The Flexibility of the Australian Constitution*

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I thought, when invited to speak at this EW Turner Memorial Lecture, that it might be appropriate to speak about an Australian constitutional theme: the flexibility or inflexibility, depending on how one views it, of our federal *Constitution*. Ernest William Turner was, after all, himself both a practising Hobart lawyer in the early days of our federal *Constitution*, a parliamentary draftsman, and a member of Tasmania's House of Assembly and Minister in the Lee government in the 1930s. So, he was no stranger to the consequences for Tasmania of Australia-wide federation.

Among the smaller, pre-federation Australian colonies, the whole question of federation presented, among much else, the possibility that they would experience domination by the larger, more populous colonies, New South Wales and Victoria. A glance at populations at the time of federation, with Tasmania having only 172 000, while New South Wales and Victoria had well over a million each, gave reality to this possibility. This led to concern not only about what initial safeguards might appear in the *Constitution*, but also about the possibility that after federation alteration of the terms of the *Constitution* might prejudice those safeguards.

Those who initiated our federal system clearly recognised how essential it was that there should be a degree of constitutional flexibility, a capacity to amend the *Constitution* from time-to-time so that it might respond to changing needs and demands. This is, of course, made manifest by the very presence of the power of amendment in s 128. The need for flexibility was also, I think, felt to arise from the novel problems that confronted the framers of the *Constitution*, and which they recognised as novel, and solutions for which they appreciated would necessarily be tentative and might require amendment as experience of the workings of the *Constitution* developed over time.

Union of the Australian colonies and the particular form it took was something that was very much a product of the times and the men of those times. As to the times, one curiosity of our federal story is that its earliest origins can be traced back to the 1840s when, far from the prevailing atmosphere being one tending towards fusion, it was fission that

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was in the air – it was a time of separation of parts of the original root stock, New South Wales. Until the 1820s, New South Wales had comprised all of Australia lying to the east of the present eastern border of Western Australia. But in the late 1820s, Tasmania became a separate self-governing colony, and in little over 30 years, by 1859, the continental map had wholly changed; that vast territory had divided up into five self-governing colonies, and, across the Tasman, New Zealand had ended its brief status as a dependency of New South Wales. Western Australia had also, by then, long been a sixth Australian colony.

The very fact of this rapid growth of separate colonial entities showed the need for some central body, if only to prevent the stifling of inter-colonial trade by local protective tariff barriers, which were being raised as early as the 1840s.

The unfortunate Earl Grey, then Secretary of State for the Colonies, suggested in 1847, among other measures little to the liking of Australian colonists, the setting up of a general assembly, a form of central legislative authority for the whole of the Australian colonies. But he did not reckon on the hostility of the colonists, who felt they could very well do without constitutional advice from the government at Westminster. There was 'apprehension and dismay' at the proposals generally, and in the upshot, the home government wisely dropped them all, including the notion of a general assembly: its only, and curious, surviving remnant being that from 1851 until 1867, the governors of New South Wales were styled Governors-General.

After that experience, Earl Grey and his successors left it to the colonies, which had proved so ungrateful towards Imperial suggestions, to themselves take whatever steps they might towards some sort of union. But what with recurrent economic boom and bust, social turmoil in the wake of the gold discoveries, heated issues of land policies, and the struggles between upper and lower houses in colonial Parliaments, colonial governments had more than enough to occupy themselves with, each in its own domestic sphere. Talk of ultimate federation provided a pleasant enough background refrain, but for over 40 years it advanced no great distance. The Federal Council of Australasia was set up in the 1880s but it achieved little. It was not until the 1890s that moves towards union gathered momentum.

It was highly significant that it was in the 1890s, and not a decade or two later, that positive action was taken. Had it been deferred for perhaps another 10 or 15 years, until the Labor party had become better established as a political force on the Australian scene, the ultimate constitutional pattern might well have been very different. A number of alternatives to what has become our present federal structure were already being dis-

cussed. Wider powers might have been conferred on the central government, and a quite differently formulated Senate might have emerged; there might, perhaps, have been no federation at all, nor any written constitution, but instead a single, unitary government for the nation, along traditional Westminster lines, with a national Parliament in which, if indeed it were bicameral, the lower house would be dominant and State rights unrepresented.

From this whole spectrum of constitutional alternatives, and there were others, too, which were aired at the time, varying selections were made and unsuccessfully urged upon a relatively unenthusiastic public throughout the 1890s by men of the left, by members of the then nascent Labor party, such as the South Australian Tom Price, and also by radical liberals such as Henry Bournes Higgins. But they were before their time; their views were not those of any at all effective majority in the 1890s.

In 1891, after a preliminary scene-setting conference in 1890, 45 colonial politicians gathered in Sydney, delegates of the six Australian colonies and New Zealand. Their aim was federation and it is important, if one is to recognise the remarkable results of their gathering together, to see these 45 in the setting of their time. Their average age was about 53, the oldest was almost 80. So they were essentially children of what now seems to us a very distant past. Born, most of them, in the 1830s and 40s, they had grown up in the full flowering of the greatness of mid-Victorian Britain – the Great Exhibition of 1851 had displayed to the world Britain's harvest of the first fruits of the industrial revolution; the second British empire was at its height. For them, the Great Duke, victor of Waterloo, was a near contemporary, not dying until 1852. Their formative years were no later than the times of Lord John Russell and Lord Palmerston. By 1840, Sir Charles Barry's majestic new palace at Westminster had already risen besides the Thames, replacing the chaotic clutter of old buildings burned down in 1834 where Lords and Commons had met for over 300 years. To them the new Westminster must have seemed the very symbol of the supremacy of Parliament and of the excellence of the Westminster system. The mother of Parliaments and the system she represented stood dominant and unchallenged.

In their several small colonial worlds, spread out around the Australian seaboard, these 45 men had not only seen representative and responsible government conferred in the 1850s, but had themselves been, with only one exception, members of colonial Parliaments. These were Parliaments operating essentially on the Westminster model, distinguished from it only by written, though relatively flexible, constitutions, by substantial vice-regal discretions, and by some very modest scope for judicial review of colonial legislation. In most cases, for more than three decades these

colonial Parliaments had, with more or less success, though certainly not always with decorum, operated a system of Cabinet government, with the supremacy of Parliament and the doctrine of ministerial responsibility as its credo. It was no wonder that they had great confidence in the excellence of Cabinet government on the British model.

Yet, despite this climate of thought and usage, the delegates found themselves confronted with little range of choice in the political structures on which might be modelled some federal form of Australian polity. There were only three federal nations whose constitutions they considered: Switzerland, Canada and the United States. And of the three, the United States seemed to provide the surest model according to which the all-important preservation of the rights and integrity of the colonies after federation could be guaranteed.

But a problem was that so much of the United States *Constitution* was alien to all that Australian colonial politicians had been accustomed to. They recognised that, as the price of federation, they would have to accept the novel concept of a distribution of, and hence a strict limitation of, legislative competence as between the federal Parliament and the States: that, after all, seemed inherent in any federal union. But this, in turn, would involve whole new areas for judicial review of the validity of legislation, which was a dramatic departure from the notion of the unchallenged supremacy of Parliament. And coupled with this would be a constitution, inflexible to the extent of being beyond the reach of ready amendment by the federal legislature, which was another invasion of legislative competency. And what of the United States *Constitution*'s keystone, the separation of the legislative from the executive power, which seemed wholly irreconcilable with Cabinet government under the familiar Westminster system of responsible government?

The founding fathers were, in truth, in a dilemma. To some it had sounded easy enough to draw up a federal constitution – really just a question of deciding which legislative powers to leave with the States and which to give to the Commonwealth. And if you were a charismatic politician like Henry Parkes, you might think that you did not have to descend to precise details even as to that. Instead, you could declare your high purpose to be the union of Australia, announcing pure patriotism to be your sole intent, and 'the very best form of free government' as your aim. But, as it turned out, this showed little real understanding of the problems of federation. The task of the convention was in reality very great.

If there was to be any effective safeguarding of the position of the less populous of the federating colonies, on which hope of any Australia-wide federation seemed to hinge, then the experiment of a relatively rigid con-

stitution had to be undertaken. This was exotic enough, though not quite so strange for those colonial politicians as it would have been for British politicians of the day, since each colony had, after all, a written constitution, either enacted by its own Parliament, or for it by the Parliament at Westminster. True, these were relatively flexible constitutions, all capable, during the 19th century, of amendment by appropriate majorities of their own legislatures. And perhaps experience in amending their own colonial constitutions concealed from many of the delegates the significance for the future of what they were now about to experiment with a constitution, which had to be relatively inflexible if it was to preserve the cherished rights of the colonies. So what were indeed strange waters may not, in this regard at least, have seemed so strange.

Again, if the colonies' rights, and especially those of the less populous colonies, were to be preserved after federation, two novel concepts had to be considered – a powerful Senate and one in which States were to be equally represented regardless of gross inequalities of population. Australian colonial legislatures offered no acceptable working model for either concept; neither did Britain, where, in Sir Samuel Griffith's words, the lower house had acquired 'a preponderating influence' over the upper.

The United States did provide such a model, and one much preferred to that offered by Canada, which had an appointed Senate, appointed for life by the government of the day and lacking the standing of an elected legislative chamber. But on one thing all delegates agreed: responsible government, with Ministers answerable in Parliament for their departments, had to be retained. This was the system they understood, and which most of them had known for some 30 years as the hallmark of colonial self-government. Not unimportantly, it was also the system under which they had attained personal eminence in their own colony. The snag was, of course, that responsible government on the Westminster model was foreign to the whole basis of the United States *Constitution*.

Basic to federation was the issue of how far the separate self-governing States were to surrender their autonomy. And, if they were to make such a surrender to the new federal legislature, the less populous States in particular expected to look to the States' house, the Senate, to ensure that that federal legislature was not dominated by New South Wales and Victoria. This was how the Senate was seen by the colonial delegates of the 1890s. And if the Senate were to be such a safeguard, then, in Sir Samuel Griffith's words, every law would require the assent of majorities of the peoples' representatives in the House of Representatives, and of the States' representatives in the Senate.

Now that, said Griffith, while an essential condition of the United States *Constitution*, was 'absolutely new to us in Australia, absolutely new to us

in the British Empire'. It is, incidentally, of course, striking that, with a few notable exceptions, among them Macrossan and Deakin, it was fundamental to so much of the reasoning and argument of the conventions of the 1890s that the Senate would operate as a States' house and not divide simply on party lines, as it in fact has done.

Perhaps this was due to the relative absence in the colonial Parliaments of the time of distinct and well-developed ideological differences, other than the cleavage between free traders and protectionists; deep-seated party divisions, and modern day party discipline, were still some years off.

Griffith told the convention that a Senate designedly possessing legislative power substantially equal to that of the lower house was another novelty, and that any strict separation of legislative and executive branches on the United States model would run counter to the whole notion of responsible government. Any melding of co-equal houses with responsible government would, he said, produce 'a system which has never in the history of the world been tried'. All this led him to seek a degree of elasticity in the working of the *Constitution*, since it had to operate for long years into the future and in unchartered waters.

When the 1891 convention delegates came to consider the prototype of what is now s 128 of our *Constitution*, the amending section, they did so under the overwhelming shadow of concern for State rights. What was to be surrendered to the federation by the *Constitution* had to be accepted as lost to the colonies, but what was retained by them after this initial surrender must not be capable of any easy federal filching in the future. A powerful Senate would, they recognised, be a partial safeguard, but an appropriately restrictive formula for amendment of the *Constitution* was needed to complete the system of safeguards. The problem, then, was to so frame what became s 128 that it would serve this function, yet permit the necessary flexibility which a constitution designed for the future, as well as for the present, must possess, especially a constitution which involved as many novelties as the Australian *Constitution* would contain.

The solution first proposed required an absolute majority of both houses, followed not by any popular referendum on the Swiss model, something discussed but rejected, but instead consideration by State conventions. In each State, elected ad hoc conventions would vote on the amendment which, if approved by a majority of State conventions, would become law. This was modified during the 1891 convention in a somewhat more democratic direction, so that to be effective the people of the States whose conventions approved of the amendment had also to comprise a majority of the people of the Commonwealth.

This whole formula reflects the extent to which the concept of federation was, paraphrasing one delegate of 1891, that of a bargain to be made, a

written agreement without which States would not have entered the federation at all, and of which no part should then lightly be set aside or altered in the future.

Some thought this formula for amendment unduly restrictive, providing 'a little too much safeguard' for the States, but they were in the minority, and it was this formula that the 1891 convention finally settled on.

When the next constitutional convention met, in Adelaide in 1897, New Zealand had departed the federal stage and for the moment Queensland was also absent; only five Australian colonies were represented. In reviewing the 1891 Bill, the Adelaide convention, through its constitutional committee, gave the electors a direct role in constitutional change by replacing the concept of elected State convention with that of a popular referendum. Then, by 1899, s 128 assumed its final form: the requirement of an absolute majority of both houses was watered down so that one house, if sufficiently determined, might put the matter to referendum. The Senate, still seen as the States' house, would thus no longer be able effectively to block the putting of proposed amendments to the people.

It is worth remarking, as Professor La Nauze has said, that those who framed the *Constitution* in its ultimate 1899 form undoubtedly believed it to be more easily alterable than that of the United States. Indeed, Professor Harrison Moore, writing in 1902, spoke of 'the great facility with which the Australian *Constitution* may be altered'.

The curious thing about this whole matter is how mistaken, in a variety of ways, were those who framed our *Constitution* about how s 128 would operate in practice. Higgins, for example, thought, perhaps reasonably enough, that amendment had been made far too difficult, that the means of alteration were insufficiently democratic. But, he based his view largely upon a fear that majorities in the less populous States would reject proposed changes, despite a majority of Australians favouring them. Yet, as Professor Crisp has pointed out, it has not been because of any consistent line-up of 'small' versus 'big' States that so many amendments have been rejected at referendum. Griffith and many others erred too, as I have said, when they thought that State loyalties, not party allegiances, would dictate the Senate's role in this as in other respects.

Then we know from experience that Harrison Moore was unduly optimistic about ease of amendment. Quick and Garran, writing in 1900, seem to have been equally optimistic. They described the restraints on ready amendment which s 128 imposed as no more than 'precautions, the wisdom and propriety of which claim favourable consideration from every reflecting mind', and said of the concept of popular referendum that it constituted 'an undoubted recognition of the qualified electors as the custodians of the delegated sovereignty of the Commonwealth'.

All of this demonstrates how difficult it is, with the best will in the world, to legislate for the future, and how hazardous it may be to do so when legislators' intentions turn upon predictions about the future course of events which prove to have been mistaken.

Henry Bournes Higgins, both a framer of the *Constitution* and later its interpreter as a justice of the High Court, spoke, in 1898, of the need for constitutions to be capable of amendment, and what he said has not, I think, since been said more eloquently. A written constitution which cannot be modified he described as 'a dead lifeless thing which no acts of persuasion can reach; what we want, above all things, is a Constitution which may grow with the growth of the people capable of adjustment to the needs of the people'.

Mere figures prove nothing, but, for what they are worth, the count of attempts to date to amend the *Constitution*, and of the fate of these attempts, is, I think, 44 *Constitution* amendments proposed since 1901 with only eight approved, rather less than one in five.

Whether this result justifies Gough Whitlam's description of Australia as 'entering the future mounted on a penny-farthing bicycle' will remain a matter of individual opinion, because whether our *Constitution* is indeed too inflexible, or has about the right degree of flexibility, must remain a very subjective judgement, much dependant upon one's personal convictions regarding the efficacy of the *Constitution* as it stands as a framework of government; likely, too, to be affected by one's views about the virtues or vices of particular proposed amendments.

What is certain is that our *Constitution* has, by its very survival over a century of existence, during good times and bad, and with relatively little exercise of its limited flexibility, proved the worth of the labours of those founding fathers of the 1890s.