commonwealth.

Proposals for Amendment of Paragraph (xxxv.).

734. The Committee considered various proposals, some submitted by persons and organizations appearing before it and others suggested by members themselves, to amend paragraph (xxxv.) *in such a way as to permit tribunals created by the Commonwealth Parliament to exercise* wider powers over industrial questions.

Extension of the Arbitration Power to all Industrial Disputes.

735. One proposal was that the Federal power should apply to all industrial disputes instead of being restricted to industrial disputes "extending beyond the limits of any one State".

736. As the Committee has already observed, paragraph (xxxv.) is not confined to the settlement of major industrial disputes which could involve protracted strikes afflicting the whole continent such as the Founders envisaged. Instead, the Commonwealth industrial tribunals may have jurisdiction over disputes of a quite formal character which are created as between the parties and made to extend beyond the limits of a single State for the purpose of attracting Federal determination of the issues. The distinction, therefore, between an interstate dispute and an intra-state dispute has lost much of its original significance and there is, in the broad substance of industrial relations, no clear division between the industries or branches of industry in which Federal awards apply and those to which State awards apply. In fact, as the Committee has mentioned, sometimes Commonwealth and State awards apply to persons doing the same kind of work.

737. The proposal is, therefore, logical. By reason of making all industrial disputes the subject of the constitutional power, the possibility would offer of awards of Commonwealth tribunals being applied to a greater number of employees than at present, which would assist in mitigating the undesirable effects which now flow from competing Commonwealth and State awards and determinations.

738. On the other hand, in the Committee's view, the proposal falls short of meeting the main objections to the present division of industrial power between the Commonwealth and the States. In the first place, the determination of industrial relations through the creation of disputes settled by the restricted processes of conciliation and arbitration would become further entrenched in Australia. Secondly, so long as the Commonwealth tribunals were without power to make a common rule, they could never fully occupy an industrial field. In practice, many non-unionists would remain subject to State legislation and tribunals. Moreover, some organizations are not registered organizations under the Commonwealth arbitration system and it would be possible for those that are so registered to re-organize so as to keep within the State sphere. It would be open to these organizations to obtain the regulation of industrial conditions under State law by avoiding the creation of disputes. In the result, the proposals would produce an enlargement of the authority of the Federal tribunals at the expense of the State legislatures and industrial authorities but would not overcome all the consequences which stem from the overlap between the work of Commonwealth and State industrial tribunals.

Commonwealth Industrial Tribunals with Power to make Common Rules.

739. As has been observed, the Federal Parliament is not competent in exercising the power conferred upon it by paragraph (xxxv.) to authorize the Commonwealth Conciliation and Arbitration Commission to declare that any term of an award which the Commission has made shall be a common rule of the industry in connexion with which the dispute arose. The terms of settlement of a dispute bind only the parties or the members of organizations which were parties to the dispute. In addition, although an organization of employees may create a dispute concerning the conditions of employment of persons not members of the organization, employers or their organizations cannot create an industrial dispute on such an issue.

740. The Committee considered a proposal that paragraph (xxxv.) should be amended to make it possible for power to be conferred upon Federal industrial tribunals to declare that any award or terms of an award made in settlement of an industrial dispute should be a common rule in the industry or section of the industry concerned. The object of the proposal was that persons not bound by the award, either as employers or employees, but engaged in either capacity in the industry to which the award applied, would then be bound by the conditions provided in the award itself. The proposal contemplated that the power to make common rules should be an adjunct of the present conciliation and arbitration process with a view to preventing further disputes arising in the industry covered by the award. In other words, there should be a dispute that is settled by the arbitration process in the first instance and then an extension of the terms of settlement to others in the industry but not parties to the dispute.

741. Advantages of the proposal would be to avoid the necessity of compelling the joining of many additional parties as respondents to a claim or of having to obtain, at some later time, roping-in awards to bind employers and employees not bound by the original dispute. In some industries, such as the pastoral industry, these advantages would be significant.

742. If it were decided that power to make common rules should be conferred within the general framework of the present paragraph, probably an appropriate form of words could be devised, but the implications of the proposal that a Federal industrial tribunal should have power to make common rules could be far reaching.

743. It was not, for example, a necessary ingredient of the proposal that the Commonwealth power should be extended, in the first instance, to enable Commonwealth tribunals to deal with all industrial disputes. However, assuming the Commonwealth power to be restricted to the settlement of disputes extending beyond the limits of any one State, as at present, undoubtedly the power to

make a common rule could be framed so as to make extensive inroads on that limitation since the rule could apply to persons not even in dispute let alone parties to an interstate dispute. The exact extent to which the power to make a common rule could supplant the jurisdiction of State tribunals would depend upon the expression of the amendment. As the High Court has observed, a common rule effects a result which is foreign to arbitration. The constitutional power to make a common rule could be such as to create very extensive areas of Commonwealth industrial regulation foreign to arbitration.

744. In the Committee's view, the proposal for a common rule, however limited, does not provide a satisfactory constitutional solution to industrial problems. Industrial conditions would continue to be regulated primarily through the medium of creation of industrial disputes which have to be settled by conciliation or arbitration. Problems arising from the activities of separate Commonwealth and State industrial authorities, to which the Committee has already referred, would still exist.

745. If, of course, the power to make a common rule was so expressed by constitutional alteration as to enable a Commonwealth tribunal to apply the terms of any award it made throughout the whole of industry, or a particular industry, this would come close to the equivalent of vesting a Commonwealth tribunal with full powers to determine the terms and conditions of employment.

Commonwealth Industrial Tribunals with Power to fix the Basic Wage and Standard Hours of Work throughout Industry.

746. Another suggestion was that the Commonwealth Conciliation and Arbitration Commission, or other Federal authorities, should have power to fix the basic wage and standard hours of work on a continent-wide basis. According to the proposal, the need for the existence of a dispute giving rise to basic wage or standard hours issues would be eliminated, although the proposal contemplated that interested parties should be accorded a right of hearing. At the same time, the necessity for a dispute in connexion with other matters affecting industrial relations would be retained. The proposal is, in part, a reaction to the diversity of the basic wages, or rather to the extent of the disparities, since diversity is no new phenomenon.

747. Simply to give power to a Commonwealth authority to determine a common rule or to make a decision prescribing a basic wage or standard hours of work would not, however, in the Committee's view, meet the real objective of this suggestion which is to produce a common wages and hours structure. Unless the Commonwealth authority was empowered to fix all remuneration and to deal with all matters of hours of work on a national basis, the States and their tribunals could still maintain present disparities and create entirely different ones by various devices involving the secondary wage structure. Disparities of greater consequence could result from different treatment of annual, sick and long service leave.

Removal of the Limitation requiring Disputes to be Settled by Conciliation and Arbitration.

748. Experience has shown that conciliation and arbitration are not necessarily the most effective means of dealing with disputes and that in some industries and circumstances other means would be better. The wages board systems in Victoria and Tasmania, for example, are not tied to these two processes. There are protagonists for the Conciliation Committees of the 1930 Federal legislation, held to be *ultra vires;* for the mediation systems adopted in the United States of America and Canada; for the Councils of Conciliation in New Zealand and for various methods currently operating in the United Kingdom.

749. Undoubtedly, the form of the Federal constitutional power has resulted in clamping a fairly rigid system on the Australian economy. Whilst there is room for employers and employees to evolve methods other than conciliation and arbitration in the regulation of their industrial relations, such, for example, as the various forms of collective bargaining, the industrial climate of Australia is primarily determined by use of the Federal conciliation and arbitration machinery.

750. The Committee believes that the elimination of the limitation should encourage greater experimentation and permit a more flexible approach to the treatment of industrial relations in particular industries. The proposal would, in addition, make it possible to solve some of the technical problems of paragraph (xxxv.). On the other hand, the assumption of jurisdiction by Federal authorities would still depend on the creation of industrial disputes. Thus, although the adoption of the suggestion would probably lead to some shift in the industrial field occupied by the Commonwealth vis-à-vis the States, the basic problems of the division of industrial power would probably remain.

Commonwealth Authorities with General Powers over Terms and Conditions of Employment.

751. The proposals so far considered involve the making of adjustments to paragraph (xxxv.) but none completely dispenses with the necessity for a dispute to provide the basis for the exercise of Commonwealth power. The Committee considered other suggestions, however, for constitutional amendment to empower the national Parliament to set up authorities, not only to deal with industrial

disputes but also empowered to prescribe terms and conditions of employment irrespective of the existence of a dispute.

752. A far-reaching suggestion was that the Commonwealth Parliament should be competent to set up industrial machinery empowered to regulate all matters relating to terms and conditions of employment in industry. Under this proposal, the Federal authorities would have full industrial power, including power to override State laws, awards and determinations dealing with industrial matters. Not all the proposals which the Committee considered as involving the committal of general power to specialized Commonwealth machinery were as extensive as the one mentioned, although each stemmed mainly from a desire to remove the conception of a dispute as the basis of action.

753. One other suggestion was that central industrial bodies, in determining terms and conditions of employment, should be required, by an appropriate constitutional formula, to accord a right of hearing to interested parties even though a dispute did not exist in the sense of the present paragraph (xxxv.).

754. It was also suggested that a Commonwealth authority should act only if there was a dispute giving rise to issues for determination but that the authority should be authorized to apply, at its discretion, the resulting award to any person, industry or branch of industry or locality. The Committee considers that this proposal falls little short of vesting full power to determine terms and conditions of employment in Federal authorities. A dispute can be created with comparative ease and be confined to a very limited branch of industry and yet the terms of the subsequent award could be applied virtually without limit to all other industry.

755. Yet another proposal was that Federal specialized machinery should be empowered to determine terms and conditions of employment but only by use of the processes of conciliation and arbitration. The Committee feels that this proposal was misconceived because, so long as conciliation and arbitration are the only employable processes, there must be a dispute with ascertained parties to the dispute to whom the tribunal's decision will apply.

756. Broadly speaking, the purpose of the abovementioned proposals was to authorize the Commonwealth Parliament to set up independent industrial machinery with general powers and responsibilities of fixing terms and conditions of employment throughout Australian industry. It would be constitutionally possible for the Parliament to authorize authorities it created to choose their own methods of dealing with industrial matters, but even if limitations were imposed as to method, responsibility for deciding what the terms and conditions of employment should be would reside in the authorities themselves and not in the Parliament.

757. The Committee believes that important advantages could flow from amending paragraph (xxxv.) to enable the Commonwealth Parliament to set up authorities vested with powers in connexion with industrial relations which go beyond the existing power with all the limitations that have been described.

758. Firstly, the proposed amendment would make it possible for Commonwealth industrial authorities to deal with disputes free from the complexities and technicalities which now beset them and the parties to a dispute. For example, disputes would not have to be formulated as interstate disputes, tribunals could be authorized to make common rules in an industry and problems of ambit would disappear.

759. Secondly, the proposal would have the advantage of allowing flexibility in the creation of industrial machinery. The Parliament could, if it wished, establish authorities to deal not only with disputes but to regulate employer-employee relationships irrespective of the existence of a dispute. Parliament could, for example, create at will conciliation committees for particular industries and local bodies to deal with local matters.

760. Thirdly, since the Constitution would no longer impose jurisdictional limits on Commonwealth industrial authorities or reserve a field of industrial relationships exclusively to the States, Commonwealth authorities could be vested with sufficient power to avoid or overcome unnecessary duplication and competition between Commonwealth and State authorities. Thus, a Federal body could determine basic wage rates according to a common principle which would apply throughout industry in Australia.

761. Nevertheless, the Committee considers that ultimate complete responsibility for the regulation of industrial conditions should rest with the Commonwealth Parliament itself rather than with independent statutory authorities which the Parliament might create.

762. The regulation of industrial relations is a matter of government which affects the welfare of the entire Australian community and the Committee's view is that it is inconsistent with responsible democratic government that independent tribunals without responsibility either to the Parliament or the people should be accorded, by the Constitution, the role of supreme legislators. Whilst the Committee believes that independent statutory bodies should continue to determine terms and conditions of employment in Australian industry, it considers that the Parliament of the Commonwealth, which is elected by the people to whom it is responsible, and not the tribunals themselves, should be the final repository of industrial responsibility. The answerability of governments to the electors is a safeguard against unwise action in the industrial field.

763. Another reason why the Committee believes that the Parliament should have a general industrial power arises from the integrated character of the present-day economy. In paragraph 96 of its Report to the Parliament in 1958, the Committee observed—

> . . . it is undoubtedly true that the integration of the Australian economy is such that there is an inter-dependence not only as between the many and various economic activities which go to make up the Australian economy but also as between these activities and the state of the economy as a whole.

The Committee believes that the Commonwealth is now generally expected to use its available legal powers for the purposes of maintaining an economy as stable as possible, a conclusion which is discussed at length in Chapter 19 of this Report. The economic aspects of the regulation of industrial relations will be further mentioned in paragraphs 770-773 below. The Committee should point out, at this juncture, that the independent exercise by extra-parliamentary authorities of power to determine wages and conditions of work would be capable of impairing the discharge by the Commonwealth Parliament of its responsibilities in other fields of government and the effectiveness of the economic policies of the Commonwealth outside the immediate field of industrial relations.

764. In addition, there is a vast area of regulation of industry directly bearing on conditions of employment that lends itself to and, in fact, requires parliamentary control rather than attention at the hands of independent statutory bodies. Factories and shops legislation is an example. Conditions under which special classes, such as young people, may be employed and protection against radiation are others. Matters of this kind should not be left to tribunals for determination on the arguments of interested parties. Instead, it should be the task of the Parliament to deal with them. The subjects require, as a prelude to legislation, intensive research and investigation, involving many others than employers' organizations and trade unions, and the provisions ultimately made will be more appropriate if they have been subjected to the public scrutiny and discussion that the parliamentary process allows.

Vesting the Commonwealth Parliament with direct Legislative Powers over Industrial Relations.

765. Sir John Latham, who besides being a former Chief Justice of the High Court was, one time, a member of the Federal Parliament and Attorney-General, wrote—

> There is reluctance in many quarters to approve any increase of federal power over industrial matters. Many are afraid of a parliament where a political party could in effect buy votes by raising wages. But there are many parliaments which have this power. There is the risk that a popularity-hunting parliament might do great damage in the industrial sphere—but any parliament may do great damage in many spheres by actions which it would be possible for it to take. If the Parliament went too far in raising wages—or in reducing wages—it could subsequently correct what it thought was an error, and in any event it would have full responsibility to the people for what it did or failed to do. The prospect of an election is a great steadying influence. Parliament would soon learn that it could not itself possibly deal with all aspects of employment, and it would establish authorities which would be given such independence in tenure as Parliament thought proper. If Parliament had fuller powers the community would not be compelled to accept—without any possibility of parliamentary revision—a wage policy framed by a court in deciding a case between a set of employers and a set of employees, and who each place their own interests before those of the community. At present wage policy is a matter for which all parliaments disclaim responsibility. They do this with a virtuous air—"We will not interfere with the Court". Some Governments get along without having any wage policy at all. If things go wrong, the Government and Parliament can blame the Court—of course very respectfully—and the Court can blame the Parliament. If responsibility were placed upon the Parliament, there would be an end to this evasion—which is a necessary result of the present system.
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> —(*Sydney Law Review*, April, 1953, at page 39.)

766. The Committee's proposal involves an alteration of the Constitution to authorize the Commonwealth Parliament to make laws with respect to terms and conditions of industrial employment and the prevention and settlement of industrial disputes. The proposed power over terms and conditions of employment is intended to be exercisable in respect of those industries in which industrial disputes, within the meaning of the existing language of paragraph (xxxv.), may arise. The proposed alteration would make it possible constitutionally to end the disabilities resulting from the present arbitration power and the divided system of industrial regulation in Australia. It would also allow more flexibility and simplicity in the handling of industrial relations than would be possible under any other proposals for constitutional change. Flexibility would be further promoted by authorizing, as the Committee proposes, the Parliament to vest State industrial authorities with power to determine terms and conditions of employment and to settle disputes. In the Committee's view, its proposal offers the best prospect of improving employer-employee relationships and promoting the welfare of particular industries according to their individual requirements.

767. The Committee wishes to make it clear that it does not contemplate that the Parliament should take the regulation of industrial relations out of the hands of industrial authorities; indeed, as mentioned, it is part of its proposal that advantage should be taken of existing State authorities for the purpose of the exercise of the power entrusted to the Parliament. Parliament could be expected to exercise the power responsibly and in the light of prior experience. The Committee wishes to emphasize, moreover, that the proposal does not bestow power on the Commonwealth Parliament to authorize the compulsory direction of labour.

768. At one stage, the Committee contemplated the possibility of an amendment which would specifically vest the power to deal with terms and conditions of industrial employment in Commonwealth authorities established for the purpose and that a residual power would be given to the Parliament to prescribe the principles upon which the authorities should act. However, the difficulties of defining a principle proved insurmountable and it appeared, moreover, that the proposal created a division which would break down in practice. As an alternative, the Committee considered a division of power which would have given the Commonwealth Parliament power to legislate with respect to such fundamental matters as the basic wage and standard hours of work and leave the balance of industrial matters to be dealt with by Commonwealth and State industrial machinery. The proposal was rejected because it also depended upon a separation in theory which would not work out in practice. In any event, as already mentioned in paragraph 764, industrial tribunals are not, in the Committee's view, bodies to which should be entrusted the determination of all matters that bear on the terms and conditions of employment.

769. Specialized industrial machinery in Australia has for long dealt directly with questions of rates of pay, hours of work and other essential conditions of work. Terms and conditions of employment in industry are now of much greater range than in by-gone years and it has become customary for Australian Parliaments, in common with other industrialized countries where a parliamentary system of government obtains, to legislate directly on an increasing number of subjects affecting employment. An example which the Committee has in mind is workers' compensation, a development in labour relations which has occurred in Australia since Federation. Workers' compensation is an acknowledged field for parliamentary action and each of the States has its own legislation. Legislation providing compensation for injured or deceased workers and their dependants has obvious implications for society as well as the individuals affected. Workers' compensation is an example of a subject in which uniformity of treatment throughout Australia is in the best interests of every one. Under the Committee's proposal, the national Parliament could legislate for the whole of the Commonwealth providing a single system of workers' compensation in substitution for separate and divergent State Acts.

770. The Committee has already briefly mentioned the relation of industrial power to general economic policy and it is appropriate to refer again to this matter.

771. The Commonwealth Parliament has certain legislative powers which it may exercise so as to affect the level and direction of economic activity, including powers with respect to overseas trade and commerce, taxation, banking and currency, borrowing of money on the public credit of the Commonwealth, the making of grants of financial assistance to the States and immigration. The Committee has no doubt that the Commonwealth is, notwithstanding the limited character of its economic powers, now generally expected by the people of Australia to carry the major share of the responsibility for the general state of the economy. Indeed, since the last war, the economic policies of successive governments have had as their declared objectives the maintenance of full employment, stimulating and maintaining a high rate of development and migration, the maintenance over a period of a reasonable balance in overseas payments and a safe level of international reserves. Stability of prices and costs has been desired as a means of achieving these objectives as well as being an end in itself.

772. Actions of State legislatures and Commonwealth and State industrial authorities are capable of having an immediate effect over wide segments of industry. Commonwealth policies in relation to taxation, credit, overseas trade and international payments and other aspects of the over-all economy have to be adapted to the decisions of the various unco-ordinated wage-fixing authorities.

773. At this stage of the nation's development, the Commonwealth Parliament should, in the Committee's opinion, be vested with an industrial power which it can exercise along with other powers relating to economic activity in order to achieve and maintain a stable economy in which all sections of the community will share equitably in the prosperity of the nation and in which the dangers of inflation and deflation and of unemployment are reduced to a minimum. With a power to make laws with respect to terms and conditions of employment in industry, the national Parliament could, for instance, direct specialized authorities to fix wages in accordance with principles which are consistent with the attainment of price stability and the entitlement of labour and industry alike to share in the growth of national productivity. The determination of industrial conditions should, in the Committee's view, reflect a national outlook.

774. The Committee is not unmindful, moreover, that the regulation of industrial conditions cannot be divorced from social objectives. Social advancement affects the entire community and not just some parts of the Commonwealth and it is proper that the Commonwealth Parliament should have at its disposal the power to achieve social objectives on a nation-wide basis.

775. A further reason why the Committee considers the Commonwealth Parliament should have the power it proposes concerns the ratification and implementation of Conventions of the International Labour Organization. The Committee has not recommended an amendment of section 51 (xxix.) of the Constitution which contains the power commonly known as the "external affairs" power. There are unresolved doubts as to the power of the national Parliament under the paragraph to give full effect to the many Conventions which the International Labour Organization has adopted. The Conventions deal with such subjects as the employment of women and young children, conditions of employment in shops, night work and sickness insurance.

776. Most of the 108 Conventions at present open for ratification deal with subjects which, apart from the external affairs power, do not fall exclusively within the legislative competence of the Commonwealth Parliament but for their implementation require the exercise by the States of their constitutional powers, particularly those relating to the terms and conditions of employment.

777. Where State law is involved, Commonwealth policy has been to ensure that the law and practice in each of the States are in accord with Convention requirements and that each State is agreeable to ratification. Australia's record of ratifications compares unfavourably with most other socially advanced democratic countries. Only 23 Conventions have been ratified and sixteen of those were ratified solely on the basis of Commonwealth law and practice. Many of the Conventions, particularly those adopted in most recent years, prescribe standards with which the law and practice or one or more States are not in accord. About 60 of the 85 Conventions open for ratification by Australia probably fall within this category. The poor record of ratifications is another illustration of the insurmountable difficulties sometimes experienced in obtaining the approval of six independent States to a single course of action. A specific example is Convention No. 100 concerning equal remuneration for men and women workers for work of equal value drawn up at Geneva in 1951. As at 1st January, 1959, 30 countries had ratified the Convention. In 1953, the Commonwealth Government announced that it did not oppose the principle of equal remuneration which the Convention enunciated. However, all States have not agreed to ratification of the Convention. Two States advised the Commonwealth that they were prepared to agree to ratification, two stated that they could not agree and the remaining two States expressed no opinion. The Commonwealth and States have discussed ratification on two subsequent occasions, but the position has not changed materially.

778. The Committee's proposal on industrial relations would enable the Commonwealth to implement most Conventions without having to depend on the agreement and action of every State.

779. There are several reasons why Australia should increase its number of ratifications. It would, for example, enhance Australia's reputation as a socially advanced country and give greater weight to Australia's views and counsel in the affairs of the Organization. The I.L.O. Conventions themselves have greater value as a standard of conditions if ratified by many countries and it is in Australia's interest that Asian countries, in particular, should endeavour to raise their standards to I.L.O. levels. By doing this, new markets would also be opened up for Australian goods.

780. The proposed industrial power should lead to an increase in the number of ratifications and less time should elapse between the adoption of a Convention and its ratification by Australia.

781. Looking ahead, new techniques and processes have become available in industry and possibly will become available at a rapidly increasing rate. These technological developments, commonly described as "automation", include the integration of what were previously successive processes by automatic transfer of material from one process to the next, automatic control or self regulation of processes which also make possible the development of new products and processes, and the development of electronic computers capable of recording and storing data and performing both simple and complex operations in relation to that data.

782. At this stage, it is not possible to determine the effects of progressive automation on the demand for labour in industry. Certainly, however, developing technical progress will produce changes in labour demand and employment in the years immediately ahead. New skills will have to be evolved and there will, comparatively speaking, be a lessening of demand for labour directly engaged in production in various industries. A greater use of automatic processes could involve other questions in the industrial relations field such, for example, as the problems of wage classification, incentive schemes and hours of work. Automatic processes also present new problems of industrial safety. One thing is clear; within the fields of employment, labour relations and labour management, the major problems arising from increasing automation will be of a national character. This is a further reason why the national Parliament should have the industrial powers which the Committee recommends.

RECOMMENDATION.

783. Accordingly, the Committee has recommended that paragraph (xxxv.) of section 51 be repealed and a new section inserted in the Constitution to provide as follows:—

(1) The Commonwealth Parliament should, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to terms and conditions of industrial employment.

(2) The power to make laws dealing with terms and conditions of industrial employment should include power—

(a) as at present, to make laws with respect to the prevention and settlement of industrial disputes by means of conciliation and arbitration; and

(b) to establish authorities of the Commonwealth, and authorize authorities established by or under the law of a State, to determine terms and conditions of industrial employment and to prevent and settle industrial disputes.

CHAPTER 16.—CORPORATIONS.

Recommendation of the Committee.

784. The Committee has recommended, in paragraph 135 of the 1958 Report, that paragraph (xx.) of section 51 of the Constitution should be repealed and replaced by a new head of power which would provide in substance as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to corporations.

(2) The power to make laws with respect to corporations should not authorize the Parliament to make laws with respect to the trade, commerce or industry of corporations, or which apply to corporations of a State, including municipal corporations, formed for governmental purposes.

The purpose of the recommendation was to enable the Commonwealth Parliament to enact a uniform companies law applying throughout the Commonwealth. It was not intended that the Commonwealth should, under the Committee's proposal, also have power to regulate the business activities of corporations.

Constitutional Power with respect to Corporations.

785. Section 51 (xx.) confers legislative power on the Commonwealth Parliament with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth: ".

786. As the Committee mentioned in its first Report, paragraph (xx.) has been the subject of much difference of judicial opinion and it is uncertain what power it confers. The consensus of judicial opinion suggests that its meaning is fairly narrow and it is very doubtful whether the paragraph confers upon the Commonwealth sufficient power to legislate on the range of subjects usually found in the companies legislation of the States and the United Kingdom.

787. The first occasion on which the High Court considered the scope of paragraph (xx.) in any detail was in the case of *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330. A summary of relevant judicial opinion expressed in that case was given in a memorandum which Sir Robert Garran submitted to the Conference of Commonwealth and State Ministers held to discuss constitutional matters in 1934. Sir Robert summarized the judgments in the case as follows:—

> The decision of the High Court in *Huddart Parker* v. *Moorehead* (8 C.L.R. 330) has thrown great doubt on the meaning of the clause. This case arose under the *Australian Industries Preservation Act* 1906. The object of that Act was to prohibit combinations in restraint of trade or unfairly competitive; and by reason of the fact that the Federal power as to trade and commerce is limited to trade and commerce with other countries and among the States the main provisions of the Act are limited to matters in relation to external and interstate trade. An attempt was made, however, to extend its provisions so far as companies were concerned to all trade, including trade within a State. The idea was that this extension could be justified as a law relating to companies.
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> The High Court, however (Isaacs *J.* dissenting) held that the Federal Parliament could not under the corporation power control the behaviour of companies. The real basis of the decision is that such a law is not really a law relating to companies but a law relating to the subject-matter under which the behaviour comes. That is to say in this particular instance, the law purported to control the behaviour of the company in respect of trade. The law was, therefore, not a law in respect of companies, but a law in respect of trade, and, not being limited to external and interstate trade, it was held to be beyond the power of the Federal Parliament.
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> In the course of their judgments, the several judges expressed views which make the real meaning of the company power a matter of great uncertainty.
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> In the first place the whole Court agreed that the clause did not confer power to create corporations. Foreign corporations it obviously could not create, and the words "trading or financial corporations formed within the limits of the Commonwealth" implied that the corporations must be formed, or created, before the Federal power attaches. As regards this last point there is, of course, a possible alternative interpretation that the words "formed within", &c., are only intended to describe home corporations as contrasted with foreign corporations; that the phrase is adjectival and not participal in meaning, and that it contains no implication that the corporation must have been formed prior to the Federal power attaching to it. This view, however, did not find favour with the Court.
>
> As to the power which the clause *did* confer, the members of the Court differed widely. Griffith *C.J.* and Barton *J.* thought that it applied to the capacity of companies but not to their behaviour; that is to say, that it enabled the Federal Parliament to forbid corporations formed under State laws from engaging in any particular branch of trade within the State, but did not enable the Federal Parliament to control the conduct of such corporations which lawfully engaged in such trade. O'Connor *J.* thought that the power was limited to the recognition of the status of corporations as legal entities within the Commonwealth, but did not include power to control their business when they had been so recognized. Isaacs *J.* thought that the clause did not give the Federal Parliament power to deal with the powers and capacities of corporations, or their internal regulation (matters that properly belonged to the States that created the corporations), but did give the Federal Parliament power to regulate the *conduct* of corporations in their transactions with or affecting the public. Higgins *J.* thought that the clause gave the Federal Parliament power to regulate the status and capacity of corporations and the conditions on which they would be permitted to carry on business, but not to regulate the contracts into which they might enter within the scope of their permitted powers.
>
> While this decision stands, it is obviously impracticable for the Federal Parliament to attempt to pass a uniform company law for the Commonwealth. It is true that the personnel of the Court has changed completely since the decision named, and it is also true that since the *Engineers' case* (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, 28 C.L.R. 129), there has been an important change in the principles of interpreting the Constitution but the fact remains that there is so much uncertainty as to what the view of the Court to-day would be on the subject that the Parliament could not take the risk of providing for the creation of companies which might at any time be found not to have been lawfully incorporated.

788. The corporations power was also discussed inconclusively by Justices of the High Court in the *Banking Case* (1948) 76 C.L.R. 1. Several of the Justices commented, however, that the power operated upon corporations as existing entities. As Latham *C.J.* pointed out, a corporation already formed derived its existence and its powers and capacities from some other law than a law under paragraph (xx.).

789. The paragraph should enable the Parliament to legislate on several aspects of company law, such as the nature and the content of returns which a company should furnish for the information of the public, the contents of prospectuses and the audit of accounts, but the starting point of all company legislation, namely the conditions of incorporation, is, apparently, beyond the power. Moreover, any corporation other than foreign corporations and trading or financial corporations are outside the Federal power. Questions may also arise as to the meaning of the expression "trading or financial corporations". The Committee's conclusion is that there is so much uncertainty as to the scope of the power that the Commonwealth cannot incur the risk of providing companies legislation which might become the subject of successful legal challenge.

790. H. S. Nicholas, who was Counsel assisting the Royal Commission on the Constitution and, later, Chief Judge in Equity of the Supreme Court of New South Wales, described the discovery that there was no general power to legislate with respect to companies as one of the surprises of litigation. (Nicholas, *The Australian Constitution*, Second Edition, at page 59.)

791. In 1929, the Royal Commission reported (*Report of the Royal Commission on the Constitution*, at page 207) that, although the exact scope of the power conferred by paragraph (xx.) was uncertain, it seemed certain that the paragraph was thought by the members of the Convention to confer power to pass a company law for the whole of Australia as the term "company law" was generally understood.

792. A similar view was repeated by Sir Robert Garran in his memorandum to the Conference of Commonwealth and State Ministers in 1934. He wrote—

> There was very little debate on this clause in the Federal Convention of 1897-98, but there is good reason to believe that this clause was intended to give the Commonwealth Parliament power in respect of what is known as "company law", that is to say, such legislation as is contained in the Companies Acts of Great Britain and of the several Australian States.
>
> In the draft Constitution of 1891 the clause was worded "the status in the Commonwealth of foreign corporations and of corporations formed in any State or part of the Commonwealth". The omission in the Constitution of the words "the status of" coupled with the retention in substance of the other words of the clause seems to mark the intention that the whole subject of foreign corporations and corporations in Australia was intended to be conferred.

793. The Committee's own impression gained from the reports is that it is uncertain what the Founders intended. During the discussions of the clause in the 1891 Debates at Sydney, two delegates, James Munro and Sir John Bray, suggested, in committee, that there should be a power to prescribe a uniform law for the incorporation of all trading corporations but Sir Samuel Griffith thought it unnecessary. He thought that the States should stipulate how companies should be incorporated, but that there should be some general law in regard to their recognition. (*Convention Debates*, Sydney, 1891, at pages 685-686.) At the Adelaide Convention in 1897, the paragraph was drawn to read "Foreign corporations and trading corporations formed in any State or part of the Commonwealth". As a result of the Debates, the words "or financial" were added but otherwise there was little discussion as to what the clause meant. (*Convention Debates*, Adelaide, 1897, at pages 793-794.) At the Melbourne Session in 1898, the words "within the limits of the Commonwealth" were substituted for the words "in any State or part of the Commonwealth".

Previous Proposals to Amend the Constitution.

794. In 1911, 1913, 1919 and 1926, proposed constitutional amendments which would have made the scope of the Commonwealth's corporation power clearer were submitted to the electors but rejected. On the second and third occasions, the majorities against the proposals were not substantial although they were voted on, as on the other occasions, along with several more contentious subjects.

795. In 1929, three members of the Royal Commission specifically recommended that the Commonwealth Parliament should have power to make laws with respect to companies and they proposed the omission of paragraph (xx.) and the insertion of the following paragraph:—

> Corporations, but not including—
>
> (a) municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members; or
>
> (b) any corporation formed for the acquisition of gain by the corporation or its members which is a co-operative society within the meaning of the law of a State, unless the Parliament of the Commonwealth expressly declares that any such corporation is not a co-operative society within the meaning of the law of the Commonwealth; or
>
> (c) the trade commerce or industry of corporations except so far as the Parliament has power under any other provision of this Constitution to make laws with respect to such trade commerce or industry.
>
> —(*Report of the Royal Commission on the Constitution*, at pages 273-274).

Three other members of the Commission, who favoured the concentration of power and responsibility in the national Parliament, stated expressly that the Commonwealth should have full power over company law (*Report of the Royal Commission*, at page 244). Only one member was opposed to an amendment of the corporations power (*Report of the Royal Commission*, at pages 298-299).

796. Action was not taken to implement the Royal Commission's recommendation, but in 1944 a proposed law to vest the Commonwealth Parliament with legislative power for five years over fourteen specific matters, including uniform company legislation, was rejected at the referendum held under section 128 of the Constitution. There have not been any further proposals submitted to the electors since 1944.

Australian Company Legislation.

797. At the present time, the company law of Australia consists almost entirely of the Acts of the six separate States and the Companies Ordinance of the Australian Capital Territory. All the legislation is derived from the company law of the United Kingdom and, with the exception of Tasmania, the pattern for each State Act has been the United Kingdom Companies Act, 1929. In the United Kingdom, the Companies Act, 1948 has now replaced the Act of 1929. Victoria, in a new Act passed in 1958, has adopted a number of the provisions of the current United Kingdom legislation but, for the most part, changes made in United Kingdom law in 1948 have not been incorporated in the companies legislation of the Australian States.

798. The State Acts provide for the incorporation and regulation of similar types of companies, including public and proprietary companies in which liability is limited by shares and other types of companies such as companies limited by guarantee, no-liability mining companies and unlimited companies. The relevant legislation is as follows:—

New South Wales—Companies Act, 1936-1957.

Victoria—Companies Act 1958.

Queensland—The Companies Acts, 1931 to 1955.

South Australia—Companies Act, 1934-1956.

Western Australia—Companies Act, 1943-1954.

Tasmania—Companies Act 1920 as amended to 1957.

799. Because of their common ancestry, the State Acts have many common features. Nevertheless, there are divergencies both in the basic and amending legislation. The fact that amendments have been made at different intervals of time has increased the divergencies.

800. The Committee does not believe it to be necessary to embark upon the tedious task of itemizing differences of law in each State. Variations have been freely acknowledged for many years in responsible commercial, legal and political circles and have formed the subject of many discussions. They are apparent on a comparative examination of the corresponding provisions of each Act. The Acts exhibit a lack of uniformity from the stage at which the formation of a company is contemplated; as for example, in the requirements affecting the issue of a company prospectus and registration. The variations carry on through the many aspects of company law including the transfer of shares; appointment of secretaries, directors and auditors; annual returns and reports; statutory meetings of shareholders; the passage of various kinds of resolutions; keeping of books of account; audit; and the registration of mortgages and charges right down to the law applicable to the voluntary or compulsory liquidation of a company.

801. The Committee does not assert that the State Acts have not afforded relative satisfaction over the years, but it believes that advantages for the nation as a whole and to business and investors in particular would flow from the achievement of uniformity in company law.

802. There appears to the Committee to be no logical reason, for instance, why, in the interests of protecting the investing public, the law applicable to the issue of a company prospectus—its contents, the offer of shares for sale, share hawking and the advertising of the prospectus—should not be uniform. Equally, in relation to business management, the machinery for registration is a subject in which nothing is lost by requiring the minimum number of persons who must subscribe their names to the memorandum of association of a company to be the same throughout the Commonwealth or by providing that the maximum number of members of a proprietary or private company should be the same in every State. There is a logical case for a uniform company law which cannot be refuted by adverting to geographical or other local factors and the Committee is unaware of any substantial body of opinion which is prepared to decry the advantages of a uniform law.

803. One of the consequences resulting from the existence of separate State legislation is that a company formed in one State must, if it wishes to do business in other States, become registered as a foreign company in each of those States. Registration in one State does not entitle a company to carry on its business throughout the Commonwealth. For the purposes of the law of a particular State, a company formed in another State of the Commonwealth is as "foreign" as a company incorporated abroad.

804. The situation is aggravated because State requirements for the registration of foreign companies differ. In one State, the law requires registration only where a foreign company establishes or has a place of business in the State. In three States, the Acts require registration only if the company carries on business in the particular State, whilst in two States, the Acts require registration in either instance. Several States make specific provision for special types of foreign companies. Again, there are differences in State law applicable to foreign companies involving such matters as the powers of local directors, particulars of directors, the responsibility of agents of a company, the registered offices, capacity of a company to own land, the keeping of books and balance-sheets, and the maintenance of local share registries.

805. When the Committee reported to the Parliament in 1958, it mentioned the present era of national development and commented that the rate and balance of national development had become the composite responsibility of the community and the Federal and State governments. It also stated that the furtherance of national development by private investment, which was apparent throughout the Commonwealth, provided striking evidence of confidence in the future of this country.

806. The Committee considers that investment, including foreign investment, would be encouraged if there were a uniform company law throughout the Commonwealth which also provided for the recognition of companies upon single registration.

807. In its last Report, the Committee also remarked upon the emergence of a national economy. The economy no longer consisted of six distinct economies, but was an integrated Australian economy. As the Committee observed, the economy continues to expand and the Commonwealth has become more than ever the logical area of commercial operations. This trend will undoubtedly continue as the process of expansion goes on and the means of communication and transport improve. The number of companies registered as foreign companies in a State, or with subsidiary companies registered in different States, is increasing and will continue to increase.

808. The divergencies in company law from State to State increase the complexity of company management and tend to impair the efficiency of commerce. The whole subject of company law becomes difficult and perplexing and adversely affects training in administration, the development of progressive thinking on corporate legal structure and the safeguarding of the interests of investors.

809. The three members of the Royal Commission on the Constitution who made the specific recommendation for the amendment of paragraph (xx.) of the Constitution considered that "uniformity in company law in Australia for the purpose of both safeguarding the public and of providing facilities for investment is desirable". (*Report of the Royal Commission*, at page 273.) The three other members who favoured increased Commonwealth power thought that the Commonwealth's exclusive power to impose customs duties created an interdependent link with a company law power.

810. On the aspect of the protection of persons having dealings with companies, the Chartered Institute of Secretaries advised the Committee as follows:—

> Despite the general similarity of State Acts there are important areas of divergence. Provisions dealing with accounts, annual reports and disclosure of information generally are among the most important provisions particularly in safeguarding the interests of investors, creditors and others having dealings with companies. These provisions vary widely as between certain States and thus it is possible for the efforts by one State to exercise proper control in these matters to be negatived by the ease with which companies can incorporate in another State and carry out their operations in the first mentioned State without being fully subject to such controls.

811. The Committee's conclusion is that there is nothing to be lost and a good deal to be gained by having a uniform company law for the whole of Australia.

State Agreement on Uniform Legislation.

812. It is, of course, possible that the States could, by agreement, eventually introduce uniform legislation and overcome some of the objections which can now be validly made to the state of the law as to corporations. The record of Commonwealth-State discussions, however, gives little cause for optimism that agreement on uniformity will be reached, implemented and maintained.

813. In 1929, all the members of the Royal Commission on the Constitution noted that the State Acts presented divergencies and lagged behind English legislation in the protection which they afforded the public. The Commission went on to say—

> At the present time it seems probable that a uniform company law may be obtained through co-operation among the States, but divergencies may subsequently arise through amending legislation in different States.
>
> —(*Report of the Royal Commission on the Constitution*, at page 208.)

814. Since then, there has been a long period of discussion and negotiation involving Commonwealth and State Ministers. For example, it was agreed at conferences attended by the State Premiers in 1933, 1946, and 1952 to explore the possibilities of achieving greater uniformity. As recently as 1956, however, Commonwealth and State officers, discussing proposals for a uniform company law, unanimously agreed that, without Commonwealth legislation, complete uniformity was impossible to achieve and that there was no practical prospect of securing the passage of a single model bill even subject to local modifications. Thirty years after the Royal Commission reported, therefore, the uniformity which the Commission envisaged has not been obtained.

Other Reasons in Support of a Federal Company Law.

815. The Committee should mention that even the introduction by the States of uniform legislation would not meet several substantial objections to the present position. The Committee agrees, for instance, with the view of the Royal Commission that uniformity could be lost as each State embarked on the task of making amendments at varying intervals of time. Company law does not stand still; it is in need of continual change to meet modern developments as the history of United Kingdom company legislation clearly demonstrates.

816. In particular, a company which is registered in one State would still have to register as a foreign company in each of the other States in which it wished to pursue its objects.

817. There are other supporting considerations. Company law is not a subject which excites political passions, and the spreading of the power among several States, as at present, is unnecessary as a safeguard against possible abuses of power. Politically speaking, company law is an arid subject. As the Chartered Institute of Secretaries informed the Committee, thinking in relation to company law in Australia has been so dominated by United Kingdom experience that, with a few notable exceptions, innovations and the introduction of ideas from other countries, which would be well suited to Australian commercial requirements, are lagging. A Commonwealth company law operating throughout the Commonwealth could be more readily amended to absorb progressive developments which take place in other countries than the separate State Acts. Indeed, the observation may be also made in connexion with the adoption of changes in the law of the United Kingdom. The extensive changes made by the United Kingdom Companies Act, 1948, many of which are for the better protection of the public interest, would become uniform law applicable to Australia much more readily if legislative action had to be taken only by one Parliament.

818. In considering the enforcement or amendment of its company laws, an individual State cannot afford to ignore the effects upon the incorporation of companies within its borders. Particularly stringent action to compel the full disclosure of a company's financial affairs in its books of account, or to strengthen the independence of company auditors, could result in the flight to other States of companies seeking registration. In these circumstances, it is only natural that single States should hesitate unless other States should move in the same direction. The Commonwealth should be free from such inhibitions and a uniform Commonwealth law would not offer a company the alternative of registration elsewhere in the Commonwealth.

819. By having one company law, it is also possible to simplify income taxation, administration of assets of a company which is being wound up and the application of death, estate and succession duties payable upon a deceased person's holdings in a company.

820. The Committee's conclusion that the Commonwealth Parliament should be competent to enact a uniform company law was strongly supported in submissions by various organizations and persons.

Recommendation.

821. Accordingly, the Committee has recommended that section 51 (xx.) of the Constitution should be repealed and replaced by a new paragraph which would provide in substance as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to corporations.

(2) The power to make laws with respect to corporations should not authorize the Parliament to make laws with respect to the trade, commerce or industry of corporations, or which apply to corporations of a State, including municipal corporations, formed for governmental purposes.

822. The Committee considered the suggestion made to the Royal Commission on the Constitution that it would be difficult to frame a constitutional alteration which would confer a power on the Commonwealth Parliament to legislate for the purposes of enacting a company law without conferring, at the same time, a power to legislate with respect to the trade, commerce or industry carried on by companies. The specific alteration to replace paragraph (xx.) recommended by the three members of the Royal Commission was regarded by them as meeting this objection. An amendment in similar terms was suggested to the Committee by the Chartered Institute of Secretaries and the Institute of Public Affairs (N.S.W.). The preparation of a satisfactory draft alteration excluding the business activities of corporations from its scope should not give rise to insuperable drafting difficulties.

823. As the Committee's recommendation reveals, there is no intention that the Commonwealth power should apply to corporations of a State, including municipal corporations, formed for governmental purposes. These corporations, generally speaking, fall outside the scope of a company law as normally understood. The exclusion of State corporations makes it clear that the grant of power should not affect the States in the exercise of their own governmental activities. The Committee also considered whether it should except from the Commonwealth power non-commercial corporations or incorporated co-operative societies. It felt that, although a Commonwealth company law may not extend to these types of corporations, this did not justify imposing such a limitation upon the power itself. To do so would, in any event, considerably complicate the constitutional amendment.

CHAPTER 17.—RESTRICTIVE TRADE PRACTICES.

Recommendations of the Committee.

824. The Committee reported in 1958 that the Commonwealth Parliament could make laws for the control of harmful restrictive trade practices in interstate trade and commerce but that its legislative power did not extend to harmful restrictive trade practices adopted in intra-state commerce of productive industry. The Committee considered that the Commonwealth Parliament should have an express power to deal with restrictive trade practices so far as they were contrary to the public interest and, for the purpose of determining whether a business practice was contrary to the public interest, it proposed the re-constitution of the Inter-State Commission for which section 101 of the Constitution provides, with a minor change in the method of constituting that Commission.

825. The Committee has recommended (1958 Report, paragraph 142) that the Constitution should be altered to provide for the following:—

(1) The Commonwealth Parliament should have an express power in section 51 of the Constitution to make laws with respect to restrictive trade practices found by the Inter-State Commission to be, or likely to be, contrary to the public interest.

(2) For the purposes of the power described in sub-paragraph (1) above, the Parliament should have power to make laws for referring questions to the Inter-State Commission for inquiry and report, and the Commission should be vested with power to make its inquiries and report to the Parliament.

(3) Section 103 of the Constitution should provide for members of the Inter-State Commission to hold office for terms not exceeding seven years subject, as at present, to removal within their respective periods of appointment on the ground of misbehaviour or incapacity.

The Federal Parliament's Constitutional Powers.

826. The national Parliament is not without some power to pass laws for the control of restrictive trade or business practices. The power to legislate over interstate and overseas trade and commerce, which is found in section 51 (i.) of the Constitution, would enable the Parliament to deal with harmful trading practices in the course of such trade. The Parliament also has a plenary power, under section 122 of the Constitution, to deal with restrictive trade practices in the Territories of the Commonwealth.

827. At one time, it was thought that section 51 (xx.) of the Constitution, which confers power upon the Commonwealth to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth, would enable the Parliament to prohibit harmful practices of the corporations described in the paragraph. In *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330, the majority of the High Court held, however, among other things, that a law of the Commonwealth Parliament which made it an offence for any of

the types of corporations described in paragraph (xx.) to conclude a contract or combine with intent to restrain trade or commerce within the Commonwealth to the detriment of the public, or to destroy or injure by unfair competition any advantageous Australian industry, was *ultra vires*. The Court also held to be *ultra vires* a Commonwealth law making it an offence for the corporations so described to monopolize to the public detriment trade or commerce within the Commonwealth. Chapter 16, dealing with the Committee's recommendation concerning corporations, contains, at paragraph 787, an account of the reasoning of the Judges in the case.

828. Commonwealth legal power stops short, therefore, of application to harmful business practices in connexion with intra-state trade and commerce or productive industry.

Legislation of the Commonwealth Parliament.

829. Early Federal Parliaments were actively concerned with questions of restrictive trade practices and attempts to monopolize industries. In 1906, the Parliament passed the *Australian Industries Preservation Act* 1906.

830. Sections 4 and 5 of the Act dealt with restraints of trade and destruction of industries. Section 4 made it an offence for a person to enter into a contract or combine in relation to trade or commerce with other countries or among the States with intent to restrain trade or commerce, to the detriment of the public, or to injure or destroy by unfair competition an Australian industry which was advantageous to the Commonwealth having due regard to the interests of producers, workers and consumers. Section 5 imposed a similar prohibition upon "Any foreign corporation, or trading or financial corporation formed within the Commonwealth". That is to say, it extended the operation of the Act to the corporations specified in section 51 (xx.) of the Constitution.

831. Sections 7 and 8 of the Act dealt with monopoly of interstate or external trade by persons and the monopoly of trade in general by foreign corporations or trading or financial corporations formed within the Commonwealth. Section 7 made it an offence for any person to monopolize or attempt to monopolize or to combine with any other person to monopolize any part of the trade or commerce with other countries or among the States with the intention of controlling, to the public detriment, the supply or price of any service, merchandise or commodity. Similar action by foreign corporations or trading or financial corporations formed within the Commonwealth was prohibited under section 8.

832. The Parliament's power to control trading practices and monopolies in the course of external and interstate trade was clear enough but sections 5 and 8 of the Act, applying a similar interdiction to the corporations specified in paragraph (xx.) of section 51, were, as the Committee has already indicated, successfully challenged in *Moorehead's Case*. Following the decision, sections 5 and 8 were repealed. Accordingly, the Act in its present form, the *Australian Industries Preservation Act* 1906-1950, is of a much more limited character than was originally intended.

833. Proposed constitutional alterations to enable the Commonwealth Parliament to legislate with respect to monopolies, sponsored by Federal Governments of different political complexions, have been submitted to, and rejected by, the electors on five occasions, namely, 1911, 1913, 1919, 1926 and 1944. In some instances, the proposed alteration was submitted along with other suggested legislative powers in one proposed law and on some occasions the proposal was submitted as a separate proposed law. On the first three occasions the Commonwealth also sought power to nationalize monopolies. There has not been any instance of a proposed law to alter the Constitution so that the Commonwealth Parliament should legislate over the subject of restrictive trade practices.

Progressive Industrialization and the Public Interest.

834. The Committee has already had occasion in this report to remark upon the growing industrialization in Australia and the emergence since Federation of a national economy in contrast with the position before Federation when each of the six colonies maintained its own distinctive economy and pursued its own colonial interests without regard, if need be, to the general welfare of the population of Australia as a whole. These aspects of post-Federation experience were described in the Committee's Report tabled in 1958 and the Committee again refers to paragraphs 91 to 103 of that Report.

835. Within the Commonwealth, although a very substantial proportion of the community's wealth is produced by primary industry, there has been tremendous progress and development in the manufacturing industries. These industries now employ double the numbers that were employed just before the outbreak of the last war and the products of the major industries, such as iron and steel, heavy machinery, motor vehicles, chemicals and textiles are distributed throughout the Commonwealth. The major primary industries, such as wool, wheat, meat and dairying, have for long provided illustrations of the impossibility of dividing the economy in terms of State boundaries. For many years, moreover, it has been apparent that the general state of the economy can be substantially affected by the level of Australia's export earnings which continue to be derived in the main by the export of primary products. The manufacturing industries now provide a further example of the economic interdependence of the people in every State of the Commonwealth. Thus, the volume and nature of production and the levels of employment and wages in one State concern the other States and the people of all States have a common interest in building up and maintaining a flourishing export trade in the products of Australia's primary and secondary industries and in the achievement of a satisfactory balance of payments position, to which the secondary industries are making an increasing contribution.

836. Industries which produce goods, of course, form only part of the entire Australian economy which, like all modern economies, is made up of multifarious activities including, in addition to rural and secondary production, the importation of goods and the many kinds of services performed within the economy, such as by the operators of communication and transport facilities, the construction industries, wholesale and retail sellers, business and professional agencies and the financial institutions of the Commonwealth. State limits means little, if anything, in the conduct of the many and varied activities which go to make up the economy and there is, as the Committee observed in its first Report, an interdependence, not only as between the various segments of the economy, but as between any particular segment and the state of the economy as a whole.

837. Other countries which have economies of a type not dissimilar to the Australian economy, but which have achieved more industrial maturity than Australia, have found it necessary in their experience to take some action against the consequences of unrestricted free trade and the concentration of resources leading to the limitation or exclusion of competition. In the opinion of the Committee, the experience of these countries indicates that the Commonwealth Parliament should have a power to legislate with respect to restrictive trade practices. The States already possess this power but the integrated nature of the Australian economy prevents them individually from acting effectively. At this stage of our economic development, uniform policies are required to be adopted throughout the Commonwealth if the promotion of the economy, consistently with the public interest, is to be properly safeguarded against abuse.

Types of Restrictive Trade or Business Practices.

838. Restrictive trade practices are as old as trade itself. According to one authoritative English treatise—*Restrictive Trade Practices and Monopolies* by Wilberforce, Campbell and Elles, at page 2—

> They represent nothing more than the attempts of intelligent men to interfere, to their own advantage, or that of the industry in which they are engaged, with the free working of supply and demand and with the results of competition. As to practices, the advantages of cornering the market were known to the ancient Egyptians; papyri are in existence which show the existence of private monopolies in wool and cloth, and a schedule of merchandise which dates from about 3000 B.C. is known, which shows an attempt to fix prices as against those prevailing in free competition.

The learned writers referred, at pages 2 and 3, to the historical antecedents to modern restrictive practices and legislative safeguards against them in the following terms:—

> In Greek times the astronomer Thales, having ascertained from the stars that the olive crop for the forthcoming season was likely to be particularly copious, arranged some months in advance to hire all available olive presses, thus proving that philosophers, as well as academic economists, can achieve economic independence . . . .
>
> Moreover, just as the practice of restriction is endemic in commerce, so the State has from the earliest time sought to interfere by legislation with sectional profit making. There are monuments in India, dating from some centuries before Christ, recording regulations to prohibit merchants and producers from making collective agreements to influence the natural market prices of goods by withholding them from trade: boycotts are mentioned amongst other punishable offences as well as any interference with buying and selling of others, and throughout history sovereigns, constitutional or otherwise, have attempted to repress private monopolies with one hand while often granting monopolistic privileges with the other.
>
> It was the Romans who first legislated against monopolies and restriction in a comprehensive way: in classical times the *Lex Julia de annona* established sanctions against combinations to raise the price of corn, and the famous Constitution of Zeno in the fifth century . . . set a precedent for . . . much medieval legislation . . . . .

839. Some restrictive trade practices benefit only the parties to them with complete disregard of the broader consequences which may be the forcing of competitors out of business with resultant unemployment or to increase prices which consumers must pay for goods and services. The cumulative effects may be damaging to the economy and even affect the nation internationally. Other restraints upon trade are not inherently bad if properly exercised and may bring about increased efficiency, the elimination of waste and lower prices. They may, at times, be necessary if an industry is to be protected from extinction or a new undertaking is to be commenced as part of the over-all programme of national development. Yet again, others may have been quite reasonable both in the interests of the parties and the nation upon introduction to serve the needs of particular economic conditions, such as a period of inflation or unusual boom, but having satisfied their original purpose, still persist with consequent general harmful effects.

840. Naturally, there is almost an infinite variety of restraints upon business which may be practised. Among the measures which stand high in the list are those taken collectively or otherwise to prevent newcomers from entering a field of trade or commerce or to discriminate against an existing organization; the allocation by agreement or understanding of the available market between firms who are parties to the arrangement; price cutting to drive competitors out of business; many kinds of price

maintenance agreements such, for example, as one under which a trader is obliged to resell at fixed prices under pain of being deprived of supplies from the same or other sources; payments of rebates to buyers who are members of selective associations or deal only with specified firms; arrangements to submit uniform tenders or to tender in such a way that a selected firm will be successful; tie-in arrangements under which the supply of certain kinds of goods or services is made conditional upon the acceptance of other goods or services; limiting production; and the prevention of the utilization of technical improvements, including patents.

841. The Restrictive Trade Practices Act, 1956, of the United Kingdom requires agreements to be registered which contain restrictions in respect of the following five categories:—

(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;

(b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;

(c) the quantities or descriptions of goods to be produced, supplied or acquired;

(d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or

(e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied.

842. The Committee has no wish to embark on a survey of the extent and effects of restrictive trade practices in Australia. It is common knowledge that restraints exist in many branches of commerce and industry. In any event, the Committee's case for a Commonwealth power over restrictive trade practices rests not so much on what has already taken place in Australia, but on the need for the national government to have a power to deal with situations which may arise as the present trend towards greater industrialization continues.

Public Policy and the Common Law.

843. Turning to our own municipal law, it is a general rule of the common law courts of England and Australia that agreements in restraint of trade and against public policy cannot be enforced. If, however, a restraint of trade or an interference with individual liberty of action is reasonable in the interests of the parties concerned and reasonable in the interests of the public and not injurious to the public, the restraint or interference will be upheld. The common law has also concerned itself with monopolies, which generally the courts condemn as being contrary to public policy and, therefore, illegal. Originally, a monopoly was the grant of an exclusive right by the Sovereign to produce, use or trade in something but the expression has for long been construed as covering various kinds of private monopoly in which the control of production, supply or trade in a commodity is in the hands of one person or combination and the rules of law are also directed against conspiracies to monopolize.

844. The common law rules plainly indicate that questions of public interest are inherent in attempts to restrain trade or to monopolize an industry or trade.

Restrictive Practices Legislation of Other Countries.

845. The major common law countries other than the United Kingdom are the three Federal States, Australia, the United States and Canada. Canada and the United States are both highly industrialized and they have supplemented the common law with legislation dealing specifically with monopolies and restrictive trade practices. The Federal Parliaments of the two countries have been able to do this because they have had the advantage of more appropriate legislative powers for the purpose than the Commonwealth Parliament possesses.

846. In Canada, the Dominion Parliament was the first in the field when it passed the Combines Investigation Act in 1889. The example was followed a year later in the United States when Congress passed the Sherman Act, 1890, which laid the foundations of a continuous policy for the protection of trade and commerce against unlawful restraints and monopolies.

847. In England itself, the home of common law, Parliament passed the Statute of Monopolies in 1624 regulating the grant of monopolies by the Crown. For many years, however, the United Kingdom Parliament was not much concerned to legislate on the subject and to a large extent the protection of the community rested on the application of judge-made rules to cases brought before the Courts by private litigants. In 1948, the United Kingdom embarked on a policy of legislative intervention for the further protection of the public interest and passed the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.

848. The countries which have employed anti-trust legislation have found it difficult to provide a satisfactory legal and administrative framework which will preserve the vigour flowing from competition but prevent that form of ruthless exploitation and competition which leads to one undertaking seeking out and destroying all its competitors. They have usually chosen to make laws directed against unfair trading practices as well. In the United States, for example, the Clayton Act, passed in 1914, deals with unlawful restraints of trade as well as monopolies and the Federal

Trade Commission Act of 1914, which created a Federal Trade Commission, declares unlawful unfair methods of competition in commerce.

849. Since the end of World War II., more countries have been turning to the protection of their industries and community by legislating against restrictive business practices. The exercise of restrictive business practices may not only be harmful in its immediate effects, but can lay the seeds of injurious monopolization.

850. In common law countries, the ordinary law has been found insufficient to deal effectively with restrictive trade practices in modern economic circumstances. For one thing, the courts have had to apply their legal rules to economic matters in which issues of great complexity may arise in evaluating the effect of a trade practice on the public. As a result, the courts have usually been unwilling to adjudge a restraint of trade held to be reasonable in the interests of the parties to be unreasonable in the interest of the public.

851. In Canada, the Federal Parliament amended the Combines Investigation Act in 1951 and 1952 to forbid resale price maintenance and to set up a Restrictive Trade Practices Commission with powers of inquiry into restraints of trade and monopolistic situations.

852. A decisive step was taken in the United Kingdom where the Parliament passed the Restrictive Trade Practices Act, 1956 providing for the registration of agreements containing restrictive trade practices of the kind specified in the Act. The Act also set up a Restrictive Practices Court to inquire whether or not trade restrictions which required an agreement to be registered were contrary to the public interest. If any restrictions are found to be contrary to the public interest, the agreement is, to this extent, void.

853. In New Zealand, the Parliament has passed the Trade Practices Act 1958 requiring registration of specific restrictive trade agreements and arrangements.

854. Other countries to pass legislation for the control of business restraints in the post-war years include Denmark, France, Japan, The Netherlands, Norway, South Africa, Sweden and West Germany.

855. On the spread of restrictive practices legislation beyond the shores of North America, Professor W. Friedmann of the United States commented recently as follows:—

> In England as in the rest of Europe, the only serious answer to the evil consequences of unrestricted free trade and concentration of resources, leading to the limitation or exclusion of competition, was, until recently, seen in the total or partial socialization of resources. It is only since the last war that legislation directed against monopolies and other restrictive practices has become a serious practical issue outside of North America. In such countries as Great Britain, Sweden or France, they are not generally seen as an alternative to public ownership or control, but as a supplementary control of private industry which in these countries retains by far the greater proportion of economic activity.
>
> A radical alternative, that of prohibiting comprehensively and in principle all forms of restrictive actions and agreements tending to eliminate competition, was developed almost simultaneously in the United States and Canada. The search for effective anti-trust legislation and machinery in these countries was intensified by the fact that, philosophically and practically, socialism and public ownership were no possible alternatives. At the same time, the dynamic, vigorous and rapidly developing North American economy produced concentrations of the trust type and other kinds in far greater rapidity and in more menacing shape than was generally the case in Europe.
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> —(*Anti-Trust Laws*, Edited by W. Friedmann, at pages 524-525.)

856. During the present century, industrial progress has been world-wide and industrial undertakings of unprecedented size have emerged. Australia, like several countries concerned with monopolistic and restrictive business practices, has participated in the two world wars of the century and encountered the harmful effects of inflationary booms and recessions which have characterized post-war living. These are conditions which provide breeding grounds for trade restraints and the Committee has no doubt that the examples of other countries show the wisdom of the Federal Parliament having an express power to legislate on restrictive trade practices as the need arises to prevent damage to the public interest and general economic welfare of the Commonwealth which could occur as a result of the adoption of practices purely for the benefit of the private interests of the parties.

International Interest in Restrictive Trade Practices.

857. The harmful effects of restrictive trade practices has also evoked international interest.

858. The Treaty constituting the European Coal and Steel Community signed in 1951 by Belgium, France, West Germany, Italy, Luxembourg, and The Netherlands had the immediate aim to set up a common market for coal and steel in order to contribute to economic expansion, full employment and a higher standard of living. The Treaty has several clauses directed against practices involving unfair competition, including Article 65 which reads in part as follows:—

> All agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market are hereby forbidden, and in particular those tending:
>
> (a) to fix or determine prices;
>
> (b) to restrict or control production, technical development or investments;
>
> (c) to allocate markets, products, customers or sources of supply.

859. In 1951, the Economic and Social Council recommended to member States of the United Nations that they take appropriate measures and co-operate with one another to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrained competition, limited access to markets or fostered monopolistic control, whenever such practices had harmful effects on the expansion of production or trade, on the economic development of under-developed areas or on standards of living. The Council also appointed an *ad hoc* Committee to prepare a draft international agreement to give effect to the resolution. The preamble to the draft agreement, which was submitted to the Council in 1953, expressly recognized the effect of restrictive business practices on some of the aims of the Charter of the United Nations. The draft agreement commences with the following preamble:—

For the purpose of realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter;

Recognizing the need for co-ordinated national and international action to attain the following objectives;

1. To promote the reduction of barriers to trade, governmental and private, and to promote on equitable terms access to markets, products, and productive facilities;

2. To encourage economic development, industrial and agricultural, particularly in under-developed areas;

3. To contribute to a balanced and expanding world economy through greater and more efficient production, increased income and greater consumption, and the elimination of discriminatory treatment in international trade;

4. To promote mutual understanding and co-operation in the solution of problems arising in the field of international trade in all its aspects;

Recognizing further that national and international action in the field of restrictive business practices can contribute substantially to the attainment of such over-all objectives;

Accordingly, the parties to this Agreement agree as follows:

860. Article 1 of the draft provided that each member country should take appropriate measures to prevent practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control. The relevant part of the Article reads as follows:—

Each Member shall take appropriate measures and shall co-operate with other Members and the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade, in the light of the objectives set forth in the Preamble to this Agreement.

861. Comments by member governments acknowledged the harmful effects of restrictive business practices on international trade. Generally it was thought, however, that the time was not yet opportune to have an international agreement since its effectiveness would depend very heavily on co-operation between member States and the ability of each State to take decisive national action. Meanwhile, the Economic and Social Council has urged governments to continue the examination of restrictive business practices with a view to the adoption of laws, measures and policies to counteract the dangers which exist to the attainment of higher standards of living, full employment and conditions of economic and social progress and development. Recently, there have been attempts to bring trade restraints within the purview of the General Agreement on Tariffs and Trade and a committee has been appointed to decide the extent to which G.A.T.T. should act in the matter.

862. The international aspects of restrictive trade practices lend further support to the Committee's proposals.

Proposed Constitutional Amendment.

863. The power that the Committee suggests the national Parliament should have is one to make laws for the control of those restrictive trade practices which are shown to be contrary to the public interest. It would, in the Committee's view, be quite proper to leave it to the Parliament to decide what restraints of trade should be controlled as being contrary to the public interest or how inquiry into the question of public interest should be undertaken. Nevertheless, the Committee considers it preferable that judgment upon public interest should, by constitutional requirement, rest with an independent specialized authority and it proposes the re-constitution of the Inter-State Commission for which provision is already made in the Constitution. Thus, the substantive legislative power of the Parliament would be exercisable only in respect of those practices shown to the satisfaction of the Commission to be to the public detriment. There is no assumption that all restraints of trade are inherently bad.

864. The invocation of the Commission in the constitutional alteration which the Committee proposes, amounts to a qualification on the exercise of parliamentary power. It is an acknowledgment that inquiries into the effects of trade restrictions usually necessitate, in the first instance, the examination of complex economic issues by persons with appropriate training and experience. It is for this reason also that the Committee believes that the ordinary courts of law should not be required to perform the function of inquiry although it will fall to the court in the long run to construe the exact scope of the power which the Committee proposes should be vested in the Commonwealth.

865. The Committee's proposal to make use of a specialized agency is an accord with the approach adopted in recent legislation in other countries, including the United Kingdom, Canada and South Africa. The Canadian Restrictive Trade Practices Commission is required to appraise the effect on the public interest of practices and arrangements disclosed in evidence. In South Africa, the special investigatory body is the Board of Trade and Industries. The United Kingdom Restrictive Trade Practices Act provided for the appointment of a special court, the Restrictive Practices Court, but that Court may comprise, in addition to five Judges, up to ten laymen knowledgeable or experienced in industry, commerce or public affairs and the Court has power to enforce its own decisions, a function which, under the Committee's proposal, would be restricted to the ordinary Courts. The recent New Zealand Act provides for a Commissioner and a Trade Practices and Prices Commission to conduct inquiries into trade practices. If the Commission is satisfied that a trade practice is contrary to the public interest, it may make an order directing the discontinuance or modification of the practice. The Act also provides for a right of appeal to a Trade Practices Appeal Authority.

Re-constitution of the Inter-State Commission.

866. Something more should be said about the Inter-State Commission. Section 101 of the Constitution requires the appointment of the Commission. The section reads—

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Other sections confer additional powers relating to railways on the Commission. Section 103 provides for the appointment of members of the Commission.

867. In spite of the mandatory language of section 101, there has not been a Commission for many years. In 1913, a Commission of three was appointed pursuant to the *Inter-State Commission Act* 1912 and it began work by an inquiry into tariffs. In 1915, the High Court held in the *Wheat Case* (1915) 20 C.L.R. 54, that the Commission had no power to issue an injunction. The Court said that section 101 of the Constitution contemplated an administrative and executive but not a curial body and for that reason and others the Commission could not be regarded as a Court capable of receiving part of the judicial power of the Commonwealth under Chapter III. of the Constitution. The Commission continued to conduct inquiries but one Commissioner resigned and, following the expiration of the terms of the other two Commissioners in 1920, the Commission lapsed for want of further appointments to it. In 1938, the Senate passed an Inter-State Commission Bill for the re-constitution of the Commission with power to conduct investigations on a wide range of commercial and financial matters and rates of charge on the railways but the Government did not persist with the measure.

868. The Committee believes that the Commission should be re-constituted in accordance with the Constitution. The Commission would be capable of performing many useful functions in relation to the provisions of the Constitution relating to interstate trade and commerce. It could, for example, engage in expert fact-finding as an aid to the judicial process or inquire into the economic effects of legislation on interstate trade and commerce.

869. Apart therefrom, the Commission would be a most appropriate body to inquire into the effects of restrictive trade practices. Use of the Commission for this purpose would, moreover, avoid having to find a place in the Constitution for another special authority.

870. Section 103 requires members of the Commission to be appointed for terms of seven years. The section reads in full—

103. The members of the Inter-State Commission—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

The Committee proposes an amendment to this section to make it possible for the Governor-General to appoint Commissioners for terms up to a maximum of seven years instead of for fixed terms of seven years, subject to the existing constitutional provision for the removal of a Commissioner during the term of his appointment for misbehaviour or incapacity. In this way, it would be possible to have continuity of membership on the body.

Application of Section 92 to Legislation dealing with Restrictive Trade Practices.

871. Any action which might be taken by the Commonwealth Parliament under a restrictive trade practices power, insofar as it affected interstate trade or commerce, would be subject to the operation of section 92 of the Constitution. As at present advised, the Committee considers it unlikely that legislation directed to the control of the harmful effects on the public of restrictive trade practices

would constitute an interference with interstate trade and commerce to an extent which section 92 inhibits. Rather, the Committee is confident that legislation of this type would be consistent with the freedom of trade which section 92 postulates.

RECOMMENDATIONS.

872. Accordingly, the Committee has recommended that the Constitution should be altered to provide for the following:—

(1) The Commonwealth Parliament should have an express power in section 51 of the Constitution to make laws with respect to restrictive trade practices found by Inter-State Commission to be, or likely to be, contrary to the public interest.

(2) For the purposes of the power described in sub-paragraph (1) above, the Parliament should have power to make laws for referring questions to the Inter-State Commission for inquiry and report, and the Commission should be vested with power to make its inquiries and report to the Parliament.

(3) Section 103 of the Constitution should provide for members of the Inter-State Commission to hold office for terms not exceeding seven years subject, as at present, to removal within their respective periods of appointment on the ground of misbehaviour or incapacity.

CHAPTER 18.—MARKETING OF PRIMARY PRODUCTS: CONSTITUTION, SECTION 92.

RECOMMENDATION OF THE COMMITTEE.

873. The Committee observed in its 1958 Report that the Federal Parliament was competent, under its power to make laws with respect to interstate and overseas trade and commerce, to deal with important branches of the marketing of primary products but that, under the constitutional division of powers, intra-state marketing was exclusively the domain of the individual States. For this reason, orderly marketing of the main primary products was sometimes only possible in Australia if the Commonwealth and the producing States were able to reach agreement on the use of their respective legal powers.

874. Further, the Committee noted that section 92 of the Constitution made it difficult to sustain orderly marketing of important primary products. The section, which required trade and commerce among the States to be absolutely free, had been held to bind both the Commonwealth and the States and had profoundly affected orderly marketing schemes by making it necessary to exclude produce intended for, or committed to, interstate trade.

875. The Committee has recommended (1958 Report, paragraph 148) that the Constitution should be altered to provide the Commonwealth Parliament with legislative power as follows:—

(1) The Parliament should have power to make laws for the submission to a poll of primary producers of proposed plans for the organized marketing of primary products.

(2) For the purpose of submitting a proposed plan to producers, the Parliament should be authorized to make such laws as it deems necessary in connexion with the holding of a poll, including laws determining who is a primary producer, eligibility to vote, and the number of votes which a producer should have.

(3) If three-fifths of the votes cast at a poll by the producers of a primary product are in favour of a proposed marketing plan for that product, the Parliament should have power to make laws to give effect to the plan free from the operation of section 92 of the Constitution, but otherwise subject to the Constitution.

(4) For the purposes of the power, a primary product should include any product directly produced or derived from a primary product which the Parliament deems to be a primary product.

COMMONWEALTH MARKETING POWERS.

876. Marketing is a form of trade and commerce which is within the well-known power of the Federal Parliament, under section 51 (i.) of the Constitution, to make laws with respect to trade and commerce with other countries and among the States. The constitutional dichotomy which places intra-state trade and commerce within the exclusive preserve of the States, therefore, also applies to marketing. However desirable it may be to regulate intra-state marketing under a comprehensive plan for the organized marketing of a primary product which enjoys substantial interstate and export markets, legal, and not commercial, reasons prevail making it necessary to invoke State powers as well as Commonwealth powers to make the plan effective. Federal interstate commerce power will

not countenance the regulation of intra-state marketing because it happens to be convenient under a broad plan of organized marketing, the other aspects of which are properly within Federal cognizance. As has been observed in the High Court—

> The express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce. This express limitation must be maintained no less steadily in determining what is incidental to the power than in defining its main purpose.
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> —(*The King* v. *Burgess, ex parte Henry* (1936) 55 C.L.R. 608, per Dixon *J.*)

877. Under section 99 of the Constitution, the Commonwealth Parliament may not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof. The section applies to laws with respect to marketing made under section 51 (i.).

878. Other legislative powers of the Commonwealth are relevant to marketing. In time of war, for example, the Parliament's power to make laws for the naval and military defence of the Commonwealth may provide legal support for a nation-wide marketing scheme. The Parliament's exclusive power to make laws for the government of the Territories of the Commonwealth would permit the operation of an organized marketing scheme within a Territory. Some other powers may also have a bearing on marketing plans, as for example, the authority of the Commonwealth under section 51 (iii.) of the Constitution to provide bounties on the production or export of goods. None of the ancillary powers, however, will normally sustain a general Commonwealth law providing a scheme of orderly marketing such as the States may at any time maintain within their own areas of jurisdiction.

EFFECT OF SECTION 92 ON COMMONWEALTH AND STATE MARKETING LAWS.

879. Both the Commonwealth and the States are, in respect of their trade and commerce laws, subject to the operation of section 92. Whether it was intended that the Commonwealth should be bound by section 92 has been doubted but the question is now academic because, in 1936, the Privy Council held in *James* v. *The Commonwealth* (1936) 55 C.L.R. 1, that the Commonwealth, as well as the States, was bound by the constitutional prohibition. The pronouncement in the *James Case* spelt the destruction of several commodity arrangements which had rested in part on the Commonwealth's immunity from section 92.

880. Before the *James Case*, State marketing laws had already foundered on section 92. In *Peanut Board* v. *Rockhampton Harbour Board* (1933) 48 C.L.R. 266, the provisions of a State Act which provided for the creation of Boards in which could be vested the property of growers in a commodity, were held to be ineffectual to prevent growers from disposing of their product in interstate trade.

881. In *James* v. *The Commonwealth*, it was held that a Commonwealth law could not, as part of a marketing arrangement in which growers shared the export market and the more profitable domestic market for dried fruits, prevent an individual grower of dried fruits from disposing of his products on interstate markets unless he exported a determined percentage of his total crop.

882. Later cases, including the decision of the Privy Council in the *Banking Case* (1949) 79 C.L.R. 497, have further exemplified the overriding position of section 92. Decisions of the Courts make it quite plain that a compulsory marketing scheme which, for example, involves acquisition, cannot validly apply to produce intended for interstate trade, whether the acquisition is under a Commonwealth or a State law.

883. Not all marketing schemes involve compulsory acquisition, but it has been decided judicially that compulsory direction falling short of acquisition may also collide with the section. For example, as was decided in *Cam & Sons Pty. Ltd.* v. *The Chief Secretary of New South Wales* (1951) 84 C.L.R. 442, a law requiring the marketing of goods which are the subject of interstate trade to be sold through the markets required to be used in the case of intra-state trade, will contravene the section.

884. In a recent case, *Fish Board* v. *Paradiso* (1956) 95 C.L.R. 443, the High Court considered a Queensland Act which provided that no person should buy or sell fish in certain districts unless the fish were first brought to established markets in the district and there sold at sales conducted by the State Fish Board. The Court held that where fish were imported from another State and sold and delivered in Queensland in the course of an interstate transaction and were then resold for domestic consumption in Queensland, the statutory control could not validly apply to the resale. Although the resale was an intra-state transaction, any control of that sale was regarded as producing an immediate and direct impact on the preceding interstate transaction and, therefore, offended against section 92.

885. It may be fairly concluded that, at the present time, it is necessary in a Commonwealth or State marketing scheme or a joint Commonwealth-State marketing scheme, to exclude from compulsory marketing arrangements produce which is intended for, or committed to, interstate trade.

886. The legal position has practical consequences detrimental to the stability of some of Australia's most important primary industries.

Commonwealth Marketing Legislation.

887. Commonwealth marketing legislation has for many years applied to several important primary commodities. The limitations of constitutional power and the presence of section 92 have usually meant the confinement of Commonwealth law to the regulation, through export control boards, of the export trade in *Australian-produced commodities, including apples and pears, canned* fruits, dairy products, dried fruits, eggs, meat and wine.

888. On occasions, Commonwealth participation in marketing has extended beyond the regulation of exports or the promotion of overseas trade. In the wheat industry, for instance, the Australian Wheat Board, by reason of complementary Commonwealth-State legislation, controls the receipt, storage and marketing of Australian wheat crops for local requirements and export.

889. Again, Commonwealth participation may be of a more limited nature, as for example, in the wool industry where the main Commonwealth instrumentality, the Australian Wool Bureau, is not directly concerned with actual marketing but promotes the use of wool by publicity and other means. The marketing of wool at home and abroad is in the hands of the industry itself and associated business houses.

The Convention Debates.

890. A perusal of the Convention Debates shows that the Founders had no wish to allot a full power to the Commonwealth Parliament to legislate on trade and commerce. One of the four resolutions moved by Sir Henry Parkes, in 1891, as the basis of a Federal Constitution was that the *powers of the existing colonies should remain intact except so far as it was agreed that any surrender* of power was necessary and incidental to the power and authority of the national Federal government. The right of the States to control commerce within their own borders was never in question and the main object of investing the Federal Parliament with the power to deal with interstate and overseas trade and commerce was to secure uniform legislation where uniformity was required as against possible conflicting State legislation. Organized marketing schemes backed by legislation are now commonplace in many major primary producing countries but, in the colonial days, entry by a *government into the field of marketing was exceptional.*

891. The Federal trade and commerce power was largely a copy of a corresponding power vested in the United States Congress, which the Founders preferred to the later Canadian example *of a Federal power which extended to the regulation of intra-provincial commerce.* In Australia, the Constitution Founders probably thought along similar lines on commercial matters to their United States counterparts of 1787. The late Mr. Justice Higgins, himself one of the Founders, observed in evidence before the Royal Commission on the Constitution—

> The provision was copied from the United States Constitution, and it is an instance of the pedantry with which at first we approached the making of the Constitution. It is hardly realized that the United States Constitution is the oldest written Constitution in the world, being 150 years old. If you take a book of *Constitutions, you will find that the world has changed its Constitutions within the last 100 years.* The United States Constitution was the first federal scheme of a substantial character in the world, and the experience of the United States has shown where it is deficient.
>
> —(*Minutes of Evidence of the Royal Commission on the Constitution,* at page 436.)

892. However inconvenient may be the treatment of trade and commerce as a subject of divided power in Australia, at least the intention of the Founders is clear.

893. There has, on the other hand, been a great deal of disputation as to the exact intention of the Founders in the framing of section 92 and, although the Committee again has no wish to impose any judgment on the controversy, the records of the Convention Debates leave no room for argument but that the Founders were substantially influenced by the *need to free trade and commerce* between the States from fiscal imposition. The application of the constitutional prohibition to marketing laws, was not a question which actuated discussion during the Debates.

894. Another of the four resolutions which Sir Henry Parkes *submitted to the Convention* in 1891 proclaimed the absolute freedom of interstate trade and commerce. Referring to it, Parkes said—

> I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that Australia, as Australia, shall be free—free on the borders, free everywhere—in its trade and intercourse between its own people; that there shall be no impediment of any kind—that there shall be no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these people shall flow on from one end of the continent to the other, with no one to stay its progress or to call it to account; in other words, if this is carried, it must necessarily take with it the shifting of the power of legislation on all fiscal questions from the local or provincial parliaments to the great national Parliament sought to be created. To my mind, it would be futile to talk of union if we keep up these causes of disunion. It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America. The United States of America have a territory considerably larger than all Australasia—considerably larger, not immensely larger—and from one end of the United States to the other there is no custom-house office. *There is absolute freedom of trade throughout the extent of the American union,* and the high duties which the authors of the protectionist tariff are now levying on the outside world are entirely confined to the federal custom-houses on the sea-coast. Now, our country is fashioned by nature in a remarkable manner—in a manner which distinguishes it from all other countries in the wide world for unification for family life—if I may use that *term in a national sense. We are separated from the rest of the world by many many leagues of sea—from* all the old countries, and from the greatest of the new countries; but we are separated from all countries by a wide expanse of sea, which leaves us with an immense territory, a fruitful territory—a territory capable of sustaining its countless millions—leaves us compact within ourselves. So that if a perfectly free people can arise anywhere, it surely may arise in this favoured land of Australia. And with the example to which I have alluded, of the free intercourse of America, and the example of the evils created by customs difficulties in the states of Europe, I do not see how any of us can hesitate in seeking to find here absolute freedom of intercourse among us.
>
> —(*Convention Debates,* Sydney, 1891, at pages 24-25.)

895. The clause agreed upon at the 1891 Convention stated that "trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be *absolutely free*".

896. The Bill of 1891 was not approved by the colonial legislatures and, in the Convention of 1897, Edmund Barton introduced a series of resolutions corresponding to Henry Parkes' earlier proposals, including the proposed free trade clause. Barton said—

> The Federal Parliament should have the exclusive power to impose and collect Customs duties. Clearly we could not have border duties. We should have free intercourse by sea, as well as by land, between one colony and another.
>
> —(*Convention Debates,* Adelaide, 1897, at page 20.)

897. During the second session at Sydney of the 1897 Convention, Barton indicated that he *intended to confine the section to protecting trade and intercourse throughout the Commonwealth* from restriction or interference by "any taxes, charges or imposts" but the clause remained unchanged. (*Convention Debates,* Sydney, 1897, at page 1,064.)

898. *During the third session at Melbourne in 1898,* Isaac Isaacs referred to views on the clause (then clause 89) expressed by Sir Samuel Griffith, one of the joint authors of the original Federal resolutions, but by then Chief Justice of Queensland. He quoted the Chief Justice as stating—

> I venture, before passing from this subject, to suggest a doubt whether the words of section 89 (which are the same as in the Draft Bill of 1891) are, in their modern sense, quite apt to express the meaning intended to be conveyed. It is, clearly, not proposed to interfere with the internal regulation of trade by means of licences, *nor to prevent the impostion of reasonable rates on state railways.* I apprehend that the real meaning is that the free course of trade and commerce between different parts of the Commonwealth is not to be restricted or interfered with by any taxes, charges, or imposts. Would it not be better to use these or similar words?
>
> —(*Convention Debates,* Melbourne, 1898, Vol. I., at page 1,014.)

Isaacs urged the Convention to accept their former colleague's views, whereupon Barton replied—

> The question is whether we should consent to a form of words remaining in this clause which might have the effect of extending the operation of interstate commerce to matters of internal regulation within a state which might be, in one sense, inimical or in derogation of free-trade as practised in that state, but which it is not the purpose of the Constitution to interfere with. Matters of internal regulation of trade, as long as they do not necessarily affect the commerce between one state and another, are entirely under the cognizance of that particular state, and it is not the purpose of any Federal Constitution to interfere with trade of that character. If we once grasp that fact, the contention of my honorable and learned friend is again strengthened. I leave the matter now to be discussed, and I am perfectly prepared to accept the general sense of the Convention. My inclination is in favour of Mr. Isaacs' view.
>
> —(*Convention Debates, Melbourne, 1898, Vol. I., at page 1,016.*)

899. Isaacs seems to have thought that the drafting committee would amend the clause as Barton indicated but later, when he found this had not been done, he moved his own amendment. It was then that George Reid, in opposition to the proposal, made his celebrated pronouncement—

> It is a little bit of laymen's language which comes in here very well . . . The thing in view in this clause is not so much the goods that will pass one way or the other, but that the relationship between those who deal in commodities, and send them from port to port within the Commonwealth, shall not be hampered by laws or officers of the Commonwealth in the sense of interfering with absolute equality of intercourse.
>
> —(*Convention Debates,* Melbourne, 1897, Vol. II., at page 2,367.)

When the proceedings at Melbourne concluded, section 92 had assumed its present form.

Earlier Proposals for Constitutional Amendment.

900. There have, in the past, been proposals affecting the Commonwealth's power to make marketing laws and to deprive section 92 of application to organized marketing schemes.

901. The Royal Commission on the Constitution considered several suggestions for amendment of section 92 and recommended an amendment to make it plain that the constitutional guarantee was intended only to prevent a State from restricting interstate trade and commerce by pecuniary imposts. The Commission also recommended that the Commonwealth Parliament should be empowered to prohibit, nullify or annul any State Act derogating from the freedom of trade throughout the Commonwealth.

902. The Commission's recommendation was as follows:—

We recommend that section 92 of the Constitution be amended so as to make it plain that the section is intended to prevent a State from restricting trade, commerce or intercourse by pecuniary imposts, and not to prevent it from protecting itself against the introduction of diseased animals or plants. We think that any amendment should extend the section so as to apply it to the Territories. We also think that the Commonwealth Parliament should be empowered to prohibit, modify or annul any State enactment which derogates from freedom of trade, commerce or intercourse between the different parts of the Commonwealth.

Effect can, we think, be given to these recommendations (a) by inserting after the words "trade, commerce and intercourse among the States" in section 92 of the Constitution the following words:—"or between a State and a Territory"; (b) by adding after the words "shall be absolutely free" the following words:—"from any pecuniary impost or from any restriction or liability imposed by reason only of goods or persons passing into a State from another State or from a Territory"; and (c) by inserting after the first paragraph of section 92, as amended, the following paragraph:—

> The Parliament of the Commonwealth may make laws prohibiting, modifying or annulling any law or regulation made by any State, or by any authority constituted by any State, having the effect of derogating from freedom of trade, commerce or intercourse among the States or between any Territory or Territories and any State or States.

—(*Report of the Royal Commission on the Constitution*, at page 264.)

903. Had the Royal Commission's proposal been implemented, each State would have been able to introduce a marketing scheme for any of the primary products produced within its borders controlling the whole of local production and supplies coming from other States. At the time the Royal Commission reported, the Commonwealth had been held not to be bound by section 92.

904. Four members of the Commission stated that they were not prepared to recommend a marketing power for the Commonwealth Parliament. In their view, an unlimited power to regulate with respect to marketing amounted to an unnecessary and dangerous interference with the internal government of the States. Three members reported in favour of a full Federal trade and commerce power.

905. On three occasions since Federation, proposed laws have been submitted to the electors concerned with the Commonwealth Parliament's marketing powers or section 92.

906. The first occasion was in 1937 when the electors voted on a proposed law which, though not involving an increase in the Commonwealth's marketing power, was to remove any laws with respect to marketing made under existing power from the application of section 92. The electors decisively rejected the proposal.

907. In 1944, the organized marketing of commodities was one of fourteen proposals submitted together to the electors and rejected. Power was not sought to modify the operation of section 92.

908. In 1946, the people voted on a proposed amendment to vest the Commonwealth Parliament with a power to make laws for the "Organized marketing of primary products". The power was to be capable of exercise notwithstanding anything contained in section 92.

909. An over-all majority of electors approved the proposal, but separate majorities were obtained in only three instead of the requisite four States.

910. The Committee believes that the favourable over-all result was largely attributable to the experience of organized marketing schemes which the Commonwealth maintained during the war under its defence powers. That the proposal did not gain the support of a sufficient number of States was the price of the cleavage of opinion among the major political parties represented in the Commonwealth Parliament.

Long-term Stability in the Primary Industries.

911. There can be no doubt as to the importance of industrial developments which have taken place in the Commonwealth since Federation. It is also incontestable that a substantial part of the total wealth of the nation has always been derived from primary production. The major commodities such as wool, wheat, meat and butter are produced in substantial quantities in several States and their markets are both nation-wide and international. These industries provide some of the best examples of how the Australian economy has completely outgrown State boundaries.

912. This country's heavy dependence upon its export earnings is well known and only serves to emphasize the importance of the primary industries, since the bulk of Australia's export trade continues to be derived from the export of primary products. In 1901-02, primary products constituted about one-half the value of total exports and 50 years later, in 1951-52, exports of the products wool, wheat and flour, meats and butter and cheese amounted to more than two-thirds of the total value of exports. In 1956-57, the same products constituted nearly two-thirds of total exports Lower returns have since affected the position, but in 1958-59 the products mentioned were still valued at £482,000,000 out of total exports of merchandise valued at £809,000,000.

913. It is not equally well known how far the local manufacturing industries depend on imports of machinery and producer materials, but these items constitute by far the greater part of Australia's import trade. Australia's continued ability to afford to import these goods at sufficient

levels to maintain the growing secondary industries obviously depends on the volume of export earnings which, as the Committee has stated, are largely constituted by the sale of primary products. The major part of the Australian work force is employed in the secondary industries.

914. There are many who can recall that the beginning of the great depression in Australia in 1929 came with the collapse of prices for primary products on overseas markets. Lack of prosperity in the primary industries brought about by bad seasons, low prices or inefficient production and marketing has disturbing consequences for other segments of the economy. A fall in farm incomes affects not only tradesmen and employment in rural localities but also the total volume of production of goods and services and the total level of employment in the community.

915. Since the solvency and success of the primary industries is a national matter from any point of view, it is important that price fluctuations should be reduced to a minimum.

916. Australia's rural industry is characterized by climatic and seasonal hazards. Rainfall is relatively low and unreliable over a large part of the areas in production and there is, in many localities, a risk of fire and flood. There is no certainty that seasonal conditions will not frustrate plans for improvement in one season or even for three or four seasons in succession.

917. Again, land in Australia has not been cultivated to the standards achieved, over long periods of time, in old established countries. There is, in Australia, an almost limitless variety of soil types and soil deficiencies, and climatic variations call for many different pasture plants, cereal varieties and types of live-stock. Land is, therefore, still in the phase of experiment with many holdings relatively undeveloped and low yielding.

918. The Australian rural work force is small and calls for special methods of management to obtain a high production per man employed. Methods of management and mechanization have created a demand for land capable of quick and easy development and, consequently, land values in suitable areas tend to be high. Because of these factors and the hazards which have been mentioned as confronting the farmer, the rural industries are also characterized frequently by a shortage of available credit.

919. The combined effect of the factors which the Committee has just mentioned has been to produce a policy of slow long-term development and improvement within the individual farmer's own resources of labour and capital and for improvements to be made when seasonal and financial conditions permit. Long-term stability is required to obtain the best use of Australia's soil. As the Australian Primary Producers' Union stated to the Committee—

> Such a policy involves looking far ahead, and thinking in terms of long cycles of seasons, including a due proportion of good and bad years, rather than precise, cut and dried plans covering short periods. The importance of long-term marketing and price arrangements is obvious, and its effect on enterprise and on incentive is very great. It follows that agriculture in Australia requires long-term plans, certainty, and a predictable economic future.
>
> . . . . . .
>
> Orderly marketing is a great help to producers in planning long-term development if it suits the particular product and if the period of the plans is long enough . . .
>
> Similarly, budgeting for improvement of production and cost efficiency on farms is much less difficult. A steady and assured market for part, at least, of the farmer's produce is a great spur to enterprise. This spur is most necessary because the many uncertain and uncontrollable factors affecting primary production tend to produce caution and a disinclination to take what would be regarded in commerce as a business risk.
>
> This important psychological factor may explain why most primary producers of some commodities prefer certain, but modest, returns to a proposition involving the possibility of big profits and of big losses. Unlike big companies in other industries, the farmer cannot afford to risk losses in the hope of big returns.

920. Unquestionably, orderly marketing arrangements can play an important part in achieving the objective of long-term stability. Some products do not lend themselves to orderly marketing schemes and some are already marketed in a way which is satisfactory to the public and producers. Nevertheless, the Committee believes that long-term stability is endangered in some primary industries in the absence of orderly marketing schemes, backed by the producers themselves.

921. The national importance of the primary industries is sufficient reason for wishing to have a proper constitutional backing for organized marketing. Apart therefrom, the Committee believes that orderly marketing is not inconsistent with the interests of consumers. The greater assurance of regular supplies and prices is a contributing factor in the proper management of any household. Attainment of stability in the primary industries also has a stabilizing effect on other branches of the economy, as the Committee has already indicated.

Insecure Legal Basis for Organized Marketing in Australia.

922. It has been evident for many years that effective orderly marketing schemes for several important primary products, including those in which the volume of export trade is substantial, require the maintenance of uniform national policies. Uniform policies, besides facilitating the more economic handling and disposing of supplies of products which enjoy extensive national and international markets, help to obviate the inducement which would perhaps otherwise offer to sections of an industry to indulge in forms of trade which, though immediately profitable to some, are not harmonious with the long-term interests of the industry as a whole.

923. Yet in Australia, by reason of the constitutional division of power, a single marketing scheme for a particular product is often only possible at all as long as the Commonwealth and up to six States are prepared to support it. It is not always possible to obtain a sufficient measure of agreement in the first instance. This comes as no surprise because the production of particular commodities is usually spread widely throughout the States of the Commonwealth and sectional interests and political factors intervene which may cause the attitude of one State to be at variance with the outlook of the Commonwealth or the other States in which the product is grown. Indeed, the fate of a Commonwealth-wide marketing plan could be determined by only one House of the Parliament of one State withholding consent to legislation. As the Australian Primary Producers' Union observed—

> Uncertainty is inevitable when one State, which might represent only a very small percentage of producers or of consumers, can delay the making of a complete agreement indefinitely; and could wreck any plan by breaking uniformity between the States, and so creating an incentive for speculative interstate trade. Once a dumping-ground for interstate trade exists, all stability can be lost.

924. If they attain agreement, the Commonwealth and States are capable of solving some of the most basic problems of marketing, but section 92 still would stand above any agreement. The declaration of freedom which it contains permits uncontrolled interstate trading which can undermine a marketing structure and the mere existence of the section may be sufficient to discourage nation-wide marketing plans from being seriously pursued. Marketing schemes become all the more vulnerable if a product can be easily and economically transported and proximity to State borders sometimes offers a strong inducement to a producer or dealer to engage in uncontrolled interstate trading. Section 92 applies as much to marketing schemes which rest on complementary Commonwealth-State legislation as it does to those schemes fostered by the Commonwealth or the States individually.

925. That the insecure legal foundations for organized marketing in Australia may frustrate a scheme favoured by a majority of States and a majority of producers is anachronistic enough. The dependence of the prosperity of the community on the primary industries and the special importance of achieving satisfactory sales of produce abroad in the teeth of fierce competition from other countries, including some who find it necessary to export some part of their production surpluses on non-commercial terms, should occasion national concern to obtain corrective constitutional alteration.

926. The Committee did not have to look far for practical illustrations as to the manner in which the division of constitutional power and the operation of section 92 have dictated the shape of marketing arrangements or been detrimental to organized marketing in important primary industries.

Commonwealth-State Complementary Legislation: The Wheat Industry.

927. The wheat industry provides one of the best examples of a primary industry confronted with the constitutional situation which the Committee has described. This industry is, next to wool, Australia's most important export industry and its prosperity is a major factor in the economic stability of the Commonwealth.

928. Because of its dependence on overseas markets in normal crop years, the welfare of the industry, unlike the secondary industries, was for years completely dependent upon returns based upon fluctuating overseas prices. A Royal Commission reported in 1935 that the industry needed stabilizing by the formation of a central marketing authority with power to control marketing of wheat throughout the Commonwealth. Nevertheless, the industry remained unorganized right up to the outbreak of war in 1939. The record of the industry during the 1930's shows that it was necessary for the Commonwealth Parliament to provide financial relief to growers on several occasions.

Wheat Marketing during World War II.

929. During the war years, the Commonwealth, acting under its defence powers, set up the Australian Wheat Board with powers of compulsory acquisition and responsibility for storage and disposal of wheat, to overcome the crisis which arose in the industry because of the closing down of export markets. The war-time scheme enabled the industry to withstand sucessfully the rigours of an extensive period of dislocation.

Commonwealth-State Legislation on Wheat.

930. Return to pre-war conditions was averted for some time after the war by the national Parliament making continued use of its war-time powers. In 1948, the Commonwealth and States agreed on a stabilization scheme covering crops for five seasons ending with the 1952-53 season. After a referendum of growers, who expressed their approval of the plan, the Commonwealth and State Parliaments passed complementary legislation charging the Australian Wheat Board, constituted under Federal legislation, with the administration of the scheme. Legislation of the participant States vested the Board with power to acquire, at prices determined in accordance with the Commonwealth Act, wheat grown in each State, except for wheat committed to interstate trade. Interstate wheat was protected by section 92 from acquisition under the scheme. The State Acts also made the Board responsible for intra-state marketing.

931. The Wheat Industry Stabilization Act of the Commonwealth, for its part, made the Board responsible for the handling of the export of wheat and wheat products and the interstate marketing of wheat. The Commonwealth guaranteed a return to growers based on the cost of production in respect of up to 100 million bushels of wheat exported from Australia from each of the crops to which the plan applied. Commonwealth legislation also established a stabilization fund consisting of the proceeds of a tax imposed on wheat exports. Sales of wheat to Australian consumers, authorized under the State and Federal Acts, were to be at fixed home consumption prices, equal to or based on the guaranteed price.

932. In 1954, the Commonwealth and States, backed by strong grower support in all five producing States, again agreed on the terms of a stabilization plan broadly similar to its predecessor to cover the wheat crops for a further five seasons.

933. It is of interest that, in 1953, the State of Victoria refused to agree to the wheat marketing plan on which the Commonwealth and the other States were agreed. A breakdown of arrrangements was prevented by Victoria agreeing to an interim marketing plan which became absorbed in the more comprehensive stabilization plan of 1954, that plan being made restrospective in its operation to cover the 1953-54 wheat crop. Had the Victorian Government not agreed at the last moment to join in the plan, Australian wheat producers either would not have had the benefit of an over-all marketing arrangement, or else there would have been an alternative scheme inevitably less effective.

934. A third scheme which is, in essentials, in line with the preceding scheme, except that the home consumption price must be equal to assessed cost of production and not more, as was possible under the previous scheme, was negotiated by Commonwealth and State Ministers in the Australian Agricultural Council and with the Select Committee of the Australian Wheatgrowers' Federation in 1958. This plan began with the 1958-59 crop and will end with the marketing of the 1962-63 crop. Legislation to give effect to the new five-crop plan was passed by the six State Parliaments. The relevant Commonwealth legislation is the *Wheat Industry Stabilization Act* 1958 and the *Wheat Export Charge Act* 1958.

935. Representatives of the Australian Wheatgrowers' Federation strongly supported the maintenance of one marketing scheme for wheat. In a submission, the Federation pointed to the harm which divided control could cause, stating—

> To enable the . . . features of the Stabilization Plan to be effective the establishment of the marketing authority on a Commonwealth basis is absolutely essential, as opposed to six State authorities operating on a separate State accounting basis. This would mean that there would be six different State authorities competing one with the other for the chartering of ships, forcing up freights and competing in the available markets of the world and cutting prices, whereas under the present plan there is only one central selling and marketing authority which enables that Board to get the best and maximum results through the world's markets.

936. The Federation maintained that a wheat marketing plan, for the benefit of the industry as a whole, should not be endangered by the possible refusal of any State to participate and, for this reason, it considered that the Commonwealth should have a marketing power. The Federation observed—

> The Committee should consider making provision for the Commonwealth to have legislative power to prevent a minority overruling the majority. As referred to previously, we have stated that the present Wheat Marketing Stabilization Plan is dependent upon Commonwealth and State complementary legislation. One State could refuse to pass the legislation in spite of the majority of the growers favouring the legislation being enacted, and yet the other three or four States may desire to pass the legislation, but this one State could prevent the plan from having legislative enforcement by standing aloof and thus wrecking the wheat marketing plan and the wishes of the majority. Provision should be made that the Commonwealth should have the power to enact such a marketing plan provided that a referendum of the growers in the Commonwealth is held and the majority of the growers favour the legislation being passed.

937. The Federation also referred to possible legal doubts arising from the complementary legislation under which State Acts vest the Commonwealth-created Wheat Board with powers and obligations. The Federation commented—

> Some doubt has also been expressed that the Australian Wheat Board is established under the Commonwealth Act and not by the States, and the State Acts cannot endow the Commonwealth with the powers given by the State Acts because a State Act cannot endow the Commonwealth instrumentality with powers which are beyond the Constitutional competence of the Commonwealth . . . There is some legal doubt also, how a State Act could impose obligations on a Commonwealth instrumentality or how a State Act could restrict the powers of the Commonwealth law as to the price to be charged for a commodity which had properly become vested in the Australian Wheat Board, which is created under the Commonwealth legislation.

Without expressing any view as to the strength of the legal doubts, to which the Federation refers, undoubtedly the constitutional power which the Committee proposes would dispel any suggestion of invalidity in the powers and duties allotted to the Commonwealth Board.

Section 92.

938. The wheat marketing arrangements are also endangered by section 92, the provision in the Constitution which has led to exclusion from control of the State Acts wheat intended for interstate trade. Since the introduction of stabilization, the volume of trade which has taken place under

cover of the exclusion of interstate wheat has not been very great. It was pointed out to the Committee, however, that in the event of a drought leading to the shortage of supplies in one or more States, it would be impossible to prevent wheat from moving interstate to purchasers outside Board control. Such a state of affairs could interfere with local marketing and supplies for overseas markets. In years in which world prices for Australian wheat should fall well below local levels based on a guaranteed price, there is an inducement for interstate sales of wheat to occur outside the reach of the marketing scheme.

939. The Wheatgrowers' Federation considered that the wheat marketing arrangements were particularly vulnerable because of section 92. In September, 1957, it advised the Committee as follows:—

> A trader in wheat can proceed across the border of any State, purchase wheat direct off the farm from a grower by offering him a cash price which would be considerably below the final payment received through the Pool. The grower, being short of ready cash, accepts the lower price. The purchaser then proceeds across the border under the protection of section 92 whereby interstate trade and intercourse must be absolutely free. Section 14 of the Commonwealth *Wheat Industry Stabilization Act* 1954 states that a person who is in the possession of wheat in the Australian Capital Territory shall deliver that wheat to the Board on demand made by or on behalf of the Board. Similar sections are inserted in the State complementary legislation which means in effect that a grower in possession of wheat for sale shall deliver to the Board, but as pointed out above, if the wheat is sold over the border into another State it has the protection of section 92 and if the Board proceeds against the grower the Board's action would fail because of previous interpretations by the Privy Council of section 92.
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> In South Australia, last harvest, it has been stated that over 25,000 bags of barley were sold from Pinnaroo to Lameroo to a trader over the border who transported it back to Victoria for his own requirement. The Barley Act also contains a provision that the grower shall deliver to the Board, but again these growers and trader are protected under section 92. A Pool, to be successful, must have 100 per cent. support.
>
> It is well known that a lot of wheat was sold over the border from Queensland and New South Wales this last season, which is breaking down the efficiency of the Australian Wheat Board's marketing authority.
>
> . . . . . .
>
> If a buyer over the border offers to buy that commodity on a cash basis it is an inducement to the grower to sell rather than wait for the slow Pool advances. While section 92 remains as it is, neither Commonwealth nor the States can legislate or control the interstate movement of that commodity. It therefore breaks down efficiency of the Pool and the marketing authority, with serious disadvantages to the majority of growers who support the Pool. The Pool, to be 100 per cent. efficient and bring about the best results to the growers, must have 100 per cent. delivery to it so as to ensure that 100 per cent. availability of the markets. Voluntary arrangements are always precarious.

The Federation urged an amendment to prevent section 92 from endangering the scheme so strongly supported by the general body of wheatgrowers.

940. Interstate movement of wheat outside the stabilization scheme has not so far jeopardized the national arrangements because substantial quantities of wheat cannot normally be moved interstate at a profit and this economic barrier will usually offset the advantages which section 92 is able to offer to individual growers.

Consumer Interest.

941. The Federation was anxious to show that stabilization did not overlook the importance of the consumers in Australia in respect of prices they paid under the legislation for flour processed into bread. For most years since the introduction of the stabilization scheme, the home consumption price has been less than the average realized export price for wheat and the home consumption price under the present plan is based on cost of production. In some years, the average realized export price has been less than the home consumption price, as for example, in 1955-56, but the balance over the years has so far been in favour of the domestic consumer. There has been a reasonable amount of give and take since stabilization was first introduced.

Negotiation of New Marketing Arrangements.

942. Another disadvantage of having to use the device of complementary Commonwealth-State legislation to formulate an effective marketing scheme is that agreement must be reached every few years. The current wheat scheme is the third which has been negotiated in this way since the war. Absence of any certainty of renewal may lead to uncertainty in the industry itself as to the future basis of marketing, prices, probable returns from long-term farm planning, the type of production which will be economic, and the improvements, breeding programmes and other matters which should be adopted in the interests of good husbandry.

943. Increased rural efficiency and a higher standard of product best suited to the needs of consumers in Australia and overseas countries should be more readily attained if the Constitution did not require the marketing power to be shared.

944. The Committee considers that the example of the wheat industry plainly shows that the Commonwealth should have a marketing power which is free from the disturbing effects of section 92.

DRIED FRUITS INDUSTRY: VOLUNTARY EQUALIZATION.

945. Some industries, valuable in themselves for providing employment, increasing Australia's export earnings and helping to make Australia self-sufficient in foodstuffs, have to sell their products on the world markets in competition with countries where cheap labour is employed and low standards of living prevail. In these circumstances, Australian producers have to obtain a higher domestic price to cover their costs of production and the losses incurred on exports. Marketing arrangements in these industries directed to the equalization of returns and an improved standard of product are particularly vulnerable to section 92. *An example is the dried fruits industry.*

946. Before 1936, the industry had a scheme of organized marketing under Commonwealth and State legislation. State legislation limited the quantities of fruits which a producer could market intra-state and Commonwealth legislation regulated interstate sales in such a way as to require a producer to export a prescribed percentage of his fruits. By these means, each producer obtained an equitable share of the total market for dried fruits.

947. The Committee has already referred to the case of *James* v. *The Commonwealth* in 1936 which put an end to the scheme when it was held that a producer of dried fruits could sell interstate notwithstanding the imposition of any quota. When the scheme collapsed, smaller producers would have been able to sell their entire production in the Commonwealth at the higher local prices while other producers had to export their surpluses and take the lower overseas prices,

948. Most producers have combined in a voluntary organization, known as the Australian Dried Fruits Association, to maintain a policy of equalization of returns to member growers. A company was formed in 1937 to buy out independent producers operating outside the Association and selling their produce only on the more profitable local market and the operations of this company have protected the industry against the dangers that beset it from uncontrolled selling. Even so, the fear is always present that the scale of independent operations will become such as to cause a breakdown of the present arrangements and, if this should occur, the stability of the industry would be seriously undermined.

949. The Australian Dried Fruits Association recommended to the Committee that, as a *permanent safeguard to the industry, the only practicable solution was a constitutional alteration* which would enable the Commonwealth to legislate for the regulation of sales within the Commonwealth, free from the operation of section 92.

DAIRYING INDUSTRY: EQUALIZATION AND COMMONWEALTH BOUNTY.

950. The Committee should also refer to problems of marketing in the dairying industry which provides an example of an industry in which the Commonwealth has had a major protective role in maintaining the stability of the industry.

951. The dairying industry is important. It is estimated that the capital investment in land, farm buildings, machinery, plant and live-stock in the industry in Australia totals £700,000,000. In addition, the capital value of land, buildings, plant and machinery used in the handling and manufacturing of dairying products would be no less than £50,000,000. On the farms and in the factories, the industry supports more than 600,000 persons. Consumption in Australia normally accounts for about 60 per cent. of butter and cheese production so that clearly the industry also depends on satisfactory export outlets. As an export industry, it makes an important contribution to the total volume of Australia's export trade. Concomitantly, the industry encounters widely fluctuating prices for its products sold on the overseas markets and, not infrequently, the export trade is relatively unprofitable.

Orderly Marketing before World War II.

952. In 1934, a plan of orderly marketing of butter and cheese was introduced following agreement between industry leaders and the Federal and State Governments. Commonwealth legislation, together with complementary legislation of the States, provided legal authority for a system of orderly marketing, involving quotas and the equalization of returns, which was approved by an overwhelming majority of producers. The decision of the Privy Council in the *James Case* wrought the destruction of the scheme.

Voluntary Equalization.

953. Difficulties confronting the industry were so serious that voluntary agreement among the manufacturers of butter and cheese was secured for a system of orderly marketing maintained by authority of written contracts between the individual manufacturers and a Committee known as the Commonwealth Dairy Produce Equalization Committee Limited. Broadly, the equalization plan involves a pooling of local sales with realizations from that portion of production exported and, under the plan, all factories receive the same value for their butter or cheese irrespective of whether it is sold in Australia or exported. The plan has proved to be of great value to the industry but its inherent weakness is that it relies on virtually complete co-operation among manufacturers, who may withdraw from the scheme if they so desire. Any appreciable withdrawal could result in the breakdown of the plan and in a return to disorderly conditions in the industry.

Commonwealth Financial Assistance.

954. Although the scheme rests on a voluntary basis, it has been materially strengthened by an important provision in the Commonwealth Dairying Industry Act which provides for the payment of bounty to the industry. The bounty is paid only to factories which are members of an approved equalization scheme. The Commonwealth Parliament has, under section 51 (iii.) of the Constitution, power to pay uniform bounties on the production or export of goods. The Commonwealth's policy of stabilizing the industry has continued since 1942 and in 1958-59 Parliament provided for a subsidy of £13,500,000. Without the payment of the subsidy there almost certainly would have been large-scale withdrawals from the scheme to take advantage of the higher Australian prices. The amount of the subsidy has, in effect, become the determining factor as to whether there would be a greater return for the manufacturer if he withdrew from the equalization plan than if he remained in the plan and continued to receive an equalized return plus subsidy.

Dangers of Breakdown in Existing Arrangements.

955. The Australian Dairy Farmers' Federation, representing some 62,000 dairy farmers in all States, voiced its fears to the Committee that the heavy decline in export prices for Australian dairy products and reduction in subsidy would encourage individual manufacturers to sell their produce outside the equalization plan for the benefit of themselves or their suppliers. The Federation advised the Committee in 1957—

> One manufacturer—fortunately a comparatively small one—withdrew in January, 1956; whilst some others are known to be giving some thought as to whether it would be to their individual benefit to sell their produce outside the Equalization Plan.
>
> Such thought towards withdrawal from the Equalization Plan of orderly marketing is influenced by the fact that, because of particular circumstances such as the location of his factory in relation to major centres of population or a buying preference for a processed product, a manufacturer may sell the bulk of his output upon the more remunerative Australian market. From the short-term aspect and in any case from a self interest viewpoint, a manufacturer may be disinclined to pay quite a considerable portion of the proceeds from the Australian sales of his factory's produce into an Equalization pool for distribution among other manufacturers. Such a manufacturer would of course increase his own personal income; or in the case of a co-operative company, a higher price could be paid to the particular section of dairy farmers supplying to that factory.
>
> Any appreciable withdrawal from the Equalization Plan must inevitably result in the complete breakdown of the Plan, and also inevitably in a return to the disorderly conditions which existed in the industry prior to the Plan being introduced A realistic statement as to the final outcome of a collapse of the industry's Equalization Plan would be to say that the industry would eventually return to a position where the Australian prices for its products would again be related directly to whatever price was being received for them on the London market which is Australia's major outlet for butter and cheese.
>
> Such an outcome would be disastrous for the dairy farmers of Australia and would cause a really serious upset in this important section of Australia's national economy.
>
> The importance of the Equalization Plan in the general welfare of the dairy industry has been recognized by both parties in the Federal Parliament. In Commonwealth legislation for assistance by way of subsidy and/or bounty for the industry since it was last introduced in 1942, there has always been specific provision that the subsidy (or bounty) was limited strictly to butter and cheese which had been marketed within an approved equalization scheme administered by an equalization body. In practice, this body has been the Commonwealth Dairy Produce Equalization Committee Limited.
>
> Such legislative provision has given tremendous support to the Equalization Plan, but market developments in recent years combined with a Government policy of subsidy reductions have now raised serious doubts in the minds of industry leaders about the certainty of continued operation of the Equalization Plan on a voluntary basis.
>
> This situation has arisen through several factors; first, total production has been increased—resulting in a higher proportion of sales at export values; secondly, export values have declined steeply; thirdly, prices in Australia have risen; and fourthly, there have been reductions in subsidy mentioned earlier.
>
> The amount of subsidy has in effect become the determining factor as to whether there would be a greater return for the manufacturer if he withdrew from the Equalization Plan. This would be a comparison of the equalized value; plus subsidy, as against the Australian price.

956. The Federation stated that the continuance of the equalization plan was necessary for the orderly marketing of butter and cheese and to ensure stability throughout the dairying industry and that the weakness of the plan as a voluntary arrangement required constitutional action to be taken to secure a firmer legal foundation for the industry's organization.

957. In October, 1958, the Commonwealth Government announced that, in addition to the usual subsidy, it would, in view of the period of low returns to producers, provide a guaranteed return to the industry for the 1958-59 season. This meant that a dairy farmer would receive a specified *minimum* return on his total production, whether sold domestically or overseas.

958. The dairying industry, besides typifying the type of problem which can arise from the operation of section 92, is also an example of an industry which has developed in such a way as to make it inevitable that the Commonwealth should assume a major responsibility in the protection of the industry's welfare.

FUTURE MARKETING PROBLEMS.

959. The case for a Federal marketing power is all the stronger when probable future developments are taken into account. Changes have been taking place in trading practices and consumer demand both at home and overseas for several years which frequently make marketing a much more complicated and technical process than in the early years of Federation.

960. In the international field, the national agricultural policies of some countries, involving the export of surpluses under what would once have been unusual types of arrangement, have disturbing effects on the normal overseas markets of several exporting countries, including Australia. Trade restrictions sometimes hamper the entry of Australian produce into countries. The Commonwealth Government is now called upon to exploit all possible avenues of disposal for Australian primary produce and Australia must be prepared for even greater problems of disposal in the future than have so far been experienced. The level of over-all efficiency of an industry, including its disposal organization, governs its chances of successfully withstanding ruthless competition so prevalent in modern world conditions. It is self-evident that the local market for primary products, even though at times less spectacular, is more reliable than the overseas market and it is no more than equitable that the fortunes of an industry abroad should be shared by the producers at large along with the fruits of the more stable local market.

961. A farm product usually reaches the ultimate consumer only after many indispensable steps have been taken, which may include transport, storage, packaging, processing, advertising, merchandising and distribution. Inefficiency or failure to pay sufficient attention to any of the steps involved could quite easily result in growers receiving returns which are not commensurate with their costs of production. Marketing is not only more complicated now than it used to be, but, in the present middle stages of the century, there have been many commercial developments which advantage an industry if properly utilized but imperil its welfare if they are disregarded. In this setting, organized marketing offers much better prospects for many industries than uncontrolled disposal.

962. Before the end of the century, scientific research will inevitably lead to the development of new types of manufactured foodstuffs and other products which could compete with the traditional products of Australia's primary industries. Already, manufactured substances compete with some natural food products, such as butter, cream and sugar. Competition is not confined to foodstuffs and the community is becoming increasingly aware of the challenge which synthetic fibres offer to wool for uses in which wool has long predominated. In the ordinary course of events, economics will outweigh sentiment and there is a growing awareness among producers that their products must satisfy consumer tastes. Organized marketing should provide the link between production and consumption by more readily ascertaining the exact nature of consumer demand and encouraging a supply which caters for it.

963. The next few years will show, in the Committee's opinion, that in some industries, organized marketing will be more important than ever in maintaining these industries on a profitable footing for the benefit of producers and the nation.

STATE MARKETING LAWS AND THE OPERATION OF SECTION 92.

964. From the evidence placed before it, the Committee had no doubt that orderly marketing schemes in individual States have been adversely affected by the operation of section 92 and the Committee was well supplied with illustrations of the susceptibility of State schemes to break down by reason of uncontrolled interstate selling operations.

965. On occasions, producers, agents or speculators in one State have been able to take advantage of temporary favourable selling conditions in another State where a marketing scheme for the particular commodity is in existence to sell their produce in that State. This has happened in recent years, for example, in the egg industry. Sometimes, producers within a State where there is a marketing scheme have elected to commit their produce to interstate trade and take advantage of more profitable sales in other States. Yet when the interstate market has ceased to be attractive, they have then expected to share in the marketing scheme of their own State to the detriment of producers who have always remained loyal to the scheme. Evidence was supplied to the Committee, moveover, of interstate transactions deliberately created to enable disposal of produce grown in a State to take place outside a marketing scheme of that State. Thus, eggs and potatoes have been transported across State borders under an arranged sale and then sold back to purchasers in the State of production.

966. On occasions, State marketing arrangements have broken down altogether because of the impossibility of controlling interstate trade, a notable instance being potatoes.

967. The Committee acknowledges that the strength of some State marketing arrangements would be far greater if they gained relief from the operation of section 92. With some reluctance, however, the Committee has not recommended a constitutional alteration which would grant to State marketing laws any form of immunity from the constitutional prohibition.

968. So far as the regulation of interstate trade is requisite in achieving successful organized marketing, the Committee does not deviate from its view that the national Parliament rather than the State Parliaments should be charged with the function of regulation. The power would be available for exercise, in appropriate cases, in conjunction with producing States. If State marketing power is

relieved from the application of section 92, it becomes possible for a State to exercise its power to the detriment of producers and consumers in other States, contrary to the national welfare of the industry and the promotion of trade throughout the Commonwealth.

969. Nor, for that matter, would an amendment in favour of the States alone provide a solution to the marketing problems of the major industries. These industries and their problems have, as the Committee has been concerned to demonstrate, a national character in which much more than the interests of individual States are at stake. Again, the proposed Federal power would, in certain cases, give producers a real opportunity for the first time in many years to decide whether their industry would be advanced by the substitution of a federally organized marketing scheme for separate State marketing organization, in which sometimes the interests of one State are played off against the interests of another State without regard to more far-reaching consequences for the industry.

Proposed Constitutional Alteration.

970. The Committee's objective has been to recommend a Federal marketing power which should offer a reasonable prospect of proving acceptable both to producers and the community. The Committee is not unmindful of the deep-seated feelings that can be aroused by the nature of the subject, and organized marketing schemes have, in the past, been ready targets of attack by different kinds of interests, including small groups of producers, traders and speculators prepared to exploit both the industry and the public for private gain.

971. After its own independent deliberations and hearing the views of several producer organizations which supported a Commonwealth marketing power to be exercised only with producer support, the Committee decided that the proposed constitutional alteration should make a poll of producers a pre-requisite to launching an organized marketing scheme under Commonwealth law.

972. Once the Constitution is to recognize the right of producers to be consulted, awkward questions arise as to how the alteration should be expressed.

973. If a detailed marketing law had to be approved, polls would have to follow all subsequent amendments of the Act and this would introduce an undesirable rigidity into the law-making process. Alternatively, if producers were required to approve an actual marketing law, the Parliament might be constrained to frame a law in such general terms as to avoid frequent reference to producers and, with this purpose in mind, it is quite probable that most extensive powers to make regulations would be conferred upon the executive. Besides, the Committee wished to avoid the position where a law of the national Parliament should be subject to the approval of a section of the community.

974. The Committee has adopted a course, which it believes to be both appropriate and effective, of authorizing the Parliament to make laws for the submission to producers of a commodity of proposed plans for the organized marketing of that commodity. Upon receiving the requisite producer approval, the Parliament should then be empowered to make laws for carrying the plan into effect. While Parliament would not be able to pass laws beyond the terms of the scheme submitted to producers, the power should be sufficiently flexible to enable amending legislation to be passed to meet changed circumstances or cover matters of detail within the charter of approval, without recourse to producers on each occasion. In this way, Parliament could make amendments to the principal Act giving effect to a commodity marketing plan without reference to producers whenever an amendment became necessary or desirable. At the same time, no amendment beyond the scope of the approved plan or inconsistent with it would be valid.

975. The Committee has also recommended that more than a simple majority of producers should approve the proposed plan before the covering marketing law can be passed and it has fixed the majority at three-fifths of the producers who vote. This should not pass without comment. Experience has shown that it is not easy to obtain such a majority in the first instance because many voters are reluctant to support an untried course of action. When the first of the wheat stabilization plans was submitted to a poll of wheatgrowers in 1948, 65 per cent. or a little less than two-thirds of the growers voted in favour. At a poll on the question of a second stabilization plan which was held in 1954, 94 per cent. of the growers who voted expressed their support for the plan.

976. It would, under the Committee's proposal, be open to the Parliament to prescribe compulsory voting if it wished.

977. In its reference to primary products so far, the Committee has not pointed to the imprecision of the expression which it has been using. There is room for differences of opinion as to the products which should be grouped as primary products. Whilst wheat is clearly a primary product, it is by no means obvious that flour may also be included in the expression and yet a marketing scheme for wheat has to take into account domestic consumption and exports of flour. The organized marketing of butter, a processed product, may be all that is required for a marketing scheme for the benefit of the dairying industry. In the Committee's view, the Parliament must also have the power to determine, in formulating a plan for marketing a primary product, which products processed or derived from the product should be covered by the plan. Any constitutional alteration should also put it beyond doubt that schemes for organized marketing also include those which are commonly described as stabilization schemes.

978. Thus, the Committee contemplates a new section being written into the Constitution to make provision as follows:—

(1) The Parliament should have power to make laws for the submission to a poll of primary producers of proposed plans for the organized marketing of primary products.

(2) For the purpose of submitting a proposed plan to producers, the Parliament should be authorized to make such laws as it deems necessary in connexion with the holding of a poll, including laws determining who is a primary producer, eligibility to vote and the number of votes which a producer should have.

(3) If three-fifths of the votes cast at a poll by the producers of a primary product are in favour of a proposed marketing plan for that product, the Parliament should have power to make laws to give effect to the plan free from the operation of section 92 of the Constitution, but otherwise subject to the Constitution.

(4) For the purposes of the power, a primary product should include any product directly produced or derived from a primary product which the Parliament deems to be a primary product.

CHAPTER 19.—ECONOMIC POWERS.

Recommendations of the Committee.

979. The Committee observed, in paragraph 149 of the first Report, that the Commonwealth Parliament had, under various provisions of the Constitution, legislative powers which could be exercised so as to affect the state of the national economy but that the powers collectively which the Parliament possessed did not permit the development of an integrated economic policy.

980. One of the Parliament's powers, the banking power (Constitution, section 51 (xiii.)), itself was a far less useful power than at Federation because of the growth of specialized financial institutions outside the banking structure.

981. The Committee further commented, in paragraph 150, that, when the Constitution was drafted, no government in Australia was responsible for the general state of the economy, including the level of employment, stability of the value of the currency and the rate and balance of economic development. It was not until many years after Federation that the achievement of economic understanding had made the factors determining these matters sufficiently clear for governments to take action. It was not surprising, in these circumstances, that the Constitution was not concerned with the allocation between the Commonwealth and the States of the powers needed to implement a general economic policy. The Committee considered that the Commonwealth now had to discharge a responsibility of government which did not exist when the Constitution was originally framed, namely, to safeguard and promote the economic welfare of the community of Australia.

982. The Committee considered that, for the purpose, the national Parliament should have specific concurrent legislative powers over capital issues, consumer credit and rates of interest charged in connexion with the borrowing of money on the security of land. The Committee's recommendations in detail on the three subjects mentioned are as set out hereunder.

Capital Issues.

983. The Committee has recommended that the Constitution should be amended to provide, in substance, as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to—
  (a) the issue, allotment or subscription of capital; and
  (b) the borrowing of money whether upon security or without security,
  by corporations which engage, or may engage, in production, trade, commerce or other economic activities.

(2) The power proposed to be vested in the Parliament under sub-paragraph (1) above is not to apply to—
  (a) the issue or allotment of capital out of profits or accumulated reserves of corporations: or
  (b) incorporated authorities of a State, including local government authorities.

Consumer Credit.

984. The Committee has recommended that the Constitution should be amended by vesting the Commonwealth Parliament with a power to make laws with respect to hire-purchase and other agreements or transactions entered into in connexion with the sale, purchase, hire or encumbrance of goods which involve the making of periodical payments or deferment of payment of the full amount payable.

Interest Rates in connexion with Loans secured by Mortgage of Land.

985. The Committee has recommended that the Commonwealth Parliament should have power to make laws with respect to rates of interest and other charges payable in connexion with loans obtained upon the mortgage or other security of land.

LEGISLATIVE POWERS OF THE COMMONWEALTH PARLIAMENT AFFECTING THE AUSTRALIAN ECONOMY.

986. The Commonwealth Parliament does not have a general power to deal with economic matters but several of its specific legislative powers can be exercised so as to affect the state of the national economy.

Trade and Commerce.

987. One such power is that vested in the Parliament, under section 51 (i.) of the Constitution, to legislate with respect to trade and commerce with other countries and among the States.

988. Paragraph (i.) virtually brings the whole of Australia's external trade into the jurisdiction of the Parliament. The Parliament may, for example, if it chooses, control the volume and direction of imports and exports of goods and services.

989. The paragraph has to be read subject to section 99 of the Constitution which inhibits the Commonwealth by any law or regulation of trade, commerce or revenue from giving preference to one State or any part thereof over another State or part thereof.

990. The power, so far as it is concerned with interstate trade and commerce, is also subject to section 92 of the Constitution.

Taxation.

991. Among the foremost relevant powers is the extensive power of taxation vested in the Commonwealth Parliament under section 51 (ii.) of the Constitution. The paragraph authorizes the Parliament to make laws with respect to "Taxation; but so as not to discriminate between the States or parts of States: ".

992. Section 51 (ii.) enables the Parliament to impose direct taxation on incomes and property of persons and the various types of business organization such as companies. Section 51 (ii.), together with section 90 of the Constitution, vests in the Parliament exclusive power to impose duties of customs and excise.

993. Obviously a potent weapon in any economy, the taxation power can be used to encourage or damp down expenditure and investment.

994. In the exercise of its taxation powers, as indicated, the Parliament must not discriminate between States or parts of States. Moreover, under section 99 of the Constitution, already referred to, a law of revenue must not give preference to one State over another State.

Banking.

995. A third specific legislative power calling for particular comment is the banking power.

996. Section 51 (xiii.) of the Constitution empowers the Commonwealth Parliament to make laws with respect to—

(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

997. The banking power permits the Commonwealth to set up its own instrumentality to engage in the business of banking. It further enables the Parliament to regulate the banking activities of private banks through the central banking structure. In this way, the Commonwealth may exercise a general supervision over the volume of credit available to the community through the banking system. As is well known, the Commonwealth Parliament makes extensive use of the banking power for purposes such as those mentioned.

998. Undoubtedly, the banking power is of primary importance in seeking to maintain the stability of the currency of Australia, full employment and economic prosperity.

999. The expression "banking" has not been fully defined and the exact nature of the financial activities which can be brought under the heading "banking" is unclear. The essential characteristics of banking still await judicial definition. On the relatively few occasions on which the matter has been considered, Judges have taken somewhat different views as to the meaning of banking.

1,000. The majority of the High Court, in the *Commissioners of the State Savings Bank of Victoria* v. *Permewan Wright & Co. Ltd.* (1914) 19 C.L.R. 457, regarded banking as a general economic concept which described any business, the real and substantial nature of which involved the receipt of moneys from members of the public, its eventual repayment and its utilization meanwhile by lending it to others. Isaacs *J.* said, at pages 470-471—

. . . The essential characteristics of the business of banking are, however, all that are necessary to bring the appellants within the scope of the enactments; and these may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society. It is, in effect, a financial reservoir receiving streams of currency in every direction, and from which there issue outflowing streams where and as required to sustain and fructify or assist commercial, industrial or other enterprises or adventures.

If that be the real and substantial business of a body of persons and not merely an ancillary or incidental branch of another business, they do carry on the business of banking. The methods by which the functions of a bank are effected . . . are merely accidental and auxiliary circumstances, any of which may or may not exist in any particular case.

1,001. More recently, in the *Banking Case—Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1—individual Justices of the High Court were inclined to pay more regard to the nature of the business activity actually performed by banks and to define banking in terms of the function and operation of banks. As Dixon *J.* (as he then was) observed, at page 335—

. . . Whatever may be the indispensable characteristics of banking, it seems probable that, for the purpose of paragraph (xiii.), they should be sought rather in the relations between banks and those who use them than in a more abstract consideration of the true economic nature of the contribution made by banking to the monetary system and public finance of a country by banks.

1,002. A limitation upon the banking power is the express exclusion of State banking, other than State banking extending beyond the limits of the State concerned.

1,003. The extent to which the power may be exercised with respect to financial institutions, which do not describe themselves as banks nor come within the scope of present banking legislation, is obscure. There are, for example, conflicting views as to whether a finance company, which invites deposits from the public for use in financing hire-purchase transactions, is engaged in the business of banking.

1,004. Another doubt is whether the financing of hire-purchase transactions is banking.

1,005. It is not altogether clear, moreover, how far the Commonwealth Parliament may regulate "non-banking" activities of banks, as for example, the acquisition by a bank of an interest in a hire-purchase company.

Currency and Coinage.

1,006. Another power of some relevance to the subject under discussion is the one, under section 51 (xii.) of the Constitution, to make laws with respect to currency, coinage and legal tender. The power has not been the subject of judicial interpretation but whilst it may, for instance, authorize a law regulating the value of the currency, it is, in the Committee's view, unlikely that the power would sustain much in the way of positive action to regulate the economy.

Corporations.

1,007. A further specific power vested in the Commonwealth is the power, under section 51 (xx.) of the Constitution, to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

1,008. The paragraph has fallen very largely into disuse since the case of *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330, in which the High Court placed a narrow construction on it. The Committee has already discussed section 51 (xx.) and set out the views of the Judges in *Moorehead's Case* in paragraphs 786-787 of Chapter 16 dealing with its recommendation on corporations.

1,009. The corporations power could conceivably support some measure of capital issues control exercisable in respect of foreign corporations and trading or financial corporations subsequent to their formation. It suffices to say, at the present juncture, however, that, as interpreted, the power seems to offer the Commonwealth Parliament little scope for direct intervention in the business activities of the corporations to which it applies.

Borrowing of Money by the Commonwealth.

1,010. Under section 51 (iv.) of the Constitution, the Commonwealth Parliament is empowered to make laws with respect to borrowing money on the public credit of the Commonwealth. The Commonwealth has a full power, under the paragraph, to borrow money for its own purposes.

1,011. Moreover, under the terms of the Financial Agreement with the States, which is supported by section 105A of the Constitution, the Commonwealth also borrows money on behalf of the States.

1,012. Governmental borrowing can effect the economy in various ways, for example, loan funds may be allocated for the purchase of items of capital equipment or earmarked for developmental projects.

1,013. However, the Commonwealth Parliament's borrowing powers do not carry with them national control or regulation of activities in other sections of the economy. The powers are purely facultative.

Public Expenditure.

1,014. The Committee should mention the power of the Commonwealth Parliament to spend moneys for the purposes of the Commonwealth. Section 81 of the Constitution states that all revenues or moneys raised or received by the Executive Government of the Commonwealth should form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution. Under section 83, any money drawn from the Treasury of the Commonwealth must be under appropriation made by law.

1,015. Under section 96 of the Constitution, the Parliament may make grants of financial assistance to the States on terms and conditions as it thinks fit.

1,016. Since the level of governmental expenditure constitutes a substantial part of total expenditure, clearly an increase or tapering off of public works or other governmental activities must have some bearing on the state of the economy.

Other Legislative Powers.

1,017. There are other powers which may be exercised to affect the economy, although to call them economic in the narrower sense would probably be a misdescription. For instance, the Commonwealth Parliament has, under section 51 (xxxv.) of the Constitution, a power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Such matters as rates of pay, hours of work and conditions of leave, fixed by Commonwealth tribunals set up under the power, may have effects over wide areas of the economy. Whilst this is so, the industrial power does not afford the Federal Parliament much scope for direct action on industrial matters. The Committee should mention, of course, its recommendation that the Commonwealth Parliament should be vested with a specific concurrent legislative power to deal with the terms and conditions of employment in industry. The Committee's recommendation is discussed at length in Chapter 15.

1,018. Other miscellaneous legislative powers which may have some relevance to the state of the economy are section 51 (iii.), under which the Commonwealth Parliament may pay uniform bounties on the production or export of goods; section 51 (xiv.), which authorizes the Parliament to make laws with respect to insurance, other than State insurance which does not extend beyond the limits of the State concerned; section 51 (xxvii.), which is the immigration power, and section 51 (xxix.), dealing with external affairs.

Commonwealth Economic Powers contrasted to the Defence Power.

1,019. By reason of the several individual legislative powers vested in it, the Commonwealth Parliament is capable of exercising a substantial influence over the state of the economy and to take decisive and even drastic action affecting the whole or part of the economy. Nevertheless, the aggregate of the single powers fails to reveal a definite line of constitutional responsibility resting in the Commonwealth to safeguard and promote the health of the Australian economy or to counter the exigencies which may arise when the economy is thrown out of balance or threatened with instability.

1,020. The Commonwealth's position in economic matters is in contrast to the power it has to deal with external aggression endangering the safety of the Commonwealth and its people. Under its defence power, principally contained in section 51 (vi.) of the Constitution, the national Parliament is competent to organize the country for total war if that is what the situation requires. Laws for the purpose of promoting the defence of the Commonwealth against aggression may touch upon every aspect of community life and the economy.

THE CONVENTION DEBATES.

1,021. Whilst the Founders were of one mind in allotting to the Commonwealth responsibility for defence, which was, after all, a traditional function of government, there was, in their time, no acknowledged responsibility of governments for the general state of the economy.

1,022. Between the Convention discussions of 1891 and their resumption in 1897, an economic depression spread throughout the colonies. The fact of the depression was accepted and no colonial parliament was charged with the task of taking corrective action. Indeed, in the 1890's, the factors affecting the state of the economy were not sufficiently well understood to enable any government to pursue an economic policy to counteract a depression. Consequently, although the Founders had first-hand experience of the effects of an economic depression, no conscious effort was devoted to the powers needed to obtain and maintain a stable economy or to divide economic powers between the Commonwealth and the States.

1,023. The view seems to have been fairly generally held throughout the Convention discussions that the functions to be entrusted to the forthcoming Commonwealth Parliament were such that the annual cost of the Commonwealth would be very small—"less than the price of a dog licence per head of population of the States" as it was observed. So far as economic matters are concerned, it is broadly true that the Commonwealth was expected to collect revenue and, after deducting its modest running costs, to divide the balance amongst the States. The possibility of the Commonwealth using its taxing powers for intrinsically economic purposes was not considered.

1,024. Apart from the taxing power, probably the most important Commonwealth economic power is the banking power. When banking was first proposed as a subject of Commonwealth power in the Convention of 1891, it provoked little discussion or examination of its possible content. One of the few matters raised was whether the Commonwealth could itself engage in the business of banking. The Debates record the following discussion:—

> Colonel Smith: I should like to ask the hon. member, Sir Samuel Griffith, if the word "banking" covers the possibility of establishing a bank for the commonwealth?
>
> Sir Samuel Griffith: I should think not!
>
> —(*Convention Debates*, Sydney, 1891, at page 684.)

In 1897, the representatives of the colonies were mainly concerned to exclude from the power State banking, which was not excluded under the 1891 draft. The Founders did not discuss the economic implications of the banking power although they were, no doubt, well aware of the importance of the banking system as a source of credit.

1,025. In considering the question of increased Commonwealth economic powers, therefore, the problem is not one of transferring specific powers to the Commonwealth consciously left with the States in the original Constitution, but of allocating between the Commonwealth and the States the powers necessary to fulfill a responsibility of government which did not exist in 1900.

THE COMMONWEALTH'S ASSUMPTION OF ECONOMIC RESPONSIBILITY.

1,026. Since the Constitution was written, it has become generally accepted that governments have a responsibility for the state of the economy. This is true, not only in Australia, but in all modern democratic countries. The development of economic understanding since Federation has made the factors determining the level of employment and affecting the value of the currency sufficiently clear for governments to plan effective action to maintain a high level of employment and a stable currency.

Emergence of a National Economy.

1,027. In Australia, it has become a recognized task of the Commonwealth and not the States to deal with matters which determine the climate of economic activity. One reason for this is the rapid growth of the Australian economy since Federation. Tremendous structural changes have occurred in Australian industry which have far outstripped the capacity of individual States to take effective action. For example, public companies exercise a significant influence on the general level of demand, especially for capital goods, and their spheres of activity increasingly tend to spread beyond the limits of one State. The impact of company activities on the economy may be such as to require regulation which must obviously be on a national basis in order to fit into the general pattern of economic policy.

1,028. As the Committee has had cause to mention frequently in this Report, from the six separate colonial economies there has emerged, in the present century, a national integrated economy. Advances in transport and communications, the development of industries and specialized economic activities, the growth of the population and numerous other factors, including external ones, such as the establishment and development of markets for Australian goods overseas and the stimulus to industrial development resulting from two world wars, have tended to make the States interdependent, and, from an economic point of view, the Australian economy can only be regarded as a single unit. There has grown from the economic matrix constituted by the dissolution of separate State economies a most complex fabric of trade and business in which there is an interdependence between the many activities constituting the whole economy and between these activities and the climate of the economy as a whole.

1,029. The limits of economic progress are, at this stage of Australia's national development, indeterminable. However, some indication of the magnitude of change in the economy is that the increase in the national product between the last census year 1954 and 1965 is not likely to be less than 60 per cent. and could be as high as 80 per cent.

1,030. The Commonwealth's assumption of economic responsibility is attributable also to the many other factors which have assisted in promoting the rapid rise of the country to nationhood. These factors include Australia's participation in two world wars with the nation-wide planning and control which they entailed and the introduction of major programmes for such matters as immigration, public works, scientific and industrial research and the exploitation of mineral resources in the interests of national development. Moreover, the Commonwealth is the financially ascendant partner in the Federation. The sources of revenue at its disposal are far greater than the sources of revenue open to the States. Under section 96 of the Constitution, the Commonwealth makes grants of financial assistance to the States. Again, under the terms of the Financial Agreement with the States, the Commonwealth took over State debts and borrows money on behalf of the States.

Aggregate Expenditure.

1,031. The Committee agrees fully with the view put to it by Dr. H. C. Coombs, Governor of the Commonwealth Bank of Australia, that it is now a recognized responsibility of Commonwealth governments that their economic policies should be concerned with the level and balance of aggregate expenditure within the economy. Dr. Coombs advised the Committee that, summarily expressed, aggregate expenditure should be—

(a) sufficient to maintain full employment;
(b) not so great as to involve—
  (i) balance of payments difficulties;
  (ii) cost increases relative to international competitors; or
  (iii) rising prices;
(c) so balanced as to give a healthy relationship between the various inter-dependent sectors of the economy.

National Crises.

1,032. Twice since Federation there have been war-caused national crises. In two world wars the Commonwealth has had to undertake many tasks of government, including the regulation of business activities, normally beyond its legislative powers. During the last war, the Commonwealth intervened directly in a wide range of economic matters. For example, it became responsible for organizing the manpower and material sources of industry on a war footing; it regulated the production and disposal of goods, controlled investment and fixed prices. The Commonwealth continued to regulate economic activities under its defence powers in the course of transition from a war-time economy to a peace-time economy in the years immediately following the cessation of hostilities.

1,033. National crises do not, however, arise only by reason of the threat of external aggression. Since the severe economic depression in the early 1930's, it has been only too plain that internal economic crises of a national character can occur affecting the welfare of every member of the community. It is the Committee's view that economic depressions, no less than war, may be national catastrophes. The rapid development of the post-war economy carries with it a continued threat of inflation which, if unrestrained, could have quite disastrous consequences. For that matter, a country in the throes of a chronic economic recession is generally weaker in world affairs and probably incurs a greater risk of being the victim of various types of aggression than at any other time. Yet, as the Committee has pointed out, the Constitution does not vest general economic powers in the Commonwealth Parliament.

National Development.

1,034. Australia's national development requires, among other things, a vast programme of public works to provide the facilities, such as power, water and communications, without which the industry cannot continue to expand. The provision of public works, along with the capital equipment programmes of private industries, continually taxes the productive capacity of the Australian economy.

1,035. It is important, too, in the programme of national development, that there should be a general confidence in the future of Australia among investors, both at home and abroad, and international lending agencies. Economic vicissitudes impair or destroy confidence.

COMMONWEALTH POST-WAR ECONOMIC POLICY.

1,036. Up to the present, in the post-war period, the Commonwealth has been compelled to rely on a limited range of constitutional powers in connexion with the maintenance and promotion of economic stability. The Commonwealth has been confined to a choice of means none of which might be the most appropriate way of dealing with a particular situation.

Post-war Boom.

1,037. In the early post-war years, labour and material shortages retarded both the replacement of exhausted facilities, plant and equipment and the rate of industrial expansion. Efforts of the Commonwealth Government in this period were devoted to meeting these problems. For example, the early introduction of a substantial migration programme gradually alleviated the manpower shortage in heavy industry. Meanwhile, strong competition developed in the capital market.

1,038. As economic activity continued at a high level, stimulated by substantial private investment and public works programmes, and the value of exports increased, particularly on account of favourable wool prices, prices rose sharply. The 1950-51 budget embodied a scheme for withholding temporarily part of the high receipts for wool sales, to mitigate their effects on the economy. In 1951, there was a rapid increase in inflation and the Government imposed some checks, including the re-introduction of a rigid control of capital issues. An unsettled international situation, including the war in Korea, made it possible for the Commonwealth to use its defence powers for the purpose of maintaining its control over capital issues. Other measures taken included provision in the budget of 1951-52 for increased direct and indirect taxes. The Commonwealth also undertook to provide moneys out of an expected budget surplus to finance State works if sufficient loan moneys were not forthcoming.

Recession in 1951-52.

1,039. Post-war inflationary trends drew to a halt in 1951-52 largely as a result of external factors. Boom conditions, further fostered by the Korean War, ended and a recession developed. There was a particularly heavy fall in the value of exports, in which lower wool prices were a major factor. At the same time, an unprecedented level of imports was flooding the country. The value of imports in 1951-52 was over £300 million more than in the previous year and almost double that of 1949-50. In 1952, there was increased unemployment. The budget for 1952-53 provided for reduced taxation. The Government also made substantial cuts in the immigration programme and imposed severe import restrictions to correct the adverse balance of trade. In the field of banking, although rates of interest on deposits and overdrafts were increased, the banks were encouraged to expand the scale of their lending in some directions with a view to providing an internal stimulus to the economy. The central bank made large releases from the special accounts held with it by the trading banks. Towards the end of 1952, the Prime Minister attended the British Commonwealth Economic Conference in London. The Conference was concerned with the need to curb inflation and rises in the cost of living in order to encourage sound economic development and to extend a multilateral trade and payment system over the widest possible area.

1,040. Subsequent improvements in the economic situation were recognized in the form of reductions in direct and indirect taxation and relief from import restrictions. However, the balance of payments position deteriorated once more towards the end of 1954 owing to increased demands for imports and there was a heavy deficit in overseas trading as at June, 1955. Moreover, there was a rapid growth in almost all classes of expenditure and, in 1955, labour shortages occurred and there were unmistakable signs of inflation. Bank lending policy was tightened and new import restrictions were imposed.

Checks to Inflation in 1956.

1,041. In spite of the action taken, inflationary tendencies persisted. There was, for example, a dramatic increase in hire-purchase finance which became a major factor in the demand for motor vehicles and, to a lesser extent, for durable consumer goods, and people tended to invest a greater proportion of their money in company securities rather than hold deposits with banks. Business interests relied increasingly on the market for their capital funds. A still further decline in international reserves occurred. Faced with aggressive competition, loan raisings for both governmental and semi-governmental authorities became increasingly difficult. For example, in December, 1955, a modest Commonwealth cash loan was undersubscribed.

1,042. In 1956, the Commonwealth sought to re-adjust the level of economic activity by the adoption of severe fiscal measures.

1,043. A supplementary budget, aimed at both investment and consumption spending, substantially increased company taxation and sales tax and customs and excise duties on many goods. In banking, the interest rate on fixed deposits and overdrafts was again increased. The imposition of more substantial cuts in imports followed. The Commonwealth also convened a special Premiers' Conference for the purpose of obtaining agreement on the use of State legal powers to counter inflationary trends. The Conference was not, however, successful.

1,044. After 1956, an improvement in the economic situation resulted in the easing of some of the burdens and restrictions imposed in that year, especially in regard to the limitation of imports. On the other hand, overseas trading conditions have not been particularly favourable in most recent years and, in 1957, drought conditions in the eastern States reduced the production of many primary products. There was an adverse balance of payments again in 1957-58 after a favourable balance in the previous year. An adverse trading balance of £187,000,000 occurred in 1958-59, a figure which reflected lower export prices for some major primary products. In 1958-59, most classes of domestic expenditure increased.

State of the Economy in 1959.

1,045. An idea of the Commonwealth's responsibilities for the state of the economy and the measures taken recently in the discharge of the responsibility, may be gained from the official survey entitled "The Australian Economy, 1959".

1,046. The survey dealt fully with the threat to expansion which is described as follows:—

By early 1958 it appeared that continuance of economic growth in Australia stood in some danger. Drought had cut back rural production and the prices of most exports had fallen; in consequence, export earnings and farm income were bound to be considerably lower than in the previous year; our overseas reserves had already begun to fall. The danger signs pointed two ways. If the loss of income, so far concentrated on the rural and mining industries, were to continue, and perhaps become larger, its effects could spread throughout the economy. Demand for the products of other industries would fall; labour and plant would be thrown idle and the confidence of investors contemplating new investment would be shaken. On the other hand, if export earnings and other external receipts were, for any length of time, to fall short of the payments we have to make abroad and our reserves dwindled, we would face again the problem of obtaining sufficient imports to meet essential needs, including those of industry. Although imports had risen during 1957, they were still only high enough to provide industry with its minimum requirements of materials, components and plant and commerce with restricted quotas of finished goods. Expansion of the economy would require more imports, not less; a reduction of imports therefore could not fail to produce disruption, increased costs, a slowing-down of expansion in important sectors and, quite possibly, a curtailment of existing activity.

1,047. The survey went on to refer to signs of unemployment. It observed—

The appearance, in January and February, 1958, of unemployment greater than usual was a source of anxiety even though the unemployment was localized and much influenced by drought. Did this portend an inability to provide employment for a labour force increasing rapidly through the addition of migrants and young people leaving school? The position was exceedingly difficult to interpret and there was much debate about it. At least the issue brought pointed notice to a critical aspect. It was not simply a matter of maintaining a constant level of internal activity and employment, but rather of keeping up a rate of progress—this in face of weakened demand in an important part of the economy.

1,048. After noting that by the end of 1958 there was still little sign of substantial recovery in the economic situation abroad and that the wool market had not improved, the survey referred to the policy which the Commonwealth decided to pursue—

The broad course for policy to follow was, however, clear enough. At the end of June our international reserves still stood at £525 million; we could, therefore, stand an external payments deficiency for some time yet, pending an improvement in world trading conditions. Official policy in most countries was bent on promoting revival, which could not be delayed indefinitely. Clearly, the main thing was to keep expansion moving in Australia, so long as measures did not run to extremes and exacerbate external difficulties by inflating demand for imports. Apart from other considerations, there was a strong case for doing this on balance of payments grounds. The effort to build up our export potential could not be allowed to flag, as it might well do if stagnation overtook industry. *Moreover, capital inflow had become more and more important in our balance of payments reckoning,* and if we were to continue to attract capital at a high rate the assurance of continuous expansion was necessary.

1,049. Then followed a statement of the Government's attitude to immigration—

At this stage, an important and typical issue of principle turned upon the migration target for 1958-59. On a short view, with apprehensions in some quarters as to our capacity to employ more labour, a case might have been made for reducing the target. But there were powerful considerations against this. Migration had become one of the fundamentals of our growth. A great many plans in business and industry now depended on the expectation of a steady population increase and in this, of course, migration was a major element. To cut the migration programme would have struck at those expectations and perhaps caused many investors to revise their forward plans. It could have been taken, too, as an admission by the Government that it lacked confidence in the future—this at a time when confidence was vital. For these well-founded reasons, therefore, the Government decided to maintain the target at a gross intake of 115,000 a year.

1,050. Finally, there was a reference to monetary policy and the Commonwealth budget. The survey read—

. . . the Commonwealth Budget for 1958-59 provided for a large cash deficit and monetary policy was directed towards a further increase in bank lending during the year. Government policy thus sought to provide a general stimulus to activity and was predicated on the belief that overseas conditions would take a turn for the better at a later stage in the financial year.

1,051. The survey also gave a more detailed account of the measures taken in support of mitigating the effects of the drop in income derived from abroad, including tax reductions, increased public expenditure, an additional grant to the States and a more extensive governmental borrowing programme.

1,052. In 1959, the Government raised the ceiling for import licensing and also increased its migration target.

1,053. In his budget speech in August, 1959, the Federal Treasurer reported on the state of the economy. After referring to the factors, including economic, political, social and industrial stability, which should help to achieve a rising national product, improve living standards and provide the additional capital facilities which expansion required, the Treasurer said—

. But there will be the same problems as in the past of keeping up an adequate momentum of growth without trying to run faster than our legs will carry us and of securing full employment of resources and the most efficient distribution of resources. dence on the part of all concerned with the expansion of

For these requirements, confidence is vital—confi ly everyone. Confidence here relies on a basic assurance our economy; and that applies, in some degree, to practica/ that steady growth will go on. . . . ces of labour, fully employed is, of course, not only a

To keep all resources, and particularly our resour/ social obligation but also a vital economic need.

Conclusions as to Post-war Economic Experience.

1,054. The economic history of Australia over the past fourteen years clearly shows how the forces at work have moulded Australia into a single economic unit and have made the Commonwealth responsible for the health of the economy.

1,055. The Committee's summary account of post-war Federal economic action also demonstrates that the Commonwealth has had to grapple with the broad problem of maintaining stability and promoting national development from a position of constitutional weakness. Fiscal action in the form of variation of the rates and the incidence of direct and indirect taxation, import restrictions, the pursuit of a monetary policy through the powers with respect to banking, limitation and expansion of public borrowing and public works, and variations in the immigration programme

have typified the types of activity to which the Commonwealth has turned in the light of its circumscribed constitutional powers. The constitutional powers, in the Committee's opinion, fail to match the responsibility which the Commonwealth is called upon to discharge.

1,056. Post-war economic experience has also emphasized the extent to which the shortage of capital retards the rate of national development and economic progress, notwithstanding a steady flow of investment in the post-war years. Public and private borrowing have competed strongly for available sources of credit, not infrequently with the result that basic governmental public works programmes have had to be curtailed or alternative means found of financing them. The Commonwealth Parliament has resorted to financing its public works out of revenue. Australia has become an extensive borrower from the International Bank for Reconstruction and Development.

CHANGING PATTERN OF FINANCIAL INSTITUTIONS.

1,057. Traditionally, the banking power has come to be regarded as the sheet anchor of Federal credit policy.

1,058. Business enterprise, whether corporate or not, obtains finance for its operations from two main sources. First, there is internal finance which includes, for example, the undistributed profits of companies and depreciation reserves. Secondly, there is finance obtained from circles external to the business, which can conveniently be called " credit " in this Report.

1,059. The Commonwealth Constitution allotted to the Parliament a power over banking at a time when the banks were the dominant source of credit. Even up to the outbreak of World War II., the banks were the principal source of credit.

1,060. However, since 1900, there has been a striking development in the institutional framework of the Australian financial system. Specialized institutions have emerged which have narrowed the field occupied by the traditional banking structure. The domestic capital market has developed with issuing houses, stronger underwriters and stock exchanges making possible the wider participation of the public in the direct provision of capital. A rapid diversification of the Australian capital market has occurred in recent years as various methods of obtaining credit have been explored. Thus, shares and debentures are floated on the stock exchange and business accepts deposits from, or issues notes to, the public. New capital raisings by Australian companies listed on Australia's stock exchanges have, in recent years, shown the trend in private, as distinct from government, finance. Details are as follows:—

Year.	Listed Companies.	
	Share Capital (ordinary and preferential).	Debentures, registered notes and deposits.
	£ million.	£ million.
1952–53	26.5	11.9(*a*)
1953–54	42.6	28.3(*a*)
1954–55	59.7	27.5(*a*)
1955–56	59.2	50.0(*a*)
1956–57	43.7	51.7(*a*)
1957–58	35.3	77.9
1958–59	47.9(*b*)	139.6(*b*)

(*a*) Estimated. (*b*) Preliminary estimates.

1,061. Another factor in the change has been the rapid growth in hire-purchase finance leading to the emergence of hire-purchase finance companies capable of exercising a significant and growing influence on the general credit situation. Yet another factor has been the increase in housing loans by savings banks and building societies. Other lenders are the life assurance and pastoral finance companies.

1,062. The changes to which the Committee has referred have resulted in a considerable decline in the proportion of total credit which the trading banks provide. Figures given by Professor H. W. Arndt, in a lecture entitled " The Banks and the Capital Market ", delivered at the University of Queensland in September, 1959, show that for the five pre-war years ended June, 1939, the trading banks provided about 56 per cent. of all credit. For the five years ended June, 1958, however, they provided only 21 per cent. of all credit. For the same two periods, new issues on the stock exchange have jumped from 18 per cent. to 36 per cent. of all credit issued whilst hire-purchase finance has risen from 2 per cent. to 16 per cent. of total credit.

1,063. It is evident that these developments have drastically reduced the Commonwealth's control of credit through the banking power. The task of restraining excessive expenditure in the earlier years of the present decade was undoubtedly made more difficult because the public invested a greater part of their money directly rather than deposit with the banks and by the willingness of business to raise money from the investing public by way of deposits. debentures, notes and other similar means.

1,064. It is less obvious, but nonetheless true, that developments within the banking system itself have reduced the effectiveness of the Commonwealth banking power. First, there has been the entry of privately owned banks into savings banking, formerly the preserve of Commonwealth and State publicly owned enterprise. Secondly, there has been some tendency for State governments to undertake commercial banking with rural and industrial banks. Thirdly, faced with competition from the expanding sources of credit, trading banks have sought themselves to provide non-bank sources of credit. Evidence is the purchase by privately owned banks of effectively controlling interests in major hire-purchase finance companies, the provision by banks of various agency services and their entry into trust development. Under section 28 of the *Banking Act* 1945, the Commonwealth exercised control over the portfolios of securities held by the trading banks, but the section was repealed in 1953.

1,065. In all probability, internal finance accounts for around two-thirds of all finance available to business and over this the Commonwealth has no direct control. The remainder is credit, and, as the Committee has stated, the Commonwealth now controls only a small and declining proportion of it through the banking power. The banks provide only about 20 per cent. to 25 per cent. of all credit. Of course, the banks remain important as marginal providers of credit, shown by the fact that bank credit fluctuates more than other sources of credit. For all this, Commonwealth control of credit has been whittled away at a time when the Commonwealth has responsibility for a high level of employment, a smoothly and rapidly expanding economy and for balance of payments equilibrium. An adjustment of the position by way of constitutional alteration is, in the opinion of the Committee, essential.

Commonwealth Credit Policy and the State of the Economy.

1,066. The Committee has mentioned that the recognized responsibilities of the Commonwealth now make it necessary that economic policy should concern itself with the level and balance of aggregate expenditure within the economy. Aggregate expenditure is the result of the decisions of all households, businesses and public authorities. It should be sufficient to maintain full employment. It should not, however, be so high as to cause balance of payments difficulties, cost increases and rising prices. It is, therefore, necessary that the Commonwealth Parliament should be able to exercise a stimulating or restraining influence on the magnitude of expenditure in the Australian economy. In this connexion, the Committee has already dealt summarily with the efforts which the Commonwealth has made since the war to limit inflation.

Consequences of Inflation.

1,067. It is scarcely necessary to spell out in any detail the reasons why the Commonwealth should be anxious to avoid inflation. Inflation involves the danger that some groups in the community will lose in the battle for distributive shares of the national income. There is also the danger that inflation may get so far out of hand as to destroy the fabric of the Australian monetary system thus causing loss of confidence in both investors and consumers, the impairment of personal savings and industrial unrest. Inflation also involves the danger that competing demands for resources will cause bottle-necks in production which in turn will reduce productivity and could, in some cases, cause structural unemployment, and later, more general unemployment. Inflation also endangers the stability of the balance of payments because an excess of home demand causes an inflationary spill-over of demand into imports, if imports are not controlled, and because a rise in the level of costs in Australia at a greater rate than overseas will undermine our attempt to increase exports, particularly of manufactured goods—an attempt which must succeed if Australia is to remain, in the long run, solvent in international trade.

1,068. In short, only in conditions in which reasonably full employment and freedom from inflation are preserved can individuals and businesses formulate their plans without their judgment being impaired by the distorting effects of inflationary or, for that matter, deflationary, influences. The skill, judgment and capacity of those engaged in agriculture, industry and commerce can be effectively mobilized for the development of the Australian economy only if they can feel assured of reasonable stability in the factors which determine or influence the economic environment in which they work.

The Supply of Credit and Inflation.

1,069. Clearly, in the Committee's view, the Commonwealth should be able to prevent excessive demands upon the available supply of resources from causing a resurgence of inflation. One important way of achieving this objective is to regulate the amount of credit available to potential borrowers.

1,070. Again, the Commonwealth should be in a position to ensure that credit is allocated in a way which will facilitate the harmonious expansion of the economy without bottle-necks or structural dislocations. For example, just as the Commonwealth has obtained the employment of migrants in the steel industry because the expansion of the steel industry is basic to the economy, so also the Commonwealth should have the power and responsibility, to be exercised in the national interest, of ensuring that the necessary supply of credit is available to basic industries and for the construction and maintenance of public utilities, such as those providing power, rather than that

undertakings of this description should suffer by reason of the diversion of investment funds into other channels of less national importance. Because of the pressure of private industry on available investment funds and resources, basic public investment, for instance in power, water supply and transport, has been relatively neglected over the years to the extent that private industry itself is beginning to find its activities hampered because of inadequate growth of these services.

1,071. Another aspect of competing demands for investment moneys has been that, in some branches of commerce, industrial undertakings have been able to offer attractive rates of interest for deposits, or on the securities which they issue, tending to make the cost of government borrowing greater. One of the reasons why the Commonwealth and the States entered into the Financial Agreement in 1927 was that competitive borrowing by the States and the Commonwealth was forcing up the rate of interest for loan moneys both in Australia and on the London market.

1,072. There are other reasons in support of increased Commonwealth power over credit, for example, increased power would ease the excessive strain now thrown upon the Federal budget, which, as the Committee has already indicated, has to take so much of the burden of achieving economic objectives.

1,073. Some companies, such as hire-purchase finance companies have, in recent years, become great repositories of private moneys. A question of public interest is involved in the scale of their activities. While, in normal circumstances, the finance companies have no difficulty in meeting their liabilities or the needs of depositors or lenders who withdraw their funds, there could be no doubt that, if a general financial difficulty arose, their ability to do so would depend upon their capacity to borrow from the banking system. Commonwealth power over credit should be sufficiently wide to enable legislation for the protection of those who entrust their moneys to finance corporations.

Capital Issues Control: Experience in Australia and other Countries.

1,074. Dr. H. C. Coombs also stressed the need for more extensive Commonwealth legislative power over credit in order to close the gaps and uncertainties in present Commonwealth constitutional power which can render a sound credit policy ineffective. He made the interesting suggestion that one method of achieving the objective would be to amend section 51 (xii.) of the Constitution which now reads "Currency, coinage, and legal tender:" to read "Currency, foreign exchange, coinage, paper money, legal tender, and the maintenance of stability in money and currency:". As Dr. Coombs said, by way of explanation of the phrase "maintenance of stability in money and currency"—

> The phrase . . . is less a subject-matter of legislation than a purpose of legislation—similar in effect to the defence power. Indeed, defence of the monetary system has much in common with military defence in that it is impossible to forecast with certainty the range of legislative action which may be necessary to effective defence, and the phrase is included to give elasticity to the powers of the Commonwealth to the extent necessary to defend the monetary system. Insofar as legislative action taken did not fall also under another head of Commonwealth legislative power, its validity would be subject to judicial test by reference to purpose.

The Committee felt unable to recommend an amendment in such general terms as the one proposed.

1,075. Credit policy stems from the control of capital issues, that is to say, control of the various means by which companies may obtain capital funds. The means include the subscription of share capital, borrowing on deposit and the issue of debentures and notes and other instruments either on the security of company assets or unsecured.

1,076. An extensive experience of capital issues control has been built up both in overseas countries and Australia.

1,077. For the purpose of channelling scarce funds into more urgent forms of investment and to prevent congestion in the capital market, main western European countries have, since the war, imposed direct control over new share issues and borrowings outside their banking systems. This has been the picture even though the economy of western Europe, as a whole, has continued to be predominantly of a private enterprise character and the greater part of investment since the war has come from the private sector.

1,078. In the United Kingdom, formal governmental intervention in the distribution of new investment dates from 1936 when the Foreign Transactions (Advisory) Committee was established to advise the Treasury on matters concerning overseas issues of capital on the London market. During the last world war, there was an extensive control in the United Kingdom over capital raisings and borrowings under the Defence (Finance) Regulations administered with the advice of a Capital Issues Committee. The war-time control was perpetuated after the war by the Borrowing (Control and Guarantees) Act, 1946. The Capital Issues Committee comprises men of experience in commerce, industry or finance who consider applications to raise loans or issue capital above a specified amount. The Committee, which is entirely independent, tenders its advice to the Treasury. Strict observance of priorities obtained until 1953 when it was relaxed for some months but control was then resumed and tightened in some respects as part of the United Kingdom Government's efforts to reduce private borrowing. Early in 1958, there was an almost complete relaxation of control as part of a policy to stimulate the economy. The control is used in the United Kingdom, in other words, according to the needs of the prevailing economic situation.

1,079. In New Zealand, control of capital issues has operated since 1940. In 1952, because of heavy pressure on the capital market, a Capital Issues Committee was established to administer the relevant regulations. The Committee's control extended to the formation of new companies; increases in nominal capital; calls on shares or issues of capital, including mortgages and debentures; and the commencement of business in New Zealand by companies incorporated overseas. The Committee was also empowered to fix rates of interest for the issue of debentures and preference shares and for mortgages subject to its control. The New Zealand Royal Commission on Monetary, Banking and Credit Systems, which sat in 1956, reported that, from details supplied to it of the applications declined and deferred, it appeared that the Committee had performed a useful task in helping to restrain the amount of investment in the private sector of the economy at a time when the available physical resources had been subjected to heavy pressure.

1,080. During the second world war, the Commonwealth maintained a comprehensive capital issues control under the National Security (Capital Issues) Regulations made under the *National Security Act* 1939. The war-time control continued for some time after the war under the authority of the *Defence (Transitional Provisions) Act* 1946 as amended. In 1951, during the Korean crisis and at a time when the international situation appeared particularly ominous, control of capital issues was re-introduced in an effort to reduce inflationary pressures, thus providing an interesting illustration of the connexion between the general climate of the economy and defence preparations. In August, 1951, the National Security (Capital Issues) Regulations were superseded by the Defence Preparations (Capital Issues) Regulations made under the *Defence Preparations Act* 1951. Regulation 6 prohibited companies from making, without the consent of the Treasurer, an issue of authorized capital if the amount of authorized capital issued by the company during the preceding two years, together with outstanding borrowings during the same period, exceeded £10,000. Regulation 10 prohibited, without the Treasurer's consent, the issue or giving of certain bonds, debentures, debenture stock, inscribed stock, mortgages or charges.

1,081. The Defence Preparations Act, to the extent to which it purported to authorize the regulations, and the regulations themselves, were upheld in the High Court in *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) 87 C.L.R. 177, as laws with respect to defence within the meaning of section 51 (vi.) of the Constitution. The Commonwealth control being based, however, on the defence power could not continue indefinitely and with the expiration of the Defence Preparations Act on 31st December, 1953, the control of capital issues ceased.

1,082. The effectiveness of capital issues control as a means of stabilizing the economy and promoting its expansion is no longer open to doubt. It is a type of control which can be made to work effectively and relatively unobstrusively. Although the constitutional power, which the Committee proposes should be vested in the Commonwealth, would have a constant content, the extent to which it would be used to regulate the flow of investment would, of course, depend upon the state of the economy and the factors influencing the economy. At some periods, as for example, perhaps, at present, the control, if exercised at all, would be largely formal but, at others, it might become more stringent according to the economic situation. The Committee is mindful that frequent small adjustments to preserve or restore balance in the economy are almost certainly better than allowing positions to develop in which drastic action has to be invoked.

Recommendation as to Capital Issues.

1,083. The Committee's recommendation as to capital issues is intended to cover all the ways in which companies may raise capital funds. It should cover issues of subscribed capital in the form of shares of various kinds and debentures. It should include borrowings by companies whether on the security of company assets or not. The power has to be widely expressed because of the many avenues now open to business to raise capital funds. As the Committee has pointed out, in paragraph 1,060, whereas, at one time, companies mainly raised new money by the issue of shares, at the present time, other forms of raising capital, such as the issue of debentures or notes or the acceptance of deposits, now exceed the amount of new money raised by share issues.

1,084. The Committee has not been concerned in its recommendation to include the raising of capital by unincorporated business undertakings, such as are carried on by firms, partnerships and individual persons. The Committee believes that its objective would be substantially achieved by confining the application of the proposed capital issues power to corporations which engage or may, at any time, engage in production, trade, commerce or other economic activities. Corporations of this description make by far the greatest demands on the investment market. The Committee is not concerned to bring within power, moreover, corporations of a non-commercial description, such as religious and charitable corporations.

1,085. The Committee also proposes the exclusion from its recommendation of incorporated authorities of a State, including local government authorities. Thus, the financial activities of authorities responsible for the provision of public utilities, including water, electricity, gas, sewerage, harbours, roads, and the transport services, would be outside the scope of the power. The Committee realizes that some corporations created by the law of a State engage in extensive trading activities, but the scale of their activities has not yet been such as to affect materially the state of the economy.

1,086. A further limitation on the proposed Commonwealth power is the exclusion from it of the issue or allotment of capital out of the profits or accumulated reserves of corporations. Although the volume of capital made available to corporations in this way is far greater than capital raised from external sources, the balance of opinion in the Committee was that the substance of the recommended power was adequate without the inclusion of internally raised or issued capital. The purpose of the proposed power is to enable the Commonwealth to regulate the flow of fresh investment. The issue of capital in the form, for example, of bonus shares out of the reserves or assets of a corporation does not involve any approach to the market for new money.

1,087. Accordingly, the Committee has recommended that the Constitution should be amended to provide, in substance, as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to—
  (a) the issue, allotment or subscription of capital; and
  (b) the borrowing of money whether upon security or without security; by corporations which engage, or may engage, in production, trade, commerce or other economic activities.

(2) The power proposed to be vested in the Parliament under sub-paragraph (1) is not to apply to—
  (a) the issue or allotment of capital out of profits or accumulated reserves of corporations; or
  (b) incorporated authorities of a State, including local government authorities.

Consumer Credit.

1,088. The Committee now turns to examine its recommendation that the Constitution should be altered to vest the Commonwealth Parliament with a power to make laws with respect to hire-purchase and other agreements or transactions entered into in connexion with the sale, purchase, hire or encumbrance of goods which involve the making of periodical payments or deferment of payment of the full amount payable.

1,089. Over the past few years, there has been a tremendous increase in the volume of credit available outside the banking system enabling persons to obtain goods for immediate use without first having to pay the full price.

1,090. At present, hire-purchase is the principal form of credit transaction which business uses. It is a transaction in which the ultimate purchaser, on entering into a contract, obtains immediate delivery and use of goods in return for which he pays the owner regular instalments for their hire. On completion of the payments, he becomes the owner of the goods previously hired to him. The owner of the goods has, until the contract is fulfilled, in the case of substantial breach of contract, such as failure to maintain payments, a right to repossess the goods. The hirer may return the goods during their hire. It is common practice for finance companies to enter into hire-purchase transactions with retailers' customers and, for the purpose, the companies usually become owners of the goods by purchasing them from the retailers. Some retailers, however, provide their own hire-purchase facilities.

1,091. There are other forms of credit transactions in use, including hiring contracts, cash orders, conditional bills of sale and instalment purchase or time payment arrangements. All may be classified under the general heading of consumer credit.

1,092. In dealing with capital issues, the Committee referred to the emergence of hire-purchase finance companies in recent years as undertakings which have competed with a considerable amount of success with other businesses and governments for available private investment. Hire-purchase finance companies also influence significantly the general level of expenditure, especially in industries producing durable consumer goods.

Growth in Volume of Hire-purchase Business.

1,093. Growth in hire-purchase finance in the present decade is shown by the following figures of the balances outstanding in Australia on retail agreements financed by hire-purchase finance companies. The figures do not include amounts outstanding under hire-purchase agreements with establishments which both retail and finance the goods. Hire-purchase business so conducted is relatively small:—

As at 30th June.	Total Amount Outstanding.
	£
1953	88,790,000
1954	132,380,000
1955	182,933,000
1956	212,960,000
1957	236,498,000
1958	296,635,000
1959	354,173,000

1,094. About two-thirds of the finance provided by hire-purchase finance companies is for various kinds of motor vehicles and most of the remaining one-third is for household and personal goods, such as refrigerators, radio and television sets and furniture. A relatively small proportion is for the purchase of plant and machinery. In 1957-58, for example, the monthly average of the amounts financed by finance businesses under new hire-purchase agreements in Australia was £19,629,000, of which £13,120,000 was for vehicles, £5,661,000 for household goods and £848,000 for plant and machinery.

1,095. Actually, the amount of hire-purchase finance provided to obtain household goods constitutes only a very minor part of the net income of Australia's households. On the other hand, total hire-purchase finance on new and used motor vehicles is in the vicinity of one-half of the value of all new motor vehicles sold. In the light of the dynamic advances made in hire-purchase finance during the 1950's, however, there could be substantial changes in the extent to which various types of consumer goods are financed by this means.

1,096. As at 30th June, 1958, the total volume of money in the community amounted to some £3,189,000,000 representing £374,000,000 in currency in the hands of the public, £1,518,000,000 in the form of deposits of the public with all cheque-paying banks and £1,297,000,000 by way of deposits with all savings banks. The outstanding balance owing to hire-purchase finance companies alone at the same date was £296,600,000 or equivalent to 9.3 per cent. of the total volume of money. As at 30th June, 1959, the balance owing to hire-purchase finance companies was £354,200,000 representing 10.6 per cent. of the total volume of money, which was £3,353,000,000.

Availability of Consumer Credit and the State of the Economy.

1,097. The growth of credit finance purchasing has, as the Committee has already pointed out, a very significant effect on the general level of expenditure. So far it has had a stimulating effect on the economy generally and been a particular stimulus to the automotive industry and other industries which produce durable consumer goods. Hire-purchase operations are especially potent from the viewpoint of the economy when the rate of growth of funds is accelerated or slowed down.

1,098. Changes in the rate of growth could intensify inflationary or deflationary pressures. The rapid increase in hire-purchase in 1955 and 1956, for example, undoubtedly contributed to the persistent threat of inflation in those years. When inflation looms on the economic horizon, any addition to the supply of credit increases the government's task of maintaining economic equilibrium. When the government is anxious to stimulate the economy because deflationary trends have become obvious, a possible shrinkage in availability of funds for hire-purchase credit could accentuate the difficulties of rectifying the situation. Moreover, the total hire-purchase debt to finance companies could, in the event of an economic recession, such as that experienced in the early 'thirties when unemployment reached grievous proportions, retard the recovery of the economy because household incomes would be directed to the discharge of existing hire-purchase indebtedness rather than to new expenditure which could act as a stimulus to production and to the economy as a whole.

1,099. In other words, hire-purchase finance companies are not only capable of exercising a material influence on the general climate of the economy because they are financing part of the community's spending but also because that spending might prove unstable in adverse economic conditions.

1,100. The trend in consumer credit is for the volume of business to increase and even if hire-purchase should become relatively less popular and other types of transaction, such as time payment, should be used on a larger scale than hitherto, changes in the rate of growth or shifts in the availability of consumer credit in all its forms will produce the same influence on the economy as hire-purchase business is now capable of exerting.

1,101. Accordingly, the Committee considers that the Commonwealth Parliament should have a concurrent legislative power over consumer credit as well as the power with respect to the raising of capital by corporations.

Regulation of Consumer Credit.

1,102. The question arises as to how hire-purchase and other consumer credit transactions can be regulated as part of an integrated economic policy.

1,103. The proposed Commonwealth legislative power over the raising of new capital would enable the national Parliament to regulate the supply of credit available to finance companies and the terms on which it is obtainable. To this extent, therefore, the proposed capital issues power could directly affect the scale of the activities of finance companies.

1,104. A power over consumer credit transactions would operate from the other direction by enabling the making of laws with respect to borrowings from finance companies. Thus, the demand for credit by way of hire-purchase could be affected by the Parliament providing for the determination and variation of minimum deposits, maximum periods of repayment and maximum rates of interest which could be charged under hire-purchase transactions.

1,105. The volume of hire-purchase business has been subject to little in the way of governmental control during the period of its very extensive growth in Australia. Yet experience has shown that the availability of hire-purchase on terms requiring the payment of nominal or very small deposits and extended periods of payments has encouraged some people to buy more than they could afford. More significantly, from the stand-point of the economy, such uncontrolled development of hire-purchase has tended to stimulate production in some industries to unhealthy levels and, by encouraging a high level of consumption expenditure in the developing economy, has added to the threat of inflation which has been a recurrent feature of the post-war economy.

1,106. Fixing of minimum down payments and maximum periods of repayment of outstanding balances under hire-purchase agreements, are effective ways of curbing excessive demand for consumer goods at a time when aggregate expenditure in the country is so high that further inflation may occur Equally, an easing of control, as for example, by way of lowering deposits, may provide a useful stimulus to the economy in the event of a threatened recession.

1,107. In the United States of America, the Board of Governors of the Federal Reserve System controlled consumer instalment credit from 1941 to 1947. Controls were re-imposed in 1948 for nine months and again during the Korean War. For several years, in South Africa, minimum deposits and maximum periods of repayment have been prescribed, mainly as counter-cyclical measures, under the Hire-Purchase Amendment Act, 1954. In the United Kingdom, control through the Board of Trade over hire-purchase and other credit transactions has, at different times since the war, been used both to discourage and encourage consumption according to the over-all state of the economy. From 1952 to 1954, the Board laid down a maximum period of repayment as well as minimum deposits. In 1954, all controls were removed. From 1955 to 1958 minimum deposits, varied according to the type of product, and maximum periods of repayment were again specified in order to restrain consumer expenditure. During 1958, controls were again removed.

1,108. Whilst the Committee contemplates that any action taken under the power with respect to consumer credit would be part of a co-ordinated economic policy and would dovetail with action taken under the proposed power over the raising of new capital, the power over consumer credit could also operate independently of any action to restrain or regulate the distribution of new capital investment. Thus, the power could be used to restrict demand for hire-purchase facilities even though hire-purchase finance companies were not experiencing any shortage of capital funds.

1,109. The Committee has directed its observations to hire-purchase because this is the principal form of consumer credit offering to-day. As the Committee has indicated, however, there are many possible means by which the purchase or acquisition of goods may be financed. In general, the Committee's observations are appropriate to other types of credit transactions which need, of course, to be covered by the proposed grant of power if the Commonwealth is to have an effective voice over consumer credit.

1,110. Although, in discussing its recommendation, the Committee has so far been mainly concerned with the need to regulate consumer credit as part of an integrated economic policy aimed at stability and a high level of employment, it believes that the interests of consumers also justify the Commonwealth having the power it proposes.

1,111. It seems to the Committee that there is a good deal of misconception about the contribution which the availability of hire-purchase and other forms of consumer credit makes to Australia's households. In the long run, people do not necessarily obtain more goods because they have credit facilities available to them; indeed, it may be said that they could buy fewer goods because of the price that they have to pay in the form of interest and other charges in order to obtain credit. Again, superficially attractive hire-purchase terms, such as nominal deposits on motor cars and major household items, undoubtedly induce some people to buy at a greater level than they can afford unless they curtail their expenditure in other directions.

1,112. On the other hand, hire-purchase is for some a form of compulsory saving. Undoubtedly, consumer credit transactions make it possible for people to obtain the immediate use of goods without having to wait until they can afford to pay cash for them and, by so doing, it may also permit income to be applied for other purposes in the meantime.

1,113. The Committee acknowledges that consumer credit has an accepted place in the present-day Australian economy. It also believes that the imposition of minimum deposits and maximum periods of repayment, as two forms of regulation of consumer credit, should ultimately serve to protect consumers against excessive expenditure on some forms of personal property. From time to time, protests are voiced publicly about excessive charges imposed in connexion with the provision of consumer credit, although there is evidence that a substantial section of the public has been fairly insensitive to the level of interest charged by hire-purchase houses. It is, however, in the interest of consumers that rates of interest and other charges should be equitable. Under the terms of the Committee's recommendation, the Commonwealth would be able to prescribe maximum rates of interest to be charged on credit transactions in connexion with the purchase or acquisition of goods.

1,114. There is nothing to prevent the States from exercising their constitutional powers and regulating consumer credit in the manner which the Committee has mentioned. However, experience has also shown how difficult it is for the States to reach agreement on, and maintain, any extensive

policy of regulation, and the failure of only one State to agree with other States could lead to a breakdown of purposeful governmental action. Because of the ease with which credit transactions can be conducted on an interstate basis, it is scarcely possible for States, acting otherwise than in concert, to achieve effective control.

1,115. In any case, the proposed powers over new capital raisings and consumer credit receive their primary justification as economic powers which the Commonwealth should be able to exercise, as the occasion requires, in the interests of achieving an integrated economic policy with a high level of employment and free from serious inflationary or deflationary influences. This is a national responsibility which cannot be discharged through the individual policies of six States.

Recommendation as to Consumer Credit.

1,116. Accordingly, the Committee has recommended that the Constitution should be amended by vesting the Commonwealth Parliament with a power to make laws with respect to hire-purchase and other agreements or transactions entered into in connexion with the sale, purchase, hire or encumbrance of goods which involve the making of periodical payments or deferment of payment of the full amount payable.

Interest Rates in connexion with Loans secured by Mortgage of Land.

1,117. The Committee's remaining recommendation on economic matters is that the Commonwealth Parliament should have power to make laws with respect to rates of interest and other charges payable in connexion with loans obtained upon the mortgage or other security of land.

Rates of Interest and the Production of Goods and Services.

1,118. The rate of interest on money borrowed in connexion with the production of goods and services can be a determining factor in the scale and success of the economic activities of the borrower. Much borrowing takes place upon the security of real property of the borrower.

1,119. Rural industries, for example, rely heavily on the provision of credit and primary producers are substantial borrowers from banks. According to statistics which the Commonwealth Bank of Australia publishes, as at the end of December, 1958, advances of the major trading banks to borrowers in Australia engaged in the primary industries amounted to £231,500,000 out of total bank advances of £924,100,000 to resident borrowers. For the most part, moneys lent to primary producers become a charge on their holdings.

1,120. The Commonwealth may, under its banking power, regulate the rates of interest which the trading banks charge. However, extensive borrowing takes place outside the banking system. For example, as at December, 1958, rural advances of the major pastoral finance companies in Australia amounted to £97,800,000.

1,121. The emergence of specialized financial institutions has, as the Committee has already had cause to mention in this Chapter, been one of the prominent features of Australian economic development in the present century. It has brought about a relative shrinkage in the role of the banking power at a time when the Commonwealth's economic responsibilities have increased. The present position where bank rates can be regulated but not the charges of other financial institutions is, in the Committee's view, also quite illogical. The reputations of the major lending institutions are beyond question but, as the scale of lending for productive purposes increases and the shortage of capital in Australia continues, some business enterprises and individual persons will find that they are able to charge very high rates of interest compared with bank rates. This state of affairs can also become reflected in higher costs of production with consequent disturbing effects on the level and balance of aggregate expenditure. It is consistent with the Commonwealth's increased responsibilities that loans secured by charge upon real property should be the subject of the national Parliament's legislative power irrespective of the description of the lender.

Construction of Dwellings.

1,122. Housing is another activity which occasions national interest and, sometimes, concern. Most Australians, at some stage of their lives, have a direct interest in the occupancy of a private dwelling. On the taking of the census in 1954, 92.5 per cent. of the total population lived in private dwellings of various kinds. According to the census, there were 2,343,000 dwellings in Australia and of these 1,475,000 were occupied by their owners or purchasers on instalments. The high proportion of home ownership in Australia is a characteristic which not infrequently occasions comment when comparisons are made with the position in other countries.

1,123. Very few dwellings are completed or purchased without their owners obtaining financial assistance, usually by way of mortgage, and the rate and nature of home building is, therefore, much affected by the availability of finance and the terms of its availability.

1,124. The trading banks are major lenders for building purposes. As at the end of December, 1958, the total advances of the major trading banks in Australia to resident borrowers was, as the Committee has mentioned, £924,100,000. Of this amount, £25,000,000 represented advances to building and housing societies and £89,300,000 was advanced to individual persons for building or purchase of their own homes.

1,125. Potential home owners also look to various other sources, both private and governmental, for funds.

1,126. One of the Commonwealth's contributions to housing is the War Service Homes scheme for the provision of homes for Australian ex-servicemen and their families. Capital expenditure under the scheme was £35,000,000 in 1958-59.

1,127. Under the current Commonwealth and State Housing Agreement, the Commonwealth provides finance to the States for housing projects and advancement to building societies and other approved institutions for lending to private home builders. In 1958-59, total advances to the States were £35,800,000.

1,128. Building societies also feature prominently in home construction. There are about 1,700 terminating and permanent building societies in Australia. Societies are mostly terminating societies with loans made to them guaranteed by State governments.

1,129. Borrowing for housing purposes takes place on a substantial scale outside both the banking system and governmental schemes. For example, new loans granted by life assurance companies in Australia on the mortgage of real estate, have, in recent years, been of the order of £48,000,000 annually. For the quarters ended September, 1958, and December, 1958, new loans granted by the life assurance companies were £13,800,000 and £17,700,000 respectively. Most of the money lent is for housing.

1,130. In addition, moneys are borrowed for housing purposes from miscellaneous sources including finance companies of various kinds and persons who have surplus moneys to invest.

1,131. As the Committee has repeatedly mentioned, Australia suffers from a shortage of capital to meet all demands for capital for nationally important objectives. In the post-war period, housing has been one of the activities which has suffered severely on this account. In these circumstances, there is always a tendency for the rate of interest to rise adding thereby to the financial burden which the home purchaser or constructor has to assume.

1,132. Generally, rates of interest on loans for housing purposes charged by lenders operating outside the banking system are higher than rates of interest which the banks charge. There is, for example, evidence of high cost borrowing by persons eligible to participate in the War Service Homes scheme but who are awaiting finance from that source.

1,133. The Committee considers that it is for the good of the public of Australia that the rates of interest on moneys borrowed on the security of real estate should be reasonable. Adequate housing of the nation is still far from a reality in Australia. Commonwealth action directed against excessive interest charges would make some contribution towards the provision of more adequate housing. As in the case of the other recommendations discussed in this Chapter, the subject is not one which readily lends itself to separate State regulation.

Recommendation as to Rates of Interest.

1,134. Accordingly, the Committee has recommended that the Commonwealth Parliament should have power, concurrently with the States, to make laws with respect to rates of interest and other charges payable in connexion with loans obtained upon the mortgage or other security of land.

1,135. It is to be observed that the proposed constitutional alteration refers to charges in addition to rates of interest. This is because moneys made available to borrowers can be charged against them in various ways not described as interest.

PART FOUR.—OTHER RECOMMENDATIONS.

INTRODUCTION.

1,136. In this Part, the Committee deals with its remaining three recommendations. The subjects are the exemption from section 92 of certain State charges on interstate road transport; the formation of new States, as States of the Commonwealth, out of the territory of existing States; and the required separate State majorities of electors for an alteration of the Constitution under section 128.

1,137. In each case, the Committee's recommendation is primarily concerned to relax a constitutional position which experience since Federation has shown to be too inflexible. The Committee believes its recommendations are more in keeping with the evolution of the Comomnwealth in the twentieth century and yet amply express the concept of Federation.

CHAPTER 20.—INTERSTATE ROAD TRANSPORT.

RECOMMENDATION OF THE COMMITTEE.

1,138. In paragraph 158 of the Report tabled in 1958, the Committee referred to the limitations which section 92 of the Constitution imposed on the power of the State to levy charges in connexion with interstate commercial road transport. The Committee pointed out that, according to the present interpretation of section 92, a State could impose charges that were, in the view of the Court, in the nature of fair recompense for the actual use made of the highways having regard to the wear and tear caused and the cost of maintenance and upkeep of the highways. It appeared, however, that a State could not, in fixing charges, take into account the capital cost of providing new roads or other capital expenditure as distinct from recurrent expenditure incident to the maintenance of roads and other facilities used by interstate road transport.

1,139. The Committee has recommended (1958 Report, paragraph 161) that the Constitution should be altered to authorize a State, notwithstanding section 92 of the Constitution, to impose charges in respect of the carriage interstate by road of persons and goods provided that—

(1) the charges are approved by the Inter-State Commission as being fair and reasonable having regard to the promotion of interstate trade and commerce and the public interest; and

(2) the charges, in their application to road transport, do not discriminate against the carriage of persons or goods interstate.

VALIDITY OF STATE ROAD CHARGES AND LICENSING LEGISLATION.

1,140. For many years, the States have imposed various kinds of charges in connexion with the transport of goods or persons by road across State borders. It was an acknowledged feature of the legislation of some States that control of interstate transport was undertaken in the interests of protecting State owned railways against competition.

1,141. Before World War II., the State Acts survived legal challenge. On one occasion, in 1933, a Victorian Act, which required motor vehicles using the roads of the State in the course of interstate trade and commerce to be registered under the law of the State which required the payment of substantial charges upon registration, was challenged as infringing section 92. A majority of the High Court, however, upheld the legislation in *Willard* v. *Rawson* (1933) 48 C.L.R. 316.

1,142. Two years later, in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189, a majority of the High Court held that a State charge imposed on vehicles engaged in interstate trade calculated at the rate of 3d. per ton of the weight of a vehicle loaded to capacity for each mile travelled within the State, did not contravene section 92.

1,143. In 1936, the Privy Council decided in *James* v. *The Commonwealth* (1936) 55 C.L.R. 1, on appeal from the High Court, that the test by which a law should be judged when subject to challenge based on section 92, was whether the law interfered with the passage of goods passing into or out of a State. Section 92 postulated freedom as at the frontier.

1,144. In Chapter 18 of this Report, the Committee observed that the Privy Council's decision had dramatic effects on Commonwealth and State marketing legislation. The decision did not, however, bring about the downfall of any State road transport legislation.

1,145. In 1937, a year later, in *Riverina Transport Pty. Ltd.* v. *State of Victoria* (1937) 57 C.L.R. 327, the High Court upheld a Victorian Act which provided a discretionary licensing system for the commercial carriage of goods by road interstate.

1,146. The position was, therefore, before the outbreak of World War II., that State transport legislation could validly impose substantial charges, whether in the nature of registration fees or charges related to mileage travelled, on vehicles engaged in interstate trade. Further, the States could make engagement in interstate road transport conditional upon holding a licence which did not issue as a matter of right but which might be granted only after taking into account such matters as public interest and the adequacy of existing transportation services, which would, of course, include the railways which the States operated.

1,147. In 1949, however, the Privy Council in the *Banking Case* (1949) 79 C.L.R. 497, closed an era in the interpretation of section 92 by retiring the test which the Council had enunciated thirteen years before in *James* v. *The Commonwealth*. It substituted a new test for determining whether a law was invalidated by section 92. The criterion was, according to the Privy Council, whether in the first place a measure had a direct as distinct from an indirect effect on interstate trade, commerce and intercourse and if it did, in the second place, whether, in its true character, it operated to impose a restriction on that trade, commerce or intercourse. If it did, it offended against the section. On this view, a restriction which applied, not at State borders but at some prior or subsequent stage of interstate trade, could also offend against the section.

1,148. One result of the decision in the *Banking Case* was to encourage challenges to State transport laws which had for many years enjoyed immunity. Notwithstanding, in 1950, the High Court, in a majority decision, in *McCarter* v. *Brodie* (1950) 80 C.L.R. 432, upheld Victorian transport legislation similar to that which the Court had upheld in the *Riverina Transport Case* in 1937.

1,149. But it was eventually held by the Privy Council in 1954 in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (No. 1) (1954) 93 C.L.R. 1, that the New South Wales State Transport (Co-ordination) Act, 1931-1952, which maintained a discretionary licensing system of motor vehicles engaged in interstate trade, was a direct restraint of interstate trade and contravened section 92. The Privy Council said that none of the transport cases in which the High Court had upheld State legislation could be regarded as having been approved by the Privy Council in either *James* v. *The Commonwealth* or the *Banking Case*. The Council then proceeded to overrule earlier transport decisions including *Gilpin's Case*, the *Riverina Transport Case* and *McCarter* v. *Brodie*.

1,150. The Privy Council's decision in the *Hughes & Vale Case* was a virtual invitation to haulier interests to challenge State Transport Acts which imposed charges on interstate haulage, even though some States made immediate efforts to amend their Acts having regard to the Privy Council's observations.

1,151. The legislation of three eastern States, New South Wales, Victoria and Queensland, came before the Court in a catena of cases which involved the Court in giving decisions on the validity of both licensing provisions and road charges. The Court held that the licensing provisions and charges imposed under the State Acts were invalid in respect of their application to interstate trade and commerce. In other cases, heard at the same time, the Road Traffic Act of South Australia, imposing significant registration fees, was held not to be validly applicable to vehicles engaged in interstate trade.

1,152. The basic case in 1955 was *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (No. 2) (1955) 93 C.L.R. 127, the other cases being decided in the light of the reasoning of the Justices in this case.

1,153. On the subject of transport charges, a majority of the Court expressed the view that a State Act could, in respect of vehicles using the roads of the State in the course of interstate trade, commerce and intercourse, impose charges which, in the view of the Court, amounted to no more than fair and reasonable recompense for the actual use made of the highways of the State having regard to the wear and tear caused and the costs of maintaining the highways in proper condition. But no member of the Bench was prepared to concede that a State Act, in fixing charges, could take into account, additionally, the capital cost of providing new roads or other capital expenditure on roads or road transport facilities as distinct from the current expenditure incident to the maintenance of roads and other facilities which interstate commerce used.

1,154. In connexion with the issue of licences to hauliers to engage in interstate road transport, the decisions made plain that if a State wished to maintain a system of licensing, except for unusual circumstances, a haulier was entitled to a licence without hindrance either in connexion with his application or in regard to the terms or conditions which might be attached to the grant of a licence.

1,155. An immediate result of the cases was that States were obliged to repay to hauliers exactions imposed under the provisions held to be invalid and there has been a series of cases relating to these matters in which the decision has usually gone in favour of the hauliers.

1,156. Two other legal developments, since the bracket of decisions in 1955, attract attention.

1,157. Interstate road operators have, in the first place, challenged legislation of three States reframed in an attempt to conform with the newly explained legal requirements.

1,158. The Commercial Goods Vehicles Act 1955 of Victoria imposed a charge of ¼d. per ton mile, calculated by adding the tare weight of the vehicle and two-fifths of its load capacity, on all commercial vehicles of load capacity exceeding four tons which travelled on the public highways of Victoria. The charge was described as a payment towards compensation for wear and tear caused thereby to public highways in Victoria. All moneys received were to be paid into a roads maintenance account to be expended only on the maintenance of the public highways. The charge also applied indifferently to interstate and intra-state vehicles. The charges so imposed were upheld in *Armstrong* v. *State of Victoria* (No. 2) (1957) 99 C.L.R. 28.

1,159. In South Australia, the Road and Railway Transport Act of that State also imposed a ton-mile charge, in this instance 1/20d. per mile per cwt. of tare weight, on unregistered commercial vehicles of 2½ or more tons tare weight driven on public roads in the State. In result, the charge operated only on vehicles engaged in interstate trade. The High Court held in *Edmund T. Lennon Pty. Ltd.* v. *State of South Australia* (1957) A.L.R. 985, that the charge could not validly apply to vehicles so engaged mainly because, in the absence of evidence, there was little in the enactment to show that the charge was no more than proper recompense for the wear and tear on the roads or other upkeep. The charge was also discriminatory.

1,160. Very recently, the High Court upheld, in *Commonwealth Freighters Pty. Ltd.* v. *Sneddon* (1959) A.L.R. 550, the conviction of a haulier for an offence against the Road Maintenance (Contribution) Act, 1958 of New South Wales. The State Act required the payment of ton-mile charges applicable equally to vehicles engaged in interstate and intra-state trade which used the roads of the State. The charge, like the Victorian charge upheld in *Armstrong's Case*, was calculated by reference to the tare weight of the vehicle and two-fifths of its load capacity. As the Court pointed out, there was nothing to indicate that the rate comprised, or would yield, any element representing capital cost and all moneys received were to be paid into a separate roads maintenance account.

1,161. The second legal development of consequence since 1955 has been the occupation of the High Court with the question of what constitutes an interstate journey which will gain the freedom which section 92 offers.

1,162. In *Naracoorte Transport Co. Pty. Ltd.* v. *Butler* (1956) 95 C.L.R. 455, the defendant company conducted a road haulage business in Naracoorte, a town in South Australia a few miles from the Victorian border. A carrier firm, which operated from the Victorian border town of Harrow, brought 89 bales of wool across the border to Naracoorte. The bales were then loaded onto the defendant company's vehicle at Naracoorte for conveyance to Geelong, in Victoria. The company was charged with an offence under Victorian transport legislation for operating a vehicle in Victoria without a licence or permit. The High Court held that, whatever the motives of the consignors of the wool in Victoria might have been in sending their wool from Naracoorte in South Australia rather than by some service following the more direct route to Geelong which did not require an interstate journey, the company's vehicle was engaged in interstate trade and commerce and, therefore, the conviction under the Act should be set aside.

1,163. Two further cases in 1959 deal with the same problem. In *Golden* v. *Hotchkiss* (1959) A.L.R. 573, a haulier loaded wool at a station property situate on the New South Wales side of the Queensland border for transport to Sydney. Part of the boundaries of the station literally formed part of the border of New South Wales and Queensland and access to the property by virtue of the road system required a vehicle to traverse for about ten miles a road which was on the Queensland side of the border. The Court held that the journey from the property in New South Wales via Queensland to Sydney was one which was protected by section 92.

1,164. The High Court also decided shortly afterwards in *Beach* v. *Wagner* (1959) A.L.R. 707, that where a carrier transported wool from Queensland to his depot in New South Wales just across the border which he then transhipped onto another vehicle for transport to Brisbane, the carriage to the depot took place in the course of interstate trade.

Border Licence.

1,165. Whilst the language of section 92 has remained the same since Federation, it has been a prolific source of litigation and, in the process of judicial review, the meaning of the section has greatly changed.

1,166. In 1920, section 92 was held not to bind the Commonwealth but in 1936 it was held that it did. The State road transport charges which were held by the High Court to be validly imposed on interstate transport before the outbreak of World War II., would now offend the constitutional prohibition. Another feature of the judicial history of the section has been the frequency with which individual Judges have differed in result or reasoning in arriving at their conclusions in particular cases.

1,167. Before Federation, the imposition of customs duties by the colonies on goods coming from other colonies seriously impeded the natural expansion of trade beyond colonial frontiers and thereby hampered the development of a continental economy. Border customs houses were the indicia of what was once described as the barbarism of borderism.

1,168. Section 92 achieved an important objective in putting an end to colonial discrimination against interstate trade but, as the Committee has shown, it has been attributed a much wider significance than that. In regard to roads, the section prevents the maintenance of a discretionary licensing system irrespective of its purpose nor does it tolerate any attempt to charge against interstate transport any part of the capital costs of providing roads and other road transport facilities.

1,169. At Federation, the roads now constituting the interstate highways did not have to bear motorized traffic and that they can do so now has been made possible only by the expenditure of large capital sums from the public revenues. The subject of roads and road charges was not consciously before the Founders who were far more interested, in their time, in the protection of the State railway systems, then the major means of land transportation.

1,170. Furthermore, the stage has now been reached at which it becomes legally possible, and not infrequently practicable, where goods are to be transported between two places within a single State, to first transport those goods across the borders of a State and then attract the immunity of section 92 to the journey from outside the State to the intended destination of the goods within the State. In this way, it is possible to escape the normal incidence of the law of the State relating to their carriage.

1,171. One view of the matter is that there is now barbarism of borderism in reverse.

1,172. Lest it be thought that the Committee is levelling unjust criticism at the Courts, it observes that the community is probably paying no more than the price of the use of "a little bit of laymen's language" in the Constitution. A striking commentary on the obscurity of the section was made by Rich J. in *James* v. *Cowan* (1930) 43 C.L.R. 386. His Honour observed, at pages 422-423—

> The rhetorical affirmation of sec. 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words "absolutely free", the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution.

1,173. In the situation which it has described, the Committee considers it only just that those who use the roads in transporting goods or persons for profit between the States should contribute to the heavy capital costs of construction and re-construction of roads and facilities such as bridges and ferries. Though charges imposed on road hauliers may, at least up to a point, be passed on to passengers or consumers of goods which are transported, nevertheless the incidence of the charge would fall upon those who have directly derived benefit from the method of transportation which has been employed.

National Importance of the Road Transport Industry.

1,174. The road transport industry has now achieved substantial importance in the Australian economy. This has been made possible by technological improvements in motor vehicles and the provision of roads to carry them.

1,175. In 1955, a Committee known as the Committee of Transport Economic Research relating to Road and Rail Transport was set up, at the request of the State Road Transport Authorities of Australia, by the Australian Transport Advisory Council, a body on which appropriate Commonwealth and State Ministers are represented. The Committee reported on the national importance of rail and road transport, in the course of which it stated—

> In connexion with the national transport tasks performed by rail and road transport, the Department of Shipping and Transport estimates that, in the year ended 30th June, 1955, road transport lifted 220 million tons of goods or 75.86% of total tons lifted in Australia, and performed 8,550 million ton-miles of freight transport of goods or 27.5% of the total ton-miles of freight carried by all the forms of transport. In the same year, the Australian railways systems including private railways lifted 55 million tons of goods including live stock, or 19% of total tons lifted and performed 7,250 million ton-miles of freight transport or 23.3% of the total ton-miles of freight transport. On the passenger side it is not possible to estimate the number of passenger journeys performed by road; but it is certain, from an examination of the bus services, hire car services, and private vehicle transport, that passenger-miles by road exceeded 20,000 million in 1954-1955. In that year the number of passenger-miles performed by railways was 6,045 million . . . Much evidence exists on the pattern of the use of motor vehicles in Australia, and this indicates that a very substantial proportion of the transport task being performed by road transport is specialized and that there is no effective substitute for motor vehicles in the performance of these services. Whatever the costs of such specialized road transport . . . they are nevertheless economic in the broad sense of being the cheapest and most efficient means of performing this type of transport.

1,176. The Australian Hauliers' Federation, a body representative of many hauliers engaged in interstate transport, also emphasized the importance of the road transport industry in a submission to the Committee. In the course of the submission, the Federation stated—

. . . the only logical position is that stated by the Commissioner for Main Roads of New South Wales in March, 1957, as follows:—

> Road transport is not an enemy to be fought at all costs. It is one of the most powerful factors working for economic progress in the world and because of the contribution it can make to economic development and thus to national income, we cannot afford not to take advantage of it in these fields where it offers direct economy.

The Committee has no quarrel with this view.

1,177. However, the picture of the economic importance of the road transport industry would be quite incomplete if it were not also mentioned that most road haulage is over short distances. The Committee of Transport Economic Research reported on this feature of the road transport industry as follows:—

. . . It has been estimated that approximately 85-90% of all commercial motor vehicles are regularly engaged on short haul work in and around country centres and capital cities on average trips not exceeding 35 miles outward journey. These include vehicles providing feeder services to and from the wharves, rail heads, airports and between places of production, distribution and consumption and all those vehicles predominantly engaged in short haul delivery for which there is no other effective form of transport. . . . It is estimated that in 1954-55 of the total traffic carried by the Australian railway systems, only 7% of freight was hauled short distances under 50 miles, and, of this total, coal and other mineral products comprised a high proportion. On the other hand, however, it is estimated that 85% of the total tonnage moved by road transport was carried distances less than 35 miles.

1,178. In the Committee's judgment, the national importance of the road transport services demonstrates how essential it is that the Australian road network should be developed and maintained to meet the growing demands of automotive transport.

1,179. For many years, successive Commonwealth Governments have made grants of money to the States for road purposes. Only this year, the Federal Parliament passed the *Commonwealth Aid Roads Act* 1959, providing assistance to the States over a period of five financial years from 1st July, 1959, of up to a total of £250,000,000 for road purposes. Payment will be made from the Consolidated Revenue Fund. In addition, the States and their instrumentalities are committed to road programmes of substantial order for which the money must be obtained from their own resources. According to the Commonwealth Department of Shipping and Transport, a total of £495,000,000 was spent by road authorities in Australia in maintenance, re-construction and new construction of roads for a nine years period ended 30th June, 1955. The Australian Transport Advisory Council estimated that, in 1956-57, net governmental expenditure on road works in Australia, irrespective of the sources of funds, after deducting taxes raised for, and paid direct to, road authorities, totalled £67,500,000 which included an expenditure of £26,600,000 by main road authorities and £40,000,000 by local authorities.

1,180. Patently, the provision of an adequate system of national roads in Australia is one of the major unresolved problems confronting the community. The Australian Hauliers' Federation referred to the road problem as follows:—

> It is apparent to every road haulier and is now generally conceded that the main roads and highways of the Commonwealth are far from adequate to handle the volume of road traffic which can be envisaged as developing in the foreseeable future. It is obvious that these roads must be properly maintained and that new roads must be constructed or existing roads improved. It is the experience of other countries that main arterial roads must be constructed so as to provide an adequate surface for vehicles carrying heavy loads and with a sufficient width to provide a traffic lane for heavy and slow moving vehicles. The provision of such highways requires the expenditure of vast amounts of public money. It is apparent from the interpretation of the law that the haulier, in common with all other beneficiaries, must pay his just share of the cost of providing these highways.
>
> It is our contention that as regards the interstate haulier this becomes simply a question of assessing the degree of responsibility properly apportioned to the haulier.
>
> The problem is simply stated but has no simple solution. The question of proper allocation of highway costs among the various groups and classes of beneficiaries is extremely complex and highly controversial but any attempt to answer the question by an empirical statement is in our contention, illogical and probably illegal.

1,181. Many calls are made upon the resources of the nation, in the current era of dynamic national development, for an expansion of facilities of many kinds and the total national income is simply insufficient to meet all reasonable demands in full. It is commonly acknowledged that the shortage of capital is the greatest single limiting factor in national development planning.

1,182. If account is taken of the entire automotive industry in Australia, it emerges plainly enough that total governmental exactions in the form of sales tax and customs duties on vehicles and parts, customs and excise duties on liquid fuel, and registration and road charges, would, if given over entirely to road programmes, provide the country with a very reasonable system of major roads indeed.

1,183. Nevertheless, the functions of modern government are many, costly and vital and have, for the most part, to be paid for out of revenue derived from taxation or obtained from loans which ultimately have to be repaid from public revenue. Motor vehicles have, since their early days, been the objects of revenue raising taxation and it would be quite unrealistic for the Committee to proceed on any other assumption than that it is a matter for governments to decide what proportion of the general revenues should be allocated to road works.

1,184. It is perspicuous that financial considerations will restrict the amount of road work in Australia for many years to come and that, meanwhile, there will be an unabated strain on the public purse. If road transport facilities are provided, then the road transport industry must, in the scheme of things, be prepared to pay adequate recompense for the use of the facilities and so relieve the general body of taxpayers of some measure of financial responsibility.

1,185. In the circumstances which the Committee has described, the community should not have to afford the luxury of interstate road transport which, under the present constitutional position, cannot be required to pay more than a modest rate of charge for maintenance equated to the cost of maintaining the highways upon which vehicles with interstate destinations travel.

The Proper Contribution of Interstate Road Transport.

1,186. The Australian Hauliers' Federation submitted to the Committee that the ton-mile charges, such as various States at present imposed on interstate road transport, had little *relationship to responsibility for road maintenance costs. Moreover, they involved considerable* difficulties of assessment and policing as, according to the Federation, were shown by the great expense incurred in administering the ton-mileage charge imposed in Victoria under the Commercial Goods Vehicles Act 1955. The Federation submitted that all the proceeds of taxation on motor fuel should be given over to road construction and maintenance and it expressed its belief that this was the most equitable form of taxation of road users, interstate and intra-state alike. The Federation stated—

> It is strongly submitted that petrol taxation is the best means available of proportioning charges for road use to the actual benefit received by each road user. It "meters" road use on a reasonable and equitable basis and makes road transport self-supporting. "Metering" of facilities is a common commercial transaction. The Americans use petrol tax as the major source of revenue funds for work on their main roads systems.
>
> The costs of collecting revenue from petrol tax are infinitesimal compared with the costs of administering the cumbersome ton-mile schemes of the various States. It has been argued that despite the historic purpose behind the imposition of petrol tax there is no reason why, if beer and whisky is taxed for general revenue then petrol should not be. We submit that there is a fundamental difference. Duties on beer and whisky are properly revenue duties. Taxes on petrol are taxes on production. Properly then, the revenue collected should be used to facilitate production and by dedication to road purposes such taxes create improved roads from which the country's economy benefits as a whole which in turn is reflected in better yields from other taxation returns.

1,187. Of the efficacy of the ton-mileage charges to which the Federation referred, the Committee's only comment is that, in their present form, they represent the result of the legal web which section 92 has placed around State intervention in the field of road transportation.

1,188. On the more general question of the allocation of the whole of the proceeds of petrol tax to road work, the Committee would point out that, apart from the question of policy involved in the suggestion that particular revenues should be earmarked for specific purposes, there is the question as to whether taxation upon petrol without the imposition of road charges upon interstate hauliers ensures that interstate hauliers bear their fair share of the cost of providing and maintaining roads.

1,189. While giving full credit to the Federation for its sincerity of purpose, the Committee believes that the Federation's suggestion amounts in substance to requiring the whole volume of road traffic to contribute towards the cost of building and maintaining roads which are of particular benefit to interstate vehicles. Vehicles not engaged in interstate trade are already required under State law to pay substantial registration fees which interstate vehicles, as the cases in recent years before the High Court have shown, cannot be compelled to pay.

1,190. Moreover, as the Australian Road Transport Federation, a body largely representative of intra-state hauliers, pointed out to the Committee, a substantial segment of intra-state commercial road traffic also pays higher road charges of various kinds than can, having regard to section 92, be lawfully demanded of interstate hauliers. The Federation stated before the Committee that some States had, in recent transport legislation designed to recover road maintenance charges from interstate hauliers, imposed the same rates of charge on intra-state road traffic. In this way, any challenge to the legislation based on discrimination against interstate trade was likely to be averted, but, at the same time, this had, in fact, resulted in a greater burden being imposed on intra-state commercial traffic which still had to pay other substantial charges such as registration. Although the Committee does not regard such a result as being a necessary legal sequel to the problem of evolving valid charges in respect of interstate road transport, it believes that the misgivings that the Federation expressed tend to support that organization's view put as follows:—

> The imposition of a tax on all transport simply because it has the virtue of being applicable to interstate hauliers is inequitable and unjust and highlights the fact that the collection of a fair and reasonable charge from interstate road users is a separate problem for which adequate Constitutional provision should be made.

1,191. Much the same viewpoint was to be found in a submission from the Farmers and Settlers' Association of New South Wales which wrote of its concern about the destruction of roads and highways by interstate hauliers who did not, in the Association's view, make a proportionate contribution towards road costs. The effect was, according to the Association, to throw upon the rural industries an excessive share of road costs. The Association observed—

> The cost of construction and the extremely heavy cost for maintenance of these much used roads have drained, in fact exhausted, the finances available and collectable for this work. Shire rates collected from land holders who may or may not use the roads have been increased and in many cases they represent up to £5 for each bale of wool annually sent off the property, and this is in addition to another £1 per bale representing the licence and registration fee of the wool grower's truck. . . .
>
> The equitable basis of contributions should be from users in proportion to their respective use of roads. But for a 1,000 acre farmer to pay £100 a year rates, £60 truck and car registration in addition to the petrol tax on fuel used, is quite out of proportion to the use he makes of the roads.

The Association recommended a constitutional alteration under which the Federal Government would be authorized to—

> collect licence registration and uniform charges on all freight conveyed over roads in Australia, upon a weight and mileage basis.

The Association contemplated that the Commonwealth would hand over the moneys to the States for road works.

1,192. Additionally, according to an estimate of the Committee of Transport Economic Research, referred to in paragraph 1,177 above, 85 per cent. of the total tonnage moved by road transport is carried distances less than 35 miles. Most of this haulage is undertaken in the vicinity of metropolitan centres. In these areas, the cost of road construction and maintenance is already well supported by various taxes, including property rates, and, as mentioned, the vehicles using the roads pay substantial registration fees and, sometimes, haulage charges as well.

1,193. It is quite apparent that taxes on petrol in substitution for specific road charges on interstate hauliers would in no way represent a proper contribution towards the construction and maintenance of roads they use but would strongly favour interstate haulage at the expense of intra-state haulage. Moreover, the Committee understands that there is little relationship between the quantity of fuel which a vehicle uses and the amount of wear and tear it is capable of causing to the highways.

1,194. Irrespective of the various expedients which may be used to obtain revenue for road purposes, the Committee considers that there is no case for conceding to one branch of the road transport industry, a privileged constitutional position in regard to a national problem. The logical and most straightforward course of action is, in the opinion of the Committee, for the Constitution to sanction the imposition of reasonable road charges on interstate transport without distinction as to whether they are to be applied for capital road works or merely road maintenance.

State Railways.

1,195. The Committee wishes to say something of the role of government owned railways. The Committee of Transport Economic Research estimated that about 90 per cent. of commercial carriage by road was non-competitive with railways. In the field of interstate haulage, however trains and motor lorries compete with each other for the available business. Because of section 92, a State can no longer control the volume and nature of traffic by road, or impose taxes on interstate road transportation for the purpose of protecting the railways of a State.

1,196. Opinions will differ as to whether compulsory co-ordination of interstate road and rail services is in the best interests of the community, even if it should tend to produce the result of lowering transportation costs in Australia. But one thing is clear—capital costs are a major item in the financial profit and loss account of each of the government railway systems. Roads, like railway tracks, are costly capital items but under the current interpretation of section 92, a State, or perhaps more accurately the taxpayers, and not the hauliers have to bear the capital costs.

1,197. Figures of the Commonwealth Bureau of Census and Statistics show that in 1956-57, government owned railways in Australia sustained a total net loss of almost £24,000,000 of which £19,500,000 constituted interest payments. In 1957-58, interest payments absorbed £21,200,000 of a total net loss of £28,900,000. The Australian Transport Advisory Council estimated that in 1956-57, after taking into account such things as contributions towards freight and fare concessions, total railway costs to the order of £32,100,000 were borne by Australian governments. Thus, at the present time, interstate road transportation has the advantage, compared with the railways, of relief from a substantial burden of capital costs which the community is called upon to bear instead.

1,198. State railways are not, moreover, at liberty to select the types of freight that they will carry and not infrequently the carriage of passengers and freight on some country lines is unremunerative but the service continues because it is in the interests of development that it should.

Recommendation.

1,199. The conclusion that the States should have the power to make interstate hauliers using the State highways pay reasonable road charges caused the Committee to consider how extensive the discretion of a State should be in imposing rates of charge.

1,200. Federal history shows that the nation gains from the promotion of trade and commerce between the States and the Committee has recognized that the road transport services, including their interstate components, perform a valuable economic function. In the circumstances, and since the recommendation involves some relaxation of the application of section 92, the Committee thinks that the right of a State to impose road charges on interstate transport should carry with it a safeguard to prevent the imposition of charges so heavy as to retard the activity.

1,201. By expressing the proposed power in such a way that the State may only impose reasonable charges on the carriage interstate by road of persons and goods it may then be left to the Courts to decide, upon a challenge of validity, whether the charges which a State imposes are reasonable.

1,202. The Committee doubts, however, whether the courts of law should have to examine the details of such legislation in order to be satisfied that the charges are in fact reasonable. On little more than a cursory study of road problems, it becomes only too apparent how complex and technical it is to calculate the cost of providing and maintaining roads and other road transport facilities, and the amount of wear and tear which vehicles of different types, capacities and speeds can cause to roads which vary according to method of construction, condition and situation. In the Committee's judgment, it is more appropriate for a specialized authority than for a court in the traditional sense to discharge the function of inquiry and decision whether road charges are fair and reasonable.

1,203. Neither, in the opinion of the Committee, should the validity of a charge depend on the accident of litigation. It appears to be better in the interests of governments, industry and the community that a State charge should have the imprimatur of approval before it becomes operative.

1,204. In Chapter 17 of this Report, in connexion with restrictive trade practices, the Committee mentioned that the Constitution already provided for an Inter-State Commission. The Committee advocated the re-establishment of the Commission and the vesting in it of the power of inquiry as to whether restrictive trade practices are contrary to the public interest as a condition precedent to the exercise of a proposed Federal power over restrictive trade practices.

1,205. The Inter-State Commission would also be an appropriate authority to decide whether rates of charge on interstate road carriage, which any State proposed to make, were reasonable. The Committee contemplates that the Commission would include members with a wide knowledge of economics, commerce and accountancy and it would enjoin that body to have proper regard to the promotion of interstate trade and commerce and the public interest when considering an application from a State. The Commission would also be free to consult appropriate authorities and experts on roads in order to arrive at equitable decisions.

1,206. A further safeguard which the Committee proposes, having regard to the historical background of the section explained earlier in this Chapter, is that no State charge should discriminate against the interstate carrier. A State would not then be able to impose heavier rates of charge on interstate haulage than it imposes on haulage within the confines of the State.

1,207. Accordingly, the Committee recommends that the Constitution should be altered to authorize a State, notwithstanding section 92 of the Constitution, to impose charges in respect of the carriage interstate by road of persons and goods provided that—

(1) the charges are approved by the Inter-State Commission as being fair and reasonable having regard to the promotion of interstate trade and commerce and the public interest; and

(2) the charges, in their application to road transport, do not discriminate against the carriage of persons or goods interstate.

The Commonwealth and Road Charges.

1,208. The Commonwealth has, under section 96 of the Constitution, for many years made grants of assistance to the States for road-building.

1,209. Such road-building as the Commonwealth has engaged in directly for its own purposes, as for example in the Territories, has not attracted the problems of section 92 but it is conceivable that the Commonwealth could become more directly concerned with road construction in the States in exercise of its constitutional powers, including the powers to make laws with respect to interstate and overseas trade and commerce and defence. If the Commonwealth were to build roads which interstate commercial traffic used, the Committee has no doubt that the Commonwealth should, upon obtaining approval of the Inter-State Commission, also be able to impose charges which include a component for capital costs without infringing section 92.

1,210. In the absence of evidence that the Commonwealth proposes to engage in interstate road works, the Committee has not, however, made any recommendation.

SECTION 92 AND CHARGES ON OTHER FORMS OF TRANSPORT.

1,211. The Committee's recommendation is confined to the charges payable by interstate road transport on which there has been so much litigation.

1,212. The Committee is aware of indications in some recent judgments in the High Court, as for example, in *Armstrong* v. *State of Victoria* (No. 2) (1957) 99 C.L.R. 28, per Dixon C.J., at pages 43-44, that charges for the use of other government owned or controlled facilities, such as wharves and shipping facilities and aerodromes and aviation facilities, also have to satisfy section 92.

1,213. No litigant has yet relied on section 92 in an endeavour to upset charges so far imposed in these other areas of transport and the extent to which section 92 would affect their validity remains obscure. In the absence of legal challenge, the Committee has confined its recommendation to road charges.

CHAPTER 21.—NEW STATES.

RECOMMENDATION OF THE COMMITTEE.

1,214. As the Committee observed, in paragraph 165 of its 1958 Report, section 121 of the Constitution provides that the Parliament of the Commonwealth may, upon such terms and conditions as it thinks fit, admit new States to the Commonwealth or establish new States. Under section 124, a new State may be formed by separation of territory from an existing State but only with the consent of the Parliament of the existing State. A new State may also be formed by the union of two or more existing States or parts of States but again only with consent of the Parliaments of the States affected.

1,215. The Committee expressed its belief that section 124 had operated as a barrier to the formation of new States from the territory of an existing State. The Committee considered that, if a majority of electors both in the area of a proposed new State and in the State as a whole, supported the formation of a new State, it should not then require the approval of the Parliament of a State before the new State can be established as a member of the Commonwealth.

1,216. The Committee has recommended that the Constitution should be altered by making provision in Chapter VI. as follows:—

(1) The Commonwealth Parliament should have power to form a new State by separation of territory from a State or by the union of two or more States or parts of States if a majority of electors in the area of the proposed State and a majority of electors in the whole State or, in the event of there being more than one State affected, a majority of electors in the area of the proposed State and majorities of electors in each State affected, vote in favour of the formation of the proposed State.

(2) The Parliament may establish a new State within three years, or such other period as the Parliament determines, from the holding of the referendum which the Committee contemplates.

(3) Electors qualified to vote at a new State referendum should be the persons qualified to be electors of members of the House of Representatives.

(4) The Parliament should have power to make such laws as are necessary to deal with all matters in connexion with the formation of a new State in accordance with the provisions of the power now proposed, including the determination of the area and boundaries of a proposed State, the framing and submission of the question of a new State to the electors, eligibility of electors to vote and the terms and conditions on which a new State may become a State of the Commonwealth.

HISTORICAL BACKGROUND TO THE FORMATION OF NEW STATES.

1,217. Eight years before Federation, Sir Henry Parkes wrote—

As a matter of reason and logical forecast, it cannot be doubted that if the Union were inaugurated with double the number of the present colonies, the growth and prosperity of all would be more absolutely assured. It would add immeasurably to the national importance of the new Commonwealth, and would be of immense advantage to Western Australia, South Australia, and Queensland themselves, if four or five new colonies were cut out of their vast and unmanageable territories.

—(*Fifty Years in the Making of Australian History*, at pages 609-610.)

1,218. In his book, *The Making of The Australian Commonwealth*, Bernhard Ringrose Wise, a delegate at the Convention Debates in 1897-98, also echoed the view which Parkes expressed some years earlier. He wrote, at page 331—

The remedy for the defects of the Constitution is to be found rather in the extension of federal powers, with an extension of local government by subdivisions of the larger States. Only by this means will be secured that "enlargement of the powers of self-government of the people of Australia" which was the declared object of the Constitution.

1,219. Professor W. Harrison Moore published his book *The Constitution of the Commonwealth of Australia* in 1902, the year following the inception of the Commonwealth. He too envisaged that the future of the Commonwealth could involve a re-arrangement of territories and he observed that it was improbable that the present political divisions were final. In these circumstances, it was natural, he said, that the Constitution should contain provision for the surrender of territories to the Commonwealth, the re-adjustment of the boundaries of existing States, and the erection of new States either by union or sub-division of existing States or by establishment out of territories which have been surrendered to the Commonwealth. Besides foreshadowing the creation of further States, Professor Moore's commentary bears repeating because of its allusions to contemporary feeling about the formation of new States. Professor Moore wrote, at pages 587-588 of the second edition of his book—

The Commonwealth of Australia started on its career in circumstances different from those of the United States or the Dominion of Canada, in that its territory was co-terminous with the territory of the States, and that the partition of the Continent amongst the members of the Union left no part of it outside the federal system. Some of the Colonies, however, were of unwieldy size and possessed a vast unsettled territory, and . . . the re-adjustment of territory was mooted from time to time. Thus, with eyes on Western Australia and South Australia, it was suggested that such Colonies should consent to a partition which would place their unsettled and distant territory in the hands of a central government for the benefit of all Australia. Again in the Colony of Queensland, separate and conflicting interests were developed, and produced political conditions which were believed to require a division of that Colony into two or three Colonies. The re-adjustment of the boundaries of New South Wales and Victoria so as to include the Riverina in the latter Colony, the erection of a new Riverina Colony, and the claims of aggrieved areas for separation from an unsympathetic capital, were among the political murmurings. In a country as yet so sparsely settled as Australia, it is improbable that the present political divisions are final.

1,220. Clauses providing for the establishment and admission of new States to the Commonwealth were adopted by the 1891 Convention with very little debate. One of the clauses specified that the formation of a State in the territory of any existing State should require the consent of the State Parliament affected.

1,221. The subject of additional States was resumed in the Convention of 1897-98. A substantial part of the discussions in 1898 was taken up in considering how the proposed new State clauses would affect Queensland. Queensland was not represented at the Convention, largely because of the existence of a division of interest and aims between the northern, central and southern parts of the colony, which prevented agreement being obtained on representation from the colony.

1,222. One of the delegates at the Convention, James Thomas Walker, of New South Wales, commented on the absence of Queensland representation as follows:—

We are all aware that one of the reasons why Queensland is not with us to-day is that in the Parliament of that colony the members for the Central and Northern Divisions voted against the Federal Enabling Bill because they were afraid, from the way in which the measure was introduced, that Queensland would be made one electorate, and that the members of the Federal Convention would therefore be largely elected by people resident in the Southern Division of the colony. In that case, they feared, if clause 117 became a part of the Constitution, they would be deprived of the right of petitioning Her Majesty which they now have. It may be, perhaps, in the recollection of honorable members that on the 9th April I presented at Adelaide a petition to the Convention from the Central Queensland Territorial Separation League. That petition has had the attention of the Queensland electors, and has not been dissented from. I think it would be well if I read a few extracts from it, showing the grounds on which the petitioners desire that a new clause shall be inserted in this Constitution so as to facilitate the entrance of Queensland into the Commonwealth. Before doing that I may mention that the colonies of Victoria and Queensland were separated from New South Wales on petition, and without the approval of the Parliament of New South Wales. In fact, Victoria would never have been able to secure separation from New South Wales if the consent of the New South Wales Parliament had been required. At the time Queensland was made into a separate colony, Her Majesty, as will be seen from the extracts I will presently read, reserved the right to separate Queensland into two or more colonies.

—(*Convention Debates*, Melbourne, 1898, Vol. II., at page 1,690.)

1,223. Edmund Barton, the leader of the Convention, acknowledged the Queensland problem in the following words:—

This is a very prickly subject, because if you endeavour to keep alive the present power of delimiting and subdividing Queensland without the consent of its Parliament, and import this into the Constitution, the danger arises whether, if you secure the assent of either Northern and Central Queensland to the Constitution, you may not alienate a large majority in Southern Queensland. Again, the difficulty would arise, and I confess it is still a difficulty, that if you keep in this Constitution a provision which necessitates the assent of the Parliament of a colony before that colony can be subdivided, that gives the majority in Southern Queensland powers over the minority in Central and Northern Queensland which they do not wish to be denied, and it might make the Constitution distasteful to them. As far as I am concerned, I do not like to handle the subject. It may be that before much time has elapsed Queensland will have got rid of this difficulty and will have agreed to some form of separation.

—(*Convention Debates*, Melbourne, 1898, Vol. I., at page 700.)

1,224. At a later stage of the Melbourne session in 1898, the Convention considered a proposal to insert a separate clause in the Constitution to cater for the possibility of Queensland being divided into separate colonies by virtue of the exercise of Her Majesty's prerogative or under any Statute.

Upon Barton undertaking to seek the views of the Premier of Queensland, the debate was adjourned. Later, the Queensland Premier advised the Convention that he feared the clause, if passed, would injure the cause of Federation in Queensland, whereupon the Convention rejected the proposal.

1,225. The clauses eventually agreed upon were not greatly different from those first approved in 1891. They are now sections 121 and 124 of the Constitution.

Constitutional Provisions.

1,226. From views expressed to the Committee, it is clear that an air of mystery surrounds the application of the new State clauses of Chapter VI. of the Constitution. This is, in part, attributable to the rather fragmentary nature of the sections but it also arises because, in spite of contemporary predictions, the provisions have lain dormant since Federation.

1,227. Section 121 is the first of the relevant sections. It vests in the Commonwealth Parliament, alone, the power to admit or establish new States as part of the Commonwealth.

1,228. The section reads—

> 121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

1,229. Questions arise as to the exact scope of the section; one being whether the power of the Commonwealth Parliament to attach terms and conditions to the entry of a new State would enable it to affect the division of legislative power now existing between the Commonwealth and the original States under the Constitution. The preponderence of opinion seems to be that a new State would not be in a different position to existing States and that, after its entry into the Commonwealth, a new State would enjoy equality of status with the other States, except to the extent that explicit provisions of the Constitution apply only to original States. For the most part, these provisions are not concerned with Commonwealth legislative powers. At least it seems reasonably clear that section 121 does not authorize the Commonwealth Parliament to exercise greater substantive legislative power with regard to a new State and its territory than it may with regard to original States.

1,230. Another matter giving rise to some doubt is whether the representation accorded a new State in either House of the Federal Parliament has any bearing on the operation of section 24 of the Constitution under which it is now provided, among other things, that the number of members of the House of Representatives should be twice the number of senators. The Committee has, of course, recommended, elsewhere in this Report, a constitutional alteration to remove the two to one ratio from the list of constitutional directives.

1,131. Section 124 is specifically addressed to the formation of a new State out of the *territory of an existing State*. Whilst the Commonwealth Parliament may form a State out of existing State territory, it may only do so, as the Committee has already observed, with the consent of the Parliament of the State affected. Where a new State is carved out of the territory of two or more existing States, then the consent of the Parliament of each of the States affected has to be obtained before the State can be established under the provisions of section 121.

1,232. Since, under Chapter VI. of the Constitution, a new State formed from existing State territory has to receive the approbation of both the Commonwealth and the State Parliaments, various questions of procedure and substance may arise on which there are, at present, unresolved doubts.

1,233. Section 124 reads—

> 124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

1,234. Section 123 is sometimes mentioned in connexion with the formation of new States. It provides—

> 123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

1,235. By reason of this section, changes in the territorial limits of a State must, therefore, have the consent, not only of the Parliament of the State, but also of the electors of that State.

1,236. On one view, the creation of a new State out of existing State territory affects the limits of an existing State, and the formation of the new State must, therefore, have the additional approval of the electors of the State under section 123.

1,237. In the Committee's opinion, section 123 relates to the alteration of State boundaries independently of the formation of new States, as for example, if the question arose of severing the Riverina area of New South Wales so that it might become part of Victoria. But, whilst the Committee does not accede to the view that the consent of the State Parliament without the accompanying approval of the electors is insufficient, it acknowledges that there is some difference of view, adding further to the uncertainty as to how the constitutional machinery for new States should be put into operation.

New State Activity.

1,238. New State interest ran high in Queensland during the Federal Debates. As the Committee has mentioned, the Convention received the Premier of Queensland's telegram in 1898 advising that the inclusion of a clause in the Constitution to preserve the power of the Queen to subdivide the colony, if it should enter the Federation, would prejudice the prospects of Federation in Queensland. At the same time, the Presidents of the Northern and Central Separation Leagues telegraphed their support of the proposed clause. In 1887, the North Queensland Separation League went so far as to send a delegation to England to put its case for separation to the home government.

1,239. Various political parties in the State of Queensland have pledged themselves in support of the creation of new States right up to the time of the last election in 1957. In 1910, the Queensland Legislative Assembly, by motion, expressed its opinion that the time had arrived when Queensland should be divided into three States and that central and northern Queensland should be granted separate constitutions. Executive action did not follow the resolution and, for several years afterwards, new State agitation was rather desultory, coming once more to the fore when, in 1922, the passage through the Legislative Assembly was achieved of a motion in which the State Parliament opined that the time had accrued to remodel the Commonwealth Constitution to provide for the subdivision of Australia into a greater number of self-governing States and to provide, further, for some easier method for the people, living in possible new State areas, to obtain self-government. The resolution urged the Prime Minister of Australia to take steps to bring about the constitutional reform. However, constructive action did not ensue.

1,240. A revival of new State interest and activity has taken place in Queensland since the end of World War II. At the opening of the new State Parliament in 1948, the Governor said that, to have a properly balanced Commonwealth Parliament, there should be at least three States across the northern portion of the continent—a view which the then Premier of Queensland repeated in the Parliament in the following year.

1,241. In 1948 also, another new State movement was formed in Queensland, culminating in 1955 in the launching of the New State for North Queensland Movement, a body which expressed its views to the Committee. Another Queensland movement active in recent years is the Capricornia New State Movement, which has its headquarters at Rockhampton. Representatives of this Movement appeared before the Committee.

1,242. Each of the Queensland Movements complained that no substantive action had been taken by the Parliament of the State in response to new State agitation over a long period of time. Each informed the Committee that the extent of public feeling about new States in Queensland had never been subjected to test by the taking of a referendum of electors anywhere in the State.

1,243. Organized movements for the formation of new States first arose in New South Wales after the end of the Great War under the leadership of the Northern New State Movement. They gained such momentum in the early 'twenties that the Government of that State appointed a Royal Commission in 1923 to examine proposals for the establishment of new States. In the previous year, the Legislative Assembly had resolved that the creation of a new State in the New England area should be considered by a Federal Convention to be summoned for the purpose. The Commission almost extinguished the ardour of new State supporters by reporting unfavourably on the formation of new States in New South Wales. In the Commission's opinion, the creation of new States, as proposed, would have increased the cost of government and taxation to be paid by residents in the proposed areas and it also felt that many of the benefits claimed by the advocates of new States could be obtained by an extension of local government and by further decentralization in administration.

1,244. About this time, it was questioned whether the consent of a State Parliament should be obtained before the Commonwealth undertook any action to form a new State from existing State territory or whether the Commonwealth should first indicate that it would form the State and specify the terms and conditions of its admission to the Commonwealth. In a letter in 1922, Prime Minister Hughes stated that the Commonwealth could hardly be expected to initiate legislation until the proposal for a new State had assumed a very concrete state acceptable to the State Parliament. In 1923, Stanley M. Bruce, the then Prime Minister, in reply to a communication from the New South Wales Government conveying the text of the resolution urging the holding of a Federal Convention, said that the first step which would appear necessary was that the Parliament of a State should affirm, not only the principle that the partition of the State was desirable, but also the terms thereof. A Federal Convention was not needed to deal with the situation in view of the State Parliament's legal position under section 124 of the Constitution.

1,245. A widespread resurgence of new State agitation occurred in New South Wales during the depression years which culminated in the appointment by the State in 1933 of a Royal Commission in the person of H. S. Nicholas, to inquire into areas in New South Wales suitable for self-government

as States of the Commonwealth. The Commissioner reported, in 1935, that two areas, one in the north and the other in the central western part of the State, were suitable for the formation of new States. He recommended the taking of a referendum in each of the areas to ascertain the opinion of the electors.

1,246. The Nicholas recommendations did not receive unqualified acceptance in any quarters and new State activity dwindled to a negligible level.

1,247. In 1948, new State feeling revived in New South Wales as well as in Queensland and the New England New State Movement was launched at Armidale. The Movement has actively pressed for parliamentary action which could lead to the formation of the State of New England in the northern area recommended by the Nicholas Commission.

1,248. The Movement advocated, in a submission to the Committee, a proposal for constitutional amendment which would place the creation of a new State substantially in the hands of the electors as an alternative to the existing machinery of section 124. Similar proposals were advanced by the two Queensland Movements.

Royal Commission on the Constitution.

1,249. Another contribution to the problem of obtaining the creation of new States from existing State territories, was made by the Royal Commission on the Constitution which reported to the Governor-General in 1929.

1,250. The Commission recommended a constitutional alteration which would enable a new State to be established on the basis of popular approval as an alternative to the approval of the Parliament of that State. The Commission's recommendation is considered in some detail later in this Chapter.

Reasons Advanced for the Formation of New States.

1,251. In the course of its inquiry, a number of reasons were put to the Committee why there should be new States in the Commonwealth. The Committee will do no more than repeat those reasons, since it is not concerned with the question whether new States should be established in specific areas of the Commonwealth.

1,252. Representatives of the North Queensland New State Movement submitted as follows:—

> We submit that the unbalanced pattern of Australian population, whereby nearly four-fifths of our entire population is centered in an area south of a line running from Brisbane to Port Augusta in South Australia, prevents the spirit and intention of Chapter VI. of the Constitution being implemented. Even before Federation and ever since, the subdivision of the Commonwealth into smaller, more compact, and more manageable States has been sought by tens of thousands of people living in areas remote from Australia's present and over-congested capitals. This subdivision has been sought with equal enthusiasm by serious and thoughtful minded residents of the capitals themselves who have not only realised the threat implicit in modern nuclear war to congested population and industry, but have also realised that sound, vital, imaginative and prosperous government would result from it. . . . The importance of subdividing the Commonwealth into smaller and more manageable States and the consequent importance of reviewing the Constitution so that their establishment may be facilitated has frequently been urged upon Federal and State Governments in the past: these arguments advanced are summarised as follows:
>
> "The admission into the Commonwealth of new Sovereign States would cause the greatest possible diffusion of political and economic power which is essential to the maintenance of the freedom of the individual and which is the only alternative to the development of an arbitrary despotism ruling over an irresponsible people."
>
> "The creation of new States in Australia would ensure a more even distribution of population and of industry over the entire fertile areas of the Commonwealth thus increasing its prosperity, decreasing the provocation it offers to crowded Asian countries by its undeveloped and under-populated areas, and making it generally more defensible."
>
> "The creation of a new State would benefit not only the area concerned, but also conduce to the progress, prosperity and safety of the whole Australian Commonwealth and to the general good of all Her Majesty's Australian subjects in every State and Territory."
>
> "The creation of new States would provide a permanent indefeasible devolution of government, thus bringing it nearer to the people and making it more democratic, more efficient and less expensive."

1,253. Capricornia New State Movement representatives said they were in no doubt concerning the urgent necessity for the creation of a new State in central Queensland and that the Movement based its views on the following points:—

> 1. Any area of reasonable size and population in Australia . . . is entitled to secure self government, provided it can demonstrate within reason its ability to survive as an economic entity. Chapter VI. of the Commonwealth Constitution obviously intends that this should be so.
>
> 2. The defence and safety of Australia demand that the northern portion of the Commonwealth should be populated and developed and the most effective method of accomplishing this end is to establish new Governments in the areas concerned, having as they would, no other interest but to improve and expand the territory within their respective jurisdictions. We see no other way to protect the high standards of living which we have established in this country and which, doubtless, given the opportunity, we can still further improve.

> 3. In the interests of Constitutional progress we must have more States. It is no easy matter to secure Constitutional amendments under existing conditions, as it is necessary to secure not only a majority vote in the electorate, but any suggested amendments must also be carried in the majority of States. As things are now, this requires a majority of at least four States to two. Circumstances have changed since the original Constitution was framed and it is a matter of some urgency that the people should have some greater opportunity of securing a shift of authority, where the majority of electors deem it necessary.
>
> 4. The government direction of local affairs by remote control has never been successful in any part of the world at any time. It leads to injustice and dissatisfaction, it retards progress and is liable to bring authority into disrepute. It is as important to have local matters placed in the hands of a Local Government as it is to have national matters placed in the hands of the Federal Government Both of these propositions need urgent attention in Australia and the necessary constitutional amendments should be placed before the people at the earliest possible date. We respectfully submit that the creation of new States is of prime importance, as it must make the passage of other equally important measures much easier of attainment.

1,254. The New England New State Movement advocated the subdivision of the State of New South Wales to decentralize government, administration, finance, industry, population and development and to enable citizens remote from the existing seat of State government to participate more effectively in the management of their own affairs. The Movement's representatives stated that New Zealand declined to join the Federation because it felt that democratic government, to be efficient, had to be within sight and hearing of the people. Remoteness from the seat of government largely reduced the possibility of any influence being exercised by distant constituencies; 1,200 miles of ocean lay between New Zealand and Australia.

1,255. H. S. Nicholas, who conducted the New South Wales Royal Commission on New States in 1933-34, later summarized the arguments for the formation of new States, put before one or other of the Commissions, including the Royal Commission on the Constitution, which dealt with the matter of new States, as follows:—

> . . . (1) that it would be easier to obtain a majority of States on a referendum if there were an odd number than as at present when a majority is equivalent to two-thirds; (2) that the powers of the Commonwealth Parliament would be increased if a larger proportion of the trade of the Commonwealth was inter-State; (3) that on the precedent of South Africa and of local government in Australia the government of an area, whether shire, county council or province, would not be efficient if its powers were liable to be curtailed from time to time by a Parliament, whether of a State or of the Commonwealth, and would not attract men of ability and of public spirit; (4) that the powers of local government bodies in New South Wales are precarious and limited. That no constitution would be satisfactory unless it had the same degree of permanence as that of a State; (5) that in States as large as New South Wales and Queensland, a Parliament sitting in the State capital did not give adequate attention to distant constituencies and was out of sympathy with rural needs; (6) that new States in New South Wales or Queensland would improve the composition of the Commonwealth Parliament, both in the Senate and in the House of Representatives, and would create a better informed interest in public affairs; (7) that residents in New South Wales suffered from the disadvantages of overcentralization and of a division of powers at the same time.
>
> —(*The Australian Constitution*, Second Edition, at pages 96-97.)

Need for Constitutional Change.

1,256. As stated, the Committee was not concerned with the merits of forming a new State in particular areas of the Commonwealth, but the argumentation put before it and the history of new State activity leaves the Committee in no doubt that the Federal Constitution should provide some more effective means of determining whether the Commonwealth should be divided into more than six States.

1,257. The history of Australia over a substantial portion of the last century is largely one of the division of the continent into separate self-governing units. Only 75 years before Federation, the original colony of New South Wales covered the whole of eastern Australia and the area now occupied by South Australia and the Northern Territory. New Zealand was also linked with New South Wales. The British authorities granted separation to Tasmania in 1825 and the Colonial Office authorized the settlement, by private initiative, of a hitherto unsettled area of New South Wales, which was proclaimed the colony of South Australia in 1836. New Zealand was definitely separated from New South Wales in 1841. Ten years later, Victoria obtained its separation, to be followed in 1859 by the establishment of Queensland as a separate colony. In the early 1860's, there was a proposal for a colony, to be called Albert, in the Riverina area of New South Wales, but the proposal did not come to fruition. The Northern Territory was added to South Australia in 1863, becoming Federal territory in 1911. Western Australia, first annexed by Britain in 1829, was always a separate settlement. Separation came about in Australia in response to petitions and vigorous agitation in areas remote from the original seat of government at Sydney. As the New England New State Movement submitted, the process of territorial subdivision was a direct result of historical experience which demonstrated the need for decentralized government and administration in the interests of settlement and development and in order to facilitate the participation of local people in the processes of government. Yet, since Federation, no new State has been formed, although the formation of new States is entirely consistent with the federal concept of government.

1,258. In pre-Federal days, practical expression could be given to popular movements for independence because the question was determinable in the last resort by the sovereign Parliament at Westminster and not the parent colony. The home-land authorities were also anxious to foster effective responsible colonial government.

1,259. In the light of early Australian history, the Founders' expectations that further independent areas of government would emerge with the growth of the Commonwealth, is easily understandable and the constitutional machinery which the Founders provided seemed to offer, at the time, a satisfactory way of making provision for future new States. The Founders had before them the example of the United States' Constitution which provided, as it now provides, for both Federal and State action in the formation of a new State out of existing State territory. Article IV, section 3, of the United States Constitution reads—

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

1,260. As the Committee recorded in its 1958 Report (paragraph 166), the new State clauses of the Constitution have not been applied because Parliaments in each of two States affected have proved unresponsive to representations of New State Movements for the formation of new States out of existing State territory. No State Parliament has yet been motivated to conduct a referendum to test the reaction of the electors. In the Committee's opinion, the misgivings which New State Movements have felt about the effectiveness of the present constitutional position are justified. Section 124 of the Constitution has, by mere existence, frustrated any possibility, so far, of the realization of new State sentiment.

1,261. In the circumstances which the Committee has outlined, the Constitution should, in its opinion, be altered so that the question of forming a new State out of existing State territory does not rest entirely on inducing State Parliaments to take action but also allows for direct expression of popular will. At the same time, no proposed constitutional alteration should tolerate the abrogation of the interests of an existing State.

Proposals for Constitutional Amendment.

Proposal of the Royal Commission on the Constitution.

1,262. Most of the members of the Royal Commission on the Constitution favoured a constitutional alteration under which the Commonwealth Parliament would have power to create a new State from existing State territory if separate majorities of electors in the area of the proposed new State and in the whole State voted in support of its creation. Where not less than two-fifths, but fewer than one-half, of the votes cast in the State, and at least three-fifths of the votes cast in the area, were in favour of the proposal, the Commonwealth Parliament was also to be authorized to create the State if it wished. The Commission reported, at pages 256-259, as follows:—

We recommend that an alternative method of creating new States should be provided in the Constitution so that in a proper case a new State may be created out of an existing State without the consent of the State Parliament. We think, however, that the whole of the people of a State, and not merely the people of an area which is to be included in a new State, are vitally interested, and that the new State should not be established until an opportunity has been given both to the people of the area and to the people of the State to express their wishes at a referendum.

The proposal should, in our opinion, be initiated by a petition to the Commonwealth Parliament from at least twenty per cent. of the electors of an area which is not less in extent than the State of Tasmania.

If the Parliament sees fit to take action, we think that a commission should be appointed to determine the boundaries of the proposed new State, regard being had to the boundaries mentioned in the petition, community of interest, physical features, existing boundaries of States and other relevant matters, and that if the Parliament approves of these boundaries it should determine the terms and conditions upon which it is prepared to establish the new State.

The Parliament should, we think, make the necessary provision for the holding of a convention, the members to be elected by the people of the area. The convention would have the task of framing a constitution for the new State. The constitution should include provisions for the transfer to the new State of assets used in connexion with any department or branch of the public service of the existing State which is to be transferred to the new State, and provisions for adjusting the financial relations of the new State and the existing State. The convention should be empowered to submit proposals to the Parliament for a variation of boundaries and for a variation of the terms and conditions on which the Parliament is prepared to establish the new State. The convention should also be empowered to consider any variation of the proposed constitution which the Parliament may require before it is willing to take further steps.

After the constitution and boundaries of the new State have been finally approved by the Parliament, an inquiry should, we think, be held by a competent body with instructions to investigate the circumstances of the area, the value of the assets that are to be transferred to the new State, and such other matters as the Parliament may deem proper, in order that the people of the area and of the existing State may have the requisite information before recording their votes for or against the proposal to establish the new State.

At the referendum the electors should, we think, be asked whether they are in favour of the new State being established upon the terms and conditions and with the constitution approved by the convention and by the Parliament.

If the voting in the area and in the State is in favour of the proposal, it may, we think, be assumed that the Parliament would give effect to the wishes expressed by the electors, and it is, in our opinion, desirable that Parliament should have power to make any necessary or convenient provision, including the fixing of the date, for the actual establishment of the new State.

If the voting in the area is in favour, and the voting in the State is against the proposal, the Commonwealth Parliament should have power to decide within a specified period whether the new State is to be established, provided at least sixty per cent. of the votes cast in the area, and at least forty per cent. of the votes cast in the State are in favour of the proposal.

In stating our views as above, we have for conciseness referred to the creation of a new State out of one existing State, but our suggestions are intended to apply also to the creation of a new State out of parts of two or more existing States, and to apply separately in respect of each State or part of a State. Two or more States or parts of States should not, in our opinion, be considered as one State or area for the purposes of the petition by which the proposal is to be initiated or for the purposes of the referendum.

Effect could, we think, be given to our recommendation by omitting from section 124 of the Constitution the words "but only" after the words "a State" and also after the words "parts of States," and by inserting after section 124 the following section:—

124A. Notwithstanding any other provision of this Constitution a new State, having a territory not less than the territory of the State of Tasmania, may be formed by separation of territory from a State, or by the union of parts of two or more States, in the following manner:—

The proposal for the establishment of the new State shall be initiated by a petition to the Parliament signed by one-fifth at least of the electors in the territory of the proposed new State, provided that where the territory includes parts of two or more States the petition shall be signed by one-fifth at least of the electors in each part.

The Parliament may, by resolution of each House, direct such inquiry to be made as the Parliament thinks fit in order that it may determine, with due regard to the boundaries mentioned in the petition, community of interest, physical features, existing boundaries of States, and such other matters as are deemed relevant, what should be the limits of the new State, if established.

The new State shall not be established unless in a convention, the members of which shall be chosen by the electors in the territory of the new State as defined at the time of election, a majority of the members approve the limits of the new State and a constitution therefor, and unless the question whether the new State should be established is submitted to the electors in the territory of the new State as defined at the time when the question is submitted, and in the State or States affected, and—

(i) unless in the territory of the new State, or where the territory includes parts of two or more States, then in each part a majority of the electors voting approve the proposed establishment, and unless in the State or in each State affected a majority of the electors voting approve the proposed establishment, of the new State; or

(ii) unless in the territory of the new State, or where the territory includes parts of two or more States, then in each part three-fifths at least of the electors voting approve the proposed establishment, and unless in the State or each State affected two-fifths at least of the electors voting approve the proposed establishment, of the new State.

The question whether the new State should be established shall not be submitted to the electors until after an inquiry is made into the circumstances of the new State, the value of the assets to be transferred thereto from any State, and such other matters as the Parliament deems proper in order that the electors may have the requisite information before voting on the question, and until after the report of the inquiry is published.

The new State shall not be established unless the establishment thereof is proclaimed within two years after the vote is taken.

Subject to the provisions of this section the Parliament may make laws—

(i) prescribing the manner in which a petition for the establishment of a new State may be presented, and the information which shall be given in or with the petition;

(ii) defining the limits of the new State;

(iii) prescribing the terms and conditions on which the new State may be established;

(iv) providing for a convention which shall be charged with the duty of framing a constitution for the new State, and shall be authorized to suggest to the Parliament any variation of the limits of the new State and any variation of the terms and conditions on which the new State may be established;

(v) prescribing the manner in which the question whether the new State should be established shall be submitted to the electors and the manner in which the vote shall be taken;

(vi) establishing the new State if the establishment is approved as required by this section.

The provisions of this section referring to the electors refer to electors qualified to vote for the election of the House of Representatives.

Sir Hal Colebatch and the Chairman.—Sir Hal Colebatch and the Chairman do not concur in the part of this recommendation which provides for the Commonwealth Parliament having power to establish a new State notwithstanding that a majority of the votes cast in the existing State is against the proposal.

Mr. Duffy and Mr. McNamara.—Mr. Duffy and Mr. McNamara are of opinion that the Constitution should not prescribe any minimum area for a new State.

1,263. The Committee considers, with respect, that the Commission's proposal has much to commend it. It has the intrinsic worth of providing a practical and comprehensive approach to the problem of new States.

1,264. It seems to the Committee, however, that the proposal contains more mandatory provisions than are, perhaps, desirable. For example, the Committee thinks that there is insufficient reason for the insertion in the Constitution of the requirement that a new State should not be established unless the establishment thereof is proclaimed within two years after the vote is taken. Matters of this kind can properly be entrusted to the Parliament's discretion. Unforeseen circumstances may make it not feasible for a new State to be established within a period of two years.

1,265. Neither does the Committee favour it being necessary to hold a convention of members chosen by the electors in the territory of the new State to approve the limits of the new State and a constitution therefor. The question of territorial limits is, in the Committee's view, as much the concern of the residents of the existing State as it is of the residents in the area of the proposed new State.

1,266. A more substantial objection to the Commission's proposal is, in the Committee's view, the provision for the creation of a new State even though only two-fifths of the electors who vote in the existing State express their support for the new State, as long as three-fifths of the votes cast in the new State territory are in favour. Since the State-wide vote also includes the votes of electors in the proposed new State area, the Committee considers it both equitable and appropriate that a majority of electors of an existing State should have to signify their approval before a new State can be formed.

1,267. The Committee acknowledges the difficulties of obtaining even a favourable two-fifths State-wide vote for the formation of a new State in specific areas of the Commonwealth. In each of four of the mainland States the capital city contains more than one-half of the population of the State. Again, each of the proposals for a new State brought to the Committee's notice by the New State Movements involved the formation of a new State which would have less than one-fifth of the total population of the State affected. On the other hand, there are other possibilities. If the number of electors in the new State area were one-half of the total number of electors of the whole State, and if a three-fifths vote were to be registered in favour of the new State in the proposed new State area, it would only require one-fifth of the votes in the remaining area of the existing State in support of the formation of the new State to constitute the required two-fifths affirmative State vote under the Royal Commission's proposal. If the number of electors in the proposed new State area were, say, one-half of the total number of electors in the remaining area of the State and three-fifths of the votes were for the establishment of the new State, a three-tenths affirmative vote in the remaining area of the existing State would be sufficient to obtain an over-all two-fifths vote in favour in the whole State. In these circumstances, the Committee doubts whether the formation of a new State, contrary to the wishes of a majority of electors in the State affected, would afford sufficient recognition of the interests of the existing State.

Institute of Public Affairs (N.S.W.).

1,268. The Institute of Public Affairs (N.S.W.) submitted to the Committee that the present provisions of Chapter VI. of the Constitution made it almost impossible to form new States out of the territory of existing States and that the power would have to be liberalized if soundly based proposals for new States were to have reasonable prospects of being brought to fruition.

1,269. The Institute submitted a proposal under which the Commonwealth Parliament should be empowered and, in certain circumstances, required to conduct a referendum in a proposed new State area. If three-fifths of the formal votes cast at the referendum held in the area were in favour of the creation of a new State, then it should be competent for the Commonwealth to form the new political entity without the consent of the Parliament of the existing State.

1,270. The Institute proposed the insertion of an additional section in Chapter VI. of the Constitution to read as follows:—

124A.—(1.) Notwithstanding the provisions of section 123 and section 124 of this Constitution the Parliament may make laws—

(a) for the purpose of determining areas suitable for the establishment of new States, whether out of an existing State or States or otherwise;

(b) for the taking of any referendum of the electors in any area determined in accordance with the preceding sub-paragraph as to whether such electors desire the establishment of any new State or States.

(2.) After the passing of any such law as may be passed under the powers contained in paragraph (b) of the last preceding sub-section, and on the petition at least 10 per cent. of the electors in any such area determined in accordance with the provisions of sub-section (1.) paragraph (a) of this section a referendum shall be taken of all the electors in such area.

(3.) In the event of such a referendum as in the last preceding sub-section being taken and not less than three-fifths of the formal votes cast at such a referendum being in favour of the establishment of such a new State, the consent of the Parliament of the existing State or States from which such new State is to be separated shall not be necessary to the establishment of such new State, nor shall any approval of the majority of the electors voting in the existing State or States be necessary for the establishment of such new State or States, but the residue of the existing State or States shall for all purposes be deemed to be an original State or States.

(4.) Electors for the purpose of this section shall have the same qualifications as those provided in section 30 of this Constitution.

(5.) Section 128 shall be read subject to this section.

1,271. Undoubtedly, if the section were to become law, it would bring the formation of new States in Australia much closer to realization.

1,272. The Committee's reservation about the Institute's proposal is that it allows the creation of a new State without reference to the electors of the existing State and thereby subjugates the interests of the whole State to the wishes of the voters in the area of the proposed new State.

New State Movements.

1,273. Each of the three New State Movements put forward a constitutional amendment providing for the creation of new States by popular vote as an alternative to the existing provisions of section 124, which the Movements considered should still be retained.

1,274. It is convenient to take the proposal submitted by the New England Movement. The Capricornia New State Movement's suggested alteration was in identical terms and the North Queensland Movement's suggestion differed only in detail.

1,275. In submitting its proposal for an additional section to be included in Chapter VI. of the Constitution, the New England New State Movement indicated that certain fundamental requirements were involved, namely—

(a) The determination of an area deemed appropriate for establishment as a State.

(b) The means by which people in such an area might initiate the process.

(c) The percentage of the electors in such an area who might initiate the process and the percentage of votes necessary to approve questions submitted by referendum concerning the formation of a new State.

(d) The order of the steps to be taken in the process of forming a new State.

(e) The provision of means to ensure that when the suitability of an area has been determined and the opinion of the people has been established as favourable to self-government positive action to give effect to constitutional requirements is taken.

1,276. The Movement, in submitting the following draft constitutional alteration, was careful to point out that it did not regard its proposal as rigid or unalterable. The proposal reads as follows:—

That the Constitution of the Commonwealth be amended by the addition to Chapter VI. of a new section after section 124, viz., section 124A, reading as follows:—

"124A. (1) Notwithstanding the provisions of section 123 and section 124 of this Constitution the Parliament may make laws—

(a) for the purpose of determining areas suitable for the establishment of new States, whether out of an existing State or States or otherwise;

(b) for the taking of referenda of electors to determine whether they desire the establishment of any new State or States.

(2) The Parliament may of its own volition, and shall upon receipt of a petition of at least ten per cent. of the electors in an area with either a population or area not less than that of the smallest existing State, appoint a Commission of not less than three persons to recommend an area (whether identical with the petitioners' area or not) suitable to be established as a new State, and such recommendation shall be made prior to the expiration of one year from receipt of the petition.

(3) When the Parliament determines that an area is suitable to be established as a new State, it may of its own volition, and shall upon receipt of a petition of at least ten per cent. of the electors in that area, take a referendum under a law made in pursuance of sub-section (1) (b) of this section, of the electors in that area, within a period of six months from the receipt of such last-mentioned petition.

(4) In the event of a majority of not less than three-fifths of the formal votes cast at such a referendum being in favour of the establishment of such area as a new State, the consent of the Parliament of the existing State or States from which the new State is to be separated shall not be necessary to the establishment of such new State, and in the further event of not less than seven-tenths of the formal votes being in favour of such establishment the approval of the electors voting in the existing State or States from which such new State is to be separated shall not be necessary, and the Parliament shall thereupon proceed to the establishment of such area as a new State.

(5) In the event of the majority of the formal votes cast at such referendum being at least a three-fifths majority, but less than a seven-tenths majority, then the Parliament shall take a second referendum of the electors in the existing State or States from which such new State is proposed to be established (including the electors within the area of the proposed new State) and unless a majority of at least three-fifths of the formal votes cast at such second referendum shall disapprove of the establishment of such new State it shall be so established by the Parliament.

(6) Electors for the purpose of this section shall have the same qualifications as those provided in section 30 of this Constitution.

(7) Section 128 shall be read subject to this section.".

1,277. The Movement's proposal would greatly enhance the prospects of the formation of new States in areas where there is widespread agitation. Furthermore, the proposal leaves little room for doubt as to the procedure which should be followed in obtaining the formation of a new State.

1,278. At the same time, the Committee felt unable to agree with an amendment by which a new State could be formed even though the majority of the formal votes cast at a referendum of the electors of the whole of the existing State disapproved the establishment of the new State out of its territory. The Committee also thought that wider discretionary power should be vested in the Commonwealth Parliament rather than that the Parliament should be committed to taking certain steps however inappropriate they might be in the light of prevailing conditions.

RECOMMENDATION.

1,279. As mentioned, section 124 requires the approval of the State Parliament to the formation of a new State out of its territory. There is no reason for the omission of this section, especially since Parliaments are the symbols of the democratic way of life in Australia. At the same time, it is no less consistent with democracy that the people of a State should be able to express themselves directly on such questions as the formation of a new area of government.

1,280. Having no doubt as to the need for some alternative provision, the Committee's proposal is that the Constitution should provide an opportunity for the people of a State to determine the question of whether a new State should be formed by severance of territory from the State. If majorities of electors, both in the area of a proposed new State and in the State as a whole, support the formation of a new State, the approval of the Parliament of the State, before the new State can be established as a member of the Commonwealth, can be dispensed with without any sacrifice of the interests of the State.

1,281. The Committee concedes that the task of obtaining new States under its proposal would be more difficult than under the proposals it has reviewed, but it is convinced that the partitioning of any existing State is a matter for the people of the State as well as those who live in the area of the proposed new State. In Australia, where population, natural resources and social and economic development tend to be centred in particular areas of a State rather than spread uniformly throughout the State, the severance of an area from a State would have vital consequences for those who remain. For example, the formation of a new State in an area well endowed with natural resources could have a disturbing effect on the economic wealth of the existing State. Of even more consequence for the remaining portion of a State would be the setting up of a new legal entity in an area which takes in the capital city of the State.

1,282. Under section 121, only the Commonwealth Parliament may admit or establish new States. At the present stage of constitutional development, any shifting of the responsibility from the Commonwealth Parliament would be difficult to countenance. Indeed, since the Commonwealth is the expression of the federal aspect of the Constitution, this would seem to make it necessary for the national Parliament alone to be the repository of authority.

1,283. Since the Committee's proposal involves a constitutional bypass of a State Parliament, the Committee further proposes that the national Parliament should have power expressly to deal with all matters which arise in connexion with the formation of a new State by popular vote. The Committee proposes that the Constitution should vest plenary authority in the Parliament to deal with all questions likely to arise in connexion with the formation of a new State in accordance with the provisions of the power now proposed, such as the determination of the area and boundaries of a new State, the framing and submission of the question of a new State to the electors, eligibility of electors to vote and the terms and conditions on which a new State may become a State of the Commonwealth. Flexibility rather than rigidity seems to the Committee to be called for since the formation of new States is a subject on which there is no past experience. It is inadvisable, in the Committee's view, to detail constitutional rules which would dictate to the Commonwealth Parliament how it should proceed at any particular stage involved in the formation of a new State. Although the people in favour of new States are naturally anxious that their efforts should not be frustrated by the refusal of a Parliament to act, the Committee considers that the national Parliament is likely to prove responsive. Apart therefrom, as the Committee has already observed, circumstances may arise in complex modern society which would render the existence of a duty to take action for the formation of a State at a particular time quite inappropriate and, perhaps, harmful to the broader interests of new State feeling.

1,284. Accordingly, the Committee has recommended that the Constitution should be amended by making additional provision in Chapter VI. as follows:—

(1) The Commonwealth Parliament should have power to form a new State by separation of territory from a State or by the union of two or more States or parts of States if a majority of electors in the area of the proposed State and a majority of electors in the whole State or, in the event of there being more than one State affected, a majority of electors in the area of the proposed State and majorities of electors in each State affected, vote in favour of the formation of the proposed State.

(2) The Parliament may establish a new State within three years, or such other period as the Parliament determines, from the holding of the referendum which the Committee contemplates.

(3) Electors qualified to vote at a new State referendum should be the persons qualified to be electors of members of the House of Representatives.

(4) The Parliament should have power to make such laws as are necessary to deal with all matters in connexion with the formation of a new State in accordance with the provisions of the power now proposed, including the determination of the area and boundaries of a proposed State, the framing and submission of the question of a new State to the electors, eligibility of electors to vote and the terms and conditions on which a new State may become a State of the Commonwealth.

CONSTITUTIONAL PROBLEMS ARISING FROM THE CREATION OF NEW STATES.

1,285. In other Chapters of this Report, the Committee has referred to problems arising from the division of legislative power between the Commonwealth and the States and also from the operation of section 92 of the Constitution. In Chapters 10 and 15, for example, the Committee adverted to the disadvantages and difficulties of divided regulation of navigation and shipping and industrial relations respectively under the separate laws of the Commonwealth and the six States. In Chapter 18, in which the Committee discussed its proposed Commonwealth power over the marketing of primary products, the Committee referred as well to the destructive effects of section 92 on organized marketing schemes through unrestrained trade across State borders. The Committee adverted to further problems arising from section 92 in supporting its recommendation on State road charges in Chapter 20.

1,286. The adoption of the Committee's recommendation on new States would make more likely an increase in the number of States of the Commonwealth, and this would serve, in the absence of other constitutional changes which the Committee has proposed, to accentuate problems, brought about by divided power or section 92, mentioned in other Chapters. To this extent, the adoption of the present recommendation would lend weight to those recommendations.

1,287. Other matters affecting new States came before the Committee's notice. Under section 121 of the Constitution, the Commonwealth Parliament may determine the extent of representation of a new State in either House of the Federal Parliament as it thinks fit. A new State has no constitutional assurance of a minimum number of members in the House of Representatives as the original States have nor would the constitutional minimum of six senators for each of the original States apply to it. On the other hand, the original States have no constitutional guarantee that the representation of a new State in either House of the Parliament would not be excessive. The Committee believes that the matter of new State representation in the Federal Parliament can properly be entrusted to that Parliament. Moreover, under the Committee's proposal, the approval of the electors of an existing State is required before the Commonwealth can establish a new State and the electors would be unlikely to approve the formation of the new State if it were to receive more favourable representation than it should, having regard to the interests of the original States.

1,288. Another question involved the application of section 105A of the Constitution, which empowers the Commonwealth to make agreements with the States with respect to the public debts of the States, and the operation of the existing Financial Agreement between the Commonwealth and the States which the section authorized. As advised, the Committee does not regard an amendment of section 105A as necessary to provide for the possibility of new States becoming members of the Commonwealth. In all probability, some variation of the existing financial arrangements would be required if a new State were to be formed from the territory of an existing State which is party to the Financial Agreement. Under section 105A, however, the parties are competent to vary or rescind any

agreement made under the section. The Committee contemplates that both the Commonwealth and the States would act with good sense in any adjustments needed to provide for the formation of a new State as part of the Commonwealth.

CHAPTER 22.—ALTERATION OF THE CONSTITUTION.

Recommendation of the Committee.

1,289. The concluding recommendation of the Committee's 1958 Report was that section 128 of the Constitution should be altered to provide that a proposed law to alter the Constitution, which has at present to be approved in a majority of the States by a majority of the electors voting and by a majority of all the electors voting before it can be submitted for the Royal assent, should be submitted for the Royal assent if it has been approved by a majority of all the electors voting and by a majority of the electors voting in at least one-half of the number of States.

Constitutional Provision for Constitutional Alteration.

1,290. As the Committee stated in paragraph 10 of the 1958 Report, for all practical purposes, the Constitution may only be formally altered in accordance with the procedure laid down in section 128 of the Constitution.

1,291. Any projected alteration of the Constitution must first take the form of a proposed law passed by an absolute majority of each House of the Federal Parliament, or, in exceptional cases, by one House of the Parliament. Proposals for constitutional change cannot originate otherwise than in the Federal Parliament.

1,292. The next step which section 128 requires is the submission of the proposed law to the electors qualified to vote for the election of members of the House of Representatives not less than two nor more than six months after its passage in the Federal Parliament.

1,293. If the proposed law is approved at the referendum by a majority of the electors voting in a majority of States and also by a total majority of all the electors voting, the proposed law must be submitted for the Royal assent. Upon Royal assent being signified, the alteration becomes effective.

1,294. Certain amendments have, by the last paragraph of section 128, also to be approved by a majority of electors in each of the States affected thereby but it is not with proposed amendments of this kind that the Committee is at present concerned.

1,295. For convenience, the complete text of section 128 is set out in full hereunder—

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

Background to Section 128.

1,296. For the most part, the colonial Parliaments were free to amend the constitutions of their respective colonies but the Founders believed that the Constitution of the Federal Commonwealth should not be amendable by the ordinary legislative process and should take account of the constituent States of the Federation.

1,297. The draft approved at the Convention in 1891 provided for the submission of proposed laws altering the Constitution to conventions to be elected by the electors of the several States qualified to vote for the election of members of the House of Representatives. If the proposed amendment was approved by the conventions of a majority of States and if the people of the States whose conventions approved the amendment were also a majority of the people of the Commonwealth, the proposed amendment was to be presented for the Queen's assent. At a later stage of the Convention Debates, the draft clause was altered to provide for the taking of the vote of the electors directly instead of through conventions. Thus the Founders provided for an appeal to the people through the ballot-box and not for the consultation of the States through any institution of government.

1,298. Harrison Moore's description of the historical background is apposite. Harrison Moore wrote in 1902—

> The adjustment of constitutional powers between the Commonwealth and States Governments is most obviously governed by the provisions concerning the alteration of the Constitution (sec. 128).
>
> The spirit of federalism requires that the federal pact shall not be at the mercy of the central government.
>
> . . . . . .
>
> In Australia it was as necessary as elsewhere to establish the federal system upon a basis which should not be disturbed by the legislature. But it was no less an object of the founders of the Commonwealth to enlarge the power of self-government. The existing colonies had the power of amending their own Constitutions; the Commonwealth must have the power of amending the Commonwealth Constitution. One of the most difficult tasks which the Convention had to perform, was to devise a mode of amending the Constitution which should make that instrument sufficiently rigid to protect the rights of the several States, to secure deliberation before action, and to discourage a "habit of mending" which might become a "habit of tinkering", but which should at the same time leave it flexible enough to recognize that development is as much a law of state life as existence, and to harmonize with the spirit of a people with whom "majority rule" is the first principle of government, and who have grown up under a political system which knows little more of the distinction between constituent and legislative power than the British Constitution itself.
>
> In no other matter was so much careful attention bestowed upon the methods of other Constitutions, and on the lessons to be gained from the experience of the United States and Switzerland. The compromise ultimately adopted is interesting both from what it adopts and from what it rejects of these models.
>
> . . . . . .
>
> The principles of Parliamentary government, of democracy, and of federalism which run through the Constitution, are all recognized in sec. 128. The tradition of Parliamentary Government and of ministerial responsibility, leaves the sole initiation of amendments with either House of the Parliament, and neither the States legislatures as in the United States, nor the electors as in Switzerland, have any direct means of setting the machinery to work. The proposed law for the alteration of the Constitution must be passed by an absolute majority of each House of Parliament, a provision common to the Constitution Acts of the several Colonies and distinguishing measures of constitutional amendment in that one respect from ordinary legislation.
>
> —(*The Commonwealth of Australia*, Second Edition, at pages 597-599.)

Record of Constitutional Amendment.

1,299. In the setting of 1900, when six independent colonies were about to federate, it was a fair expression of the federal principle that the consent of electors in a majority of States should be secured in order to implement constitutional changes.

1,300. Experience has shown that the Constitution is exceedingly difficult to amend. There have, in the history of the Commonwealth been 24 proposed laws, some of which dealt with several subjects, submitted to the electors. Only in four instances have the requisite majorities been obtained in favour of the proposed constitution change. The first was in 1906, when a change was made in the date on which the terms of newly elected senators should begin. The second in 1910 concerned the taking over of State debts by the Commonwealth; the third in 1928 was to enable effect to be given to the Financial Agreement between the Commonwealth and the States; and the fourth in 1946 vested the Commonwealth Parliament with concurrent legislative power to provide certain types of social services. Of the four successful amendments, only the third and fourth are now really significant.

1,301. In the Committee's opinion, which it expressed in paragraph 18 of the 1958 Report, negative referendum results have been less the expression of independent State outlook than the outcome of the opposition of political forces to the government of the day which first sponsored the proposed constitutional alterations. Where the over-all vote of the electors has been adverse, there should, however, be no quarrel with the constitutional provision.

1,302. Yet, there have also been three occasions on which proposed laws have been supported by an over-all majority of electors without the requisite individual State majorities being sufficient for the carriage of the proposal. In 1937, a proposed alteration to vest the Commonwealth Parliament with concurrent legislative power on the subject of aviation was supported by a clear majority of electors but there were separate majorities in only two States. In 1946, when the electors approved the social services amendment, two other proposals, dealing with organized marketing of primary products and industrial employment respectively, also obtained majorities of the total votes of the electors of the Commonwealth. In each instance, however, there were separate majorities obtained in only three States. A few thousand more affirmative votes in one of the other three States would have reversed the result.

Proposed Modification of Section 128.

1,303. Where there are only six original States, the present constitutional requirement means that separate majorities must be obtained in four out of the six States or, in other words, for every State in which there is an adverse vote there must be a favourable vote in two States. At present, therefore, a constitutional change has to be supported not only by a majority of States but by two-thirds of the States, a proportion difficult to achieve in the light of the democratic processes which have operated in Australia since Federation.

1,304. Of course, as the Committee pointed out in Chapter 21, in discussing the formation of new States, the Founders did not contemplate that the number of States would remain static at the original six. The application of the majority principle when there are, say, seven or nine States, would offer greater prospects for constitutional change than when there are but six States.

1,305. Something should be done, in the Committee's opinion, to reduce the excessive rigidity which experience has shown that section 128 possesses and the Committee proposes that it should be sufficient to obtain separate electoral majorities in at least one-half of the States instead of in a majority of States.

1,306. The Committee's proposal would not disturb the federal fabric of the Constitution, inherent in section 128, but its proposal would serve to lay more emphasis on constitutional change by the democratic process of majority vote than there at present exists.

1,307. Under the Committee's proposal, proposed constitutional alterations would not have greatly enhanced prospects of success. As has been stated, out of the twenty proposed laws so far rejected there have been but two instances in which, though the State majorities were evenly divided, there was a totality of votes in favour of the proposals submitted. Moreover, the effect of the Committee's proposal would change the existing constitutional position only where there is an even number of States. If there were an odd number of States, say seven, to require separate majorities in at least one-half of the States, would be to require majorities in four States, that is to say, in a majority of States. Again, the suggested alteration would become proportionally less significant with increases in the number of States of the Commonwealth.

1,308. The Committee should also draw attention to the fact that no proposed law may be submitted to a referendum unless it is submitted not earlier than two months after being passed in the Federal Parliament nor later than six months after being so passed. The electors have, therefore, an adequate opportunity to become informed as to the issues involved in a proposed constitutional alteration and will vote upon the proposal whilst it is fresh in their minds.

1,309. The Committee believes that if effect were to be given to its proposal, some progress will have been made towards ensuring that the written Constitution is adaptable to meet the needs of successive generations of the community in the light of conditions which are bound to change further during the maturing stages of the Commonwealth just as they have already changed since Federation.

SECRETARIAT.

1,310. The Committee deems itself fortunate to have had as its Legal Secretary a brilliant young lawyer of outstanding ability, character and personality in Mr. J. E. Richardson, B.A., LL.M. The Committee expresses its keen appreciation of the action of the Solicitor-General in making Mr. Richardson's services available. His numerous written submissions on aspects of the Constitution, his efficient help to the Committee in its deliberations and his preparation of draft reports were invaluable and were matched by his complete devotion to the work of the Committee throughout the past three years.

1,311. The Committee also desires to thank the Clerk of the Committee, Mr. K. O. Bradshaw of the Senate staff, for his capable and untiring efforts on behalf of the Committee at all times.

1,312. The Committee records its indebtedness for efficient and faithful service to Mr. R. J. Harmey, LL.B., and Mrs. M. J. Russom, assistants to the Legal Secretary.

PRESENTATION OF THE REPORT.

1,313. The Committee has the honour to present its Report to the Parliament.

Dated this twenty-fifth day of November, One thousand nine hundred and fifty-nine.

NEIL O'SULLIVAN, Chairman.

P. J. KENNELLY, Member.

N. E. McKENNA, Member.

REG. C. WRIGHT, Member.

ARTHUR A. CALWELL, Member.

A. R. DOWNER, Member.

D. H. DRUMMOND, Member.

LEN. W. HAMILTON, Member.

P. E. JOSKE, Member.

REG. T. POLLARD, Member.

E. J. WARD, Member.

E. G. WHITLAM, Member.

APPENDIX A.

INDUSTRIAL RELATIONS: MR. DOWNER'S RESERVATION.

I recorded my dissent from the Committee's recommendation relating to industrial conditions in Annexure "A" to the Report which the Committee presented to the Parliament in October, 1958.

2. On that occasion, I expressed the view that section 51 (xxxv.) of the Constitution should be amended so as to enable the Commonwealth Parliament to make laws for the prevention and settlement of industrial disputes without being restricted to the processes of conciliation or arbitration or by the necessity for a dispute to extend beyond the limits of a single State. I considered that a general power over terms and conditions of industrial employment, which the Committee recommended to be vested in the Commonwealth Parliament, provided a greater extension of existing power than was desirable.

3. I subscribe fully to the Committee's view, expressed in Chapter 15 of the Report, that the effect of paragraph (xxxv.) is too complex and technical, and that its language of limitation imposes unnecessary restrictions on the scope of Commonwealth power.

4. In particular, I believe that the distinction between an intra-state dispute and a dispute extending beyond the limits of any one State is artificial, and misfits the contemporary structure of the Australian economy which, of course, is not limited by State boundaries. Moreover, as the Committee has pointed out in the course of explaining its recommendation, disputes can now readily be created so as to extend beyond the limits of one State for the purpose of attracting Federal settlement. In these circumstances, the distinction has outlived its usefulness.

5. I agree, too, that it should be open to the Commonwealth Parliament to constitute specialized industrial machinery to deal with disputes otherwise than by the two processes of conciliation and arbitration if other means should be better suited to the requirements of particular industries or localities.

6. There is no reason at all why the Commonwealth Parliament should not have at its disposal, when considering the question of industrial machinery, a choice of methods by which industrial disputes may be settled. Experience of the wages board system of dealing with industrial disputes in some of the States shows that employers and employees have confidence in the handling of industrial disputes by specialized authorities not tied to conciliation or arbitration.

7. I think, for example, there could well be a place in the Federal industrial arena for the appointment of Conciliation Committees such as the Federal Parliament unsuccessfully attempted to constitute in the provisions of the *Commonwealth Conciliation and Arbitration Act* 1930. That Act provided for the appointment by the Governor-General of Conciliation Committees. An appointment was to be made upon the application of a party to an industrial dispute or a party to an application to vary an award. The chairman of a Conciliation Committee so appointed was to be a Conciliation Commissioner but of the members other than the chairman one-half were to be representative of employers and the other half representative of employees. The members were not to be chosen as the agents of the disputants but as persons whom the Governor-General considered likely to appreciate their interests. The members of the Committee, other than the chairman, were to deliberate and, if they reached agreement, they could provide for the terms of agreement to have the same effect as an award. The majority of the High Court held, however, in *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319, that relevant provisions of the Act were invalid on the ground that the Federal industrial power did *not authorize the establishment of a body of persons which might settle a dispute by discussion* amongst themselves without any hearing or determination between the disputants.

8. For many years it has been unbroken practice for the Commonwealth and each of the States to entrust the determination of terms and conditions of employment primarily to industrial tribunals and this well established tradition has proved acceptable to employers, employees and the community alike. The fact that, under the present circumscribed Commonwealth industrial power, Commonwealth awards apply to so many employees in industry is itself an indication of the robustness of the Australian system.

9. I acknowledge that advantages could flow from vesting the Commonwealth Parliament with a general power to legislate with respect to terms and conditions of *employment in industry*. A power of no less substantial character is vested in the State Parliaments.

10. Experience since Federation, however, demonstrates the wisdom of keeping the determination of industrial matters out of the political forum. This means, in practice, out of party politics. Concessions to employers on the one side, and to employees on the other, can easily become the subject of election promises without proper consideration as to their consequences. No one can doubt that this, in fact, would happen. The national economy could be gravely injured by the legislature fulfilling pledges given in the heat of the moment, or out of a desire to capture votes.

11. In the Federal sphere, the ramifications of political action are nation-wide and ill-judged action may be a disturbing influence on the entire economy. This will become even more marked in the future, as Australia develops more and more into a unified nation.

12. As to the retention of the concept of an industrial dispute as the basis of any extension of Commonwealth power, I believe that the significance of requiring a dispute to attract Federal jurisdiction has been much exaggerated. To-day, disputes within the meaning of paragraph (xxxv.) are usually quite formal. They are so-called paper disputes, not indelibly marked with employer-employee antagonism. In my opinion, the need to have a dispute in the first instance helps to clarify the points on which employers and employees disagree.

13. But, apart from this, to vest the Commonwealth Parliament, or even specialized tribunals of experts, with a general power to determine terms and conditions of employment in industry would involve an unwarranted and dangerous extension of power. The alternative to Parliament having full power to legislate on industrial relations is not the creation of extra-parliamentary bodies as supreme industrial legislators with power to regulate every aspect of the industrial relations of employers and employees throughout the entire structure of Australian industry. Economic virility is better preserved if the parties are free to negotiate amongst themselves, and have recourse to the industrial machinery on matters unresolved between them. Accordingly, I believe in the retention of the concept of a dispute as the basis of Federal jurisdiction in industrial matters.

14. For the reasons which I have shortly stated, I consider that section 51 (xxxv.) of the Constitution should be altered to enable the Commonwealth Parliament to make laws with respect to the prevention and settlement of industrial disputes.

15. Since my proposal is predicated upon the existence, or likelihood, of an industrial dispute, I contemplate, by such an alteration, that the Parliament would exercise its power by establishing industrial authorities. My proposal would also permit the Parliament to prescribe the principles to which the authorities of its creation should have regard in the prevention or settlement of an industrial dispute. In this way, some measure of political responsibility would exist for the work of the specialized extra-legislative industrial machinery. This I believe to be necessary. At the same time, the authorities, and not the Parliament, would be charged with the resolution of actual or impending disputes.

A. R. DOWNER.

APPENDIX B.

DISSENTING REPORT OF SENATOR R. C. WRIGHT.

THE PARLIAMENT.

The Liberal Party opinion is that a two chamber Parliament is one of the firm safeguards of the individual's freedom—guaranteeing the ordinary citizen from impulsive parliamentary action whether of the Right or the Left.

The Labour Party's policy is for the abolition of an upper chamber—in Australia, the Senate—and legislation by a single-chamber Parliament.

2. Dr. Strong states—

Uni-cameral constitutionalism, or government by one Chamber, is a comparatively rare, and always temporary, phenomenon in the history of great states; while bi-cameral constitutionalism, or government by two Chambers, is the method characteristic of all important states to-day. The exceptions at the moment are all states of little constitutional significance, such as Portugal, Finland, Bulgaria, Turkey and Czechoslovakia (under the new constitution of 1948). Experiments in the uni-cameral method have generally been tried during periods of revolutionary reconstruction, only to be ended, in the succeeding period of reaction or even while the revolutionary *régime persisted, by the re-establishment of the Second Chamber*, as was the case in England, for example, during the period of Cromwell's Protectorate. (Page 186.)

The arguments in favour of Second Chambers must, therefore, be considered in conjunction with the way in which the Upper House is constituted. Those arguments are: that the existence of a Second Chamber prevents the passage of precipitate and ill-considered legislation by a single House; that the sense of unchecked power on the part of a single Assembly, conscious of having only itself to consult, leads to abuse of power and tyranny; that there should be a centre of resistance to the predominate power in the state at any given moment, whether it be the people as a whole or a political party supported by a majority of voters. In the case of a federal state there is a special argument in favour of a Second Chamber which is so arranged as to embody the federal principle or to enshrine the popular will of each of the states, as distinct from that of the federation as a whole.

—(Dr. C. F. Strong, *Modern Political Constitutions*, Third Edition, 1949, at page 187.)

3. In Australia the Senate is both a chamber of review and a special representative of the States in the Federal Parliament.

4. The initial point of the Federal Constitution was the equal representation of States in the Senate. That was the starting point. The next provision was to say that the House of Representatives should be composed of members whose numbers should be in proportion to the respective numbers of the people in the several States and should be as nearly as practicable twice the numbers of the Senators. The Parliament was constituted around the essential idea of equality of representation of the States in the Senate. That was the basic idea upon which alone agreement to federate was possible.

5. The powers conferred on the Senate were effective. Section 53 of the Constitution expresses the position—

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate.

. . . . . .

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

These provisions were earnestly debated during the Constitutional Conventions. They were regarded as essential powers for the States' House.

6. The Australian Senate as a Second Chamber has been referred to as "in some respects the most powerful in the British Dominions". (Sir John Marriott, *Second Chambers*, 1927, Second Edition, *at page 113.*)

Dr. Strong states the position:—

The functions of the Senate in Australia are, unlike those in America, purely legislative, and it has "equal power with the House of Representatives in respect of all proposed laws", with the exception of finance bills which must originate in the Lower House and cannot be amended, though they may be rejected, by the Senate. But the Constitution contains the most stringent provisions against abuse on the part of the House of Representatives of its sole power in the passage of money bills, and the Senate can force a dissolution of both Chambers even on a question of finance. Thus, it may be confidently asserted that the Australian Senate is the most powerful Second Chamber in the British Dominions.

—(*Modern Political Constitutions*, Third Edition, 1949, at page 205.)

APPENDIX B—*continued.*

7. The position of the Senate as seen by Dr. Quick and Sir Robert Garran is stated as follows:—

The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the Constitution, using the word federal in the sense of linking together and uniting a number of co-equal political communities, under a common system of government. The Senate is not merely a branch of a bicameral Parliament; it is not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their *constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar* and special interests, as well as for the ventilation and consideration of their grievances.

. . . . . .

. . . it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the *legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.*

—(*The Annotated Constitution of the Australian Commonwealth*, at page 414.)

8. The Senate Committee on the *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* 1950 in its report said—

107. *Functions of the Senate.*—Coming now to the question of functions, *the Senate was conceived as the* Chamber charged with the responsibility of protecting State rights and as a House of Review.

. . . . . .

109. Turning to the Senate's function as a House of review, this function is a universally accepted role of a second Chamber. The necessity for a second Chamber—"reviewing or suspending measures that the lower House has rushed through in an hour of fervor or passion"—*is the verdict of history throughout the world.* To quote the words of that distinguished nineteenth century writer John Stuart Mill—

"A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituent authority. The same reason which induced the Romans to have two Consuls, makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year."

The passage of time since those words were written has done nothing to lessen their force. . . .

—(*Parliamentary Paper*, No. S.1 of 1950.)

Sir Henry Manning, Q.C., writing in 1952, added this comment:—

The Select Committee of the Senate by whom the Report was prepared consisted of seven members of whom *three were Ministers in the previous Chifley Administration*, namely, Senators McKenna (Chairman), Ashley and Courtice, and four supporters of the Chifley Administration, namely Senators Arnold, Finlay, Nash and Sheehan. Senator McKenna had also been [Deputy] Leader of the Government in the Senate. This unanimous expression of opinion at such a crisis cannot be lightly regarded. . . .

—(*The Upper House, The People's Safeguard*, at page 12.)

9. The Second Chamber in the Australian Constitution, therefore, as the House of the States, was the essential basis of agreement by the Australian States and their people to form the federal Commonwealth. It had three important qualities—

(a) direct election by the people on a franchise of adult suffrage;

(b) equal representation of the original States; and

(c) equal powers with the House of Representatives to originate, amend or reject any legislation except as to initiation and amendment of some money bills.

10. The fact that the Senate is directly elected by the people makes an essential distinction between the Australian Senate and—

(a) hereditary Chambers, such as the House of Lords, which, in any view, is a survival of a former age;

(b) nominated Chambers—where the Executive Government can swamp the Upper House by nominees who may be pledged as a condition of appointment to pass specified legislation, perhaps, even for the abolition of the Second Chamber, as in New Zealand;

(c) Upper Houses elected indirectly—by the State Legislatures as in the United States of America until 1913, or by the two Houses of Parliament voting simultaneously as now in New South Wales.

There is very little analogy between the Senate and the House of Lords.

The people are represented in the Senate as directly and fully as in the House of Representatives. This is important in this democratic age; because it means that when a claim is made by the Senate to have legislation reconsidered, amended, or in the case of critical legislation to delay it until the electors can vote again on the Government's policy as expressed in that legislation, in each of those cases the claim is made not by gentlemen whose nobility derives from the accident of birth; or by those who have found favour with and been appointed by the Executive Government—itself perhaps since displaced; or by those who have secured acceptance by dubious manoeuvres of indirect voting devices. When the Senate rejects or amends a measure, it does so in the exercise of an independent judgment, as the direct representative of the people and of the States; only to require further consideration of the measure before final enactment.

2 to 1 Ratio.

11. In my opinion the most desirable and effective size for a Senate is between 40 and 80 members. Such a legislative chamber enjoys many advantages in comparison with large unwieldy bodies numbering several hundred. In my opinion the status of a House of the legislature is strengthened, and not reduced, by having a reasonably small number of members. This is one of the features which has made the American Senate the strongest and most influential democratic Second Chamber in the world. I emphasize this to disabuse any possible critic of the notion that I cling to a Senate having one-half of the numerical strength of the House of Representatives for the sake of numbers.

12. But the Commonwealth has been described by competent authority as "one of the most advanced social democracies in the world" (page 112), and emphasis has been placed by the same authority upon the strength which that democracy derives from its Constitution, and particularly from its Senate, as "the most powerful Second Chamber in the British Dominions". (Dr. Strong, *Modern Political Constitutions,* Third Edition, 1949, at page 205.)

It is because the Founders recognized that the Parliament under the Constitution consisted of two Houses of almost equal strength, that prolonged consideration was given to the possibility of deadlocks, and among the ingenious provisions adopted for the solution of disagreements between the two Houses was a joint meeting of the Senators and the Members. It is this provision that gives importance to the relative numbers of the two Houses. So long as the joint sitting is part of the procedure to resolve deadlocks, it is, in my opinion, important that the ratio of 2 to 1 in the numerical strength of the two Houses should be retained—that is, that the Senators should be one-half of the number of the members of the House of Representatives. Otherwise the less populated States, specially represented in the Senate, may lose their constitutional strength in the case of difference with the more populated States in the joint meeting. *It is only for this reason that I disagree with the majority* recommendation in paragraph 110 of the Committee's Report.

13. I note that the Senate Committee on the *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* 1950 reported—

> The Committee, therefore, does not recommend any change in the two-to-one ratio . . . while provision is made in the Constitution for joint sittings to settle disagreements by a joint vote of the Houses.
>
> —(*Parliamentary Paper,* No. S.1 of 1950, paragraph 87.)

Deadlocks.

14. Before 1900 there was not in the English Constitution, or any of the Constitutions of the Australian colonies, any statutory provisions for resolving deadlocks between the two Houses of those Parliaments. But the Founders recognized that the Australian Senate was being created with significant and unusual strength. This derived from its election on adult suffrage and from the fullness of its powers to legislate, equal with the House of Representatives on all matters except some money bills and, even in those cases, the Senate has full constitutional right to reject any money bill. It had unusual strength as the constitutional representative of the States.

It was when the Founders considered the extraordinary prestige which the Constitution thus accorded to the Senate that they began to consider the wisdom of incorporating into the Constitution some specific deadlock provision.

Various proposals were put forward. They are stated by Quick and Garran—

> The first deadlock proposal was made in the Sydney Convention of 1891, when Mr. Wrixon proposed a joint sitting in case suggestions of the Senate as to Money Bills were rejected by the House of Representatives. This was negatived.
>
> At the Adelaide session in 1897, deadlock proposals were moved by Mr. Wise and Mr. Isaacs, but were negatived on division.
>
> During the statutory adjournment, the Legislative Assemblies of New South Wales, Victoria and South Australia, suggested the insertion of different deadlock provisions, and at the Sydney session the question was debated at length, with the result that two schemes were inserted in the Bill:—(1) A consecutive dissolution of both Houses, proposed by Mr. Symon; (2) a simultaneous dissolution of both Houses, followed if necessary by a joint sitting at which a three-fifths majority should decide—a proposal built up on propositions made by Mr. Wise, Sir Geo. Turner, and Mr. Carruthers.
>
> At the Melbourne session, after the second report, the question was again discussed, with the result that the scheme for a consecutive dissolution was omitted; but otherwise—except in minor details—the Sydney decision was adhered to. Drafting amendments were made before the first report and after the fourth report.
>
> The three-fifths majority was strongly objected to in New South Wales, and both Houses of the Parliament of that colony recommended the substitution of a simple majority. At the Premiers' Conference at Melbourne in 1899, an absolute majority was substituted for a three-fifths majority.
>
> —(*The Annotated Constitution of the Australian Commonwealth,* at page 684.)

15. The result was section 57 of the Constitution—

(a) It provides for solving a deadlock only in relation to bills initiated in the House of Representatives. If a bill originates in the Senate, and is perpetually rejected by the Representatives, the section has no application.

(b) If the Representatives, with an interval of three months, twice pass a bill which the Senate does not accept, the Governor-General may dissolve both Houses and cause an election.

(c) If after such dissolution, and a consequent election, the Representatives again pass the bill, and the Senate again rejects it, the Governor-General may convene a joint sitting and, if an absolute majority of the total number of members of the House and of the Senate then vote for the bill, it is passed, and can be assented to by the Crown.

16. In the American Constitution, which is the source of so much of the Australian *Constitution, no special provisions for deadlocks exist. Marriott states the American position*—

> In the event of a disagreement between the two Houses a conference committee, composed of members of both Houses, is appointed by the President of the Senate and the Speaker of the House. The report of this committee is generally accepted by both Houses. Not until the Bill is passed in identical form by the two Houses is it sent up for the approval of the President, who has the right to send it back to Congress. Should it again pass by a two-thirds vote in both Houses, the President's veto lapses and the Bill becomes law with or without his assent.
>
> —(Sir John Marriott, *Second Chambers,* 1927, Second Edition, at page 70.)

17. The Australian provisions for a double dissolution have been invoked only twice in 59 years—once in 1914, and again in 1951. In each instance the general election which followed solved the deadlock, without recourse to a joint sitting. This is fairly strong evidence that those provisions have been sufficient for the political occasions of a most significant period. The provisions established a ready procedure for a Government to appeal to the electors, if Senate opposition prevented legislation carrying into effect its programme. But the history, which shows that a Government has thought fit to invoke a double dissolution only twice, demonstrates that Senate opposition has not in fact proved any real obstacle to the passage of important legislation.

18. It is not without significance also to note that, although Standing Orders provide precedures for Conferences between managers from each House to resolve disagreements, such a Conference has been held only on two occasions. They were able to reach agreement in each instance.

19. The majority of the Committee proposes that the joint sitting shall become the primary procedure for solving deadlocks. It proposes to eliminate a dissolution as a necessary step in the process, and bypass the people's vote in the procedures for resolving deadlocks. That proposal would have the effect of enabling the Parliament to sit in joint session—

(a) on a money bill passed once by the House of Representatives, if for a period of 30 days the Senate has not approved of the bill;

(b) on any other Bill, passed twice by the House of Representatives, which in the first instance for 90 days, and on the second occasion for 30 days, the Senate has not accepted.

At the joint sitting the majority required is "an absolute majority of the total number of members of the two Houses, and at least one-half of the total number of members of the two Houses chosen for and in a State in at least one-half of the States".

The joint session under the present Constitution would have 122 Representatives and 60 Senators. In future, if the majority proposals become part of the Constitution, it may have 36 Senators and 200 or more Representatives. In either case, it is quite clear that a joint sitting, used as the sole and primary means to solve disagreements, is a ready means of submerging the Senate in futility. No

Second Chamber could expect to retain its independence and individual right to represent States under such a system. Moreover, why should the people's vote be bypassed—"it is not Parliament that should rule; it is the people who should rule through Parliament".

—(Churchill, *House of Commons Debates*, Vol. 444, Col. 206.)

20. The procedure of a joint sitting when the numbers of Senators and Representatives are markedly unequal is of course a mere formality. Even when the majority thereat is "at least one-half of the total number of the members of the two Houses chosen in a State in at least one-half of the States" it is clear that the Senate representation of the small States could never expect to prevail against the larger and more populated States—whose predominance in the House of Representatives is overwhelming.

21. In effect, therefore, the majority proposal seeks to apply to the wholly elected Senate, in the Australian federal system, the provisions which the Parliament Acts of Great Britain in 1911 and 1949 have applied to the hereditary House of Lords in a unitary system. Not only that, but the majority proposals would abbreviate the Senate's powers even more severely than did the Parliament Act, 1949, of England restrict the powers of the House of Lords.

The comparison is—

DELAYING POWER.

—	House of Lords, 1911.	House of Lords, 1949.	The Senate (proposed).
Money Bills	1 month	1 month ..	30 days
Other Bills	2 years	12 months ..	4 months

22. On consideration, I feel my opposition to these proposals grow, when I recall—

(a) the Parliament Act of 1911 was possible only because of the power of the Executive to appoint to the House of Lords sufficient Crown appointees to ensure the passage of the Bill;

(b) the Parliament Act, 1911, was expressed to be a temporary provision pending reform of the House of Lords. It was a "stop gap" measure as Mr. Quintin Hogg described it. (*House of Commons Debates*, Vol. 444, Col. 80). The preamble of the statute said that the provisions should be of an interim nature, until proper proposals could "be prepared for Parliament to fulfil the announced intention to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of an hereditary basis";

(c) the Parliament Act was directed at a situation where "During the four years of the Parliament of 1906 no Government measure against the third reading of which the official Opposition voted in the House of Commons passed into law" (May, *Constitutional History of England*, 1912, Vol. III., at page 343), by reason of the House of Lords adoption of the opposition view.

In 1947 the English Labour Government was confronted with some electoral difficulties, and its Bill for the Nationalization of Iron and Steel would not have matured into an Act of Parliament before the next pending elections, if the provisions of the Parliament Act, 1911, were to remain unaltered. So the Government brought in a bill to reduce from three to two the number of sessions in which a bill under the Parliament Act, 1911, must be passed, and from two years to one year, the minimum period during which such a bill could be delayed. The idea was produced not by consideration of constitutional or national issues, but out of "a deal between Cabinet Ministers quarrelling about the nationalization of steel." (Churchill, *House of Commons Debates*, Vol, 444, Col. 209.)

This Bill making further inroads upon the legislative authority of the House of Lords was made possible and enacted by virtue of the provisions of the Parliament Act, 1911, itself. But equally interesting to the unsuspecting, is the fact that its operation was made retrospective so as to speed the Iron and Steel Nationalization Bill through to the stages of enactment. It was by these means that this revolutionary legislation was passed.

As a Liberal, I recoil from the thought of accepting these precedents as applicable to permanent reform of a popularly elected States' House in which democracy has a genuine chance of expression as at present constituted.

23. It is well to recall the statements which Sir Winston Churchill made in the House of Commons in November, 1947, during the debate on the Parliament Bill which became the Parliament Act, *1949*:—

Of course, there must be proper Executive power to any Government, but our British, our English idea, in a special sense, has always been a system of balanced rights and divided authority, with many other persons and organized bodies having to be considered besides the Government of the day and the officials they employ.

—(*House of Commons Debates*, Vol. 444, col. 206.)

All this idea of a handful of men getting hold of the State machine, having the right to make the people do what suits their party and personal interests or doctrine is completely contrary to every conception of surviving western democracy.

(Ibid.)

I will not expatiate upon the kind of laws they could pass if all is to be settled by a party majority in the House of Commons, under the discipline of the whips and the caucus. But anyone can see for himself, and it is now frankly admitted on the opposite side of the House, that what is aimed at now is a single chamber Government at the dictation of Ministers, without regard to the wishes of the people and without giving them any chance to express their opinion.

(Ibid., col. 212.)

As a freeborn Englishman, what I hate is the sense of being at anybody's mercy or in anybody's power, be he Hitler or Attlee. We are approaching very near to dictatorship in this country—dictatorship that is to say,—I will be quite candid with the House—without either its criminality or its efficiency.

(Ibid., col. 213.)

This is a dictatorship that we are facing, a timid incompetent dictatorship, but a dictatorship none the less, and one that at any time in the lifetime of this Parliament may be replaced by a determined, totalitarian oligarchy.

(Ibid., col. 214.)

24. In the half-century which has followed federation, we have seen shifts and changes in the political scene perhaps not fully anticipated in 1900. This period has witnessed tremendous growth of executive power. In 1901 the Senate was a potentially great House. But the Treasury was the prerogative of the Representatives, and as such the preserve of the Ministry. The Executive, in the next half-century, was to grow. Under the weight of two world wars in every British country, even though responsible government prevailed, the Executive overshadowed Parliament. In war time, it was well-nigh the *alter ego* for Parliament. But in great crises also, apart from wars, the popular House under the control of the Executive brooked no delay at the instance of "conservatives". Hereditary or nominee Upper Houses were openly assailed. If necessary, the Executive would "create" more peers or nominate the requisite number of party members. New dictators whether Socialist, Fascist, Nazi or Communist or otherwise must not be baulked by such "obstructions" as Second Chambers.

25. The truth is that the impetus for a One Chamber Parliament comes from the Socialist aim to enthrone the Executive as the legislative power.

The Socialist Party—the Labour Party—beginning about 1900, based itself upon Caucus control and party solidarity. The majority of the party in secret Caucus decided the party's attitude to parliamentary measures. If the party had the seals of office, the Caucus was the substitute for Parliament. It, of course, did its business in secret. In Australia, whenever the party was represented in the Senate, the one Caucus controlled both Houses of the Federal Parliament by a single majority vote—where the party members, whether Senators or Representatives, sat in joint session in party meeting.

It is not then difficult to see the advantage to the Socialist Party of abolition of the Senate—and as a first step, as proposed in the majority report, its debilitation. One-chamber government, for a revolutionary party choosing to retain the cloak of the parliamentary facade, was more easy and facile. Sir Stafford Cripps, when a dedicated member of the Socialist League, saw this. In his essay entitled "Can Socialism Come by Constitutional Methods?" he wrote:—

From the moment when the Government takes control rapid and effective action must be possible in every sphere of the national life . . . The Government's first step will be to call Parliament together at the earliest moment, and place before it an Emergency Powers Bill to be passed through all its stages on the first day. This Bill will be wide enough in its terms to allow all that will be immediately necessary to be done by ministerial orders. These orders must be incapable of challenge in the courts or in any way except in the House of Commons.

—(*The Passing of Parliament*, by Professor G. W. Keeton, at page 28.)

Professor Keeton adds:—

The régimes of both Mussolini and Hitler, it will be remembered, began in exactly the same way, and inasmuch as Sir Stafford points out that all opposition to government policy is to be treated as sabotage, it is clear that the dissolution of an effective parliamentary opposition would rank high on the list of priorities.

Opposition to any Government view in the Senate is no longer graced with the term opposing view. It is something to be disparaged. It is "obstruction" by the Senate.

26. Professor Keeton further adds:—

There was, perhaps, a special appropriateness in the remarks of Mr. Clement Davies in the House of Commons on October 23rd, 1950, that

"it was sad to see how little interest was being taken in a matter that concerned the sovereignty of Parliament by members of all parties. During the last thirty years the tendency had been to surrender back to the executive powers that had been won from them over the centuries. There was a tendency to initiate a new judicial power, to create administrative laws, making the executive to a large extent judges in their own case. The sovereignty of Parliament was threatened. All the time we were being called on to surrender more and more of our rights and privileges to the Government of the day. This continuous erosion was far more dangerous to liberty than any attack from the other side. We were awake to that and could resist it, but the drip, drip, drip of erosion was more likely to destroy the House."

These observations were uttered having in mind the House of Commons, after the powers of the House of Lords had already been reduced to insignificance.

Marriott, after referring to the growing disinclination of the House of Commons to reject or amend Government Bills, adds—

Thus the House of Lords is not alone in its eclipse. Its diminishing importance in the sphere of legislation finds a parallel in that of the Commons, and both may be regarded as symptoms of a common cause—the increasing autocracy of the Cabinet, the encroachment of the Executive upon the sphere of the Legislature . . . My purpose is to show that while it is true that the Second Chamber has lost all effective power of legislative initiation, it has surrendered it not to the Commons but to the Cabinet. The only advantage enjoyed by the Commons over the Lords is that of a first taste of the legislative dishes served up by the ministerial chefs.

—(Marriott, *Second Chambers*, at page 43.)

To the Socialist, the dictator and the ambitious Executive, Second Chambers with effective powers of delay and review are anathema.

27. The only unicameral experiment in earlier English history had produced what Cromwell described as "the horridest arbitrariness that ever existed on earth".

On 19th March, 1649, the Rump of the Long Parliament had solemnly resolved that "from henceforth the House of Lords in Parliament shall and is hereby wholly abolished and taken away". It was a development of a line of thought (parallel to a current minority view in Canberra to-day)—that the Rump in 1651 pushed on their "Bill for New Representation". This Bill contained "the amazingly impudent proposals" that the existing members of the House of Commons should retain their seats without re-election, and that they should have a veto upon all new members who should be elected not merely to the next but to all future parliaments.

The single chamber exercised arbitrary power. The restoration of the House of Lords came in 1660.

28. One often hears quoted Abbé Siéyès—

If a Second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.

But the epigram is stimulating to the wit, though dull to the sober sense. If a Second Chamber agrees in nine cases out of ten, and disagrees in one case out of ten, and that isolated case is of paramount importance, it would be difficult to say that such a Chamber is superfluous or mischievous. It is a matter of surprise that such an epigram should trickle its ear-tickling way through history as if it were a sound proposition.

Dr. Strong's comment is—

The Abbé Siéyès, the most prolific constitution-monger of the period [the French Revolution], who had a very great influence on the form of constitutional experiments connected with the first Revolution, . . .

29. Both branches of the argument are used by critics of the Senate. Because the Senate has been for the most part acquiescent in the Representatives' legislation, it is said that it is useless as a House of Review. Because it usually divides on party lines and not on a line of demarcation by States, it is claimed that it has forfeited its role as representatives of the States.

It is not to be denied that on past experience there is some ground for both criticisms. But it is to be denied that either criticism warrants a conclusion that the Senate should be undermined.

It is worth recalling that Woodrow Wilson had this to say of the American Senate—

There cannot be a separate breed of public men reared specially for the Senate. It must be recruited from the lower branches of the representative system, of which it is only the topmost part. No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. I think it safe to say, therefore, that, though it may not be as good as could be wished, the Senate is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be.

—(Wilson, *Congressional Government*, at page 195.)

30. And so the agitation for a Government's power to bypass the Senate is based on two completely inconsistent claims—

(a) one school of critics claims that when the Senate rejects or amends a measure it obstructs the peoples' Government.

(b) the other section claims that if the Senate always agrees with the House of Representatives it is purposeless, and therefore, it is argued, its powers ought to be reduced.

But it is neither fair nor sound to base these claims on the performance of the Senate—

(a) under the Block voting period 1903-1946, or

(b) when the Labour Party has a majority in the Senate.

(a) First because under the Block party voting system prior to the introduction of proportional representation, the imbalance in the Senate was the designed result of an undemocratic system enacted by the Federal Parliament for the express purpose of manipulating a Government majority in the Senate. I think it is only fair to claim that the Senate as an institution should be judged by its performance when the Federal electoral system does not unfairly prejudice it;

(b) I discount the performance when Labour has control of the Senate, because that Party's Caucus requires its members to do two things quite subversive to the purposes of the Senate—

(i) It gathers into one Caucus both Senators and Representatives. In the Caucus one Senator has one vote. But if he is a Senator from a small State the Constitution gives him in Parliament a vote of greater value than, for example, a Representative from New South Wales. The Caucus obliterates the true value of the Senator's authority to represent his State;

(ii) The secret vote of a numerical majority in Caucus, or a decision of the Party Executive, binds a Labour Senator to vote, not according to his interpretation of policy or State interest, but as a majority of the Party Caucus or the Executive direct.

Senator McKenna, on 17th October, 1950, speaking on the *Communist Party Dissolution Bill* 1950 [No. 2] said—

the federal executive is the controlling body of the Australian Labour party, and directs all its activities during the periods between the triennial conferences . . . Not only is every member of the Parliamentary Labour party honourably bound by the decision of the federal executive, but so also is every member of the Australian Labour party throughout Australia. Lest there should be any misunderstanding on that point let me make it clear how the federal executive is elected . . . It is the body thus democratically elected which made the pronouncement that now binds every member of the party. So far as I, and other members of the Federal Parliamentary Labour party are concerned, whatever we may say regarding that decision in the halls of the party, we are bound by the decision, and accept it unquestionably . . . we of the Federal Parliamentary Labour party concur entirely in the statement made by the federal executive . . .

—(*Parliamentary Debates*, Vol. 209, at page 811.)

It may be said that to discard the performance of the Senate when Labour has a majority is an abstract and unreal approach. I prefer to think that abuses evident in those circumstances should be corrected by special measures protecting the integrity of a Senator's parliamentary position. It is probably a long overdue reform to enact that a member of Parliament who agrees to pawn his vote to any outside organization, Caucus or Party, commits an offence and becomes disqualified.

It is preferable to destroy abuses which tend to corrupt good institutions, rather than fulfil the purpose of the abuse, and because the institution has worsened under the abuse, destroy the institution.

31. If, then, I am right in discounting Senate performance—

(a) during the block voting period prior to 1949, and

(b) when Labour Caucus or its Party Executive controls a Senate majority,

we can consider the trend of Senate experience in other circumstances to see whether the Senate is, on the one hand, supine and insignificant or on the other, hostile and obstructive.

The effect of block voting had been that generally all seats in a State were won by candidates of one party. With the introduction in 1949 of proportional representation as a method of counting votes and electing Senators, there is assured proportional, and not unbalanced block representation, to the three major parties, to minority parties, and even to Independents in the Senate.

Whenever a State industry or interest is in issue in the Senate support is usually expressed on a State basis, for example, Tasmanian Fruit, or Queensland Sugar, or West Australian Mining or South Australian Water Rights.

And undoubtedly the existence of the Senate representation of the States is a standing challenge to any Government who would unfairly invade the State interests. The Journals of the Senate show that divisions frequently diverge from the strict party line and that amendments of legislation are often proposed and sometimes carried.

Senate Committees have done some creditable work.

But even where the Senate has acted strictly on party lines, instances can be given of action in the Senate of great value to the public interest.

(1) In 1950 when the Bill called *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* 1950 was before the Senate, the Labour majority sent the Bill to a Select Committee for report. It is a matter for regret that the Government Senators were unwilling to join the Committee. But the Committee exposed such weaknesses in the measure that the Bill was dropped.

(2) The *Communist Party Dissolution Bill* 1950. The Labour Government denounced the Bill as an arbitrary measure. It was amended in the Senate in important respects by a Labour majority to ensure that the legislation should have proper regard to what Labour claimed to be the ordinary processes of law including *trial by jury, onus of proof and the right of appeal and condemnation by law* rather than executive act. When agreement could not be reached between the Houses, the Bill was laid aside in the House of Representatives. But when the measure was presented a second time to the Senate the Labour Party deserted its cause, and rather than face a double dissolution, yielded to its Party Executive's direction not to oppose the Bill. It would have done the Senate great credit if it, and not only the High Court, had had the honour of destroying such an arbitrary measure.

(3) Perhaps the most important single issue in Australian politics since 1947 has been Banking.

When the *Banking Act* 1947, which provided for the Nationalization of Banking, was passed, the Liberal-Country Party Opposition in the Senate was powerless—numbering only 3 in a Senate of 36. Can any one reasonably deny that, if the Opposition then had had the numbers, it would have been a great service to the country to have sent the measure for decision by the electors before its final enactment. Due to the fewness of the Opposition under the block voting system at the time, this revolutionary measure had a speedy passage through the Senate; but it was subsequently declared invalid by the High Court for contravening the Constitution. It is probably true to say that the public disapproval of this measure was chiefly responsible for a change of Government *at the next general elections in 1949.*

The new Government occupied eight years before comprehensive counter legislation was submitted, establishing an independent Reserve Bank and submitting all units of the trading bank structure—both Government and private—to the control of the Reserve Bank without discrimination or advantage. This obviously *was legislation of the highest national importance. The Senate at the time (1957)* was equally divided. But on the Labour side three Senators were independent of Caucus control—two members of the Democratic Labour Party and one a member of the Queensland Labour Party.

Although I strongly supported the legislation, I record my belief that the Senate *Opposition performed national service in refusing the passage of the measure on* two occasions (1957 and 1958) until there was a general election. The Government did not seek a double dissolution. But at the next election (November, 1958) the Government was returned with majorities in both Houses sufficient to pass the banking measures.

The enactment in those circumstances, after public debate, when the people were acquainted with the actual provisions of the Bills, satisfies one's democratic sense more fully than if the Bills had not been checked by the Senate for further consideration by the electors.

32. *But in the special character of the States' representative there is much more need to-day* at Canberra for an effective Senate than in 1900. It was because the Senate was given such strong powers in respect of money bills that a special procedure for deadlocks became of importance.

It is in respect of bills appropriating revenue or moneys or imposing taxation that the Senate has no power to originate.

It may not amend proposed laws imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government.

It may not amend any bill so as to increase the proposed charge or burden on the people.

But in all other respects the Senate has equal powers with the House of Representatives.

The financial relationship between the States and the Commonwealth has become increasingly important from the States' point of view with every decade since Federation. With every decade we *have witnessed the growing dependence of the States upon moneys voted by* Act of the Federal Parliament.

Section 87—the Braddon Blot—guaranteed to the States three-fourths of the Customs and Excise revenue for ten years after 1900. In 1910 the States lost any share in indirect taxes (Customs and Excise). In 1942 by the Commonwealth assertion of exhaustive powers over the main field of direct taxation, i.e., income tax, the States, for practical purposes, were made to depend upon reimbursement grants—granted by Acts of the Federal Parliament. It is my view that a balanced governmental responsibility can be maintained in a federation only if the fields of revenue available to each Government—Commonwealth and State—are constitutionally guaranteed.

Under the Constitution, as it stands, the Commonwealth is supreme in the realm of finance. The Constitution has been found to afford no real safeguard for State financial security. So long as the Commonwealth has that superiority over revenues, and the States are dependent for finance on Federal Act of Parliament, in my view, it is imperative that the authority of the Senate be preserved and not in any respect impaired, to express the State's rights to finance and prevent unfair distribution of revenue. If the present proposals of the majority of the Committee to bypass the Senate prevail, the less populous States must rely only on their influence with the Federal Government and such sense of equity as general argument there can engender. The Federal Parliament will cease to provide real protection for the less populous States.

33. But 59 years in the development of an institution is a very short period. Indeed it was *after such a comparatively short experience that the American Senate itself* assumed the predominant role in Congress. In its first years of the Congress, reference was made to "the dull and trivial proceedings in the Senate Chamber, and to early adjournments in order that its members might have an opportunity to listen to the more spirited debates in the House". (Haynes, *The Senate of the United States,* at page 1,000.) But that has changed.

If the Australian Senate's performance in the role of review is disappointing, that is no argument for destruction of Senate authority. Indeed, while any hope remains of the Senate discharging an independent review, it is an argument against reduction of authority. And that argument is very much strengthened by reason of the almost total extinction of a spirit of individual judgment expressed in a vote on either side in the House of Representatives. To reduce the Senate to unquestioning acceptance of measures coming from the House of Representatives is not to enhance the power of the House of Representatives, but it is to give authority to Cabinet—a secret body whose acceptance in the British Parliamentary conception is wholly dependent upon the maintenance of Parliament—a bicameral Parliament—which is critical and independent and honorable in its fearless examination of Cabinet bills.

34. It is useless to deny that the House of Representatives, as well as the Senate, has lost much of these qualities. While they are running low let not one House, for the aggrandisement of the Executive power—not only Cabinet, but behind it, the strongly entrenched bureaucracy—reduce the power of the other.

My conception of Liberal politics is that Parliament—in both Houses—should at all costs be maintained as a free, deliberative and independent assembly of peoples' representatives and that the substitution therefor of Executive government should be resisted. Sir Winston Churchill's guidance before 1939 was often disregarded, but now his famous message to the Inter-Parliamentary Conference 1957 should be heeded:—

Since the Inter-Parliamentary Conference last met in London, twenty-seven years ago, free Parliamentary institutions have confronted, and have triumphantly overcome, the heaviest assault ever made upon them.

. . . . . .

Our Parliament has survived because it made itself the spokesman not of government but of the people. In the fiercest clash of debate we have jealously guarded the right of every Member freely to speak for his constituents and for himself. If your Conference will follow this tradition, it can make a significant contribution to toleration between ideologies and understanding between nations. Thus alone can freedom endure and mankind live in peace.

This precious duty and right of the individual member belongs in a much stronger sense to each of the Houses of Parliament.

The Senate's constitution is appropriate to discharge that function. It is not the constitution *of the Senate which needs reform. It is the abuses in its party management which should be corrected.*

35. It is for the foregoing reasons, that I oppose the majority recommendation in paragraph 130 of the Committee's Report.

36. The further proposal in paragraph 130 to enable a joint sitting as the ultimate solvent, preceded either—

(a) by a double dissolution, or

(b) by a general election for the House of Representatives and one-half of the Senate—

provided that the House of Representatives election coincides with the normal periodical election of the Senate—is acceptable to me.

My reason for accepting such an amendment is, that in each case, the electors have expressed their will, and an Upper House in the Australian democracy exists only to ensure that Parliamentary measures express the settled will of the people.

Terms of Senators.

37. Only on one occasion (1953) in 59 years, has it been necesary to have a separate Senate election.

A six year term of the Senator is one of the strengths from which he derives his independence.

Continuity of the Senate is regarded as a strength.

But I think it would reduce the Senate to a complete echo of the House of Representatives, and a pretence to any independence of judgment, if one-half of the Senate automatically went out for election every time a crisis sent the House of Representatives to the country.

On the score of economy and from the point of view of the convenience of electors, I can agree that simultaneous elections for members of the two Houses should be held as far as possible; but I *cannot agree with an approach to the problem which seeks permanent simultaneous elections at the* cost of the Senate's independence and the strength which accrues to it from its continuity. If elections get out of step, a solution always is for the House of Representatives to shorten its own term to bring it again into line with the Senate, as it did in 1955.

There are, in my view, real objections to a provision that every time the House of Representatives precipitates an election one-half the Senate should go up for election too. Such elections of the House of Representatives may emanate from internal personal differences, alterations of party allegiances, or miserable party manœuvres.

Further, the growing constitutional development of the right of Heads of Government to secure a dissolution of the popular House upon request, in my opinion, makes it imperative that the Prime Minister should not have the power to treat the States' House as an appendage of the Popular House and take one-half of the Senate to election at the will of the Executive Government.

The Senate would be better abolished than exist as an echo of the Federal Executive Government.

CONCURRENT LEGISLATIVE POWERS.

Corporations and Economic Powers.

38. The present placitum (xx.) of section 51 of the Constitution is expressed to give the Commonwealth Parliament power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Its meaning has remained obscure from the point of view of legal interpretation. But it is generally agreed that it does not give the Commonwealth power to enact a uniform Companies Act or to legislate for the control of trading activities of the companies mentioned.

In my opinion there would be merit in repealing the present provisions and substituting for them an explicit power to legislate uniformly throughout all States and Territories, for the formation and winding up of companies.

But the majority's proposal, I fear, goes beyond that. It is a general power with respect to "corporations". It is followed by a provision that the power should not authorize the Commonwealth Parliament to make laws with respect to the "trade, commerce or industry" of corporations or which apply to corporations of a State (including municipal corporations) formed for governmental purposes.

The expression "corporations" is wide enough to include industrial, trading, mining, and financial corporations—indeed, every type of corporation, save only corporations of a State (including municipal corporations) formed for governmental purposes. Take for example industrial unions incorporated as organizations under the industrial power. In relation to them the proposed power may be capable of indefinite development.

Also in relation to companies generally the power to legislate for incorporation authorizes the prohibition of incorporation for some purposes or the imposition of conditions upon the act of incorporation. These are not fanciful objections. Present company law has special provisions for the business of banking. Life Insurance Companies are required to pay deposits to the Treasury as a guarantee of security. The Federal Parliament, when it decided to nationalize the banks, provided that a private banking corporation should cease to carry on business as from a date specified by the Treasurer in the *Gazette*. On future occasions similar, or much more radical, provisions may be made as to shipping or insurance or steel or mining or, indeed, any other companies.

But it is when the proposed "corporations" power, is read with the subsequent group of economic powers recommended by the majority that I am driven to dissent.

These proposals are for Federal power with respect to—

(1.) (paragraph 983) (i) (a) the issue, allotment, or subscription of capital; and

(b) the borrowing of money whether upon security or without security,

by corporations which engage, or may engage, in production, trade, commerce, or other economic activities.

(ii) It is declared that the power is not to apply to—

(a) the issue or allotment of capital out of profits or accumulated reserves of corporations; or

(b) incorporated authorities of a State, including local government authorities.

(2.) (paragraph 984) hire-purchase and other agreements or transactions entered into in connexion with the sale, purchase, hire or encumbrance of goods which involve the making of periodical payments or deferment of the full amount payable.

(3.) (paragraph 985) rates of interest and other charges payable in connexion with loans obtained upon the mortgage or security of land.

With all respect, I regard this as an odd collection of economic powers for Federal constitutional purposes. The group does not, to my mind, express a completed conception of any definable economic activity appropriate for constitutional demarcation.

If under paragraph 983 (1)(b) the Parliament can legislate without limit as to "borrowing of money" by companies, it seems to me a false protection to say that, under paragraph 784, the corporations power does not extend to trading. If you can control a company's right to borrow money, you can control its trade. So, too, if you can prohibit the issue and allotment of capital by corporations, you can strangle corporations.

If, under paragraph 984, you can legislate without restriction upon credit sales of "goods" or mortgages or encumbrances of goods, you have power to control the "trade, commerce or industry", not only of corporations but of individuals in a very wide degree. In fact the power is virtually a power to control the sale and disposition of ships, motor vehicles, farm implements, live and dead stock, furniture, and all "goods" except, apparently, those which are the subject of cash sales. It would, I think, not be denied that it would enable Federal price control of credit sales.

Then, add to all this the power proposed in paragraph 985, "rates of interest and other charges in connexion with loans upon the mortgage or other security of land"! The parliament which can fix interest rates can exercise an important control over the "trade, commerce and industry" of corporations, as well as individuals, who obtain loans upon the security of houses, farms or industrial land or any land.

For these reasons I find the protection expressed in paragraph 784 quite illusory.

Control of capital issues is thought to be a suitable method of combating inflation and ensuring more money for government loans.

> Financial controls of this general description have become familiar as devices appropriate to situations of actual or potential inflationary tendencies. They provide a means of assisting a selected category of purposes in the economic life of a community by precluding access for other purposes to some of the chief sources of finance. By thus controlling the flow of purchasing power, they have the practical effect of diverting goods and services away from those purposes which are not within the favoured class and (since they are unlikely to be allowed to lie idle if there is a demand for them in another direction) towards the purposes which the controls are designed to help

—(Per Kitto *J.* in his dissenting judgment in *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) 87 C.L.R., at 259-260.)

But any confidence which one might have in the efficacy of such controls to combat inflation is offset by want of confidence in the political uses to which such powers can be put. I take leave to quote another passage from the same learned judgment, at page 260—

> But reason and experience combine to teach that in a practical world a system which closes one channel to the flow of purchasing power is nothing less than a system which increases the flow into those which are left, Conscription and direction of labour, and the compulsory acquisition and rationing of goods, are direct and obvious means of satisfying the requirements of governmental and private purposes from a volume of goods and services which is insufficient for the demand; but it is not always expedient, and it may not always be practicable, to resort to such courses to meet the difficulty. Capital issues control, operating as it does to limit the purposes for which would-be consumers may get purchasing power into their hands, is an indirect but effective means of achieving the same ends. It produces less disruption of the life of the community, and less interference with personal liberty; but its true nature, if for these reasons it is less apparent, is not different.

I find difficulty in trusting the exception of the issue and allotment of capital out of "profits and accumulated reserves" of corporations. I do not trust it either as an economic or a constitutional discrimen. Watered capital seems to me to have its only appropriate existence in inflation: the reason of the exception is not clear to me.

Further, the whole group envisages machinery for comprehensive economic control; Canberra specializes in a form of bureaucratic government in which government licences, consents and permits, and official orders and decrees are the everyday stock in trade. Perhaps by their nature the proposed heads of power are inappropriate for rules of law prescribing courses of action being laid down in legislation. But whether this is so or not, experience convinces me that the form of control which would be exercised would be a Board or Commission or Authority with power to permit or licence individuals or corporations to do this or that, and power to prohibit or direct individuals or corporations in the specified trade activities. This form of control permits of discrimination or preference as between individuals, or business undertakings, or industries, or States, and is objectionable to any one who values the rule of law. The unexaminable executive decree, of the wisdom and justice of which the official claims sole jurisdiction, is too high a price to pay for possible economic regulation and stability. It should never be forgotten that the arbitrary system of import licensing persists now in Canberra only because the Federal Parliament has unrestricted power over imports in trade with foreign countries without any constitutional guarantee of freedom such as section 92 has secured for interstate trade: unqualified powers of economic control should not belong to Canberra.

For these reasons, I find myself opposed to the recommendations contained in paragraphs 784, 983, 984 and 985.

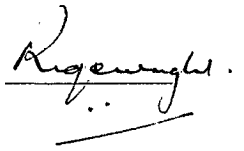
Marketing of Primary Products: Constitution, Section 92.

39. I accept the proposal as to organized marketing set out in paragraph 875 of the Report, provided section 99 of the Constitution is amended to prohibit discrimination as well as preference in interstate trade.

Alteration of the Constitution.

40. I am unable to agree to the proposed amendment of section 128 enabling an alteration of the Constitution to be made on a vote of less than a majority of the States, i.e., as the Committee expresses it "at least one-half of the number of States". The present terms of the Constitution requiring a majority of States is of special importance in Australia. The six States have their special interests. It is not appropriate that any three of them should have the power to alter the Constitution—maybe, in very vital respects: for example, the repeal of section 92 or the modification of the section which would enable nationalization of important interstate industries.

REG. C. WRIGHT.



APPENDIX C.

1958.

REPORT FROM THE JOINT COMMITTEE ON CONSTITUTIONAL REVIEW.

I.—APPOINTMENT OF THE COMMITTEE.

1. The House of Representatives resolved, on 24th May, 1956, as follows:—

(1) That a Joint Committee be appointed to review such aspects of the working of the Constitution as the Committee considers it can most profitably consider, and to make recommendations for such amendments of the Constitution as the Committee thinks necessary in the light of experience.
(2) That the Prime Minister and the Leader of the Opposition in the House of Representatives be *ex officio* members of the Committee.
(3) That in addition, the following Members of the House of Representatives, namely, Mr. Calwell, Mr. Downer, Mr. Drummond, Mr. Hamilton, Mr. Joske, Mr. Pollard, Mr. Ward and Mr. Whitlam, be appointed to serve on the Committee.
(4) That the Senate be requested to appoint four Members of the Senate to serve on the Committee, and to appoint one of those Members to be the Chairman of the Committee.
(5) That the Chairman of the Committee may, from time to time, appoint another member of the Committee to be the Deputy Chairman of the Committee, and that the member so appointed act as Chairman of the Committee, at any time when the Chairman is not present at a meeting of the Committee.
(6) That, in the absence of both the Chairman and the Deputy Chairman from a meeting of the Committee, the members present may appoint one of their number to act as Chairman.
(7) That the Committee have power to appoint sub-committees consisting of four or more of its members, and to refer to any such sub-committee any matter which the Committee is empowered to examine.
(8) That the Committee or any sub-committee have power to send for persons, papers and records, to adjourn from place to place and to sit during any adjournment of the Parliament and during the sittings of either House of the Parliament.
(9) That the Committee have leave to report from time to time, and that any member of the Committee have power to add a protest or dissent to any report.
(10) That six members of the Committee constitute a quorum of the Committee and two members of a sub-committee constitute a quorum of the sub-committee.
(11) That, in matters of procedure, the Chairman, or person acting as Chairman, of the Committee, have a deliberative vote and, in the event of an equality of voting, have a casting vote, and that, in other matters, the Chairman, or person acting as Chairman, of the Committee have a deliberative vote only.
(12) That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.
(13) That a Message be sent to the Senate acquainting it of this resolution and requesting that it concur and take action accordingly.

2. On the same day a resolution was passed in the Senate in the following terms—

(1) That the Senate concurs in the Resolution transmitted to the Senate by Message No. 30 of the House of Representatives relating to the appointment of a Joint Committee to examine Problems of Constitutional Change.
(2) That Senators Kennelly, McKenna, Spicer and Wright be members of the Joint Committee.
(3) That Senator Spicer be the Chairman of the Joint Committee.
(4) That the Resolution, so far as it is inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.
(5) That the foregoing resolutions be communicated to the House of Representatives by Message.

3. Shortly after the Committee commenced its deliberations, Senator Spicer was appointed Chief Judge of the newly formed Commonwealth Industrial Court. Some months later, on 24th October, 1956, the Attorney-General, Senator O'Sullivan, was, by resolution of the Senate, appointed to fill the vacancy on the Joint Committee in place of Senator Spicer. It was also resolved that Senator O'Sullivan be Chairman of the Committee.

4. The ending of the first session of the twenty-second Parliament made it necessary for the Committee to be reconstituted. This was done by resolutions of the Senate and the House of Representatives respectively in March, 1957. By amendment of the Senate, agreed to by the House of Representatives, a minor change was made to the resolution first transmitted to the Senate, which was in almost identical terms to the resolution agreed to by the Houses in the previous year, to enable the Committee to sit during any recess as well as an adjournment of the Parliament. Thus paragraph (8) of the resolution as originally passed by the House of Representatives was amended to read as follows—

(8) That the Committee or any sub-committee have power to send for persons, papers and records, to adjourn from place to place and to sit during any recess or adjournment of the Parliament and during the sittings of either House of the Parliament.

5. The Committee was again constituted in 1958, after the commencement of the third session of the Parliament, by resolutions of the two Houses similar in substance to those of the preceding year.

II.—PROCEEDINGS OF THE COMMITTEE.

6. The Committee decided at an early meeting, to assume for general purposes, the title of Constitution Review Committee.

7. The Committee also appointed the following officers:—

Mr. J. E. Richardson, Attorney-General's Department—Legal Secretary.

Mr. K. O. Bradshaw, Usher of the Black Rod—Clerk of the Committee.

8. The necessity for the appointment of a new Chairman, following the resignation of Senator Spicer from his place in the Senate, precluded the Committee from sitting as frequently as it would have hoped during the second half of 1956. The Committee sat on only eleven days in that year. In 1957 the Committee sat on 54 days and this year it sat on 29 days.

9. The Labour members of the Committee considered that full legislative powers should be vested in the Commonwealth Parliament with the duty and authority to create States possessing delegated constitutional powers, but since it was not possible to gain agreement to this effect the Committee was concerned to ascertain what measure of agreement was possible between members from both sides of the Parliament. For this reason, the Committee considered that its work would be better advanced if its proceedings were not conducted in public. Moreover, as the Prime Minister indicated in his speech when first moving for the establishment of the Committee, it was not intended that the Committee should assume the character of a Royal Commission with many people giving evidence. The Committee did not issue an open invitation for people to attend and give their views but it invited, either on its own initiative or upon receipt of a request, individual persons and representatives of organizations with specific views or experience to give the benefit of their knowledge. In addition, the Committee invited the leaders of political parties in the various States to confer with it on matters of concern to the States. Leaders in most, but not all, of the States responded to the invitation. A list of the persons who appeared before the Committee is contained in Annexure "C" to this Report. To these persons the Committee expresses its appreciation and thanks. The Committee also wishes to acknowledge the many written submissions of views which it received from other persons and organizations.

III.—MODE OF ALTERING THE CONSTITUTION.

10. It is well to recall at this juncture that, for all practical purposes, the Constitution may only be altered in accordance with the procedure laid down in section 128 of the Constitution.

11. The amendment process (with certain exceptions not material here) first requires the Commonwealth Parliament to pass a proposed law for the alteration of the Constitution; the proposed law must then be submitted to the electors of the Commonwealth. Thus the first paragraph of section 128 provides—

> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

12. The second paragraph of section 128 makes provision, in certain circumstances, for a proposed law altering the Constitution, which has been passed by one House but not the other, to be submitted to referendum.

13. It is further prescribed in the section that, subject to certain exceptions, if the proposed law is approved in a majority of States by a majority of electors who vote and also by a majority of the total number of electors who vote, the proposed law must be submitted for the Royal assent. Thus the fourth paragraph of section 128 provides—

> And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

14. Certain amendments have, by the fifth paragraph of the section, also to be approved by a majority of electors in each of the States affected thereby. Thus the fifth paragraph of the section reads—

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

15. Clearly, therefore, no constitutional alteration is possible unless action is first taken by the Commonwealth Parliament to frame a proposed law for submission to the electors.

16. The foregoing account of the constitutional position in connexion with the making of constitutional changes substantially explains the Parliament's decision to undertake a constitutional review by a Joint Committee comprising an equal number of members of the Government and Opposition Parties.

17. In answer to a question in the Senate arising from a reported statement of a State Premier advocating the addition of representatives of the States to the Committee, the then Attorney-General, Senator Spicer, explained the purpose of the Committee as follows:—

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

18. The record of past attempts to obtain approval to proposed laws to alter the Constitution has shown how difficult the task can be. There have, in the history of the Commonwealth, been twenty-four proposed laws, some of which dealt with several subjects, submitted to the electors. Only in four instances have the requisite majorities been obtained in favour of the proposed constitutional change. The first was in 1906 when a change was made in the date on which the terms of newly elected senators should begin; the second in 1910 concerned the taking over of State debts by the Commonwealth; the third in 1928 was to enable effect to be given to the Financial Agreement between the Commonwealth and the States; and the fourth in 1946 vested the Commonwealth Parliament with concurrent legislative power to provide certain types of social services. The opinion is widely held, and is shared by the Committee, that the main reason for the failure of many of the other proposals submitted to the people has been that they have usually been opposed by the opposition parties in the Federal Parliament and in their concomitant political organizations in the States. On different occasions the same parties have proposed and opposed somewhat similar proposals. Accordingly, it is important to obtain party agreement at the Federal level for any substantial constitutional changes.

19. The Committee's sole responsibility is to report to the Parliament, and any subsequent action with a view to obtaining constitutional reform, as for example, consultation with the States in appropriate cases, will rest with the Government, the Parliament itself and ultimately, of course, the people.

IV.—NATURE OF THE REVIEW.

20. The Committee concluded that it would not fully discharge its obligation to the Parliament if it confined its deliberations to isolated features of the Constitution and that the proper approach was to ascertain whether experience since the inception of the Commonwealth on 1st January, 1901, had demonstrated the need or desirability to make constitutional alterations in respect of any of the provisions contained in the eight Chapters of the Constitution.

21. At the same time, valuable though the lessons of the past often are, a review so limited would, in the opinion of the Committee, have failed to appreciate that the Constitution as an organic instrument of government in a democratic federalism must also serve the legitimate needs of future generations. It is not enough that the Constitution should be sufficient to serve the present-day requirements of the community within its ambit. It should be capable also of promoting or giving effect to the will of the people at any particular time in the foreseeable future as expressed by democratic processes.

22. That the Constitution should be the expression of the will of the people has always been true. Indeed, the preamble of the Commonwealth of Australia Constitution Act of the United Kingdom Parliament which constituted the Commonwealth of Australia begins with the words—

> 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:

Later, in covering clause 3 of the Constitution, it is mentioned that Western Australia should also be united in the Federal Commonwealth "if Her Majesty is satisfied that the people of Western Australia have agreed thereto".

23. Accordingly, in reviewing the Constitution, the Committee has had regard both to past experience of the federal system of government and to probable future developments which may have a bearing on laws required to meet new needs of the community.

24. For example, in relation to the number of members of the House of Representatives, experience showed that the continued increase in population since Federation had brought about a situation shortly after the conclusion of the second World War in which many electorates were unwieldly Steps were taken in 1948 to increase the number of members of the House of Representatives from 74 for the six States to 121. At the same time, if only for constitutional reasons, it was necessary to increase the number of senators from 36 to 60. At the present time, the average number of persons, as distinct from electors, for every Federal electoral division is about 80,000. If the average is to remain unchanged, on an estimated population of the six States of 12,000,000 in 1968, there would be an increase of about 28 in the total membership of the House of Representatives. A question then arises whether the Senate should also be increased in size according to the proportion at present specified in section 24 of the Constitution.

25. The means of transport provide another example. The several sections of the Constitution which deal with the management and control of State railways appear to the casual observer to accord to railways an exaggerated importance. The Convention Debates show, however, that railways were considered at the turn of the century to be major instruments of policy capable of aggressive use by one State to divert the flow of wealth from its natural economic outlets to the detriment of neighbouring States. But other factors have intervened since Federation to mitigate some of the harmful possibilities, which many of the Founders envisaged, of unrestricted competition between State railways. One of these factors has been the growth since Federation of civil aviation as an important transportation service. Yet the full impact of aviation on the life of the community has yet to be experienced, as for example, in promoting the development of thinly settled areas of Australia.

V.—SCOPE OF THE REPORT.

26. The Committee intended to furnish a report containing its recommendations and draft constitutional alterations to give effect to them, accompanied by a full exposition. Members have given as much time as possible to the very responsible task committed to them by the Parliament as to which the Committee's record of 89 sitting days since November, 1956, bears witness. Nevertheless, the early interruption of the Committee's work, caused by the appointment of Senator Spicer to judicial office, and the dissolution of the present Parliament which will occur somewhat before the Committee had anticipated, has regrettably precluded the Committee from attaining its objective. It has been unable to complete the writing of the Report.

27. The Committee decided, after most anxious consideration, that the proper course of action was to make a report to the Parliament setting out separately but summarily its recommendations and not including either explanatory draft constitutional amendments or supporting exposition. The recommendations in detail, the draft amendments and the considerations which have been responsible for the making of the recommendations set out in this Report will be furnished separately in a paper which should be available for tabling when the twenty-third Parliament is summoned next year. Should the Committee be reconstituted, the paper would be presented as a further report.

28. The ensuing paragraphs of this Report will reveal the extensive nature of the Committee's nquiries. The Committee wishes to point out, however, that because of insufficient time it was not able to conclude its deliberations on all aspects of the Constitution which it wished to consider fully.

VI.—COMMONWEALTH LEGISLATIVE MACHINERY.

29. The Committee considered it appropriate to commence its review with an examination of the sections of Chapter I. of the Constitution relating to such matters as the number of senators and members of the House of Representatives, relationships between the two Houses, terms of senators, rotation of senators and the duration of the House of Representatives, or in other words, those sections which provide for the legislative machinery of the Commonwealth of Australia.

30. In creating machinery for the exercise of Commonwealth legislative power, the Founders were able to draw upon the examples of established federal systems of government in the United States of America and Canada. Nevertheless, the bicameral parliamentary machinery written into the Constitution was, in many respects, fashioned against a background of indigenous colonial politics and conditions. Domestic considerations led the Founders to insert provisions in Chapter I. which were virtually without precedent in 1900, as for example, section 57 which provides machinery for the settlement of deadlocks between the two Houses. Again, in 1900 only a speculative forecast was possible as to how the Senate with its power to reject any bill and with its members directly chosen by the people of the States, would function.

31. The Commonwealth body politic has been profoundly affected since Federation by the emergence and entrenchment of nationally organized political parties with sufficient strength individually or in combination to form and maintain a government. In particular, the evolution of political parties has upset the speculations of many of the Founders as to how the Senate would function. The Senate has for many years been as susceptible to party political influences as the House of Representatives and proceedings in the Senate usually find party divisions corresponding to those in the House of Representatives. The history of deadlocks between the two Houses is, for example, one of conflicting policies of the national parties. The loyalty of senators to their parties has been largely responsible for the sublimation of the original dual conception of the Senate as a States House and a House of review. An important contributing factor has been the increase in the number and importance of national interests and issues, some of which are referred to hereunder in paragraphs 77 to 103 of this Report.

32. At the same time, the party system and the growth in matters of national interest have inevitably given greater prominence to the House of Representatives. Since Federation, the Prime Minister has always been a member of the House of Representatives and members of that House have provided the bulk of the members of successive Ministries. And, as was contemplated by the Founders, most legislation originates in the House of Representatives upon introduction by a Minister. It is customary for the general body of electors to think of the party or coalition of parties returned with a majority at the general election of members of the House of Representatives as having a mandate to give effect to the policies advocated on the hustings.

33. The Committee considers that some constitutional changes are now necessary to facilitate the maintenance of continuous sound democratic government in the light of changed conditions since Federation. It is, for example, clearly required that the House of Representatives should be of sufficient size to provide adequate representation for the ever increasing number of electors and that, in the spirit of democracy, as a general rule equal weight should be accorded to the votes of electors. It can happen, moreover, that legislation introduced by a government in the House of Representatives and passed by that House is rejected by the Senate even though the government clearly possesses the confidence of the electors as expressed at the most recent elections. Party divisions in the Senate usually correspond to those in the House of Representatives. However, by reason of the principle of continuous existence of the Senate, under which the places of only one-half of the number of senators become vacant at the same time, and the operation of the system of proportional representation for the counting of votes for the election of senators, a government may find that it does not command a majority in the Senate. In such circumstances, the Committee considers that there should be some alternative to double dissolution as a means of resolving deadlocks which does not involve the disruption of Parliamentary government or necessarily require the electors to attend the polling booths.

34. The Committee's recommendations on Commonwealth legislative machinery are set out in paragraphs 35 to 69 below.

NUMBER OF SENATORS AND MEMBERS OF THE HOUSE OF REPRESENTATIVES.

35. Section 7 of the Constitution states that the Senate shall be composed of senators for each State directly chosen by the people of the State. The section also empowers the Parliament to make laws increasing or diminishing the number of senators for each State, provided that equal representation of the six original States is maintained and the number of senators for each of those States is never less than six.

36. Section 24 of the Constitution provides that the House of Representatives should be composed of members directly chosen by the people of the Commonwealth. The number of members chosen in the several States has to be in proportion to their respective populations subject to there being at least five members chosen in each original State. The section provides further that the number of members of that House should be, as nearly as practicable, twice the number of senators, a requirement which is commonly known as the two to one ratio.

37. Section 27 of the Constitution empowers the Parliament, subject to the Constitution, to make laws for increasing or diminishing the number of members of the House of Representatives. This section, and section 7 so far as it relates to the number of senators, have to be read subject to the application of the two to one ratio.

38. There are, at present, ten senators for each State making a total of 60 senators, and 122 members of the House of Representatives chosen in the various States. Plainly, as the Constitution now stands, an increase in the number of members of the House of Representatives to take account of a substantially increased population must be accompanied by an increase in the number of senators.

39. THE COMMITTEE RECOMMENDS that the Constitution be amended to provide as follows:—

(1) The number of members of the House of Representatives should be no longer tied to being as nearly as practicable twice the number of senators.

(2) The Parliament should have power to determine the number of senators, provided equal representation of the original States is maintained, but there should be not less than six nor more than ten senators for each original State.

(3) The Parliament should continue to have power to make laws for increasing or diminishing the number of members of the House of Representatives, and the number of members chosen in the several States should remain in proportion to population. However, the power of the Parliament to determine the number of members of the House of Representatives should be subject to the qualification that the number of members to be chosen in any State should be determined by dividing the population of the State by a figure determined by the Parliament which is the same for each State and is not less than 80,000; thus providing that there should be on average at least 80,000 people for every member. Where, upon a division, there is a remainder greater than one-half of the divisor, there should be an additional member to be chosen in the State concerned.

(4) The power of the Parliament referred to in sub-paragraph (3) above should be subject to the present constitutional provision that there should be no less than five members chosen in each original State.

DISAGREEMENTS BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES.

40. Section 57 of the Constitution deals with disagreements between the Senate and the House of Representatives in respect of any proposed laws passed by the House of Representatives. If the Senate rejects or fails to pass a proposed law or passes it with amendments which the House of Representatives will not accept and that House, after an interval of three months, in the same or the next session, again submits the proposed law to the Senate, either with or without any amendments made or suggested by the Senate, and the Senate again rejects or fails to pass the bill or makes amendments unacceptable to the House of Representatives, the Governor-General may dissolve both Houses simultaneously. Such a dissolution may not take place within six months before the date of expiry of the House of Representatives by effluxion of time.

41. The section provides further that if the House of Representatives, after the double dissolution and the ensuing general election, again passes and submits the proposed law whether with or without amendments or suggested amendments and the Senate still resists, the Governor-General may convene a joint sitting of the two Houses to deliberate and vote on the proposed law and any amendments made by one House which have been unacceptable to the other. If the proposed law, with or without amendments, is carried by an absolute majority of the total number of members of the two Houses at the joint sitting, it is taken to have been passed by both Houses and must be presented for the Royal assent.

42. Thus, section 57 prescribes the conditions which must be satisfied before a deadlock can exist. Once a disagreement exists within the meaning of the section, the only action that can be taken with a view to its resolution is a dissolution of the two Houses. It is not possible, for example, for the two Houses to proceed to a joint sitting without a double dissolution first occurring. The deadlock may then be finally determined by a joint sitting of the two Houses if the disagreement still persists after the double dissolution. As indicated, section 57 applies to any bill passed by the House of Representatives whether it be a bill within the competence of the Senate to amend or a bill which the Senate may not amend because it imposes taxation or appropriates revenue or moneys for the ordinary annual services of the Government.

43. THE COMMITTEE RECOMMENDS that the Constitution be amended by the repeal of section 57 and its replacement by a new section which will provide, in substance, for the following:—

(1) A deadlock should be deemed to arise in respect of a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government if, during any session of the Parliament, the Senate has not, at the expiration of a period of 30 days after receipt of the measure from the House of Representatives, passed the proposed law or the proposed law with any amendments it has requested and which the House of Representatives has accepted. It should not be necessary for that House to have to pass the bill for a second time before a deadlock can arise.

(2) In respect of other proposed laws, the House of Representatives should be required, as at present, to pass for the second time a bill which the Senate has resisted and the Senate should be given a further opportunity to consider the measure before a deadlock arises. Conditions of deadlock should be deemed to arise if—

(*a*) during a session, the Senate has not, at the expiration of 90 days after receiving the proposed law from the House of Representatives for the first time, passed the proposed law as transmitted to it or with amendments in respect of which the House of Representatives has expressed its concurrence;

(*b*) the House of Representatives again passes the proposed law in the same or the next session either with or without any amendments made by the Senate; and

(*c*) after receiving the proposed law for the second time, the Senate either again rejects it or has not, at the expiration of 30 days during the session, passed either the proposed law or the proposed law with amendments which the House of Representatives has found acceptable.

In effect, therefore, the Senate must be allowed at least 90 days to make up its mind on a bill which it has received for the first time from the House of Representatives. That period of time must elapse before the House of Representatives again passes the bill even though the Senate should reject the bill within the prescribed time. Upon the submission of the disputed measure to the Senate for the second time, the conditions of deadlock arise immediately upon rejection of the measure, or otherwise at the expiration of a period of 30 days.

(3) When a deadlock arises, the Governor-General, acting on the advice of the Federal Executive Council, should have power to dissolve both Houses except that a dissolution should not be possible within six months of the expiry of the House of Representatives by effluxion of time.

(4) As an alternative to double dissolution, however, the Governor-General in Council should be empowered to convene a joint sitting of the members of the two Houses to deliberate and vote upon the proposed law in dispute together with any amendments which have been made by one House but not agreed to by the other. A disputed bill may only be presented for the Royal assent if at the joint sitting it is approved by an absolute majority of the total number of members of the two Houses and by at least one-half of the total number of members of the two Houses chosen for and in a State in at least one-half of the States.

(5) If a deadlock is not resolved at a joint sitting, or if a bill passed by the House of Representatives is rejected at a joint sitting, the Governor-General in Council should also be authorized to dissolve both Houses provided that, as at present, the double dissolution does not occur within six months of the expiry of the House of Representatives by effluxion of time.

(6) As a further alternative to double dissolution, either without a joint sitting being held or where disagreement persists after a joint sitting, if the House of Representatives should be dissolved within twelve months of the deadlock first arising, for the purposes of the proposed section the dissolution of the House of Representatives should be treated as a stage in the settlement of deadlocks in similar manner to a double dissolution, as to which *see* sub-paragraph (7) hereunder.

(7) If after a double dissolution, or if after a general election of members of the House of Representatives has occurred as contemplated in sub-paragraph (6) above, the House of Representatives again passes the proposed law within six months of the commencement of the first session of the new Parliament and the Senate either rejects the law or otherwise has not, at the expiration of a period of 30 days after the transmission of the bill to it, passed the law or the law with any amendments acceptable to the House of Representatives, the Governor-General in Council may convene a joint sitting. If the proposed law together with any of the amendments in dispute is affirmed by an absolute majority of the total number of members of the two Houses, then the bill should be deemed to have been duly passed and must be submitted for the Royal assent.

TERMS OF SENATORS.

44. Section 7 of the Constitution provides, among other things, that senators shall be chosen for a term of six years.

45. Section 13 prescribes the date of commencement of senators' terms. The term of service of a senator begins on the first day of July following the date of his election with the exception that after a dissolution of the Senate, which may occur under section 57 of the Constitution, the term of a senator is taken to begin on the first day of July preceding his election.

46. All senators do not retire at the same time. Sections 13 and 14 together provide for the expiry of terms at two different times.

47. The allotment of fixed terms for senators is in contrast to the position of members of the House of Representatives. Under section 28 of the Constitution, the House of Representatives may continue for three years from its first meeting and no longer and it may be sooner dissolved by the Governor-General.

48. As a result of the operation of the constitutional provisions above-mentioned in paragraphs 44 to 46, it is always possible for general elections for members of the House of Representatives to take place without being accompanied by an election for senators. The Committee considers that elections for members of the House of Representatives and one-half of the number of senators for a State should be held at the same time. Simultaneous elections for members of the two Houses would also enhance the effectiveness of a dissolution of the House of Representatives as a stage in the settlement of deadlocks between the two Houses in accordance with the Committee's recommendations contained in paragraph 43 above.

49. THE COMMITTEE RECOMMENDS that the Constitution be altered to omit the provision now made for senators to be chosen for terms of six years and to provide instead that senators should hold their places until the expiry or dissolution of the second House of Representatives after their election, unless the Senate should be earlier dissolved under the provisions of section 57 of the Constitution.

ROTATION OF SENATORS.

50. As mentioned in paragraph 44, the Constitution provides that senators should have six-year terms. Consistently with the principle of continuous existence of the Senate, the Constitution also provides, as indicated in paragraph 46, that only one-half of the senators for each State, or as near to one-half as practicable, should retire every three years. This is known as the rotation of senators. Section 13 entrusts to the Senate the function of arranging for the rotation of senators.

51. Section 14 of the Constitution makes further provision for the rotation of senators when the number of senators for a State is increased or diminished. In this instance, the function is vested in the Parliament as a whole.

52. Section 13 does not restrict the Senate as to the means which it may adopt in dividing senators into two classes, first, those whose places will become vacant after three years and, second, those whose places will become vacant after six years from the beginning of their terms of service.

53. Earlier in this Report, the Committee recommended the re-writing of section 57 but it is still possible under the Committee's proposal for a double dissolution to take place. Accordingly, the provisions of section 13 so far as they deal with the rotation of senators after a double dissolution remain operative even though section 57 should be amended as recommended.

54. On the occasions on which section 13 has been applied, terms have been allotted to senators for each State according to the degree of their success at the elections. The Committee considers that constitutional effect should be given to past practice.

55. THE COMMITTEE RECOMMENDS that section 13 of the Constitution be amended to provide that—

(1) the Senate should, when first meeting after a dissolution, divide the senators chosen for each State into two classes in such a way that the terms allotted to the senators chosen for each State accord with their relative order of success at the elections resulting from the dissolution; and

(2) the Parliament should have power to make laws providing for the manner in which the relative success of senators at an election is to be ascertained for the purposes of the section.

56. It is doubtful, as section 13 now reads, whether a person who has been validly chosen as a senator for a State at the elections taking place after a double dissolution, but who later dies, resigns or becomes disqualified from sitting as a senator before the division of senators into classes, can be included in the division and thus a term allotted to the place which the senator would have held.

57. THE COMMITTEE RECOMMENDS that the name of any senator chosen for a State who has died, resigned or been disqualified before the division of senators into classes, should be included among the names of the senators to be divided into classes and an allotment made to one of the two classes of senators in accordance with the requirements of section 13 as recommended to be altered.

CASUAL VACANCIES IN THE SENATE.

58. Section 15 of the Constitution deals with the filling of casual vacancies in the Senate. It provides, in the first instance, that if a vacancy occurs in the place of a senator before the expiration of his term, the Parliament of the State for which the senator was elected should appoint a person to fill the vacancy. Provision is made if the Houses of Parliament of the State are not in session, for the Governor in Council of the State to make an appointment to hold the place in the meantime. A person appointed by a State to fill a casual vacancy does not necessarily hold the place for the unexpired portion of the vacating senator's term. If, before the expiration of the term, a general election of members of the House of Representatives or an election of senators for the State occurs, whichever is the earlier, a successor must be chosen at the election to hold the place until the expiration of the term.

59. The Committee desired to recommend a constitutional amendment whereby, if the senator for a State whose place has become vacant was a member of a political party, the Parliament of the State or the Governor of the State should be required, in filling the vacancy, to choose a person who was a member of the same political party as the vacating senator. The Committee was, however, unable to find a form of amendment which would satisfactorily express the objective it had in mind.

60. The Committee wishes to record, however, that although its members belong to different political parties, all were strongly of the view that the principle referred to in the last preceding paragraph should be observed without exception.

61. It is open to doubt whether a person who was validly chosen as a senator for a State and who dies, resigns or becomes constitutionally incapable of sitting as a senator before the commencement of his term of service, has a place which becomes vacant under section 15. If the situation cannot be dealt with under section 15, a fresh election is necessary.

62. THE COMMITTEE RECOMMENDS that the Constitution be amended to provide that, in the circumstances mentioned in paragraph 61, a place should become vacant within the meaning of section 15.

DIVISION OF STATES INTO ELECTORAL DIVISIONS.

63. The Parliament may, under section 29 of the Constitution, make laws for determining the divisions in each State for which members of the House of Representatives may be chosen and the number of members to be chosen for each division. A division may not be formed out of parts of different States.

64. Although section 24 of the Constitution requires the number of members to be chosen in the several States to be in proportion to the population of the States, once the number of members of a State is ascertained in accordance with the section, the Parliament may, under section 29, divide the State into electoral divisions of its own choosing. There could, for example, be twice the number of electors in one electoral division in a State compared with another division in the same State or there could be one member for one division but more than one member for another division.

65. The Committee considers that a constitutional alteration should be made which would ensure that all electorates are single member electorates and that the number of electors in each division is, as nearly as practicable, uniform.

66. THE COMMITTEE RECOMMENDS that the Constitution be amended to provide that—

(1) the Parliament may make laws dividing each State into electoral divisions equal in number to the number of members to be chosen in the State with one member to be chosen for each division;

(2) upon the division of a State into electoral divisions, the number of electors in a division in a State should not exceed by more than one-tenth, or fall short of by more than one-tenth, a quota ascertained by dividing the total number of electors in the State by the number of members to be chosen in that State;

(3) the division of a State may be reviewed at any time but the division of every State into electoral divisions should be reviewed at least once in every ten years and where, upon review, the number of electors in a division in a State is found not to be within one-tenth of the quota, there should be a further division of that State into divisions;

(4) for the purposes of the division of each State into electoral divisions and any subsequent division of a State into divisions, including the required decennial review, the Governor-General in Council should be required to constitute an Electoral Commission for each State to make recommendations to the Parliament in connexion with the division of the State into divisions;

(5) the division at any time of a State into electoral divisions should not take place until the Electoral Commission constituted for the State has reported to the Parliament; and

(6) each Electoral Commission should consist of not less than three members and all Electoral Commissions in existence at the one time should have the same number of members.

RECKONING OF POPULATION.

67. Section 24 requires generally that the number of members of the House of Representatives chosen in the several States shall be in proportion to the respective numbers of their people.

68. Section 127 of the Constitution provides that, in reckoning the numbers of the people of the Commonwealth or of a State or other part of the Commonwealth, aboriginal natives shall not be counted. The main effect of the section is to preclude the aboriginal population of a State from being taken into account when determining the number of members of the House of Representatives to be chosen in the State.

69. THE COMMITTEE RECOMMENDS the repeal of section 127 of the Constitution.

VII.—CONCURRENT LEGISLATIVE POWERS.

70. It seems to be a widespread misconception that the grant of an additional legislative power to the Commonwealth Parliament necessarily involves a withdrawal of power from the States. Most of the legislative powers vested in the Commonwealth Parliament are known as concurrent powers, that is to say, they do not belong exclusively to that Parliament but are also retained by the States. Where the powers are concurrent, section 109 of the Constitution accords paramountcy to Commonwealth laws over State laws. This means that State laws may be displaced in so far as they are inconsistent with valid Commonwealth laws. Nevertheless, States may, and in fact continue to, legislate in respect of subjects upon which the Commonwealth Parliament may also pass laws.

71. The Committee considers it most important, moreover, for it to be more commonly understood and appreciated that the laws which the Commonwealth Parliament passes under any head of its legislative powers must, in the long run, accord with the people's wishes. The Federal Parliament is democratically elected to express the will of the people and general elections for members of the House of Representatives must be held at least every three years. The Committee considers that criticism of increased legislative powers for the central Parliament has often failed to do justice to the explicit pronouncements in the Constitution itself that the members of each House of the Federal Parliament must be directly chosen by the people. In proper perspective the question to be determined is whether the people wish to have their will expressed through the national Parliament or through the Parliaments of the respective States.

72. There is also a tendency on the part of some to assert that the Commonwealth Parliament possesses more legal power than it has. In the Committee's opinion, this is mainly because the responsibilities of the Commonwealth frequently lead to action in matters which arouse national interest.

73. From the commencement of the Convention Debates, the Founders assumed that the sharing of power between the Commonwealth and the States should be effected by the States continuing to have general legislative powers and allotting to the new Commonwealth such specific legislative powers as could be generally agreed upon by the representatives of the separate Colonies. The powers given to the fledgling Federal Parliament were the expression both of conservatism and legalism consistent with the preservation of independent interests of the States.

74. In the course of the first half century of Federation there has been a decisive shift in the balance struck in 1900 between Federal and State interests, caused by modern developments that have affected the Commonwealth as a whole rather than the States individually.

75. The division of legislative power between the Commonwealth and the States has meant that matters affecting more than one State which are beyond the reach of Commonwealth legislative power and which, in the public interest, require regulation, will be outside the exercise of effective governmental authority unless the States voluntarily agree between themselves on the formation and maintenance of common policy. Experience has shown that it is frequently difficult for six independent States to reach agreement and that there are, in practice, vacuums of legal power.

76. In the opinion of the Committee, the growth in number and importance of matters affecting the people of the Commonwealth as a whole requires the vesting of additional concurrent legislative powers in the national Parliament. Some of the more significant aspects of developing nationhood to which the Committee has had regard are shortly described in paragraphs 77 to 103 below.

GROWTH IN POPULATION.

77. When the first Commonwealth census was taken in 1901, it showed the population of Australia to be less than 4,000,000. The population at the taking of the census in 1933 was 6,630,000 and at the last census in 1954 it had reached 8,987,000. At the end of 1957 there were 9,747,471 people or more than two and one-half times the number at 1901. It is safe to assume that future growth, even from natural increase alone, will continue to be substantial.

78. A notable feature of the expanding population has been the net migration intake in the post-war years. The increase in population was of the order of 2,000,000 for the ten years ended December, 1957. This comprised a natural increase of approximately 1,180,000 and a net gain of some 940,000 new settlers under Australia's migrant programme.

79. The community's acceptance of the intake of large numbers of people from old-established countries indicates its recognition of the urgent need for progressive economic development and increased defensive strength. The rapid increase in population, however, brings with it immediate and large demands for housing, public works and services and other facilities of a capital nature. Increasing population, therefore, although essential to development, accentuates the growing pains of a young country in search of adequate capital to sustain the desired rate of national development.

80. Since the last war, about 1,000,000 persons have entered Australia as migrants, making up about one-tenth of the total population. These persons have no traditional ties to any particular State as a separate entity in the Federation.

DEFENCE.

81. The need for a single system of defence was one factor which led to the foundation of the Commonwealth. However, the concept of total war was then unknown and international conflicts were confined to limited areas and to the armed forces of the contending parties. Two world wars have since demonstrated that industrial capacity will provide the sinews of any future wars and it is clear that the health of the national economy in peacetime is a vital factor in building up and maintaining adequate defences against aggression.

NATIONAL DEVELOPMENT.

82. The rate and balance of national development affects every Australian. It calls for concerted effort on the part of all and the best utilization of the nation's resources and may be said to be the composite responsibility of the community, and the Governments, Federal and State.

83. State Governments have expended substantial sums on the provision of capital works and services and the level of activity is far greater than in the earlier days of Federation and far greater, moreover, in the years since the second World War than before. Most of the capital works and services undertaken by the States have been financed by loan funds. Expenditure by the States out of loan moneys on works and services (excluding local and semi-governmental works and services) was £9,000,000 in the first full financial year of Federation. In 1921–22 the amount so expended increased to £34,000,000 and in 1951–52 it was £198,000,000. In the five financial years ended 1956–57, total net loan expenditure on State capital works and services was £803,000,000. In some years State expenditure would have been higher except for the inability of the loan market to meet all requirements and, in recent years, the Commonwealth Government, by subscribing to special loans, has made possible the completion of State works and housing programmes far larger than could have been financed from ordinary loan raisings.

84. The Commonwealth has also been committed over recent years to heavy programmes of a capital nature. Commonwealth expenditure on capital works and services was £42,000 in 1901–02. Twenty years later it was £9,000,000 and in 1951–52 it was £155,000,000. Total expenditure over the past five financial years has been £693,000,000, all of which has come from the Consolidated Revenue Fund, compared with a total of £35,000,000 for the last five pre-war years ended in 1938–39.

85. The furtherance of national development by means of private investment in its various forms is apparent in every State of the Commonwealth and the application of private capital provides striking evidence of confidence in the future of this country. It is obvious, however, that the extent of private investment on projects, which may be described as developmental, depends largely on their attractiveness compared with forms of investment which may fulfil little or no developmental purpose.

SCIENTIFIC PROGRESS.

86. The present century has so far been an age of outstanding scientific achievements affecting the daily life of the people of the Commonwealth. At Federation, knowledge of electro-magnetism had enabled telegraphic and telephonic services to be established. Further progress in the use of electro-magnetic waves has already made possible radio and television. Australia profits greatly from research into problems of the primary and secondary industries carried on by the States and the Commonwealth, as for example, pasture improvement, pest control and the extraction of valuable minerals from their ores. Medical research has had beneficial results for the community, for example, research into tuberculosis has made a substantial contribution towards eradicating the disease.

87. The limits of scientific development are indeterminable and the process is continuous. Practical benefits should be derived in the foreseeable future, for instance, from current research on nuclear energy and weather modification. If Australia is to maintain a satisfactory rate of development and its place in the community of nations, there will have to be further expansion of research programmes.

TRANSPORT AND COMMUNICATION.

88. The dispersal of the population and resources of Australia over an area of 3,000,000 square miles creates acute transport problems. The paucity of communications between large areas of Australia at Federation suggested that some types of legislative power could not be appropriately vested in the Commonwealth Parliament.

89. In 1900, railways and shipping were the prime means of transportation as they continued to be for many years afterwards. Other means of transport have become important since Federation. Technical progress in the construction of roads and the design of motor vehicles has enabled a considerable volume of trade and commerce between the States to be carried on by road. The provision of roads has involved the States and the Commonwealth in heavy financial commitments. Carriage by air has also been developed and there is now an umbrella of commercial air services extending over the length and breadth of Australia. Air transport, besides being a major means of communication

between the States, is an instrument of geographical development, as for example, in outback parts of the continent. The provision of facilities such as aerodromes and navigational aids is, however, costly and the burden of providing them has fallen almost entirely on the Commonwealth.

90. In relation to navigation, ships may use the same waterways irrespective of whether they are engaged in interstate or intrastate trade. Similarly, aircraft engaged in interstate and intrastate flights usually make use of the same facilities and airspace. This would suggest that there are practical reasons why the legal power over these forms of transportation should not be divided on the basis of the nature of a voyage or flight but should be vested in one Government.

EMERGENCE OF A NATIONAL ECONOMY.

91. Federation brought together six colonies, each with its own distinctive economy—New South Wales, for instance, was an ardent advocate of free trade but Victoria was a protectionist stronghold.

92. Progressive national development and defence necessities, already referred to have, however, been strong integrating forces. The denial in the Constitution of legal power to the States to impose customs and excise duties and the trend towards greater uniformity in industrial conditions in Australia, in which Commonwealth industrial machinery has played an important part, have also been major contributing factors in this integration.

93. The economy's assumption of a national character may be illustrated in various ways. A substantial increase has occurred, for example, in the volume of trade between Australia and other countries. In the first financial year of Federation, export earnings were valued at £50,000,000. In 1921–22 they were £128,000,000 and in the five financial years from 1934–35 to 1938–39 averaged £142,000,000 annually. In the financial year ended June, 1952 they had attained the value of £675,000,000 and in 1956–57 the total value of exports from Australia was £993,000,000. Increases, particularly since the end of the war in 1945, are substantial even after allowing for the decline in the value of money. Wool exports, for instance, which were the equivalent of 529,000,000 lb. of greasy wool in 1901–02, had risen to 1,036,000,000 lb. 50 years later and 1,408,000,000 lb. in 1956–57. At corresponding dates, wheat exports were 543,000 tons, 1,685,000 tons and 2,440,000 tons, respectively. Imports increased in value from £38,000,000 in the first Federal financial year and an annual average of £107,000,000 for the five years ended 30th June, 1939, to a record figure of £1,053,000,000 in 1951–52. Total value of imports for the financial year ended June, 1957, was £719,000,000. External trade has been predominantly a Commonwealth responsibility.

94. Experience in recent years has made it apparent that there is a close connexion between Australia's balance of payments and general economic conditions in the community. For example, internal inflation quickly leads to a rising demand for imports.

95. The bulk of Australia's export earnings continues to be derived from the export of primary products. In 1901–02 primary products constituted about one-half the value of total exports. Fifty years later, in 1951–52, exports of wool, wheat, flour, meat and butter alone constituted £452,000,000 out of a total value of exports of £675,000,000. In 1956–57 the exports of these products were worth about £635,000,000 or nearly two-thirds of the total value of exports from Australia. Competition in the world markets among countries exporting primary products is intense and the greatest efficiency is required in production and marketing methods to preserve the welfare of the primary industries and maintain a satisfactory volume of export earnings. Without doubt, it is a matter of national importance that Australia should not be priced out of world markets.

96. Australia's trade and payments relationships with other countries represent, of course, only one example of the connexion between one segment and the whole of the Australian economy. Putting the matter in more general terms, it is undoubtedly true that the integration of the Australian economy is such that there is an inter-dependence not only as between the many and various economic activities which go to make up the Australian economy but also as between these activities and the state of the economy as a whole.

CHANGING PATTERN OF THE ECONOMY.

97. The national economy in the process of expansion has also become more sophisticated. The prosperity of the Colonies until Federation depended mainly on primary production and mineral wealth. But there has, during the present century, been a remarkable transformation from an economy, predominantly rural, to one which to a great extent is industrial. This has occurred even though primary production has increased over the same period and primary products remain the most important commodities of export.

98. In 1921–22 the net value of primary production, including minerals, was £232,000,000 compared with factory production valued at £122,000,000. By 1938–39 the net value of primary production was £185,000,000 but the net value of factory production had risen in the meantime to £203,000,000. Since the last war, the growth in factory production has increased rapidly and by 1956–57 value of production stood at £1,622,000,000 compared with £1,232,000,000 for primary production.

99. If the value of materials and fuel used in production is included, output of factories was valued at £29,000,000 in 1901 and primary production was worth £86,000,000. In 1921–22 factory output was £320,000,000 compared with primary production valued at £226,000,000. By 1938–39 factory output had increased to £500,000,000 and primary production in the same year was £255,000,000. In 1956–57 the gross value of factory output was £4,021,000,000 compared with a gross value of £1,526,000,000 for primary production.

100. Increasing industrialization has brought with it an increase in the number of persons employed in factories from an average of 379,000 in 1922 to 1,063,000 last year. This has been accompanied by a growth in the membership and strength of industrial organizations of employers and employees and the use of governmental industrial machinery for the determination of conditions of employment. In 1954 about 90 per cent. of the total number of employees in industry in Australia were subject to State or Commonwealth awards and determinations.

101. The Commonwealth's express industrial power was narrowly conceived and takes the form of a power to make laws for the prevention and settlement, by the means of conciliation and arbitration, of industrial disputes extending beyond the limits of any one State. In spite of the limitations of the power, the number of employees in Australia whose conditions of employment are regulated by Commonwealth awards and determinations is not far short of the number whose conditions are determined by State industrial machinery. Commonwealth awards and determinations have, moreover, had material effects on the work of State authorities and upon the conditions of employment of persons not covered by awards at all.

102. It was commented earlier that progressive industrialization and defence were inseparable. Countries with a self-contained capacity to manufacture nuclear energy have a greatly increased defence potential. It is now apparent that nuclear energy will also have important peace-time uses such as in the generation of power for industrial purposes. Nuclear energy provides a striking illustration of the inter-relation of industrial virility and the safety of the Commonwealth.

103. Another example of the changing economy is the emergence of specialized financial institutions which have supplemented the traditional field occupied by the banking system. Hire purchase finance companies, for example, have become great repositories of private moneys. They accept deposits and offer unsecured and secured short-term investments to the public at attractive rates of interest. Their activities are also capable of extensively influencing the general level of expenditure on goods produced by Australian industries. Furthermore, there have been developments in the domestic capital market with issuing houses, stronger underwriters and stock exchanges making possible the wider participation of the public in the direct provision of capital.

104. There are other matters indicative of a maturing Commonwealth. Thus, the independent international status which Australia has acquired since Federation, formally recognized in the Statute of Westminster, and the extensive activities of the Commonwealth in connexion with the provision of social services would be matters worthy of inclusion in a comprehensive account of post-Federation trends. But in the present compendious survey the Committee has confined itself to the more important national developments underlying the recommendations which follow later in this Report.

105. In reviewing Commonwealth power, the Committee has also derived assistance from the knowledge that has accumulated over more than half a century of judicial interpretation of the Constitution. The penetrating scrutiny of the courts, especially the High Court of Australia, has helped to clarify the scope and limitations of many of the Parliament's legislative powers. The decided cases have also supplied illustrations of the difficulties which may arise from specific limitations of power. Thus, the Parliament's authority to make laws for navigation and shipping was held not to extend to intrastate shipping operations. Later cases served to emphasize the difficulty of determining in particular situations, for instance, in collisions between ships, whether Commonwealth or State marine law applied. Again, the High Court has held that the Parliament's power to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth does not confer power to deal with the creation of corporations or to legislate generally for the control of restrictive trade practices of corporations. Judicial interpretation of the frequently litigated Federal conciliation and arbitration power has shown that, in spite of the adoption by the Court of a flexible and progressive judicial approach to the meaning of the power, excessive legalism is the inevitable result of the technical form in which the power is expressed.

106. The Committee's recommendations as to the additional concurrent legislative powers which it considers should be vested in the Commonwealth Parliament are set out in paragraphs 107 to 157 below.

NAVIGATION AND SHIPPING.

107. Section 51 (i.) of the Constitution empowers the Parliament to make laws with respect to trade and commerce with other countries and among the States. Section 98 declares that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping.

108. The High Court has held that the power conferred by section 98 is subject to the limitations inherent in section 51 (i.) which means that the effect of the two provisions is to endow the Parliament not with a substantive power to deal with navigation and shipping at large, but only with power to deal with navigation and shipping insofar as they are relevant to interstate and foreign trade and commerce.

109. Section 51 (vii.) of the Constitution authorizes the Parliament to make laws with respect to lighthouses, lightships, beacons and buoys. It is also possible for intrastate navigation and shipping to be subject to some Federal regulation by the exercise of other constitutional powers vested in the Parliament. However, it is still true to say that intrastate navigation and shipping in general is beyond the reach of the Parliament.

110. THE COMMITTEE RECOMMENDS that the Constitution should be amended to vest the Commonwealth Parliament with an express power to make laws with respect to navigation and shipping.

AVIATION.

111. In the absence of an express power over aviation, the Commonwealth has had to rely principally on the power of the Parliament under section 51 (i.) of the Constitution to make laws with respect to interstate and overseas trade and commerce to provide necessary legal support for many of its extensive activities in this field of transport and communication. The Commonwealth is precluded by the limitations of the trade and commerce power from legislating with respect to intrastate aviation.

112. THE COMMITTEE RECOMMENDS that the Constitution should be amended to confer on the Commonwealth Parliament an express legislative power over aviation.

SCIENTIFIC AND INDUSTRIAL RESEARCH.

113. The Parliament does not have a specific power to carry on scientific and industrial research.

114. Research carried on by the Commonwealth involves the expenditure of public funds rather than an exercise of governmental power as ordinarily understood, but it may be that the purposes for which the Parliament can lawfully appropriate moneys from the Consolidated Revenue Fund are not unrestricted.

115. Most scientific and industrial research carried on by the Commonwealth and its authorities may well be regarded as incidental to various subjects of legislative power of the Parliament and, for that reason, the expenditure of public funds may, on any tenable view as to the Parliament's power of appropriation, be lawful. The Committee considers, however, that the Commonwealth's capacity to engage freely in research should not be hampered by possible constitutional restrictions.

116. THE COMMITTEE RECOMMENDS that the Commonwealth Parliament be vested with power to make laws for the carrying on and promotion of scientific and industrial research.

NUCLEAR ENERGY.

117 The growth of nuclear physics, making possible the application of nuclear energy for practical purposes, is a phenomenon of the present century and alone this would explain the absence of any reference to it in the Commonwealth Constitution.

118. By reason of its various constitutional powers, notably with respect to defence and overseas trade, the national Parliament is not without some effective legal powers at the present stage of nuclear development in Australia. Expected developments in the use of nuclear energy for constructive and destructive purposes will inevitably, however, reveal serious deficiencies in Commonwealth legal power, particularly if it should be sought to promote a self-contained integrated nuclear power industry serving the needs of industry and national development as well as defence.

119. It seems also that the Commonwealth Parliament has insufficient legislative power to make proper provision for the protection of the health and welfare of the community as a whole from dangers which can arise from the use of radio-active materials and isotopes.

120. THE COMMITTEE RECOMMENDS that the Commonwealth Parliament should be empowered by constitutional amendment to make laws with respect to—

(1) the manufacture of nuclear fuels and the generation and use of nuclear energy; and

(2) ionizing radiations.

POSTS AND TELEGRAPHS AND OTHER LIKE SERVICES.

121. The Parliament has, under section 51 (v.) of the Constitution, power to make laws with respect to postal, telegraphic, telephonic and other like services.

122. In 1935 a majority of the High Court held that paragraph (v.) conferred on the Commonwealth Parliament power to legislate with respect to radio broadcasting, most of the Justices agreeing that broadcasting was a service which could be classed with telegraphic and telephonic services.

123. Since that time, television services which, like broadcasting, involve transmission by means of electro-magnetic waves, have begun in Australia under Commonwealth control. The Committee is of opinion that any possible doubt as to the power of the Commonwealth to make laws with respect to broadcasting and television should be removed by constitutional alteration.

124. Services, such as broadcasting and television, in which transmission or reception is by electro-magnetic systems, fall within the category of telecommunication services. Without doubt there will be further progress in telecommunications and the Committee considers that any constitutional alteration should be flexible enough to take account of it as a matter of national importance.

125. THE COMMITTEE RECOMMENDS that the Constitution should be altered to make it clear that the Commonwealth Parliament has power to make laws with respect to broadcasting, television and other services involving transmission or reception by electro-magnetic means.

INDUSTRIAL CONDITIONS.

126. Section 51 (xxxv.) of the Constitution authorizes the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

127. Paragraph (xxxv.) is not the only source of Commonwealth industrial power. The Parliament may deal with industrial conditions so far as they come within other subjects of constitutional power vested in it, such as section 51 (i.) which empowers the Parliament to make laws for interstate and overseas trade and commerce, and section 122 under which laws may be made for the government of the Territories of the Commonwealth. Nevertheless, the power conferred by paragraph (xxxv.) mainly determines the extent of the Commonwealth's activity in the broad field of industrial employment.

128. Paragraph (xxxv.) is limited to the prevention and settlement of industrial disputes. It does not apply to all industrial disputes but only to those which extend beyond the boundaries of a single State. Conciliation and arbitration are the only processes available in the prevention and settlement of such disputes. These qualifications upon Federal power have, in practice, restricted the Parliament to legislation such as the Conciliation and Arbitration Act which creates independent specialized machinery to deal with industrial disputes.

129. The limited Federal power provides a contrast to the general power of the States to deal with conditions of employment of persons within their jurisdiction by means of their own choosing, such as direct legislative intervention and the setting up of industrial courts, wages boards and other authorities.

130. The Committee considers that the character of the Commonwealth's industrial power should correspond more closely to State power by vesting in the Parliament more extensive legislative power with respect to the determination of industrial conditions. The Committee contemplates, however, that the Parliament would continue to provide for the handling of employer-employee relationships by existing forms of Commonwealth and State industrial machinery and, accordingly, that it should be constitutionally possible for the Commonwealth Parliament to make use of State authorities for the purpose. The proposed extension of Commonwealth power is not intended to imply the withdrawal of the States from responsibilities in regard to industrial matters.

131. THE COMMITTEE RECOMMENDS that paragraph (xxxv.) of section 51 be repealed and a new section inserted in the Constitution which would provide in substance as follows:—

(1) The Commonwealth Parliament should, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to terms and conditions of industrial employment.

(2) The power to make laws dealing with terms and conditions of industrial employment should include power—

(*a*) as at present, to make laws with respect to the prevention and settlement of industrial disputes by means of conciliation and arbitration; and

(*b*) to establish authorities of the Commonwealth, and authorize authorities established by or under the law of a State, to determine terms and conditions of industrial employment and to prevent and settle industrial disputes.

CORPORATIONS.

132. The Parliament has, under section 51 (xx.) of the Constitution, power to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

133. The paragraph has been the subject of so much difference of judicial opinion that, beyond saying it has a narrow meaning, it is quite uncertain what power it confers. It is probable that the Commonwealth Parliament is not authorized to legislate generally with respect to the range of matters which are normally included in the Companies Acts of the States.

134. The Committee is of opinion that the national Parliament should have a power over corporations sufficient to enable it to enact a uniform companies law applying throughout the Commonwealth. At the same time the necessary constitutional alteration should be so framed as not to confer a power to regulate the business activities of corporations.

135. THE COMMITTEE RECOMMENDS that section 51 (xx.) of the Constitution should be repealed and replaced by a new paragraph which would provide in substance as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to corporations.

(2) The power to make laws with respect to corporations should not authorize the Parliament to make laws with respect to the trade, commerce or industry of corporations, or which apply to corporations of a State, including municipal corporations, formed for governmental purposes.

RESTRICTIVE TRADE PRACTICES: INTER-STATE COMMISSION.

136. As already mentioned, section 51 (xx.) of the Constitution confers power upon the Commonwealth Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. The High Court has held, by a majority, that a law of the Commonwealth Parliament which made it an offence for any of the types of corporations described in paragraph (xx.) to conclude a contract or combine with intent to restrain trade or commerce within the Commonwealth to the detriment of the public, was *ultra vires.*

137. The present legal position is that the Commonwealth can control harmful restrictive trade practices in interstate commerce but not in intrastate commerce or productive industry.

138. The Committee's view is that effective control of restrictive trade practices requires uniform policies applying to trade and commerce within the whole of the Commonwealth.

139. The Committee considers that the Commonwealth Parliament should have power to deal with restrictive trade practices but only so far as they are contrary to the public interest.

140. Section 101 of the Constitution states that there shall be an Inter-State Commission. It also provides that the Parliament may confer upon the Commission powers of adjudication and administration for the execution and maintenance of the provisions of the Constitution relating to trade and commerce and laws made thereunder. The Committee believes that the Commission would be an appropriate authority to inquire and report to the Parliament whether a restrictive trade practice is contrary to the public interest. There has not been an Inter-State Commission for many years, but section 101 provides that there should be such a body. In the Committee's opinion, the Inter-State Commission should be re-established.

141. Section 103 provides, among other things, that members of the Inter-State Commission are to be appointed by the Governor-General in Council for fixed terms of seven years. The Committee's view is that the section should be amended to provide that members may be appointed for terms not exceeding seven years thus enabling different terms to be allotted to individual members and making possible continuity in membership.

142. THE COMMITTEE RECOMMENDS that the Constitution should be altered to provide for the following:—

(1) The Commonwealth Parliament should have an express power in section 51 of the Constitution to make laws with respect to restrictive trade practices found by the Inter-State Commission to be, or likely to be, contrary to the public interest.

(2) For the purposes of the power described in sub-paragraph (1) above, the Parliament should have power to make laws for referring questions to the Inter-State Commission for inquiry and report, and the Commission should be vested with power to make its inquiries and report to the Parliament.

(3) Section 103 of the Constitution should provide for members of the Inter-State Commission to hold office for terms not exceeding seven years subject, as at present, to removal within their respective periods of appointment on the ground of misbehaviour or incapacity.

MARKETING OF PRIMARY PRODUCTS: CONSTITUTION, SECTION 92.

143. Each of the main primary industries in Australia is carried on in more than one State. The Federal Parliament is competent, under its power to make laws with respect to interstate and overseas trade and commerce, to deal with important branches of the marketing of primary products but, under the constitutional division of powers, intrastate marketing is exclusively the domain of the individual States.

144. An effective scheme for orderly marketing of products usually requires the maintenance of a uniform national policy but in Australia such a scheme is generally possible only so long as it is one to which the Commonwealth and up to six States are prepared to subscribe.

145. This is not the only difficulty confronting orderly marketing of nationally important primary products. Section 92 of the Constitution requires trade and commerce among the States to be absolutely free and the section has been held to bind both the Commonwealth and the States. The meaning which the Courts have given to the constitutional declaration has had profound effects on marketing schemes by making it necessary to exclude from compulsory marketing arrangements produce which is intended for, or committed to, interstate trade.

146. Accordingly, orderly marketing schemes rest on insecure legal foundations; they are difficult to initiate and susceptible to collapse even though supported by a clear majority of producers in the Commonwealth and perhaps in each of the States of production as well.

147. The Committee believes that a satisfactory legal basis can be found for orderly marketing schemes for the major primary products, only if the national Parliament is vested with a general marketing power free from the operation of section 92. The exercise of the power should be subject to the approval of producers.

148. THE COMMITTEE RECOMMENDS that the Constitution should be altered to provide the Commonwealth Parliament with legislative power as follows:—

(1) The Parliament should have power to make laws for the submission to a poll of primary producers of proposed plans for the organized marketing of primary products.

(2) For the purpose of submitting a proposed plan to producers, the Parliament should be authorized to make such laws as it deems necessary in connexion with the holding of a poll, including laws determining who is a primary producer, eligibility to vote and the number of votes which a producer should have.

(3) If three-fifths of the votes cast at a poll by the producers of a primary product are in favour of a proposed marketing plan for that product, the Parliament should have power to make laws to give effect to the plan free from the operation of section 92 of the Constitution, but otherwise subject to the Constitution.

(4) For the purposes of the power, a primary product should include any product directly produced or derived from a primary product which the Parliament deems to be a primary product.

ECONOMIC POWERS.

149. The Commonwealth Parliament has, under various provisions of the Constitution, legislative powers which can be exercised so as to affect the state of the national economy, such as the powers with respect to taxation, conciliation and arbitration, borrowing money on the public credit of the Commonwealth and banking, but these powers collectively do not permit the development of an integrated economic policy. The banking power (Constitution, section 51 (xiii.)) itself is a far less useful power than at Federation because of the growth of specialized financial institutions outside the banking structure.

150. When the Constitution was drafted, no Government in Australia had a responsibility for the general state of the economy, including the level of employment, stability of the value of the currency, and the rate and balance of economic development. It is only in recent years that the development of economic understanding has made the factors determining these matters sufficiently clear for Governments to take action. It is not surprising, therefore, that the Constitution did not concern itself with the allocation between the Commonwealth and the States of powers necessary to give effect to general economic policy. The question is not one of transferring to the Commonwealth specific powers consciously left with the States under the Constitution, but of allocating between the Commonwealth and the States the power necessary to fulfil a responsibility of government which did not exist when the Constitution was originally framed but which, in the Committee's view, is now generally accepted in the light of developments since Federation, including those mentioned in paragraphs 77 to 103 of this Report. The Committee considers that the Commonwealth should be in a position to discharge such a responsibility and that, for the purpose, the national Parliament should have specific concurrent legislative powers over capital issues, consumer credit and rates of interest charged in connexion with the borrowing of money on the security of land.

151. As to capital issues, the Committee is concerned with various ways in which companies may obtain capital funds, such as by the subscription of share capital, borrowing on deposit, and the issue of debentures, notes and other instruments either on the security of company assets or unsecured. The Committee is not concerned with unincorporated business undertakings such as are carried on by firms, partnerships and individual persons.

152. THE COMMITTEE RECOMMENDS that the Constitution should be amended to provide, in substance, as follows:—

(1) The Commonwealth Parliament should have power to make laws with respect to—

(*a*) the issue, allotment or subscription of capital; and

(*b*) the borrowing of money whether upon security or without security,

by corporations which engage, or may engage, in production, trade, commerce or other economic activities.

(2) The power proposed to be vested in the Parliament under sub-paragraph (1) above is not to apply to—

(*a*) the issue or allotment of capital out of profits or accumulated reserves of corporations; or

(*b*) incorporated authorities of a State, including local government authorities.

153. By consumer credit, the Committee has in mind the various types of transactions under which the purchase or acquisition of goods is financed, such as hire purchase. They are commonly called time payment transactions. The volume and terms of this form of business have important repercussions on the Australian economy.

154. At present, hire purchase is the most popular form of consumer credit. There are, however, other types of transactions, such as instalment purchase arrangements and bills of sale, which achieve much the same result as hire purchase by enabling consumers to obtain on credit goods for immediate use. The Committee considers that any constitutional amendment should be sufficiently flexible to take account not only of existing forms of credit transactions but also of transactions which might be used in future, as for example, perpetual hire of goods.

155. THE COMMITTEE RECOMMENDS that the Constitution should be amended by vesting the Commonwealth Parliament with a power to make laws with respect to hire purchase and other agreements or transactions entered into in connexion with the sale, purchase, hire or encumbrance of goods which involve the making of periodical payments or deferment of payment of the full amount payable.

156. The other concurrent power it is proposed to be vested in the Parliament is directed to the regulation of interest rates when money is borrowed upon the security of land outside the banking system.

157. THE COMMITTEE RECOMMENDS that the Commonwealth Parliament should have power to make laws with respect to rates of interest and other charges payable in connexion with loans obtained upon the mortgage or other security of land.

VIII.—INTERSTATE ROAD TRANSPORT.

158. Section 92 of the Constitution proclaims that trade, commerce and intercourse among the States shall be absolutely free. The section has been frequently relied on in recent years in litigation in connexion with interstate commercial road transport. A majority of the High Court has held that, in respect of vehicles using roads within a State in the course of interstate trade and commerce, the State may impose charges that are, in the view of the Court, in the nature of a fair recompense for the actual use made of the highways having regard to the wear and tear caused and the costs of maintenance and upkeep of the highways. It seems that a State can not, in fixing charges, take into account the capital cost of providing new roads or other capital expenditure as distinct from recurrent expenditure incident to the maintenance of roads and other facilities used by interstate road transport.

159. The Committee considers that vehicles using roads within a State in the course of transporting persons or goods between States for profit should be prepared to bear a reasonable share of the capital cost to the States of providing the roads and other transport facilities which they use. A State charge which so provides and at the same time imposes no greater burden on interstate commercial traffic than it does on intrastate road transport should be deemed not to infringe section 92.

160. The Committee thinks, furthermore, that an independent authority should determine whether or not a State charge imposed on interstate transport is reasonable and that the matter should be capable of decision in advance of the actual imposition of a charge. The Committee has, in paragraphs 140 to 142 of this Report, already referred to the Inter-State Commission. It is of opinion that the Commission would be an appropriate authority to decide whether State charges are reasonable or not.

161. THE COMMITTEE RECOMMENDS that the Constitution should be altered to authorize a State, notwithstanding section 92 of the Constitution, to impose charges in respect of the carriage interstate by road of persons and goods provided that—

(1) the charges are approved by the Inter-State Commission as being fair and reasonable having regard to the promotion of interstate trade and commerce and the public interest; and

(2) the charges, in their application to road transport, do not discriminate against the carriage of persons or goods interstate.

IX.—COMMONWEALTH-STATE FINANCIAL RELATIONS.

162. There were many indications to the Committee, in the course of its inquiries, of dissatisfaction with the present state of financial arrangements between the Commonwealth and the States. The view was repeatedly expressed that it was necessary for the States to have a greater measure of financial independence and increased responsibilities in the raising of revenue for State purposes. The Committee concluded that some action was needed to improve the position and that it should be prepared to recommend constitutional changes if any should be found necessary.

163. Searching inquiries indicated, in the opinion of the Committee, that current discontent largely stemmed from arrangements made within the constitutional framework, as for example, in relation to the imposition of income taxation, which, if the Commonwealth and the States were to agree, could probably be adjusted without the need for constitutional amendment. The Committee felt, however, that it should consider whether constitutional changes could be made to give the States greater financial responsibilities, but it found itself unable to ascertain whether any particular course of action proposed would assist in solving more important Commonwealth-State financial problems and at the same time be acceptable to all or most of the States and the Commonwealth. The Committee's misgivings were accentuated because the States have not so far put forward co-ordinated proposals to effect a material improvement in their financial position.

164. Thus, although the Committee was prepared to deal fully with any constitutional aspects of the inter-governmental financial problem, it was unable to do so and it regretfully reports accordingly. The Committee believes that a conference of the political leaders of the Commonwealth and the States is needed to discover whether any substantial adjustment of the relative financial positions of the Commonwealth and the States could be achieved.

X.—NEW STATES.

165. Section 121 of the Constitution provides that the Parliament of the Commonwealth may, upon such terms and conditions as it thinks fit, admit new States to the Commonwealth or establish new States. By virtue of section 124, however, it is a pre-requisite to the formation of a new State by separation of territory from a State that the consent of the Parliament of that State be obtained. A new State may also be formed by the union of two or more States or parts of States but only with the consent of the Parliaments of the States affected.

166. New State Movements have existed in Australia over many years and their origins may be traced beyond Federation. Currently, there are well known Movements in two States. The Committee believes that the effect of section 124 has been to prevent the strength of new State feeling being adequately tested. In its opinion, the Constitution should provide an opportunity for the people to determine the question whether a new State should be formed. If a majority of electors both in the area of a proposed new State and in the State as a whole support the formation of a new State, it should not require the approval of the Parliament of the State before the new State can be established as a member of the Commonwealth.

167. THE COMMITTEE RECOMMENDS that the Constitution should be amended by making provision in Chapter VI. as follows:—

(1) The Commonwealth Parliament should have power to form a new State by separation of territory from a State or by the union of two or more States or parts of States if a majority of electors in the area of the proposed State and a majority of electors in the whole State or, in the event of there being more than one State affected, a majority of electors in the area of the proposed State and majorities of electors in each State affected, vote in favour of the formation of the proposed State.

(2) The Parliament may establish a new State within three years, or such other period as the Parliament determines, from the holding of the referendum which the Committee contemplates.

(3) Electors qualified to vote at a new State referendum should be the persons qualified to be electors of members of the House of Representatives.

(4) The Parliament should have power to make such laws as are necessary to deal with all matters in connexion with the formation of a new State in accordance with the provisions of the power now proposed, including the determination of the area and boundaries of a proposed State, the framing and submission of the question of a new State to the electors, eligibility of electors to vote and the terms and conditions on which a new State may become a State of the Commonwealth.

XI.—ALTERATION OF THE CONSTITUTION.

168. The procedure laid down in section 128 of the Constitution for the alteration of the Constitution has been described in Part III. of this Report. As was there mentioned, generally proposed laws for the alteration of the Constitution, including proposed laws similar to those so far submitted to referendum, need to be approved in a majority of States by a majority of electors voting in addition to a majority of all the electors who vote. This means that it is necessary to obtain majorities in four of the six States.

169. The Committee acknowledges the vital interest of the people in proposed constitutional alterations, and considers that if a clear majority of the electors who vote at a referendum are in favour of a proposed law, their will should not be frustrated because separate majorities of electors have not been obtained in a majority of the States. It is, in the Committee's opinion, more in accord with democratic principle and the developments since Federation that it should be sufficient to obtain separate majorities in at least one-half of the number of States. Of the twenty proposed laws which have failed to obtain the necessary majorities under section 128, two were approved by a majority of the electors voting and in addition by majorities of the electors in half of the States.

170. THE COMMITTEE RECOMMENDS that section 128 of the Constitution should be altered to provide that a proposed law to alter the Constitution, which has at present to be approved in a majority of the States by a majority of the electors voting and by a majority of all the electors voting before it can be submitted for the Royal assent, should be submitted for the Royal assent if it has been approved by a majority of all the electors voting and by a majority of the electors voting in at least one-half of the number of States.

XII.—COMPLETION OF THE CONSTITUTIONAL REVIEW.

171. As mentioned earlier, the Committee has been precluded, because of insufficient time, from considering fully many important matters upon which it wished to report. The Committee's hope is that the next Parliament will take up the question of the continuance of the work on which the Committee has embarked, and that a successor Committee, authorized to make use of the Committee's records and work, will be appointed to complete the constitutional review.

XIII.—*EX OFFICIO* MEMBERS.

172. The Prime Minister and the Leader of the Opposition in the House of Representatives, the *ex officio* members of the Committee, did not attend the sittings or participate in the deliberations of the Committee.

XIV.—RESERVATIONS.

173. Mr. Downer's signature is subject to the reservation relating to industrial conditions set out in Annexure "A" to this Report.

174. Senator Wright's signature is subject to his observations and reservations appearing in Annexure "B" to this Report.

XV.—PRESENTATION OF THE REPORT.

175. The Committee has the honour to present its Report to the Parliament.

Dated this first day of October, One thousand nine hundred and fifty-eight.

NEIL O'SULLIVAN, Chairman.

P. J. KENNELLY, Member.

N. E. McKENNA, Member.

REG. C. WRIGHT, Member.

ARTHUR A. CALWELL, Member.

A. R. DOWNER, Member.

D. H. DRUMMOND, Member.

LEN. W. HAMILTON, Member.

P. E. JOSKE, Member.

REG. T. POLLARD, Member.

E. J. WARD, Member.

E. G. WHITLAM, Member.

ANNEXURE "A".

INDUSTRIAL CONDITIONS: MR. DOWNER'S RESERVATION.

Mr. Downer wishes to record his dissent from the Committee's recommendation relating to industrial conditions set out in paragraph 131 of the Report.

In Mr. Downer's opinion, section 51 (xxxv.) of the Constitution should be amended so as to enable the Commonwealth Parliament to make laws for the prevention and settlement of industrial disputes without being restricted to the processes of conciliation and arbitration or by the necessity for a dispute to extend beyond the limits of a single State.

Mr. Downer considers, however, that a general power over terms and conditions of industrial employment which the Committee has recommended to be vested in the Commonwealth Parliament provides a greater extension of existing power than is desirable.

ANNEXURE "B".

SENATOR WRIGHT'S OBSERVATIONS AND RESERVATIONS.

COMMONWEALTH LEGISLATIVE MACHINERY: REPORT, PART VI.

1. The reason for the Senate's constitutional voting strength in relation to money bills was its role as representative of the States. Although throughout its history the influence of party has impressed the Senate more than its State representation, a new opportunity was presented by the system of proportional representation for the Senate to function as a States House. That opportunity and challenge to the Senate becomes more urgent in view of the dwindling financial independence of the States. In 1910, the States lost any share in indirect taxes (customs and excise) and in 1942 they lost income tax. I am convinced, therefore, that the Senate's powers should not be weakened either (*a*) in respect of money bills until the States are guaranteed constitutionally a proper share of public revenues to enable them to discharge their proper State governmental functions, or (*b*) in respect of the Senate's numerical strength relatively to the House of Representatives so long as a joint sitting is the means of solving deadlocks.

I will agree to a provision facilitating the synchronization of Senate and House of Representatives elections by providing that senators' terms should be six years provided that if the Senate has rejected any measure on which the House of Representatives goes to the country, half of the Senate should go with it. Or if no decision of the Senate has precipitated the election, then the half of the Senate should go if the Senate so decides.

The recent constitutional development of the right of Heads of Government to obtain a dissolution of the House of Representatives on request in my opinion makes it imperative that the Prime Minister should not have power to treat the States House or the Senate as an appendage to the Popular House and take the Senate out at the will of the Executive Government.

The Senate would be better abolished than exist as an echo of the Federal Executive Government.

It has not shown marked independence except on party lines up to date. But if when it consists of a majority of members whose political policy is to preserve the bicameral system and to have a House of review which has a right to judgment different from the Executive, it could be improved by—

(*a*) having separate party meetings,
(*b*) having no members in the Cabinet,

and thereupon, except on the basis that Caucus controls Parliament, including the Senate, the Senate could be expected to grow into a deliberative Chamber of reconsideration and review with its primary work in the protection of a proper balance between State rights and encroaching Commonwealth power.

Number of Senators and Members of the House of Representatives.

2. I express my dissent from the recommendation set out in paragraph 39 of the Report.

Disagreements between the Senate and the House of Representatives.

3. I express my dissent from the recommendation set out in paragraph 43 of the Report.

Terms of Senators.

4. I express my dissent from the recommendation set out in paragraph 49 of the Report.

Reckoning of Population.

5. I express my dissent from the recommendation set out in paragraph 69 of the Report.

CONCURRENT LEGISLATIVE POWERS: REPORT, PART VII.

Industrial.

6. I particularly justify the power over industrial terms of employment set out in paragraph 131 of the Report. It is an exceedingly wide power, but unless some *Parliament* is given this power, Parliamentary government in respect of it is in danger.

In my opinion, there is no alternative to recognizing that the Commonwealth Parliament should have this power.

Corporations and Economic Powers.

7. There would be advantage in a uniform Companies Act as conventionally understood, applicable alike in all States and the Territories. But this proposed power could be used not for ordinary company law purposes, but to regulate and control companies.

And if, in addition, the Commonwealth were to gain the proposed powers over capital issues, credit sales or mortgages of goods and interest on land loans, you would have complete apparatus for rigid regulation on the order and decree system, with licences and permits on the bureaucratic model, very akin to nationalization.

Accordingly, I express my dissent from the recommendations set out in paragraphs 135, 152, 155 and 157 of the Report.

Marketing of Primary Products: Constitution, Section 92.

8. I accept the proposal as to organized marketing set out in paragraph 148 of the Report provided section 99 is amended to prohibit discrimination as well as preference in interstate trade.

ALTERATION OF THE CONSTITUTION: REPORT, PART XI.

9. I dissent from the proposal set out in paragraph 170 of the Report to reduce the majority of States required for constitutional amendment.

OMISSIONS FROM THE REPORT.

10. I am strongly of the opinion that the present recommendations fail to supply most important amendments needed to—

(*a*) ensure constitutionally proper financial revenues to the States;
(*b*) assure to the Federal Parliament ample defence powers; and
(*c*) guarantee fundamental individual liberties.

REG. C. WRIGHT.

ANNEXURE "C".

LIST OF PERSONS WHO ATTENDED MEETINGS OF THE CONSTITUTION REVIEW COMMITTEE.

(According to the order of attendance.)

M. R. O'Halloran, Leader of the Opposition in the House of Assembly of South Australia.

C. R. Cameron, M.P., representing the Executive of the South Australian Branch of the Australian Labour Party.

The Honorable Sir Thomas Playford, G.C.M.G., Premier of South Australia.

The Right Honorable Sir Earle Page, G.C.M.G., C.H., M.P.

J. V. Moroney, O.B.E., Secretary, Department of Primary Industry, Canberra.

P. H. Morton, Leader of the Opposition in the Legislative Assembly of New South Wales, R. W. Askin, M.L.A., and K. M. McCaw, M.L.A.

The Honorable R. Cosgrove, Premier of Tasmania.

The Honorable W. Jackson, Leader of the Opposition in the House of Assembly of Tasmania.

Dr. J. F. Gaha, M.H.A. (Tasmania).

J. Reynolds, Hobart, Tasmania.

F. C. Green, M.C., former Clerk of the House of Representatives.

The Right Honorable Sir John Greig Latham, G.C.M.G., former Chief Justice of the High Court of Australia.

L. W. Barrow, J. E. Menadue, the Honorable William Slater, M.L.C., and C. W. Quihampton, representing the Australian Natives' Association.

Sir Garfield Barwick, Q.C., H. W. Robson of Counsel and Colonel R. S. Coates, representing the Institute of Public Affairs (New South Wales).

Sir Roland Wilson, C.B.E., Secretary to the Commonwealth Treasury.

Dr. H. C. Coombs, Governor of the Commonwealth Bank of Australia.

Professor G. Sawer, Professor of Law, Australian National University, Canberra.

P. J. Hannaberry, O.B.E., Commonwealth Railways Commissioner.

C. H. McFadyen, C.B.E., Secretary, Department of Shipping and Transport, Melbourne.

The Honorable A. R. G. Hawke, Premier of Western Australia.

A. Wills-Johnson, Perth, Western Australia.

Mrs. B. M. Rischbieth, O.B.E., Miss I. L. Glasson, Miss M. A. Talbot and Mrs. A. H. Rankin, representing the Australian Federation of Women Voters.

The Honorable D. Brand, Leader of the Opposition in the Legislative Assembly of Western Australia.

A. T. Brendish, representing the Western Australian Country Party.

E. C. Gare, Miss M. A. Talbot, W. L. Grayden, M.L.A., and J. R. Henshaw, representing the Western Australian Native Welfare Council Incorporated.

L. E. Williams, G. H. Hopkins, J. H. Peake and A. D. Hooper, representing the New State for North Queensland Movement.

G. H. Hopkins, representing the Ingham Chamber of Commerce.

H. G. Pearce, M.P.

J. O'Malley, G. H. Gray, J. E. Harding and R. Clay, representing the Capricornia New State Movement.

B. Foley and J. Jones, representing the Council of Agriculture (Q'land).

R. J. S. Muir, representing the Queensland Cane Growers' Council and the Australian Cane Growers' Association.

S. O. Cowlishaw and H. Garside, representing the Queensland Grain Growers' Association.

P. A. Wright, U. R. Ellis and P. N. Harrison, representing the New England New State Movement.

L. Ainsworth, Chief Electoral Officer for the Commonwealth.

R. M. Eggleston, Q.C.

K. G. Lee, representing the Egg and Egg Pulp Marketing Board (Victoria).

P. B. Ryan and N. Barnett, representing the Egg Marketing Board for the State of New South Wales.

I. T. Serjeant and Mrs. I. L. Waight, representing the Australian Primary Producers' Union.

E. E. Nuske and T. C. Stott, M.P. (South Australia), representing the Australian Wheatgrowers' Federation.

E. G. Roberts, R. C. Gibson, A. F. Baird and R. H. Francis, representing the Australian Dairy Farmers' Federation and affiliated organizations.

K. S. Jacobs of Counsel, representing the Graziers' Federal Council of Australia, the Metal Trades Employers' Association and the Chamber of Manufactures of New South Wales, accompanied by W. E. de Vos of the Graziers' Federal Council of Australia and D. G. Fowler and J. M. Hammond of the Metal Trades Employers' Association.

P. J. Self, representing the Australian Council of Employers' Federations.

F. J. Spellacy and R. Rowe, representing the Australian Road Transport Federation.

Professor J. P. Baxter, O.B.E., and A. D. McKnight, C.B.E., representing the Australian Atomic Energy Commission.

THE

COMMONWEALTH OF AUSTRALIA

CONSTITUTION ACT

AS ALTERED BY

CONSTITUTION ALTERATION (SENATE ELECTIONS) 1906 (No. 1 OF 1907),

BY THE

CONSTITUTION ALTERATION (STATE DEBTS) 1909 (No. 3 OF 1910),

BY THE

CONSTITUTION ALTERATION (STATE DEBTS) 1928 (No. 1 OF 1929),

AND BY THE

CONSTITUTION ALTERATION (SOCIAL SERVICES) 1946 (No. 81 OF 1946).

THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT.(a)

(63 & 64 VICT. CHAPTER 12.)

An Act to constitute the Commonwealth of Australia.

[9th July, 1900.]

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:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the Commonwealth of Australia Constitution Act.

Act to extend to the Queen's successors.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

Proclamation of Commonwealth.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Commencement of Act.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several

(a) Note.—This print of the Constitution Act contains all the alterations of the Constitution which have been made up to and including the 1st November, 1959. The Acts by which the Constitution was altered are the *Constitution Alteration* (*Senate Elections*) 1906 (assented to 3rd April, 1907); the *Constitution Alteration* (*State Debts*) 1909 (assented to 6th August, 1910); the *Constitution Alteration* (*State Debts*) 1928 (assented to 13th February, 1929); and the *Constitution Alteration* (*Social Services*) 1946 (assented to 19th December, 1946).

colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

Operation of the Constitution and laws.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Definitions.

6. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of Federal Council Act, 46 & 49 Vict. c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Application of Colonial Boundaries Act, 58 & 59 Vict. c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

Constitution.

9. The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION.

This Constitution is divided as follows:—

CHAPTER I.—THE PARLIAMENT.

CHAPTER I. THE PARLIAMENT.

PART I.—GENERAL.

PART I. GENERAL.

Legislative power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

Governor-General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

Sessions of Parliament. Prorogation and Dissolution.

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

Summoning Parliament.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

Commonwealth of Australia

First Session.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Yearly session of Parliament.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

PART II. THE SENATE.

PART II.—THE SENATE.

The Senate.

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Qualification of electors.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Method of election of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Constitution

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

Rotation of senators. Altered by No. 1, 1907, s. 2

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of ~~the third year~~, **three years,** and the places of those of the second class at the expiration of ~~the sixth year~~, **six years,** from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made ~~in the year at the expiration of which~~ **within one year before** the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of ~~January~~ **July** following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of ~~January~~ **July** preceding the day of his election.

Further provision for rotation.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Casual vacancies.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

Commonwealth of Australia

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

Qualifications of senator.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of President.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

Constitution

PART III.—THE HOUSE OF REPRESENTATIVES.

PART III. HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as to races disqualified from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in in that State shall not be counted.

Representatives in first Parliament.

26. Nothwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:—

New South Wales	twenty-three;
Victoria	twenty;
Queensland	eight;
South Australia	six;
Tasmania	five;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales	twenty-six;
Victoria	twenty-three;
Queensland	nine;
South Australia	seven;
Western Australia	five;
Tasmania	five.

Alteration of number of members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Duration of House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Electoral divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

Qualification of electors.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Application of State laws.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Writs for general elections.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

Writs for vacancies.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

(i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

(ii.) He must be a subject of the Queen, either naturalborn or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of Speaker.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

PART IV.—BOTH HOUSES OF THE PARLIAMENT.

PART IV. BOTH HOUSES OF THE PARLIAMENT.

Right of electors of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

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Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

Member of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Disqualification.

44. Any person who—

(i.) Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv.) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Vacancy on happening of disqualification.

45. If a senator or member of the House of Representatives—

(i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or

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(ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

Penalty for sitting when disqualified.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

Privileges, &c., of Houses.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Rules and orders.

50. Each House of the Parliament may make rules and orders with respect to—

(i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:

(ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

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PART V.—POWERS OF THE PARLIAMENT.

PART V. POWERS OF THE PARLIAMENT. Legislative powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

(i.) Trade and commerce with other countries, and among the States:

(ii.) Taxation; but so as not to discriminate between States or parts of States:

(iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv.) Borrowing money on the public credit of the Commonwealth:

(v.) Postal, telegraphic, telephonic, and other like services:

(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii.) Lighthouses, lightships, beacons and buoys:

(viii.) Astronomical and meteorological observations:

(ix.) Quarantine:

(x.) Fisheries in Australian waters beyond territorial limits:

(xi.) Census and statistics:

(xii.) Currency, coinage, and legal tender:

(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv.) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

(xv.) Weights and measures:

(xvi.) Bills of exchange and promissory notes:

(xvii.) Bankruptcy and insolvency:

(xviii.) Copyrights, patents of inventions and designs, and trade marks:

(xix.) Naturalization and aliens:

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi.) Marriage:

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(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii.) Invalid and old-age pensions:

(xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances: Inserted by No. 81, 1946, s. 2.

(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.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

(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:

(xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States 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:

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Exclusive powers of the Parliament.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Powers of the Houses in respect of legislation.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bill.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the

Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

Royal Assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Recommendations by Governor-General.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Disallowance by the Queen.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Signification of Queen's pleasure on Bills reserved.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II. THE GOVERNMENT.

CHAPTER II.—THE EXECUTIVE GOVERNMENT.

Executive power.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Provisions referring to Governor-General.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Ministers of State.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Ministers to sit in Parliament.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Appointment of civil servants.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Command of naval and military forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:—

Posts, telegraphs, and telephones:

Naval and military defence:

Lighthouses, lightships, beacons, and buoys:

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

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Certain powers of Governors to vest in Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAPTER III.—THE JUDICATURE.

CHAPTER III. THE JUDICATURE.

Judicial power and Courts.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judges' appointment, tenure, and remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

Appellate jurisdiction of High Court.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

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But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Appeal to Queen in Council.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Original jurisdiction of High Court.

75. In all matters—

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:

(v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

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Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i.) Arising under this Constitution, or involving its interpretation:

(ii.) Arising under any laws made by the Parliament:

(iii.) Of Admiralty and maritime jurisdiction;

(iv.) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i.) Defining the jurisdiction of any federal court other than the High Court:

(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii.) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

CHAPTER IV.—FINANCE AND TRADE.

CHAPTER IV. FINANCE AND TRADE.

Consolidated Revenue Fund.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

Constitution

Money to be appropriated by law.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

Transfer of officers.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

Transfer of property of State.

85. When any department of the public service of a State is transferred to the Commonwealth—

(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

Uniform duties of customs.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

(i.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii.) The Commonwealth shall debit to each State—

(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(*b*) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Exceptions as to bounties.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Payment to States for five years after uniform tariffs.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides—

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another

State for consumption, shall be taken to have been collected not in the former but in the latter State:

(ii.) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the

Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

Saving of certain rates.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be

necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

Taking over public debts of States. Altered by No. 3, 1910, s. 2.

105. The Parliament may take over from the States their public debts ~~as existing at the establishment of the Commonwealth~~, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

Agreements with respect to State debts. Inserted by No. 1, 1929, s. 2.

105A.—(1.) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—

(*a*) the taking over of such debts by the Commonwealth;
(*b*) the management of such debts;
(*c*) the payment of interest and the provision and management of sinking funds in respect of such debts;
(*d*) the consolidation, renewal, conversion, and redemption of such debts;
(*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
(*f*) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2.) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3.) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4.) Any such agreement may be varied or rescinded by the parties thereto.

(5.) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6.) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

CHAPTER V.—THE STATES.

CHAPTER V. THE STATES.

Saving of Constitutions.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Saving of power of State Parliaments.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Saving of State laws.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

Inconsistency of laws.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

Intoxicating liquids.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

States may not raise forces, Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

States not to coin money.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State 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.

Recognition of laws, &c., of States.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

Protection of States from invasion and violence.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Custody of offenders against laws of the Commonwealth.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI. NEW STATES.

CHAPTER VI.—NEW STATES.

New States may be admitted or established.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

Government of territories.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII. MISCELLANEOUS.

CHAPTER VII.—MISCELLANEOUS.

Seat of Government.

125. 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.

Power to Her Majesty to authorize Governor-General to appoint deputies.

126. The Queen may authorize the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies 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 not affect the exercise by the Governor-General himself of any power or function.

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Commonwealth of Australia

CHAPTER VIII. ALTERATION OF CONSTITUTION.

CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

Constitution

SCHEDULE.

—

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. So HELP ME GOD!

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

By Authority: A. J. ARTHUR, Commonwealth Government Printer, Canberra.