FIRST REPORT OF THE CONSTITUTIONAL COMMISSION

VOLUME II

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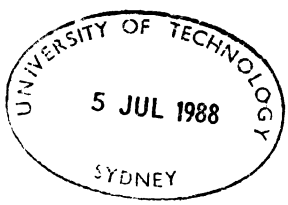

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27 April 1988

Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

At your request, and pursuant to paragraph (iv) of our Terms of Reference, we present our first report on the revision of the Australian Constitution.

Yours sincerely,

Sir Maurice Byers, CBE, QC
Chairman

Professor Enid Campbell, OBE

Hon Sir Rupert Hamer, KCMG

Hon EG Whitlam, AC, QC

Professor Leslie Zines

VOLUME TWO

This is the second volume of the First Report of the Constitutional Commission. The first volume consists of the following material:

- Letter of transmittal
- Table of contents
- Summary of recommendations
- Chapter 1 - Constitutional Commission
- Chapter 2 - Terms of Reference
- Chapter 3 - Preamble and covering clauses
- Chapter 4 - The Parliaments*

This volume consists of: **Page**

A detailed Table of Contents appears in the first volume of this Report.

Note '*' indicates extracts only from the Final Report.

CHAPTER 5. THE EXECUTIVE GOVERNMENT OF THE COMMONWEALTH

INTRODUCTION

In Chapter 2 of the Report we have provided a general account of the provisions of the Constitution which govern the executive branch of the government of the Commonwealth and the relationship between the executive branch and the Parliament. In this Chapter we consider whether the provisions of the Constitution relating to the executive branch are in need of revision.

Most of these provisions appear in Chapter II of the Constitution under the heading 'Executive Government'. Provisions in other parts of the Constitution which will be dealt with in this Chapter of the Report are sections 2-4, which relate to the offices of Governor-General and Administrator of the Commonwealth, and section 126 which provides for the appointment of deputies of the Governor-General.

All but one of the matters considered in this Chapter have been considered and reported on by the Advisory Committee on Executive Government.[1] We have endorsed most of the Committee's recommendations and we deal with them usually in the order in which they appear in the Committee's Report. A number of the matters reported on by the Committee are not dealt with in this Chapter of our Report but are considered in other Chapters. For example, covering clause 2, succession to the throne, assent to and reservation of Bills and disallowance of legislation are dealt with in Chapter 2; the preamble to the Commonwealth of Australia Constitution Act 1900 is dealt with in Chapter 3; the Senate and supply and the funding of Parliament in Chapter 4. Advisory opinions by the High Court will be dealt with in Chapter 6 of our Final Report.

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1 The Terms of Reference of that Committee are set out in Appendix C.

The one matter dealt with in this Chapter of the Report which was not considered by the Advisory Committee on Executive Government is the transfer of State departments to the Executive Government of the Commonwealth and federal power to legislate on departments so transferred. The federal legislative power was considered in Chapter 19 of Report of the Advisory Committee on Distribution of Powers.

Principal issues

The principal issues considered in this Chapter are:

(a) Do we need a Head of State, as distinct from a Head of Government, as part of our system of federal government?

(b) Should the powers exercisable by the Queen of Australia be altered or retained?

(c) Should the Westminister-style of government be preserved and, if so, should it be further written into the Constitution?

(d) Who should be the Queen's Ministers of State for the Commonwealth? Should they continue to be persons who are members of the Parliament? Should it continue to be possible to appoint senators as Ministers?

(e) Should the Constitution be altered to make express provision for the appointment of the Prime Minister and to define the circumstances in which his or her appointment may be terminated?

(f) Should the provisions of the Constitution relating to the appointment and terms of office of Ministers be altered? In particular, should it be made clear that Ministers are appointed and are removable by the Governor-General only on the advice of Prime Minister?

Should there be express provision for appointment of Assistant Ministers?

(g) Should the Parliament retain power to fix the maximum number of Ministers who may be appointed?

(h) Should the power to establish and disestablish departments of State of the Commonwealth remain with the Governor-General in Council, that is, the Governor-General acting on the advice of the Federal Executive Council?

(i) Should there continue to be a constitutional requirement that a Minister be appointed to administer each department of State of the Commonwealth?

(j) Should the Constitution be altered to make it clear that Ministers without portfolio may be appointed?

(k) Should the provisions of the Constitution dealing with the Federal Executive Council be altered? For example, should the membership of the Council be confined to the Queen's Ministers of State for the time being?

(l) Should the Constitution be altered to include more detailed provisions on the appointment and terms of office of the Governor-General?

(m) Should the provisions of the Constitution relating to Administrators of the Commonwealth and deputies of the Governor-General be altered?

(n) Should the provisions of the Constitution relating to the powers of the Governor-General and the Governor-General in Council be altered? In particular should there continue to be provision, as in section 2, for assignment of specific powers to the Governor-General by the Queen? Should there be provisions to regulate

the exercise of 'the reserve powers' of the Governor-General?

(o) Should the Governor-General continue to have the command in chief of the defence forces, and, if so, should the nature of the office be more clearly defined?

(p) Should section 61 of the Constitution be altered to clarify the content and scope of the executive power of the Commonwealth? Should the section also be altered to vest the executive power of the Commonwealth directly in the Governor-General?

(q) Should the Constitution be altered to make it clear that the executive power of the Commonwealth is subordinate to the legislative powers of the Federal Parliament? In particular, should the Constitution be altered to confer on the Federal Parliament an express power to make laws regulating the exercise of powers vested in the Governor-General and the Governor-General in Council?

(r) Should the provisions of the Constitution relating to the transfer of State departments to the Executive Government of the Commonwealth be retained or altered?

HEAD OF STATE

Recommendations

In Chapter 2 of this Report we have **recommended** that:

(i) covering clause 2 of the Commonwealth of Australia Constitution Act 1900 be altered to read:

> The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of Australia.

(ii) section 59 of the Constitution be repealed so as to abolish the power of the Queen to disallow Acts of the Federal Parliament; and

(iii) section 60 of the Constitution be repealed and section 58 altered to abolish the power of the Governor-General to reserve Bills passed by the Houses of the Federal Parliament for the Queen's personal assent.

In Chapter 6 of the Final Report we will recommend that the Constitution be altered to repeal the surviving provisions for appeals to the Queen in Council.

Later in this Chapter we recommend alteration of section 126 of the Constitution to empower the Governor-General to appoint deputies on the advice of the Prime Minister, without having to obtain the Queen's authority to do so.[2]

Apart from these changes we recommend no alterations of the Constitution which would affect the position of the Queen as the Head of State of Australia.

Current position

In the Commonwealth of Australia, the Head of State is, and always has been, the person who, for the time being, is also the King or Queen of the United Kingdom - though since 1953 that person has been separately styled and titled Queen of Australia.[3]

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2 Under the heading 'Administrator of the Commonwealth and deputies of the Governor-General' - 'Reasons for recommendation'.

3 Chapter 2 under the heading 'Effect of independent nationhood'.

Neither the Constitution nor the Commonwealth of Australia Constitution Act actually refers to the Queen as Head of State. It is nevertheless proper to regard her as Head of State because of the role in government these instruments assign to her.

She is a constituent part of the Federal Parliament (section 1) and the Governor-General assents to Bills passed by the two Houses of Parliament in her name (section 58). She appoints the Governor-General to be her representative in the Commonwealth and she alone may remove the Governor-General from office (section 2). The executive power of the Commonwealth is formally vested in the Queen, but is declared to be exercisable by the Governor-General (section 61). The persons appointed to administer federal departments are declared to be 'the Queen's Ministers of State for the Commonwealth' (section 64). The salaries payable from the Consolidated Revenue Fund to the Governor-General and the Ministers are formally payable to the Queen (sections 3 and 66).

Many of the constitutional powers which might have been given to the Queen were, under Australia's Constitution, given rather to the Governor-General or the Governor-General in Council, that is to say, the Governor-General acting on the advice of the Federal Executive Council.[4] These powers cannot be exercised by the Queen at any time or on any occasion. Under the Constitution, the only powers which the Queen may exercise are those expressly vested in her. The Royal Powers Act 1953 (Cth), it is true, permits the Queen to exercise certain powers of the Governor-General when she is in Australia, but these powers are limited to the powers conferred on the Governor-General by federal statutes. They do not include the powers conferred on the Governor-General by the Constitution.

At the present time the only constitutional powers of significance which the Queen exercises in relation to the Commonwealth of Australia are:

4 See discussion under the heading 'Federal Executive Council' below.

(a) the power to appoint and dismiss the Governor-General (section 2);

(b) the power to appoint and dismiss administrators[5] of the Commonwealth (section 4); and

(c) the power to authorise the Governor-General to appoint deputies (section 126).

These powers are now exercised only on the advice of the Prime Minister of Australia.

At the Adelaide session of the Australian Constitutional Convention in 1983, it was resolved that certain practices be recognised as conventions in Australia. Certain of these practices relate to the exercise of powers which the Constitution grants to the Queen. They were recognised and declared as follows:[6]

Powers vested in the Queen by the Commonwealth Constitution

(1) Powers vested in the Queen by the Commonwealth Constitution are exercisable by Her on the advice of Commonwealth Ministers and not on the advice of United Kingdom Ministers.

(2) The Queen receives advice from Commonwealth Ministers directly.

Appointment of the Governor-General

(3) The Governor-General is appointed by the Queen on the formal advice of the Prime Minister of Australia after informal consultation on the appointment between the Queen and the Prime Minister. United Kingdom Ministers are not concerned in the appointment.

(4) Assignments by the Queen of powers or functions to the Governor-General under section 2 of the Constitution are made on the advice of the Prime Minister of Australia. Any assignment in a matter of exclusively

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5 The appointment of administrators is dealt with under 'Current position - Administrator' below.

6 ACC Proc, Adelaide 1983, vol I, 319-20.

State concern is not advised or made except at the request of the States concerned.

...

(6) Commissions to administrators under section 4 of the Constitution are issued and withdrawn on the advice of the Prime Minister of Australia and are issued only to State Governors. Where it is necessary for an administrator to act under his commission, the most senior available holder of a dormant commission assumes duty, seniority amongst State Governors being determined according to the dates of their appointment as State Governors.

(7) The power of the Queen under section 126 of the Constitution to authorise the Governor-General to appoint a deputy is exercised on the advice of the Prime Minister of Australia.

...

Respective Position of the Queen and the Governor-General in Australia

...

(11) The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not Herself exercise those powers.

When in Australia, the Queen may assent to Bills passed by the Federal Parliament. She may also open the Parliament and preside at meetings of the Federal Executive Council. The latest occasion on which the Queen presided at a meeting of the Council was for the signing of the proclamation of the Australia Act 1986 (Cth).

As will be explained later in this Chapter, there was a time when it was thought that there were some executive powers in relation to Australia which could be exercised only by the Queen or by the Governor-General, acting in pursuance of an express assignment of authority to the Governor-General by the Queen under section 2 of the Constitution.[7] It is now clear that this is no longer the

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[7] See below under the heading 'Powers of the Governor-General' - 'Current position'.

case and in recognition of this fact the Queen, on 1 December 1987, revoked the remaining assignments of power under section 2.

Although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it.

On 17 September 1900 Queen Victoria in Council declared by proclamation that on and after 1 January 1901 the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, and also Western Australia should be united in a Federal Commonwealth under the name of the Commonwealth of Australia. On 29 October 1900 the Queen issued (a) Letters Patent constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia, (b) Instructions to the Governor-General and Commander-in-Chief and (c) a Commission appointing the first Governor-General and Commander-in-Chief.[8] The Letters Patent of 1900 duplicated a number of provisions in the Constitution and were to that extent unnecessary.

On 21 August 1984, the Queen, acting on the advice of the Prime Minister, revoked the Letters Patent of 29 October 1900, as amended, and the Royal Instructions. No fresh Instructions were issued and the new Letters Patent dealt only with a limited range of matters. They were:

(a) the mode by which persons are to be appointed to the offices of Governor-General and administrator of the Commonwealth;

(b) the oaths or affirmations to be sworn before the offices of Governor-General and administrator of the Commonwealth are assumed;

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8 Commonwealth Statutory Rules 1901-1956, Vol V, 5300, 5301 and 5310; see also Letters Patent of 30 October 1958, Commonwealth Statutory Rules (1958) 494.

(c) the circumstances in which the powers and functions of the Governor-General can be exercised by the administrator; and

(d) the appointment of deputies to the Governor-General.

These Letters Patent represent the full extent to which any Royal instrument having legal effect, other than an instrument authorised by a Federal Act,[9] now controls any aspect of the government of the Commonwealth of Australia.

Advisory Committee's recommendations

In Chapter 1 of its report the Advisory Committee on Executive Government considered a number of general questions concerning the Head of State of the Australian federation. They included:

(a) Do we need a Head of State as part of our system of government?

(b) Should Australia be a Monarchy or republic?

(c) If a Monarchy is to be retained, should the Constitution make procedural provision for the possibility of a transition to a republic at some future time?[10]

The Committee's recommendations in relation to these questions were:

(a) that a Head of State be maintained in our system of government, whether Monarchical or republican;[11]

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9 See Royal Powers Act 1953 (Cth).

10 Other matters dealt with by the Committee in Chapter 1 of its Report are considered elsewhere in this Report.

11 Executive Report, 3.

(b) that a referendum for a republic should not be held at this time;[12] and

(c) that there should not be an alteration to the Constitution to allow for the possibility of transition to a republic at some future time.[13]

The Committee concluded 'that a head of state, as a symbol of national identity, is an appropriate and desirable element in our system of government.'[14] It noted that most of the submissions made to it on this question supported that conclusion. It did, however, emphasise that the question of what powers and functions are appropriate for a Head of State is a separate issue.[15]

In considering the question of whether Australia should remain a constitutional Monarchy or become a republic, the Committee proceeded on the basis that the only type of republican government which could reasonably be contemplated was one which preserved the elements of a democratic political system. 'In the case of republics', the Committee reported:

> we are considering only 'constitutional republics' in which either the position of head of state is separate from that of head of government in much the same way as occurs in the present system or, if the two positions are combined, there are considerable restraints upon power, many of these designed to ensure that the government remains answerable to the people.[16]

The Committee heard evidence and considered many submissions on the Monarchy/republic issue, and also had regard to published works dealing with it. After considering the arguments on both sides, the Committee decided not to recommend that any

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12 id, 7.

13 ibid.

14 id, 2.

15 id, 2-3.

16 id, 3.

alterations of the Constitution be put to a referendum at this time. The Committee reached that conclusion because, on the evidence available to it, and regardless of the merits of the arguments, there was 'no prospect ... of a change in public opinion in the near future which would result in there being majority support for a republic.'[17] 'In view of this', the Committee added, 'and the fact that for many people the issue is an emotionally charged one, we believe that a recommendation to hold a referendum on this question at the present time would detract from other aspects of this report.'[18]

Submissions

In Chapter 1 of its Report, the Advisory Committee on Executive Government considered a number of submissions on the subject of a Head of State. We received a number of submissions on the topic after that Committee had published its Report.

In none of these later submissions was the need for a Head of State questioned, but, as with the earlier submissions, there were considerable differences of opinion about what the constitutional arrangements for the Head of State should be.

A number of the later submissions supported retention of existing arrangements.[19] Some even suggested that an important reason why the Queen should continue to be the Head of State is that, as Head of State, she has the ultimate power to protect Australians

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17 id, 6.

18 id, 6-7.

19 eg Country Women's Association of Australia S3090, 20 November 1987; Tasmanian Government S3373, 9 March 1988; Queensland Government S3290, 4 February 1988; J Bradbury S2869, 2 November 1987; N Barnfield S2907, 29 October 1987; A Richardson S2915, 29 October 1987; F Porche S2879, 28 October 1987; B Edwards S2690, 15 October 1987; B Monks S2665, 2 October 1987; S Holme S2569, 29 November 1987; W Phillips S3031, 5 November 1987; B Joyce S2553, 18 December 1987.

against irresponsible Governments.[20] This view is clearly based on a misconception of the present constitutional position.

There were other submissions of favouring fundamental changes. Some suggested that Australia should become a republic,[21] or should adopt a presidential system like that in the United States of America.[22] Some suggested simply that the Head of State should be elected[23] or should be an Australian citizen.[24]

Reasons for recommendations

We are in broad agreement with the views of the Advisory Committee on the desirability of preserving the office of Head of State and on the question of whether the electors should, at this time, be asked to vote on the issue of constitutional Monarchy versus a republic. We also agree with the Committee that for Australia to become a republic would not require anything more than certain alterations to the Constitution, in accordance with the procedure laid down in section 128.

Alterations of the Constitution to this end would not, it should be stressed, automatically entail Australia's withdrawal from the

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20 eg J Bradbury S2869, 2 November 1987; L Kelly, United Political Association S2851, 29 October 1987; C den Ronden S3084, 20 November 1987.

21 eg P Schrader S2825, 26 October 1987; D Beasant S2740, 24 October 1987; L Foley S2887, 28 October 1987; W Ryan S2903, 28 October 1987; G Murray S2266, 29 June 1987; N Cameron S2539, 1 September 1987; W Forbes S2591, 20 November 1987; A Story S3160, 13 January 1988; New Australian Republican Party S2226, 10 June 1987 and S2469, 9 September 1987; M O'Rourke S2415, 31 August 1987; Citizens for Democracy S3051, 13 November 1987.

22 eg W Ryan S2903, 28 October 1987; G Murray S2266, 29 June 1987; A Alcock S2723, 14 October 1987; A Story S3160, 13 January 1988.

23 eg G Hollebone S2785, 27 October 1987; E Lyneham S2298, 10 July 1987; W Sullivan S2342, 28 July 1987.

24 eg O'Rourke S2415, 31 August 1987; Federation of Ethnic Communities Council of Australia S2561 and S2829, 31 October 1987; New Australian Republican Party S2469, 9 September 1987.

Commonwealth of Nations. There are now twice as many republics in the Commonwealth of Nations as there are realms of the Queen. But all the member nations recognise the Queen as head of that Commonwealth.

The constitutional powers vested in the Monarch as Head of State of the Commonwealth of Australia, and exercised by her personally, are now few and in every case are exercised only on the advice of the Prime Minister of Australia. This convention is so well established that it is not, in our opinion, necessary for it to be formally enacted in the Constitution. We do not therefore **recommend** alteration of the Constitution to include a provision along the lines of section 7(5) of the Australia Act 1986 (Cth).[25]

Equally we do not think it is necessary for the Constitution to be altered to incorporate the principle, agreed on at the Adelaide session of the Australian Constitutional Convention in 1983, that:

> The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not herself exercise those powers.[26]

MINISTERS AND DEPARTMENTS

Recommendations

We recommend that the Constitution be altered by omitting sections 62, 63, 64, 65 and 66 and by substituting sections to include the following :

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25 This provides that 'The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.' This provision was included because, before the Act, the advice was tendered by a British Minister.

26 ACC Proc, Adelaide 1983, vol I, 320.

Prime Minister, Ministers and Departments of State.

62. (1) The Governor-General shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.

(2) The Prime Minister shall not hold office for a longer period than ninety days unless he is or becomes a member of the House of Representatives.

(3) The Prime Minister shall hold office, subject to this Constitution, until he resigns or, following a resolution passed by the House of Representatives that the Government does not have the confidence of the House, the Governor-General terminates his appointment on that ground.

Ministers and Assistant Ministers.

63. (1) The Governor-General may, with the advice of the Prime Minister, appoint Ministers and Assistant Ministers.

(2) No Minister or Assistant Minister shall hold office for a longer period than ninety days unless he is or becomes a senator or a member of the House of Representatives.

(3) The Governor-General may, with the advice of the Prime Minister, terminate the appointment of a Minister or an Assistant Minister.

Queen's Ministers of State.

64. (1) The Prime Minister, Ministers and Assistant Ministers appointed under section sixty-two or section sixty-three of this Constitution shall be the Queen's Ministers of State for the Commonwealth.

(2) The number of Ministers and Assistant Ministers shall not exceed the number prescribed by the Parliament.

Departments of State.

65A. (1) The Governor-General in Council may establish departments of State of the Commonwealth.

(2) The Governor-General may, with the advice of the Prime Minister, appoint any of the Queen's Ministers of State to administer each of those departments.

Remuneration of Ministers of State.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

Section 65 would deal with the Federal Executive Council. It is dealt with later in this Chapter.

Current position

The provisions of the Constitution relating to the appointment and terms of office of the Queen's Ministers of State for the Commonwealth, to the establishment of departments of State of the Commonwealth and to the appointment of Ministers to administer them have already been outlined in Chapter 2 of this Report. These provisions are examined in more detail later in this Chapter.

Broadly the Constitution provides for appointment of Ministers by the Governor-General. Those appointed as Ministers must be members of the Parliament or become members of Parliament within a certain time after their appointment. Ministers hold office at the pleasure of the Governor-General, that is to say, may be dismissed by the Governor-General at any time and for any cause.

The power to establish and, by implication, disestablish departments of State of the Commonwealth is vested in the Governor-General in Council. Appointment of Ministers to administer those departments are, however, made by the Governor-General. In practice those appointments are made according to the advice of the Prime Minister.

Apart from the requirement that the Ministers shall be or become members of Parliament, there is nothing in the Constitution which regulates the exercise of the Governor-General's power to appoint and dismiss Ministers. Regulation of the Governor-General's discretion has been left entirely to constitutional convention. Practices which should be observed as conventions were enunciated

by a resolution of the Australian Constitutional Convention in 1985.[27]

Nowhere in the Constitution is there any mention of the office of Prime Minister. That of the Premier of a State is, however, referred to in the Australia Act 1986 (Cth). Nor does the Constitution include any reference to the Cabinet. It does, however, provide for a Federal Executive Council of which the Ministers for the time being are ex officio members. But constitutionally, this body is separate and distinct from the Cabinet.

Advisory Committee's recommendations

In Chapter 2 of its report, the Advisory Committee on Executive Government considered the following general questions:

1. Should the 'Westminster' system of government be preserved in Australia?
2. Should the system of government be further written into the Constitution?
3. Who should be the ministers?
4. What checks should there be on executive government?[28]

The Committee recommended 'that there should be no change from the present system based as it is on the principle of a parliamentary executive ...'.[29] As we have explained in Chapter 2, we have construed our Terms of Reference as requiring that this principle be preserved.[30] The Committee also concluded that the present constitutional requirement that the Queen's

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27 The terms of that resolution are set out in Chapter 2 under the heading 'Resolutions of the Australian Constitutional Convention'.

28 Executive Report, 11.

29 id, 13.

30 See Chapter 2 under the heading 'Parliamentary Government in Australia'.

Ministers of State for the Commonwealth be, or become, members of the Parliament, should be retained.[31] It did, however, recommend that several alterations should be made to Chapter II - The Executive Government - of the Commonwealth, principally to give constitutional force and expression to well-established principles which already govern the way in which the provisions of Chapter II operate.

The Committee pointed out that:

> At present, Chapter II ... reads as if the Governor-General is personally in charge of the executive government of Australia. Section 61 provides that the Governor-General exercises 'the executive power of the Commonwealth'; section 62 provides that the Governor-General is advised by a Federal Executive Council whose members hold office 'during his pleasure'; and, if read literally, section 64 provides that the Governor-General may appoint anyone as a minister so long as that person becomes a member of parliament within three months, regardless of whether or not the House of Representatives has confidence in him or her. If the words of Chapter II are read literally, they provide a misleading picture of the way in which the present system of government in Australia actually operates. This confusion is compounded by the fact that there is no mention of the existence of cabinet (as a body different from the executive council), or of the office of prime minister, or any explicit statement of the need for a government to maintain the confidence of the House of Representatives.[32]

The constitutional alterations recommended by the Committee were:

(a) Alteration of section 64 to make it clear that the head of government is the Prime Minister. It was suggested that this alteration 'might take the form of adding to section 64 a statement to the effect that the Governor-General shall appoint an officer to head the government, to be known as the prime minister.'[33]

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31 Executive Report, 18.

32 id, 13.

33 id, 15.

(b) Alteration of section 64 to include a requirement 'that when the Governor-General appoints or dismisses ministers, he should do so on the advice of the prime minister, except on those occasions ... when the prime minister is also dismissed.'[34]

(c) Alteration of section 64 'to write into the Constitution the principle of a parliamentary executive, viz that a government holds power by "maintaining the confidence" of the House of Representatives'.[35]

(d) An express provision 'allowing for the appointment of assistant ministers.'[36]

In addition the Committee, with two members dissenting, recommended 'that detailed rules requiring the Governor-General to exercise his "reserve powers" in conformity with the principles of the parliamentary executive should be included either in the Constitution or in a law approved by the Parliament.'[37] Three of the seven members of the Committee thought that the rules should be incorporated in the Constitution. The detailed rules recommended related to matters such as the appointment and dismissal of a Prime Minister; the dissolution of the House of Representatives and, under section 57, both Houses; and assent to Bills.[38] If the rules were not incorporated in the Constitution, the Constitution should be altered to give the Parliament a power to enact them.[39]

The Committee recommended that the Constitution be not altered to include an express provision to permit Ministers to appear in

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34 ibid.
35 id, 16.
36 id, 18.
37 id, 16.
38 id, 36-44.
39 id, 16.

both Houses of the Parliament,[40] or to prevent senators from being appointed as Ministers.[41]

Submissions

In Chapter 2 of its Report, the Advisory Committee on Executive Government considered a number of submissions relating to Ministers and Departments.

Submissions received since the Committee published its Report included:

(a) several in favour of the present provision that Ministers shall be members of Parliament[42] and several against;[43]

(b) some in favour of the current system of a parliamentary executive;[44]

(c) some in favour of specific mention of the Prime Minister in the Constitution;[45]

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40 id, 19.

41 id, 28.

42 eg Country Women's Association of Australia S3090, 20 November 1987; Citizens For Democracy S3051, 13 November 1987.

43 eg R Bowey S2912, 29 October 1987; B Edwards S2690, 15 October 1987.

44 eg Queensland Government S3290, 4 February 1988; Tasmanian Government S3373, 15 March 1988; Citizens for Democracy S3051, 13 November 1987; Country Women's Association of Australia S3090, 20 November 1987; T Corley S2999, 11 November 1987; R Kershaw S2805, 24 October 1987.

45 eg J Steward S2952, 16 September 1987; L O'Shea S2998, 8 November 1987.

(d) several in favour of express provision for dismissal of the Prime Minister;[46] and

(e) two expressly favouring no change to the constitutional arrangements for Executive Government.[47]

The Commission received a detailed submission from the Queensland Government commenting on the Advisory Committee's Report.[48] Although that Government strongly supported the recommendation that the notion of a parliamentary executive be preserved, it generally disagreed with the Committee's recommendations for alteration of the provisions of the Constitution relating to Ministers. In particular, it expressed strong opposition to constitutional or legislative codification of constitutional conventions. 'Any attempt to entrench constitutional conventions at this time', it was suggested, 'would be both premature and counter-productive.' One of the advantages of leaving certain matters to be regulated by convention, it was argued, was that conventions are adaptable. It was nevertheless pointed out that the Queensland Government had, at the Australian Constitutional Convention in 1983 and 1985, supported the recognition of certain constitutional conventions by that body.

Reasons for recommendations

We agree with the Committee's view that the Constitution should not be altered to effect any major change in the system of Executive Government at the federal level. We also agree that it is desirable that a number of changes should be made to provisions in Chapter II of the Constitution to give constitutional expression to certain accepted principles governing the operation of the present system. We are not,

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46 eg K Playford S2746, 25 October 1987; Merewether Residents Group S3236, 8 February 1988; W Phillips S3031, 5 November 1987; J Goldring S2582, 28 December 1987.

47 Tasmanian Government S3373, 15 March 1988; S Holme S2569, 29 November 1987.

48 Queensland Government S3290, 4 February 1988.

however, persuaded by the arguments of the three members of the Committee who thought that there should be detailed rules in the Constitution, regulating the exercise of the Governor-General's so-called 'reserve powers'.

In our view, it is not appropriate to include in the Constitution rules as detailed as those proposed by the majority of the Committee. We also consider that the preferable way in which to give constitutional expression to the principle that, generally, the Governor-General should not exercise the powers reposed in him or her by the Constitution, except in accordance with the advice of Ministers who are members of the Parliament and who have the confidence of the House of Representatives, is to alter the Constitution so that:

(a) most of the powers presently invested in the Governor-General are invested in the Governor-General in Council, or the Governor-General acting in accordance with the advice of the Prime Minister; and

(b) membership of the Federal Executive Council is confined to the Queen's Ministers of State for the Commonwealth for the time being.[49]

The question of what powers presently reposed in the Governor-General should be reposed in the Governor-General in Council is considered in other parts of this Report.[50] The question of whether the Parliament has or should be able to make laws to regulate the exercise of the constitutional powers of the Governor-General and Governor-General is dealt with later in this Chapter. In this part of the Report we confine our attention to those provisions in Chapter II of the Constitution which relate to:

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49 See discussion under the heading 'Federal Executive Council' below.

50 See list below under the heading 'Powers of the Governor-General' - 'Introduction'.

(a) the appointment and terms of the Queen's Ministers of State for the Commonwealth;

(b) the powers of the Parliament to prescribe the number of Ministers who may be appointed and the offices they shall hold;

(c) the establishment of departments of State of the Commonwealth and the appointments of Ministers to administer those departments; and

(d) the salaries of Ministers.

Who should be the Ministers?

Current position

At present, the Constitution effectively limits the class of persons who may be appointed as the Queen's Ministers of State for the Commonwealth to persons who are members of the Parliament. The last paragraph of section 64 states:

> 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.

The three month period of grace which this section allows has several advantages:

(a) It allows the Ministers of an incoming Government to be sworn in before the new Parliament has met and before they have been sworn in as senators or members of the House of Representatives as section 42 of the Constitution requires.

(b) It enables a Minister who wishes to become a member of the other House to resign the seat in the House of which he or she is presently a member but yet retain

Ministerial office while the processes of election to the other House are in train.

(c) It permits Ministers to continue in office for a period even though their membership of the Parliament is formally at an end, for example, in the case of members of the House of Representatives, because the House has been dissolved.

Advisory Committee's recommendations

The Advisory Committee's Report sets out arguments for and against the rule that the Ministers shall be members of the Parliament.[51] It also deals with question of whether there should be a constitutional provision prohibiting senators being appointed as Ministers.[52] The Committee's reasons for recommending that the present requirement that Ministers be members of Parliament be retained were:

(a) It is very important to preserve the democratic principle that persons holding high office as ministers should be elected by the people. Moreover, at a more practical level, the ballot box remains the surest check on corruption, the abuse of power and inefficiency.

(b) The skills required to administer a government department include not only knowledge of the subject matter of the department's work, but also political skills, such as balancing the interests of different groups in the community in the public interest. These skills are acquired through a life spent in public affairs.

(c) Introducing non-parliamentary ministers into the government would be likely to increase prime ministerial power, unless special provision were made to ensure that they were not appointed by the prime minister, and hence not beholden to him.

(d) Precisely because they have knowledge and experience derived from close involvement in industry or the trade

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51 Executive Report, 16-8.

52 id, 28.

unions, appointment of non-parliamentary ministers creates the risk that the portfolios may be captured by 'special interests'. Even if the non-parliamentary ministers are able completely to divorce themselves from their previous occupations, there is a severe risk that the public may lack confidence that they have been able to do so.

(e) Outsiders already can be used as advisers to governments. In this way the government has full access to their knowledge and experience. Such advisers can be part-time or full-time. Such advice is already being used by our ministers; as is evident in the growth of 'ministerial advisers'.

(f) There is already legislation enabling governments to bring in 'outsiders' as permanent heads of departments on fixed-term contracts. There are schemes available for interchange between public service and outside community leaders. It may be that this sort of interchange is the appropriate place for the introduction of 'new blood' and new ideas rather than in the ministry itself.[53]

The Committee went on to state that generally it considered 'desirable that ministers should serve some kind of parliamentary apprenticeship'. It also suggested 'that the fact that they are members of parliament makes them more aware of the need to be answerable politically for their actions, or inactions.'[54]

Reasons for recommendations

For the reasons given by the Committee we <u>recommend</u> that the general principle enshrined in the last paragraph of section 64 be retained. The Constitution should continue to require that Ministers of State of the Commonwealth be senators or members of the House of Representatives. The only change in that regard we propose is that the Constitution reflect the established convention that the Prime Minister must be or become a member of

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53 id, 17.

54 ibid.

the House of Representatives. We deal with the office of Prime Minister later on.[55]

We further recommend that the words appearing at the beginning of last paragraph of section 64 - 'After the first general election' - be omitted on the ground that they fall into the category of provisions which are clearly expended. This small alteration of section 64 was, we note, recommended by the Australian Constitutional Convention in 1975 and 1976.[56] Effect was to be given to the recommendation by clause 9 of the Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983. This Bill was passed by both Houses of the Parliament but no writ for a referendum on it was issued.

In considering the last paragraph of section 64 we have examined the question whether any change should be made to the requirement that a Minister shall not hold office for longer than three months unless he or she is or becomes a senator or member of the House of Representatives. Specifically we have looked at the question of whether the period of three months should be extended or reduced.

We are satisfied that some period of grace should continue to be allowed, for if there were an inflexible requirement that a Minister holds office only so long as that Minister is a member of Parliament, every Minister who is a member of the House of Representatives would cease to be a Minister once the House's term had expired or once the House had been dissolved. There could also be doubts about the validity of the appointment of a person as a new Minister before that person had actually taken

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55 Under the heading 'Appointment and terms of office of the Prime Minister and Ministers' below.

56 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.

his or her seat in the Parliament, even though it was clear that the person had been elected.[57]

We have noted that under section 6 of New Zealand's Constitution Act 1986[58] the period of grace which is allowed is much shorter than that allowed under section 64 of the Australian Federal Constitution. Under section 6 a person who is not a member of Parliament may be appointed and hold office as a Minister if that person was a candidate for election at the preceding general election for the House of Representatives. But a person so appointed as a Minister vacates office if after 40 days he or she has not become a member of Parliament. The section also provides that if a member of Parliament who is a Minister ceases to be a member of Parliament, he or she cannot continue to hold Ministerial office for longer than 28 days after ceasing to be a member.

We have received no submissions urging an increase or reduction of the period of grace allowed by section 64 of the Constitution and we have received no evidence to suggest that the present rule has occasioned difficulties or been abused.

As the Advisory Committee has pointed out, the three-month rule does introduce a measure of flexibility into the system of responsible parliamentary government without compromising the basic principle that the Ministry should be drawn the membership of the Parliament. The rule permits a Minster who does not seek reelection or is defeated at general elections to retain Ministerial office until a successor is appointed. It permits a Minister who is a senator, but wishes to move to the House of Representatives, to remain a Minister after resigning his or her seat in the Senate. It also provides scope for the introduction

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57 On the question of when a member's term of service as a member commences see Ualesi v Minister of Transport (1980) NZLR 575, 580. But cf Electoral Act 1956 (NZ), section 31A, as amended by Act no 116 of 1986.

58 Operative from 1 January 1987.

into the Ministry, if a Government thinks it desirable, of persons who have yet to be chosen for parliamentary office.

Accordingly, we recommend that the present rule be retained but that the period of time be expressed as 90 days rather than 3 months.

Appointment and terms of office of the Prime Minister and Ministers

Current position

The provisions of the Constitution dealing with the appointment and terms of office of the Queen's Ministers of State for the Commonwealth are as follows:

> 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> 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.[59]

Literally construed these provisions empower the Governor-General to appoint anyone to be a Minister of State, subject only to the qualification contained in the last paragraph of section 64, and to dismiss anyone so appointed, at will. Anyone appointed as a Minister under section 64 has to be appointed to administer a department of State of the Commonwealth which has already been established by the Governor-General acting on the advice of the Federal Executive Council. All Ministers appointed under section 64 are automatically members of the Federal Executive Council, but under section 62, persons other than Ministers can be appointed to the Council. Anyone who becomes a member of the Council remains a member of that body for as long as the Governor-General chooses.

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[59] The third paragraph of the section is set out and commented on above.

Advisory Committee's recommendations

The Advisory Committee recommended that section 64 of the Constitution be altered to include explicit statements that:

(a) The Governor-General shall appoint an officer to head the Government, to be known as the Prime Minister.

(b) When the Governor-General appoints or dismisses Ministers, he should do so on the advice of the Prime Minister, except on those occasions when the Prime Minister is also dismissed.

(c) The Government holds power by maintaining the confidence of the House of Representatives.[60]

The Committee reported that a number of the submissions made to the Commission supported the proposition that the Constitution should expressly refer to the office of Prime Minister.[61] It noted that clause 9 of the Bill, Constitution Alteration (Fixed Term Parliaments) 1983, contained provisions to that effect. The Committee considered that the Constitution should make it clear that the appointment of Ministers is to be on the advice of the Prime Minister, and likewise their dismissal (except where the Prime Minister is himself dismissed). Such an alteration would merely describe what now happens. But the principle 'should be explicitly stated as a democratic safeguard, and to ensure that the Constitution reflects what actually occurs.'[62]

Previous proposals for reform

The Constitution Alteration (Fixed Term Parliaments) Bills of 1982 and 1983 contained clauses which involved a complete recasting of section 64. These clauses were linked to another

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60 Executive Report, 15-6.

61 id, 14-5.

62 id, 15.

clause involving alteration of section 5 of the Constitution to prevent the Governor-General from dissolving the House of Representatives before the expiration of its term except in accordance with section 57, or where the House of Representatives resolved that it had no confidence in the Prime Minister and no other Government having the confidence of the House could be formed.

The essential features of the proposed new section 64 were:

(a) The power to create departments of State for the Commonwealth would remain with the Governor-General in Council.

(b) Express provision was made for appointment by the Governor-General of the Prime Minister.

(c) The Governor-General's power to appoint other Ministers would be exercisable only on the advice of the Prime Minister.

(d) The Prime Minister would be required to be or become a member of the House of Representatives, but other Ministers could continue to be appointed from both Houses.

(e) All Ministers, including the Prime Minister, would be appointed to administer departments of State.

(f) All Ministers, including the Prime Minister, would be members of the Federal Executive Council, ex officio, as at present, and collectively they would be Ministers of State for the Commonwealth. (The reference to Queen's Ministers was to be omitted.)

(g) Except where the Prime Minister was dismissed or resigned from office, in accordance with certain rules, the Governor-General would not be able to dismiss a

Minister except on the advice of the Prime Minister. If, however, the Prime Minister was dismissed or resigned in accordance with those rules, the other Ministers would automatically cease to hold office.

(h) The only circumstance in which the Governor-General could dismiss a Prime Minister from office was when the House of Representatives passed a resolution[63] expressing a lack of confidence in the Prime Minister and the other Ministers, and a further resolution declaring that, if another named person were to be appointed as Prime Minister, that person and the other Ministers would have the confidence of the House. Eight days would be allowed for the passing of that further resolution. If the Prime Minister had not resigned before the passing of that resolution, or did not resign forthwith on the passing of it, the Governor-General would be obliged to dismiss the Prime Minister from office.

Reasons for recommendations

Section 64 clearly does not reflect practice or convention. It makes no reference to the key office of Prime Minister. It contains not so much as a hint of the ground rules which in fact govern the selection of persons to be Ministers and their removal from office. We are of the view that section 64 ought to be omitted and new sections incorporating the following principles ought to be substituted:

(a) The office of Prime Minister is different from that of other Ministers of State.

(b) The principle that, whereas the Governor-General has a discretion in selecting the person to hold the office

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63 In pursuance of a motion of which not less than 24 hours' notice had been given.

of Prime Minister,[64] the Governor-General cannot dismiss a Prime Minister unless the House of Representatives resolves that it does not have confidence in the Government.

(c) The Queen's Ministers of State for the Commonwealth, other than the Prime Minister, shall be appointed by the Governor-General, acting on the advice of the Prime Minister, and the Governor-General's power to dismiss those Ministers shall be exercised only on the advice of the Prime Minister.

(d) The Prime Minister shall not hold office for more than 90 days unless he or she is or becomes a member of the House of Representatives.

(e) The power to establish and disestablish departments of State of the Commonwealth shall reside in the Governor-General acting on the advice of the Federal Executive Council. The Governor-General's power to appoint Ministers to administer those departments shall be exercised only on the advice of the Prime Minister.

The alterations to give effect to these recommendations are contained in proposed sections 62, 63, 64(1) and 65A. We comment separately on proposed 65A later in this Chapter.[65]

Our proposals on the appointment and terms of office of Ministers differ from those contained in the Constitution Alteration (Fixed Term Parliaments) Bills of 1982 and 1983 in the following respects:

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64 This discretion is, of course, to be exercised in accordance with the principles of responsible government. See Chapter 2.

65 See below under the heading 'Ministers and departments'.

(a) Our proposals expressly identify the Prime Minister as Head of Government.

(b) Under our proposals, the appointment of a Prime Minister could be terminated on the passing of a resolution by the House of Representatives that the Government does not have the confidence of that House, but it would not be obligatory for the Governor-General to act immediately on the passing of such a resolution. The Governor-General might give the Prime Minister an opportunity to resign. Or if it appeared that the resolution of no confidence was not a genuine expression of the opinion of the House, for example, because of the absence from the House of a number of members of the Government party or parties, the Governor-General might decline to act in order to allow the House an opportunity to rescind its resolution.

(c) On the resignation or termination of appointment of a Prime Minister, following a vote of no confidence, the other Ministers would not, as under the 1982 and 1983 proposals, automatically cease to hold office. The expectation would be that if the Prime Minister ceased to hold office in these circumstances, the other Ministers would resign. If they did not, they could be dismissed by the Governor-General acting on the advice of the incoming Prime Minister.

(d) Under our proposals, the appointment and terms of office of the Prime Minister and other Ministers are contained in sections separate from those which deal with membership of the Federal Executive Council, establishment of departments of State and appointment of Ministers to administer them.

Role of the Governor-General. We recognise that if our proposals were adopted, the circumstances in which the Governor-General could terminate the appointments of the Prime Minister, Ministers

and Assistant Ministers would effectively be limited to cases in which the House of Representatives had passed a vote of no confidence in the Government. There would be no reserve power in the Governor-General to terminate Ministerial appointments, and it would thus not be open to the Governor-General to terminate the appointment of a Prime Minister on grounds such as the failure by the Senate to pass essential appropriation or supply Bills, or serious misconduct in an official capacity.

The Advisory Committee concluded that Ministerial appointments should continue to be at the pleasure of the Governor-General, but a majority favoured the enactment of legislation by the Federal Parliament to regulate the exercise of the reserve powers and the alteration of the Constitution to authorise the enactment of such legislation. The proposed legislation included the following rule:

> The Governor-General can dismiss the prime minister for persisting in grossly unlawful or illegal conduct, including a serious breach of the Constitution, when the High Court has declared the matter to be justiciable and the conduct to be unlawful, illegal or a breach of the Constitution, or when the High Court has declared the matter is not justiciable, and the Governor-General believes that there is no other method available to prevent the prime minister or the government engaging in such conduct.[66]

A minority of the Committee, however, thought the rule should be that:

> The Governor-General may dismiss the prime minister in cases in which he believes that there is no other method available to prevent the prime minister or his government engaging in substantially unlawful action, including a substantial breach of the Constitution, or other conduct contrary to the principles of democratic government.[67]

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66 Executive Report, 42, rule 10.

67 ibid.

A majority of us (Sir Rupert Hamer dissenting) are of the opinion that the Governor-General should not have power to terminate the appointment of a Prime Minister whose Government still has the confidence of the House of Representatives merely because the Governor-General believes that the Prime Minister or members of his or her Government have violated, are violating, or are about to violate the law or the Constitution. Allegations of illegality can and, in our view, should be adjudicated in courts of law; likewise allegations that the Constitution has been, or is about to be, contravened.

A majority of us (Sir Rupert Hamer dissenting) are also of the view that, even when the Prime Minister has been adjudged guilty of illegal acts or of breach of the Constitution, the question of whether that conduct is sufficiently serious to warrant removal from office should not be for the Governor-General to decide. That judgment should be left rather to the House of Representatives.

We would also point out that if the Prime Minister is found guilty of a criminal offence or disobeys an injunction to restrain unconstitutional action, the Prime Minister may be imprisoned. Such imprisonment may result in the Prime Minister ceasing to be a member of the Parliament because, under the Constitution, he or she either becomes disqualified from being a member, or forfeits his or her seat by failure to attend the House for two consecutive months of a session,[68] and thereby ceases to be qualified to be Prime Minister. The proposed new provision on termination of the appointment of a Prime Minister is expressed in terms which are meant to make it clear that the Prime Minister may, by operation of the Constitution, cease to hold office for these reasons.

Dissent. Sir Rupert Hamer dissents from the recommendation as expressed in paragraph (b) above, since it appears to oust altogether the reserve powers of the Governor-General in relation

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[68] See Constitution, sections 38 and 44.

to the dismissal of a Prime Minister. He points out that the Advisory Committee on Executive Government devoted considerable attention to this matter, and cited the many authorities who support the power of the Governor-General in an extreme situation to dismiss a Prime Minister.[69]

The Committee listed the four 'reserve powers', where the Governor-General could act without, or contrary to Ministerial advice, as follows:

1. The appointment of the prime minister
2. The dismissal of the prime minister
3. Dissolution of the House of Representatives
4. A double dissolution pursuant to section 57 of the Constitution,[70]

and formulated rule 10, quoted above,[71] to encapsulate the accepted convention relating to the dismissal of a Prime Minister.

Sir Rupert Hamer points out that the Committee was unanimous in recognising the existence of these reserve powers in the Governor-General, and Sir Rupert Hamer considers that if the Commission is not to accept its recommendation that they be laid down in an Act of Parliament it should not at the same time exclude their operation in a paragraph in the terms proposed. It should be redrafted so as expressly to recognise and retain these reserve powers.

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69 Executive Report, 42.

70 id, 39.

71 Also in Executive Report, 42.

Assistant Ministers

Current position

Although the Constitution provides for the appointment of Ministers to administer the departments of State of the Commonwealth, it makes no express provision for the appointment of Ministers to assist in the administration of these departments. In the past, members of Parliament have been appointed as Assistant Ministers, but it has been recognised that such appointments present some constitutional difficulties.

The main difficulty is that if a Minister receives a Ministerial salary he or she thereby becomes the holder of an office of profit under the Crown within the meaning of section 44 (iv.) of the Constitution. Unless that person comes within the proviso to that section which says that the office of profit rule does not apply to 'the office of any of the Queen's Ministers of State for the Commonwealth', he or she is disqualified from being a member of the Parliament. Whether a salaried Assistant Minister is a Queen's Minister of State for the Commonwealth for the purposes of the proviso is a matter on which there have been differences of opinion.

Various ways and means have been adopted whereby Assistant Ministers can be appointed and remunerated without jeopardising their membership of the Parliament. One way has been to establish a small department which the Assistant Minister is appointed to administer as the Minister, and then to appoint that person as Minister to assist another Minister in the administration of another department.

Assistant Ministers in other Westminster systems

In many other parliamentary systems of the Westminster type, it is not uncommon for Ministers to be assisted by junior Ministers who are also members of the legislature. In the United Kingdom, there are three 'grades' of Ministers: those who are members of

the Cabinet; departmental Ministers or Ministers outside the Cabinet; and parliamentary secretaries. All are members of the Parliament. There are statutory limits on the number of Ministers who may sit in the House of Commons,[72] and further statutory limits on the number of salaries payable to Ministers.[73]

Assistant Ministers have also been appointed in the Australian States, but only two of the State Constitution Acts make express provision for appointments of this kind.

In New South Wales, the Premier may appoint members of the Legislative Assembly, other than members who are Ministers or members of the Executive Council, to be parliamentary secretaries, to carry out such functions as the Premier determines. A parliamentary secretary may not, however, be appointed to perform functions which, under an Act or an instrument made thereunder, can only be performed by a particular officer holder.[74]

In Tasmania, the Governor may appoint as Secretary to Cabinet any member of the Parliament or of the Executive Council. The functions of this officer are similar to those of parliamentary secretaries in New South Wales.[75]

In none of the States is there any entrenched constitutional provision which inhibits the appointment of members of Parliament as salaried Assistant Ministers. Such inhibitions as are imposed are purely statutory and can be changed by ordinary legislation.

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72 House of Commons Disqualification Act 1975, Schedule 2; this may be amended by Orders in Council under the Ministers of the Crown Act 1975.

73 Ministerial and other Salaries Act 1975.

74 Constitution Act 1902 (NSW), sections 38B-38E.

75 Constitution Act 1934 (Tas), sections 8E-8H. See also Constitution Act 1986 (NZ), sections 8-9.

Previous proposals for reform

The problems associated with appointment of Assistant Ministers were considered by Senate Standing Committee on Constitutional and Legal Affairs in its report on The Constitutional Qualifications of Members of Parliament. Those problems would have been resolved under alterations which the Committee recommended should be made to the provisions of the Constitution which deal with qualifications and disqualifications of members of the Parliament. The Committee did, however, make the further recommendation that if these alterations were not made, the proviso to section 44(iv.) of the Constitution should be altered by inserting after the words 'the Queen's Ministers of State for the Commonwealth' the words 'or any of the Queen's Assistant Ministers of State for the Commonwealth or any person holding a like office.'[76]

Advisory Committee's recommendation

The Advisory Committee on Executive Government took note of the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs. It concluded that if sections 44 (iv.) and 64 of the Constitution do have the effect of precluding 'a member of parliament from holding a salaried position in the government other than as a minister of state administering a government department', they impose 'an unnecessary inhibition on the organisation of the government.'[77]

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76 The Constitutional Qualifications of Members of Parliament (1981) 73.

77 Executive Report, 18.

The Committee thought that there are advantages in having Assistant Ministers. The appointment of Assistant Ministers could not only help to relieve Ministers of their workload but could also 'result in a reduction of the number of departments, a cut in excessive interdepartmental communication and committees and bureaucratic delay. It would also provide a training ground for ministers.'[78]

The Committee accordingly recommended that the Constitution be altered by inclusion of a provision allowing for appointment of Assistant Ministers.[79]

Submissions

The Advisory Committee on Executive Government considered submissions relating to Assistant Ministers in Chapter 2 of its Report. We received only a few submissions on Assistant Ministers after that Report was published. Three submissions recommended against inclusion of provisions for Assistant Ministers.[80]

In its submission on the Report of the Advisory Committee on Executive Government[81] the Queensland Government stated that it sees no pressing need for an alteration of the Constitution to permit appointment of Assistant Ministers. It seemed to be of the view that the Constitution already allows the appointment of more than one Minister to administer a department.

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78 ibid.

79 ibid.

80 Country Women's Association of Australia S3090, 20 November 1987; W Phillips S3031, 5 November 1987; J Bradbury S2869, 2 November 1987.

81 Queensland Government S3290, 4 February 1988.

Reasons for recommendations

While we accept that section 64 of the Constitution may not prevent the appointment of more than one Minister to administer a department of State, we are of the view that because of the problems which have arisen in the past about the appointment of salaried Assistant Ministers, it is advisable that the Constitution should make express provision for appointment of Assistant Ministers.

Our recommendations provide for appointment of Assistant Ministers in the same way and on the same terms as other Ministers. They and the other Ministers would, collectively, be the Queen's Ministers of State for the Commonwealth.[82]

Further reference to Assistant Ministers will be included in the recommended alterations of the Constitution to do with disqualifications of members of Parliament in our Final Report.

Number of Ministers

Current position

Section 65 of the Constitution provides:

> 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.

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82 See proposed sections 63 and 64(1).

The effect of this section, read together with section 51(xxxvi.), is that no more than seven persons can be appointed as Ministers of State unless the Parliament enacts legislation to increase the maximum number of Ministers who may be appointed. The Parliament has from time to time so legislated. The current legislation provides that: 'The number of the Ministers shall not exceed thirty.'[83]

Section 65 also empowers the Parliament to prescribe what offices the Ministers are to hold, but in the absence of such prescription, the Ministers hold such offices as are directed by the Governor-General.

Previous proposals for reform

In 1975 and in 1976 the Australian Constitutional Convention recommended that the first part of section 65 referring to seven Ministers be omitted, on the ground that it was 'obviously outmoded' and that the section be 'redrafted to enable the Parliament to determine the number of Ministers.'[84] This recommendation was not, however, incorporated in the Bill, Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983.

Reasons for recommendations

The alterations to Chapter II of the Constitution which we **recommend** involve the repeal of the whole of section 65. The proposed section 64(2) does, however, preserve the power of the

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83 Ministers of State Act 1952 (Cth), section 4 (as amended by Act No 91 of 1987).

84 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.

Parliament to prescribe the maximum number of Ministers and Assistant Ministers who may be appointed. The power is, we believe, integral to the principle that the Parliament enjoys a supremacy over the executive branch of government.

The alterations we recommend do not, however, include any counterpart of the second half of section 65, the part which empowers the Parliament to prescribe or the Governor-General to direct what offices the Ministers are to hold. We recommend that there be no such provision because we think it unnecessary. The power to decide what Ministerial offices particular Ministers shall hold is, we think, implicit in the power to appoint Ministers. Although the Parliament has enacted legislation which refers to particular Ministers, for example the Attorney-General and the Treasurer, it has not enacted legislation to constitute specific Ministerial offices. Furthermore, even when legislation invests powers in particular Ministers, for example the Attorney-General, provisions of the Acts Interpretation Act 1901 (Cth), enable those powers to be exercised by other Ministers.

The Parliament can, even without section 65, enact legislation to provide that Ministers shall be members of statutory bodies. For example, in exercise of its powers under section 51 the Parliament can establish a board of which one of the members is a Minister. Remuneration of the Minister as a member of that board could, however, raise the question whether the Minister thereby held an office of profit under the Crown and was thus disqualified from being a member of Parliament.

The appointment of Ministers as deputies to the Governor-General we deal with later in this Chapter.[85]

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85 Under the heading 'Current position - deputies'.

Ministers and departments

Current position

Section 64 of the Constitution invests the power to establish departments of State of the Commonwealth in the Governor-General in Council. The power to appoint Ministers to administer the departments is, however, vested in the Governor-General.

Since 1906, the practice has been for departments to be established and disestablished by Administrative Arrangements Orders. These list what the departments are to be, provide a general description of each department's functions and itemize the Acts of Parliament (or parts thereof) to be administered by the Minister responsible for administering each department. The Administrative Arrangements Orders are published in the Gazette.[86]

Reasons for recommendation

We see no reason to change the present constitutional rule that departments of State of the Commonwealth be created by the Governor-General in Council. We do, however, consider it desirable that the power to establish departments and the power to appoint Ministers and Assistant Ministers to administer departments should, partly for the sake of clarity, be conferred in a section separate from that dealing with the appointment and terms of office of Ministers. While the new section 65A we propose would maintain the present requirement that a Minister, who is also a member of Parliament, head each department, it would be open to the Governor-General, acting on the advice of the Prime Minister, to appoint Ministers without portfolio, that is to say, Ministers who do not have a department to administer.

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[86] Departments are also listed in Schedule 2 of the Public Service Act 1922. Section 7A of the Act provides for automatic amendment of the Schedule whenever a department therein specified is abolished or a new department established.

All Ministers would continue to be members of the Federal Executive Council.

Salaries of Ministers

Current position

Section 66 of the Constitution provides:

> 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.

The Parliament has otherwise provided.

Previous proposals for reform

Section 66 has been considered by the Australian Constitutional Convention which in 1975 and again in 1976 resolved that the section was 'out of touch with reality and should be redrafted along the lines of the' proposed new section 48 on salaries of members of the Parliament. The new section 48 recommended by the Convention read as follows:

> The Parliament shall determine, or provide for the determination of, the remuneration, salaries and allowances of each Senator and each member of the House of Representatives to be reckoned from the day on which he takes his seat.[87]

The Bill, Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983 made no provision for alteration of section 48 or section 66.

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87 ACC Proc, Melbourne 1975, 174; ACC Proc, Hobart 1976, 206-7.

Reasons for recommendation

In Chapter 4 of this Report we have already recommended alteration of section 48. We consider it desirable that a similar alteration be made to section 66. We accordingly recommend that section 66 be omitted and that the following section be substituted:

> 66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

FEDERAL EXECUTIVE COUNCIL

Recommendation

We recommend that sections 62 and 63 of the Constitution be omitted and that there be substituted the following section:

> 65. (1) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.
>
> (2) The Councillors shall be the Queen's Ministers of State for the time being, who shall each make the oath or affirmation prescribed by the Parliament.
>
> (3) The Governor-General may convene meetings of the Federal Executive Council.
>
> (4) The provisions in 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.

The effect of the proposed alterations is:

(a) to limit the membership of the Federal Executive Council to the Prime Minister, Ministers and Assistant Ministers of State for the Commonwealth for the time being;

(b) to make it clear that the power to convene a meeting of the Federal Executive Council is vested in the Governor-General;[88] and

(c) to preserve the present constitutional requirement that members of the Federal Executive Council shall be sworn in, but to clarify what is meant by that requirement.

The recommendations outlined above need to be read in conjunction with other recommendations concerning provisions of the Constitution which invest powers and functions in the Governor-General in Council,[89] and also with our recommendation for alteration of section 126 of the Constitution. That section deals with appointment of deputies to the Governor-General.[90]

Current position

The main provisions in the Constitution which deal with the Federal Executive Council are sections 62, 63 and 64. Sections 62 and 63 provide as follows:

> 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.
>
> 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.

Under section 64 the Queen's Ministers of State for the Commonwealth are members of the Council ex officio. In practice they are sworn in as Executive Councillors before being commissioned as Ministers.

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88 Under section 126 of the Constitution this power can be assigned to a deputy.

89 See list below under the heading 'Powers of the Governor-General' - 'Introduction'.

90 See the heading 'Administrator of the Commonwealth and deputies of the Governor-General' below.

The oath of office to be sworn by Executive Councillors is not prescribed either by the Constitution or by Act of Parliament. Its form is based on that sworn by Privy Councillors in the United Kingdom and includes an undertaking that the Councillor 'will not directly or indirectly reveal such matters as shall be debated in Council.'

Although the members of the Council hold office only during the pleasure of the Governor-General, in practice the Ministers who have been sworn in as Executive Councillors continue to be members of the Council even when they have ceased to hold Ministerial office.[91] But once having ceased to hold Ministerial office, members of the Council are no longer summoned to attend meetings. They are referred to as members not under summons.

Meetings of the Council are formally convened either by the Governor-General or by a deputy appointed by the Governor-General under section 126 of the Constitution who has been authorised to summon meetings of the Council. The practice has been to appoint as deputy the Vice-President of the Council who is a Minister appointed to the position of Vice-President on the advice of the Prime Minister.

Although not, strictly speaking, a member of the Executive Council, the Governor-General presides over meetings of the Council. Meetings may also be presided over by any of his duly appointed and authorised deputies. At present the practice is for the Governor-General to appoint all Ministers to be deputies to preside over meetings of the Council at which the Governor-General is unable to be present, according to a prescribed order of precedence.

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91 We are aware of only one case in which the appointment of an Executive Councillor has been terminated. This occurred on 22 December 1977 when the appointment of Senator Sheil, a Minister without portfolio, was terminated following certain statements by him on policy matters: JA Pettifer, House of Representatives Practice (1981) 111.

Neither the Constitution nor any Act of the Parliament specifies a quorum for meetings of the Council. At a meeting of the Executive Council on 12 January 1901 it was decided that at least two members of the Executive Council, exclusive of the Governor-General, shall be necessary to constitute a meeting of the Executive Council for the exercise of its powers.[92] Current practice requires the presence of either the Governor-General (or Vice-President of the Council) and two other Executive Councillors who are Ministers, or three Executive Councillors who are Ministers.

Meetings of the Council are arranged when there is business to transact and frequently during the Autumn and Budget sessions of the Parliament. The business to be transacted is listed in a document, called the Schedule, and at the conclusion of a meeting this is signed by those present, including, if present, the Governor-General.

The business is of a purely formal nature. What is presented is a recommendation, known as a Minute, that something which is required, by the Constitution or by statute, to be done or made by the Governor-General in Council be so done or made. This Minute is signed by the responsible Minister and is accompanied by an explanatory memorandum. Once the recommendation is approved, the Governor-General marks the Minute 'Approved' and signs it. Some other instrument, for example, regulations may have to be executed to give legal effect to the decision.

If the Governor-General is not present at a meeting of the Executive Council, the Schedule and each approved Minute are subsequently for the Governor-General's signature.

Previous proposals for reform

Resolutions of the Australian Constitutional Convention. At the Adelaide session of the Australian Constitution Convention in

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92 Hansard, 24 May 1973, 2673.

1983 it was resolved that certain practices should be recognised and declared to be practices which should be observed as conventions in Australia. Several of these practices related to the Federal Executive Council. These were:[93]

Composition of the Executive Council

(12) The Governor-General chooses Executive Councillors (including a Vice-President of the Council) on the advice of the Prime Minister.

(13) Even if members of the Executive Council retain their positions they are under summons only while they are also members of the Government.

...

Operation of the Executive Council

(15) The Executive Council is not a deliberative body: it give (sic) formal advice to the Governor-General by way of approval of a written submission by a Minister.

(16) The Governor-General is entitled to receive full information concerning matters before the Executive Council and, whilst bound to accept the unanimous advice of his Ministers, may raise, for Ministerial consideration, questions concerning matters submitted to, or recommended by, the Council.

(17) The Governor-General is informed in advance of proposed Executive Council meetings and of the proposed business, and decides whether he will be present.

(18) The Governor-General, on the advice of the Prime Minister, appoints the Vice-President of the Executive Council to be a deputy of the Governor-General for the purposes of summoning and presiding at meetings of the Council at which the Governor-General is not to be present. The Governor-General also appoints each Minister, other than the Vice-President, to be his deputy for the purpose of presiding at meetings of the Council at which the Governor-General, the Vice-President or a more senior Minister is not present.

(19) A meeting of the Executive Council consists of at least two Ministers in addition to the Governor-General, the Vice-President or deputy of the Governor-General who is presiding.

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93 ACC Proc, Adelaide 1983, vol I, 320.

Advisory Committee's recommendation

The Advisory Committee on Executive Government has recommended 'that there be no change to the powers, functions, composition and procedures of the Executive Council.'[94] This recommendation does, however, need to be read in conjunction with other of the Committee's recommendations, in particular:

(a) the recommendation that 'Section 51 should be amended by granting the Commonwealth Parliament power to make laws with respect to the exercise of any executive power by the designated constitutional organ';[95]

(b) the recommendation that 'Section 61 should be amended to provide that the exercise of the executive power of the Commonwealth shall be subject to legislative control';[96]

(c) the recommendation 'that the Constitution be amended to provide explicitly that all powers vested in the Governor-General, except the "reserve powers", be exercisable only in accordance with ministerial advice';[97] and

(d) the recommendation of the majority 'that the Commonwealth Parliament enact a code of practice governing the reserve powers ...'.[98]

The Committee's recommendation in relation to the Federal Executive Council proceeds on the assumption that there will be no change in the powers given by the Constitution to the Governor-General and the Governor-General in Council. The other

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94 Executive Report, 50.

95 id, 59.

96 ibid.

97 id, 37.

98 id, 39.

recommendations referred to above do, however, propose that the Constitution be altered in ways that would affect the exercise of powers invested in the Governor-General. They would give the Parliament express powers to regulate the exercise of the powers of the Governor-General and the Governor-General in Council.

For reasons we explain later in this Chapter we propose a somewhat different approach to a number of the problems the Advisory Committee has identified. For example, we recommend that a number of the powers presently invested by the Constitution in the Governor-General should be invested in the Governor-General in Council. We also **recommend** that some powers invested in the Governor-General should be declared to be powers to be exercised on the advice of the Prime Minister.

Reasons for recommendations

The proposed alterations do not in any way affect the powers of the Federal Executive Council; nor do they involve any change in the manner in which the business of the Council is transacted, or in the relationship between the Council and the Governor-General. They are framed on the assumption that the Council is not a deliberative body but rather one whose primary function is to give formal advice to the Governor-General as to the exercise of powers which, by the Constitution or Acts of Parliament, may be exercised only by the Governor-General in Council.

We have recommended, that the provision governing the composition of the Federal Executive Council be altered so that membership is restricted to the Queen's Ministers of State for the time being. As has already been pointed out, they are already members of the Executive Council ex officio, but they remain members of the Council even after they have ceased to hold Ministerial office. In our view it is desirable that the Constitution accurately reflect the well-established constitutional convention that the only members of the Executive Council who may be called on to participate in meetings of the Council are persons who are presently Ministers. Certainly the Constitution should not

convey the impression, as it presently does, that appointments to the Council are a matter for the Governor-General's personal choice.

If membership of the Council is limited to the Queen's Ministers of State for the time being and they are members of the Council ex officio, it is not, strictly speaking, necessary to require that members of the Council be formally sworn in as members. At present, persons who are to be commissioned as Ministers are first sworn in as Executive Councillors, though the Constitution does not indicate what it is that is to be sworn or affirmed. Once having been sworn as members of the Executive Council, the incoming Ministers may then tender formal advice to the Governor-General concerning the establishment and disestablishment of departments, a power which, under section 64, is exercisable only by the Governor-General in Council. The formal commissioning of Ministers may then proceed in conformity with the new Administrative Arrangements Order approved by the Governor-General in Council.

We see no reason why members of the Executive Council should not continue to be sworn in as members of that body. We think, nonetheless, that the Constitution should clearly state that swearing in involves the making of an oath or affirmation and that the form of that oath or affirmation should be as prescribed by the Parliament. Were our recommendation regarding the composition of the Executive Council to be adopted, the commissioning of persons as Ministers would necessarily have to precede their swearing in as members of the Council. The making of any new Administrative Arrangements Order would follow the swearing in of the new members of the Council.

Our other recommendation for alteration of the constitutional provisions concerning the Federal Executive Council is designed to clarify a matter which is not, at present, altogether clear but which, in our view, ought to be clarified lest it give rise to doubts about whether a meeting of the Council has been validly constituted and consequent doubts about the validity of acts of

the Governor-General in Council. It concerns who has authority to convene a meeting of the Council. It is, we think, desirable that there be unambiguous rules on these matters, rules which make it 'possible to distinguish an accidental assembly of persons who are Executive Councillors from a meeting of "the Federal Executive Council".'[99]

There is, as Professor Sawer has pointed out, an ambiguity in section 62 of the Constitution in relation to the power to summon a meeting of the Council. According to him:[100]

> The reference in s. 62 to members of the Council being 'summoned' by the Governor-General could be interpreted as meaning that a Council occurs only if the Governor-General summons members of the Council ... for the purpose of advising him, and it might further be implied that the presence of the Governor-General is necessary to the gathering being a Council, so far as s. 62 is concerned. On the other hand, the 'summoning' in s. 62 could be interpreted as referring only to bringing the intended members into the Governor-General's presence for the purpose of swearing them; the order of words is better suited to that interpretation. It may be that even without aids from s 62, one could reach the conclusion that prima facie the mark of existence of an Executive Council is that it should be summoned by the Governor-General; the long history of the unfolding of the prerogative through the various Councils of the Crown, which includes the development of parliament, supports such a view.

It has long been assumed that the Governor-General does have power to summon a meeting of the Council, and that a meeting of Executive Councillors is not a meeting of the Council unless the meeting has been convened by the Governor-General or by a deputy appointed under section 126 of the Constitution who has been authorised to summon a meeting of the Executive Council. The Letters Patent of 1984 relating to the office of Governor-General proceed on this assumption. Under the alterations we propose, the power to convene a meeting of the Council is expressly

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99 G Sawer, Federation under strain (1977) 94.

100 id, 94-5.

reposed in the Governor-General, whose power under section 126 to appoint deputies to exercise that power is preserved.[101]

The alteration to the Constitution we propose is, it should be noted, one which gives the Governor-General power to convene rather than to summon meetings of the Executive Council. We think the word 'convene' is the more appropriate of the two. As an Irish judge once observed: 'There is an obvious difference between "convened" and "summoned" ... "convened" is applied, properly, not to individuals but to aggregate bodies. A Board is "convened"; an assembly is "convened"; a senate is "convened"; but A is not "convened", he is "summoned, warned or noticed".'[102]

THE GOVERNOR GENERAL

Appointment and terms of office

Recommendations

We recommend no alteration of the provisions of the Constitution which relate to the appointment of the Governor-General and to the Governor-General's terms of office other than of the provision relating to the Governor-General's salary.

We recommend that section 3 be omitted and the following section be substituted:

Remuneration of the Governor-General.

> 3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Governor-General, an annual sum the amount of which shall be fixed by the Parliament.

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101 See 'Administrator of the Commonwealth and deputies to the Governor-General' below.

102 R v Smith 1 Jebb & Sy 634, quoted in Stroud's Judicial Dictionary (4th edn, 1971) vol 1, 598.

> The remuneration of the Governor-General shall not be reduced during his continuance in office.

Current position

Section 2 of the Constitution provides that the Governor-General is to be appointed by the Queen. Clause II(a) of the Letters Patent relating to the office of Governor-General, dated 21 August 1984, require the appointment to be made by commission under the Sign Manual and Great Seal of Australia. Such appointment is at the Queen's pleasure.[103]

It has been accepted for over sixty years that the appointment of the Governor-General should be on the advice of the Prime Minister of Australia. This convention was recognised at the Adelaide session of the Australian Constitutional Convention in 1983.[104] At the same time it was resolved that informal consultation between the monarch and the Australian Prime Minister should precede the Prime Minister's advice.[105]

The Constitution does not prescribe any qualifications for appointment of a person to the office of Governor-General, though clause II(b) of the Letters Patent of 21 August 1984 stipulates that, before assuming office, a person appointed to be Governor-General shall take the oath or affirmation of allegiance in the form set out in the schedule to the Constitution, and also the oath or affirmation of office, in the presence of the Chief Justice or another Justice of the High Court of Australia.

Section 3 of the Constitution provides for payment of a salary to the Governor-General. It states:

> 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.

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103 Gazette, S334-5, 24 August 1984.

104 ACC Proc, Adelaide 1983, vol I, 319.

105 ibid.

> The salary of a Governor-General shall not be altered during his continuance in office.

The effect of this section and section 51(xxxvi.) is that the Parliament may fix the annual salary payable to a Governor-General, but once having fixed it, cannot vary it during the incumbent's term of office. In practice this has meant that the Parliament has normally fixed the salary after the retirement of one Governor-General and before the new incumbent takes office. Section 3 operates as a standing appropriation of the annual salary which the Parliament has determined.

Advisory Committee's recommendations

The Advisory Committee on Executive Government considered whether any alterations should be made to the Constitution concerning the appointment of a Governor-General, qualifications for appointment, salary, term of office, removal from office, and offices which a Governor-General may hold after retirement.[106]

The Committee recommended no change to the present constitutional position other than replacement of section 3 by a provision modelled on section 72(iii.) of the Constitution. That section provides that Justices of the High Court and of other federal courts 'Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.'

Although the Committee did not recommend any alterations to the Constitution in relation to the other matters mentioned, it did express views on what it considered to be three desirable practices:

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106 Executive Report, 31-5.

(a) The Governor-General should be an Australian citizen.[107]

(b) Governors-General should continue to be appointed 'during the Queen's pleasure', no maximum term should be specified and, on the assumption that, by convention, the current term is five years, that term should be capable of extension.[108]

(c) It would be undesirable for a former Governor-General to hold office under the Crown, either of the Commonwealth or a State.[109]

On the matter of removal of a Governor-General from office, a majority of the Committee concluded that the present position, which allows the Queen, acting on the advice of the Prime Minister, to remove a Governor-General at any time, is 'superior to the alternative, which would be a complicated provision for removal of the Governor-General on the ground of misbehaviour or incapacity, with complicated procedures to ascertain their existence'.[110] It was pointed out that were a Prime Minister to advise the Queen to remove the Governor-General from office, the Queen would 'be entitled to exercise her rights to be consulted, to encourage and to warn', though were the Prime Minister 'to persist in his advice that the Governor-General should be dismissed, the Queen would ... have eventually to act upon it.'[111]

The Committee suggested that one way of ensuring 'some minimum formal procedure for the dismissal of the Governor-General' would be to insert in the Letters Patent relating to the office of

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107 id, 32. This was also the view of Australian Constitutional Convention - see ACC Proc, Adelaide 1983, vol I, 319.

108 Executive Report, 33.

109 id, 35.

110 id, 34.

111 ibid.

Governor-General a clause similar to clause II in the Letters Patent of 14 February 1986 relating to the Governor of Queensland. This clause provides that the Governor's appointment may be terminated only by an instrument in writing, signed by the Queen, taking effect on its publication in the State's Government Gazette or at such later time as the Gazette specifies.[112]

Submissions

The Advisory Committee on Executive Government considered submissions on the appointment and terms of office of the Governor-General. These are noted in Chapter 3 of its Report. Few submissions on the appointment and terms of office of the Governor-General were received after the publication of the Committee's report.

The later submissions included a submission from the Queensland Government on the recommendations of the Advisory Committee.[113] They included also several submissions supporting the proposition that the Governor-General should be an Australian citizen.[114] Some suggested that the Constitution should be altered to provide that the Queen's power to remove a Governor-General from office is to be exercised on the advice of Australian Ministers[115] or on the advice of the Prime Minister.[116]

Reasons for recommendations

We agree with the Advisory Committee's recommendations that there should be no alteration of the Constitution in respect of the appointment of a Governor-General, qualifications for appointment

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112 ibid.

113 Queensland Government S3290, 4 February 1988.

114 eg New Australian Republican Party S2469, 9 September 1987; Federation of Ethnic Communities Council of Australia S2561 and S2829, 31 October 1987; M O'Rourke S2415, 31 August 1987.

115 eg T Corley S2999, 11 November 1987.

116 eg W Phillips S3031, 5 November 1987.

to the office, the terms of office and removal from it. We believe that the convention that the Queen does not appoint a Governor-General except on the advice of the Prime Minister of Australia is so well established that there is no need to alter section 2 of the Constitution to make it clear that the Queen's power of appointment cannot be exercised except on that advice. For the same reason we do not think it necessary to alter the Constitution to limit the class of persons who may be appointed to the office of Governor-General to Australian citizens.

We note, but make no comment on, the suggestion by the Advisory Committee that the Letters Patent relating to the Governor-General be amended by the insertion of a clause similar to clause II of the Letters Patent of 14 February 1986 relating to the Governor of Queensland.

We do, however, recommend that section 3 of the Constitution be altered to make it clear that although the salary payable to the Governor-General cannot be reduced by the Parliament during his or her term of office, it can be increased. We agree with the Advisory Committee's view that section 3 should be expressed in terms similar to section 72(iii.) of the Constitution.

Powers of the Governor-General

Introduction

A number of **recommendations** concerning the powers and functions of the Governor-General and the Governor-General in Council have been made in earlier parts of this Report. We refer, in particular, to our **recommendations** on:

(a) sessions and meetings of the Parliament and prorogation and dissolution of the House of Representatives;[117]

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[117] Chapter 4 under the headings 'Meetings of Parliament', 'Terms of the Federal Parliament'.

(b) issue of writs for Senate elections;[118]

(c) recommendation of money votes;[119]

(d) assent to Bills and reservation and disallowance of Bills;[120]

(e) dissolution of both Houses of the Parliament and the convening of joint sittings;[121]

(f) appointment and dismissal of Ministers;[122]

(g) establishment of departments of State;[123] and

(h) the Federal Executive Council.[124]

Further recommendations affecting the powers and functions of the Governor-General and the Governor-General in Council appear in later sections of this Chapter and in subsequent Chapters. These include recommendations on:

(i) the command in chief of the naval and military forces (section 68);[125]

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118 Chapter 4 under the heading 'Electoral laws and writs for elections'.

119 Chapter 4 under the heading 'Recommendation of money votes'.

120 Chapter 2 under the heading 'Reservation and disallowance'.

121 Chapter 4 under the heading 'Disagreement between the Houses'.

122 Chapter 5 under the heading 'Appointment and terms of office of the Prime Minister and Ministers'.

123 Chapter 5 under the heading 'Ministers and departments'.

124 Chapter 5 under the heading 'Federal Executive Council'.

125 Chapter 5 under the heading 'The command in chief of the Defence Forces'.

(j) appointment and removal of judges (section 72);[126] and

(k) amendment of the Constitution (section 128).[127]

This part of the Chapter deals with matters of general principle and with provisions in the Constitution which appear to us to enshrine general principles regarding the powers and functions of the Governor-General.

Current position

Under the Constitution, some powers are invested in the Queen, some in the Governor-General and some in the Governor-General in Council. Of the powers given to the Queen, some are exercisable by her alone, but on Ministerial advice, and some by the Governor-General. The powers given to the Governor-General in Council are powers which can be exercised only on the advice of the Federal Executive Council (section 63). These were the powers which the Framers of the Constitution considered to be purely statutory or which had, by custom or statute, been detached from the prerogatives of the Crown.[128] The powers invested in the Governor-General alone, on the other hand, were ones which replicated Royal prerogatives, that is, powers possessed by the Queen under the common law.[129]

This explanation of why some powers were vested in the Governor-General and others in the Governor-General in Council is not entirely satisfactory because some of the powers vested in the Governor-General were clearly not among the Royal prerogatives,

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126 Chapter 6 in the Final Report.

127 Chapter 13 in the Final Report.

128 They included issue of writs for general elections for the House of Representatives (section 32), creation of departments of State (section 64) and various powers of appointment (sections 67, 72 and 103).

129 Conv Deb, Adelaide 1897, 908-15; Conv Deb, Melbourne 1898, vol II 2249-64; Quick and Garran, 406. See also New South Wales v Commonwealth (Seas & Submerged Lands Case) (1975) 135 CLR 337, 364-5 (Barwick CJ).

for example the power under section 57 to dissolve both the Senate and the House of Representatives, and the Governor-General's power under section 128. On the other hand various powers of appointment to public offices exercisable by the Governor-General in Council were still prerogative powers.

When the Framers of the Constitution decided that some powers should be reposed in the Governor-General and others in the Governor-General in Council, they did not intend that the powers given to the Governor-General alone should be exercised in every case at his or her personal discretion. The powers of the Governor-General, Edmund Barton observed during the Convention Debates, 'can never be exercised without the advice of a responsible Minister, and if that advice is wrongly given it is the Minister who suffers.'[130] '[N]o one who understood these matters', Barton commented, 'would dream of adding the words "in Council".'[131]

There does not appear to be any firmly established convention that all of the powers vested by the Constitution in the Governor-General must be exercised on the advice of the Executive Council. The Advisory Committee on Executive Government identified three cases in which it is accepted that the advice of a single Minister is sufficient.[132] Then there are the so-called 'reserve powers', the powers which are said to be exercisable by the Governor-General without or contrary to Ministerial advice. The Advisory Committee identified these as the power to appoint and to dismiss the Prime Minister (section 64), dissolution of the House of Representatives (section 5), and a double dissolution pursuant to section 57 of the Constitution.[133] How the reserve powers should be exercised is, however, regulated to a large extent by constitutional convention and at the Brisbane session of the Australian Constitution

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130 Conv Deb, Melbourne 1898, 2254.

131 ibid.

132 Executive Report, 37.

133 id, 38-9.

Convention in 1985, a resolution was passed approving a series of statements about practices which ought to be observed.[134]

Other powers, not itemised in the Constitution, are exercisable by the Governor-General by virtue of section 61 of the Constitution. These powers include some which were formerly assigned to the Governor-General by the Monarch pursuant to section 2 of the Constitution. Section 61 vests the Executive power of the Commonwealth in the Queen and declares it to be exercisable by the Governor-General as the Queen's representative. The power is expressed to extend 'to the execution and maintenance of ... [the] Constitution, and of the laws of the Commonwealth.' Section 2 provides, inter alia, that the Governor-General '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.'

One effect of section 61 is to endow the Crown in right of the Commonwealth with certain prerogative powers. These include some of the prerogatives which in the early years of Federation were assumed to be prerogatives which could not be exercised by the Governor-General unless they were expressly assigned to the Governor-General under section 2. The generally accepted view now is that section 61 'enables the Crown to undertake all Executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution.[135] It includes the prerogative powers of the Crown, that is, powers accorded to

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134 ACC Proc, Brisbane 1985, Vol I, 415-7. These resolutions are set out in Chapter 2 above, under the heading 'Resolutions of the Australian Constitutional Convention'.

135 See Chapter 2.

the Crown by the common law.'[136] We deal further with section 61 later in this Chapter.[137]

Section 2 of the Constitution provides:

> 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.

Assignments of powers pursuant to section 2 have been made on three occasions, in every case on the advice of Australian Ministers. In 1941, the Governor-General was authorised to declare war on Finland, Hungary, Romania and Japan. On 2 November 1954, the Queen, acting on the advice of the Federal Executive Council, assigned further powers, including the power to appoint certain diplomatic officers and consuls and to grant an exequatur in respect of foreign consuls. The last assignment was made on 30 May 1973 when the Queen, again acting on the advice of the Federal Executive Council, assigned powers respecting the appointment and withdrawal of ambassadors and high commissioners.

On 1 December 1987 the Queen, acting on the advice of the Prime Minister,[138] formally revoked the assignments made in 1954 and 1973. This was done on the basis that the powers assigned were already exercisable under section 61 and that powers assigned under section 2 should not include powers exercisable by the Governor-General under section 61.

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136 Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J); see also Victoria v Commonwealth and Hayden (Australian Assistance Plan Case) (1975) 134 CLR 338, 405-6 (Jacobs J).

137 Under the heading 'The Parliament and the executive'.

138 The principle that assignments under section 2 should be made on the advice of the Prime Minister was endorsed by the Australian Constitutional Convention in Adelaide 1983 - ACC Proc, Adelaide 1983, vol I, 319.

Finally, it should be noted that the Letters Patent of 29 October 1900 constituting the offices of Governor-General and Commander in Chief duplicated a number of the provisions in the Constitution conferring powers on the Governor-General, and also granted some other powers which are now clearly among the powers embraced by section 61. The new Letters Patent of 21 August 1984 eliminated these redundant clauses and at the same time revoked the Royal instructions to the Governor-General dated 29 October 1900.[139]

Advisory Committee's recommendations

The Advisory Committee on Executive Government made the following recommendations in relation to matters relevant to this part of the Chapter:

(a) The Constitution be altered to provide explicitly that all powers vested in the Governor-General, except the 'reserve powers', be exercisable only in accordance with Ministerial advice.[140]

(b) Principles, as set out, to guide the exercise of the 'reserve powers' should be enacted by the Federal Parliament.[141] (Two members of the Committee dissented from this recommendation.)

(c) The first clause of section 61 should be altered to provide: 'The executive power of the Commonwealth is vested in the Governor-General.'[142]

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139 Gazette, S334-5, 24 August 1984.

140 Executive Report, 37.

141 id, 38-43.

142 id, 52.

(d) Section 2 should be altered to omit the final clause which impliedly empowers the Queen to assign powers and functions to the Governor-General.[143]

Submissions

The Advisory Committee on Executive Government considered submissions relating to the powers of the Governor-General in Chapter 3 of its Report. Following the publication of the Committee's Report, we received a number of submissions on the same subject.

A number of these later submissions suggested that the provisions of the Constitution relating to the powers of the Governor-General should not be changed.[144]

An equally large number of the submissions recommended that these provisions of the Constitution should be changed. Some favoured definition, limitation and codification of the powers of the Governor-General.[145] Many recommended that the powers of the

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143 id, 57.

144 eg J Bradbury S2869, 2 November 1987; R Kershaw S2805, 24 October 1987; C den Roden S3084, 20 November 1987; R and S Barnes S2868, 28 October 1987; G Smalley S2821, 29 October 1987; R McDonald S3166, 9 January 1988; G Burgoyne S2712, 17 October 1987; J Tolson S3041, 11 November 1987; J Jones S2909, 26 October 1987; N Barnfield S2907, 29 October 1987; L Fisher S2767, 22 October 1987; H Nicholas S2557, 12 December 1987; B Edwards S2690, 15 October 1987; S Holme S2569, 29 November 1987; A Richardson S2915, 29 October 1987; Tasmanian Government S3373, 15 March 1988.

145 eg G Hollebone S2785, 27 October 1987; G Yeates S3146, 6 January 1988; E Greer S3132, 29 December 1987 and S3242, 5 February 1988; C Lloyd S3056, 18 November 1987; T Manning S2175, 29 May 1987; W Riley S2811, 23 October 1987.

Governor-General should, in most cases, be exercisable only on the advice of the Federal Executive Council.[146]

In its submission on the Advisory Committee's Report, the Government of Queensland[147] expressed the view that the Committee had been overly conservative in its view of what the reserve powers of the Governor-General are. It argued strongly against legislative enactment of practices to govern the exercise of these powers and suggested that some of the practices recommended by a majority of the Committee were less than satisfactory. It recommended that the Commission should endorse the practices which the Australian Constitutional Convention had, at the Adelaide and Brisbane sessions of 1983 and 1985 respectively, resolved should be observed as conventions.

The Committee's recommendation for alteration of section 61 to vest the executive power of the Commonwealth directly in the Governor-General, it was further submitted, was unnecessary. On the other hand, the proposed alteration of section 2 was considered to have merit.

Reasons for recommendations

We are in broad agreement with the general proposition that the Constitution should be altered to make it clear that most of the powers vested in the Governor-General should be exercisable only on Ministerial advice.

Elsewhere in this Report we recommend that certain powers vested in the Governor-General - the power to appoint and dismiss Ministers and the power to appoint deputies - should be declared

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146 eg Citizens for Democracy S3051, 13 November 1987; J Goldring S2582, 28 December 1987; T Corley S2999, 11 November 1987; F McGuirk S3284, 8 January 1988; G Yeates S3146, 6 January 1988; N Forbes S2591, 20 December 1987; W Phillips S3031, 5 November 1987; W Riley S2811, 23 October 1987; J Steward S2952, 16 September 1987; H Hall S2706, 18 October 1987.

147 Queensland Government S3290, 4 February 1988.

to be exercisable on the advice of the Prime Minister.[148] We recommend also that certain other powers of the Governor-General should be vested in the Governor-General in Council.

The matter of appointment and the term of office of the Prime Minister is dealt with earlier in this Chapter.

For the purposes of this Report we do not think it necessary to canvass in detail the proposal by a majority of the Committee that legislation be enacted to lay down principles to guide the exercise of the reserve powers.[149] Our view is that our Terms of Reference neither require nor invite us to make recommendations on what legislation ought to be enacted by the Parliament in the exercise of its constitutional powers, except in cases where it is clear that legislation would need to be enacted to effectuate a constitutional provision. For the same reason we offer no comment on the principles which the majority of the Advisory Committee recommended for enactment other than that some of these principles would not be apt were our recommendations for alteration of the Constitution to be adopted. None of our remarks in this connexion should, however, be taken as implying that we consider it undesirable or inappropriate for efforts to be made by bodies such as the Australian Constitutional Convention to formulate statements regarding the manner in which certain constitutional powers should and should not be exercised, and regarding the factors which ought to be taken into account in their exercise.

The recommendation of the Advisory Committee that section 61 of the Constitution be altered so that the executive power of the Commonwealth is vested directly in the Governor-General is not

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148 Under the headings 'Appointment and terms of office of the Prime Minister and Ministers', 'Administrator of the Commonwealth and deputies of the Governor-General'.

149 The question of whether the Constitution should be altered to make it clear that the Parliament has authority to enact such legislation is considered under the heading 'The Parliament and the Executive'.

one we endorse. Although the Committee recognised that 'The Queen was, and still is, the formal Head of State of Australia and, therefore, the supreme head of the executive branch of government',[150] it thought:

> it would be wise to amend section 61 to remove any uncertainty regarding the relationship between the Queen and the Governor-General and to ensure that the language of that section provides no support for the notion that the Queen of Australia (even though acting on the advice of Commonwealth ministers) can exercise any Commonwealth executive power.[151]

We are not persuaded that the alteration of section 61 proposed by the Committee is either necessary or desirable. The alteration would not enlarge the range of powers exercisable by the Governor-General. So long as the Queen of Australia is head of State, we consider it entirely appropriate that the executive power of the Commonwealth should, as at present, be formally invested in her and declared to be exercisable by the Governor-General. The Queen is, we note, a constituent part of the Parliament (section 1). Were section 61 to be altered in the way proposed by the Committee, an equally good case could be made for alteration of the definition of the Parliament to exclude the Queen and to substitute the Governor-General. Our judgment is that any proposal to alter section 61 to eliminate reference to the Queen would be construed by many electors as derogatory and but a step towards establishment of a republican form of government.

The alteration to section 2 of the Constitution which the Committee has recommended is, however, one which we support without hesitation. Were that section to be altered as proposed, it would read simply:

> 2.(1) There shall be a Governor-General, who shall be appointed by the Queen and shall be Her Majesty's representative in the Commonwealth.

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150 Executive Report, 51.

151 id, 52.

(2) The Governor-General shall hold office during Her Majesty's pleasure.

The alteration would entail omission of those words which suggest that there are some powers which the Governor-General cannot exercise unless they have been expressly assigned.[152]

As has already been pointed out[153] there is now no doubt that all of the powers which have, in the past, been assigned to the Governor-General pursuant to section 2 are now powers which are exercisable under section 61. The Queen's revocation in 1987 of all extant assignments under section 2 recognises that fact. The part of section 2 which would be excised by the proposed alteration, we agree, 'can now be regarded as entirely obsolete.'[154]

The command in chief of the Naval and Military Forces

Recommendation

We recommend that section 68 of the Constitution be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative, acting with the advice of the Federal Executive Council.

The object of this proposed alteration is to make it clear that whatever powers the Governor-General may exercise by virtue of having the command in chief of the Defence Force are powers

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152 In Chapter 14 of the Final Report we will recommend adoption of a general savings clause to preserve the position of office holders appointed under provisions which have been altered.

153 See above under the heading 'Powers of the Governor-General' - 'Current position'.

154 id, 57.

which, constitutionally, cannot be exercised except in accordance with the advice of the Federal Executive Council.

Current position

Section 68 of the Constitution provides:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

It is clear beyond doubt that whatever powers the Governor-General may exercise pursuant to this section, these powers are ones that are exercisable only on the advice of the responsible Minister. In fact, the Governor-General's role as Commander in Chief is 'essentially a titular one' and always has been.[155] As the present Governor-General noted in an address to the Joint Services Staff College, Canberra, in June 1983:

> no question of any reserve power lurks within the terms of s. 68 and practical considerations make it essential, even were constitutional ones not also to require it, that the Governor-General should have no independent discretion conferred upon him by that section.[156]

Whether section 68 has the effect of conferring any substantive powers is open to question. Any of the Royal prerogatives in relation to the disposition of the armed forces[157] are already included within the Executive power of the Commonwealth under

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155 Coutts v Commonwealth (1985) 157 CLR 91, 109 (Deane J).

156 Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 Melbourne University Law Review 563, 570.

157 Chandler v Director of Public Prosecutions (1964) AC 763; Burmah Oil Co v Lord Advocate (1965) AC 75.

section 61 of the Constitution. Those powers are, moreover, subject to regulation by the Parliament in exercise of the defence power granted by section 51(vi.) and have been so regulated by the Defence Act 1903.

Section 8 of that Act vests the 'general control and administration of the Defence Force' (as defined in section 30) in the Minister for Defence. Since 1975 provision has been made in the Act for an officer styled the Chief of Defence Force Staff who has command of the Defence Force (section 9(2)). The Secretary of the Department of Defence and the Chief of Defence Force Staff jointly have the administration of the Defence Force except with respect to:

(a) matters falling within the command of the Defence Force by the Chief of Defence Force Staff or the command of an arm of the Defence Force by the Chief of Staff of that arm of the Defence Force; or

(b) any other matter specified by the Minister (section 9A).

The powers so vested are, however, required to 'be exercised subject to and in accordance with any directions of the Minister' (sections 8, 9(2) and 9A) and the command vested in the Chief of the Defence Force Staff is expressly declared to be subject to section 68 of the Constitution (section 9(5)). Particular powers conferred on the Governor-General by the Act are, by virtue of section 16A of the Acts Interpretation Act 1901 (Cth), required to be exercised on the advice of the Federal Executive Council.

Intention of the Framers. The Framers of the Constitution intended section 68 to be merely declaratory of pre-Federation practice. It had long been the practice for colonial governors to be commissioned by the Monarch as commanders in chief of local forces.[158] These commissions were in the nature of delegations of the Royal prerogative of command of the armed forces.[159] There had been occasions on which colonial governors, including governors of Australian colonies, had asserted authority to exercise the command in chief of the local forces independently of advice from the responsible Minister, but by the end of the nineteenth century it had been established and accepted that for a governor so to act was highly improper, indeed, unconstitutional. Even the Monarch could not exercise the command in chief save on Ministerial advice.[160]

At the third session of the Federal Convention held in Melbourne in 1898, Alfred Deakin moved that clause 68 of the draft Constitution - the clause which was later to be substantially enacted as section 68 - be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is hereby vested in the Governor-General acting under the advice of the Executive Council.[161]

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158 Colonial Service Regulations of 1892 stipulated that a colonial governor appointed as commander in chief was not invested with command of Her Majesty's regular forces in the colony except by special appointment - Stephen, op cit, 566.

159 This prerogative had been affirmed in the preamble to an English statute of 1661 (13 Chas 2, Stat 1, C.5). This declared that 'Forasmuch as within all his Majesties realms and dominions the sole supreme government command and disposition of the Militia and of all forces by sea and land and of all forts and places of strength is and by the laws of England ever was the undoubted right of his Majesty and his royal predecessors ...'. The Monarch relinquished personal command of the armed forces in 1793 when a separate office of General Commander in Chief was created.

160 Stephen, op cit, 569; HE Renfree, The Executive Power of the Commonwealth of Australia (1984) 180-1.

161 Official Records of the Debates, 1898, Vol II, 2249.

Deakin considered that because some Australian colonial governors had, in the past purported to exercise authority as commanders in chief otherwise than in accordance with Ministerial advice, the Governor-General's obligation to act on such advice should 'be placed beyond doubt'.[162] Although the motion to amend the clause was defeated, it was not because the delegates disagreed with the proposition that the command in chief should be exercised only on advice of the responsible Minister.

The reason was rather that the delegates believed that the constitutional convention was so well established that it was not necessary to spell it out. Edmund Barton pointed out that the command in chief of the armed forces was one of the Royal prerogatives and in drafting the Constitution, the practice had been not to add the words 'in Council' after the word 'Governor-General' where a power to be invested in the Governor-General was presently a prerogative power. The term 'Governor-General in Council' had been used only in relation to those prerogative powers which had 'long been demitted or got rid of by statute or other practice'.[163]

Barton even suggested that were the proposed amendment to be adopted it would 'probably, if not certainly, be struck out' when the Bill for the Constitution came before the United Kingdom Parliament.[164] 'We shall be told', he predicted, 'that we ought to understand that the matter is sufficiently regulated by constitutional usage already, and that the prerogative which is

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[162] id, 2251; see also 2257.

[163] id, 2253.

[164] id, 2255.

nominally vested in the Queen, is actually wielded by the Cabinet'.[165]

Advisory Committee's recommendations

The Advisory Committee on Executive Government concluded that the commander in chief of the Defence Force should continue to be the Governor-General. In its view the principle which section 68 enshrines, namely that 'of military subordination to the civil authorities', is an important one and should be preserved.[166] The Committee considered, nonetheless, that section 68 should be altered to make it clear that the Governor-General's powers as commander in chief 'are purely ceremonial'.[167] It recommended two further alterations of a formal nature:

(a) The constitutional provision should refer to 'the Defence Force of the Commonwealth', rather than 'the Naval and Military Forces of the Commonwealth', to include the Air Force and any other military forces that may be established in the future.

(b) Section 68 should be reworded 'to confer an office, rather than a power'.[168]

Accordingly, the Committee recommended 'that section 68 be amended to refer to the Defence Force, and to provide that the titular head of the Defence Force shall be the Governor-General who shall be known as the Commander in Chief'.[169]

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165 id, 2254. See also remarks of J Symon at 2261.
166 Executive Report, 35.
167 ibid.
168 ibid.
169 ibid.

Submissions

The Advisory Committee on Executive Government considered submissions on the Governor-General as commander in chief of the armed forces in Chapter 3 of its Report.

Since the publication of that Report we have received the following submissions:

(a) The Constitution should be altered to provide that the Governor-General act as commander in chief on the advice of the Federal Executive Council.[170]

(b) The Governor-General should be able to exercise the command in chief independently of the advice of the Federal Executive Council.[171]

(c) The Constitution should be altered to clarify section 68 in relation to the air force.[172]

(d) The Constitution should be altered to clarify what powers the Governor-General, as commander in chief, may exercise in times of emergency.[173]

(e) The command in chief of the defence forces should not reside in the Governor-General.[174]

The Queensland Government submitted that it was unnecessary to change section 68 as it is already well understood that the

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170 eg G Yeates S3146, 6 January 1988; W Phillips S3031, 5 November 1987; A Richardson S2915, 29 October 1987, L Foley S2887, 28 October 1987.

171 eg E Winney S3019, 26 October 1987; H Nicholas S2557, 12 December 1987; C den Ronden S3084, 20 November 1987.

172 N Berryman S3100, 24 November 1988; E Winney S3019, 26 October 1987; H Nicholas S2557, 12 December 1987.

173 eg A Douglas S2812, 26 October 1987.

174 Citizens For Democracy S3051, 13 November 1987.

Governor-General would act as commander in chief on the advice of the Federal Executive Council.[175]

We wrote to the Minister for Defence, Hon KC Beazley, MP seeking his views on possible changes to section 68 of the Constitution. In response, Mr Beazley said that:

> there seems to have been a long history of misunderstanding about the meaning and application of section 68 and the role of the Governor-General as Commander-in-Chief of the Defence Force. My own view is that there is unlikely to be doubt in the future on the part of a government or on the part of a Governor-General that the title is purely titular, but that despite the clear understanding on their part there will remain some prospect of misinterpretation by others of section 68. I would not have thought that any misapprehensions in the future would be of greater consequence than those in the past, given that those responsible for effecting the provisions of section 68 are unlikely to misinterpret it. I would add that there is little likelihood in my view of a misunderstanding by the Chief of the Defence Force and Chiefs of Staff that the Governor-General's powers under section 68 are purely ceremonial.
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> As you would be aware section 68 descended from the inherent prerogative of the crown in command of the United Kingdom's military forces. I see no particular purpose served by breaking with that tradition and hence I would not argue against the proposition that the Governor-General should be the Commander-in-Chief of the Defence Force even though in a purely utilitarian sense the title has little or no meaning.
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> ...
>
> My suggestion would be that you either add 'titular' to 'office of the Governor-General' or, as Alfred Deakin proposed at the Constitutional Conference of 1898, add 'acting under the advice of the Executive Council' to the rewording you are considering.[176]

Reasons for recommendation

We agree with the Advisory Committee that the general principle which section 68 expresses, namely that the command in chief of

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[175] Queensland Government S3290, 4 February 1988.

[176] Hon KC Beazley, MP S2942, 5 November 1987.

the Defence Force should be vested in Governor-General, should be retained. The alteration which we propose to the section does not, however, involve, as the Committee's recommendation does, a reformulation of the entire section. It involves merely the addition of words having the same effect as those which in 1898 Deakin proposed should be added to the proposed section.

While there is no doubt that the office of commander in chief is purely titular or honorific and that any powers exercisable by that officer can, by constitutional convention, be exercised only Ministerial advice, we are of the view that this convention is one which should be embodied in the Constitution. We have come to this view largely because it is apparent that the true constitutional position is not generally understood. It is still assumed by some people that the Governor-General can, under section 68, exercise a command function independently of Ministerial advice.[177] This assumption is plainly ill-founded.

We see no reason why section 68 should be altered to omit the reference to 'the naval and military forces of the Commonwealth' and to substitute the words 'the Defence Force of the Commonwealth'. The expression 'the Defence Force' is defined in section 30 of the Defence Act 1903 (Cth) to consist of three arms: the Australian Navy, the Australian Army and the Australian Air Force, and it could be redefined by legislation to include other arms. But constitutionally the expression 'the naval and military forces of the Commonwealth' is a generic expression which embraces any branch of the armed forces of the Commonwealth. A similar expression is employed in the description in section 51(vi.) of the power of the Federal Parliament to legislate with respect to defence - 'The naval and military defence of the Commonwealth ...'. It has not been suggested that the formulation of this power should be altered and we do not recommend any such alteration.

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[177] See Stephen, op cit, 564-5.

We also see no reason to alter section 68 in the manner recommended by the Advisory Committee so as to indicate that the Governor-General merely holds the office of commander in chief, and is the titular head of the Defence Force. As far as we have been able to discover, there is no difference in law between holding the office of commander in chief and having the command in chief of armed forces.

Before Federation, the term used in the commissions of colonial governors and in some colonial legislation was 'commander-in-chief'.[178] The term commander-in-chief was also used in the Letters Patent of 29 October 1900 (since revoked) constituting the office of Governor-General and the subsequent commissions of Governors-General.[179] The term 'Command-in-Chief' seems to have been derived from section 15 of the British North America Act 1867 (now the Canadian Constitution Act 1867).[180]

Administrator of the Commonwealth and deputies of the Governor-General

Recommendation

We **recommend** that section 126 of the Constitution be altered to read:

> The Governor-General may, with the advice of the Prime Minister, 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

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178 See eg The Volunteer Force Regulation Act 1867, section 4 (NSW); Volunteers Act 1878 (Qld), section 3; Defence Act 1885 (Tas), section 3.

179 This was in accordance with Colonial Service Regulations and Colonial Office practice.

180 This section provides: 'The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.'

> functions of the Governor-General as he thinks fit to assign to such deputy or deputies; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

Current position - Administrator

When the Governor-General is absent from Australia, the office is occupied by an Administrator appointed by the Queen pursuant to section 4 of the Constitution. On assuming the administration of the Government of the Commonwealth, the Administrator exercises all of the powers and functions of the Governor-General. Dormant commissions for the office of Administrator are generally held by all the State Governors; the acting commission is held by the senior Governor.

The commissions to the Administrators appointed under section 4 are issued by the Queen on the advice of the Prime Minister of Australia. This practice was recognised by the Australian Constitutional Convention in 1983 and declared to be one which should be observed as a convention in Australia. Specifically it was resolved that the convention be that:

> Commissions to administrators under section 4 of the Constitution are issued and withdrawn on the advice of the Prime Minister of Australia and are issued only to State Governors. Where it is necessary for an administrator to act under his commission, the most senior available holder of a dormant commission assumes duty, seniority amongst State Governors being determined according to the dates of their appointment as State Governors.[181]

The circumstances in which a person appointed as an Administrator may exercise the powers, functions and authorities of the Governor-General are defined in clause III of the Letters Patent relating to the office of Governor-General, dated 21 August 1984.[182] Under that clause, an Administrator may exercise the Governor-General's powers, functions and authorities 'only in the

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[181] ACC Proc, Adelaide 1983, vol I, 319.

[182] Gazette, S334-5, 24 August 1984.

event of the absence out of Australia, or the death, incapacity or removal, of the Governor-General for the time being'. The reference to 'absence out of Australia' is defined to mean 'absence out of Australia in a geographical sense' but so as not to include 'absence out of Australia for the purpose of visiting a Territory that is under the administration of the Commonwealth of Australia'.

Clause III of the Letters Patent also stipulates that on the occasions when an Administrator may exercise the powers, functions and authorities of the Governor-General, 'the administration of the Government of the Commonwealth' shall not be assumed by an Administrator except by request. In the event of the absence of the Governor-General from Australia the request must ordinarily be made by the Governor-General or the Prime Minister. In the event of the death, incapacity or removal of the Governor-General the request must ordinarily be made by the Prime Minister.

The rules set out in clause III include provisions defining the circumstances in which an Administrator shall cease to exercise the powers etc of the Governor-General.

Current position - deputies

The office of deputy of the Governor-General is provided for in section 126 of the Constitution. This reads:

> 126. The Queen may authorise 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.

The requisite authority to appoint deputies was originally conferred by clause VI of the Letters Patent issued by the Queen

on 29 October 1900 to constitute the office of Governor-General. New Letters Patent were issued by the Queen, acting on the advice of the Prime Minister, on 21 August 1984.[183] These revoked the Letters Patent of 1900 as amended. Clause IV of the new Letters Patent authorises the Governor-General to appoint deputies under section 126 of the Constitution, but the authorisation is subject to certain limitations. They are that a person appointed as a deputy:

> shall not exercise a power or function of the Governor-General assigned to him on any occasion -
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> (i) except in accordance with the instrument of appointment;
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> (ii) except at the request of the Governor-General or the person for the time being administering the Government of the Commonwealth that he exercise that power or function on that occasion; and
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> (iii) unless he has taken on that occasion or has previously taken the Oath or Affirmation of Allegiance in the presence of the Governor-General, the Chief Justice or another Justice of the High Court of Australia or the Chief Judge or another Judge of the Federal Court of Australia or of the Supreme Court of a State or Territory of the Commonwealth.[184]

Among the resolutions passed at the Adelaide session of the Australian Constitutional Convention in 1983 on practices which should be observed as conventions, there were three relating to appointment of deputies under section 126 of the Constitution and the role of these deputies:

> (a) The power of the Queen under section 126 of the Constitution to authorise the Governor-General to appoint a deputy is exercised on the advice of the Prime Minister of Australia.

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183 Gazette, S334, 24 August 1984.

184 The oath or affirmation of allegiance is declared to be that in 'the form set out in the Schedule to the Constitution' (clause V).

(b) The Governor-General acts on the advice of the Prime Minister in appointing a deputy under section 126.

(c) A State Governor who is appointed as a deputy of the Governor-General acts on the advice of Commonwealth Ministers in Commonwealth matters.[185]

The present practice is for the Governor-General to appoint all Ministers for the time being as deputies for certain limited purposes. The Vice-President of the Executive Council is appointed a deputy with authority to summon meetings of the Federal Executive Council and to preside over any meeting of the Executive Council at which the Governor-General is unable to be present. The other Ministers are appointed as deputies, but their authority is limited to presiding over a meeting of the Executive Council when neither the Governor-General nor Vice-President (or acting Vice-President) is able to be present. Occasionally a deputy is appointed when the Governor-General visits a relatively inaccessible part of the country. Deputies are also appointed to swear in members of Parliament.

The office of deputy to the Governor-General differs from that of Administrator in three respects:

(a) The Administrator is appointed, and can only be appointed, by the Queen, whereas a deputy to the Governor-General is appointed by the Governor-General.

(b) The Administrator can exercise all of the powers of the Governor-General merely by virtue of the instrument of appointment whereas a deputy to the Governor-General cannot exercise any power or function of the Governor-General other than one specifically assigned to him or her. Thus if a deputy has been appointed and the only power delegated is to preside at meetings of the Federal Executive Council, he or she does not have

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[185] ACC Proc, Adelaide 1983, vol I, 319.

authority to perform acts on behalf of the Governor-General. The authority is merely to preside and to signify to the Governor-General that the Council has approved a minute (ie recommendation) placed before it.[186]

(c) The Administrator stands in the shoes of the Governor-General, whereas a deputy to the Governor-General is merely a delegate of the Governor-General and the relationship between that deputy and the Governor-General is governed by the ordinary rules about delegations of public powers.[187]

Advisory Committee's recommendation

The Advisory Committee on Executive Government formed the view that sections 4 and 126 were provisions that appeared 'to work well' and accordingly recommended that they not be altered.[188]

Reasons for recommendation

We agree with the Advisory Committee's recommendation in relation to section 4 of the Constitution. We have, however, concluded that there are elements of section 126 which are no longer consistent with Australia's status as a sovereign, independent nation and which can now be regarded as outmoded.

Under the section as it now stands, the Governor-General's power to appoint deputies is dependent on the Queen having authorised the power to be exercised. But that authority was conferred even before the federation came into being. It is most unlikely that the authority would now be withdrawn. Section 126 as it now stands also enables the Queen to exercise control over the

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186 JA Pettifer, House of Representatives Practice (1981) 112.

187 See M Aronson and N Franklin, Review of Administrative Action (1987) 55-60.

188 Executive Report, 36.

Governor-General as regards the powers and functions assigned to deputies, over when deputies can exercise their assigned powers, and, arguably, also over the manner in which deputies exercise their assigned powers and functions. Of course, this power of control would not now be exercised except on the advice of the Prime Minister.

In our opinion, the authority of the Governor-General to appoint deputies and to delegate powers and functions to them should stem directly from the Constitution, and not, as at present, from the Letters Patent issued thereunder. Likewise, that authority should not be limited in any way which suggests that the Queen retains effective power to control the manner in which the capacity to appoint deputies is exercised or to determine what powers and functions may be assigned to and exercised by them. That capacity is, we recognise, an important one and should be conferred by express constitutional provision.

We also recognise that the power is one which, by convention, would be exercised only on Ministerial advice. We think it appropriate that this convention be incorporated in section 126 by the inclusion of words which indicate that the powers formally invested in the Governor-General to appoint deputies, and to assign powers and functions to them, can only be exercised on the advice of the Prime Minister. Under the new section 126 which we propose, the Prime Minister would be the person who would have to take responsibility, politically, for the uses made of the power.

THE PARLIAMENT AND THE EXECUTIVE

Introduction

Most of our recommendations concerning the relationship between the legislative and executive branches of government of the Commonwealth have already been dealt with in Chapter 4 of this Report and in preceding parts of the present Chapter. In this part we deal principally with the ambit of the executive power of

the Commonwealth and with the powers of the Parliament to enact legislation with respect to the exercise of those powers, and also with respect to specific powers invested by the Constitution in the Governor-General and the Governor-General in Council.

Our remarks are addressed primarily to recommendations of the Advisory Committee on Executive Government that:

(a) section 51 of the Constitution be altered by granting the Commonwealth Parliament power to make laws with respect to the exercise of any executive power by the designated constitutional organ; and

(b) section 61 of the Constitution be altered to provide that the exercise of the executive power of the Commonwealth shall be subject to legislative control.[189]

We give reasons why a majority of us do not endorse these recommendations.

Current position

The Constitution grants a number of specific powers to the Queen, the Governor-General and the Governor-General in Council. Constitutionally, it is unnecessary to classify any of those specific powers according to whether they are legislative or executive in character. The Constitution also refers to a broad category of power described simply as 'the executive power of the Commonwealth' (section 61). It implies that this power is somehow distinguishable from, 'the legislative power of the Commonwealth' which, by section 1, is vested in the Federal Parliament, and from 'the judicial power of the Commonwealth' which, by section 71 of the Constitution, is vested in certain courts.

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[189] Executive Report, 59.

The executive power includes, as has already been pointed out, such of the Royal prerogatives as pertain to the subjects of federal legislative power. What else it might include is not entirely clear. It does not, however, extend beyond that which has been or could be the subject of valid legislation.[190]

The prerogatives and any other power imported by section 61 can be regulated by federal legislation or even replaced by statutory powers. Such legislation may be enacted in exercise of the Federal Parliament's power to make laws with respect to particular subjects, or in exercise of the power conferred by section 51(xxxix.) to make laws with respect to matters 'incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth ... or in any department or officer of the Commonwealth.' The Parliament cannot, however, legislate to invest executive power in federal courts. Whether it may legislate to invest executive power in itself or in any House of Parliament is, however, unsettled.

The extent to which the Parliament can legislate to control the exercise of the specific powers invested by the Constitution in the Governor-General and the Governor-General in Council is a question on which opinions are divided. There is no doubt that the Parliament cannot legislate to place these powers in other hands. The problem is rather whether the Parliament has power to make laws which regulate the exercise of the powers, for example by prescribing procedures which must be followed. The differing opinions are noted in the Advisory Committee's Report.[191]

Advisory Committee's recommendations

The Advisory Committee on Executive Government considered several submissions from academic lawyers concerning the terms of section 61. Some suggested 'that the prerogative was unsuitable as a

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190 Victoria v Commonwealth and Hayden (Australian Assistance Plan Case) (1975) 134 CLR 338, 362 (Barwick CJ), 378-9 (Gibbs J), 396 (Mason J), and 406 (Jacobs J).

191 Executive Report, 58-9.

measure of Commonwealth executive power, and that any reformulation of section 61 should endeavour to dispense with it'.[192] One suggested that the only sources of executive power should be the Constitution, another that the only source should be statutes.[193] The Committee thought that there was 'much to be said for dispensing with the prerogative, an admittedly archaic and uncertain element of the common law'[194] but concluded that if executive powers were to depend solely on the enactment of legislation or on specific provisions in the Constitution, 'the practical working of government could be severely disrupted'.[195] It therefore decided not to recommend any alteration of section 61 other than that previously mentioned which would involve omission of reference to the Queen.

We agree with the Committee's view that section 61 should not be altered as regards the ambit of executive power.

The Committee did, however, recommend that the Constitution be altered to make it clear beyond doubt that the exercise of the executive power under section 61 is subject to legislative control. It also recommended that section 51 be altered to provide that the Parliament has 'power to make laws with respect to the exercise of any executive power by the designated constitutional organ'.[196] This recommendation is linked with the earlier recommendation by a majority of the Committee that legislation be enacted to regulate the exercise of the Governor-General's reserve powers.[197]

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192 Executive Report, 55.
193 ibid.
194 id, 56.
195 ibid.
196 id, 59.
197 id, 38-43.

Submissions

The Advisory Committee on Executive Government considered submissions on the Parliament and the Executive in Chapter 4 of its Report. Since publication of that Report we have received the following submissions on this topic:

(a) that the convention of Ministerial responsibility be expressly recognised in the Constitution;[198]

(b) that the Parliament to control all the acts of the Executive;[199] and

(c) in its submission on the entire report of the Committee the Government of Queensland stated that it did not agree with these particular recommendations; it considered that the proposed alterations of sections 51 and 61 were 'not needed and would totally denude the Governor-General of any meaningful role in the governance of our nation'.[200]

Reasons for recommendation

The majority of us (Sir Maurice Byers, Professor Campbell, Sir Rupert Hamer and Mr Whitlam) are not persuaded that it is necessary to alter the Constitution to include express statements that the executive power of the Commonwealth and the powers invested in the Governor-General and Governor-General in Council are subject to legislative control. The Parliament already has power to legislate to regulate the exercise of the prerogatives of the Commonwealth and other powers included in section 61 - even to abrogate them.

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198 eg L O'Shea S2998, 8 November 1987.

199 eg L Foley S2887, 28 October 1987; L O'Shea S2998, 8 November 1987; A Richardson S2915, 29 October 1987.

200 Queensland Government S3290, 4 February 1988.

We acknowledge that there is room for difference of opinion about the Parliament's power to regulate the exercise of the specific powers vested in the Governor-General and the Governor-General in Council, but we note that there is no decision of the High Court which distinctly denies the Parliament a competence to enact such legislation. We are inclined to the view that section 51(xxxix.) of the Constitution would support much legislation of this type, for example legislation of the kind already enacted to do with qualifications and procedures in selecting Justices of the High Court. Section 51(xxxix.) would, we have no doubt, be interpreted in the light of the principles of responsible government which the Constitution implies and also in the light of the constitutional principles received from the United Kingdom which accord Parliaments supremacy over the executive organs of government.

Professor Zines is in agreement with the other members of the Commission that no alteration of the Constitution is necessary to legislate to control the general executive powers vested by section 61. Any power included in section 61 is reflected in a legislative power of the Commonwealth. There is more doubt as to legislative control of specific powers conferred by the Constitution on the Governor-General or the Governor-General in Council. There is often no express legislative power in relation to the specific subject of Executive authority, for example, the dissolution of a House of Parliament or the appointment of judges. To legislate, it is necessary to rely on section 51(xxxix.) - 'Matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth ... or in any department or officer of the Commonwealth.' If the specific executive powers in question are construed as conferring a discretion it is arguable that it is not 'incidental' to the exercise of the discretion to control it, either at all or to any considerable degree.

The argument that section 51(xxxix.) is sufficient for this purpose depends on implication, namely, the concept of parliamentary supremacy over the Executive. Professor Zines is

of the view, like the majority of the Commission, that the High Court is likely to hold that Parliament has the necessary power because of this principle.[201]

There is, however, much legal opinion to the opposite effect, and Professor Zines considers that the matter should be put beyond doubt by constitutional alteration. In his view, it should be made clear that all actions by the Governor-General or the Governor-General in Council should be subject to control by Parliament as the supreme law making body and the most democratic element in our Constitution. He would, therefore, recommend that there be added to section 51 a paragraph conferring power on the Parliament to make laws with respect to the regulation and control of any power vested by this Constitution in the Governor-General or the Governor-General in Council.

TRANSFERRED DEPARTMENTS

Recommendations

We recommend that the Constitution be altered by repealing:

(i) section 52(ii.);
(ii) section 69; and
(iii) sections 84 and 85.

Current position

Sections 52(ii.), 69, 84 and 85 of the Constitution provide as follows:

> 52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and

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201 He so advised the Australian Constitution Convention: 'Opinion on Integrated Courts Scheme', Judicature Sub-Committee Report, ACC Proc, Brisbane 1985, vol II, 27, 33-6.

good government of the Commonwealth with respect to -

...

(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:

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.

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.

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 used, 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.

Transfer of departments on the establishment of the Commonwealth. These sections of the Constitution are all concerned with the departments of the public services of the Australian colonies which were to be transferred to the Commonwealth either on the establishment of the Commonwealth or shortly thereafter. The departments to be transferred are identified in section 69. The departments of customs and excise were to be transferred on the establishment of the Commonwealth. The other departments listed were to become transferred to the Commonwealth on a date or dates to be proclaimed by the Governor-General. These were the departments of:

(a) Posts, telegraphs, and telephones;
(b) Naval and military defence;
(c) Lighthouses, lightships, beacons and buoys; and
(d) Quarantine.

Basically what was involved in the transfer of these departments to the Commonwealth was a transfer of public servants to the service of the Commonwealth and the transfer to the Commonwealth of property used in connexion with the work of those departments. The detailed provisions on the transfer of personnel and property were set out in sections 84 and 85. The effect of those sections will be explained later.

Power to legislate with respect to the subjects dealt with by the transferred departments was given to the Federal Parliament by other sections of the Constitution. The power to legislate with respect to customs and excise was encompassed by the general power conferred by section 51(ii.) of the Constitution to make laws with respect to taxation, and by virtue of section 90 was declared to be an exclusive federal power. Concurrent power to legislate was granted to the Federal Parliament in relation to:

(a) Postal, telegraphic, telephonic and other like services (section 51(v.));

(b) The naval and military defence of the Commonwealth and of the several States ... (section 51(vi.));

(c) Lighthouses, lightships, beacons and buoys (section 51(vii.)); and

(d) Quarantine (section 51(ix.)).

Section 114 prohibited States from raising or maintaining 'any naval or military force' without the consent of the Federal Parliament.

The State departments of posts, telegraphs and telephones, and naval and military defence were formally transferred to the Commonwealth on 14 February 1901 and 25 February 1901 respectively, in each case by virtue of a proclamation under section 69. No dates, however, were fixed by proclamation for the transfer of the other State departments listed in the

section. The reason was that the Commonwealth did not wish to employ all the officers in the State departments in which quarantine and lighthouse officers were employed. The quarantine officers were generally employed in public health departments and lighthouse officers in departments responsible for harbours and rivers. It was decided that these two classes of officers should be transferred to the federal public service under legislation enacted in reliance on section 51 powers.[202] The transfers were effected by the Quarantine Act 1908 (Cth) and the Lighthouses Act 1911 (Cth).

Sections 84 and 85 of the Constitution deal with rights and obligations which arise when departments of the public service of a State become or are transferred to the Commonwealth. When those sections apply, their effect is as follows:

(a) the officers of the transferred department 'become subject to the control of the Executive Government of the Commonwealth' (section 84(i.));

(b) the officers of the transferred departments are guaranteed certain rights (section 84, paras 2 and 3) and financial outlays necessary to give effect to those rights are a charge on federal revenues;[203]

(c) persons who, at the establishment of the Commonwealth, are officers of the public service of a State (but not of a transferred department) and are (by consent of the Governor in Council) transferred to the federal public service are guaranteed the same rights as officers of transferred State department who are retained in the service of the Commonwealth (section 84(iv.));

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202 See opinions 317 (11 August 1908) and 455 (28 June 1912) of RR Garran in Opinions of Attorneys-General of the Commonwealth of Australia, vol I, 1901-14 (1981) 393, 589.

203 Bond v Commonwealth (1903) 1 CLR 13.

(d) all State property used exclusively in connexion with the transferred department is vested in the Commonwealth; that is to say, title automatically passes without need of any formal conveyance - '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' (section 85(i.));

(e) the title to property passing under section 85(i.) includes title to Royal metals and minerals, that is gold and silver;[204]

(f) States are to be compensated by the Commonwealth for the value of property passing under section 85(i.), as agreed between them: and if there is no agreement, as determined under federal legislation;[205]

(g) the Commonwealth is authorised to 'acquire any property of the State, of any kind used, but not exclusively used in connexion with the [transferred State] department'. If this power is exercised, the State has a right to be compensated by the Commonwealth. If there is no agreement as to the amount to be paid, the value of the property is to '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' (section 85(iii.)); and

(h) the Commonwealth becomes subject to the State's current obligations in respect of the transferred department (section 85(iv.)).

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204 Commonwealth v New South Wales (1923) 33 CLR 1.

205 Query whether the federal legislative power is subject to the 'just terms' proviso in section 51(xxxi.).

In our view, sections 84 and 85 have no application when a State department is transferred to the Commonwealth otherwise than under section 69, for example, by legislation in exercise of section 51 powers.[206] If, however, a transfer pursuant to federal legislation involves the acquisition of State property, the legislation must provide for acquisition on just terms (section 51(xxxi.)).

Section 52(ii.) of the Constitution grants to the Federal Parliament exclusive power to legislate on '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'. This provision relates only to the departments transferred to the Commonwealth under section 69,[207] though, according to the New South Wales Court of Appeal, the exclusive legislative power it confers extends to matters relating to federal departments and statutory corporations which have replaced those departments.[208]

According to Quick and Garran, the power to legislate with respect to 'matters relating to any department' includes 'all matters relating to the organization, equipment, working, and management of the department, the appointment, classification, and dismissal of officers, and all the general body of law relating to its conduct and administration' and 'all the machinery, procedure, and regulation, without which a public

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206 See Trower v Commonwealth (1923) 32 CLR 585, 589 (Isaacs J); Cosway v Commonwealth (1942) 65 CLR 629, 637 (McTiernan J); Quick and Garran, 817; opinion 521 (5 November 1913), of WH Irvine in Opinions of Attorneys-General of the Commonwealth, vol I, 1901-1914 (1981) 668. Examples of federal legislation providing for the transfer of State officers include the Income Tax (War-Time) Arrangements Acts of 1942 and 1946 and the Commonwealth Public Service Acts of 1945 and 1946. The validity of the first of these Acts was upheld in South Australia v Commonwealth (1942) 65 CLR 373.

207 Carter v Egg and Egg Pulp Marketing Board (Vict) (1942) 66 CLR 557, 571 (Latham CJ).

208 Australian Postal Commission v Dao (1985) 63 ALR 1.

department would be impotent'.[209] This interpretation of section 52(ii.) has been approved by a majority of the New South Wales Court of Appeal.[210] On the other hand, section 52(ii) does not confer power to legislate with respect to the subject matters with which the transferred departments dealt. Federal power to legislate with respect to those matters derives rather from section 51 and is a concurrent power.[211]

Previous proposals for reform

Resolutions of the Australian Constitutional Convention: At the Melbourne session of the Convention in 1975 and again at the Hobart session in 1976, it was resolved that:

(a) the last paragraph of section 84 be omitted; and

(b) the second phrase in section 85(i.) - 'but in the case of departments controlling customs and excise and bounties, for such time only as the Governor-General may declare to be necessary' - be omitted.[212]

These resolutions were part of a series of resolutions dealing with provisions in the Constitution which were considered to be expended or outmoded. They followed recommendations in a report from Standing Committee C.[213] The Committee was advised that the parts of sections 84 and 85 which would remain after the omissions mentioned above could have a continuing operation

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209 Quick and Garran, 660.

210 Australian Postal Commission v Dao (1985) 63 ALR 1, Kirby P and Samuels JA. See also The King v Taylor; Ex parte Professional Officers' Association - Commonwealth Public Service (1951) 82 CLR 177, 184 (Latham CJ).

211 The King v Brislan; Ex parte Williams (1935) 54 CLR 262, 274-5 (Latham CJ); Carter v Egg and Egg Pulp Marketing Board (Vict) (1942) 66 CLR 557, 571 (Latham CJ), 583 (Starke J).

212 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.

213 ACC 1974, Standing Committee C, 'Interim Reports to Executive Committee' (1974), 12, ACC Proc, Melbourne 1975.

'especially if the reference power [under section 51(xxxvii.)] were to be used'.[214]

The Bill, Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983 was intended to give effect to the Convention resolutions in relation to sections 84 and 85.[215]

At the Brisbane (1985) session of the Convention it was resolved:

> (i) that if the inter-change of powers proposal was put to referendum and passed before the next plenary session of the Convention, matters relating to any department of the public service the control of which is transferred to the Commonwealth by the Constitution should be designated as matters on which the States may legislate; but that
>
> (ii) if the inter-change of powers proposal were not implemented or a designation not made, the Constitution be altered by repealing section 52(ii.) altogether.[216]

This resolution followed a recommendation by the Fiscal Powers Sub-Committee of the Convention.[217] In its Report the Sub-Committee commented[218]

> Section 52(ii.) has not caused serious practical difficulties in the past. This is partly because it has been subsumed within the general doctrine of Commonwealth immunity. Nevertheless, the issue potentially is raised whenever a State law purports to apply to one of the transferred departments. Some of the immunities cases presently before New South Wales courts, for example, involve the application of New South Wales occupational safety laws to Commonwealth defence establishments and might bring section 52(ii) into operation. In combination with

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214 id, 31.

215 Clauses 12 and 13.

216 ACC Proc, Brisbane 1985, vol I, 420.

217 ACC Proc, Brisbane 1985, vol II, paras 3.23-3.27.

218 id, para 3.24.

> other aspects of immunities, the section may cause further problems. A State law which fell within section 52(ii.) would not be applied by the Commonwealth (Application of Laws) Act 1970 (Cth) within a Commonwealth place. The relationship between sections 64 of the Judiciary Act 1903 (Cth) and section 52(ii.) also raises complex legal questions.

The Sub-Committee went on to say[219] that if the general doctrine of Commonwealth immunity from the operation of State laws were to be abrogated, as was recommended:

> section 52(ii.) should be altered as well, in the interests of completeness and consistency. It is not necessary in principle for the Commonwealth to have exclusive power in this matter, particularly if the exclusivity applies to some departments and not to others. It is doubtful, in fact, that the Commonwealth needs an express power to legislate for matters relating to its own departments at all. In the absence of section 52(ii.) the Commonwealth nevertheless would have power to legislate for such matters pursuant either to the incidental power in section 51(xxxix.) or to the incidental power that accompanies each of the substantive heads of power in section 51.

Advisory Committee's recommendations

Section 52(ii.) of the Constitution was considered by the Advisory Committee on the Distribution of Powers. The Committee recommended that:

> 1. In the event of a Constitutional referendum approving a proposal for an interchange of powers between the State and Commonwealth Parliaments, matters relating to any department the control of which is transferred to the Commonwealth by the Constitution should be designated as matters on which the States may legislate.
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> 2. If the interchange of powers proposal is not implemented, or a designation is not made, the Constitution should be altered by deleting section 52(ii.) of the Constitution altogether.[220]

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[219] id, para 3.25.

[220] Powers Report, 179.

In so recommending, the Committee supported the intent of the resolution of the Australian Constitutional Convention in 1985, and essentially for the same reasons as were given by the Fiscal Powers Sub-Committee of the Convention. It agreed in particular that:

(a) it is not necessary in principle for the Commonwealth to have exclusive powers in this matter, particularly if the exclusivity applies to some departments but not others; and

(b) there was no need for an express power for the Commonwealth to legislate for matters relating to its own departments, given the existence of the incidental powers.[221]

Although the Committee acknowledged the existence of a connexion between section 52(ii.) and the doctrine of Commonwealth immunities, it did not see its recommendations in relation to section 52(ii.) 'as being dependent upon the abrogation or other alteration of the present doctrine of Commonwealth immunity'.[222] It also noted that its recommendations would

> not in any way prevent the Commonwealth using its incidental powers of legislation to override or render ineffective, as a result of section 109, any State laws which impede or otherwise prevent the effective discharge of the functions and duties performed by Commonwealth public servants.[223]

The Committee did not express any views on sections 69, 84 and 85 of the Constitution.

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221 id, 181.

222 id, 182.

223 ibid.

Submissions

The Commission received no submissions on sections 52(ii.), 66, 84 or 85 of the Constitution.

Reasons for recommendations

Section 52(ii.). We recommend that section 52(ii) be repealed from the Constitution principally on the ground that, in our view, it is unnecessary. Although elsewhere in this Report we recommend that the Constitution be altered to provide for interchange of powers between the States and the Commonwealth, we are not persuaded that section 52(ii.) should be repealed only if that particular alteration is not made.

There are four reasons why we have concluded that section 52(ii.) is unnecessary.

(a) The Federal Parliament already has power under section 51 to legislate on the matters referred to in section 52(ii).

(b) Even in the absence of section 52(ii.) the Federal Parliament would probably have exclusive power to legislate on the matters to which section 52(ii.) relates and matters in relation to federal departments of the public service other than those transferred under the Constitution. As Latham CJ observed in Carter v Egg and Egg Pulp Marketing Board (Vict):[224] 'Any State legislation professing to control a Commonwealth department would be invalid because no State Parliament has or ever has had any power to legislate on such a subject.'

(c) If State Parliaments did have concurrent power to legislate on the matters referred to in section

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[224] (1942) 66 CLR 557, 571.

52(ii.), the Federal Parliament could, by virtue of section 109, enact legislation which would override State legislation on those matters.[225]

(d) It is anomalous that the Constitution purports to give the Federal Parliament exclusive power to legislate on matters relating to some departments but not others.

Section 69. We recommend that section 69 be repealed on the ground that it is a provision the force of which is spent. Transfers of State departments which were effected under the section will be saved by the general savings clause which we propose should be added to the Constitution.

Sections 84 and 85. We recommend that these two sections be repealed from the Constitution principally because, in our opinion, they are expended provisions. Unlike Standing Committee C of the Australian Constitutional Convention, we do not think the sections can have any continuing operation; in other words, they cannot apply to the transfer of any State departments to the Commonwealth other than transfers under section 69.

We have also had regard to the following matters:

(a) Even if sections 84 and 85 do have a continuing operation, they are unnecessary because the legislative powers granted to the Federal Parliament by section 51 of the Constitution are sufficient to enable that Parliament to enact legislation to deal with matters associated with the transfer of administrative functions and responsibilities from States to the Commonwealth, and with transfer of personnel and property.

(b) State property interests are adequately protected by section 51(xxxi.) and perhaps more so than they would

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[225] See Dao v Australian Postal Commission (1987) 70 ALR 449.

be if section 85 applied. Furthermore, there is no suggestion that federal legislation which has been enacted in the past for the transfer of State officers to the services of the Commonwealth has not adequately protected the interests of transferred officers.

(c) Assuming again that sections 84 and 85 have a continuing operation they do not appear to us to be entirely apt to deal with the matters that would now be dealt with were the Federal Government to take over the administration of legislation and programs previously administered by State departments. The State department as such is not what the Commonwealth would wish to be transferred. What would be sought to be transferred is responsibility for the performance of certain functions. Those functions may be performed by only one section of the State department, or by sections of two or more State departments. Transfer of State public servants and of State property may be involved, but as the immediate post-Federation experience with the quarantine and lighthouse staff showed, transfer of departments is not always the appropriate mode of achieving the desired ends. That experience shows, if anything, that the transfer of a State department to the Commonwealth, whatever the means, is not likely to be employed to accomplish a transfer of functions and responsibilities from a State to the Commonwealth.

CHAPTER 7. NEW STATES

Recommendations

We recommend that the Constitution be altered so as to provide more precise and simplified means for the creation of new States, in particular:

(i) to clarify the ways in which new States may come into existence; and

(ii) to establish the entitlement of a new State to membership of the House of Representatives and the Senate.

Current position

The procedure for the creation of new States is laid down in sections 121 and 124. These sections appear in Chapter VI of the Constitution. The title of the Chapter, 'New States', is in fact somewhat misleading, since it deals with other subjects as well, such as the government of Territories and the alteration of State boundaries. Sections 121 and 124 provide:

> 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.
>
> 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.

The wording of these sections has given rise to considerable doubt and difficulty both as to their precise meaning, and as to their application to the various ways in which potential new States may originate. For instance, section 124 deals with two ways in which a new State might be created, namely:

(a) by separation of territory from a State;

(b) by the union of two or more States, or parts of States,

but the Chapter makes no explicit reference to the position of an existing self-governing polity (for example, New Zealand) nor to the position of Territories surrendered to, and accepted by, the Commonwealth under section 111 (for example, the Northern Territory and the Australian Capital Territory).

The Constitution in section 121 places in the hands of the Commonwealth the actual admission and establishment of new States, along with the power to impose terms and conditions of admission or establishment, including the extent of representation in either House of the Federal Parliament. But these deceptively simple provisions have given rise to a number of important problems of interpretation and application. We have been concerned to consider, for instance:

(a) the extent of the Parliament's power to impose terms and conditions on the admission or establishment of new States;

(b) the basis of the representation of new States in the Federal Parliament;

(c) whether the status of 'New State' implies parity with existing States and, if it does, in what respects; and

(d) whether the powers of a new State may be restricted in a manner different from that of existing States.

Issues

The only real issue is whether the Constitution should be altered so as to clarify the present difficulties in interpretation and to simplify the procedure for the admission of New States, and if it should, in what respects.

Previous proposals for reform

The Australian Constitutional Convention. The procedure for the creation of new States was one of the items listed for discussion at the very first session of the Convention in Sydney in 1973. The reference of this matter to the Standing Committee for investigation was strongly supported by delegates from all States who drew attention to the many difficulties and uncertainties arising under the present Chapter VI of the Constitution.[1] The proposal was especially welcomed by delegates from the Northern Territory who submitted a long memorandum on the problems created by section 122 in their quest for full Statehood.[2]

Other delegates cited several attempts to create new States under the existing provisions of the Constitution and blamed the obscurities and inadequacies of Chapter VI in part for their failure. They listed, for example:

(a) 1910 Resolution by the Queensland Legislative Assembly, that Queensland be divided into three States;

(b) 1922 Resolution in the New South Wales Parliament that New England be created a separate State;

(c) 1934 Royal Commission in New South Wales which recommended the division of New South Wales into three States;

(d) 1948 New State movements in both New South Wales and Queensland; and

(e) 1967 Referendum in New South Wales on the proposed State of New England.[3]

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1 ACC Proc, Sydney 1973, 294-8, 301-3, 313-4, 317-8, 322-3, 327-9, 340-1, 347-9.

2 id, 294-8, 322-3.

3 id, 302-3.

At the Melbourne (1975) session of the Convention the subject of new States was again debated, this time at the instance of delegates from the Australian Capital Territory, who submitted two resolutions.

The first, which was carried unanimously, dealt with the position of Territories surrendered to the Commonwealth under section 111 (for example, the Australian Capital Territory and the Northern Territory) and with the doubts expressed by some authorities as to whether a Territory accepted by the Commonwealth under section 111 was in law capable of later becoming a State under section 121. The resolution was:

> That this Convention recommends -
>
> (a) that there be a constitutional alteration so as to resolve any doubts in law whether a Territory surrendered under section 111 and made in consequence subject to exclusive Commonwealth jurisdiction, may later pass from the Commonwealth so as to be admitted or established as a new State under section 121; and
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> (b) that any other constitutional alteration necessary to enable a Territory to be constituted as a State with a status similar to but not more favourable than that of an original State be made.[4]

The second resolution, moved by a delegate from the Australian Capital Territory, sought to clarify the position with respect to senators representing Territories, but also sought in one clause to establish the principle that upon the establishment of a Territory as a new State it should be entitled to representation in the Senate. After discussion, debate on this resolution was adjourned.

At the Hobart (1976) session of the Convention, the resolution passed by the Melbourne (1975) session was further discussed, this time at the instance of delegates from the Northern Territory. Paragraph (a) was strongly supported and re-affirmed without dissent, but in respect of paragraph (b), Hon EG Whitlam

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[4] ACC Proc, Melbourne 1975, 176.

pointed out that in its terms it would require any new State to have a minimum of 5 members in the House of Representatives, and a number of senators (then 10) equal to that of each State. This paragraph was negatived without a division.

Submissions

The Commission received relatively few submissions regarding new States. The majority of those, moreover, were concerned with specific issues regarding the admission of new States to the Commonwealth, rather than the constitutional provisions in that regard.

For example, some submissions urged the admission of the Northern Territory as a State.[5] E Wickham argued that the granting of Statehood to the Northern Territory would lead to greater unity within Australia in that it would discourage the northern parts of the nation from establishing ties with South East Asian countries.

However, as the Northern Territory Government acknowledged,[6] there is no constitutional bar to its admission as a State. Indeed, the Government opposed reform of section 121, particularly if such reform retards its objective of Statehood. It was especially concerned that its representation in the Senate may be fixed on the basis of population. The Territory said that it will only accept Statehood on equal terms, and that includes Senate representation equal to that of the Original States. It accepts, however, that its representation in the House of Representatives should be based on the same population quota as applies to the rest of Australia.

The Law Society of the Northern Territory submitted that:

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5 AJ Smit S951, 11 February 1987; E Wickham, S3234, 16 February 1987.

6 S3693, 6 November 1986.

> Northern Territory statehood without general equality as to powers, duties and representation with the other states would seriously disadvantage residents of the new state. The federal nature of the Australian Constitution should not be departed from in the case of the new state of the Northern Territory.[7]

One submission suggested a reform to make the Constitution more flexible in regard to the merger of existing Territories into existing States.[8] Another proposed a new scheme of electoral division whereby the States and Territories should all be divided up into counties, each county to have equal representation.[9] This would effect equality of representation as between the States and the Territories.

Several submissions advocated the abolition of the States.[10] This matter, however, does not fall within our Terms of Reference.

Other material. At an early meeting of the Commission, we studied a report from the Joint Select Committee on Electoral Reform,[11] and the Minister's tabling statement in Parliament.[12] We also had before us relevant papers submitted at the conference on 'The Northern Territory of Australia and Statehood' in Darwin on 2 and 3 October 1986, comprising:

(a) Professor Colin Howard, 'Statehood on Conditions: Federal Representation and Residual Links';

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7 S3669, 6 November 1986.

8 DJ Bull S36, 25 February 1986.

9 RC Kershaw S1320, 23 March 1987.

10 New Economics Association, S1300, 10 April 1987; TW Tapp, S1352, 29 March 1987; MJR Brown, S1419, 1 April 1987.

11 Joint Select Committee on Electoral Reform, Report No 1, November 1985.

12 Hansard, House of Representatives, 17 September 1986.

(b) Hon LF Bowen, Federal Attorney-General, 'Northern Territory Statehood: the Commonwealth Perspective'; and

(c) Hon Mr Justice Toohey, 'New States and the Constitution: An Overview'.

Other reports and documents studied by the Commission were:

(a) 'Towards Statehood', Northern Territory Ministerial Statement, 28 August 1986;

(b) GR Nicholson, 'The Constitutional Status of the Self-Governing Northern Territory';[13]

(c) MH Byers, QC (Solicitor-General), Opinion 'Northern Territory Establishment as a State', 10 December 1980;

(d) MH Byers, QC (Solicitor-General) and Senator Peter Durack (Attorney-General), Joint Opinion 'Northern Territory Establishment as a State', 18 July 1978; and

(e) Hon Justice Michael Kirby, 'Australasia Revisited - Towards the Trans-Tasman Federation', April 1987.

To assist us further in our consideration of this important topic, we decided to commission papers by the Commission staff, in conjunction with Mr Justice Toohey, an original member of the Commission, as follows:

(a) 'New States - Constitution section 121';

(b) 'New States and the Constitution: an Overview'; and

(c) 'Working Paper on Territory Representation'.

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[13] (1985) 59 Australian Law Journal 698.

The most obvious candidate for Statehood at present is the Northern Territory, which was originally surrendered by South Australia in 1907 under the terms of section 111, and accepted by the Commonwealth. According to section 111, that Territory then become subject to the exclusive jurisdiction of the Commonwealth. Considerable doubt has been expressed whether the Northern Territory can thereafter be 'admitted' to the Commonwealth, or 'established' as a new State, under the terms of section 121. This question was dealt with by Byers in his opinion mentioned above, and also by Byers and Durack in their joint opinion, and the conclusion reached was that the Parliament does have power under the Constitution to establish the Northern Territory as a State. The question before us, therefore, is whether the Constitution should be altered so as to make that power explicit.

The Australian Capital Territory was surrendered by New South Wales in 1911[14] and accepted by the Commonwealth. Constitutionally, therefore, it is in a similar position to the Northern Territory.

A more difficult question arises as to the appropriate representation of such a new State in the Federal Parliament. Professor Colin Howard in his paper at the Darwin Conference pointed out that 61% of the Australian population lives in New South Wales and Victoria, 16% in Queensland, some 9% in both South Australia and Western Australia, and under 3% in Tasmania. The Northern Territory has well under 1%. Section 121 of the Constitution clearly gives the Parliament discretion to decide 'the extent of representation in either House of the Parliament', but the question arises whether there are any constraints on that decision, arising from the representation accorded to the existing States, or from the operation of other sections of the Constitution.

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14 Seat of Government Acceptance Act 1909 (Cth) section 5(1); the proclaimed day was 1 January 1911, see Gazette 1910, 1851.

It seems reasonable that the representation of a new State in the House of Representatives should be determined in the same manner as that of the existing States under section 24, that is, by dividing the population of the new State by the quota. But this is a practical, rather than a legal result. Under the Constitution at present, the representation could be higher or lower, according to what the Parliament decides. And should the new State be accorded the same minimum representation of five members as the original States?

And what of the Senate? Should the number of senators for the new State be related to the number of representatives? Should it be the same as for the existing States? Should any formula at all be laid down in the Constitution?

Reasons for recommendations

The very existence of so many doubts and difficulties in relation to the admission or establishment of new States of itself affords a powerful reason for the review of the present provisions of the Constitution on this matter, and encourages the attempt to clarify the procedure. In considering the various alternatives, we have been very much assisted by the opinions and reports mentioned above, and reinforced in the basic view which we hold of the intent and meaning of Chapter VI of the Constitution, namely, that it leaves the Federal Government with virtually unfettered discretion in the matter of the admission or establishment of a new State, and with respect to the 'terms and conditions' which it may impose upon its entry.

What those 'terms and conditions' may be will, in the end, be a political matter, dependent in part on the economic and geographical situation of the new State, as well as its population, degree of development, and other factors. We would expect that the definition of those 'terms and conditions' would be achieved in every case primarily by close consultation between the Federal Government and the authorities in the proposed new State, and ultimately in consultation also with the existing States in the Federation.

We have reached the firm conclusion that the existing provisions of the Constitution with respect to the admission or establishment of new States are deficient and lack clarity on important points, and that it is time for alterations to be made to settle the doubts which have arisen and to facilitate the entry of new States into the Australian federation at the appropriate time.

We consider, in particular, that the Constitution should be much more precise than it is at present, on two important matters, namely,

(a) The possible origins of potential new States; and in that connection, it should be put beyond all doubt that a Territory surrendered by a State, and accepted by the Commonwealth under section 111, may become, at an appropriate later date, a new State in the Australian federation.

(b) The entitlement of a new State to membership of the House of Representatives and the Senate respectively should be unequivocally established in the Constitution itself.

We **recommend** therefore that section 121 be altered to make it clear that the Federal Parliament has power:

(a) to create or establish a Constitution for a new State:

(i) established from a Territory;

(ii) formed by separation of territory from a State or by the union of two or more States, or parts of States; or

(iii) formed by the union of a part or parts of a State and a Territory, and

(b) to make its approval of the Constitution of an independent body politic a condition of the admission of that body politic as a new State.

We have already recommended in Chapter 4 that the Constitution be altered to provide firm formulas for the extent of representation of new States in the Federal Parliament, and in that respect to give effect to the substance of the recommendations made by the Joint Select Committee on Electoral Reform.[15]

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15 See Chapter 4 'Composition of Federal Parliament', particularly the 'Reasons for Recommendations' dealing with 'Representation of new States'.

CHAPTER 8. CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

Recommendation

We **recommend** that a new section 119A be added in the Constitution in the following terms:

> 119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.

The addition of the proposed new section 119A would give Local Government recognition for the first time in the Australian Constitution.

Current Position

Local Government in Australia consists of 836 individual bodies, with about 8,000 elected members and some 170,000 employees. Local Government bodies are constituted exclusively in accordance with the laws of the relevant State or Territory. At present, there is no reference to Local Government in the Australian Constitution.

Issues

The real issues which arise from the total silence of the Constitution on the subject of Local Government are both constitutional and financial in character. Many of the financial questions are in our opinion best resolved at political level, for example:

(a) the coordination of loan raisings;
(b) the allocation of financial grants;
(c) Local Government taxation (rates, etc).

We have given consideration principally to those issues which concern the Constitution itself, namely:

(a) Should the Constitution be altered to give recognition to Local Government?

(b) Should the Constitution protect Local Government from abolition by the Commonwealth, or the States or Territories?

(c) Should inter-governmental financial arrangements have a constitutional basis?

Previous proposals for reform

Australian Constitutional Convention. Representatives of Local Government were members of the Constitutional Convention from its first session in Sydney in 1973, and it was the consistent aim of those representatives to advocate and secure the recognition of Local Government in the Australian Constitution as a third sphere of government.

That first session of the Convention noted that it should give attention to 'the financial provisions of the Constitution, with particular reference to...(e) the position of Local Government in relation to Commonwealth and State taxation and immunities' (Agenda Item 3), and to 'The place of Local Government under the Constitution' (Agenda Item 7).[1]

In 1974 the Federal Government submitted to a referendum four proposals, one of which would have given the Commonwealth power to borrow money for Local Government and to make grants directly to them. The proposal was defeated, with 46.8% of all electors approving it, with a majority in only one State, New South Wales (50.79%). The Constitution Alteration (Local Government Bodies) 1974 would have inserted the following provisions into the Constitution:

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1 ACC Proc, Sydney 1973, xxxi, xxxvi.

51(ivA.) The borrowing of money by the Commonwealth for local government bodies:

96A. The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

The Melbourne (1975) session of the Convention recommended referendums on the same proposal with the addition of the words 'constituted under the law of a State or Territory' after the words 'local government bodies' and 'body'. The Convention also adopted a resolution recognising the fundamental role of Local Government in the system of government in Australia; recognising that the traditional sources of revenue available to Local Government are inadequate; and declaring that Local Government bodies should as a general principle be elected (Agenda Item S6(1)).[2]

The Convention further recommended that 'the Commonwealth and State governments should co-operate in investigating means by which local government bodies might be given access to sufficient financial resources to enable them to more effectively carry out their essential functions' (Agenda Item S6(1)).[3]

Federal finance and Local Government. Meanwhile, the Federal Government had begun to grant financial assistance to Local Government. Under the Grants Commission Act 1973 (Cth) the Grants Commission was to inquire into and report upon applications by Local Government bodies for grants of assistance to a State to enable Local Government bodies to function, by reasonable effort, at a standard not appreciably below the standards of Local Government bodies in their own or other regions. The grants recommended by the Commission were paid under section 96 to the States pursuant to the Local Government Grants Act 1974 (Cth) and the Local Government Grants Act 1975 (Cth).

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2 ACC Proc, Melbourne 1975, 171-2.

3 id, 171.

The 1973, 1974 and 1975 Budgets also made some specific purpose grants directly to Local Government bodies. A challenge to such direct payments was dismissed by the High Court in Victoria v Commonwealth and Hayden (Australian Assistance Plan Case).[4] Since 1976 all grants to the States for distribution to Local Government have been made under section 96 pursuant to the Local Government (Personal Income Tax Sharing) Act 1976 (Cth), as amended, now the Local Government (Financial Assistance) Act 1986 (Cth).

The Hobart (1976) session of the Convention unanimously passed a resolution that:

> this Convention, recognising the fundamental role of Local Government in the system of government in Australia, and being desirous that the fulfilment of that role should be effectively facilitated -
>
> (a) invites the States to consider formal recognition of Local Government in State Constitutions;
>
> (b) invites the Prime Minister to raise at the next Premier's Conference the question of the relationships which should exist between Federal, State and Local Government; and
>
> (c) requests Standing Committee 'A' to study further and report upon the best means of recognition of Local Government by the Commonwealth.[5]

Thus the question was effectively to be handled in two phases; but there was no dissent from the view that a way should be found, if possible, to secure the recognition of Local Government in the Constitution of the Commonwealth.

The Brisbane (1985) session of the Constitutional Convention considered and adopted a report from its Structure of Government Sub-Committee, which advocated an alteration to the Australian Constitution in the following terms:

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4 (1975) 134 CLR 338.

5 ACC Proc, Hobart 1976, 208.

> Subject to such terms and conditions as the Parliament of a State or the Northern Territory or in respect of any other Territory the Parliament of the Commonwealth may from time to time determine every State and Territory of the Commonwealth shall provide for the establishment and continuance of Local Government bodies elected in accordance with such laws and charged with the peace order and good government of the local areas for which they are elected. Each such Local Government body shall have the power to make by-laws for the peace order and good government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf.[6]

This draft clause had been recommended by the Australian Council of Local Government Associations.

Recognition in State Constitutions. Victoria was the first State to formally recognise Local Government in its Constitution in 1979. The Constitution (Local Government) Act 1979 (Vict) inserted a new Part IIA which specifically requires the existence of a system of elected local bodies, makes provision for the Local Government franchise, and declares that the suspension and dismissal of municipal councils may only take place by specific parliamentary enactment.

Victoria was followed by Western Australia (1979), South Australia (1980) and New South Wales (1986). Queensland and Tasmania are the only States which have not so far complied with the invitation of the Constitutional Convention.

Advisory Committees' recommendations

Distribution of Powers Committee. The Distribution of Powers Advisory Committee received a large number of submissions, both oral and written, on this subject, from virtually all State Local Government associations, the Australian Council of Local Government Associations (ACLGA), the Council of Capital City Mayors and numerous other municipal authorities.[7] Almost all

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6 ACC Proc, Brisbane 1985, vol I, 422.

7 Powers Report, para 7.11-23, 121-22.

(including the ACLGA in its first submission to the Committee in November 1986) advocated recognition in the Australian Constitution in a form similar to that of the new section proposed by the Constitutional Convention in Brisbane.

The Local Government Association of New South Wales advocated a more expansive approach, namely, the inclusion in the Federal Constitution of a separate Chapter concerned with Local Government, which would provide for its existence, its exercise of certain powers, and protection of a council from dismissal except for just cause. It also proposed a redistribution of powers between the three levels of government.

The 1987 Annual Conference of ACLGA in Canberra endorsed this more expansive approach, and ACGLA made oral submissions to that effect to the Committee at a public hearing in Canberra and in a supplementary submission in January 1987. The ACLGA acknowledged that its new proposals entailed substantial changes, but argued that they were justified by the major political and economic changes which have occurred since Federation, including the increasing mismatch between responsibilities and resources, and the rapid expansion of Local Government functions in modern urban societies.[8]

Two groups, the Country Women's Association and the Environmental Law Commission, opposed the proposed recognition of Local Government on the ground that it would diminish the authority and responsibility of State Governments.[9]

The Powers Advisory Committee recommended, for the reasons summarised below, that Local Government should not be accorded recognition in the Federal Constitution.

1. There is some uncertainty as to how the High Court

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8 Powers Report, para 7.15-17, 121.

9 id, para 7.23, 122.

would interpret a provision in the form proposed by the Constitutional Convention in Brisbane.

2. Support for the proposals came almost exclusively from Local Government and appeared mainly to be based on a perceived need to increase the status of Local Government.

3. The implications of a new Chapter on Local Government had not been canvassed in sufficient depth.

4. Any entrenchment of the existence of Local Government should take place in State Constitutions under which it exists.

5. The nature of any perceived threat to Local Government had not been made clear to the Committee.

6. Some remote areas of Australia did not have Local Government and should not be compelled to have it.

7. The proposed section 108A adopted by the Australian Constitutional Convention would cast upon Federal and State Parliaments a legal duty to establish Local Government - an unusual course.

8. The appointment of administrators to carry on the affairs of Local Government bodies dismissed for misconduct might become more difficult.

9. It would be undesirable to entrench in the Constitution another level of government which would be in competition with the States.[10]

Trade and National Economic Management Committee. The Trade and National Economic Management Advisory Committee also received numerous submissions on the status, powers, responsibilities and

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10 id, 7.24-35, 122-24, Appendix K, 237-40.

finances of Local Government.[11] These submissions naturally dealt primarily with the fiscal position of Local Government, but also involved comment and discussion on the recognition of Local Government. The Committee agreed that the tax base of Local Government is small, especially in relation to the rapidly increasing role of Local Government in human and social services, recreation and the environment. The Committee noted a strong consensus that the level of rate exemptions in favour of both Federal and State Governments and their instrumentalities, is a severe detriment to the finances of many municipalities.[12]

The Committee, however, took the view that the nature and scope of the tax base for Local Government basically involved policy decisions at an inter-governmental level, and that the need for constitutional change had not been demonstrated. It reiterated the conclusion, reached elsewhere in its report, that particular types of taxes, with the exception of customs duties, should not be exclusively allocated to specific levels of government.[13]

The Committee finally recommended that the Constitution be altered to include an appropriate recognition of Local Government, but it refrained from citing specifically the form which such recognition should take.[14]

Submissions

The Commission distributed Background Paper No 11 outlining the issues affecting Local Government, and the various proposals which had been made to recognise its status in the Constitution. We invited submissions on the subject from interested parties.

As is noted in the Powers Report[15] and Trade Report,[16] numerous submissions were received from local councils favouring the

11 Trade Report, 229-232, 235-9.
12 id, 176, 178, 186.
13 id, 162, 240.
14 id, 239-41.
15 Powers Report, para 9.11-23, 121-2.
16 Trade Report, 229-39.

constitutional recognition of Local Government. Numerous further submissions to the Commission were received from councils in response to the Committees' reports. Without exception, these supported the constitutional recognition of Local Government.

The Department of Local Government and Administrative Services supported the granting of recognition to Local Government before the Trade Committee[17] on two grounds:

(a) Local Government is an elected and publicly accountable sector of government; and

(b) Local Government participates in the federal system of public administration.

Key Local Government bodies. Other responses came from the Federal Government's office of Local Government and from Local Government associations. The Office of Local Government of the Department of Immigration, Local Government and Ethnic Affairs (OLG),[18] the Australian Council of Local Government Associations (ACLGA)[19] and the Council of Capital City Lord Mayors (CCCLM)[20] made submissions which renewed the call for constitutional recognition and, in some instances, took issue with assertions or conclusions of the Committees.

The OLG repeated the argument that recognition of Local Government as a party with which other spheres of government should consult and negotiate would accord Local Government a status commensurate with its rights and responsibilities as a democratically elected institution. Constitutional recognition would also lead to more effective public administration. The OLG argued that recognition was necessary to protect the democratic rights of Local Government - to guard against unwarranted

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17 Trade Report, 236.

18 S3050, November 1987.

19 S3055, 17 November 1987.

20 S2918, November 1987.

dismissal of councils or failure to observe the rules of natural justice in the course of a dismissal.

The ACLGA argued, contrary to the conclusion of the Powers Committee, that recognition would not be a purely symbolic gesture. It pointed out that Australia has supported the International Declaration of Local Self-Government within the United Nations and said:

> In the absence of an appropriate form of Local Government recognition within the Australian Constitution it is difficult for the Commonwealth to espouse in international fora its belief in and support for local democracy.[21]

It also denied that local councils, if given constitutional recognition, would be permitted to impose any kind of taxation. They would still be ultimately subject to State or Territory law, and thus their tax base would be controlled to the extent that the State or Territory saw fit.

Like the OLG, the ACLGA saw an inevitable increase in the effectiveness of public administration as a result of the facilitation of direct negotiation between the Commonwealth and local councils.

The CCCLM submitted that recognition in State Constitutions is insufficient since these 'can be changed by a simple majority and thus fail to offer any real security'.[22] Recognition in the Federal Constitution would not be merely symbolic but would reflect the reality of the social, political and economic framework and would facilitate the guarantee of democratic rights in the local sphere.

The CCCLM made a series of quite specific recommendations including:

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21 S3055, 17 November 1987, 9.

22 S2918, November 1987, 4.

(a) clarification of the Commonwealth's power under section 81 to grant money to Local Government;

(b) a guarantee of democratic elections for Local Government;

(c) a guarantee of natural justice for councils when they are to be dismissed; and

(d) safeguards against long-term disruption to the democratic process consequent on such a dismissal.

All three of these bodies favoured recognition in the form of a new Chapter, purporting, in the words of the CCCLM, 'to ensure the "establishment and continuation" of a system of local government...'.[23]

The ACLGA argued that a new Chapter, rather than the proposed section 108A (as the Constitutional Convention's proposal has been called), would be in keeping with the structure of the Constitution and would be the form of recognition that would most accurately reflect the current situation. It would reassert the reality of the Australian federal system.[24]

Some submissions[25] would go even further, establishing a number of new, smaller States. As this proposal amounts to a substantial rearrangement of our federal system, it falls outside our Terms of Reference and we therefore make no comment.

State Governments. The Tasmanian Government opposed recognition of Local Government in the Federal Constitution, arguing that it is a matter to be dealt with in State Constitutions, since Local

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23 S2918, November 1987, 4; a chapter in substantially the same terms is set out in the Trade Report, 238-9.

24 The OLG had supported the insertion of a new chapter in its submission to the Powers Committee. Powers Report, para 7.21, 122.

25 eg JJ Bayly S342, 23 September 1986.

Government is a creature of State legislation.[26] The Queensland Government also opposed constitutional recognition of Local Government because, in its submission:

(a) The Constitution is a federal document concerned with granting specific heads of power to the Commonwealth, placing certain restrictions on their exercise, and leaving the residue of powers to the States. The entrenchment of a further sphere of government would cause problems as the Constitution is concerned with 'national or 'interstate' matters and not local concerns.

(b) The entrenchment of Local Government rights would legitimate a third tier of government thereby diminishing the authority and legislative competence of the States in this area.

(c) Constitutional recognition would encourage the Commonwealth to by-pass the States and deal directly with local authorities, encouraging unhealthy competition between the States and local authorities. This could lead to a weakening of federalism.

(d) It would be difficult to provide a provision which safeguards and enhances the interests of the variety of local authorities in Australia. Such a provision might be interpreted by the High Court contrary to the intention of the proponents and to the detriment of Local Government.

(e) Entrenched provisions would be difficult to alter (even if they became inappropriate, inadequate, outdated or even counter-productive) and so would need to be of a vague, simple and symbolic type.

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26 S1452, 7 April 1987; reiterated in letter of 9 March 1988.

(f) Local authorities already have a strong statutory basis and their continued existence is not under threat. It is difficult to justify an alteration to the Constitution which is only symbolic.

(g) Because local authorities are created by State Parliaments the appropriate place to recognise them is either in State Constitutions or other important State legislation.[27]

Reasons for recommendation

We were thus faced with conflicting recommendations from the two Advisory Committees. We have been assisted by the discussion of the issue in the Committee's reports, as well as by further oral and written submissions.

We recognise that the points made by the Powers Committee must be taken into consideration on this question, but we are not persuaded that they should outweigh the strong arguments before the Commission in support of recognition. In our view, the outcome should not depend upon any 'perceived threat to the continued existence of local government',[28] but, rather, on the need to accord it the status of an established part of the structure of government in Australia. We also believe that strong support for such recognition does exist, both through the Constitutional Convention and in submissions to the Commission and its Advisory Committees.

There is an obvious need for some flexibility in dealing with remote and undeveloped areas. But we believe that section 119A provides that flexibility. Further, it would be a matter for such legislatures themselves to make provision to avoid the kind

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27 S3172, 16 December 1987; S3674, 31 March 1988.

28 Powers Report, para 7.34, 124.

of 'competition' between the two spheres of government which the Committee was concerned to avoid.[29]

We recognise, however, the force of the arguments by the Powers Committee relating to the varying degrees of constitutional development in the Territories (for example the Australian Capital Territory, Christmas Island or Norfolk Island) and the problem of remote and undeveloped areas in the Northern Territory. It could be argued that Local Government is not necessarily appropriate in some or all of such places, and that to impose a constitutional obligation to establish Local Government there is both unnecessary and onerous. On balance, we consider that it is impossible to treat the Territories as being in a comparable position to the States in this respect, and that it might well become one of the incidents of a Territory becoming a State that it incurred a legal duty in relation to the establishment and maintenance of Local Government. We therefore agree with the minority of the Powers Committee that the alteration which we recommend should be confined to the States.

Third sphere of government. We have come to the conclusion that it is time for the recognition of Local Government as a third sphere of government in the Australian Constitution. Local Government was in existence well before Federation, and it has grown markedly in scope and importance since then. In 1900, the role of Local Government lay almost entirely in the supply of services to property, particularly in roads, drainage and the collection and disposal of garbage.

In more recent times, however, that role has broadened to cover a wide range of services to people and to the community, especially in the provision of social services, of recreational and sporting facilities, in town planning, the arts, and the environment. Local Government has therefore become an increasingly important part of the structure of government in Australia, and has a legitimate right to be recognised and consulted in the allocation

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[29] id, 7.35, 124.

of responsibilities and resources within the public sector. It is important that the overlapping of functions between the different levels of government should be minimised as far as possible, and loan funding and financial assistance be directed in the most efficient and effective way. On the other hand, Local Government derives its existence, as well as its powers and responsibilities from State Constitutions and is legally and in practice a subordinate form of government.

We agree with the general thrust of the recommendation of the 1985 Brisbane session of the Constitutional Convention, as supported by a wide range of Local Government bodies before the Commission, and in principle by the Trade and National Economic Management Advisory Committee. We believe that recognition in the Australian Constitution in the form proposed will give Local Government the necessary status as a third sphere of government, and the necessary standing to enable it to play its full and legitimate role in the structure of government in Australia, and as an equal partner in consultations about the allocation of responsibilities and resources within that structure.

We also note the proposal by the Centre for Research on Federal Financial Relations, endorsed by the 1985 Brisbane Constitutional Convention, that a Federal Fiscal Council be formed with the task of facilitating joint discussions between the three spheres of government and informed decisions on all aspects of taxation, borrowing, expenditure and grants arrangements, in order to ensure equity and uniformity as far as possible in the provision of government services to Australian citizens regardless of their place of residence.

CHAPTER 9. RIGHTS AND FREEDOMS

INTRODUCTION

It will be clear from a reading of the Constitution and from this Report that the Constitution deals mainly with the structures of government and the powers exercised by the different branches of government, namely, the Parliament, the Executive and the judiciary. Relatively little provision is made in the Constitution for the protection or recognition of the rights and freedoms of groups or individuals in Australia. Certainly there is no comprehensive statement of constitutional rights and freedoms as is found in the constitutions of other comparable federal systems, for example the Constitution of the United States of America and the Canadian Charter of Rights and Freedoms and similar rights in the constitutions of India and the Federal Republic of Germany.

In this Chapter of the Report we consider three provisions of the Constitution which, in broad terms, may be described as guarantees of rights or freedoms.

They are:

(a) the guarantee that a person is entitled to trial by jury for the trial on indictment of federal offences (section 80);

(b) the guarantee that where the Federal Parliament makes laws for the acquisition of property it must provide for 'just terms' (section 51(xxxi); and

(c) the guarantee that the Federal Parliament cannot make laws 'for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion', and the guarantee that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

In each case the limitations on the guarantee will be examined and its extension at a federal, State and Territory level will be considered.[1]

In the Final Report, detailed consideration will be given to the inclusion of statements of guaranteed rights and freedoms in the Constitution. We will there deal with related issues such as whether any such guarantees should be generally stated or whether they should apply only as limitations on the actions of Governments, whether they should be expressed in absolute or qualified terms, and whether there should be some capacity for a Government to 'opt out' of the application of any such guarantees in certain circumstances. The new provisions which we recommend are set out in an Appendix to this Report.

TRIAL BY JURY

Recommendations

We recommend that the Constitution be altered to provide for a right of trial by jury in all cases where the accused is liable to capital punishment, corporal punishment or imprisonment for two years or more, except in cases of trial for contempt of court or the trial of defence force personnel under defence law.

This guarantee should apply to trial by jury of offences against laws of the Commonwealth, States and Territories.

Trial by jury of any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However the court should have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.

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1 Democratic rights are dealt with in Chapter 4 of this Report.

The legislatures of the Commonwealth, the States and self-governing Territories should have the express power to make laws relating to waiver by the accused of trial by jury, the size and composition of juries, and majority verdicts.

These recommendations should be given effect by altering section 80 of the Constitution.

Current position

Section 80 of the Constitution states:

> 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.

The High Court held in 1915 that the section did not apply to proceedings for an offence against the law of a Territory.[2]

The High Court has interpreted section 80 as applicable only to those federal offences which the law requires to be prosecuted on indictment. Federal offences must be created by federal laws which may provide how they are to be prosecuted, for example, on indictment or by summons. The Court has treated section 80 as if it read 'if there is a trial on indictment it shall be by jury'[3] and as leaving it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily.[4]

As a result a guarantee has been reduced to a mere procedural provision. In Kingswell's Case, for example, sections imposing penalties ranging from life imprisonment to a fine not exceeding

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2 The King v Bernasconi (1915) 19 CLR 629.

3 Kingswell v The Queen (Kingswell's Case) (1985) 159 CLR 264, 274.

4 id, 277.

$2,000[5] were held by a majority of the Court not to contravene section 80 on the ground that they did not require the trial to be on indictment.[6] In coming to this conclusion the majority relied on previous decisions ranging from The King v Archdall and Roskruge; Ex parte Carrigan and Brown[7] to Li Chia Hsing v Rankin.[8] Justice Deane thought the previous decisions were wrong and should not be followed.[9]

There can be no doubt that the meaning the Court has placed on section 80, while it may give effect to its language, flouts its intention. When deletion of the clause was sought at the 1897 Convention, its retention was supported 'as a necessary safeguard of individual liberty.'[10] Chief Justice Griffith described section 80 in 1915 as containing 'a fundamental law of the Commonwealth'.[11]

Waiver of trial by jury

The High Court decided in 1986, by a majority of three Justices to two, that where a law of the Commonwealth provides for trial on indictment the accused does not have the right to choose a trial before a Judge alone.[12]

Issues

The following issues arise with respect to trial by jury:

(a) Should the guarantee of trial by jury be extended to offences against laws of the States and Territories?

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5 id, 271.

6 id, 276-7.

7 (1928) 41 CLR 128.

8 (1978) 141 CLR 182.

9 (1985) 159 CLR 264, 298-322.

10 Quick and Garran, 807.

11 The King v Snow (1915) 20 CLR 315, 323.

12 Brown v The Queen (1986) 160 CLR 171.

(b) To which class of offences should the guarantee of trial by jury apply?

(c) Should the guarantee of trial by jury be able to be waived and, if it should, on what conditions may trial by jury be waived?

(d) Is the current provision in section 80 for the jurisdictional venue of jury trials adequate?

(e) Should section 80 make provision for the size and composition of juries and majority verdicts?

Previous proposals for reform

Trial by jury and section 80 of the Constitution have been considered by the Australian Constitutional Convention and Committees advising it.

The following are the proposals that have arisen:

1974: Standing Committee B recommended that section 80 be extended to apply to Territories and States with respect to offences alleged under a law relying for its constitutional authority on section 122 of the Constitution made by the Commonwealth or a Territorial legislature for any purposes for which the Commonwealth might enact legislation under sections 51 or 52 independently of its legislative powers under section 122.[13]

1975: The Convention recommended that the provisions of section 80 should be extended to mainland Territories equally with States where the offence alleged is under a section 122 law made by the Commonwealth or a Territorial legislature and so that the Constitution gives the right to

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13 Report to Executive Committee from Standing Committee B (1 August 1974) in ACC Proc, Melbourne 1975, 14, 16.

the trial on indictment of any offence against any law of a State to be by jury.[14]

1976: The Convention recommended that the Constitution be altered in relation to mainland Territories so that the provisions of section 80 should be extended to such Territories equally with States where the offence alleged is under a section 122 law made by the Commonwealth or a Territorial legislature.[15]

1985: The Judicature Sub-committee rejected the options of either (1) making section 80 a real guarantee of trial by jury or (2) repealing section 80, in favour of recommending no change. The Sub-committee suggested that, in any revision of section 80, the 'venue' provision should be omitted.[16]

Advisory Committees' recommendations

The Rights Committee recommended that section 80 be altered to provide that neither the Commonwealth nor a State shall

> provide for or permit trial without jury for an offence which is punishable by imprisonment for twelve months or more, but may provide for or permit such a trial if a magistrate or a judge so orders upon the application of the accused.[17]

The Judicial Committee recommended:

(a) trial by jury be guaranteed for offences attracting penalties of either capital punishment, corporal punishment or a maximum term of two years of

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14 ACC Proc, Melbourne 1975, 177.

15 ACC Proc, Hobart 1976, 209.

16 Second Report of Judicature Sub-Committee to Standing Committee (May 1985), ACC Proc, Brisbane 1985, vol II, 11-13.

17 Rights Report, 45.

imprisonment or more with the exceptions of contempt of court offences and proceedings against defence force personnel under martial law;

(b) extension of trial by jury to proceedings for offences against the laws of States and Territories subject to the exceptions noted above; and

(c) the legislatures of the Commonwealth, States and Territories be given the power to make laws permitting waiver of jury trial by the accused, laws providing for appeals from convictions and acquittals, and laws regulating the size and composition of the jury and majority verdicts.[18]

Submissions

The dominant view emerging from submissions received by the Constitutional Commission and Advisory Committees in relation to trial by jury may be summarised as follows:

(a) trial by jury is a fundamental right in a democratic society and a fundamental mode of trial in our system of criminal justice;

(b) trial by jury should be guaranteed in cases of serious offences;

(c) the guarantee should extend to offences against the laws of the Commonwealth, States and Territories; and

(d) the legislatures of the Commonwealth, States and Territories should have the power to make laws with respect to the composition and number of jurors and majority verdicts.[19]

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18 Judicial Report, 102-3.

19 The Judicial Report collates and analyses relevant submissions: id, 96-103.

The following views were contained in a minority of submissions:

(a) section 80 should be repealed;

(b) trial by jury should be abolished; and

(c) section 80 should not be extended to the States and Territories.

The Commission received two submissions from State Governments in response to the reports of the Rights and Judicial Committees in relation to trial by jury.

The Queensland Government states:

> Whilst recognising the symbolic and practical importance of the jury in the administration of justice, fetters such as those proposed should never be placed on an elected Government which is in the best position to determine how the interests of the People can be safeguarded.
>
> In our view section 80 serves the dual purpose of enshrining in the Constitution the critical role of the jury whilst allowing the Commonwealth sufficient latitude to fulfil its obligations.[20]

As instances requiring latitude, it cites problems involving 'terrorist offenders', 'major organised crime figures', major fraud and white collar conspiracy trials.

The Queensland Government supports the thrust of the Judicial Committee's recommendations relating to venue for trial, majority verdicts, appeals from acquittals, defence force cases and contempt cases.

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[20] Queensland Government S3069, 25 November 1987.

The Tasmanian Government does not oppose a constitutional guarantee of trial by jury for serious offences. However, it argues that it should retain the ability to stipulate those crimes which should attract the guarantee. It is unacceptable to the Tasmanian Government to have a constitutional guarantee for offences carrying a penalty of two years imprisonment or more as this would disturb the present statutory regime in Tasmania wherein a maximum penalty of 21 years is provided for all criminal offences except murder and treason.[21]

Reasons for recommendations

It is manifest that the intention of those who framed the Constitution has, in respect of section 80, profoundly miscarried. What they intended as a necessary safeguard of individual liberty was, it has transpired, no more than a mere procedural provision. Going as far back as at least the Magna Carta, trial by jury has for centuries been considered as fundamentally important to the liberty of the subject under the rule of law. An exposition of the literature emphasising the historical growth and central significance of trial by jury in common law systems is contained in the judgment of Justice Deane in Kingswell's Case.[22]

He said:

> The guarantee of s. 80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.[23]

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21 Tasmanian Government S1342, 25 March 1987.

22 (1985) 159 CLR 264, 298-307.

23 id, 298.

He referred to 'the fundamental importance of trial by jury to the liberty of the subject under the rule of law'[24] and stated:

> The rationale and the essential function of that guarantee are the protection of the citizen against those who customarily exercise the authority of government: legislators who might seek by their laws to abolish or undermine 'the institution of "trial by jury" with all that was connoted by that phrase in constitutional law and in the common law of England' (per Griffith CJ); administrators who might seek to subvert the due process of law or be, or be thought to be, corrupt or over-zealous in its enforcement; judges who might be, or be thought to be, over-remote from ordinary life, over-censorious or over-responsive to authority.[25]

Trial by jury in serious cases is a basic right intended to be protected by the Constitution. That intention has been defeated due to a choice of language the dangers of which were, it seems, anticipated only by Mr Isaacs.[26]

We think that that failure should now be rectified. We accordingly **recommend** that section 80 should provide that in the case of all offences punishable by capital or corporal punishment or by imprisonment for two years or more the trial should be by jury. We would exclude trials for contempt of court and the trial of defence force personnel under defence law.

Guarantee of trial by jury for serious offences

In coming to the view that the constitutional guarantee of trial by jury should apply to offences carrying a maximum penalty of two years imprisonment or more (subject to exceptions considered below) we had to decide between the recommendation of the Rights Committee that the guarantee apply to offences carrying a maximum penalty of one year or more and the recommendation of the Judicial Committee which was ultimately followed.

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24 id, 300.

25 ibid.

26 Quick and Garran, 808.

The Rights Committee recommendation, representing the views of many who made submissions, was not rejected lightly.

That Committee forcefully argued

> that any case in which a person may be imprisoned for one year or more is a 'serious case' and that no person should be imprisoned, even for a relatively shorter period, without having had the benefit of the right to trial by jury.[27]

On the same point the Judicial Committee argued:

> Despite submissions which considered that liability to more than 6 or 12 months imprisonment should attract the guarantee, the most practical line to draw is liability to more than 2 years imprisonment, which appears to be the general limit of magistrates' jurisdiction in Australia, with very few exceptions. If a lesser period were selected the number of jury trials would be enormous.[28]

Our primary aim of providing a constitutional guarantee is to maintain the current level and availability of jury trials. The Judicial Committee recommendation should accordingly be preferred.

We also **recommend** that trial by jury be guaranteed for offences carrying the penalties of corporal punishment or capital punishment. This follows the recommendation of the Judicial Committee. We wish to cover the possibility of the return of these forms of punishment but not to endorse them.[29]

Exception to the guarantee

We also adopt the recommendation of the Judicial Committee that the guarantee of jury trial should not apply to trials of defence force personnel under defence law and cases of contempt of court.

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27 Rights Report, 45.

28 Judicial Report, 99-100.

29 id, 100.

The 'defence' exception is necessary for discipline of the defence forces in times of peace and war. Contempt of court is better suited to trial before a judge alone rather than by jury.[30]

Guarantee of trial by jury in States and Territories

We adopt the recommendations of the Judicial Committee and the Rights Committee that the guarantee of trial by jury be extended to offences against laws of a State or Territory. This also follows early resolutions of the Australian Constitutional Convention.

The Judicial Committee argues and we accept that:

> Once the view is taken that jury trial is a fundamental individual right there is no reason why it should not extend to trial for serious State and Territory offences, as well as federal offences.[31]

Differences in criminal procedure for offences committed in Federal, State and Territorial jurisdictions are undesirable and could lead to injustice. It would be manifestly unjust were a defendant to be granted a summary trial in State jurisdiction, but a jury trial in the federal jurisdiction, simply because of where the offence is alleged to have occurred. Therefore the guarantee of trial by jury should apply throughout Australia.

Bearing in mind that the rationale and essential function of trial by jury is the protection of the individual against the authority of Government, against administrators who might seek to subvert due process of law or be over-zealous in its enforcement and against judges remote from ordinary life or over-responsive to authority,[32] and its widespread popular acceptance, no reason

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30 id, 100-1.

31 id, 100.

32 Kingswell's Case, (1985) 159 CLR 264, 300.

exists to confine the guarantee to offences against federal law. If the right to jury trial is sufficiently important to require constitutional protection, then, unless the Constitution is to be mocked, the protection must be complete.

We have in this connection given close attention to the submissions of the Queensland and Tasmanian Governments and to the careful and thoughtful considerations they advance. Nevertheless, safeguards to due process sanctioned by the practice of centuries must take precedence over both matters of convenience and penalty structures in the criminal statutes of the States.

Waiver of trial by jury

The Judicial Committee recommended that the legislatures of the Commonwealth, States and Territories be given an express power to make laws providing for waiver of trial by jury by the accused. No contrary submissions were received. Such an alteration would allow the respective legislatures to overcome the 1986 High Court decision that an accused charged with a federal offence may not waive trial by jury.[33]

We agree with the Committee that the conditions under which trial by jury may be waived are details which ought not be in the Constitution, being matters more appropriate for the Parliament.

Venue for trial by jury

We **recommend** that section 80 be altered to specify the procedure for determining the venue for trial by jury. There should be no possibility of the Parliament permitting the Crown to choose a venue where it believes that a conviction is most easily secured. Whilst we agree with the Judicial Committee that the present section 80 does not cover offences in more than one place or in a

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33 Brown v The Queen (1986) 160 CLR 171.

place or places unknown, we disagree with the Committee that the present constitutional provision for venue be altogether omitted.

In our view the venue provision in section 80 should be altered to:

(a) let Parliament make laws to determine venue where the alleged offence did not simply occur in one jurisdiction such as an offence in two or more jurisdictions or in a place or places unknown; and

(b) provide flexibility for the court to change the venue for trial where appropriate.

Nevertheless the current provision in section 80 that jury trials should be in the jurisdiction where the offence occurred should be retained subject to a contrary direction from the court.

Composition and size of jury and majority verdicts

We agree with the Judicial Committee that, first,

> Criticisms of particular aspects of jury trial, to the extent that they are valid, can be met by specific measures of reform, without abandoning the fundamental principle of jury trial.[34]

and, secondly,

> to recommend changes to s 80 which will allow the Parliament full opportunity to enact laws to overcome present or future problems relating to jury trials...[35]

Failure so to provide leaves open the possibility that section 80 will be interpreted to allow only juries in the common law sense,

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[34] Judicial Report, 98.

[35] id, 101.

namely, a randomly selected, unbiassed jury of twelve who must be unanimous before a guilty verdict may be entered. Accordingly section 80 should be altered expressly to allow the legislatures to make laws with respect to the size and composition of juries and majority verdicts.

Trial by jury and the Chapter on rights and freedoms

An important feature of our proposals relating to trial by jury is that it is deliberately left outside the Chapter on rights and freedoms which we elsewhere recommend.[36]

The significance of this exclusion is that the Chapter on rights and freedoms includes a provision to the effect that all rights in the Chapter are qualified by any law which is demonstrably justifiable in a free and democratic society. We do not believe that such a qualification is needed in relation to trial by jury because our proposal contains such qualifications as we consider to be appropriate.

Summary of recommendations and reasons

Section 80 of the Constitution should be altered to guarantee trial by jury for serious offences against laws of the Commonwealth, States and Territories. The section should be altered to ameliorate problems which may arise with respect to the venue for trial. The legislatures of the Commonwealth, States and Territories should have the express power to make laws with respect to waiver of trial by jury, the size and composition of juries and majority verdicts.

A guarantee of trial by jury would both entrench a fundamental right and be in the interest of justice and the community. It should be extended to the States and Territories.

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[36] See Chapter 9 of the Final Report.

PROPERTY RIGHTS

Recommendations

We **recommend** that the Constitution be altered to ensure that:

(i) a law of a State may not provide for the acquisition of property from any person except on just terms, and

(ii) a law made for the government of any Territory (under section 122) or a law of a Territory may not provide for the acquisition of property from any person except on just terms.

Current position

Section 51(xxxi.) of the Constitution gives the Federal Parliament power to make laws with respect to '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'. The power is subject to two express constraints. First, the Commonwealth can only legislate for the acquisition of property for particular purposes. Secondly, where property is acquired in or from a State the Commonwealth must provide compensation amounting to 'just terms'.

The provision was included in the Constitution to make certain that the Commonwealth possessed a power compulsorily to acquire property, particularly from the States. The condition 'on just terms' was included to prevent the arbitrary exercise of the power at the expense of a State or a person. Although the provision does not confer upon any person an enforceable right to claim just terms in respect of an acquisition of property, its effect is that a law which provides for an acquisition of property otherwise than on just terms is invalid.[37]

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[37] Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 289 (Deane J). See also Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 285 (Starke J), 290-1 (Dixon J).

'Just Terms'. The expression 'just terms' is not a precise one. The standard to be applied has been described as 'one of fair dealing between the Australian nation and an Australian State or individual'[38] and as whether 'the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property'.[39]

What is 'just' will depend on a range of circumstances. For example, what is just as between the Commonwealth and a State (that is, two Governments) may depend on special considerations not applicable to an individual. Also, the fact that a law must be fair and just as between an individual or a State and the federal government does not mean that the interests of the public or of the Commonwealth must be disregarded. Justice involves consideration of the interests of the community as well as of the person whose property is acquired.[40]

Where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the court will examine the nature and extent of a claimant's entitlement under that procedure and the nature of the procedure itself in deciding whether the acquisition for which the law provides is 'on just terms'.[41]

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38 Nelungaloo Pty Ltd v The Commonwealth (1952) 85 CLR 545, 600 (Kitto J); quoted with approval in Commonwealth v Tasmania (1983) 158 CLR 1, 291 (Deane J).

39 Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 290 (Dixon J).

40 Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 280 (Latham CJ), 291 (Dixon J).

41 Commonwealth v Tasmania (1983) 158 CLR 1, 290-1 (Deane J).

The Federal Parliament has a discretion to enact the just terms which it thinks ought to be part of any law made under section 51(xxxi.). If they might reasonably be regarded as just terms, there is no ground for a court to decide that the law is constitutionally invalid, even if the court might have thought that other terms would appear to be fairer.[42]

Acquisition of property under State laws. There is no constitutional obligation for State laws to provide just terms for the acquisition of property. As the High Court has said, States 'may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'[43] and 'however hard or unjust it may be considered, there is nothing in s. 51(xxxi.) to restrain the power of the State'.[44]

A recent example of the lack of a guaranteed right of compensation in the States is found in the Coal Acquisition Act 1981 (NSW) under which all coal[45] in New South Wales was vested in the Crown. Coal had been owned previously by some private land owners. The Act provides that the Governor 'may make arrangements' for 'the determination of the cases, if any, in which compensation is to be payable' and for 'the determination of the amount and method of payment of any such compensation'. Except for those cases, however, the Act provides that 'compensation is not payable as a result of the enactment of this Act.'[46]

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42 Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 279-80 (Latham CJ), 290-1 (Dixon J), 294-5 (McTiernan J), and Starke J at 285 restating the view he expressed in Minister of State for the Army v Dalziel (1944) 68 CLR 261, 291; Commonwealth v Tasmania (1983) 158 CLR 1, 289 (Deane J).

43 PJ Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382, 397-8, also 405 (Latham CJ).

44 id, 412 (Dixon J). See also Pye v Renshaw (1951) 84 CLR 58, 79-80 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

45 'Coal' was defined to mean 'coal within the meaning of the Coal Mining Act, 1973, that is in a natural state on or below the surface of any land to which the legislative power of the State extends': section 3.

46 Section 6, Coal Acquisition Act 1981 (NSW).

Because the States are free from constitutional restriction, it is at times possible for the Commonwealth to avoid its obligation to provide just terms by making an arrangement with a State. Instead of acquiring the property itself, the Commonwealth may make a financial grant to the State and the State may then use this grant to acquire the property on other than just terms for a purpose which the Commonwealth wishes to foster.

This happened in the case of a soldier settlement scheme following World War II. Although the federal legislation was held to be invalid[47] the amended State legislation was upheld by the High Court.[48]

Acquisition of property in the Territories. The limitations of the present provision are also illustrated by reference to the position in the Territories, particularly the Northern Territory. In 1969 the High Court decided that the constitutional power to make laws for the government of a Territory of the Commonwealth (including the Australian Capital Territory, the Northern Territory or any other Territory) includes a power akin to that possessed by the States to make laws for the compulsory acquisition of property. Because the power is not limited or

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47 Under a 1945 agreement between the Commonwealth of Australia and the States of New South Wales, Victoria and Queensland, arrangements were made for the settlement of discharged members of the Defence Force and other eligible people on land resumed or otherwise acquired by the States. The States were to acquire the land at a value not exceeding that determined in a ruling in February 1942. The Commonwealth was required to provide for the payment of money to the States and to people settling on the land. The agreement was authorized in the War Service Land Settlement Agreements Act 1945 (Cth) and in State legislation. A challenge was made to the federal and New South Wales legislation. In 1949 the High Court held, by a majority (Latham CJ, Rich, Williams and Webb JJ; Dixon and McTiernan JJ dissenting) that the federal legislation was invalid because it was legislation with respect to the acquisition of property upon terms which were not just. Consequently the relevant New South Wales legislation, although not invalid, was inoperative so far as it related to the agreement with the Commonwealth: PJ Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382.

48 Pye v Renshaw (1951) 84 CLR 58.

qualified by section 51(xxxi.), the Commonwealth is not required to provide just terms when acquiring property from a Territory or from a person in a Territory.[49]

The grant of self-government and the creation in 1978 of the Northern Territory of Australia as a body politic under the Crown was accompanied by a number of changes to the law regulating the acquisition of property there. Because the broad legislative power given to the Legislative Assembly 'does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms',[50] the Northern Territory is obliged (under federal legislation) to provide just terms, even though States are not. The Northern Territory (Self-Government) Act 1978 also provided that (subject to an exception involving certain pre-existing interests of the Commonwealth in land in the Northern Territory)

> the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.[51]

Thus, as a matter of policy rather than constitutional necessity, the Federal Parliament has legislated for the Commonwealth to provide just terms where land is acquired in the Northern Territory. In 1978 the Lands Acquisition Act 1955 (Cth) was amended so that the Northern Territory would be regarded as if it were a State for the purposes of the application of that Act.[52] Statutory exceptions to this general rule have been made for the purposes of the Aboriginal Land Rights (Northern Territory) Act 1976, under which title to certain categories of land can be granted by the Commonwealth to Aboriginal Land Trusts for the benefit of relevant Aboriginals.

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49 Teori Tau v Commonwealth (1969) 119 CLR 564.

50 Northern Territory (Self-Government) Act 1978 (Cth), sections 6, 50(1).

51 id, sections 50(2), 69, 70.

52 Lands Acquisition Act 1955, section 5AA.

In 1978 the Land Rights Act was amended to provide that, notwithstanding any law of the Commonwealth or of the Northern Territory, 'the Commonwealth is not liable to pay to the Northern Territory any compensation by reason of the making of a grant to a Land Trust of Crown land that is vested in the Northern Territory' (emphasis added).[53] Similarly, where federal legislation was required to vary the boundaries of one Aboriginal Land Trust and to validate the proclamation of the Uluru (Ayers Rock - Mount Olga) National Park before title to the land could be given to another Aboriginal Land Trust, it was provided that 'the Commonwealth is not liable to pay compensation to any person by reason of the enactment' of that legislation (emphasis added).[54]

In summary, the Constitution requires that federal laws made for the acquisition of property must provide for just terms where property is acquired from a State or from a person in a State. The Constitution contains no such requirement with respect to:

(a) federal laws for the acquisition of property in a Territory;

(b) State laws for the acquisition of property; or

(c) Territorial laws for the acquisition of property.

Issues

Two main issues have emerged in the review of section 51(xxxi.), namely:

(a) whether the Constitution adequately protects an individual whose property is acquired by or on behalf of a Government; and

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53 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), section 3A; see The Queen v Kearney; Ex parte Japanangka (1984) 158 CLR 395, 418-21 (Brennan J).

54 Petermann Aboriginal Land Trust (Boundaries) Act 1985, section 5.

(b) whether the Constitution should provide any exceptions to the rule that the Commonwealth must provide just terms where it acquires property.

Previous proposals for reform

At the Melbourne (1975) session of the Australian Constitutional Convention, delegates from the Australian Capital Territory moved that the Constitution be altered in relation to mainland Territories:

> (a) so as to ensure that the 'just terms' requirement of section 51(xxxi) should be made to extend to any acquisition of property by the Commonwealth in such a Territory or under a section 122 law or by the government of such a Territory.[55]

The motion was amended, on the motion of delegates from the Commonwealth (Mr Whitlam and Mr Enderby) by adding 'and also to extend to any acquisition of property by a State in the State.'[56]

Supporters of the original motion argued that, in considering the position of residents of Territories vis-a-vis the residents of the States, there was 'no rational basis in law for denying Territory residents the same rights which apply to other Australians.'[57] Such an alteration would reverse the effect of the High Court's decision that the Commonwealth is not required to provide just terms when acquiring property from a person in a Territory,[58] and would also ensure that the Commonwealth would have to provide just terms when acquiring property outside a Territory for a purpose connected with the government of the Territory. It was also argued that if it is fair for the Federal Government and Territorial administrations to be subject to the

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55 ACC Proc, Melbourne 1975, xxxvi, 136-9.

56 id, xxxvi.

57 id, 137.

58 Teori Tau v Commonwealth (1969) 119 CLR 564.

provision, it is also fair that the provision should apply to State Governments.[59] The Convention voted, by a majority, to recommend that the Constitution be altered to that effect.[60]

Following reconsideration of the resolution in 1976, the Australian Constitutional Convention in Hobart voted by majority to remove reference to the States and agreed to recommend that the Constitution be altered in relation to mainland Territories in the terms originally proposed.[61]

Advisory Committees' recommendations

Section 51(xxxi.) was considered by the Rights Committee and by the Powers Committee.

Extension of the requirement to provide just terms. The Rights Committee recommended extending the 'just terms' requirement in two ways. First, it recommended that section 51(xxxi.) be altered by adding the words 'including the purposes set forth in section 122'. That is, the Rights Committee recommended that section 51(xxxi.) be altered so that the Commonwealth would have to provide compensation for the acquisition of property in a Territory.[62] Secondly, the Rights Committee recommended the inclusion of a similar section in the Constitution which would apply to the States, namely:

> The power of each State to make laws for the peace, order and good government of the State with respect to the acquisition of property shall be exercised so as to provide just terms for the acquisition of property from any person.[63]

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59 ACC Proc, Melbourne 1975, 140, 144-5, 150-1.

60 id, 151-3, 176.

61 ACC Proc, Hobart 1976, 209.

62 Rights Report, xvii.

63 id, 102.

The Rights Committee recommended these alterations so that the Constitution would contain a comprehensive scheme for 'the basic protection from arbitrary deprivation of property without compensation' which constitutes a 'guarantee of an economic right - the right of ownership of property.'[64]

Procedural protections. The Rights Committee also recommended a constitutional guarantee that a Government should act fairly in the process of acquiring property and referred to many submissions which drew attention to various ways in which people may be deprived arbitrarily of their liberty and management of their property (particularly those involuntarily confined in mental institutions). The Committee recommended a constitutional provision prohibiting the Commonwealth or a State from depriving 'any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice', (emphasis added),[65] a provision whose origins, the Committee said, can be traced back to Magna Carta.[66]

Exception to the requirement to provide just terms. Both Advisory Committees recommended an exception to the 'just terms' requirement of section 51(xxxi.) where property is acquired for Aboriginals. The Rights Committee took the broader approach, recommending that section 51(xxxi.) provide that 'the Commonwealth shall not be obliged to provide just terms for the acquisition of land from a State for the purposes set forth in section 51(xxvi.).' That is, just terms would not have to be provided where land was acquired for 'the benefit of the Aboriginal people and of the Torres Strait Island people'

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64 id, 66.

65 id, 46.

66 Magna Carta, 1297, provided: 29 'No free man shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in any way ruined ... except by the lawful judgment of his peers or by the law of the land.'

(section 51(xxvi.) in the altered form recommended by the Rights Committee).[67] The Powers Committee took a narrower view, recommending that the Constitution be altered

> to ensure that the Commonwealth is not required by the Constitution to compensate State governments in respect of the acquisition of Crown land for aboriginal purposes, where that land has, at any time since Federation, been designated as land reserved for Aboriginals under the laws of any State.[68]

The alteration recommended by the Rights Committee would apply to any land owned by a State. The Rights Report suggests, however, that the Committee was primarily concerned with the 'serious financial burden' which the Commonwealth would have to bear where land which has been occupied by Aboriginal groups as 'reserves' or otherwise for lengthy periods is acquired by the Commonwealth for vesting in such Aboriginal groups.[69] The Powers Committee said that submissions showed support either for an unqualified alteration to exempt acquisitions for Aboriginal purposes from the just terms requirement or for an alteration restricted to the acquisition of non-urban and unalienated Crown land.[70]

The arguments in favour of dispensing with the obligation to compensate State Governments where property is acquired for purposes related to Aboriginal affairs were summarised by the Powers Committee as follows:

- the requirement at present operates as a practical restraint on the ability of the Commonwealth to make just provision in favour of aborigines, eg, in the way of recognizing aboriginal land rights;
- the requirement 'rewards' in a sense the States which fail to make provision for the grant of ownership rights to aboriginal communities;

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67 Rights Report, xvii-xviii, 102-3.

68 Powers Report, para 6.37, 104.

69 Rights Report, 72.

70 Powers Report, para 6.34, 103.

- the transfer of ownership rights in land to aboriginal communities is seen by some as a 'restitution' of their rights since ownership of land was taken away from the aboriginal population as a result of European settlement;

- the ability of the Commonwealth Parliament to provide financial assistance to the States under section 96 is seen as a more flexible and realistic way of providing compensation as between governments.[71]

After considering those and contrary arguments, the Powers Committee concluded that, while a general exemption was not justified, it would be appropriate to exempt from section 51(xxxi.) the acquisition for Aboriginal purposes of land which has been proclaimed an Aboriginal reserve by any State.[72] The Committee mentioned briefly the categories of land which might be brought within the exemption, the links between Aboriginals and land and the history of use and occupation of some areas (particularly land reserved for Aboriginals by States).

The Committee noted that, in some cases, States had altered the boundaries of Aboriginal reserve lands and had excised portions of them. Aboriginal occupants had been removed from reserves. Because Aboriginals had no legal title to the land, they were not compensated for the loss they suffered as a consequence of such Executive actions.[73]

The majority of the Powers Committee was of the view that, in respect of lands which at some time since Federation have been

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71 id, para 6.49, 106; see also para 6.34, 103.

72 id, para 6.51, 107.

73 id, para 6.52-4, 107. The Committee noted, as examples, action taken by the South Australian Government in the case of Point Pearce Reserve in the 1950s and by the Queensland Government in the case of Aurukun and Mornington Island Reserves in 1979. We also note that in 1983 the New South Wales Parliament enacted legislation which deemed the revocation of certain Aboriginal reserves to have been validly effected in order to overcome possible invalidity in actions previously taken: Crown Lands (Validation of Revocations) Act 1983 (NSW).

reserved for Aboriginals under the laws of the States, there can be no reasonable claim by the States to compensation for their acquisition by the Commonwealth for Aboriginal purposes. Moreover, the States should not be in a position to put obstacles in the way of acquisition by the Commonwealth by removing a reservation of the land for Aboriginals in order to affect the compensation payable.[74] The Committee recommended the exception to the guarantee in section 51(xxxi.) because it was a matter which was seen as being inextricably connected with the practical operation of the present power to make laws with respect to Aboriginals.[75]

Submissions

A number of submissions were received favouring the inclusion of a guarantee of the right to own property in the Constitution.[76] One person submitted that there should be no compulsory acquisition of property,[77] while others said that the power to acquire property should be limited to cases of national crisis (such as war) or where property had been illegally obtained,[78] or that the power should be exercised 'under law with the principle of justice and commonsense'.[79]

Others suggested that the requirement to provide just terms be

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74 id, para 6.55, 108.

75 id, para 6.58, 109.

76 eg J Zonius S469, 13 November 1986; S Hamilton S514, 16 November 1986; C Matthews S609, 27 November 1986; Australians for Individual Rights S904, 10 February 1987; PC Bingham S1138, 6 March 1987; G Gower S2808, 6 October 1987; H Veersema S2766, 22 October 1987; GW and IA Potts (who suggested a right to the 'peaceful enjoyment of property') S2863, 31 October 1987.

77 C Matthews S609, 27 November 1986.

78 MJ Fitzpatrick S570, 17 November 1986.

79 J Jones S2909, 26 October 1987.

extended to apply to State and Territorial Governments, Local Government and to any semi-government or statutory body.[80]

The Freehold Rights Association considered that the power of the Government to acquire private property should be further limited so that a State would have to provide just terms for the acquisition of property from any person, and so that any acquisition could only proceed after an independent inquiry had confirmed the justification for the acquisition.[81]

Aboriginal land rights. A number of submissions were received concerning property rights for particular groups, particularly land rights for Aboriginals. We will deal with such rights elsewhere in Chapters 9 and 10 of the Final Report.

Submissions were made on the two Advisory Committees' recommendations that the Commonwealth should not have to provide compensation where certain land is acquired from a State for Aboriginals.[82] The Queensland Government opposed any recommendation to remove the constitutional requirement in cases where the Commonwealth acquires land in a State for Aboriginal purposes.[83] The Queensland Government was particularly critical of the broadly expressed recommendation of the Rights Committee

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80 eg Soroptomist International of the South West Pacific S3059, 19 November 1987; Citizens for Democracy S2235, 15 June 1987; S Taylour S1386, 2 April 1987; P Philippa S270, 18 September 1986; N Forbes S2591, 20 December 1987; Mrs Elizabeth Mitchell S2594, 22 December 1987; Ian MacKinnon S3249, 11 February 1988; Ms Gwen M Jones S3291, 23 February 1987; Mrs V Guest S3313, 1 March 1988; Ian Robertson S2720, 19 October 1987; Members of the National Party of Australia, Queensland, Russell Island S2953, 29 October 1987; S Souter S2656, 7 October 1987; RM Smith S3169, 14 January 1987; AC Stewart S2904, 30 October 1987; Iain C Macpherson S3938, 11 November 1987; WHJ Phillips S3031, 5 November 1987; Mr A Richardson S2915, 29 October 1987; R Chandler S2881, 28 October 1987; John W Bradbury S2869, 2 November 1987; Colin S Tory S2736, 22 October 1987.

81 S2443, 1 September 1987.

82 eg AC Stewart S2904, 30 October 1987 opposed the proposal; WHJ Phillips S3031, 5 November 1987 supported it.

83 S3069, 17 November 1987; S3172 16 December 1987.

which, it submitted, 'strikes at the very heart of federalism' because it would give the Federal Government power 'to unilaterally deprive another Government of its property without reasons, without compensation, without safeguards and without negotiations.'[84] It endorsed the arguments in favour of retaining the present position set out in the report of the Powers Committee.[85]

In its submission, [S2493, 12 September 1987.] the Northern Territory Government noted that, under the Northern Territory (Self-Government) Act 1978, it is bound to pay just terms for the acquisition of private property. The Government said that a similar provision may be included in its constitution if the Northern Territory becomes a State. It submitted that the same requirement should apply 'to the Commonwealth in its acquisition of private property'. Hence the Northern Territory Government supported the recommendation made to that effect by the Rights Committee.

The Government opposed, however, the Rights Committee's recommendation that compensation not be payable where the Commonwealth acquires land from a State Government for the purposes of benefiting Aboriginals and Torres Strait Islanders. Its position, it said, 'has long been that all Crown land acquired for Commonwealth purposes (including land acquired for Aboriginal people) should require compensation to be paid to the Northern Territory Government (or a new State Government).' In its opinion, the Northern Territory should be placed in a similar position as currently exists in the States.

Reasons for recommendations

Extension of the requirement to provide just terms. For reasons outlined earlier in this Report[86] we believe that the

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84 S3069, 17 November 1987, 38.

85 Powers Report, 6.50, 107.

86 Chapter 2 under the heading 'The Constitution and State systems of government'.

constitutional requirement of just terms in legislation for the acquisition of property should apply to other laws for the acquisition of property by Governments from any persons wherever they live in Australia. It is only fair that persons should be justly compensated where their property is acquired by a Government, whether it be Federal, State or Territorial.

Furthermore, we can see no compelling reason why other Governments should not be subject to the same constitutional requirements as apply to the Commonwealth. As we noted earlier, a Parliament would have some discretion in the amount of or procedure for determining 'just terms' and, in deciding whether a law was valid, a court would have regard to the interests of the community as well as of the person whose property is acquired. The interpretations of section 51(xxxi.) to date show that it is flexible enough in its operation to ensure that the Federal Parliament can enact laws which it reasonably thinks are just and that persons whose property is acquired under such laws are not treated unjustly. For that reason, the alterations which we recommend are in substantially the same terms as section 51(xxxi.).

Our recommendation relating to acquisition in a Territory is confined to acquisition from 'any person'. We have not included acquisition from 'any Territory', where a Government of a Territory as a body politic has been established. The recommended provision is, therefore, in contrast with section 51 (xxxi.) which refers to acquisition from 'any State or person'. In contrast with the States, the Territories are dependencies of the Commonwealth and their Governments are the creatures of federal law, made under section 122. The legislative, executive and judicial powers of a Territory are such as federal law provides. Those powers of self-government will vary from Territory to Territory and, in respect of each Territory, from time to time. In most cases, the initial property of the Territory will have been transferred to it from the Comnonwealth.

It is not possible to determine in advance the occasions when 'just terms' would be appropriate for a Federal acquisition of property belong to a Territorial Government. In our view, it is a matter to be resolved between the Commonwealth and a Territory as the Territory moves towards Statehood or acquires a greater degree of self-government. The example of the Northern Territory, referred to above, shows how suitable arrangements can be made under existing constitutional provisions.

Procedural protections. We have decided not to **recommend** the addition of an express provision ensuring that a Government shall not deprive a person of property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[87] In our view, such a provision is not only unnecessary, but inapt to give appropriate constitutional protection to the legitimate interests of persons whose property is compulsorily acquired, or even destroyed, by governmental acts. It is, we believe, far less apt for that purpose than a just terms requirement of the kind found in section 51(xxxi.) of the Constitution.

The constitutional guarantee proposed by the Committee would inhibit the powers of Governments to deprive people of their property only as regards the procedures to be followed in taking or destroying property. So long as those procedures were prescribed by law and complied with the principles of fairness and natural justice, a person would have no constitutional grounds for complaint, even though no compensation was paid or payable to that person. As presently understood, procedural fairness, or natural justice, requires only that certain minimum standards be observed in the processes of reaching decisions of certain kinds. The principal requirement is that a person who stands to be adversely affected, or to have legitimate expectations disappointed, by the exercise of some power shall be afforded an opportunity of being heard before the power is

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87 Rights Report, 46.

exercised. There is, however, no requirement that the ultimate decision be fair or just.

It seems to us that the concept of just terms embodied in section 51(xxxi.) of the Constitution, as it has been interpreted by the High Court, provides a much more satisfactory solution to the problem with which the Committee was concerned than a constitutional guarantee in the terms the Committee proposed.

The requirement that federal legislation for the acquisition of property provide for just terms implies not only that the amount payable be fair but also that the procedure by which compensation is determined is also fair. To a large extent it is left to the Parliament to determine what procedures are appropriate. However the court could hold such legislation to be invalid if it is such that a reasonable man could not regard the terms of acquisition as being just.[88] As Deane J said:

> where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the Court will examine the nature and extent of the entitlement of a claimant under the procedure established and the nature of the procedure itself in deciding whether the acquisition for which the law provides is 'on just terms'.[89]

Exception to the requirement to provide just terms. Having carefully considered the arguments in favour of excluding the 'just terms' requirement in certain circumstances where the Commonwealth acquires land for Aboriginals, we have decided not to recommend such an alteration. We consider that such an exception to section 51(xxxi.) would be wrong in principle. In our view the principle in section 51(xxxi.) is important and should be extended to the benefit of all people who own property in each State and Territory. It is a protection against the

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88 Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 279-80 (Latham CJ), see also 290 (Dixon J), 295 (McTiernan J); Commonwealth v Tasmania (1983) 158 CLR 1, 289 (Deane J).

89 Commonwealth v Tasmania (1983) 158 CLR 1, 290. See also 290-2 where he applied the principle to the provisions in that case and decided that they were invalid.

arbitrary and unjust acquisition of property by Government at any level and should not be diminished.

In any event, there may be no need for such an alteration. Concern was expressed in submissions to the Rights Committee and to the Powers Committee that the Commonwealth is reluctant to legislate to acquire land in the States for Aboriginals, in part, at least, because it fears that the cost of providing just terms would be prohibitive. There has been no judicial decision on this matter. But in our view, bearing in mind the factors mentioned above, a court would be likely to decide that relatively little compensation would be payable to the State if the Commonwealth were to acquire land which is reserved for and occupied by Aboriginals or Torres Strait Islanders and if the purpose of the acquisition were to ensure that they should use, occupy and even own that land. Similarly, given that what is just between the Commonwealth and a State may depend on special considerations not applicable to an individual, an acquisition of some vacant Crown land in a State may not be subject to substantial compensation requirements.

On the other hand we do not think it is reasonable to suggest that, where land is now in private ownership or has had substantial improvements made to it by a State, the Commonwealth should be able to avoid paying what is just in all the circumstances only because the purpose of the acquisition is meritorious. Needless to say, the Commonwealth would assert that most, if not all, acquisitions of property by it are for worthwhile purposes. But it would not be seriously suggested that the amount of compensation payable to a person should be substantially diminished, or even that no compensation should be payable, only because the purpose of the acquisition was worthwhile.

This recommendation and the reasons for it should not be taken to suggest that we oppose a fair and equitable program of land rights for Aboriginals. Rather, we consider that such a program can be developed within the existing constitutional framework.

We note that, had we recommended an alteration similar to that suggested by the Rights Committee and the Powers Committee (for example that the just terms requirement would not apply where the Commonwealth acquired land in a State which is an Aboriginal reserve for the benefit of Aboriginals) the direct benefit to Aboriginals would have been limited. While some Aboriginal groups might have been granted more secure title to that land, many other groups, and the majority of Aboriginals, could not benefit and the scheme could be seen as arbitrary. Furthermore the potential for its use would, in terms of the land involved, operate quite unevenly around Australia. In some States relatively small areas would be affected, while in other States very large areas would be affected. In practical terms that could add to tensions already apparent in some communities.

FREEDOM OF RELIGION

Recommendation

We **recommend** the alteration of section 116 of the Constitution so that the guarantees of freedom of religion therein shall apply to the Commonwealth, States and Territories.

We further **recommend** the omission of the words 'make any law' from section 116 of the Constitution in order to give the provision operation beyond the making of a statute.

Section 116 as altered would provide:

> The Commonwealth, a State or a Territory shall not establish any religion, impose any religious observance or prohibit 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, a State or a Territory.

Current position

Section 116 of the Constitution provides:

> 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.

Section 116 is modelled on provisions in the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...[90]
>
> ...no religious test shall ever be required as a qualification to any office or public trust under the United States.[91]

Section 116 applies only to the Commonwealth. Of the States, only Tasmania has a guarantee of religious freedom in its Constitution[92] and this provision may be repealed by the State Parliament.

Historical note. Although section 116 restricts only the Parliament of the Commonwealth, it appears in Chapter V of the Constitution which is headed 'The States'. The reason is that the original clause in the 1891 draft Constitution applied only to the States.[93] This prohibition against State legislation was omitted at the Melbourne session of the Convention in 1898, on the ground that it was an unwarranted invasion of the legislative powers of the future States.[94] Henry Bournes Higgins, Victorian delegate and future High Court judge, argued successfully for the restriction on federal power. He maintained, on the basis of what he said was American experience, that without a suitable restriction on the power of the Commonwealth, the mention of

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90 The Constitution of the United States, Amendment 1.

91 The Constitution of the United States, Article 6, section 3.

92 Section 46 of the Constitution Act 1934 (Tas).

93 Quick and Garran, 951.

94 CL Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 Melbourne University Law Review 54.

'Almighty God' in the preamble might result in the High Court holding that the Commonwealth could make laws about religion.[95]

The scope of section 116. In our view, section 116 of the Constitution is a provision of high importance. It guarantees a fundamental freedom. As Mason ACJ and Brennan J said in The Church of the New Faith v Commissioner of Pay-Roll Tax (Vict) (Scientology Case) (1983):

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject-matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[96]

Section 116 is concerned with both the toleration of all religions and the toleration of absence of religion.[97] Moreover, it is concerned essentially with the protection of the individual's right to freedom of belief and conscience. Acting Chief Justice Mason and Brennan J went on to say:

> Protection is not accorded to safeguard the tenets of each religion; no such protection can be given by the law, and it would be contradictory of the law to protect at once the tenets of different religions which are incompatible with one another. Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of

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95 JA La Nauze, The Making of the Australian Constitution (1972) 229. For a full account of the historical background to section 116 see R Ely, Unto God and Caesar: Religious issues in the emerging Commonwealth 1891-1906 (1976).

96 154 CLR 120, 130.

97 Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (Jehovah's Witnesses Case) (1943) 67 CLR 116, 123 (Latham CJ).

> religious beliefs which are within the area of legal immunity is not restricted.[98]

Section 116 contains one of the few individual guarantees of rights and freedoms that are expressly provided for in the Constitution. It embodies four separate concepts:

(a) establishing any religion;
(b) imposing any religious observance;
(c) freely exercising any religion; and
(d) requiring any religious test.

The section restricts only the power to 'make any law'. It does not expressly apply to the exercise of executive power. Section 116 could apply, however, to a federal law which authorised Executive action to do anything prohibited by section 116.[99]

In order to come within that purview of section 116 the law must be '<u>for</u>' 'establishing' 'imposing' or 'prohibiting'. This has raised some problem as to what Barwick CJ has called 'the purposive content' of the provision[100] and whether the purpose may be determined from its effect or result.[101]

In the <u>DOGS Case</u>, the first prohibition - establishing any religion - was given a fairly narrow meaning, namely the creation of a State religion. The Court (Murphy J dissenting) rejected the broad meaning given to that phrase in the United States, where it has been held to require 'a wall of separation' between church and State. It was held, therefore, that provision for

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98 154 CLR 120, 132.

99 <u>Attorney-General (Vict); Ex rel Black v Commonwealth</u> (<u>DOGS Case</u>) (1981) 146 CLR 559, 580-1 (Barwick CJ).

100 146 CLR 559, 581.

101 Gibbs J in the <u>DOGS Case</u> referred to 'purpose or effect', 146 CLR 559, 604; Mason J referred to 'purpose or result', 615; see also <u>Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association</u> (<u>Lebanese Moslem Case</u>) (1987) 71 ALR 578, 593 (Jackson J).

financial assistance for private schools was not in breach of section 116.

It does not follow, however, that the Court would give a narrow construction to the restrictions against imposing any religious observance or prohibiting the free exercise of any religion. As Gibbs J has pointed out, the latter restrictions, unlike the establishment clause, had the purpose 'of protecting a fundamental human right'.[102] In interpreting the meaning of 'religion' in other contexts, but bearing in mind section 116, a number of High Court judges have been conscious of the need to define the term having regard to the object of section 116 in granting religious freedom.[103]

Like all freedoms, however, freedom of religion cannot be absolute. It must be qualified at times by other social interests and freedoms.[104]

Whether section 116 applies to laws made under section 122 for government of the Territories is doubtful.[105] It is clear, however, that section 116 does not apply to State laws. In Grace Bible Church v Reedman (Grace Bible Church Case)[106], the Supreme Court of South Australia declared that no right of religious freedom existed under the common law. The doctrine of

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102 146 CLR 559, 603.

103 Scientology Case (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J), 174 (Wilson and Deane JJ), 151 (Murphy J).

104 Scientology Case (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J); Jehovah's Witnesses Case (1943) 67 CLR 116. The latter case and some cases before it have been criticised on the ground that the Court adopted rather broad criteria to describe the qualifications that were permissible on religious freedom. As indicated above, however, judges in recent times have indicated that they place greater importance on this guarantee.

105 The High Court, in Teori Tau v Commonwealth (1969) 119 CLR 564 suggested that section 116 did apply to Territory laws, but Gibbs J in the DOGS Case (1981) 146 CLR 559, 593 indicated that he found that difficult to accept.

106 (1984) 54 ALR 571.

parliamentary supremacy meant that citizens did not have rights which could not be overridden by Parliament.[107] Mr Justice White concluded: 'It takes something as powerful as a constitutional provision such as[108] to restrict the power of the Parliament.'[109]

Issues

Five main issues concerning section 116 arise:

(a) Are the religious freedoms of Australians adequately protected under the common law in the States?

(b) Is it appropriate to extend the guarantees in section 116 to the States?

(c) Would the proposed alteration to section 116 produce any problems in the States regarding the distinction between educational and religious activities?

(d) Is it important to include the Territories in the section?

(e) Should the operation of section 116 be extended beyond the making of a statute?

Previous proposals for reform

Constitutional referendum. Among the 17 matters put to referendum in the Post-war Reconstruction and Democratic Rights proposal in 1944 was that section 116 of the Constitution 'shall apply to and in relation to every State in like manner as it applies to and in relation to the Commonwealth.' The proposed provisions were to continue in force until the expiration of a

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107 id, 579 (Zelling J), 581 (White J), 585 (Millhouse J).

108 section 116.

109 id, 581.

period of five years from the date upon which Australia ceased to be engaged in hostilities in World War II. The proposal was approved by 45.99% of all electors and by a majority of electors in South Australia and Western Australia.

Australian Constitutional Convention. Section 116 was referred to Standing Committee B at Sydney in 1973. It recommended that the section be altered so as to have application in the Territories. At the Melbourne (1975) session Dr Letts (NT) proposed the motion:

> That this Convention recommends that the Constitution be amended in relation to mainland Territories so as to ensure that the provisions of section 116 apply in such Territories.[110]

The Hon EG Whitlam proposed that the following words be added to the motion:

> and in relation to the States, so as to ensure that the provisions of that section apply to the laws of the States.[111]

Debate on the matter was deferred till the next session of the Convention.

At Hobart in 1976 Mr Pead (ACT) proposed the motion:

> the Constitution be amended in relation to mainland Territories so as to ensure that the provisions of section 116 apply in such Territories and, in relation to the States, so as to ensure that the provisions of that section apply to the laws of the States.[112]

Mr Maddison (NSW) proposed the following amendment to the motion:

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[110] ACC Proc, Melbourne 1975, 127.

[111] id, 128.

[112] ACC Proc, Hobart 1976, 178.

> That the words 'and, in relation to the States, so as to ensure that the provision of that section apply to the laws of the States', be omitted.[113]

The uncertainty concerning the application of section 116 to the Territories was discussed. There was wide agreement that the question should be put beyond doubt and that section 116 should be altered accordingly.

The proposed extension of section 116 to the States was more controversial. Attorney-General Durack, speaking on behalf of the Federal Government, said he was concerned that the section as altered could be 'interpreted in such a way as to affect the provision of State aid to independent schools.' The fear was that the High Court could give a wide interpretation to the establishment clause.[114] This concern was resolved by the High Court in the DOGS Case in 1981.

The amendment was negatived. The motion was carried by 45 votes to 33.

Advisory Committee's recommendation

The Rights Committee recommended that section 116 of the Constitution be altered to read:

> 116. The Commonwealth or a State shall not establish any religion, or impose any religious observance, or prohibit 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 or a State.[115]

The Advisory Committee recognised that freedom of religion is

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[113] id, 179.

[114] id, 180. Attorney-General Durack also expressed concern regarding the extension of section 116 to the Territories.

[115] Rights Report, 53.

generally enjoyed in Australia.[116] But it noted cases, including the Lebanese Moslem Case (1987) and the Grace Bible Church Case (1984), which in its view highlighted the precarious nature of that freedom under the common law. The Committee recommended the extension of section 116 to the States.

In doing so, the Advisory Committee recognised the possible implications such an extension could have on other legitimate State activities, particularly in the field of education.[117] However, the Advisory Committee was confident the courts would resolve any problems that might arise.

The Advisory Committee also recommended that a State Parliament be allowed to pass a law so as to 'opt out' of the limitations on its power embodied in the altered section 116.[118]

Further, the Advisory Committee recommended the extension of section 116 to cover all forms of governmental conduct. It stated:

> in order to make it clear that the actions of departmental officials interfering with the conduct of the religious affairs of a congregation would be clearly prohibited, the restraint on power should not be limited merely to the passing of 'laws'.[119]

The Advisory Committee did not recommend the inclusion of express reference to the Territories in section 116. Instead it

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116 id, 9.

117 For example, where a State Education Act requires the registration of schools.

118 id, 37.

119 id, 53.

recommended that the words 'Subject to the Constitution' should be added at commencement of section 122.[120]

Submissions

Section 116 attracted many submissions. Most of these recognised that the freedom to believe or not to believe in a religion is of fundamental importance. The right should be entrenched in the Constitution. Four main arguments were canvassed:

(a) **Freedom of religion is of the essence of a free society and its constitutional guarantee should be extended to the States.** This view was expressed in many submissions representing a wide range of opinions.[121]

The National Jewish Commission on Law and Public Affairs stated: 'Whatever the rationale of the framers of the Constitution in restricting the ambit of section 116 to the Commonwealth, it is submitted that no valid distinction may be maintained in the latter part of the twentieth century, and that there is no good reason why the States too should not be subject to the constitutional safeguards currently enshrined in the section.'[122]

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120 id, 105. The effect would be to dispel the uncertainty relating to the application of section 116 to laws made by the Commonwealth for the government of the Territories under section 122. It is not clear whether the Advisory Committee intended the amended section 116 to apply also to the legislatures of the Territories. However, as these are subordinate legislatures, created originally under section 122, it can be assumed that the amended section 116 would so apply.

121 Church of Scientology S612, 27 November 1986; Business and Professional Women's Club of Albury S743, 16 December 1986; The Brethren S954, 15 December 1986; Queensland Government S3069, 25 November 1987; Anti-Discrimination Board S3077, 20 November 1987; Action Group for Religious Liberty S3204, 4 December 1987; Mr PH Bailey, Deputy Chairman, Human Rights Commission S190, 22 November 1986; The Standing Committee of the Anglican Church, Diocese of Sydney S1426, 3 April 1987.

122 The National Jewish Commission on Law and Public Affairs S792, 19 December 1986.

Some of the submissions contended that the Grace Bible Church Case underlined the need for an alteration of this kind.[123] A submission was also received favouring the extension of section 116 to the Territories.[124]

(b) **Australia is a multi-cultural society and it would be appropriate for the Constitution to prohibit discrimination against the religions of ethnic and other minority groups.** Again, many submissions were received to this effect.[125] Several submissions advocated the inclusion of a sub-clause to section 116 guaranteeing the rights of ethnic religions in Australia.[126]

(c) **While freedom of religion is of fundamental importance, it must operate within reasonable limits prescribed by law.** Many submissions were concerned to protect individuals from abuses of religious freedom. It was argued that individuals should be protected from harassment by religious zealots.[127] The right of the community to defend individuals against cruel and degrading treatment was noted.[128]

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123 The Brethren S954, 15 December 1986; Grace Bible Church S442, 4 November 1986; New South Wales Council for Civil Liberties S400, 25 October 1986.

124 Stephen Souter, S1177 8 March 1987.

125 Ethnic Communities' Council of Queensland Ltd S3278, 8 February 1988; Human Rights Group S1035, 27 February 1987; Italian Federation of Migrant Workers and Families S1241, 7 March 1987; Feminist Legal Action Group S2668, 9 October 1987; J Long, Commissioner for Community Relations S694, 4 December 1986.

126 Denuta Kozaki S926, 16 February 1987; NSW ALP, Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; Hon Franca Arena MLC S895, 3 February 1987; Enosis Chios NSW Ltd S1090, 4 March 1987; Ethnic Communities' Council of NSW S849, 27 January 1987.

127 Megan Sassi S2908, 29 October 1987.

128 J Vander-Wal S905, 5 February 1987.

(d) **Discrimination should not be permitted on the ground of freedom of religion.** In a number of submissions it was argued that the discriminatory attitudes of some religions against women, for example, should not be tolerated,[129] nor should educational standards be compromised for reasons of religious liberty.[130]

Many of the submissions in support of the Advisory Committee's recommendation were qualified. The Queensland Government, for instance, did not agree with the omission of the words 'make any law' on the ground that the Full Federal Court in the Lebanese Moslem Case[131] had already dealt satisfactorily with the scope and reach of section 116. The Queensland Government also noted the need for further consideration of the legal ramifications of the proposed extension of section 116 to the States.[132]

In other submissions it was suggested that the attempt to accommodate all religions, cultures and beliefs could undermine traditional Christian values. The Ascension Life Centre Ministries warned that such an approach could 'lead to confusion and disharmony'.[133] Concern was expressed that too broad a definition of religion could be adopted by the courts.[134] The Council for the Defence of Government Schools proposed an alteration to the establishment clause of section 116 invalidating Government grants to church schools.[135]

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129 Feminist Legal Action Group S2668, 9 October 1987; Western Australia Women's Advisory Council to the Premier S707, 10 December 1986.

130 Rev Imray S1489, 27 March 1987.

131 (1987) 71 ALR 578.

132 The Queensland Government S3069, 25 November 1987. In view of the Grace Bible Church Case (1984), the Queensland Government asked whether the proposed amendment would permit a State to maintain appropriate educational standards.

133 The Ascension Life Centre Ministries S3176, 19 January 1988.

134 Soroptomist International of Cooma S843, 20 January 1987.

135 Council for the Defence of Government Schools S2254, 25 May 1987.

A majority of the submissions favoured an alteration to section 116 of the Constitution broadly in the terms recommended by the Advisory Committee. The submissions suggest that many Australians recognise the need for a powerful constitutional guarantee of religious freedom.

Reasons for recommendation

The values that underlie our political tradition demand that every individual be free to hold and to manifest whatever beliefs and opinions that person's conscience dictates. So long as an individual does not transgress the reasonable limits established in a free and democratic society, his or her freedom of religious belief and practice should not be fettered. Religious freedom is the paradigm freedom of conscience.

We believe that the guarantee of that freedom should be consistent throughout the federation. The same standards should apply in every place and to every Government. There is no case for variation where such a basic human liberty is concerned. We agree with the view expressed by the Victorian delegation at the Hobart (1976) session of the Australian Constitutional Convention to the effect that it is pressing States' rights too far to say that the States should make their own decisions about religious freedom.[136]

The reasons the Framers of the Constitution had for limiting section 116 to the Commonwealth are no longer compelling. It should be borne in mind that Australian society has changed markedly since Federation. Its ethnic mixture is now far richer. As a consequence, the need for a constitutional guarantee of religious freedom is arguably greater. Australian society is mostly tolerant. Widespread religious discrimination is not an imminent or constant threat. However, the common law does not protect religious freedom and section 116, as altered in the way we recommend, would offer to all Australians a powerful safeguard of their right to freedom of religion.

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[136] ACC Proc, Hobart 1976, 179.

We have explained that one purpose of the proposed alteration is to clarify areas of uncertainty under section 116. We agree with the Advisory Committee that the omission of the words 'make any law' is required to remove any doubt regarding the section's application to governmental actions of an Executive and administrative kind. The proposed alterations would also remove the uncertainty that has existed regarding the operation of section 116 in the Territories.

Deletion of the word 'for' from the establishment clause would not alter the interpretation adopted by the majority of the High Court in the DOGS Case (1981). That ruling also removes the objections of the Federal Government, as expressed at the Hobart (1976) session of the Australian Constitutional Convention, to the extension of section 116 to the States and Territories.[137] Further, omission of the word 'for' from the free exercise clause would, we believe, assist the courts in arriving at a reasonable interpretation of this basic freedom.

Reasonable limits on freedom of religion. In our recommendations for the Chapter relating to rights and freedoms, we include a provision declaring that the rights and freedoms in the Chapter 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' As section 116 is not in that Chapter, the suggested provision will not directly apply to it. Moreover, as section 116 is not at present so qualified, we considered it inappropriate to suggest anything that might lead some to believe that we would cut down an existing guarantee.

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137 See 'Previous proposals for reform - Australian Constitutional Convention' above.

However, the courts have recognised the need to establish limits to the guarantees embodied in section 116, limits that have regard to the needs of society and other rights and freedoms of individuals. We note in this respect that Mason ACJ and Brennan J, in the Scientology Case (1983), ruled that canons of conduct which offend against the law are 'outside the area of any immunity, privilege or right conferred on the grounds of religion.'[138] As Latham CJ suggested in the Jehovah's Witnesses Case (1943), this does not mean that the ordinary law may automatically override a constitutional provision.[139] According to Latham CJ, it does mean, however, that the guarantees embodied in section 116 do not extend to religious practices which are cruel, degrading or discriminatory in nature. Protection is not afforded to forms of religious worship which, for example, require human sacrifices or which promote the practice of suttee.[140]

Under the altered section 116, infringements against an individual's freedom of thought, conscience or movement on the grounds of religion would not be tolerated. The fundamental purpose of section 116 is to preserve the dignity of the individual. A religious code or practice which contradicted that purpose would not be acceptable. The guarantee of freedom of religion is not an invitation to break the law or to flout the positive morality of the community.

We do not intend the proposed alteration to section 116 to affect the legitimate legislative capacity of the States and Territories. Section 116 would prevent a State or Territory from passing a law to establish an official Church or to impose a

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138 154 CLR 120, 136.

139 67 CLR 116, 129.

140 id, 125-31.

religious test as a qualification for any public office. On the other hand, it would not affect the provision of State or Territory aid to independent schools, nor would it prevent a State or Territory from maintaining appropriate educational standards.

Balanced against the individual's right to freedom of religion is the legitimate right of the State or Territory to maintain adequate standards of instruction. Where conflicts arise we believe that the courts will be able to differentiate between religious activities and those activities which properly become subject to regulation by educational authorities.[141]

Section 116 of the Constitution is a provision of high importance. It guarantees a fundamental freedom. We **recommend** the clarification of that guarantee and its extension to the States and Territories.

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[141] We note that a case similar to Grace Bible Church v Reedman (1984) was heard under the Canadian Charter of Rights and Freedoms. In that case it was held by the Canadian Supreme Court that: 'A requirement that a person who gives instruction at home or elsewhere have that instruction certified as being efficient is a demonstrably justified limitation within the meaning of s. 1' of the Canadian Charter of Rights and Freedoms. Jones v The Queen (1986), 28 CCC (3d) 513 (SCC). That section reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

CHAPTER 10. THE DISTRIBUTION OF POWERS

Introduction

In this Chapter of the Final Report we will consider the manner in which the legislative powers of the Commonwealth and the States are divided in the Constitution and the interpretation of those powers. The bulk of the Chapter will be devoted to an examination of specific subjects in respect of which some have suggested the Federal Parliament should have or be denied express legislative power. In particular, we will consider the recommendations of the Advisory Committee on the Distribution of Powers.

For the purpose of this Report, however, we confine our attention to two matters only, namely:

(a) a recommendation that the Federal Parliament be given power to make laws with respect to defamation; and

(b) alteration of the existing provision governing the inter-change of legislative powers between the Commonwealth and the States.

DEFAMATION

Recommendation

We **recommend** that the Constitution be altered by adding after paragraph (v.) of section 51 the following paragraph:

> (vA.) Defamation otherwise than in the course of the proceedings of the Parliament of a State or of a court of a State.

The effect of the alteration would be to empower the Federal Parliament to make uniform laws with respect to all forms of print and electronic media on the subject of defamation. But the

proposal is expressly made subject to the qualification that this power is not to impinge on the powers of the States to make laws with respect to the publication of defamatory matter in the course of proceedings in their Parliaments or their courts.

Current position

The Australian Law Reform Commission in its report on this subject remarks that the common law has not produced a really satisfactory definition of defamation. However, it adopted[1] the definition of Lord Atkin that defamation is the publication of a statement which 'would tend to lower the plaintiff in the estimation of right-thinking members of society generally.'[2] We adopt this definition for the purpose of our Report.

We also adopt the definition of 'publication' suggested by the Law Reform Commission, which stated, '"publication" is the "communication or transmission of matter by a person to a person other than the person to whom the matter relates"'.[3]

The communication or transmission may be by spoken words, or other audible sounds, by written words, by visual representations (for example cartoons), or by signs, signals or gestures. At present liability, both civil and criminal, is principally governed by the laws of the several States and Territories, which are not by any means identical, and the differences between them cause difficulties under modern conditions. Some aspects of defamation are however affected by federal laws, for example, the Broadcasting Act 1942, Parliamentary Papers Act 1908, Parliamentary Privileges Act 1987 and many statutes which protect federal officers and members of federal bodies from civil liability.

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1 The Law Reform Commission, Unfair publication: defamation and privacy, (1979) para 77, 44.

2 Sim v Stretch (1936) 52 TLR, 669-70.

3 The Law Reform Commission, Unfair publication: defamation and privacy, op cit, para 108, 58.

At the time of Federation, the news media were confined to newspapers and periodicals circulating broadly within each colony. Those which reached other colonies, along with books and periodicals from abroad, were subjected to the local laws on defamation in the separate colonies.

New media technology and nationwide publication. Now, with the development of the electronic media, such as television and radio, and transmissions by satellite, operating on a nationwide scale, and the growth of national newspapers and periodicals, the virtues of having a uniform law on defamation have become more and more apparent. The difficulties facing writers, journalists and publishers from the existence of eight different laws on defamation in the States and Territories are readily appreciated:

(a) In some jurisdictions, codes have been enacted by the Parliament; in others, modified common law rules apply.

(b) Uncertainty arises where certain defences (such as truth) are available in some jurisdictions but are not complete defences in others.

(c) Uncertainty, and the need to seek legal advice on differing provisions, is costly and delays publication of information to the public.

(d) A plaintiff may bring proceedings concurrently in several jurisdictions in respect of the same publication, resulting in increased delay and costs.

(e) 'Forum shopping' for the most favorable venue is invited.

(f) In some jurisdictions, juries determine defamation cases; in others, they are heard by a judge alone.

Judicial concern over current law. On occasions, judges have commented on the unsatisfactory state of the law. For instance,

Mr Justice Fox in a 1973 case in the Supreme Court of the ACT, commented:

> That the same matter, published simultaneously in three jurisdictions from the same video tape should be the basis for the recovery of damages in two, but not in the third, is doubtless a strange and unsatisfactory result, but it is one which flows from the difference in the laws of those places.[4]

and in 1977, in another case in the Supreme Court of the ACT, Mr Justice Blackburn, after considering an article published in six jurisdictions, said:

> The result, presumably, is that the total effect of the article is less defamatory in New South Wales than in the [Australian Capital] Territory. This anomaly does not surprise me; the interstate diversity of the law of defamation is a matter of familiar dismay in this court.[5]

Previous proposals for reform

Australian Constitutional Convention. The Australian Constitutional Convention at its first session in Sydney (1973) noted defamation as a matter requiring its attention and referred it to its own Standing Committee C for consideration and report.

In 1974 Standing Committee C agreed to recommend that the subject of defamation was a national concern and should be transferred to the Commonwealth under the reference power (section 51 (xxxvii.)) if all States could agree on the terms of reference. If not, it should be transferred by alteration to the Constitution, provided that such alteration did not confer power on the Commonwealth to affect the privileges of State Parliaments and courts.

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4 Gorton v Australian Broadcasting Commission (1973) 22 FLR 181, 196.

5 Renouf v Federal Capital Press of Australia Pty Ltd (1977) 17 ACTR 35, 59.

The Melbourne (1975) and the Hobart (1976) sessions of the Convention each adopted the following resolution:

> That this Convention recommends that -
>
> (a) the matter of defamation shall be the subject of uniform references of power by all States to the Parliament of the Commonwealth; and
>
> (b) if such references are not made within a reasonable time the Constitution should be altered to confer the power to make laws with respect to defamation on the Parliament of the Commonwealth -
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> but any power so referred or conferred should not extend to the making of laws with respect to the privileges of State Parliaments or State Courts.[6]

Subsequently, the Standing Committee of Attorneys-General has conferred in an effort to achieve identical State defamation legislation across Australia, but no agreement could be reached. Nor has any agreement been reached between the States on the terms of a reference to the Commonwealth of power with respect to defamation under section 51(xxxvii.) of the Constitution.

Australian Law Reform Commission. In its report Unfair publication: defamation and privacy the Australian Law Reform Commission recommended that there should be a uniform law of defamation in Australia to replace the present multiplicity of laws.[7] The Commission prepared a draft Bill which was framed as a Federal Bill and relied on several heads of federal power, for example, posts and telegraphs, trade and commerce, and corporations. The Bill was comprehensive but in our opinion it would have had limited application and would have compounded the problems.

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6 ACC Proc, Melbourne 1975, 172; ACC Proc, Hobart 1976, 203.

7 para 303, et seq.

Submissions

In July 1986 we published a Background Paper on Defamation reviewing the current position, the identified problems and previous proposals for reform. We indicated a provisional view, in line with the Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention, that we should recommend an alteration to the Constitution to confer power to make laws with respect to defamation on the Parliament of the Commonwealth.

We invited comments from interested members of the public and a large number of submissions were made. Most were strongly supportive of the provisional view which we had formed. The Newspaper Publishers' Association of Melbourne favoured the reform provided that the new uniform law were no more restrictive in its content than the law presently existing in Victoria.[8] News Limited submitted that, while it wholeheartedly supported the concept of uniformity, it would want to see any draft legislation before given endorsement to the proposal.[9] John Fairfax & Sons Ltd expressed some concern at the form that any uniform defamation law might take, on the basis that it might have to incorporate the worst and most restrictive features of existing State laws.[10] The Australian Press Council argued strongly that the defamation power should be coupled with a constitutional guarantee of freedom of speech.[11]

On the other hand, the strong endorsement for our provisional

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8 S219, 13 August 1986.

9 S213, 12 August 1986.

10 S246, 9 September 1986.

11 S727, December 1986.

view came not only from a number of individuals,[12] but also from many representative groups, including:

Federal Capital Press of Australia Pty Ltd;[13]
Federation of Australian Radio Broadcasters;[14]
Special Broadcasting Service (SBS);[15]
Australian Book Publishers Association;[16]
Australian Society of Authors Ltd;[17]
Queensland Newspapers Ltd;[18]
Australian Broadcasting Corporation;[19]
WA Centre of PEN;[20]
Citizens for Democracy;[21]
National Council of Women (Tasmania);[22] and
Isaacs FEA Constitutional Committee.[23]

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12 eg SAL Kitchen S1108, 24 November 1986; Professor H Luntz S206, 4 August 1986; Justice Elizabeth Evatt S2555, 5 August 1986; AD Ferguson S192, 30 July 1986; Joan M Erskine S144, 23 April 1986; Catherine E Birskys S580, 13 November 1986; Mr D Smith S791, 6 January 1987; Lloyd Davies S860, 8 December 1986; Justice David Hunt S199, 23 July 1986; DW Anderson S1276, 18 March 1987; CH Wanless S3040, 12 November 1987. Opposing the recommendation, Mr NJ Murray S729, 7 December 1986 argued that the States should refer power to the Commonwealth to enable a national Act to be passed.

13 S211, 29 July 1986.

14 S204, 6 August 1986.

15 S214, 28 July 1986.

16 S210, 8 August 1986.

17 S157, 30 July 1986.

18 S182, 24 July 1986.

19 S312, 29 September 1986. The ABC also argued that the Commission recommend that, irrespective of any proposal for constitutional change, the Federal Parliament use its existing constitutional powers to enact a law which would cover most, if not all, significant publications in all media in Australia. SAL Kitchen opposed that approach because it is unwieldy and uncertain: S1108, 24 November 1986.

20 S207, 8 August 1986.

21 S2262, June 1987.

22 S3217, 28 February 1987.

23 S195, 4 August 1986; S1323, 24 March 1987.

Lack of uniformity causes inequity. All these submissions adopted the general view that the present lack of uniformity can produce anomalous and inequitable results, and that it is now time to update the Constitution on a subject where technological change has so clearly overtaken it. The precise form of such a uniform law would, of course, be a matter for the Federal Parliament. A number of submissions contained comments on the strengths and weaknesses of existing laws and made suggestions for a federal law which would strike a fair balance between free speech on the one hand and the privacy and reputation of the citizen on the other.

We were particularly assisted by a submission from Mr Justice David Hunt of the Supreme Court of NSW, which included two addresses on the subject of uniform defamation laws which he had given to the 22nd Australian Legal Convention in Brisbane in July 1983 and to the Media Law Association of Australasia in Sydney in November 1983.

In his view the need for a uniform law of defamation applying throughout Australia 'cannot be disputed', but he is severely critical of the report of the Australian Law Reform Commission on the subject. In particular, he regards as a fundamental error of approach the attempt by the Commission to codify the law, on the ground that defamation is a complex and constantly developing field in which the common law has proved itself both flexible and adaptable, and codification would have a stultifying effect.

These and other criticisms of both the Australian Law Reform Commission's report and the draft Bill prepared by the Federal Attorney-General for the consideration of the Standing Committee of Commonwealth and State Attorneys-General, relate, however, to the content of any possible uniform law, and it is not our function to make recommendations on such matters.

Editorial response. On 2 October 1987 we publicly announced our decision to recommend that the Federal Parliament be given power to make laws with respect to defamation. In response, an editorial in The Canberra Times stated:

> It is plainly silly in a country where every significant broadcast and publication crosses state borders to have eight defamation laws. This situation brings the law in general into disrespect. Further, it causes unfairness, uncertainty and delay. It also inhibits publication of matters of public interest.[24]

The editorial supported each of the elements of our proposal, which it described as 'a good first step towards a more just and publicly beneficial defamation law'. It is characteristic of the views expressed editorially in many branches of the media.

Reasons for recommendation

The power to make laws with respect to defamation which we propose should be granted to the Federal Parliament is not an unlimited power. It does not extend to the making of laws with respect to defamation in the course of proceedings of the courts and Parliaments of the States. The Federal Parliament will have no power under the proposed provision to make overriding laws on this subject. We are, of course, not here concerned with the scope of any other powers of the Commonwealth which enable the Federal Parliament to make laws which affect the operation of State defamation laws, for example the broadcasting power.

We recommend that the federal defamation power should be limited in this way because we do not think it desirable that the Federal Parliament should have power to make laws which determine the liability, if any, which is to attach to publication of defamatory matter in the course of State court and parliamentary proceedings. In a matter so central to the operation of these State institutions, the power to determine the governing law should not, in our view, be included within the scope of federal power with respect to defamation.

Were the Federal Parliament to have a plenary, concurrent power to make laws with respect to defamation, it could enact a

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24 The Canberra Times, 19 October 1987, 2.

comprehensive defamation code which superseded all State laws on the subject, including those which provide that publication of defamatory matter is, on certain occasions, absolutely privileged. These occasions include publication in the course of court and parliamentary proceedings. The publication of defamatory matter on these occasions is absolutely privileged because it is thought that the proceedings are ones in which the public interest requires utmost freedom in communication. That public interest is considered to outweigh the reputational interests of individuals.

Under the provision we propose, the federal defamation power would not extend to the making of laws which would affect these protective laws of the States.

Limits on federal power. In considering the way in which the limitation on the proposed federal defamation power should be expressed, we have had regard to the terms of the resolution passed by the Australian Constitutional Convention in 1975 and 1976.[25] That resolution was that any defamation power referred to or conferred on the Federal Parliament 'should not extend to the privileges of State Parliaments or State Courts'. It is by no means clear what was intended to be excluded from federal legislative power by this form of words, though we assume that it was meant to exclude, at the very least, a power to affect State laws according absolute privilege to oral or written statements made in the course of the proceedings of State courts and Parliaments.

It does not, however, seem to us that a limitation of the federal defamation power in terms which referred to the privileges of State courts and Parliaments is apt to achieve the desired purpose. A limitation so expressed would, we believe, create unnecessary uncertainty about the reach of the federal power. We have concluded that it is preferable to define the sphere of

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25 Quoted under the heading 'Previous proposals for reform' above.

defamation law into which the Federal Parliament cannot intrude in terms which point rather to the occasions of publication of defamatory matter which cannot be the subject of federal defamation laws. We have chosen the phrase 'proceedings of the Parliament of a State or of a court of a State' because it is not only concise but also conforms with established modes of describing occasions of absolute privilege.

We recognise that this phrase does not define the sphere of defamation law to be excluded from the federal power as precisely as some might think desirable. We are aware of doubts which exist about what are 'proceedings in Parliament' for the purposes of Article 9 of the Bill of Rights 1689[26] and of the steps which the Federal Parliament has recently taken to resolve those doubts so far as the proceedings of that Parliament are concerned.[27] It does not, however, seem to us to be appropriate for any qualifications on legislative powers conferred by section 51 of the Constitution to be spelled out in detail in that section. If the term 'proceedings of the Parliament of a State or of a court of a State' were to be defined, it would be preferable to do so in a separate section.

Alternatively, the entire qualification on the federal defamation power to be conferred by alteration of section 51 would have to be spelled out in a separate section stating that the federal power does not extend to the making of laws with respect to defamation in itemised cases.[28]

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26 This provides that 'The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.' The doubts about what is a proceeding in Parliament were discussed in the Final Report of the Joint Select Committee (Cth) on Parliamentary Privilege (PP 219/1984) para 5.1 - 5.28, 41-9.

27 Parliamentary Privileges Act 1987, section 76(2).

28 eg the cases specified in Clause 16 of the draft uniform defamation Bill prepared by The Law Reform Commission, Unfair publication: defamation and privacy, op cit, 213, 228.

We are not persuaded that it is necessary to include in the Constitution a precise definition of what is encompassed by the expression 'proceedings of the Parliament of a State or of a court of a State.' The meaning of the expression would, like any other expression in the Constitution, have to be determined, if necessary, by the High Court of Australia. The Court would, we assume, interpret the limit placed on the federal power having regard to the scope of absolute privilege under State laws and to the purpose of the limitation.

Summary of reasons for recommendation

We believe that there is an overwhelming case for such a uniform law, and that in view of the problems apparently associated with any agreement on either identical State legislation, or an identical reference of power, the purpose would be best achieved, under present circumstances, by an alteration of the Constitution in the terms recommended.

INTER-CHANGE OF POWERS

Recommendation

We <u>recommend</u> that the Constitution be altered to allow the inter-change of legislative powers between the Federal and State Parliaments. The alteration has the following features:

(i) The Federal Parliament may designate any of its exclusive powers as matters about which a State Parliament may make laws, and a State Parliament may refer a matter to the Federal Parliament for the purposes of section 51(xxxvii.) of the Constitution.

(ii) Any designation or reference under this provision:

- shall be by Act of the Parliament making the reference or designation;

- may be subject to limitations or conditions;

- if limited in duration, may be extended by or under an Act of the Parliament making the reference or designation;

- may be modified or revoked, but only by express provision in an Act of the Parliament making the reference or designation.

The purpose of this alteration is to allow the Commonwealth, if it wishes, to refer any of its few exclusive law-making powers to the States, and to clarify the operation of the existing provision in the Constitution under which the States (if they wish) may refer any of their law-making powers to the Commonwealth.

Current position

Section 51(xxxvii.) of the Constitution gives the Federal Parliament power to make laws on matters referred to it by the Parliament or Parliaments of any State or States; but there is no corresponding provision in the Constitution to allow the Commonwealth to refer any of its powers to the States.

Over the years, the lack of this reciprocal power has frequently been seen as an unfortunate omission, and an obstacle to good government and effective administration. For instance, only the Commonwealth at present can make laws on certain subjects, such as excise, and laws about various government departments and about 'Commonwealth places' (for example, Post Offices, federal government offices, airports, defence establishments). It has often been considered that better administration would result if the Commonwealth had power voluntarily to invest the States with power to legislate on these matters.

Present uncertainty. On the other hand, there is uncertainty about the precise meaning of the existing provision in the

Constitution, and how it is intended to operate. Questions which have arisen include:

(a) whether or not a State retains power to legislate on a matter which it has referred to the Commonwealth;

(b) whether or not a reference of power can be made subject to conditions as to its exercise, or its duration; and

(c) whether or not the referral of power can be revoked.

These uncertainties have contributed to the reluctance of States to refer matters to the Commonwealth. Our proposal would clarify the Constitution on these points.

Since Federation, the total number of references of powers by the States has been 30, distributed as follows:

NSW	5
VIC	6
QLD	4
WA	6
SA	5
TAS	4

Of these, eleven remain operative:

New South Wales	Commonwealth Powers (Meat Inspection) Act 1983 Commonwealth Powers (Family Law - Children) Act 1986
Victoria	Debt Conversion Agreement Act 1931 Commonwealth Powers (Family Law - Children) Act 1986 Abattoir and Meat Inspection (Arrangements) Act 1987

Queensland	The Commonwealth Powers (Air Transport) Act of 1950
South Australia	Commonwealth Legislative Power Act 1931 Commonwealth Powers (Family Law) Act 1986 Meat Inspection (Commonwealth Powers) Act 1987
Tasmania	Commonwealth Powers (Air Transport) Act 1952 Commonwealth Powers (Family Law) Act 1987

Other references of power have been discussed at Premiers' Conferences (for example in 1934 and 1942) but possible referrals could not be agreed upon because the States were unsure whether such referrals could be made conditional or for limited periods of time, or whether they could be revoked.

Previous proposals for reform

Australian Constitutional Convention. The question of inter-change of powers was taken up by the Australian Constitutional Convention at its very first session in Sydney (1973). It was indeed the first item on the agenda of topics for discussion by the Convention, under the heading:

> The methods of amending the Constitution and varying the distribution of powers, with particular reference to -
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> (a) the uncertainties concerning the power of State Parliaments to refer power to the Parliament of the Commonwealth (s. 51(xxxvii)); ...[29]

The discussion was initiated by a submission made by the New South Wales delegation and supported as a promising contribution

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[29] ACC Proc, Sydney 1973, xxvii.

to cooperative federalism by the delegations of the Parliaments of the Commonwealth and all the States, except Queensland, which asked for more time to consider the question.

The Prime Minister announced to the Convention on 6 September 1973, that the heads of all the delegations, except Queensland, had met and agreed on the principle of references of power either way and with removing existing doubts about operation of the present power.[30]

Standing Committee B was given the task of recommending suitable alterations to the Constitution, and under its guidance a group of federal and State draftsmen set about the task.

In the meantime a Bill for a referendum to give effect to the proposals of the Convention was introduced into the Federal Parliament, and passed by the House of Representatives on 6 March 1974. The Senate, however, deferred the Bill until it could be considered by all State Governments and by the Australian Constitutional Convention.

Standing Committee B subsequently resolved to recommend to the Convention that the Constitution be altered in the manner proposed by the Bill, and this recommendation was adopted, with some minor amendments, by the Convention at its session in Melbourne in September 1975.[31] This revised Bill was introduced into the Federal Parliament on 1 October 1975, but lapsed with the double dissolution in November. Subsequently the Hobart (1976) session of the Convention approved the draft,[32] and the 1978 meeting in Perth again approved the proposal in principle.[33] The Adelaide (1983) session of the Convention again endorsed an

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30 ACC Proc, Sydney 1973, 197.

31 ACC Proc, Melbourne 1975, 171.

32 ACC Proc, Hobart 1976, 208.

33 ACC Proc, Perth 1978, 206.

inter-change of powers alteration which took account of objections to points of detail in the original Bill.[34]

The Bill, Constitution Alteration (Inter-Change of Powers) 1984, intended to give effect to the recommendations of the Adelaide session of the Constitutional Convention, was passed by both Houses of the Federal Parliament, with the support of all parties. It was subsequently defeated at a referendum on 1 December 1984, being approved by 47.06% of all electors, and in the States by percentages ranging from 49.86% in Victoria to 34.64% in Tasmania.

Submissions

In July 1986, we issued Background Paper No 5 which reviewed the history of reform proposals on this subject, indicated the present uncertainties of interpretation of the existing section 51(xxxvii.) of the Constitution, and stated the arguments for and against the proposal at the referendum of 1 December 1984.

We indicated a provisional view that we should accept the proposal of the Australian Constitutional Convention and make a recommendation accordingly. We invited comment from interested bodies or individuals.

One submission was received from the Victorian Government.[35] It urged the adoption of the inter-change of powers proposal, noting that resolutions in favour of it 'have consistently been accepted by the Constitutional Convention on a cross-party basis'. The proposal has been 'unanimously endorsed by the Victorian delegation...which was representative of all Victorian parliamentary parties'. The submission argued that the chief advantage of the proposal:

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34 ACC Proc, Adelaide 1983, 323-4.

35 Victorian Government S231, 15 August 1986.

> is that it would introduce useful flexibility into the Australian federal system, subject to the safeguard provided by the need for parliamentary approval. In particular, it would enable powers to be transferred for limited periods to meet short-term needs, and for experimental purposes. If a reference proved to have an unexpected operation, the proposal would enable it to be amended....Moreover, one advantage of the interchange of powers mechanism...is that use of the power can be regulated by the referring government. If necessary, the power can be withdrawn.

Reasons for recommendation

We agree with the arguments accepted by successive meetings of the Australian Constitutional Convention that the existing provision in the Constitution on inter-change of powers should be altered to remove doubts about its operation, and be made fully reciprocal. We consider that such a change would add flexibility under varying circumstances to the exercise of powers under the Constitution and would contribute to effective cooperative federalism.

We have reviewed the arguments expressed against the proposal at the 1984 referendum but find them to lack real substance. In particular, they appear to fail to recognise that the States may refer any of their powers to the Commonwealth under section 51 (xxxvii.) of the Constitution as it stands, and have from time to time done so. The only change in that respect envisaged in the present proposal is to make more precise the conditions under which that may happen, and to ensure that a State referring such a power shall retain full control over it, including the right to revoke the transfer.

The second part of the proposal would merely create a reciprocal right for the Commonwealth to refer any of its few exclusive powers to a State or States, whilst still retaining the same full control.

In neither case is it accurate to term it in any sense an alteration of the distribution of powers between the Commonwealth and the States under the Constitution.

Similarly, the power to levy sales taxes and excise duties resides at present in the Commonwealth exclusively, and the reference of such a power to the States would not of itself 'lead to a heavier tax burden'. It might equally add a greater flexibility and lead to a lesser tax burden in certain desirable respects. It would in any case be a matter for political decision by the State Governments concerned. This subject is dealt with in Chapter 11 of this Report.

The other minor objections are best answered by a study of the proposal itself and its inherent safeguards in that no inter-change of powers could occur unless both the Federal and State Government agreed to the inter-change. The reference of power would be revocable, and could be made subject to limitations of time, and other relevant conditions.

Form of proposed alteration

The alteration of the Constitution which we recommend appears in Appendix K to this Report. It is in somewhat different form from the text of the proposed alteration to the Constitution submitted to referendum in 1984. It is in our view a more concise and direct version which achieves the same result, except that it does not refer to the investing of federal courts with State jurisdiction. That subject will be covered in Chapter 6 of the Final Report.

CHAPTER 11. THE NATIONAL ECONOMY

EXCISE DUTIES

Recommendation

We **recommend** that the States be empowered to levy excise duties, by omitting the words 'and of excise' from section 90 of the Constitution.

Alternatively, we **recommend** that the States be empowered to levy an excise duty with the consent of both Houses of the Parliament of the Commonwealth. This may be achieved by an alteration of section 91 of the Constitution.

Current position

The first paragraph of section 90 of the Constitution provides:

> 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.

It is not clear from the Convention Debates what was the object of the Framers in preventing the States in levying excise duties.[1] Its inclusion with duties of customs and bounties on production and exports seems to indicate concern with preventing impairment of federal tariff policies. A Federal Government could have a protectionist customs tariff negated or impaired by a State tax on locally produced goods. Similarly, a federal

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1 M Coper, 'The High Court and Section 90 of the Constitution' (1976) 7 Federal Law Review 1, 21-6.

policy of free trade would be defeated by a State bounty on production or exports.[2]

Some judges, however, have construed section 90 as having broader objects, including giving 'the Parliament a real control of the taxation of commodities',[3] and 'the control of the national economy as a unity which knows no State boundaries, by a legislature without direct legislative power over that economy as such'.[4] Others, despairing of discovering any precise object, have urged that tests formulated in earlier cases should be closely followed, without regard to social or economic effects.[5]

The result of numerous cases decided by closely divided courts has been to produce much uncertainty as to the power of the States to levy taxation effecting commodities. Some propositions, however, may, for the present, be accepted. The States may not levy an ordinary sales tax, purchase tax or tax on the production of goods when the rate of tax is related to the quantity or value of the goods. Taxes connected with production which, on the face of the legislation, are not related to quantity or value of the goods produced can be excise duties in some circumstances.[6]

The States may levy a fee for a licence or franchise to carry on the business of selling goods where the fee is calculated in

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2 Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599, 616 (Gibbs CJ). The test adopted by Murphy J conformed, by and large, to this object. He was of the opinion that an excise duty was one imposed on or by reference to production within the State. A State sales tax imposed without reference to the place of production was, therefore, not an excise duty (HC Sleigh Ltd v South Australia (1977) 136 CLR 475; Logan Downs Pty Ltd v Queensland (1977) 137 CLR 59).

3 Parton v Milk Board (Vict) (1949) 80 CLR 229, 260 (Dixon J).

4 Western Australia v Chamberlain Industries Pty Ltd (1970) 121 CLR 1, 17 (Barwick CJ).

5 HC Sleigh Ltd v South Australia (1977) 136 CLR 475, 497 (Stephen J).

6 Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599, 616 (Gibbs CJ).

relation to the quantity or value of goods sold, or purchased for purposes of sale, during a period preceding that of the licence. Such a fee, however, will not be valid if it is related to the value or quantity of goods produced or sold during the period of the licence.[7]

In the case of a licence for the right to produce goods, any fee related to the quantity or value of goods produced is an excise duty whether the period chosen is before or after the grant of the licence.[8] A State fee imposed on producers of a product to provide for the expenses for administration of a statutory marketing scheme may be an excise duty and, therefore, invalid.[9]

Issues

The issues that arise in relation to section 90 are concerned with (a) its meaning and object, (b) its effect on the States and, in particular, on their ability to exercise their constitutional functions, and (c) the protection the section gives to federal policies relating to national economic management by fiscal means:

(a) The judicial decisions have produced much uncertainty about what constitutes an excise duty. Also, taken together, those decisions do not indicate any clear purpose in depriving the States of the power.[10] For example, in the area of licence fees, High Court decisions enable the States to levy by indirect and circuitous means what to the average person is a sales tax, while denying the States the direct power to levy a sales tax. Much therefore depends on legislative

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7 Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529; Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177.

8 Gosford Meats Pty Ltd v New South Wales (1985) 57 ALR 417.

9 Matthews v Chicory Marketing Board (Vict) (1938) 60 CLR 263; Parton v Milk Board (Vict) (1949) 80 CLR 229; Logan Downs Pty Ltd v Federal Commissioner for Taxation (1965) 112 CLR 177.

10 Trade Report, 152.

devices and drafting, without regard to social or economic objects or effects.

Another area in which the States may achieve indirectly what they may not do directly relates to agricultural marketing schemes. As indicated above, section 90 prevents, in many situations, a State from financing the administration of a scheme by levying a fee on producers of the product. On the other hand, if a State acquires title to the produce, it may validly deduct from the proceeds of the sale of the product the cost of administration before paying the balance of the proceeds of sale to the producers.

(b) Nevertheless there are many types of taxes that are denied to the States by section 90. Licence fees based on past sales or wholesale purchases have been used to obtain revenue from those in the business of selling tobacco, liquor and petrol, but, for practical reasons, it is not possible to use that device for the purpose of achieving the same effect as a general sales tax or value added tax.

This has raised the question whether the States have sufficient taxing powers to carry out their functions, and also the issue of what is called 'fiscal vertical imbalance'. The Constitution does not limit the type of taxes which may be imposed by the Commonwealth. Customs and excise duties are the only taxes which the States are forbidden to impose.

As a practical matter, however, the States were, in 1942, deprived of the ability to levy income tax. They have not levied any general income tax since then. The Commonwealth became the sole income tax raising authority as a result of the 'uniform tax scheme'. This was achieved by the Commonwealth imposing a high rate of income tax, which left little or no room for the States to levy a similar tax.

The States were reimbursed for this loss of income tax revenue by the grant of money from the Commonwealth, under section 96 of the Constitution. The latter section empowers the Commonwealth to make financial grants to the States on such terms and conditions as the Parliament thinks fit. Section 96 will be discussed elsewhere in this Chapter in our final Report.[11] This situation has continued to the present day for reasons that are largely political.[12]

The absence of a State income tax, combined with the lack of power to levy various forms of indirect tax under section 90, has led to the result that the Commonwealth raises far more than is required for its own purposes, while the States raise far less than they need. It is this situation that constitutes 'the fiscal vertical imbalance'. The difference is met by the Commonwealth making grants to the States under section 96. Most of the funds received by the States are granted without conditions and become part of the general revenue of each State. Other grants are made on condition that they are used for specified purposes and are known as 'special purpose grants'.

While a situation of fiscal vertical imbalance and federal grants to States exists in most federal countries, the degree of imbalance is far greater in Australia than in any other country. While the States, the Northern Territory and Local Government are responsible for about 50% of Australian Government

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11 The uniform tax scheme was upheld in South Australia v Commonwealth (1942) 65 CLR 373 and Victoria v Commonwealth (1957) 99 CLR 575.

12 Under the Income Tax (Arrangements with the States) Act 1978 (Cth) a State which meets the requirements of the Act, including the adoption of the bases of assessment for federal income tax, can impose an income tax surcharge (or grant a rebate) which will be collected or administered by the Commonwealth. No State has availed itself of this opportunity.

expenditure, they raise little more than 20% of total revenue. Over the last 60 years payments by the Commonwealth to the States have constituted between 52% and 67% of total Budget outlays. The estimate for 1986-7 was 52.7% of State Budget expenditure.[13]

It has also been argued that the denial of State power to impose taxation on goods has resulted in the States imposing other taxes that are regressive, inefficient and complex.

(c) The main arguments against giving the States the power to levy excise duties concern (a) the role of the Commonwealth and its control and management of the economy, (b) the effect of State excise taxes in impairing the free flow of commerce throughout Australia and (c) the impairment of federal tariff policy, as explained above.

Submissions

The major submissions in relation to section 90 are reviewed in the Trade Report.[14] They covered three main areas:

(a) the inefficiency which follows from the imposition by States of numerous different types of tax;

(b) the question of whether imposition by States of excise would have an adverse impact on effective national economic management; and

(c) the uncertainty faced by commodity marketing boards as to whether or not their levies offend section 90.

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13 C Walsh, 'The distribution of taxing powers between levels of government' in G Brennan (ed) Constitutional Reform and Fiscal Federalism, Centre for Research on Federal Financial Relations, ANU (1987) 4, 24, 28.

14 Trade Report, 153-9.

As to the first point, Professor BML Crommelin[15] expressed the opinion that States' revenue raising would be more efficient if they could impose duties of excise. He also emphasised the importance of freedom of choice for Governments with respect to the type of tax they will impose.

Dr JP Nieuwenhaysen,[16] speaking as former chairman of a committee of inquiry into revenue-raising in Victoria, submitted that the types of taxes to which State Governments are forced to have recourse 'have very little justification, as far as public finance theory is concerned...'. He further submitted that those taxes, for example stamp duty, are inequitable and regressive, and that it would be far more administratively efficient to run one State Tax Office, rather than a separate office for each type of tax. This would be possible if States were permitted to levy duties of excise.

Dr CA Saunders[17] referred to the 'fuel franchise fee', a fairly typical device used by States to circumvent section 90, as not 'a very easily understood and efficient sort of tax' - the implication being that it would be more efficient if its constitutional validity were undoubted.

Former Tasmanian Premier NCL Batt[18] submitted that the several present State taxes are 'terribly expensive to collect' and that sales tax has the advantage of being an 'identifiable revenue-raising item.'

On the subject of the relation between section 90 and national economic management, Dr PJ Moy[19] explained that there is a trade-off. On the one hand, there is the dispute-settling mechanism whereby powers are handed to the Commonwealth with respect to

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15 S3785, 26 November 1986.

16 S3635, 24 November 1986.

17 S3766, 24 November 1986.

18 S3526, 14 October 1986.

19 S3727, 10 November 1986.

subject matters where there is a potential for inter-governmental co-ordination problems. On the other hand, there are the benefits of federation - that is, decentralisation and the retention of decision-making powers at a lower level and therefore closer to the people. Dr Moy made it clear that he saw the latter as sufficiently desirable to override the former. Thus any adverse effect on national economic management would be compensated for by political considerations.

Dr Nieuwenhaysen[20] asserted that if the States could levy duties of excise (and hence have only the one type of tax), this would facilitate national economic management, as this single tax would be more easily monitored by the Federal Government. He also argued that excise duties would tend to become uniform throughout the States because of competition between the States.

Dr NR Norman[21] was of the opinion that the use of excise duties to 'fine-tune' the economy is uninteresting in the present day, the theory on which it is based being discredited.

The Queensland Government,[22] however, would take issue with many of these points. Contrary to Dr Nieuwenhaysen's assertion, it submitted that State-imposed 'final consumption taxes' would lead to a greater fiscal imbalance between the States. Also, far from accepting the assertions of Professor Crommelin, Dr Nieuwenhaysen and Mr Batt that a single tax-base for the States would be more efficient and hence more economical, it would argue that a final consumption tax would result in less revenue-raising capacity for Queensland. It therefore opposed the Committee's recommendation.

The problems which section 90 raises for commodity marketing boards were canvassed in a number of submissions.[23] These argued

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20 S3635, 24 November 1986.

21 S3688, 2 December 1986.

22 S3674, 31 March 1988.

23 CB McIntosh, S3734, 5 December 1986; PJ Conalty, S3738, 8 December 1986; Council for Agriculture S893, 4 December 1987.

that the most reasonable and equitable way for such boards to raise revenue is on a fee-per-unit basis, rather than on a fee-per-farm basis. Such a fee, however, runs the risk of a costly High Court challenge, with a subsequent diversion of resources from the services which the boards are set up to provide. It was submitted, therefore, that the Constitution should exempt from the operation of section 90 such levies as are imposed for the purpose of defraying the costs incurred by marketing boards in the course of carrying out their normal functions.

Previous proposals for reform

The Royal Commission on the Constitution, in 1929, recommended that the States be given concurrent power to impose excise duties on goods not the subject of customs duties.[24]

The Brisbane (1985) session of the Australian Constitutional Convention resolved as follows:

> (i) That the State tax base be extended by enabling the States to impose duties of excise;
>
> (ii) that the change be effected by removing the words 'and of excise' from section 90 of the Constitution; and
>
> (iii) that if the interchange of powers proposal is implemented in the near future, the power to impose excise duties be designated as a matter on which the States may legislate until a more permanent change is achieved.[25]

Advisory Committee's recommendation

The majority of the Advisory Committee on Trade and National Economic Management recommended that section 90 of the Constitution be altered to allow the States to impose 'final consumption taxes'. The Report did not define the nature of those taxes.

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[24] 1929 Report, 259-60.

[25] ACC Proc, Brisbane 1985, vol I, 418.

In High Court cases relating to section 90 a 'consumption tax' is taken to mean one levied on the act of consuming. Such a tax is not an excise duty, provided that no opportunity is given to pay the tax at the time of purchase.[26] In economics literature, however, it refers to a tax which, it is expected, will be passed on to the ultimate consumer, even though it is legally imposed on a producer or seller. We take the phrase 'final consumption tax' in the Advisory Committee's Report to mean a tax of what is expected to be the final transaction, namely, the retail sale. The majority of the Committee made it clear that they were not recommending a State power to tax production. Associate Professor Coper went further and suggested that the States should be given full power to levy any excise duties. Hon Dr Rex Patterson and Mr Mark Burrows dissented. They favoured no change to section 90.

Reasons for recommendation

In Chapter 11 of our Final Report we will discuss the broad issues of economic management by the Commonwealth, the general fiscal powers of both spheres of government, the grants power in section 96, and, as it affects all these matters, the demands of a federal system. For the present, we confine ourselves to the question whether any alteration should be made to section 90 of the Constitution. In doing so, however, we must touch on some aspects of the broader issues.

Whatever view is taken of the countervailing interests of State fiscal needs and federal economic management, we consider that the operation of section 90 is unsatisfactory. There is, as mentioned above, a considerable amount of uncertainty in the interpretation of the provision, and this uncertainty has increased as the result of recent decisions. The States cannot be expected to plan their Budgets if important taxes remain subject to constitutional doubt. Also, as explained above, in respect of fees to carry on a business, the judicial decisions

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26 Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177.

have forced the States to impose taxes by technical and devious means. The distinctions drawn in this area have no social or economic justification. If, as a matter of policy, it is thought that the States should not impose a sales tax on, say, cigarettes, they should not be permitted to achieve what, to the average purchaser, amounts to the same thing by imposing a licence fee related to past sales or purchases.[27] We consider, therefore, that section 90 should not remain unchanged.

Policy question. That still leaves open the question of policy. The present situation in which the States are not responsible for the raising of most of the funds they spend has an obvious serious effect on the accountability and responsibility of those Governments. Expenditure decisions cannot in those circumstances take full account of the tax cost of the decisions. So, not only does a high fiscal imbalance impair the functioning of the State as an independent unit of the federation, it tends to sap at least some of the duties of responsibility and sound decision-making that are the concomitants of governmental power. This in turn severs the link between policy making and electoral control.

The omission of the prohibition of State excise duties from section 90 would not in itself do away with fiscal imbalance. Indeed, there are arguments, which we will consider in our Final Report, which suggest that it should remain. The issue is, therefore, purely one of degree. What is clear is that the imbalance in Australia, compared with other federal countries, is of a very high degree.[28] The preponderance of expert views is that, in the absence of a broad indirect tax power, the States have resorted to numerous other taxes which are regarded as less economically desirable, or the effect of which is difficult to monitor.

We emphasise that it is no part of our function to express a view as to whether indirect taxes are socially desirable. The issue

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27 Trade Report, 159.

28 Trade Report, 160.

is simply whether the States should be able to embark on such a taxation policy if they consider it to be justified. Similarly, it has been suggested by some that the States have not fully exploited revenue-raising activities in other areas such as taxation of services. What we are concerned with, however, is extending the potential tax base of the States, so that they can determine, after such expert advice as they receive, the most suitable taxation policy. This in turn increases the opportunity for individuals, groups and the electorate at large to urge particular policies relating to State taxation.

State power to levy excise. We believe that the above considerations produce a strong prima facie case for giving the States power to levy excise duties. This brings us to the consideration of the effect of such change on federal responsibility for national economic management, and on the free flow of goods among the States. The dissenting members of the Advisory Committee were concerned with both these matters. Their arguments against any change to section 90 are as follows:

(a) State taxes would affect the level of costs of producing and marketing goods, and so affect the value of imports and exports. Also, some goods taxed will be the same as those that have incurred customs duties, and this could upset federal tariff policy. The States could also tax selected goods from abroad and so protect their industries from competition.

(b) Differing State tax rates can interfere with the flow of goods. This could lead to a wasteful use of resources and influence resource allocation.

(c) Even if State taxation power in this regard is limited to 'a final consumption tax', the 'consumption' could include the use of materials for production in mining, agriculture and manufacture.

(d) A general State sales tax may hit particular industries that the Commonwealth may wish not to see burdened. It should not have to 'hope to pass' legislation to exempt those industries.

The view of the minority is summed up in the following passage:

> In times of depression, recession, high inflation, national emergency and indeed, in all times, taxation policy is always of great significance in the economic control of the economy. It must be the Commonwealth's prime responsibility to effectively control the economy and to implement those tax policies which will influence the level of consumer demand to the degree desired by the national government to fit the economic circumstances at any point of time. To do this efficiently, the Commonwealth should have control over taxation policies as they relate to goods produced and sold throughout the nation including those goods which are the subject of international trade.[29]

It is undoubtedly the case that the existence of any State taxes affecting industry or commerce may make the task of the Commonwealth somewhat more difficult in its efforts to deal with such matters as the consumer price index, the balance of payments, the encouragement of exports and import replacements and so on. There is, we believe, no one today who would suggest that these matters are not among the principal responsibilities of the Commonwealth. In Chapter 11 of our final Report we explore these matters further. As the Advisory Committee said,[30] the issue is not whether these taxes are capable of affecting national economic planning, but whether the risks are so great that, despite the factors in favour of increasing State taxation powers to which we have referred, there should be a constitutional prohibition. The argument might be strong if the Commonwealth lacked the ability to take counteracting measures.

The Advisory Committee considered that the Commonwealth probably had power to legislate to exempt persons from payment of State

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[29] Trade Report, 165.

[30] id, 161.

excise duties under present constitutional powers or under new powers that it had recommended. Its report added that if the Committee was wrong, the Commission might wish to consider a specific power 'to override State tax laws'. We will not be making recommendations relating to federal fiscal, commercial and economic powers until our final Report. We confine our considerations to the present provisions of the Constitution, as our present recommendation relating to excise duties is not dependent on any other recommendations we may make in the final Report.

Despite the view of one judge and some dicta by two others that might be thought to be to the contrary,[31] we are of the view that section 51(ii.) - the taxation power - does not include within its subject matter State taxation. In our view, however, applying the principles that have been consistently recognised by the High Court over a number of decades, the Federal Parliament has the power to protect any activity that is within a subject of federal power from a direct burden. This would, in our view, include State taxation of that subject matter.[32] This issue will be examined further in Chapter 11 of our final Report.

The Parliament, therefore, could, for example, exempt persons from the payment of State excise duties imposed on interstate or overseas trade or the trade of trading corporations. It is likely that the concept of interstate or overseas trade includes the first sale within a State after importation into that State from another State or another country.[33] Existing powers of the Commonwealth, therefore, probably extend to exempting persons from the payment of State excise duties in many, but not in all, circumstances.

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31 Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599, 637 (Murphy J), 617 (Gibbs CJ), 631 (Mason J).

32 Australian Coastal Shipping Commission v O'Reilly (1962) 107 CLR 46, 61-9 (Menzies J).

33 Australian Coarse Grains Pool v Barley Marketing Board (Qld) (1985) 59 ALR 641, 656 (Mason J).

Excise and federal financial controls. We have considered whether the omission of excise duties from section 90 should be coupled with a recommendation that the Parliament should have express legislative power to exempt persons from the payment of State excise duties. We have decided against such a recommendation. We believe that the Commonwealth has sufficient overall power in respect to borrowing, taxation and other financial matters to ensure that State revenue laws do not impede federal policy. Despite imposition of excise duties by the States, the Commonwealth would (unless there is political agreement to the contrary) remain the major tax gatherer. The States will still be the recipients of large federal grants. These facts, together with its powers over banking and overseas trade and financial transactions, will ensure its power to control State borrowings and to influence State Budgets. All this results in a degree of actual power that, in our view, makes unnecessary any express legal power (other than that which already exists) to override State excise duties.

Whether the dominating position of the Commonwealth will remain, or whether, as many suggest, there should be a new fiscal agreement among the Commonwealth and the States altering the present position, is a matter of policy for the Commonwealth, having regard to its responsibilities. That, however, is irrelevant for present purposes, except that State power to levy excise duties will be a factor the Commonwealth will have to take into account in considering the terms of any such agreement.

If a State attempted, as the dissenting members of the Advisory Committee suggest, to single out goods from overseas for taxation, there is no doubt that the Federal Parliament would have power to legislate to prevent the tax operating. Indeed it may be that such a tax would be invalid as constituting a customs duty, because the importation of goods would be a criterion of liability for imposition of the tax.

So far as interstate trade is concerned, it is clear that any attempt by a State to discriminate against the goods of another

State or goods intended for other States would be invalid under section 92. The operation of section 92 will be examined in Chapter 11 of our final Report.[34]

Differing State taxes would, as the dissenting members indicate, have an effect on the national common market and could, no doubt, be a factor in resource allocation. Having regard to the likelihood of tax competition among the States it is in our view likely that the differences in levels of rates of taxation would not be great and would tend toward, if they did not achieve, uniformity. Most of the expert witnesses who made submissions to the Advisory Committee on this matter did not think that variation of tax rates would be a serious problem.

In any case it is important to note that different laws on a multitude of topics and varying State forms of assistance to industry are permitted under the Constitution as it presently exists. Many of these laws and types of assistance inevitably affect the national market and resource allocation. As explained in Chapter 2, one cannot have a federal system and insulate the policies of each of the central and State Governments from being affected by the actions of the other Government. What the States do must have some influence or effect on matters of federal responsibility and vice versa. The limited protection of section 90 gives to federal economic policies was emphasised by Chief Justice Gibbs in the following terms:

> On any possible view of its effect, s. 90 itself confers on the Parliament only a very limited power to control the economy. There are many taxes which have a tendency to enter into the price of commodities but which are not excises, and which are accordingly within the power of the

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34 According to the present state of judicial authority, it may be that any excise duty on interstate transactions (including the first sale in the importing State) would be invalid under section 92, whether or not it was discriminatory (Hughes and Vale Pty Ltd v New South Wales (No.2) (1955) 93 CLR 127). If this view continues to be followed it would have a serious effect on any State or federal sales tax legislation. The issue has recently been argued before the High Court of Australia. A decision is awaited.

> States to impose. Payroll tax is an obvious example. There are many other legislative measures which a State can take either to discourage or to encourage production and manufacture. On the one hand it can fix quotas on production or manufacture, or indeed forbid production or manufacture altogether; on the other hand, it can, for example, favour producers and manufacturers by reducing their taxes and the charges made to them for power and freight, and by building ports and railways for their use and providing them with other assistance. Thus s. 90 does not go very far towards giving the Commonwealth exclusive control of or influence over the production or manufacture of goods.[35]

To forbid the States to take any action which might affect the national economy in a manner inconsistent with federal policy would, taken to its logical conclusion, deny any power to the States. The issue is one of degree and balance. In our view, the balance, in policy terms, leans in favour of the States having power to levy excise duties.

Final consumption taxes. The majority of the Advisory Committee recommended that State power to impose excise duties should be limited to 'final consumption taxes' which, as we have indicated, we take to mean taxes on retail sales. It seems to be generally accepted that from the points of view of equity, the functioning of the national market and problems of tax avoidance, the most desirable State taxes on goods would be a general tax on final sales.[36] We do not recommend limiting State power in this respect. Our reasons are, first, that having regard to the history of judicial interpretation of section 90 any attempt to limit the State power in this way would, as Associate Professor Coper pointed out,[37] produce similar differences of opinion among the High Court as to the purpose and scope of the provision as has been manifest for the past 80 years in the interpretation of the present provision. Secondly, for the reasons given above, we

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35 Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599, 617.

36 Economic Budget and Review Committee, 15th Report to the Victorian Parliament, (1986) 49.

37 Trade Report, 165.

believe that the Commonwealth has sufficient constitutional power in relation to many types of taxes, and in other cases sufficient political and economic power, to deal with any difficulties that might arise.

Alternative recommendation. If our major recommendation in relation to excise duties is not accepted, we would, as an alternative, **recommend** that the States should be permitted to levy such excise duties as are approved by resolution of both Houses of the Federal Parliament. This can be achieved by an appropriate alteration to section 91 under which the States may grant, 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.[38]

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38 See also our recommendations relating to the interchange of powers in Chapter 10.

APPENDICES

APPENDIX A

MEMBERS OF ADVISORY COMMITTEES

AUSTRALIAN JUDICIAL SYSTEM

Hon Mr Justice DF Jackson (Chairman)
Professor James Crawford
Hon Mr Justice WMC Gummow
Mr Roger Jennings, QC
Hon Mr Justice GA Kennedy
Hon Mr Justice R McGarvie

DISTRIBUTION OF POWERS

Hon Sir John Moore, AC (Chairman)
Dr Breen Creighton
Hon Donald Dunstan, AC, QC
Hon Jack Ferguson, AO
Mr Geoff Lindell
Mr Paul Munro (resigned 30 June 1986)
Mr George Polites, AC, CMG, MBE
Hon Haddon Storey, QC, MLC

EXECUTIVE GOVERNMENT

Rt Hon Sir Zelman Cowen, AK, GCMG, GCVO, K St J, QC, (Chairman)
Hon Kim Beazley, AO (resigned 10 August 1986)
Professor Donald Horne, AO
Ms Susan Kenny
Hon Sir James Killen, KCMG
Mr David Solomon
Hon John Wheeldon
Associate Professor George Winterton

INDIVIDUAL AND DEMOCRATIC RIGHTS

Mr Terrence Purcell (Chairman)
Mr AR Castan, QC
Mr Russell Clarke
Ms Rhonda Galbally
Mr Peter Garrett
Mr Thomas Keneally, AO, FRSL
Dr Paolo Totaro, AM
Professor Eric Willmot, AM

TRADE AND NATIONAL ECONOMIC MANAGEMENT

Hon Mr Justice MG Everett (Chairman)
Mr Bob Bakewell
Mr Mark Burrows
Associate Professor Michael Coper
Hon Dr Rex Patterson
Alderman HG Percival, OBE, MLC
Ms Phillipa Smith

APPENDIX B

CONSTITUTIONAL COMMISSION

TERMS OF REFERENCE

To inquire into and report on or before 30 June 1988, on the revision of the Australian Constitution to:

(a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;

(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

For the purpose of conducting hearings, three members of the Commission shall be sufficient to constitute a quorum. Where there is a division of opinion within the Commission the majority opinion shall prevail but if the Commission is equally divided, the opinion of the Chairman shall prevail. During the course of their inquiry, the Commission shall:

(i) seek the views of the public, and business, trade unions and financial institutions;

(ii) hold public hearings and sponsor public meetings to ascertain the views of interested organisations, groups and individuals on constitutional reform;

(iii) stimulate public discussion and awareness of constitutional issues by circulating draft proposals and putting forward initiatives and views on constitutional reform;

(iv) make interim reports on matters under study at intervals to be determined in consultation with the Attorney-General; and

(v) consult with, and evaluate the reports and recommendations of, advisory committees which are established to examine specific subject areas of constitutional reform.

APPENDIX C

ADVISORY COMMITTEES

TERMS OF REFERENCE

AUSTRALIAN JUDICIAL SYSTEM

The Committee's Terms of Reference were:

(a) to consider the provisions of Chapter III of the Constitution dealing with the structure of the Australian judicial system, and to advise on the desirable future structure of that system;

(b) to consider whether s 80 of the Constitution relating to trial by jury should be retained or altered; and

(c) to consider the provisions of ss 51(xxiv), 51(xxv) and 118 of the Constitution dealing with service and execution of process, recognition of laws and court judgments and full faith and credit.

DISTRIBUTION OF POWERS

1. Expansion of Commonwealth Power

   (a) Existing Powers

      (i) Family Law (ss 51(xxi), 51(xxii))
      eg adoption, illegitimacy, custody and guardianship of infants, maintenance, property: in the absence of divorce.

(ii) Industrial Relations (ss 51(xxxv), 51(i), 51(xx), 122).
eg direct powers with respect to terms and conditions of employment and analogous relationships, prevention and settlement of industrial disputes by Federal and State bodies, protection of public against interruption of essential services, control of industrial organisations.

(iii) Post and Telegraphs (s 51(v))
Cover similar modern modes of communication (including 'data communication'): updating.

(iv) Industrial and Intellectual Property Law. (ss 51(xviii), 51(xxix)).
Cover modern developments in regard to property rights over broadcast material, industrial designs, protection of service marks, rights of breeders of plants: updating.

(v) Defence (s 51(vi))
Deletion of 'military and naval' as unnecessary.

(vi) Aborigines (s 51(xxvi))
Inclusion of a new power to remove potential limitations on the existing power eg people of Aboriginal race or descent.

(vii) Fisheries (s 51(x))
Cover fresh water and intra-territorial water fishing.

(viii) Social Services (ss 51(xxxiii), 51(xxxiiiA))
Substitute comprehensive power.

(ix) Railways (ss 51(xxxii), 51(xxxiii), 51(xxxiv))
Uniformity of railway gauges.

(x) Transportation (ss 51(i), 51(xx), 98, 122)
Confer comprehensive power.

(xi) Scientific and Industrial Research (ss 51(xxxix), 61 and 81, 'national implied power')
Provision of a comprehensive power.

(b) New Powers

(i) National accident compensation scheme.

(ii) Occupational health and safety.

(iii) Regional development and creation in co-operation with the States regional authorities charged with specific powers and responsibilities.

(iv) Defamation.

(v) Nuclear energy and ionizing radiations.

(vi) Trade and professional qualifications and registration.

(vii) Drugs and standards of food.

(viii) Health in co-operation with the States.

(ix) National works in co-operation with the States.

(x) Environmental Protection

(xi) National crime.

2. Contraction of Commonwealth Powers

(a) External Affairs
Legislation giving effect to international treaties

over matters of a domestic character traditionally regarded as matters falling within State responsibility. Including, issues concerning individual rights.

(b) Family Law.

(c) Industrial Relations (including determination of disputes involving employees of State governments and authorities).

(d) Use of Commonwealth powers to further objects not relevant to any Commonwealth powers eg, banning exports to protect the environment.

3. Alteration of Exclusive Commonwealth Powers

Make concurrent legislative powers over

(a) Commonwealth places (s 52(i)); and

(b) Transferred 'departments of the public service' (s 52(ii)).

4. General Limitations on Commonwealth and/or State Legislative Powers

(a) Adequacy of s 109 as a means of resolving conflicts between Commonwealth and State laws.

(b) Extension of guarantees with respect to discrimination and uniformity in relation to Commonwealth (non-trade) laws.

5. Other Matters

Constitutional recognition of local government.
Territorial self government.

EXECUTIVE GOVERNMENT

1. Head of State

(a) Do we need a Head of State?
- Powers of Head of State.

(b) Monarchy of Republic?
- Type of monarchical or republican government.

2. The Queen of Australia

(a) Style, Title, Succession and Regency: Should the Constitution preamble and covering Clause 2 be amended to remove reference to the Crown of the United Kingdom? Religious discrimination and the Act of Settlement.

(b) Powers of Queen of Australia
- Appointment of the Governor-General
- Removal ('recall') of the Governor-General
- Functions when present in Australia
- Any other powers? eg Section 59 disallowance of laws
- The Queen and the States

3. The Governor-General

(a) Method of Selection: Should s/he be chosen by the Prime Minister, the government or elected by Parliament, the people or in some other way?

(b) Nationality

(c) Term and removal

(d) Powers of the Governor-General
- Powers, if any, exerciseable without or contrary to ministerial advice
- Powers in relation to the armed forces - Section 68
- Judicial (or other) review of the exercise of power

(e) Sources of advice, including judicial advisory opinions

(f) Deputy Governor-General and Acting Governor-General Sections 4 and 126.

4. Relations within the Government

(a) Preservation of the Australian version of the 'Westminister' system. Alternatively, should the Head of government be directly elected by the people?

(b) Cabinet/Ministry: Should it/they be recognised by the Constitution?

(c) Should the office of PM be recognised by the Constitution?

(d) Should the PM be elected by Parliament or one of the Houses?

(e) Should Ministers be Members of Parliament?

(f) Should provisions be made for Assistant Ministers?

(g) Should Senators be eligible for the Ministry?

(h) Should provision be made for some extra-parliamentary Ministers? Section 64.

(i) The Executive Council
- should it be retained
- composition
- powers (cf Canadian and British Privy Councils)
- relationships of Cabinet/Ministry

5. Relations between Parliament and the Government

(a) Should there be special provisions in the Constitution requiring that the government or any Minister retain the confidence of the Lower House?

(b) Should the Senate have the same powers as the House of Representatives with regard to the confidence in the Government or Ministers?

(c) What are the consequences for executive government of the Senate denying or deferring supply?

6. Executive power of the Commonwealth

(a) What should the government be empowered to do without legislative authorisation?

(b) Should the government have any sphere of power independent from legislative control? If so, to what extent?

INDIVIDUAL AND DEMOCRATIC RIGHTS

(1) What is the best way to ensure and advance the individual and democratic rights of the Australian people as citizens and as a society within the legislative, executive and judicial structure of Australian government?

(2) Should the Constitution spell out guarantees of individual and democratic rights?

(3) Are the guarantees already provided in the existing Constitution adequate for Australians today?

(4) Are we already sufficiently protected by existing laws and traditions, apart from the Constitution?

(5) If any Constitutional guarantees are desirable, which ones should be included, what form should they take, who should be bound by them and who should enforce them?

TRADE AND NATIONAL ECONOMIC MANAGEMENT

A. In general terms, to advise the Constitutional Commission, in accordance with its terms of reference, on all matters relating to trade and national economic management in respect of Australia within the basic framework of a federal system.

B. In particular, to consider and report to the Constitutional Commission on the following matters:

Division of Legislative Powers

1. Whether the existing division of legislative powers between the Commonwealth and the States creates an appropriate framework for trade and national economic management.

   In particular:

   (a) Whether the existing legislative power of the Commonwealth in relation to interstate and overseas trade and commerce is adequate to enable the Commonwealth to regulate trade and commerce, including external trade, in the national interest.

(b) Whether the existing legislative power of the Commonwealth is adequate to enable the Commonwealth to regulate, in the national interest, the activities of trading, financial and business entities.

(c) Whether the existing legislative power of the Commonwealth is adequate to enable the full implementation in the national interest of international treaties, agreements, obligations and recommendations which relate to trade and national economic management

(d) In general, what legislative powers the Commonwealth should have in order to enhance national economic and social development. Matters for consideration, by way only of example, included
- national companies and securities regulation
- the development of Australia's natural resources
- foreign investment
- consumer protection and trade practices
- commodity marketing
- national transport and distribution policies
- communications

Fiscal Powers

2. Whether the taxation, revenue raising, borrowing and expenditure powers of the Commonwealth, the States and Territories and local government are adequate to enhance national economic and social development.

Relevant issues include the following:

(a) To what extent, if any, should the Commonwealth's taxation powers be exclusive?

(b) Should the Commonwealth have general power to spend its revenue and to give effect to the appropriation of it

by the Federal Parliament as it thinks fit, or should its power be restricted to areas which the Commonwealth can regulate under its legislative powers (s 81 of the existing Constitution)?

(c) What constitutional framework would permit appropriate revenue-sharing arrangements between the Commonwealth, the States and Territories and local government?

(d) To what extent, if any, should one level of government, or its authorities, be exempt from, or have the power to grant exemptions from, taxation by another level of government?

Regional Economic Preferences

3. Whether the existing provisions of the Constitution are adequate to prevent the application of laws or practices which result in regional economic preferences contrary to the national interest.

For example:

(a) To what extent, if any, should the Commonwealth be prevented from favouring one State, Territory or region over another?

(b) To what extent, if any, should the Constitution prevent a State or Territory from giving assistance to local interests?

(c) Is the existing guarantee in Section 92 of the Constitution of absolute freedom of trade, commerce and intercourse among the States appropriate?

(d) Are the existing provisions of the Constitution relating to the Inter-State Commission appropriate?

APPENDIX D

MEETINGS OF THE CONSTITUTIONAL COMMISSION

30, 31 January 1986	Sydney
3 March 1986	Canberra
20 March 1986	Sydney
5, 6 June 1986	Sydney
14, 15 August 1986	Sydney
23, 24 October 1986	Sydney
4, 5 December 1986	Sydney
18, 19 December 1986	Sydney
4-6 February 1987	Canberra
5, 6 March 1987	Sydney
2, 3 April 1987	Sydney
30 April, 1 May 1987	Sydney
13, 15 May 1987	Canberra
22, 23 June 1987	Sydney
13, 14 August 1987	Sydney
24-27 August 1987	Sydney
10, 11 September 1987	Sydney
5, 6 November 1987	Sydney
12, 13 November 1987	Sydney
30 Nov - 4 Dec 1987	Sydney
17, 18 December 1987	Sydney
13-15 January 1988	Sydney
27-29 January 1988	Sydney
10-12 February 1988	Sydney
24-26 February 1988	Sydney
9-11 March 1988	Sydney
29-31 March 1988	Sydney
6-8 April 1988	Sydney
20-22 April 1988	Sydney

APPENDIX E

PUBLIC HEARINGS CONDUCTED BY THE CONSTITUTIONAL COMMISSION AND ADVISORY COMMITTEES

CONSTITUTIONAL COMMISSION

City/Town	Dates on which public hearings were held	Number of people who made submissions
Inverell	9 February 1987	12
Ballarat	16 February 1987	17

AUSTRALIAN JUDICIAL SYSTEM

City/Town	Dates on which public hearings were held	Number of people who made submissions
Sydney	31 July, 1 August 1986	14
Melbourne	21, 22 July 1986	13
Brisbane	13, 14 October 1986	15
Adelaide	8, 9 July 1986	11
Perth	10, 11 July 1986	8
Canberra	24, 25 September, 27 October 1986	11
Darwin	16 October 1986	3
Hobart	24, 25 July 1986	7

DISTRIBUTION OF POWERS ADVISORY COMMITTEE

City/Town	Dates on which public hearings were held	Number of people who made submissions
Melbourne	23, 24 September, 12 December 1986	10
Hobart	25 September 1986	6
Adelaide	8 October 1986	14

Perth	10 October 1986	10
Norfolk Island	17 October 1986	11
Brisbane	4 November 1986	11
Darwin	6 November 1986	3
Canberra	18 November 1986	20
Sydney	14 November 1986	15

EXECUTIVE GOVERNMENT ADVISORY COMMITTEE

City Town	Date on which public hearings were held	Number of people who made submissions
Sydney	3, 10, 24 September 1986	10
Canberra	17 September, 1 October 1986	8
Melbourne	22, 29 October 1986	9
Adelaide	10 November 1986	1
Hobart	8 October 1986	4
Brisbane	26, 27 February 1987	6
Darwin	16 March 1987	4
Perth	20, 21 November 1986	7

INDIVIDUAL AND DEMOCRATIC RIGHTS ADVISORY COMMITTEE

City/Town	Dates on which public hearings were held	Number of people who made submissions
Newcastle	27 September 1986	13
Tamworth	28 September 1986	10
Melbourne	11 October 1986	22
Bendigo	12 October 1986	14
Adelaide	18 October 1986	16
Sydney-City	25 October 1986	26
Hobart	1 November 1986	7

Launceston	2 November 1986	9
Alice Springs	7 November 1986	7
Darwin	8 November 1986	10
Perth	15 November 1986	28
Canberra	22 November 1986	23
Albury	23 November 1986	18
Brisbane	2 December 1986	27
Rockhampton	3 December 1986	10
Townsville	4 December 1986	11
Cairns	5 December 1986	14
Sydney-Fairfield	14 December 1986	14

TRADE AND NATIONAL ECONOMIC MANAGEMENT ADVISORY COMMITTEE

City/Town	Dates on which public hearings were held	Number of people who made submissions
Sydney	1, 2, 3 December 1986	24
Armidale	4 December 1986	4
Albury	5 December 1986	5
Melbourne	24, 25, 26 November 1986	18
Mildura	27 November 1986	8
Morwell	28 November 1986	6
Brisbane	8, 19 December 1986	12
Toowoomba	10 December 1986	1
Townsville	11 December 1986	2
Cairns	12 December 1986	4
Adelaide	27, 28 October 1986	8
Mount Gambier	29 October 1986	3
Port Augusta	30 October 1986	2
Hobart	13, 14 October 1986	9

Launceston	15 October 1986	1
Burnie	16 October 1986	2
Perth	10, 11 November 1986	12
Kalgoorlie	12 November 1986	2
Port Hedland	13 November 1986	1
Darwin	15, 16 December 1986	9
Alice Springs	18 December 1986	4
Canberra	4, 5, 12 February 1987	10

APPENDIX F

BACKGROUND PAPERS PUBLISHED BY CONSTITUTIONAL COMMISSION

Number	Title	Date
1	Defamation: One Law for Australia?	10 July 1986
2	Term of Parliament: 3 Years or 4?	17 July 1986
2A	Term of Parliament: 3 Years of 4? (Revised)	6 April 1987
3	Simultaneous Elections	5 August 1986
4	Nexus Between the Senate and the House of Representatives	22 July 1986
5	Interchange of Powers Between the Commonwealth and the States	23 July 1986
6	Outmoded and Expended Provisions of the Australian Constitution	11 July 1986
7	Qualifications of MPs	27 July 1986
8	Deadlocks Section 57	October 1986
9	The Senate and Money Bills	November 1986
10	Qualifications of Members of Parliament	November 1986
11	Issues Affecting Local Government	undated
12	Amending the Constitution	January 1987
13	Fixed Term Parliaments	undated

Australia's Constitution: Time to Update Summary of the Reports of the Advisory Committees to the Constitutional Commission		
	First edition (100,000 copies)	September 1987
	Second edition (20,000 copies)	January 1988
	Third edition (20,000 copies)	March 1988
	Fourth edition (20,000 copies)	March 1988

APPENDIX G

BULLETINS PUBLISHED BY CONSTITUTIONAL COMMISSION

Bulletin No 1	May 1986
Bulletin No 2	September 1986
Bulletin No 3	March 1987
Bulletin No 4	July 1987
Bulletin No 5	September 1987

APPENDIX H

PAPERS AND REPORTS PREPARED BY ADVISORY COMMITTEES

AUSTRALIAN JUDICIAL SYSTEM

Issues Paper (1986)
Summary of Issues Paper (1986)
Statement of Preliminary Views (1987)
Report to the Constitutional Commission (22 May 1987)

DISTRIBUTION OF POWERS

Issues Paper (August 1986)
Report to the Constitutional Commission (6 June 1987)

EXECUTIVE GOVERNMENT

Issues Paper (August 1986)
Report to the Constitutional Commission (30 June 1987)

INDIVIDUAL AND DEMOCRATIC RIGHTS

Issues Paper (1986)
Report to the Constitutional Commission (15 June 1987)
Working Papers by Stephen J Odgers (1987)

TRADE AND NATIONAL ECONOMIC MANAGEMENT

Issues Booklet (September 1986)
Chapters from the Issues Booklet were reprinted separately as:

Background Paper No 1	Consumer Protection
Background Paper No 2	Trade Practices
Background Paper No 3	National Companies and Securities Regulation
Background Paper No 4	Natural Resources
Background Paper No 5	Section 92
Background Paper No 6	Commodity Marketing
Background Paper No 7	Fiscal Powers
Background Paper No 8	Communications

Report to the Constitutional Commission (June 1987)

APPENDIX I

CITIZENSHIP

Acquisition of Australian Citizenship

The Australian Citizenship Act 1948 provides that Australian citizenship may be acquired in four ways:

(a) by birth in Australia;
(b) by adoption;
(c) by descent;
(d) by naturalization.

There are also provisions by which certain British subjects are Australian citizens.

Birth in Australia. As a result of amendments to the Act in 1986, a person who is born in Australia after the commencement of the amending legislation does not acquire Australian citizenship merely by reason of being born in Australia. Section 10 of the Act, as amended, provides that a person born in Australia after the commencement of the amending Act of 1986 is an Australian citizen by virtue of that birth if, and only if:

(a) a parent was at the time of birth an Australian citizen or a permanent resident of Australia ('permanent resident' is defined in section 10(6), see also section 5A); or

(b) the person has, throughout the period of 10 years commencing on the day of birth, been ordinarily resident in Australia.

Notwithstanding that a person satisfies these conditions, he or she does not become an Australian citizen if he or she was born at a place then under occupation by the enemy and a parent was at

that time an enemy alien (section 10(3)). (An exception is made in the case where one parent is at the time of birth an Australian citizen or permanent resident and not an enemy alien (section 10(5)).)

A person who is born in Australia, but who does not automatically become an Australian citizen on birth, may become an Australian citizen upon the making an application to the Minister under section 23D(1) of the Act.

The Minister may register the person as an Australian citizen if satisfied that 'the person (a) was born in Australia; (b) is not, and has never been, a citizen of any country; and (c) is not, and never has been, entitled to acquire the citizenship of a foreign country.' Section 23D(1A), inserted in 1986, goes on to provide:

> Where the Minister is satisfied that a person has or had reasonable prospects, at a particular time, of acquiring the citizenship of a foreign country if the person were to apply, or to have applied, at that time for the grant of such citizenship, the person shall be taken, for the purposes of sub-section (1), to be or to have been entitled to acquire the citizenship of that country at that time.

Section 23D gives effect to the Convention Relating to the Status of Stateless Persons (date of accession 12 December 1973; in force in Australia on 13 March 1974) and the Convention on the Reduction of Statelessness (date of accession 13 December 1973; in force in Australia 13 December 1975).

The new constitutional provision proposed by the Advisory Committee on Individual and Democratic Rights would override sections 10 and 23D. Anyone born in Australia would automatically be an Australian citizen regardless of the status of a parent or parents. Legislative provisions might nonetheless enable renunciation of citizenship so acquired. There could, however, be an implied limitation on the Parliament's power to define what is an effective act of renunciation.

Citizenship by adoption. Section 10A of the Act provides:

> A person, not being an Australian citizen, who -
>
> (a) under a law in force in a State or Territory, is adopted by an Australian citizen or jointly by 2 persons at least one of whom is an Australian citizen; and
>
> (b) at the time of his adoption is present in Australia as a permanent resident,
>
> shall be an Australian citizen.

Under the constitutional provision recommended by the Advisory Committee, a person would automatically acquire Australian citizenship on attaining the status of an adopted child of an Australian citizen. The provision does not make it clear whether, as at present, the adoption would have to be under a law in force in a State or Territory. Nor does it make it clear whether, to acquire citizenship by adoption, the adopting parent or parents have to be Australian citizens at the time of the adoption.

For example, would a person become an Australian citizen merely because he or she had been adopted by X under the laws of Greece, and X had subsequently become an Australian citizen by naturalization? Or would citizenship by adoption be acquired only if the adopting parent was, at the time of the adoption, an Australian citizen, and the adopted person was at the time of adoption, 'a child'? Who would be 'a child' for this purpose? Would the term 'child' be interpreted in the way 'adult person' was interpreted by the High Court for the purposes of section 41 of the Constitution?[1]

A further point to be noted about the section recommended by the Advisory Committee is that it would override the present requirement that the adopted person, at the time of the adoption, be present in Australia as a permanent resident.

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[1] See King v Jones (1972) 128 CLR 221.

Citizenship by descent. Section 10B of the Act provides for acquisition of citizenship by descent as follows:

(1) A person born outside Australia (in this sub-section referred to as the "relevant person") is an Australian citizen if -

(a) the name of the relevant person is registered for the purposes of this section at an Australian consulate within 18 years after his birth; and

(b) a person, being a parent of the relevant person at the time of the birth of the relevant person -

(i) was at that time an Australian citizen who had acquired Australian citizenship otherwise than in the manner referred to in sub-sub-paragraph (ii) (A); or

(ii) was -

(A) at that time an Australian citizen who had acquired Australian citizenship under this section, or under section 11 of this Act as in force at any time before the commencement of this section; and

(B) at any time before the registration of the name of the relevant person (including a time before the birth of the relevant person), present in Australia, otherwise than as a prohibited immigrant, as a prohibited non-citizen, or in contravention of a law of a prescribed Territory, for a period of, or for periods amounting in the aggregate to, not less than 2 years.

(2) Where, at the time of the birth of a child (in this sub-section referred to as the "relevant child"), one of the parents of the relevant child was not an Australian citizen, the name of the relevant child shall not be registered for the purposes of this section at an Australian consulate unless the person applying to register the name declares in writing to the person to whom the application is made, or otherwise satisfies that person, that -

(a) at least one person who is, at the time of the application, a responsible parent of the relevant child, was, at the time of the birth of the relevant child -

(i) a parent of the relevant child; and

(ii) an Australian citizen; or

(b) a person who was, at the time of the birth of the relevant child -

(i) a parent of the relevant child; and

(ii) an Australian citizen,

is dead.

(3) The validity of the registration at an Australian consulate of the name of a person is not affected by a failure to comply with sub-section (2) in relation to that registration.

The constitutional provision recommended by the Advisory Committee would have the effect of according Australian citizenship to any person who was the natural-born child of Australian citizens. Presumably the Committee's intention was that Australian citizenship would be so acquired only if a natural parent of the person was an Australian citizen at the time of that person's birth.

Were the Committee's recommended provision to be adopted, it would affect the existing law on acquisition of citizenship by descent in the following ways:

(a) A person born to an Australian citizen would automatically become an Australian citizen on birth without need for the birth to be registered at an Australian consulate within a certain time.

(b) A person born to an Australian citizen would automatically become an Australian citizen on birth irrespective of how the parent acquired citizenship. At present citizenship is not acquired when the parent has acquired Australian citizenship by descent unless that parent was, at any time before the registration of the child, present in Australia for not less than two

years, otherwise than as a prohibited immigrant or as a prohibited non citizen.[2]

Citizenship by naturalization. The Act provides for acquisition of Australian citizenship by a process which involves formal application for grant of citizenship and decision on any such application by a governmental officer. The officer has to be satisfied that prescribed statutory qualifications have been met.

The Constitution, does not, in any way, inhibit the Parliament's power to determine what conditions have to be fulfilled by a person who seeks to acquire Australian citizenship by naturalization. The section proposed by the Advisory Committee would not affect Parliament's legislative powers in that regard.

Loss of citizenship

The Act specifies four circumstances in which Australian citizenship is lost. They are:

(a) acquisition of another nationality;

(b) renunciation of citizenship;

(c) service in enemy armed forces;

(d) deprivation of citizenship by the Minister.

Acquisition of another nationality. Citizenship is automatically lost when an Australian citizen who has attained the age of 18 years does an act or thing (other than marriage) the sole or dominant purpose of which, and the effect of which, is to acquire the nationality or citizenship of a foreign country (section 17).

Renunciation of citizenship. A person may, under section 18 of the Act, renounce Australian citizenship if:

2 This general rule is qualified by section 23D(3) - one of the special provisions to prevent persons being stateless.

(a) The person has attained the age of 18 years and is a national or citizen of a foreign country; or

(b) The person was born, or is ordinarily resident, in a foreign country and is not entitled, under the law of that country, to acquire the nationality or citizenship of the country by a reason that the person is an Australian citizen.

A person who is qualified to renounce citizenship is required to lodge a declaration of renunciation with the Minister. Subject to certain provisos, the Minister is obliged to register the declaration. On registration, the declaration terminates the person's Australian citizenship.

Service in enemy armed forces. Loss of citizenship is also automatic when a person, is, under the law of a foreign country, a national or citizen of the country, and commences to serve in the armed forces of that country at a time when the country is at war with Australia (section 19).

Deprivation of citizenship by the Minister. The only circumstances in which an Australian citizen may be deprived of citizenship by administrative decision are:

(a) when a person has acquired citizenship by naturalization, and has then been convicted of an offence under section 50 of the Act - the offence of making a misleading statement or concealing a material circumstance in relation to the application for grant of citizenship (section 21);

(b) when a person has acquired citizenship by naturalization, and when that person has at any time after applying for citizenship, been convicted of an offence committed before the grant of citizenship, and sentenced to imprisonment for ore than 12 months (section 21).

The power to deprive a person of citizenship in either of these circumstances is vested in the Minister, and it can only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen. Any exercise of the Minister's power would be judicially reviewable.

Section 23D(3A) of the Act, however, provides that the Minister cannot deprive a person of citizenship under section 21 if the effect of the deprivation would be that the person would become stateless. This limitation on the Minister's power does not apply where the person has been convicted of an offence against section 50 in relation to his or her application for naturalization. It should also be noted that, although under section 23(2) the Minister has power to order that any child (under the age of 18) of a person who is deprived of citizenship under section 21 shall cease to be a citizen, section 23D(3A) ensures that the Minister cannot make such an order if the result would be to render the child stateless.

Effect of provision recommended by Advisory Committee. The principal effect of the section proposed by the Committee would be to prevent the Parliament from making laws which, of their own force, would deprive citizens of their citizenship. Parliament could merely define the circumstances in which a determination might be made that a person be deprived of citizenship. It would also have to prescribe procedures to be followed which satisfied the principles of fairness and natural justice. In most cases that would require giving the citizen an opportunity of being heard.

Deprivation of citizenship would probably be interpreted to mean only involuntary termination of citizenship. If that were the case, the Parliament could continue to provide for voluntary renunciation of citizenship and could also limit the circumstances in which citizenship can be renounced. United States experience does, however, suggest that there could be problems about the extent to which the Parliament could legislate

to define what was to be regarded so voluntary relinquishment of citizenship.

United States citizenship is defined and conferred by Section 1 of the Fourteenth Amendment of the Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The Constitution does not expressly provide for deprivation of citizenship but the Supreme Court of the United States has held that nothing in it prevents voluntary relinquishment of citizenship, either expressly or by conduct.[3] On the other hand Congressional legislation providing for involuntary termination of citizenship on grounds such as refusal to serve in the armed forces, or voting in elections in a foreign country, has been held unconstitutional.[4] The Court has, nevertheless, held that the Congress can legislate to specify circumstances in which a citizen is presumed to have relinquished citizenship voluntarily; though if Congress makes any such law, it does not, of its own force, operate to deprive a person of citizenship. It will have that effect only if the Government can prove that the citizen voluntarily did that which Congress has declared to be expatriating, and also did it with the intention of renouncing citizenship.[5]

Congress can, for example, enact a law which provides that a citizen of the United States shall lose his or her citizenship by 'taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state', but that law will be read down to mean that the specified expatriating event must

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3 Kennedy v Mendoza-Martinez, 372 US 144, 159 n 11 (1963).

4 Kennedy v Mendoza-Martinez, 372 US 144 (1963); Trop v Dulles, 356 US 86 (1958); Afroyim v Rusk, 387 US 253 (1967).

5 Vance v Terrazas, 444 US 252 (1980).

have been done voluntarily and with the specific intent to renounce citizenship.[6]

Some further points which emerge from judicial interpretations of the United States Constitution which are relevant to an understanding of the possible effect of the citizenship clause which the Advisory Committee recommends are:

(a) Even if there were no express provision to authorise the Parliament to make laws for involuntary termination of Australian citizenship, the Parliament would have power to make a law providing for termination of the citizenship of a person who became a citizen by naturalization, but who was subsequently proved to have engaged in fraud or misrepresentation in connexion with his or her application for grant of citizenship.[7]

(b) Although the Parliament would have plenary power to prescribe the conditions precedent for acquisition of citizenship by naturalization, it probably could not make a law with respect to naturalization under which the person or body determining an application for grant of citizenship by naturalization could attach to the grant any condition subsequent which, if breached, would automatically result in loss of citizenship.[8]

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6 ibid.

7 Fedorenko v United States, 449 US 490 (1981); Afroyim v Rusk 387 US 253, 267, n 23 (1967).

8 Roger v Bellei, 401 US 815 (1971).

APPENDIX J

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

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:-

1. This Act may be cited as the Commonwealth of Australia Constitution Act.

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.

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.

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 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.

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.

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.

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.

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.

9. The Constitution of the Commonwealth shall be as follows:-

THE CONSTITUTION.

This Constitution is divided as follows:-

CHAPTER I
THE PARLIAMENT

PART I - GENERAL

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."

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.

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.

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.

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.

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.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

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

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 of 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.

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.

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.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

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.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

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.

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; 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.

The election to fill vacant places shall be made **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 **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 **July** preceding the day of his election.

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.

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, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session 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 from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent

vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where -

(a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

(b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

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

If the place of a senator chosen by the people of a State at the election of senators last held before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 became vacant before that commencement and, at that commencement, no person chosen by the House or Houses of Parliament of the State, or appointed by the Governor of the State, in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, held office, this section applies as if the place of the senator chosen by the people of that State had become vacant after that commencement.

A senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, being a senator appointed by the Governor of a State in consequence of a vacancy that had at any time occurred in the place of a senator

chosen by the people of the State, shall be deemed to have been appointed to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State that commenced or commences after he was appointed and further action under this section shall be taken as if the vacancy in the place of the senator chosen by the people of the State had occurred after that commencement.

Subject to the next succeeding paragraph, a senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office until the expiration of the term of service of the senator elected by the people of the State.

If, at or before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, a law to alter the Constitution entitled "Constitution Alteration (Simultaneous Elections) 1977" came into operation, a senator holding office at the commencement of that law who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a Senator chosen by the people of the State shall be deemed to have been chosen to hold office -

(a) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and seventy-eight - until the expiration or dissolution of the first House of Representatives to expire or be dissolved after that law came into operation; or

(b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eighty-one - until the expiration or dissolution of the second House of

Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

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.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

19. A senator may, be 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.

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.

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.

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.

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.

PART III - THE 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.

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.

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.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the 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.

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.

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.

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.

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.

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.

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 natural-born 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.

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.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

37. A member may be 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.

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.

39. Until the Parliament otherwise provides, the presence of a 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.

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

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.

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 authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

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.

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 an person whose services are not wholly employed by the Commonwealth.

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

(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.

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.

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.

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.

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.

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.

PART V - 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, telegraphs, telephonic, and other like services:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control for 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) Sensus 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:

(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:

(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, 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.

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.

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 a 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 change 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.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

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.

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.

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 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 Queens's assent.

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.

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.

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.

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 Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

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.

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.

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.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

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.

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.

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.

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.

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.

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.

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.

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.

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.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

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 judgements, 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 judgement of the High Court in all such cases shall be final and conclusive.

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.

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.

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.

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.

77. With respect to any of the matter 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.

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.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

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

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 purpose of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

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.

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.

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.

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 used, but not exclusively used in connexion with the department; the value thereof shall, of 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.

88. Uniform duties of custom shall be imposed within two years after the establishment of the Commonwealth.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

102. The Parliament may be 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.

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.

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.

105. The Parliament may take over from the States their public debts, 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.

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

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.

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.

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.

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.

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.

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.

112. After the 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.

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.

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.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

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.

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.

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.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

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.

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.

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.

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.

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.

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.

126. The Queen may authorise 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 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.

CHAPTER VIII.

ALTERATION OF 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 and **Territory** 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 **and Territory** 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.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

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.)

APPENDIX K

PROPOSED ALTERATIONS TO THE CONSTITUTION

BILL NO. 1

A BILL

FOR

An Act to alter the Commonwealth of Australia Constitution Act by omitting obsolete words and so as to recognise the Queen of Australia.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Commonwealth of Australia Constitution Act) 1988.

Omission of enacting words.

2. The Commonwealth of Australia Constitution Act is altered by omitting the words "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:-".

Act to extend to the Queen's successors.

3. Section 2 of the Commonwealth of Australia Constitution Act is altered by omitting the words "the United Kingdom" and substituting the word "Australia".

Operation of the Constitution and laws.

4. Section 5 of the Commonwealth of Australia Constitution Act is altered by omitting all the words after and including "; and the laws of the Commonwealth".

Repeal of sections 7 and 8.

5. Sections 7 and 8 of the Commonwealth of Australia Constitution Act are repealed.

BILL NO. 2

A BILL

FOR

An Act to alter the Constitution so as to require senators and members of the House of Representatives to take oaths or affirmations of allegiance to the Queen of Australia.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title

1. This Act may be cited as the Constitution Alteration (Oaths and Affirmations of Allegiance) 1988.

Schedule

2. The Constitution is altered by omitting from the schedule thereto the words "of the United Kingdom of Great Britain and Ireland" and substituting "of Australia".

BILL NO. 3

A BILL

FOR

An Act to alter the Constitution to empower the Parliament of the Commonwealth to make laws with respect to the Succession to the Throne.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Australian Sovereign) 1988.

Legislative powers of the Parliament.

2. Section 51 of the Constitution is altered by inserting the following paragraph before paragraph (i):

"(xxxviiiA.) Succession to the Throne, and regency, in the sovereignty of Australia:".

BILL NO. 4

A BILL

FOR

An Act to alter the Constitution with respect to:

(a) the simultaneous elections of senators and members of the House of Representatives and the extension of their terms;

(b) the relationship between the Senate and the House of Representatives; and

(c) the establishment of new States and their representation in the Parliament of the Commonwealth,

and also to make certain other alterations of the Constitution.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

PART I.- PRELIMINARY.

Short title.

1. This Act may be cited as the Constitution Alteration 1988.

PART II.- GENERAL PROVISIONS WITH RESPECT TO SENATORS AND MEMBERS OF THE HOUSE OF REPRESENTATIVES.

2. The Constitution is altered by omitting section 7 and substituting the following sections:

The Senate.

"7. (1) The Senate shall be composed:

(a) of senators for each Original State;

(b) of senators for new States; and

(c) of senators for those Territories that are entitled to be represented in the Senate.

"(2) The senators for a State or Territory shall be directly chosen by the people of the State or Territory, voting as one electorate.

"(3) Subject to this Constitution, senators hold office for two terms of the House of Representatives.

Representation of Original States.

"7A. There shall be twelve senators for each Original State.

Representation of new States.

"7B. A new State is entitled to be represented in the Senate by a number of senators ascertained as set out in the following table:

Number of members of House of Representatives	Number of senators
1, 2, 3, 4 or 5	2
6 or 7	3
8 or 9	4
10 or 11	5
12 or 13	6
14 or 15	7
16 or 17	8
18 or 19	9
20 or 21	10
22 or 23	11
24 or more	12

Representation of Territories.

"7C. (1) Except as provided by the succeeding provisions of this section, a Territory is entitled to be represented in the Senate by a number of senators ascertained as set out in the table in section seven B.

"(2) The Australian Capital Territory and the Jervis Bay Territory shall be treated as one Territory for the purposes of this section and are entitled to be represented in the Senate by at least two senators.

"(3) The Northern Territory of Australia is entitled to be represented in the Senate by at least two senators.

"(4) A Territory (other than the Australian Capital Territory or the Northern Territory of Australia) that:

(a) is not represented in the House of Representatives or is so represented by only one member is not entitled to be represented in the Senate; or

(b) is represented in the House of Representatives by two or three members is entitled to be represented in the Senate by one senator.

Term of service of Territory senators.

"7D. Subject to this Constitution, the terms of service of senators representing the Territories expire on the expiry or dissolution of the House of Representatives.".

Casual vacancies - senators representing States.

3. The Constitution is altered by omitting from section 15 all the paragraphs of that section after the fourth paragraph.

4. The Constitution is altered by inserting after section 15 the following section:

Casual vacancies - senators representing Territories.

"15A. (1) If the place of a senator for a Territory that does not have an elected legislature becomes vacant before the expiration of the term of service of the senator, the members of the Senate and of the House of Representatives, sitting and voting together at a joint sitting of the members convened by the Governor-General in Council, shall choose a person to hold the place until the expiration of the term.

"(2) If the Parliament is not in session when the vacancy is notified, the Governor-General in Council may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament or until the expiration of the term, whichever first happens.

"(3) If the place of a senator for a Territory that has an elected legislature becomes vacant before the expiration of his term of service, the legislature of the Territory shall choose a person to hold the place until the expiration of the term.

"(4) If the legislature is not in session when the vacancy is notified, the Administrator of the Territory, acting with the advice of the Executive Council of the Territory, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the legislature or until the expiration of the term, whichever first happens.

"(5) If a Territory has a legislature that consists of two Houses, the reference in sub-section (3) to the legislature of the Territory shall be read as a reference to those two Houses sitting and voting together at a joint sitting convened by the Administrator of the Territory acting with the advice of the Executive Council of the Territory.

"(6) Where a vacancy in the place of a senator chosen by the people of a Territory has occurred and, at the time when the senator was chosen, he was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, the person chosen or appointed under this section in consequence of that vacancy and of a subsequent vacancy or vacancies shall be a person who is a member of that party.

"(7) Where:

(a) in accordance with sub-section (5) a member of a particular political party is chosen or appointed; and

(b) before taking his seat he ceases to be a member of that party, otherwise than by that party having ceased to exist,

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified as provided by sub-section (8).

"(8) Whenever the place of a senator for a Territory becomes vacant before the expiration of the senator's term of service, the President of the Senate shall notify the Governor-General of the vacancy.

"(9) The name of the person chosen or appointed under sub-section (1) or (2) or chosen or appointed under sub-section (3) or (4) shall be certified to the Governor-General by the President of the Senate or the Administrator of the Territory concerned, respectively.".

Vacancy to be notified.

5. The Constitution is altered by inserting in section 21, after the word "State", the words ",or the Administrator of the Territory,".

6. The Constitution is altered by omitting section 24 and substituting the following section:

The House of Representatives.

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

"(2) The number of members to be chosen at a general election shall be as the Parliament provides but so that there is one member for not fewer than each one hundred thousand people of the Commonwealth, as shown by the latest statistics of the Commonwealth. For the purposes of this section, the people of the Commonwealth includes the people of the Territories.

"(3) The number of members ascertained as mentioned in sub-section (2) shall be increased by such number of members as is necessary to give effect to sub-section (5) and to the provisions of this Constitution for the representation of Territories in the House of Representatives.

"(4) Subject to sub-section (5), the number of members chosen in each State shall be in proportion to the respective numbers of their people and shall be ascertained as the Parliament provides.

"(5) At least five members shall be chosen in each Original State and at least one member shall be chosen in each new State.".

Alteration of number of members.

7. The Constitution is altered by repealing section 27.

8. The Constitution is altered by omitting section 31 and substituting the following sections:

Election of members of the House of Representatives.

"31. The Parliament may make laws, subject to this Constitution, with respect to the election of members of the House of Representatives but so that the method of choosing members shall be the same for all the States and for the Territories that are entitled to be represented in the House of Representatives.

Representation of Territories in House of Representatives.

"31A. (1) Subject to sub-sections (3) and (4), a Territory is entitled to be represented in the House of Representatives when the number of people of the Territory is in excess of fifty thousand, as shown by the latest statistics of the Commonwealth.

"(2) Where a Territory is entitled to be represented in the House of Representatives, the number of members to be chosen at each general election shall be the same as the number that would be applicable under section twenty-four of this Constitution if the Territory were a State other than an Original State.

"(3) The Australian Capital Territory and the Jervis Bay Territory shall be treated as one Territory for the purposes of this section and together are entitled to be represented in the House of Representatives by at least two members.

"(4) The Northern Territory of Australia is entitled to be represented in the House of Representatives by at least one member.".

Date of effect of changes in representation.

"31B. A change in the number of senators or members of the House of Representatives by which a State or Territory is entitled to be represented has effect from the next general election of members of the House of Representatives the writs for which are issued more than twelve months after that change.".

PART III.- THE ELECTION OF SENATORS AND THEIR TERMS OF OFFICE.

9. The Constitution is altered by omitting sections 9, 10, 11, 12 and 13 and substituting the following sections:

Election of senators.

"9. (1) The Parliament may make laws, subject to this Constitution, with respect to the election of senators but so that the method of choosing senators shall be the same for all the States and for the Territories that are entitled to be represented in the Senate.

"(2) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

Issue of writs for the election of senators.

"10. (1) The Governor-General in Council shall cause writs to be issued for the election of senators whenever the terms of service of senators are about to expire or have expired.

"(2) The writs shall be issued within ten days from the expiry of those terms of service.

Term of service of senators.

"11. (1) As soon as may be after the first meeting of the Senate following a dissolution of the Senate, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable.

"(2) Subject to this Constitution, the term of service of senators included in the first class expires on the expiry or dissolution of the second House of Representatives to expire or

be dissolved after they were chosen or, if there is an earlier dissolution of the Senate, on that dissolution.

"(3) Subject to this Constitution, the term of service of senators included in the second class expires on the expiry or dissolution of the first House of Representatives to expire or be dissolved after they were chosen.

"(4) Where, after the election of senators following a dissolution of the Senate but before the division of senators for a particular State into classes under this section, the place of a senator for that State chosen at the election becomes vacant, the division shall be made as if the place of the senator had not become so vacant. For the purposes of section fifteen of this Constitution, the term of service of the senator shall be deemed to be, and to have been, the term of service that would have been his term of service if his place had not become vacant.

"(5) In the case of a senator whose term of service would, if this Constitution as in force immediately before the commencement of this section applied in relation to him, expire on 30 June 1990, his term of service expires on the expiration or dissolution of the first House of Representatives to expire or be dissolved after that commencement or, if there is an earlier dissolution of the Senate, on that dissolution.

"(6) In the case of a senator whose term of service would, if this Constitution as in force immediately before the commencement of this section applied in relation to him, expire on 30 June 1993, his term of service expires on the expiration or dissolution of the second House of Representatives to expire or be dissolved after that commencement or, if there is an earlier dissolution of the Senate, on that dissolution.

"(7) The reference in sub-section (5) or (6) to a senator does not include a reference to a senator holding office by

virtue of an appointment under section fifteen of this Constitution by the Governor of a State.

"(8) If the place of a senator chosen by the people of a State has become vacant before the commencement of this section and, at that commencement:

(a) no person held office by virtue of section fifteen of this Constitution; or

(b) a senator held office by virtue of an appointment under that section by the Governor of a State,

in consequence of the vacancy, then, for the purpose of the application of that section in relation to the vacancy, the term of service of the senator chosen by the people of the State shall be deemed to be, and to have been, the period for which he would have held his place under sub-section (5) or (6), as the case may be, if his place had not became so vacant.".

PART IV.- DURATION OF THE HOUSE OF REPRESENTATIVES.

10. The Constitution is altered by omitting section 28 and substituting the following section:

Duration of the House of Representatives.

"28. (1) Subject to this Constitution, each House of Representatives shall continue for four years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

"(2) The Governor-General shall not dissolve the House of Representatives within three years after the first meeting of the House after a general election unless the House has passed a resolution that the Government does not have the confidence of the House and the Governor-General is satisfied that it is not possible for a Government having the confidence of the House to be formed.

"(3) This section has effect with respect to the House of Representatives first elected at a general election held after the commencement of this section and with respect to each subsequent House of Representatives.".

PART V.- RELATIONSHIP BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES.

11. The Constitution is altered by omitting sections 53 and 54 and substituting the following sections:

Money Bills not to originate in the Senate.

"53. (1) A proposed law imposing taxation or appropriating revenue or moneys may not originate in the Senate.

"(2) The Senate may not amend a proposed law so as to increase a proposed charge or burden on the people.

"(3) Except as provided by this section and by section fifty-four of this Constitution, the Senate has equal power with the House of Representatives with respect to all proposed laws.

Powers of the Houses with respect to money bills.

"54. (1) This section applies to a proposed law that:

(a) imposes taxation or deals only with the imposition, assessment or collection of taxation; or

(b) appropriates revenue or moneys:

(i) for the ordinary annual services of the Government;

(ii) for the construction of public works or buildings;

(iii) for the acquisition of land; or

(iv) for the acquisition of plant or equipment,

or for two or more of those purposes.

"(2) Subject to sub-section (3), the Senate may not amend a proposed law to which this section applies.

"(3) The Senate may amend a proposed law as mentioned in paragraph (1)(b) in so far as it appropriates revenue or moneys for a new purpose, that is to say, for a purpose:

(a) in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or

(b) the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

"(4) The Senate may, at any stage, return to the House of Representatives a proposed law that may not be amended by the Senate requesting, by message, the omission or amendment of any item or provision. The House of Representatives may, if it thinks fit, make any omission or amendment so requested, with or without modifications.

"(5) If a proposed law to which this section applies becomes law, a provision in it that deals with a matter other than one mentioned in sub-section (1) is of no effect.

Interpretation.

"54A. A proposed law shall not be taken to be one to which section fifty-three or fifty-four of this Constitution applies by reason only that it contains provisions for:

(a) the imposition or appropriation of fines or other pecuniary penalties; or

(b) the demand, payment or appropriation of fees for licences or for services under the proposed law.".

Tax Bills

12. The Constitution is altered by omitting the first paragraph of section 55.

13. The Constitution is altered by omitting section 57 and substituting the following sections:

Disagreements between the Houses - money bills not passed within three years following first meeting of House of Representatives after a general election.

"57. (1) This section applies only:

(a) where a period of three years has not elapsed since the first meeting of the House of Representatives after a general election; and

(b) to a proposed law that may not be amended by the Senate.

"(2) If the House of Representatives passes a proposed law to which this section applies and:

(a) the Senate has rejected it; or

(b) within thirty days after the transmission of the proposed law to the Senate, the Senate has not passed it,

the proposed law shall be taken to have been passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

"(3) Paragraph (2) (b) does not apply if, within the period of thirty days mentioned in that paragraph, the House of Representatives is dissolved or the Parliament is prorogued.

"(4) Section fifty-eight of this Constitution does not apply to a proposed law presented to the Governor-General under sub-section (2) unless there is endorsed on it a statement signed by the Speaker of the House of Representatives that the proposed law is one to which this section applies and that the provisions of sub-section (2) have been complied with in relation to it.

Disagreements between the Houses - money bills not passed during fourth year following first meeting of House of Representatives after a general election.

"57A. (1) This section applies only:

(a) where a period of three years has elapsed since the first meeting of the House of Representatives after a general election; and

(b) to a proposed law that may not be amended by the Senate.

"(2) If the House of Representatives passes a proposed law to which this section applies and:

(a) the Senate has rejected it; or

(b) within thirty days after the transmission of the proposed law to the Senate, the Senate has not passed it,

the Governor-General in Council may dissolve the Senate and the House of Representatives simultaneously.

"(3) Paragraph (2)(b) does not apply if, within the period of thirty days mentioned in that paragraph, the House of Representatives is dissolved or the Parliament is prorogued.

Disagreements between the Houses - other than money bills.

"57B. (1) This section applies only to a proposed law that may be amended by the Senate.

"(2) If the House of Representatives passes such a proposed law and the Senate rejects it and if, after an interval of ninety days from the rejection of the proposed law, the House of Representatives, in the same or the next session, again passes the proposed law, with or without any amendments that have been made, suggested or agreed to by the Senate, and the Senate again rejects the proposed law, with or without any amendments to which the House of Representatives has not agreed, the Governor-General in Council may dissolve the Senate and the House of Representatives simultaneously, provided that a period of at least three years has elapsed since the first meeting of the House of Representatives after the last general election.

"(3) If, at the expiration of sixty days after the transmission to the Senate of a proposed law to which this section applies, the Senate has not passed the proposed law as transmitted to it or has passed it with amendments to which the House of Representatives has not agreed, the Senate shall be taken to have rejected it.

"(4) If, after the dissolution, the House of Representatives again passes the proposed law, with or without any amendments that have been made, suggested or agreed to by the Senate, and the Senate again rejects the proposed law, with or without any

amendments to which the House of Representatives has not agreed, the Governor-General in Council may convene a joint meeting of the members of the Senate and of the House of Representatives.

"(5) The members present at the joint sitting may deliberate and vote on the proposed law and upon any amendments that have been made in the proposed law by the Senate and not agreed to by the House of Representatives. Such an amendment that is affirmed by a special majority shall be taken to have been agreed to.

"(6) If the proposed law, with any amendments so agreed to, is affirmed by a special majority, 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.

"(7) For the purposes of sub-sections (5) and (6), a special majority is -

(a) an absolute majority of the total number of the members of the Senate and of the House of Representatives; and

(b) with respect to each of at least one-half of the States - a majority consisting of at least one-half of the total number of senators and of the members of the House of Representatives chosen for or in that State.

"(8) Section fifty-eight of this Constitution does not apply to a proposed law presented to the Governor-General under sub-section (6) unless there is endorsed on it a statement signed by the Speaker of the House of Representatives that it is one to which this section applies and that the provisions of sub-sections (2) to (7) (inclusive) have been complied with in relation to it.

"(9) For the purposes of this section, a proposed law again passed by the House of Representatives as mentioned in sub-

sections (2) and (4) shall be taken to be the same proposed law as the former proposed law transmitted to the Senate for its concurrence if it is identical with the former proposed law or contains only such alterations as:

(a) are necessary by reason of the time that has elapsed since the introduction of the former proposed law in the House of Representatives; or

(b) represent amendments of the former proposed law made by the Senate.".

PART VI.- THE STATES AND TERRITORIES.

Chapter V.

14. The Constitution is altered by inserting in the heading to Chapter V, after the word "STATES", the words "AND TERRITORIES".

15. The Constitution is altered by omitting Chapter VI and inserting the following sections at the end of Chapter V:

New States.

"121. (1) The Parliament may establish a new State in any of the following ways:

(a) by separation of territory from a State or States;

(b) by the union of two or more States;

(c) by the establishment of a Territory or part of a Territory, or of two or more Territories or parts of Territories, as a State; or

(d) by any other form of union consisting of a combination of territory separated from one or more States with territory forming the whole or part of an existing Territory or existing Territories.

"(2) An alteration of the limits of a State for the purpose of the formation of a new State shall not be made except with the consent of the Parliament of that State.

"(3) The Parliament may establish a constitution for a new State. The constitution so established may contain provisions for or with respect to its alteration.

"(4) Such a constitution, as originally established or as altered, shall not contain a provision that is inconsistent with or affects the operation of this Constitution.

"(5) Before the establishment of a new State, the Parliament may make laws, not inconsistent with this Constitution, for the peace, order and good government of the new State. Upon the establishment of the State, such a law becomes a law of the State.

Admission of existing bodies politic as new States.

"121A. The Parliament may admit an existing body politic (not being a body politic established by or under the law of a State or Territory) as a new State.

Laws consequential on establishment or admission of new States.

"121B. (1) The Parliament may make laws, not inconsistent with this Constitution, consequential on the establishment or admission of a new State.

"(2) In particular, the Parliament may make laws with respect to the first election of senators and members of the House of Representatives for a new State.

Alteration of limits of States.

"121C. (1) The Parliament of the Commonwealth may, with the consent of the Parliament of the 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 are agreed on, and may, with the like consent , make provision with respect to the effect and operation of an increase, diminution or alteration of territory in relation to any State affected.

"(2) Sub-section (1) does not apply to the increase, diminution or alteration of the limits of a State for the purpose of the establishment of a new State.".

Government of Territories.

"122. Subject to this Constitution, the Parliament may make laws for the government of territory surrendered by a State to and accepted by the Commonwealth or otherwise acquired by the Commonwealth.

Representation of small Territories.

"122A. (1) Residents of a Territory that is not entitled to be represented in the Parliament (being persons qualified to be enrolled as electors of the Territory) are entitled to vote at an election of senators or members of the House of Representatives for or in such Territory on the mainland of Australia as the Parliament provides.

"(2) Persons so entitled to vote shall be included in such electoral division as the Parliament provides.".

PART VIII.- MISCELLANEOUS ALTERATIONS.

16. The Constitution is altered by omitting section 58 and substituting the following section:

Assent to Bills.

"58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.

"(2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation.".

Repeal of sections 59 and 60.

17. The Constitution is altered by repealing sections 59 and 60.

18. The Constitution is altered by omitting section 110 and substituting the following section:

Governors and Administrators.

"110. A reference in this Constitution to the Governor of a State or to the Administrator of a Territory includes a reference to a person who is for the time being administering the government of the State or Territory, respectively.".

BILL NO. 5

A BILL

FOR

An Act to alter the Constitution so as to ensure that the members of the Parliament of the Commonwealth, of the Parliaments of the States and of the legislatures of the Territories are chosen democratically by the people.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short Title.

1. This Act may be cited as the Constitution Alteration (Democratic Elections) 1988

Commencement.

2. This Act shall come into operation at the expiration of 2 years after it receives the Royal Assent.

Qualification of electors.

3. The Constitution is altered by omitting section 8 and substituting the following section:

"8. (1) Subject to this Constitution, the qualification of electors of senators shall be in each State or Territory that which is prescribed by the Parliament as the qualification of electors of members of the House of Representatives and sub-section (3) of section thirty of this Constitution applies in relation to the election of senators as it applies in relation to electors of members of the House of Representatives.

"(2) In the choosing of members, each elector shall vote only once.

Provision as to races disqualified from voting.

4. The Constitution is altered by repealing section 25.

5. The Constitution is altered by omitting sections 29 and 30 and substituting the following sections:

Federal electoral divisions.

"29. (1) The Parliament may make laws determining the divisions in each State or Territory for which members of the House of Representatives may be chosen and the number of members to be chosen for each division.

"(2) The number of members shall be the same for each division of a particular State.

"(3) A division shall not be formed out of parts of different States.

"(4) A division may be formed out of different Territories, out of parts of different Territories or out of a Territory and part of another Territory.

"(5) In the absence of an applicable law as mentioned in sub-section (1), a State or Territory shall be one electorate.

Number of electors in State divisions to be equal.

"29A. Electoral divisions in a State shall be determined at such times as are necessary to ensure that the number of electors in each division is the same except that the number of electors in a division may depart to an extent not greater than one-tenth more or one-tenth less from the number ascertained by dividing the total number of electors in the State by the total number of members of the House of Representatives to be chosen in the State.

Number of electors in Territory divisions to be equal.

"29B. Where there are electoral divisions in a Territory, or as mentioned in sub-section (4) of section twenty nine of this Constitution, these divisions shall be determined at such times as are necessary to ensure that the number of electors in each division is the same except that the number of electors in a division may depart to an extent not greater than one-tenth more or one-tenth less from the number ascertained by dividing the total number of electors in the Territory or Territories concerned by the number of members of the House of Representatives to be chosen in that Territory or those Territories.

Definition of "elector".

"29C. In sections twenty-nine, twenty-nine A and twenty-nine B of this Constitution, 'elector' means a person whose name

is on a roll of electors qualified to vote at elections of members of the House of Representatives for the State or for the Territory or Territories concerned.

Qualification of electors.

"30. (1) Subject to this Constitution, the qualification of electors of members of the House of Representatives shall be, in each State or Territory, that which is prescribed by the Parliament.

"(2) In the choosing of members each elector shall vote only once.

"(3) Laws made by the Parliament for the purposes of this section shall be such that each Australian citizen who -

(a) complies with any reasonable conditions prescribed by those laws as to residence in Australia or in a part of Australia or in a Territory and as to enrolment; and

(b) has attained the age of eighteen years,

is entitled to vote, subject to any disqualification prescribed by those laws as to persons who -

(c) are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or

(d) are undergoing imprisonment for an offence.".

Right of electors of States.

6. The Constitution is altered by repealing section 41.

7. The Constitution is altered by inserting after section 107 the following sections:

State electoral divisions.

"107A. (1) Where there are electoral divisions of a State for the purpose of choosing members of a House of the Parliament of the State, then, at the time when those divisions are determined, but subject to the succeeding provisions of this section, the number of electors in each division shall be the same.

"(2) Sub-sections (3) (4) and (5) apply where several members are to be chosen at a general election in at least one electoral division of a particular House of the Parliament of a particular State.

"(3) A quota shall be ascertained by dividing the number of electors for that House by the number of members of that House.

"(4) If only one member of a particular House is to be chosen in a particular division, the number of electors in that division shall be a number equal to that quota.

"(5) If two or more members of a particular House are to be chosen in a particular division, the number of electors in that division shall be the number ascertained by multiplying the quota by the number of members of that House to be chosen in the division.

"(6) The electoral divisions of a State shall be determined at such times as are necessary to ensure that the number of electors in each division is in accordance with the preceding provisions of this section except that the number of electors in a particular division may depart to an extent not greater than one-tenth more or one-tenth less from the number otherwise applicable under sub-section (4) or (5).

"(7) Where electoral divisions of a State for the purpose of choosing members of a House of the Parliament of the State are not constituted in accordance with the preceding provisions of this section, the State shall, for the purpose of the election of those members, be one electorate and the method of choosing those members shall be, as nearly as practicable, the same as the method of choosing senators for the State.

"(8) In this section, 'elector' means a person whose name is on a roll of electors qualified to vote at elections of members of the House concerned.

Qualification of electors.

"107B. (1) Each House of Parliament of a State shall be composed of members directly chosen by the people of the State.

"(2) Subject to this Constitution, the laws of a State with respect to the qualification of electors of members of a House of the Parliament of the State shall be such that each Australian citizen who -

(a) complies with any reasonable conditions as to residence prescribed by those laws as to residence in the State or in a part of the State and as to enrolment; and

(b) has attained the age of eighteen years,

is entitled to vote, subject to any disqualification imposed by those laws as to persons who are of the kind mentioned in paragraph (c) or (d) of section thirty of this Constitution.

"(3) Notwithstanding sub-section (1), a casual vacancy in the membership of a House of the Parliament of a State may be filled as that Parliament provides.

Electors to have one vote only.

"107C. In the choosing of members of a House of the Parliament of a State, each elector shall vote once only.".

8. The Constitution is altered by inserting after section 122B the following sections:

Electoral divisions of Territories.

"122C. (1) The legislature of a Territory may make laws determining the divisions in the Territory for which members of that legislature may be chosen and the number of members to be chosen for each division.

"(2) Those numbers shall be the same for each division.

"(3) Electoral divisions of a Territory shall be determined at such times as are necessary to ensure that the number of electors in each division is the same, except that the number of electors in a division may depart to an extent not greater than one-tenth more or one-tenth less from the number ascertained by dividing the total number of electors in the Territory by the number of members of the legislature.

"(4) In the absence of a law dividing a Territory into divisions, the Territory shall be one electorate.

"(5) In this section, 'elector', in relation to a Territory, means a person whose name is on the roll of electors qualified to vote at elections of members of the legislature of the Territory.

Qualification of electors.

"122D. (1) The legislature of a Territory shall be composed of members directly chosen by the people of the Territory.

"(2) Subject to this Constitution, the laws of a Territory with respect to the qualification of electors of members of the legislature of that Territory shall be such that each Australian citizen who -

(a) complies with any reasonable conditions as to residence in the Territory or in a part of the Territory and as to enrolment; and

(b) has attained the age of eighteen years,

is entitled to vote, subject to any disqualification imposed by those laws as to persons who are of the kind mentioned in paragraph (c) or (d) of section thirty of this Constitution.

"(3) Notwithstanding sub-section (1), a casual vacancy in the membership of the legislature of a Territory may be filled as that legislature provides."

Electors to have one vote only.

"122E. In the choosing of members of the legislature of a Territory, each elector shall vote once only.".

9. The Constitution is altered by inserting the following section in Chapter VII after section 126:

Standing

"127A. Any person who claims that his rights have been infringed by a breach of, or a failure to comply with, section eight, thirty, one hundred and seven B or one hundred and twenty-two D of this Constitution may apply to a court of competent jurisdiction for an appropriate remedy.".

BILL NO. 6

A BILL

FOR

An Act to alter the Constitution so as to ensure that the Parliaments of the Commonwealth and the States and the legislatures of the Territories meet within 75 days after polling day.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short Title.

1. This Act may be cited as the Constitution Alteration (Parliamentary Sessions) 1988.

2. The Constitution is altered by omitting section 5 and substituting the following section:

Parliamentary sessions and prorogation and dissolution.

"5. (1) The Governor-General in Council may appoint such times for holding the sessions of the Parliament as the Governor-General in Council thinks fit.

"(2) The Governor-General in Council may, from time to time, by Proclamation or otherwise, prorogue the Parliament.

"(3) The Governor-General in Council may, subject to this Constitution, in like manner dissolve the House of Representatives.

"(4) After a general election of the House of Representatives, the Parliament shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.".

3. The Constitution is altered by inserting after section 110 the following section:

Summoning of State Parliaments after general elections.

"110A. After a general election of the more numerous House of the Parliament of a State (or, if there is only one House of the Parliament of a particular State, after a general election of that House), the Parliament of the State shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.".

4. The Constitution is altered by inserting after section 122A the following section:

Summoning of Territory legislatures after general election.

"122B. After a general election of the legislature of a Territory, the legislature shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.".

BILL NO. 7

A BILL

FOR

An Act to alter the Constitution so as to provide certain saving provisions necessitated by an alteration of the Constitution.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Savings) 1988.

2. The Constitution is altered by inserting at the end of Chapter VIII the following section:

Savings

"129. (1) In this section, 'constitutional alteration' means an alteration of this Constitution, however made; 'legal proceeding' includes a proceeding in or before a body or person not being a court.

"(2) A constitutional alteration does not affect the continued operation of a law of the Commonwealth or of a State or Territory made before the alteration took effect except to the extent (if any) that, under this Constitution as so altered, the law could not have been made.

"(3) A constitutional alteration does not -

(a) revive anything (including a law) that was not in force or existence immediately before the alteration took effect;

(b) affect the previous operation of this Constitution or anything duly done or suffered before the alteration took effect;

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred before the alteration took effect;

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence before the alteration took effect; or

(e) affect an investigation, legal proceeding or remedy in respect of such a right, privilege, obligation, liability, penalty, forfeiture or punishment.

"(4) Such an investigation, legal proceeding or penalty may be instituted, continued or enforced and the penalty or forfeiture may be imposed as if the constitutional alteration had not been made and anything in relation to investigation, legal proceeding or penalty may be done in all respects as if the constitutional alteration had not been made.

"(5) A constitutional alteration does not affect the holding of the office of Governor-General or any other office established by or referred to in the Constitution and a person holding the office immediately before the constitutional alteration took effect continues to hold the office as if the alteration had not been made.

"(6) The preceding provisions of this section have effect except to the extent that a contrary intention is expressed by the constitutional alteration.".

BILL NO. 8

A BILL

FOR

An Act to alter the Constitution so as to empower the Parliament of the Commonwealth to make laws with respect to nationality and citizenship.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Citizenship and Related Matters) 1988.

Legislative powers of the Parliament.

2. The Constitution is altered by omitting paragraph (xix.) of section 51 and substituting the following paragraph:

"(xix.) Nationality, citizenship, naturalization, and aliens:".

BILL NO. 9

A BILL

FOR

An Act to alter the Constitution with respect to the Executive Government of the Commonwealth.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Executive Government) 1988.

2. The Constitution is altered by omitting sections 2 and 3 and substituting the following sections:

Governor-General

"2. (1) There shall be a Governor-General, who shall be appointed by the Queen and shall be Her Majesty's representative in the Commonwealth.

"(2) The Governor-General shall hold office during Her Majesty's pleasure.

Remuneration of the Governor-General.

"3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Governor-General, an annual sum the amount of which shall be fixed by the Parliament.

The remuneration of the Governor-General shall not be reduced during his continuance in office.".

Recommendation of money votes.

3. The Constitution is altered by omitting from section 56 the word "Governor-General" and substituting the words "Governor-General in Council".

4. The Constitution is altered by omitting sections 62, 63, 64 and 65 and substituting the following sections:

Prime Minister, Ministers and Departments of State.

"62. (1) The Governor-General shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.

"(2) The Prime Minister shall not hold office for a longer period than ninety days unless he is or becomes a member of the House of Representatives.

"(3) The Prime Minister shall hold office, subject to this Constitution, until he resigns or, following a resolution passed by the House of Representatives that the Government does not have the confidence of the House, the Governor-General terminates his appointment on that ground.

Ministers and Assistant Ministers.

"63. (1) The Governor-General may, with the advice of the Prime Minister, appoint Ministers and Assistant Ministers.

"(2) No Minister or Assistant Minister shall hold office for a longer period than ninety days unless he is or becomes a senator or a member of the House of Representatives.

"(3) The Governor-General may, with the advice of the Prime Minister, terminate the appointment of a Minister or an Assistant Minister.

Queen's Ministers of State.

"64. (1) The Prime Minister, Ministers and Assistant Ministers appointed under section sixty-two or section sixty-three of this Constitution shall be the Queen's Ministers of State for the Commonwealth.

"(2) The number of Ministers and Assistant Ministers shall not exceed the number prescribed by the Parliament.

Federal Executive Council.

"65. (1) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.

"(2) The Councillors shall be the Queen's Ministers of State for the time being, who shall each make the oath or affirmation prescribed by the Parliament.

"(3) The Governor-General may convene meetings of the Federal Executive Council.

"(4) 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.

Departments of State.

"65A. (1) The Governor-General in Council may establish departments of State of the Commonwealth.

"(2) The Governor-General may, with the advice of the Prime Minister, appoint any of the Queen's Ministers of State to administer each of those departments.".

Command of the naval and military forces.

5. Section 68 of the Constitution is altered by adding at the end thereof ", acting with the advice of the Federal Executive Council".

Power of Governor-General to appoint deputies.

6. Section 126 of the Constitution is altered:

(a) by omitting the words "The Queen may authorise the Governor-General to appoint any person" and substituting "The Governor-General may, with the advice of the Prime Minister, appoint any person";

(b) by omitting the words ", subject to any limitations expressed or directions given by the Queen".

BILL NO. 10

A BILL

FOR

An Act to alter the Constitution by omitting outmoded words with respect to remuneration of senators, members of the House of Representatives and Ministers of State.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Remuneration Provisions) 1988.

2. The Constitution is altered by omitting section 48 and substituting the following section:

Remuneration of senators and members.

"48. Each senator and each member of the House of Representatives shall receive such remuneration as the Parliament may fix.".

3. The Constitution is altered by omitting section 66 and substituting the following section:

Remuneration of Ministers of State.

"66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.".

BILL NO. 11

A BILL

FOR

An Act to alter the Constitution so as to recognise local government in the States.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Local Government) 1988.

2. The Constitution is altered by inserting after section 119 the following section:

Local Government.

"119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.".

BILL NO. 12

A BILL

FOR

An Act to alter the Constitution so as to extend the guarantees of the right to trial by jury, freedom of religion, the right to fair compensation for acquisition of property and freedom from discrimination on the ground of residence in a State.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Existing Rights and Freedoms) 1988.

2. The Constitution is altered by omitting section 80 and substituting the following section:

Trial by jury.

"80. (1) The trial of a person for an offence, where the accused is liable to capital punishment, corporal punishment or imprisonment for more than two years, shall be by jury except in the case of a trial for contempt of court or a trial of a member of the naval and military forces of the Commonwealth before a

court-martial under a law relating to the control of the naval and military forces of the Commonwealth.

"(2) The trial by jury of any offence against a law of the Commonwealth that:

(a) was not committed in a State or Territory;

(b) was committed in two or more of the States and Territories; or

(c) was committed at a place or places unknown,

shall be held at such place or places as the Parliament prescribes. The trial by jury of other offences against a law of the Commonwealth shall be held in the State or Territory where the offence was committed. In either case, the Court may, on application by the accused or the prosecution, transfer the trial to a court of competent jurisdiction in another State or Territory.

"(3) Laws:

(a) permitting waiver by the accused of trial by jury;

(b) for giving effect to sub-sections (1) and (2) and (3) of this section, including laws for regulating the size and composition of the jury, and for majority verdicts,

may be made:

(c) in respect of offences against a law of the Commonwealth or of a Territory - by the Parliament of the Commonwealth;

(d) in respect of offences against a law of a State - by the Parliament of the State;

(e) subject to any law made as mentioned in paragraph (c) of this sub-section, in respect of offences against a law in force in a Territory - by a legislature for the Territory that has power to make laws with respect to trial by jury.".

3. The Constitution is altered by inserting after section 115 the following sections:

Acquisition of property under State law.

"115A. A law of a State may not provide for the acquisition of property from any person except on just terms.

Acquisition of property in Territories.

"115B. A law made under section one hundred and twenty-two of this Constitution or a law of a Territory may not provide for the acquisition of property from any person except on just terms.".

4. The Constitution is altered by omitting section 116 and substituting the following section:

No establishment, etc. of religion.

"116. The Commonwealth, a State or a Territory shall not establish any religion, impose any religious observance or prohibit 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, a State or a Territory.".

5. The Constitution is altered by omitting section 117 and substituting the following section:

Discrimination on ground of residence, etc.

"117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.

"(2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.".

BILL NO. 13

A BILL

FOR

An Act to alter the Constitution so as to guarantee certain rights and freedoms.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Rights and Freedoms) 1988.

Commencement.

2. This Act shall come into operation at the expiration of 3 years after it receives the Royal Assent.

3. The Constitution is altered by inserting after Chapter V. the following chapter:

"CHAPTER VIA.

"RIGHTS AND FREEDOMS.

Extent of guarantee.

"124A. This Chapter guarantees the rights and freedoms mentioned in it against acts done:

(a) by the legislative, executive or judicial arms of the Commonwealth, States or Territories;

(b) in the performance of any public function, power or duty conferred or imposed on any person or body by law.

Remedies.

"120B. A person whose rights or freedoms, as guaranteed by this Chapter, or by sections eighty, one hundred and sixteen or one hundred and seventeen, have been infringed may apply to a court of competent jurisdiction for an appropriate remedy.

Limits.

"124C. The rights and freedoms guaranteed by this Chapter may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Other rights and freedoms.

"124D. The rights and freedoms guaranteed by this Chapter do not abrogate or restrict any other right or freedom that a person may have.

Freedom of conscience etc.

"124E. Everyone has the right to:

(a) freedom of conscience and religion;

(b) freedom of thought, belief and opinion;

(c) freedom of expression;

(d) freedom of peaceful assembly; and

(e) freedom of association.

Freedom of movement.

"124F. (1) Every Australian citizen has the right to enter, remain in and leave Australia.

"(2) Everyone lawfully in Australia has freedom of movement and residence in Australia.

"(3) Sub-sections (1) and (2) of this section are not infringed by laws made by the Parliament with respect to entry into and residence in a Territory that is not on the mainland of Australia.

Equality rights.

"124G. (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

"(2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

No cruel or inhuman punishment etc.

"124H. (1) Everyone has the right not to be subjected to cruel, degrading or inhuman treatment or punishment.

"(2) Everyone has the right not to be subjected to medical or scientific experimentation without that person's consent.

Search and seizure.

"124I. Everyone has the right to be secure against unreasonable search or seizure.

Liberty of the person.

"124J. (1) Everyone has the right not to be arbitrarily arrested or detained.

"(2) Everyone who is arrested or detained has the right:

(a) to be informed, at the time of the arrest or detention, of the reason for it;

(b) to consult and instruct a lawyer without delay and to be informed of that right;

(c) to have the lawfulness of the arrest or detention determined without delay;

(d) to be released if the detention or continued detention is not lawful.

Rights of persons arrested.

"124K. Everyone who is arrested for an offence has the right:

(a) to be released if not promptly charged;

(b) not to make any statement, and to be informed of that right;

(c) to be brought without delay before a court or competent tribunal;

(d) to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention.

Rights of persons charged.

"124L. (1) Everyone who is charged with an offence has the right:

(a) to be informed without delay, and in detail, of the nature of the charge;

(b) to have adequate time and facilities to prepare a defence;

(c) to consult and instruct a lawyer;

(d) to receive legal assistance if the interests of justice so require and, if the person does not have sufficient means to provide for that assistance, to receive it without cost;

(e) to be tried without delay;

(f) to a fair and public hearing by a court;

(g) to be present at the trial and to present a defence;

(h) to have the assistance, without cost, of an interpreter if the person cannot understand or speak the language used in the court;

(i) to be presumed innocent until proved guilty according to law;

(j) to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(k) not to be compelled to be a witness against himself or to confess guilt;

(l) if finally acquitted of the offence or pardoned for it, not to be tried for it again;

(m) if finally found guilty of the offence and punished for it, not to be tried or punished for it again.

"(2) Everyone convicted of an offence has the right to appeal according to law against the conviction and any sentence.

No retrospective offences.

"124M. No one shall be liable to be convicted of an offence on account of any act or omission which did not constitute an offence when it occurred.".

BILL NO. 14

A BILL

FOR

An Act to alter the Constitution so as to empower the Parliament of the Commonwealth to make laws with respect to defamation.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Defamation) 1988.

Legislative powers of the Parliament.

2. The Constitution is altered by inserting after paragraph (v.) of section 51 the following paragraph:

"(vA.) Defamation otherwise than in the course of the proceedings of the Parliament of a State or of a court of a State:".

BILL NO. 15

A BILL

FOR

An Act to alter the Constitution with respect to the inter-change of powers between the Parliament of the Commonwealth and the Parliaments of the States.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Inter-change of Powers) 1988.

2. The Constitution is altered by inserting after section 108 the following sections:

Vesting exclusive Federal powers in State Parliaments.

"108A. (1) The Parliament of the Commonwealth may designate any matter within its exclusive powers for the purposes of this section.

"(2) Subject to this Constitution, the Parliament of a State may make laws with respect to a matter so designated and with respect to matters incidental to the execution of the power to make such laws.

Reference or designation of matters.

"108B. A reference of a matter by the Parliament of a State under paragraph (xxxvii.) of section fifty-one of this Constitution, and a designation of a matter by the Parliament of the Commonwealth under section one hundred and eight A of this Constitution:

(a) shall be by Act;

(b) may be subject to limitations and conditions;

(c) if limited in duration, may be extended by or under an Act of the Parliament that made it; and

(d) may be modified or revoked, but only by express provision in an Act of the Parliament that made it.".

BILL NO. 16

A BILL

FOR

An Act to alter the Constitution so as to empower the States to impose duties of excise.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows

Short Title.

1. This Act may be cited as the Constitution Alteration (Excise) 1988.

Exclusive power over customs and bounties.

2. The Constitution is altered by omitting from section 90 the words "and of excise".

BILL NO. 16A

A BILL

FOR

An Act to alter the Constitution so as to empower the States to impose duties of excise.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title

1. This Act may be cited as the Constitution Alteration (Excise) 1988.

2. The Constitution is altered by omitting section 91 and substituting the following section:

Exceptions as to excise and bounties.

91. Nothing in this Constitution prohibits a State from:

(a) granting any aid to or bounty on mining for gold, silver, or other metals;

(b) 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;

(c) imposing, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any duty of excise.".

BILL NO. 17

A BILL

FOR

An Act to alter the Constitution by omitting obsolete provisions.

BE IT ENACTED by the Parliament of the Commonwealth of Australia, with the approval of the electors as required by the Constitution, as follows:

Short title.

1. This Act may be cited as the Constitution Alteration (Obsolete Provisions) 1988.

Representatives in first Parliament.

2. The Constitution is altered by repealing section 26.

Right of electors of States.

3. The Constitution is altered by repealing section 41.

Exclusive powers of the Parliament.

4. The Constitution is altered by omitting from section 52 the sub-section:

"(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:"

Transfer of certain departments.

5. The Constitution is altered by repealing section 69.

Money to be appropriated by law.

6. The Constitution is altered by omitting from section 83 the paragraph:

"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.

7. The Constitution is altered by repealing section 84.

Transfer of property of State.

8. The Constitution is altered by repealing section 85.

Customs, excise and bounties.

9. The Constitution is altered by repealing section 86.

Application of customs and excise revenue for first ten years.

10. The Constitution is altered by repealing section 87.

Payment to States before uniform duties.

11. The Constitution is altered by repealing section 89.

Exclusive power over customs, excise, and bounties.

12. The Constitution is altered by omitting from section 90 the paragraph:

"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.".

Trade within the Commonwealth to be free.

13. The Constitution is altered by omitting from section 92 the paragraph:

"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.

14. The Constitution is altered by repealing section 93.

Customs duties of Western Australia.

15. The Constitution is altered by repealing section 95.

Financial assistance to States.

16. The Constitution is altered by omitting from section 96 the words "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament" and substituting the words "The Parliament".

Audit.

17. The Constitution is altered by repealing section 97.