Chapter Two

Constitutions and The Constitution

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Introduction

Much will be said here today and tomorrow about the document known as The Constitution. Much has already been said and written elsewhere as to the need to change that document because the world has changed. The more I have read of what has been written by those who seek change, the more sensible it has seemed to try to put The Constitution in its place within the total structure of Australian constitutional law. Nothing I say will be new to the lawyers present. But it may be useful to others, and even lawyers can benefit from being reminded of the truth from time to time.

Written and Unwritten Constitutions

It is often said that England has an unwritten constitution and Australia a written one. The statement is rather worse than a misleading quarter-truth. It rests on a fundamental confusion between two different things, namely "the constitution" or "the constitutional law" of a country as the system of rules relating to the government of that country, and "the Constitution" as a particular document (or group of documents, but I will not add that each time) containing a statement of some of those rules (usually important ones), which rules are often given special weight by their inclusion in that document. Every organised country has the first.
Not every country has the second.
Both legs of the statement require consideration.

A. That English constitutional law is unwritten.

This is the commentators' way of saying that the greater part of the constitutional law of England is written. It is to be found in documents such as Acts of Parliament; statutory instruments; the Standing Orders of the Houses of Parliament, and other laws and customs of the Parliament; law reports; textbooks of recognised authority; and elsewhere. Magna Carta 1215 continues to be part of the constitutional law of England. So does the Habeas Corpus Act of 1679 (the Latin means roughly "Thou (shalt) have the body (in court)"), empowering a court to require any person who holds another person imprisoned to bring that person before the Court and justify the imprisonment. The right of each person in England to his personal freedom rests ultimately on that Act. In 1772 there was heard before the Court of King's Bench the matter of the negro slave Sommersett, a Jamaican slave brought to England to serve his owner during a visit. The words of the great Lord Mansfield have come down to us in various forms, most famously:
"The air of England is too pure for any slave to breathe. Let the black go free."
That declaration, which I do not regret that I can never speak aloud without a tremor in my voice, was made on the return of a writ of habeas corpus directed to Captain Knowles, on whose ship The Anne and Mary in the River Thames Sommersett lay in irons. The writ commanded Captain Knowles to attend the Court of King's Bench and justify the imprisonment. He did attend, and he failed. After Lord Mansfield spoke, no man who breathed the air of England was any more a

slave. Those who have lived in countries where people disappear in the night will need no convincing of the importance of Habeas Corpus as part of the constitutional law of a country. The Bill of Rights of 1689 and the Act of Settlement of 1701 are part of the constitutional law of England. So are the Parliament Acts of 1911 and 1949, and the Royal Assent Act 1967, limiting the powers of the House of Lords in any conflict with the House of Commons. So is the Statute of Westminster 1931, which did as much as a Parliament unable to bind its successors could do, to ensure that the self-governing Dominions had in law what they had long had in political reality, namely complete charge of their own affairs, free from interference by the Imperial Parliament.

Very much therefore is written. But it is also true that many greatly important things do remain unwritten; certainly are not written in any definitive form. This is true of a host of rules and understandings as to how things work: constitutional conventions. No written law establishes the office of Prime Minister; or establishes the Cabinet; or says that the monarch must give the royal assent to every Bill approved by both Houses of Parliament; or prescribes who shall be called on by the monarch, after an election, to form a government. But there are strong conventions indeed as to these and very many other matters. Their strength may be sufficiently illustrated by noticing that on three separate occasions Queen Victoria recognised that constitutional convention compelled her to call on Mr Gladstone to form a Ministry.

It is important to note that conventions of that kind can and do develop. I have mentioned the convention that the monarch has no choice but to give the royal assent to every Bill approved by both Houses of Parliament. The proposition is not one I would have put in those terms to Queen Elizabeth the First, for good reasons one of which is that in her long day my proposition would have been untrue. Gloriana frequently enough refused the royal assent, and her refusals were accepted, like much else she did, as being well within her royal prerogative. The last monarch to refuse assent was good Queen Anne, who did so several times but with some criticism. Her last hurrah was in 1707, a refusal of assent to a bill for settling the militia in Scotland. After that the right to refuse assent withered and it has undoubtedly died. That quite fundamental change in the constitutional arrangements of England took place without one Act of Parliament saying one word about the matter.

B. That Australia's constitutional law is all written, and is to be found in The Constitution.

This is equally untrue. The Constitution is of course fundamental. You will be aware that the legal origin of the Commonwealth of Australia is to be found in an Imperial Statute, the Commonwealth of Australia Constitution Act 1900 (U.K.). That Act provides in section 3 for the establishment of "a Federal Commonwealth under the name of the Commonwealth of Australia". Section 9 says that "The Constitution of the Commonwealth shall be as follows", and sets out what it calls "The Constitution". (I have already referred to the document in that way, and I do so below. I use the capitalised "Constitution" or "a Constitution" as meaning any formal document of the same type.) Section 5 of The Commonwealth of Australia Act provides that the Act (which includes The Constitution) "shall be binding on the courts, judges and people of every State and of every part of the Commonwealth". Nothing inconsistent with The Constitution can stand.

But Australia has vastly more constitutional law than is set out in The Constitution. The greater part of the constitutional law of England was brought to Australia with the English settlement, and its content continues to apply as part of the constitutional law in force in Australia. Through our legislatures we can of course exclude or alter its components as we will. In some States the legislature has drawn up a list of which United Kingdom statutes shall continue to apply, and has enacted that others shall not. The details do not matter today. Until some action is taken, the inherited constitutional arrangements attach.

Thus Magna Carta is part of the constitutional law of Australia (of New South Wales and Victoria, at any rate, and I suspect all States) though somewhat sadly the most recent attempt to call it in aid finally failed: Jago v The District Court of New South Wales (1989) 168 C.L.R. 23. The Habeas Corpus Act 1679 gives to each person in this room the same protection that it gave black Sommersett in 1772.

Again, a few years ago a Cabinet Minister with views directed the Trade Practices Commission to defer indefinitely dealing with a Trade Practices Act application concerning the Australian Stock Exchanges, preferring that the matter remain in abeyance until legislation he believed would soon be forthcoming took the control of the Stock Exchanges from the Trade Practices Commission to the National Companies and Securities Commission. Protests availed nothing. When all else had failed, application was made to the Federal Court for a writ of mandamus directing the Commission to proceed under the law in fact enacted and in force. One authority only was brought forward: the Bill of Rights 1689 and its fine declaration:

"the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;".

The Minister did not take long to give in. His advisers explained to that surprised functionary that great as he of course was, he no more had power to dispense with the laws that in fact existed than had the Ministers who served Charles II. The Bill of Rights governed him here in Australia just as it governed and continues to govern Ministers in the United Kingdom.

Again, it is obvious that the United Kingdom statute the Statute of Westminster 1931 forms part of Australian constitutional law.

The body of Australian constitutional law that is in writing elsewhere than in The Constitution also includes a large written element deriving from Australia, as e.g. the Australia Act 1986 [supported by the Australia Act 1986 (U.K.)], taking even further the legal separation flowing from the Statute of Westminster; the various State Constitution Acts, themselves recently amended by the Australia Act; other Commonwealth and State statutes and statutory instruments; the law and customs of the Australian Parliaments; law reports; even text books by authors who write books on what they call Australian Constitutional Law, and then deal only with that particular part of it which they find in The Constitution.

Just as in England, much too is unwritten. The Constitution contains no mention of party, of Prime Minister, or of Cabinet. That rightly meant little to Lord Hopetoun, the designated first Governor-General. On 26 December 1900, five days before the Commonwealth existed, he commissioned Edmund Barton to form a caretaker Ministry, as Prime Minister, until an election could be organised and held. There had of course been a brou-ha-ha when Lord Hopetoun had first selected, just seven days earlier, the leading anti- Federalist Sir William Lyne. That selection failed because no one of standing would serve with him. But no one doubted that the unwritten English position of Prime Minister had come to Australia, though The Constitution said not one word about it. No one doubted that someone had to be commissioned, and would properly be called Prime Minister. Indeed all relevant English constitutional conventions came, their form adapting to Australian conditions as they arrived. Since that time those conventions have not of course stood still. Australia has been free to develop its inheritance as has suited Australia. Perhaps the best example is the "Westminster doctrine" of the Minister's personal responsibility for what is done by his department, which Australia has developed to mean that a Minister has very little personal responsibility for what is done by his department.

Except in that last detail, all of that is like, not different from, the position in England.

The Significance of the Constitution

What is significant about The Constitution, then, is not the fact that it is written. What makes The Constitution significant is that it brings together in one document rules on many fundamental

matters, and that what that particular document contains, whether or not on an important matter, is supreme (in the senses both of prevailing over anything said elsewhere, and of being beyond the control of what Parliament says in future). It is those features which lead us to call such a document a Constitution, and it is the presence of such an instrument that distinguishes the Australian constitutional position from that of England. The Constitution is of very great importance. But the existence of this important document must not be allowed to obscure the fact that there is much constitutional law outside it. As I have said, there already was in Australia, and The Constitution operates in and as part of, a wider range of constitutional law. A great part of that law is by no means beyond the capacity of legislatures to control; and large parts of it can develop merely by practice.

Origins of a Formal Constitution

One can distinguish three factors which are likely (especially when more than one of them operate at the same time) to result in a nation having a formal Constitution, and governing the matters that Constitution is likely to deal with.

A. That the Nation is a Created Entity

The first is that the country concerned is a created (or a re-created) entity. England and some other historic European countries evolved over long centuries, growing their constitutions with them piecemeal as they evolved. In such cases many great documents may contribute to the constitution of the country, without there being any fundamental document on which all others rest. No document justifies the ultimate fundament of English constitutional law, that what the Queen in Parliament enacts is the law. So far as the Courts are concerned that rule simply exists, fundamental, unexplained, axiomatic, unchallengeable. Its acceptance rests ultimately on the sturdy slaying of those who have disputed it. Judges have known better than that. The Commonwealth of Australia, by contrast, did not evolve over the centuries. At the stroke of midnight on 31 December 1900 it sprang into existence in an instant, its Constitution with it, fully- armed like the goddess Pallas Athena.

The same is essentially true of the United States of America.

The more turbulent origins of the great republic made its period of formal creation somewhat longer, from at any rate the signing of the Declaration of Independence by fifty-six Representatives of "the united States of America" gathered "In Congress" on 4 July 1776, to the approval of "The Constitution of the United States of America" on 17 September 1787 by thirty-nine Representatives meeting under the Presidency of the man who signed himself Go. Washington of Virginia, and the coming of that Constitution into force on 4 March 1789 upon ratification by a sufficient number of States. It makes no difference that one nation and its constitution were created by Act of Parliament, the other by the action of component States; or that one was created in an instant, the other over a period of a few years. Both nations were created, and the history of each country illustrates the inevitability that such an origin will produce a document which says that the new entity exists, and says something of what it is, and how it is to work.

The same can happen where a country overthrows one system of government and replaces it with another. From the French Revolution on, Europe has provided many examples.

Although this factor requires that a founding document be created, dealing with certain matters of fundamental importance, and requires that the document be supreme in the sense of prevailing over any other existing law, it does not in itself require that the document be supreme in the sense of remaining beyond the control of the legislature it creates. What is now the State of Victoria became a self-governing colony by virtue of an Act entitled The Constitution Act, of 1854, the validity of the enactment of which rested ultimately upon an Act of the Imperial

Parliament. But s. LX of the Act provided that thereafter the Legislature of Victoria should have "full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of the Act." It may seem a tricky concept, amending the statute which gives you your own existence. Lawyers live with it easily enough. I fancy that the position is the same in most if not all of the other States.

B. That the Entity is to be Part of a Federal Structure.

The second factor likely to result in a Constitution is the creation of a federal system: "federal" in the sense that governmental power over people living in the same geographical area is to be shared between co-ordinate and independent governments operating in different spheres. Each inhabitant of an Australian State is governed partly from Canberra and partly from his own State capital, with neither of those governments able to give orders to the other. We take the existence of such a position for granted, but it is one which those who have not lived in a federation can find exceedingly difficult to comprehend. It is a requirement of such a system, that there be rules as to the sharing of power between the governments concerned. If those rules are to be known and to continue to be known, it is a practical necessity that they be written down. The location of such rules in a document called a Constitution follows almost automatically.

In the case of Australia this factor was very strong. Long and stirring had been the fight to achieve acceptable balance between the powers intended for the new Commonwealth, on the one hand, and those of the Colonies, now to be States, on the other. The Commonwealth of Australia Constitution Act opens by reciting that the people of the five States concerned (Western Australia joined in later) "have agreed to unite in one indissoluble Federal Commonwealth". Section 3 provides that the people "shall be united in a Federal Commonwealth". That was indeed the essence of what was being done.

It is obvious enough that to the extent that the existence of a Constitution flows from this factor of federalism, that Constitution requires to be not only written and fundamental, like any Constitution for the creation of a nation, but also supreme in both senses identified above. It must prevail over all other laws, and it must be beyond the control of any of the Parliaments between whom the powers are distributed.

C. A Desire for Protection Against Government

A third factor which where operative is likely to result in a Constitution is a desire to have formal guarantees of life, liberty and property against invasion by government. If such formal guarantees are to exist, there must be a document setting them out. And if they are to prevail against government, that document must prevail over all other laws, and must be beyond the control of any of the Parliaments to alter. If there is to be such a document, it is clearly appropriate that it be part of the Constitution of the country concerned. The First to the Tenth Amendments of the United States Constitution, the so-called Bill of Rights inserted on 15 December 1791, may stand as the most famous example.

In the case of Australia this factor played little part. A case for the inclusion of protections such as those contained in the Constitution of the United States was indeed put forward at the Constitutional Conventions, but it was not widely endorsed and save as to freedom of religion it was rejected. The matter is commented on in Sir Owen Dixon's paper Two Constitutions Compared, in Jesting Pilate (lst edn., 1965) at p. 102.

The Constitution and Responsible Government

I draw attention next to the fundamental distinction which exists between "responsible government" under a parliamentary system of government, where those who have executive power (the Prime Minister and Ministers) are required to be members of and are responsible to

and removable by the legislature (which is what the people actually elect); and a system of government as in the United States, where the executive (the President and through him his personally appointed Cabinet) derives its authority not from Congress but from the personal election of the President by the people. Neither the President nor any of his Cabinet is permitted to be in the Congress. A Prime Minister who does not have the support of the legislature (I am not concerned at this point with dramatic irrelevancies such as which House of the legislature) is a virtual impossibility. A Prime Minister who loses control of the legislature must go. Parliament can bring about the removal of a Prime Minister at any time, by a vote of no-confidence. Congress, by contrast, cannot remove a President. The President gains his authority not from Congress but direct from the people. That a President does not control Congress is immaterial to his position as President. I think it correct to say that every post-war Republican President has for all or (in one case) most of his presidency faced a Congress controlled by the Democrats. Indeed Democrat Presidents too have found Congress unruly enough. But Congress had nothing to do with the President's appointment, and nothing Congress can do will bring about his removal. (The exception of removal through impeachment for personal wrongdoing is more apparent than real. The Houses of the Congress are there acting as prosecutor and court, not as Houses of a legislature.)

I am not in the slightest concerned here with the question which system is to be preferred. I am concerned simply to draw attention to the difference between the system of responsible government and a system under which the head of the executive government (whether or not he is also the Head of State) derives his authority otherwise than through the elected legislature.

Each Australian Colony had (and each successor State has) a system of responsible government, as of course did (and does) England. It is no surprise that our Founding Fathers adopted the same system for the Commonwealth. I mentioned earlier Lord Hopetoun's correct assumption that the working of the Constitution they drew up required that there be a person called a Prime Minister. The view has been that it was with skill and discernment that the Founding Fathers melded this system with the requirements of a federation. Good judges have said:

"Probably the most striking achievement of the framers of the Australian instrument of government was the successful combining of the British system of parliamentary government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations." (The Boilermakers' Case (1956) 94 C.L.R. at p. 275).

What may seem remarkable, is with how few strokes the Fathers did this. One provision of the Constitution makes the Executive power exercisable by the Governor General. Another requires the Governor General to summon an Executive Council. Another empowers him to appoint officers as Ministers of State, and says that they shall be members of the Executive Council, and that they shall not hold office for more than three months unless a member of one House or the other. There is little more. Not a word about parties, about majorities, about the election of Ministers by Caucus, about resigning if a vote of no confidence is carried, or about any of a host of such matters. In England and in the Australian colonies these matters were governed by constitutional convention, and the Founding Fathers took it for granted that when on 1 January 1901 the words they had written came to life, they would find those conventions waiting to attach.

The Drafting of a Constitution

The way the Founding Fathers dealt with responsible government was surely right. It was a Constitution they were creating, and a Constitution, said Oliver Wendell Holmes Jr., is meant to endure. A Constitution is not meant to be drawn in such terms as to soon or easily become out of date. A Constitution should be a broad and continuing document, not seeking to prescribe the answers to each generation's problems but providing the basic structure within which each passing generation will carry on and resolve the issues important to that generation. A well-drawn Constitution will leave much to be governed by other laws and by convention, inherited at the outset, and capable of change without touching the Constitution as a document at all. Each generation succeeds to that inheritance as developed to that time. Each hands the inheritance on, adapted to changing needs. As I said earlier, the Founding Fathers knew and intended that with the little they made The Constitution say as to the Executive there would flow in the whole body of constitutional law as to responsible government as existing at that time. They worked on the same basis throughout the Constitution. The point was noticed by Sir Garfield Barwick in Victoria v The Commonwealth and Hayden (1975) 134 C.L.R. 338. Speaking of the purpose of ss. 81 and 83 of The Constitution, and the suggestion that they were inserted merely to reflect the English position, Sir Garfield said:

"Sections 81 and 83 are provisions of the Constitution. Clearly, in my opinion, they were not inserted merely to reflect British parliamentary practice in cases resulting from conflicts long since resolved between King and Parliament. Rather, they are there to reflect Australian, not British, history and to implement the federal distribution of power and financial relationship upon which the colonies had resolved. If those sections were passed merely to endorse the outcome of the conflict of Crown and Parliament in the long past they were an unnecessary adornment. The British parliamentary practice would have come with the establishment of the Parliament as part of the inheritance by the Commonwealth of the common law." (My emphasis)

Where, in the ordinary case, the British practice was not spelled out in The Constitution, nothing in The Constitution would prevent the continuing development of that practice.

Amending The Constitution

In Principle Amendment Ought to be Occasional

A Constitution drawn as a Constitution ought to be, and as on the whole The Constitution was, is inherently likely to remain relevant to each passing generation. I am a great admirer of modern stationery, but a Constitution really ought not to take loose-leaf form, with each generation adding another sheaf of detailed provisions giving the received answers to what it sees as "today's" problems. If the terms of The Constitution are forever being added to and amended to deal with the particular problems of the day, in more and more detail, we may expect to finish with a document looking not so much like a Constitution as like the Income Tax Assessment Act; a document which presumably skilful draftsmen, probably kindly enough in their own homes, have turned into a waste-land containing parts which no one – – I choose my words with care – – can fairly interpret; parts where no interpretation can be said to be wrong: or right. That is not where we want The Constitution to finish.

When Amendment May be Necessary

With whatever restraint and care a Constitution is drawn, occasions will arise to consider change. That should I suggest be when dissatisfaction is widely felt as to some matter of government, and no solution is seen other than one requiring amendment to the Constitution. If some other solution is seen, that will be the way to go. Where there is no need to change the Constitution, there is a need not to change the Constitution. This, I observe, is in line with the traditional

practice of the High Court as to interpreting The Constitution. The Court's practice has been to interpret the Constitution only where the case cannot otherwise be decided. If the case can be decided on the facts, or on some other non-constitutional ground, it will be. Only if forced to it will the Court address the constitutional issue. Some have thought that in recent years the Court has shown enthusiasm to get to constitutional issues, and have been disturbed. A judge who wants to get to the constitutional point has something he wants to say. It is safer for cases to be decided by judges who need to say something, as part of the job.

Remembering the factors seen as leading to the emergence of a Constitution, the cases for amendment will in general be:

A. When some structural change is desired in the governmental entity, and it cannot be achieved consistently with the existing Constitution.

B. When some change is sought in the distribution of powers between the central and the State governments. This of course can only be achieved by amending The Constitution.

C. If it is desired to amend the protections built into The Constitution, or (in the Australian case) to have formal protections of a kind we have so far done without.

In any of these cases, if the case on the particular issue is made out we will seek to amend The Constitution, not because we set out to "reform" it, or to "bring it up to date", or to "make The Constitution relevant to today's conditions", but because in the pursuit of some specific goal of good government we found amendment of The Constitution necessary.

Forewarning and Forearming

What I have just said will I trust forewarn and forearm you for when you hear, as in this context you most surely will, the phrase "horse and buggy". When you hear that phrase you will know that someone is going to tell you that the world has changed since 1890, or 1897, or 1901, or whichever such date the speaker chooses, and therefore the Constitution must be changed, for otherwise it will become "irrelevant" to "today". Which means, if you will think about it, that The Constitution will need changing every "day" for the rest of time. On the same argument the Ten Commandments ought to have been modernised and made relevant again (I was going to say "re-relevanted", but I am terrified that some trendy enthusiast will adopt it) when quinqueremes ceased to sail to Nineveh: and periodically since. It is because the Ten Commandments were drawn in terms which did not depend on their own day, that in three and a half thousand years the day has not come when a generation has said that it finds them irrelevant, and has called for an up-date. Certain things can, it seems, be expressed reasonably permanently. The Constitution is not sacred. If faults emerge, if some provision is in fact found to inhibit our fair progress, let us surely take heart and seek to rectify it. But no recital of technical and technological change, no eloquent reference to John Nesbitt's passing parade, not even the approaching end of the second millennium of the Christian era, none of these in itself tells you that The Constitution does, or probably does, or ought to, need changing: let alone that it needs the ministrations of a host of worthy people, who at great expense (to be borne by the taxpayer) will push it and prod it and see if they can't find some way in which it could do with a change.

In one of his essays A E Housman remarks that people often find arguments easier to understand if the argument is put in physical terms. I find it useful, in Australia, to put arguments into sporting analogies. Thus would anyone say that a particular batsman should be picked for the Test team, on the basis that although he was not the best batsman available he was "good enough" to play for Australia, and in addition he was a Presbyterian and there wasn't any other Presbyterian in the team? In important areas like Test cricket that would be seen as obvious nonsense. Yet newspaper editors frequently suggest that High Court judges should be selected on similar principles. (Some say that some have been.)

In the southern States Australian Rules football is thought about by the people a good deal more than is The Constitution. There is coming up soon some important round figure anniversary or other for Australian Rules Football. No one has yet suggested that this means that a Commission should be appointed to lead a decade of debate to ensure that the rules of football remain relevant to today's conditions. The suggestion would seem absurd. When Polly Farmer's attacking handball and in turn the adoption of the running game changed the face of how such football is played, no one suggested that the rules "had" to be amended to reflect the change. Things went on as before, changing the rules if the playing of football disclosed some defect, and otherwise leaving the rules alone and playing the football. No one suggested, when the Centenary Test match was being arranged a few years ago, that those hoary old laws of cricket (dating from long before 1890) must surely need reconsideration. In these important areas we handle the rules with respect. It is just possible that the Constitution merits similar treatment.

It is salutary to take warning from our recent past. In 1977 there was inserted into The Constitution a new s. 15, designed to ensure that a replacement Senator appointed to complete the term of a Senator whose place has for some reason become vacant, shall be of the same political party as that Senator.

For sections 7 to 23 of the Constitution (including the original section 15), covering every issue concerning the Senate, the Founding Fathers needed (in the copy before me) 32 cm. of print. In the same copy, this 1977 version of cl. 15 requires on its own 26cm. In a Constitution of 128 clauses, this abhorrent s. 15 contains some 5% of the whole Constitution. It is approximately 1000 words long. Lincoln needed 265 words for the Gettysburg Address. In the United States Constitution 1000 words contains the following amendments:

Amendments 1 to 10, the Bill of Rights
Amendment 13, Prohibition of slavery
Amendment 15, Negro suffrage Amendment
Amendment 17, Popular election of Senators
Amendment 18, Prohibition
Amendment 19, Women's suffrage
Amendment 21, Repeal of Prohibition.

And in 1977 Australia solemnly put into The Constitution that number of words to ensure that never again could a Mr Bjelke-Petersen appoint a Senator Field to fill the vacancy created when a Mr Whitlam appointed a Senator Gair as Ambassador to Ireland and the Holy See. Used that number of words to deal most clumsily with a matter which is pre-eminently one to be dealt with outside the Constitution. All political parties joined in inserting into The Constitution this utterly inappropriate little tribute to the importance of political parties. Is it any wonder that one awaits with trepidation the turgid drafting that trendy enthusiasts would seek to put into The Constitution to celebrate the end of a millennium?

Some Teachings of The Constitutional Centenary Foundation

In recent times there has been formed the Constitutional Centenary Foundation, Inc., under the chairmanship of Sir Ninian Stephen. It is the third of a series of such bodies, all overtly designed to proceed and lead debate in a neutral fashion. In 1973 the Whitlam Government set up the Australian Constitutional Convention . In December 1985 the Hawke Government established the Constitutional Commission. Now the Keating Government has launched the Constitutional Centenary Foundation, Inc. (How Australian can a name be ?) Truly our central masters are determined to sponsor neutral debate as often and for as long as it takes them to get what they want.

The Foundation's first Newsletter, published in April 1992, is full of interest. An opening paper, The Constitutional Decade, is attributed to the Chairman. There is a "Concluding Statement"

from a Constitutional Centenary Conference held in 1991, and there are papers by Professor Cheryl Saunders and Mr Padraic P McGuinness. Various matters warrant remark.

Sir Ninian expectedly leads off with "horses and buggies", though with trendily different terminology ("carriages to cars", "cavalry to nuclear weapons"). It has been a century "of extraordinary change" (unlike say the l9th century, which in a period of some forty unchanging years invented railways, steamships, chloroform, the telegraph, sewerage, and vaccination). The inevitable follow-up comes to time, but it goes far further than any similar statement I have previously seen:

"The great curiosity of our system of government, however, is that the formal structure of the entire federal system has remained substantially unchanged since it was laid down in the constitution adopted by the people of Australia nearly a century ago. The so-called Westminster system and its conventions, the conduct of parliaments, the structure and role of local governments, indeed the whole structure of our polity has remained in its formal detail very much as it was laid down at the beginning of federation."

I confess that I look at that passage with astonishment, especially coming as it does from the man whose own hand wrote the Governor-General's assent to the Australia Act 1986, and coming as it does immediately after a passage reading:

"Many aspects of life in Australia have been influenced by and have adapted to these changes, including the way in which our democracy works in fact, as distinct from the theoretical model of a hundred years ago."

Time does not permit me to pursue every hare (no: every rabbit – they are more prolific) down every burrow. But in particular:

1. You will see, if you examine the passage in the light of what I have said earlier, a totally inappropriate equating of The Constitution on the one hand and "the whole structure of our polity" on the other.

2. How can it possibly be said that "the whole structure of our polity has remained in its formal detail very much as it was laid down at the beginning of federation", in the presence of the Statute of Westminster 1931 and the Australia Act 1986 ? (And a great deal more).

3. The "so-called Westminster system and its conventions" was not "laid down" (scil., in the Constitution) "at the beginning of federation". What was laid down at the beginning of federation was The Constitution, and The Constitution contains not one word about that system and its conventions, "in its formal detail" or at all. The Constitution said only that Ministers of State have to be in the legislature.

4. No doubt there are descriptions in books of parts or (ambitious books) the whole of "the so-called Westminster system and its conventions", but the system has never been "laid down" anywhere, "in its formal detail" or otherwise. The whole point of much of it is that it is not laid down.

5. A fundamental feature of conventions is that they do not have "formal detail".

6. Is there any reason for the pejorative "so-called" ? Is it more than an encouragement to get away from traditional ideas as to constitutional practice?

7. There is a flat contradiction between saying that "the way in which our democracy works in fact, as distinct from the theoretical model of a hundred years ago" has adapted to the extraordinary changes of our century, and saying that the "whole structure of our polity", including its conventions, has remained "very much as it was" in 1901. Conventions are based on what happens; are based "on the way our democracy works in practice". Change the one and you change the other.

8. The Constitution does not contain one word about "the structure and role of local government". Local government is not mentioned in the Constitution at all. Whatever is or is not hampering whatever development is or is not wanted, nothing in the Constitution is hampering it.
Bringing it all together: First, if there is to be a comparison at all then the relevant one is not that between the outside world and the single document called The Constitution, but that between the outside world and the total constitutional arrangements of the country. In saying that "the way in which our democracy works in fact" has adapted to the outside changes, Sir Ninian undermines the contrast he seeks to draw. But in any event it is not at all obvious that any constitutional arrangements ought to change, and least of all those set out in The Constitution, simply because they have been and now are faced with new problems and situations. Good constitutional arrangements are designed to do just that.
Sir Ninian also says, again expectedly, that "now" is very much the time for "an examination of our political system and its structures". He refers to the pending arrival of the 21st Century (an event which one must admit will happen), and the centenary of our federation. The theme is a popular one. The Concluding Statement calls for a process of review of the Australian constitutional system to be completed by the year 2000, and says that the 1990's "provides (sic) an opportunity to review the Australian constitutional system". Why the opportunity is greater than that provided by any other decade it forbears telling us. Professor Saunders tells us that the approach of the centenary of federation "provides a symbolic opportunity for constitutional review". So it might, but things can be symbolic without being sensible. Even Mr McGuinness, who writes the two most sensible papers in the Newsletter, thinks that "everyone now agrees that this decade ought to be a time for debate and information". Faced with such unanimity it seems well to remind oneself that in the last decade of the first millennium good and learned people throughout Christendom expected the second coming of Christ and the end of the world to occur in holy tandem at the end of the year 1000, and bade the fearful make ready.
Perhaps there is still time to query all these propositions.
What in the end Sir Ninian's Cavalcade of Change point comes to, is that Australia has coped with and accommodated to vast changes, within the existing structure of The Constitution, which remains largely as enacted in 1900. I should have thought that would lead one to praise The Constitution, rather than to lead the debate to consider its modernisation and to wonder whether we "might call our fundamental governmental structures into question". Anyone who replies that in certain areas the accommodation which has been reached is inappropriate is in danger of agreeing with me, that you should not set out to "modernise" The Constitution at all, or on any other grand project of that sort, but rather that you should come at seeking to amend The Constitution only if, in some particular respect, experience reveals some defect of governmental arrangements which can be rectified in no other way. That does not mean that the end of a millennium or any other magically round number need provoke us to tinker concernedly with what is not causing trouble. Let us, at all costs, not have The Constitution treated in the way that led to Professor T.G. Tucker's textual conjectures in his edition of The Supplices of Aeschylus receiving the criticism:
"In practice no word, however good, is safe if Mr Tucker can think of a similar word which is not much worse."

A Comparison with the United States

Certainly Australia must make up its own mind what to do. But some comparison with the history of the Constitution which served as a model for our own seems not out of place. I make three points.
First, American practice accepts fully the importance of convention. What Section 1 of Article II of the Constitution says as to the election of the President of the United States, is that the election

shall be by Electors nominated by the various State legislatures, who will send their votes to be opened by the President of the Senate, and counted under his direction. Not a word about parties, candidates, primaries, Conventions, lapel-buttons, balloons, or any other part of what people like us thought were essential parts of the election of a President. Nay, not a word about the fact that the citizens of each State of the Union will vote on the matter, and will expect their vote to be determinative. No American seems to be dismayed by this. None expects world-wide tension as the votes for President are counted in the Senate chamber. None doubts that when the votes are unsealed and examined it will be found that each Elector, in compliance with utterly binding convention, has voted in accordance with the popular vote in his or her State. What no one has suggested, is that this development of popular binding guidance for the Electors makes it necessary to re-draw Section 1 of Article II of the Constitution to make it give all the detail of what happens, in terms "relevant to today".

The United States not only accepts such situations, but feeds them. In recent years it was decided that the citizens of the District of Columbia should have a vote for the President, just like citizens of States. To this end the 23rd Amendment was brought forward. What it did not say was that the citizens of the District of Columbia should be entitled to a vote on the matter. It said simply that the District shall be entitled to as many Electors as if the District were a State. All America knew that the rest would follow.

Secondly, the United States Constitution has been the subject of twenty-six amendments in 215 years. That includes the First to the Tenth Amendments, the Bill of Rights. Those amendments were proposed in a bunch on 25 September 1789 and were essentially a deferred part of the adoption of the original Constitution. Two amendments at least represented very special cases of a social programme being reflected into the Constitution (Prohibition and Abolition). That leaves a total of 14 true amendments in 215 years, a good deal fewer than Australia's allegedly restrictive 8 amendments in 91 years. Since the foundation of the Commonwealth of Australia, the United States has amended its Constitution nine times: not dramatically different from Australia's eight times. America's immense power (in "horse and buggy" terms, the United States didn't just watch others develop nuclear weapons and power: it invented them), its super-power status, all came without one constitutional amendment giving the central government more power. (The only amendments which have ever given increased powers to the government of the United States are the 16th and the l9th Amendments: power to impose income tax, and power, since gone, to enforce Prohibition.)

Thirdly, and somehow it comes as no surprise, the United States let its two-hundredth birthday pass with no sign of a call to re-assemble (perhaps in false beards) some latter day State representatives in Congress under some latter-day Go. Washington of Virginia, to look anxiously at Ben. Franklin's old effort (written before the days of the buggy, though they did have horses) and see what they could do to make it relevant again. Perhaps their history had taught them something of what a Constitution is for. Perhaps they were kept from folly by having too much respect for their Constitution, and knowing too much of what Constitutions are and should be.

Conclusion

We are asked to take for granted the necessity for an utterly different approach. We are it seems to start again; in Sir Ninian's words, "to help lay the foundations for a system of government that accords with the realities of today and the needs of tomorrow". Here we poor deluded mortals were, some of us, thinking that we had "a system of government which accords with the realities of today" (whatever the words mean), while so help me Sir Ninian now reveals to us in a neutral debate-leading fashion that at present we do not have even the foundations for such a system of government. Those old Founding Fathers wrought even worse than we thought. On the other hand, perhaps they didn't. One can take some comfort from the remark of the great humourist

Tom Lehrer, about the counsellor who "made his living giving helpful advice to people who were happier than he was".