

**ANNUAL LA TROBE JUSTICE SPEECH: "SECTION 128 OF THE
COMMONWEALTH CONSTITUTION AND CONSTITUTIONAL
CHANGE"**

MELBOURNE, 22 AUGUST 2013

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Thank you La Trobe University Law Students' Association and the Leo Cussen Centre for Law. I am very grateful for the opportunity to speak to you this afternoon. My topic today is s 128 of the Commonwealth Constitution.

Earlier this year the federal government announced a referendum on the recognition of local government in the Commonwealth Constitution. The referendum was to take place on the same day as the anticipated federal election. Although the proposed referendum has been shelved, it focused direct attention, once again, on s 128 of the Constitution and the workings of that provision. This was particularly the case as referenda on Commonwealth involvement with local government have failed before in 1974 and in 1988. In fact, only eight out of 44 referenda since federation have resulted in constitutional change.

As you might expect, there has been considerable debate over the years about the scope and interpretation of s 128 and criticisms of the various legislative arrangements supporting the processes for which that section provides.

As to the scope and interpretation of s 128, before the passage of laws referred to as the *Australia Acts* (one passed by the federal Parliament and one passed by the Parliament of the United Kingdom), there was concern over the possibility that the Parliament of the United Kingdom might exercise power (preserved under the Statute of Westminster¹) to alter any part of any Act expressed to apply to Australia, which could include the preamble and the covering clauses to the Constitution². However, the stated purpose of the *Australia Act* 1986 (Cth) was to ensure that constitutional arrangements conformed "with the status of the Commonwealth of Australia as a sovereign, independent and federal nation", so that theoretical danger has passed.

In contemporary times, post the *Australia Acts*, the Constitution is no longer seen as having an inferior status to any other law³. It has been opined that the *Colonial Laws Validity Act* 1865 (Imp) merely defined the basic rule of the legal system under the British Empire, which was that the British Parliament was

¹ *Statute of Westminster* 1931 (UK), s 4.

² See Thomson, "Altering the Constitution: Some Aspects of Section 128", (1983) 13 *Federal Law Review* 323 at 329-331.

³ *Australia Act* 1986 (Cth), s 1; *Australia Act* 1986 (UK), s 1. See also Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 123 [3.121].

supreme throughout the Empire – a principle gone from the Australian legal system since 1986⁴.

As to the criticism directed towards the legislative arrangements supporting the processes identified in s 128, more will be said about that in the third section of this talk.

It must be acknowledged that s 128 works to ensure that "any change to the Constitution has the broadest possible support"⁵. However, requiring electors to give simple answers to complex constitutional or policy questions is daunting and this task must be accomplished in accordance with a strict procedure. It has been said that the necessary processes predispose the referendum mechanism to practical difficulties, and indeed failure, unless there is clear bipartisan support for a proposed alteration⁶.

With that introduction, what I propose to do today is to organise this talk on s 128 of the Constitution under three headings: (1) the s 128 power; (2) the drafting history of s 128; and (3) the success rate of constitutional referenda in Australia.

⁴ Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 123 [3.121].

⁵ Williams and Hume, *People Power: The History and Future of the Referendum in Australia*, (2010) at 24.

⁶ See Blackshield and Williams, *Australian Constitutional Law and Theory*, (5th ed, 2010) at 1340-1345.

The s 128 power

Section 128, the single provision in Ch VIII of the Constitution, governs alterations to the Constitution. It opens with the words: "This Constitution shall not be altered except in the following manner". It has been remarked that this opening sentence contains a prohibition in respect of an implied conferral of power⁷. Detailed processes for altering the Constitution pursuant to that implied power follow the opening sentence.

The detailed processes laid down in s 128 are initiated by the federal Parliament bringing forward a proposed law to alter the Constitution. That proposed law must first be passed by an absolute majority of each House of the federal Parliament, or in certain specified circumstances twice by an absolute majority of either House. Between two and six months after it leaves the Parliament, the proposed law must be submitted to the electors in each State and Territory for a vote to be taken in such manner as Parliament prescribes. For a proposed law for constitutional alteration to succeed, there must be a majority of voters agreeing in a majority of States (ie four out of six) and there must also be an

⁷ Gageler, "Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations", in Murray (ed), *Constitutional Perspectives on an Australian Republic: Essays in Honour of Professor George Winterton*, (2010) 6 at 6. See also Thomson, "Altering the Constitution: Some Aspects of Section 128", (1983) 13 *Federal Law Review* 323.

affirmative vote nationwide. This is often referred to as the "double majority" requirement. The proposed law must then receive the Governor-General's assent.

It might be noted further that any proposed amendment that seeks to (i) diminish the proportionate representation of any State, or (ii) diminish the minimum number of representatives of a State, or (iii) increase, diminish or otherwise alter the limits of a State, requires a third step of approval, effectively necessitating a triple majority.

Quick and Garran, authors of the seminal text which annotates each section of the Constitution, describe the requirement for a double majority in s 128⁸ in the following way:

"These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable."

⁸ Quick and Garran, *The Annotated Constitution of the Commonwealth of Australia*, (1901) at 988.

That observation is consonant with the broad agreement from the beginning that the mechanism for altering the Constitution should be strict. At the Adelaide Convention in 1897, Sir Edward Braddon said⁹:

"[W]hile I would not say the Constitution should be such as could only be amended by force of arms, I hope we shall provide all necessary safeguards against its being lightly amended."

This evokes a fear that a constitution which is too rigid — unamendable — may provoke revolution, whereas a power of amendment which is not overly rigid permits evolution as times change. The founding fathers were quite conscious of the links between civil strife and social and political change as they had occurred both in the United Kingdom and Europe and in the United States of America. Quick and Garran's observations have also been borne out by history. Eight alterations by constitutional referenda, out of 44 proposed alterations brought forward by federal Parliament, do indeed indicate that it is almost only inevitable change which can be effected successfully through the s 128 process. However, in defence of s 128, it has been suggested that the problem may not lie with the rigidity of s 128 processes. Rather, the record of rejection may reflect the fact that proposed amendments are not treated on their merits because they

⁹ *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 1021.

become too politically freighted. More will be said on that topic later.

Drafting history of s 128

When I turn now to consider the drafting history of s 128, it will become clear that delegates at the Australasian Federal Conventions were in some conflict over whether the principles of responsible and representative government, on the one hand, or popular sovereignty, on the other, should be preferred when determining a mechanism for altering the Constitution. And, as Professor La Nauze has noted, federalism effectively added a third layer of complexity to the relevant debates¹⁰.

Looking ahead for a moment, it has been observed that "Sir William Harrison Moore saw in s 128 a recognition of three principles: those of Parliamentary government, of democracy and of federalism"¹¹. It is helpful to bear in mind the endpoint and those three principles — Parliamentary government, democracy and federalism — when considering the ebb and flow of debate over the preferable method of altering the Constitution.

¹⁰ La Nauze, *The Making of the Australian Constitution*, (1972) at 125.

¹¹ *Wong v The Commonwealth* (2009) 236 CLR 573 at 582 [21] per French CJ and Gummow J; [2009] HCA 3.

The story of the Federation movement, which gathered momentum in the second half of the 19th century and led to the Australasian Federal Conventions in the last decade of that century, has been told frequently¹². Delegates to the Conventions considered and debated draft clauses in draft constitutions, and that is a separate story in itself. We have both the Official Records of Debates and a great deal of archival materials to assist us in understanding that story.

In *Cole v Whitfield*¹³, a case concerning s 92 of the Constitution which was decided in 1988, a unanimous High Court departed from the Court's previous approach to considering historical materials (including the Convention Debates) in constitutional matters. The Court explained the rationale for the departure. Giving consideration to historical materials was for the purpose of identifying the contemporary meaning of language used in the Constitution, the subject to which the language in the Constitution was directed, and the nature and objectives of the movement towards federation from which the Constitution emerged¹⁴. There are superb collections of relevant primary

¹² See, for example, La Nauze, *The Making of the Australian Constitution*, (1972).

¹³ (1988) 165 CLR 360; [1988] HCA 18.

¹⁴ *Cole v Whitfield* (1988) 165 CLR 360 at 385.

materials now available, which complement the Official Records of the Convention Debates¹⁵.

The model for the first draft of a clause containing a system of altering the Constitution was the United States Convention model. In essence, the Bill brought in for debate in Sydney in the 1891 Convention provided for¹⁶:

1. passage of the proposed alteration by an absolute majority of the Senate and the House of Representatives;
2. submission of the proposed alteration to conventions, to be elected by the electors of the several States qualified to vote for the election of members of the House of Representatives; and
3. approval by conventions of a majority of the States.

The proposed amendment would then become law, subject to the Queen's power of disallowance¹⁷. But an amendment by which the proportionate representation in either House of

¹⁵ See, for example, Williams, *The Australian Constitution: A Documentary History*, (2005).

¹⁶ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 884.

¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 884.

Parliament of the Commonwealth was diminished would not become law without the consent of the convention of that State¹⁸.

A second model, put forward in a motion contravening the new alteration clause, was proposed by Mr Andrew Thynne, a Queensland delegate, in Sydney in 1891¹⁹. Thynne suggested that all future amendments of the Constitution be submitted to the electors for their "direct vote for approval"²⁰. He remarked approvingly on the "democratic" aspect of that proposal and put it forward on the basis that the people are "really the sovereign power"²¹, a theory of the Constitution which has found favour in a number of subsequent High Court decisions.

The Swiss Constitution gave effect to that model, providing that any alteration to that Constitution could only be effected by an expression of views of the majority of the States and *also* a majority of the people²². You can see in those requirements the

¹⁸ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 884.

¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 18 March 1891 at 495.

²⁰ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 March 1891 at 107.

²¹ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 March 1891 at 107. See also *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 888.

²² *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 888.

genesis of the "double majority" idea to which I made reference earlier.

Andrew Thynne's referendum proposal immediately encountered opposition from delegates concerned that any provision for amendment to the Constitution by direct popular approval would "sacrifice"²³ the smaller colonies. Furthermore, Sir Samuel Griffith queried whether it would be practical to have millions of people discussing such matters in detail. He said of the proposed referendum model of alteration²⁴:

"You must have a complicated document, and in order that the electors may exercise an intelligent vote they must be thoroughly familiar with every detail. Is that a practicable state of things? Will you ever get electors to vote under those circumstances?"

Griffith considered that State conventions with elected delegates (following the United States model) would be preferable to plebiscites, and recommended that that view be adopted. Mr Alfred Deakin pointed out that a convention model would have none of the advantages of a deliberative body²⁵. He appreciated

²³ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 888.

²⁴ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 894.

²⁵ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 895.

that there were tensions between the idea of popular sovereignty and the system of representative and responsible government exemplified in the constitutional arrangements of the United Kingdom, particularly as they had developed during the 19th century. However, Deakin thought that those two theoretical approaches to government could be reconciled, and that a democratic strand was not antithetical to representative government. You have to remember that the wider backdrop, against which the Constitution developed, included major social and political change in Australia in the direction of widening the suffrage. In this respect the colonies ran ahead of the mother country²⁶. In the result, the proposal for a referendum model for altering the Constitution was defeated in Sydney in 1891, although a requirement for a vote by a majority of the people of the Commonwealth was accepted²⁷, presaging the compromise which was eventually reached.

The Convention in Adelaide in 1897 included delegates directly elected by the people of the States. Before the Convention proper began, three committees sat to examine the Draft Constitution which had emerged from the 1891 Convention in Sydney.

²⁶ *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 16-17 [14]; [2010] HCA 46.

²⁷ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 962-964.

The relevant committee, the Constitutional Committee chaired by Edmund Barton, examined 14 motions that "could reasonably be said to have involved a conscious decision to promote or oppose the extension of 'democratic' participation in federal politics"²⁸. Four of the five successful motions effected significant change and what is important for present purposes is that "amendments of the Constitution [were] to be referred to the electors, not to conventions in the various States"²⁹.

Thus the Adelaide Convention commenced with a draft amendment clause, cl 121, which contained a requirement for direct popular vote for any amendment to the Constitution³⁰. This led to some complications, such as the question of how to deal with unequal suffrage because women had the right to vote in South Australia at that time but not elsewhere in the colonies. However, such complications and further amendments, subject to one exception, can be put to one side for now as they constitute a separate topic on their own.

²⁸ La Nauze, *The Making of the Australian Constitution*, (1972) at 124.

²⁹ La Nauze, *The Making of the Australian Constitution*, (1972) at 124.

³⁰ *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 1020.

One of the more interesting suggestions for further amendment came from Deakin at the Melbourne Convention of 1898. He suggested that those "who have state rights at heart" would do well to consider whether the referenda mechanism could be enhanced by enabling State Parliaments to initiate proposals to amend the Constitution³¹. However, he never moved this suggested addition and it appears to have slipped from view. The Constitutional Commission of 1988 ("the 1988 Commission") sought to breathe new life into Deakin's idea, but to no avail. It should also be noted that proposals for referenda being initiated by citizens have been made at various times since Federation. The Report of the 1988 Commission gave detailed consideration to the idea which has re-emerged most recently in the Citizen Initiated Referendum Bill 2013 (Cth).

In the *State Banking Case*³², Sir Owen Dixon remarked that the Constitution is a "political instrument"³³ – political instruments reflect compromise and certainly s 128 does precisely that. The requirement that a majority of voters must vote to approve a proposed alteration to the Constitution reflects democracy and its

³¹ *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 9 February 1898 at 730.

³² *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; [1947] HCA 26.

³³ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82.

underpinning notion of popular sovereignty. Sections 7 and 24 of the Constitution, which provide that the Houses of Parliament shall be composed of members "directly chosen by the people", was considered most recently in the High Court's decision in *Rowe*³⁴, which concerned the question of whether persons who had enrolled for the first time, but belatedly, had the right to vote. Those sections complement the democratic aspect of s 128. The requirement that a majority of the States vote in support of any proposed alteration to the Constitution reflects federalist concerns. And the initiation of the proposed alteration by Parliament reflects the essential framework of representative and responsible Parliamentary government derived from the system of government in Britain.

The success rate of referenda in Australia

That brings me to the third section of this talk. The success rate of referenda in Australia had already been mentioned. As I have said, few referenda have succeeded. This limited success rate shows that the Australian electorate will not alter the Constitution without a high degree of conviction that change is necessary.

³⁴ *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

Let me mention briefly something of the relevant machinery. As provided by s 128, Parliament prescribes the manner in which any referendum votes are taken. In most referenda, each elector receives a pamphlet containing arguments in favour of or against the proposed alteration. Those arguments are normally no more than two thousand words in length and must be authorised by a majority of those members of Parliament who voted for or against the proposed alteration. Some criticisms of this legislative support for the processes in s 128 focus on sending to voters, at the same time, arguments in favour of and against the proposed alteration. Another frequently encountered criticism is that voters are asked to deal with too much compacted into a single question.

There is also the *Referendum (Machinery Provisions) Act* 1984 (Cth), which provides that such arguments as are produced in favour of or against a proposed alteration to the Constitution must be submitted to each voter "not later than 14 days before the voting day for the referendum"³⁵.

A majority of the High Court in the *Work Choices Case*³⁶ commented on the significance of failed referenda and said³⁷:

³⁵ *Referendum (Machinery Provisions) Act* 1984 (Cth), s 11.

³⁶ *New South Wales v The Commonwealth* (2006) 229 CLR 1; [2006] HCA 52.

³⁷ *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 101 [132].

"It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth of the matter is much more complex than that. For example, party politics is of no little consequence to the outcome of any referendum proposal. And much may turn upon the way in which the proposal is put and considered in the course of public debate about it."

In that context I will give you two examples, one a successful referendum and one the most recent failed referendum, and leave you to ponder such lessons as might be learnt from those experiences.

The two examples of referenda to which I now turn are those which occurred in 1967 and 1999.

1967

On 27 May 1967, Australia voted to approve an alteration to the Constitution to delete discriminatory provisions within it and to grant the Commonwealth power to make laws with respect to Aboriginal people.

Section 51(xxvi) of the Constitution empowered the federal Parliament to make laws with respect to: "The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws". As a result of the referendum the words "other than the aboriginal race in any State" were deleted. Section 127 of the Constitution provided: "In reckoning

the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted." That section was also deleted. The change was a long time coming. In 1962, the right to vote in federal elections had finally been extended to all indigenous Australians and a movement for constitutional reform on this issue eventually resulted in a national consensus in favour of change. Only arguments in favour of the change were circulated to the electors. The vote in favour of deleting the discriminatory provisions from the Constitution was the highest recorded "Yes" vote for any referendum proposal (90.8%).

In 1967 a second question had been put to the Australian people, to change the provision in s 24 of the Constitution that the House of Representatives shall be, as nearly as practicable, twice the size of the Senate. Most Australians vote "No" in respect of that second proposal.

1999

The second example which I will mention is the unsuccessful referendum in 1999, concerning the issue of whether Australia should become a republic. As well as the main issue, voters were asked to vote on whether they preferred a directly elected head of state or supported Parliament choosing the head of state. That choice had distinct echoes of the debate I have described in relation to s 128, over whether it was better to have a convention model or a popular vote for altering the Constitution.

Although it is not often mentioned in the narrative of our nation, there was some republican sentiment in the colonies in the middle of the 19th century, more particularly as the influx of population onto the goldfields included Americans. However, it dissipated rather quickly as the movement towards universal manhood suffrage gathered pace, and succeeded effectively more quickly than had been anticipated.

Moving forward to the 1990s, a Constitutional Convention was held in 1998 on the question of Australia becoming a republic. On 6 November 1999, Australians voted on the question and a second question in relation to the alteration of the preamble to the Constitution, voting "No" in response to both questions.

Professor Michael Coper has remarked on differing judicial attitudes to s 128 and I will leave you with his comments as a stimulus for further thought in forming your own views. He said³⁸:

"Those broadly in favour of [constitutional] change and impatient with our failure to achieve it tend to characterise the [s 128] process as difficult and the negative results [of referenda] as explicable by anything other than a genuine understanding by the electorate of the issues. Those broadly

³⁸ Coper, "The People and the Judges: Constitutional Referendums and Judicial Interpretation", in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in honour of Professor Leslie Zines*, (1994) 73 at 87.

against [constitutional] change ... tend to see the electorate as appropriately wise."

Once again, thank you for the invitation to address you today.