Chapter Eleven

The 1944 Referendum

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Dr Evatt's Curtain–Raiser

On 1 October 1942, less than ten months after the Japanese attack on Pearl Harbor, Dr H V Evatt, Attorney–General and Minister for External Affairs in the Curtin Labor administration, introduced into the House of Representatives the Constitution Alteration (War Aims and Reconstruction) Bill. The terms of this Bill were so sweeping that it was bound to have attracted strong opposition, not only from State Governments, but also from the Federal Opposition, by then a demoralized and fractious group comprising the United Australia Party and the Country Party.

Sir Paul Hasluck has observed in the second volume of his contribution to Australia's official history of the Second World War that "the controversy surrounding the proposal contributed far more than the uniform taxation measures [also introduced in 1942] had done to the growth of concern about the possible use of wartime powers and arrangements to inaugurate lasting socialist or unificationist programmes'.

Dr Evatt moved:

"That leave be given to bring in a Bill for an Act to alter the Constitution by empowering the Parliament to make laws for the purpose of carrying into effect the war aims and objects of Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world, and for the purpose of post-war reconstruction generally."

The opening of Dr Evatt's second reading speech set the tone for the whole: it was a veritable jeremiad. He claimed:

"When the war is over, Australia will be confronted with the greatest task of economic rehabilitation in its history. Problems of employment, of housing, of health and child welfare, of vocational training, and of markets and price stability, will call for enterprise and statecraft of the highest order. The whole history of the Commonwealth Constitution shows that these problems cannot be solved without wider powers in the hands of the central government."

Evatt then spelt out the difference between the Commonwealth Government's war capability and its powers in time of peace:

"... events have proved that the Constitution which the Australian people adopted in 1900 is flexible enough for the needs of war. But it is equally true that it is not flexible enough to serve Australia in the great task of post-war reorganization which the declared war aims of the United Nations will involve. Why is this? The defence powers of the Commonwealth are contained in a few general words, to which the courts have been able to give a sufficiently wide interpretation to meet the situation of totalitarian war. By way of contrast, the peace-time powers of the Commonwealth, though numerous and detailed, are hedged around with severe limitations. Although they were written down in the 1890's, many of the words and phrases were simply transcribed from the American Constitution of 1787. The general approach belongs to the horse-and-buggy age of social organization. This is especially true of the economic powers that are so vital an element in a modern industrial community. For instance, `trade and commerce' is so divided between the Commonwealth and the State authority that neither can deal effectively with it. Such topics as production, employment, investment, industrial conditions, are either not

committed to the national government at all, or are granted in jealous, limited, qualified and indirect terms. The Constitution of 1900 is outmoded.

"If the exercise of national power is necessary for war, it is equally necessary for reconstruction. Most thoughtful Australians are realizing that the Constitution of 1900 is not an instrument fitted to the needs of tomorrow. Let us consider the tasks involved. The mistakes of the past must not be repeated. Every promise to the men and women of the fighting services must be honoured. The full development of the physical resources of Australia will be necessary for expanded production, increased population, full employment and social security. No policy of national development can be carried out effectively without power to control prices and investment. The transfer of men and women from the fighting services and the war–time industries to suitable peace-time occupations will involve a huge programme of works and housing. The division of powers between the Commonwealth and the six States with divergent policies will be a fatal obstacle to speedy and effective national planning. Some of the Commonwealth's war-time controls may last for a time after hostilities close; but only for a time. Without carefully considered constitutional amendment the result in the post–war world in Australia will be social and economic disorganization, chaos in production, mounting unemployment, widespread social insecurity — in short anarchy."

Lest that should not prove a sufficient inducement to proceed with all despatch to assist in the fulfilment of the learned doctor's grand design, there was a further uplifting remonstrance :

"But the problem goes even deeper. This country, like all the other United Nations, has pledged itself to the task of achieving the broad objectives embodied in the Atlantic Charter and the historic declaration of the four essential human freedoms. These declarations are not legal instruments technically binding on Australia; they are far more. They are solemn pledges of our dedication as a nation to the great ends of economic security, social justice and individual freedom. .... the Australian nation, which is pledged as a nation, must be endowed as a nation with legislative powers to carry out the pledges within Australia and its territories."

Sir Paul Hasluck commented that this represented the main part of Dr Evatt's case. His stated objective, as Hasluck observed, had been plainly set out in the title of the Bill and "... [a]fter stressing the aims of `economic security and social justice' he plainly revealed the enormous scope of the power he sought":

"It is proposed that the Parliament should have power to make any law which in its own declared opinion will tend to achieve economic security and social justice, including security of employment and the provision of useful occupation for all the people. I desire to make it perfectly clear that the amendment I propose will give the decision to Parliament itself, and no person will be able to challenge the validity of Parliament's decision. For its decisions and actions Parliament will be responsible to one authority only – the people of Australia."

In the week subsequent "the Government", in Sir Paul Hasluck's words, "being faced with mounting opposition to the Bill and the prospect of a head-on collision with State Governments and Parliaments, decided that the debate on the Bill should not proceed", or at least, as the Prime Minister stated in the House of Representatives on 8 October, not:

"until after the measure has been referred to a special committee, consisting of eight members of the House of Representatives and four members of the Senate, to be equally representative of the Government and the Opposition."

The Prime Minister continued:

"The Government desires that the committee shall have added to it the Premier and the Leader of the Opposition of each State Parliament.. .

"The members of the committee to be chosen from the House of Representatives will be the Prime Minister (Mr Curtin), the Leader of the Opposition (Mr Fadden), the Deputy Prime

Minister (Mr Forde), the Deputy Leader of the Opposition (Mr Hughes), the Attorney–General (Dr Evatt), the Right Honourable member for Kooyong (Mr Menzies), the Treasurer (Mr Chifley), and the Right Honourable member for Cowper (Sir Earle Page). The gentlemen from the Senate who have been nominated to act on the committee are Senators Collings and Keane, representing the Government, and Senators McLeay and Sampson representing the Opposition."

The Prime Minister concluded:

"I am confident, in the light of the history of the efforts that have been made from time to time to amend the Constitution, that recourse to this procedure, whilst delaying the consideration of the Bill by the Commonwealth Parliament, will add immeasurably to the practicability of giving effect to whatever legislation this Parliament may pass... The committee will consider the Bill, and make any suggestions that it may wish. But the form in which the Bill shall become law will be entirely a matter for the Commonwealth Parliament."

Sir Paul Hasluck remarked of this changed procedure:

".... This Committee was created by decision of the Government, not by Parliament, and the parliamentary situation simply was that the Bill remained on the notice paper, while outside Parliament, discussions proceeded about the constitutional changes which the Bill had proposed. While it is doubtful whether the Government had a clear intention on the next step when Curtin announced that the debate would be deferred, the consequence of the deferment was that the Government abandoned the original purpose of changing the Constitution by Act of the Commonwealth Parliament followed by a referendum (as provided in Chapter VIII of the Constitution), and sought the method of gaining additional legislative powers for the Commonwealth Parliament by having matters referred by the Parliaments of all the States, as provided in Section 51 (xxxvii), thus avoiding a referendum during the war."

This Committee, which came to rejoice under the name of a Convention, formally met in Canberra on 24 November, 1942. On 3 November, 1942 Mr (later Sir) Clifden Eager, K.C., moved in the Victorian Legislative Council, of which body he was then the designated unofficial Leader:

"That, in the opinion of this House, it is desirable that, before the representatives of this State proceed to the Convention which has been called by the Commonwealth Government to consider proposed alterations to the Constitution of the Commonwealth, the members of the Legislative Council and of the Legislative Assembly should meet together for the purpose of discussing the proposed alterations."

This, together with a contingent motion that the Legislative Assembly should be acquainted with the terms of the foregoing resolution and asked to concur in it, was passed by the Legislative Council without a division. With the Legislative Assembly's concurrence, the two Houses of the Victorian Parliament, in an action for which there was then no precedent and which has not to my knowledge been emulated since, met in joint session in the chamber of the Legislative Assembly on 10 and 11 November, 1942.

The political situation in Victoria at the time was that, from April 1935, Victoria had been governed by a Country Party administration under A A (later Sir Albert) Dunstan. Until June 1942, this minority administration had been kept in office by the Labor Party under Thomas Tunnecliffe and then John Cain senior. The Dunstan government's decision to join South Australia, Queensland and Western Australia in mounting a High Court challenge to the uniform income taxation legislation of the Curtin government gave the Victorian Labor Party the pretext to withdraw its support. The Dunstan government then continued in office as a minority administration with the support of the United Australia Party. Because of this reversal of alliances, the Victorian Labor Party was able to be represented at the Constitutional Convention in Canberra by John Cain senior in his recently assumed capacity as Leader of the Opposition,

while the United Australia Party had no independent representation, as a tame supporter of the Dunstan government. The debate at this joint session of the Victorian Parliament saw members of the Victorian Labor Party outnumbered, as indeed they were in normal circumstances in both Houses sitting separately.
Early on the first day of the joint session, Clifden Eager, KC, MLC moved:
"That, in the opinion of this Joint Meeting of the Members of the two Houses of the Parliament of Victoria, the proposed alteration of the Constitution of the Commonwealth set out in the Commonwealth Constitution Alteration Bill is expressed in language too wide and too indefinite, would destroy the federal character of the Constitution, would undermine the authority of the High Court of Australia as the guardian of the Constitution, and would sweep away the safeguards of the rights of the people at present existing in the Constitution."
After two days of debate this motion was carried without a division, but only after the Labor Party members had announced their intention of leaving the chamber before the question was put. Although therefore the question was recorded as having been carried unanimously, it was not in fact a unanimous decision of all those who were entitled to vote, and there was no record of those who had in fact voted in favour.

The "Constitutional Convention", Canberra, 24 November –2 December, 1942.

Dr Evatt directed the preparations for the meeting of this so–called Convention. One who was involved in a group of about thirty in these preparations was Sir Paul Hasluck, then an officer in the Department of External Affairs: he was later to recall these preparations as `frenzied'; but this was at most times an apt description of the learned doctor's modus operandi. Sir Paul added:
".... Before the convention met he [Evatt] distributed a handbook entitled Post-war Reconstruction. A Case for Greater Commonwealth Powers. In the preface, signed by Evatt, it was made clear that the proposals in the Bill introduced in the House of Representatives were not `final or definitive' and suggestions for its modification were invited. The case, in brief, was that the Commonwealth's power must be extended `to enable it to supervise a grand national plan for post-war reconstruction', and the powers would have to be wide enough to ensure the planned use of Australia's economic resources so that they were fully employed and directed primarily to achieving `economic security and rising standards'... Considered as a handbook prepared for a meeting that was to be described as a Constitutional Convention, the publication is a curious mixture of emotional political appeals and argument. It reveals clearly what the Government wanted to do but is not wholly convincing as a case for doing it."
The Victorian Premier was to reflect on this general air of confusion when, on 9 December l942, he moved the second reading in the Victorian Legislative Assembly of the Commonwealth Powers Bill which was the direct outcome of that Convention so-called. After quoting the resolution which the joint session of the Victorian Parliament had carried, he continued:
"With the guidance of that resolution the Victorian delegates arrived at Canberra to attend the opening of the Convention on the 24th of November. To the astonishment of many of the delegates it was announced, as soon as the Convention began its proceedings, that the Commonwealth Government now proposed to ask the Convention to consider an entirely new draft Bill. Copies of that Bill – called a Constitution Alteration (Post-war Reconstruction) Bill – were circulated among the delegates, who were also presented with a publication prepared by the Commonwealth Attorney– General in book form, and consisting of 188 pages of material, designed apparently to educate the members of the Convention in matters relating to war aims and post–war reconstruction...
"Not the least interesting portion of the book consisted of 95 questions asked and answered by the Commonwealth Attorney–General. This part of the book demonstrated the ease with which questions can be answered when the answerer himself frames the questions. I have tried that, and

honourable members will also realize how easy it is! The delegates were invited to adjourn until next day to consider the new draft Bill, together with the book that had been issued. It was evident that it was mentally, if not physically, impossible to digest the contents of the book in the time available. It was apparent, too, that the book had been prepared in reference to proposals in a Bill that had since been abandoned. Consequently, most of the delegates concentrated on attempting to dissect and analyse in one day the contents of the new draft Bill, suddenly circulated in place of one that had been the subject of discussion throughout Australia for a period of six or seven weeks."

Sir Paul Hasluck described the new draft Bill as follows:

".... First the Government had inserted into the Bill constitutional guarantees of religious freedom, and freedom of speech and of the Press, in a form in which they could not be abridged either by the Commonwealth or by any of the States. Second, the primary grant of power to the Commonwealth had been defined by the phrase `post–war reconstruction' which, Evatt said, meant national planning aimed at re–establishing the life and economy of the nation. Third, it had been made clear that the post–war reconstruction power would empower the Commonwealth Parliament to make laws with respect to 12 specified subject matters or groups of subject matters. Most of these had been in the original Bill. Fourth, all the present powers would be subject to interpretation by the High Court as the guardian of the federal system, and the provision making the opinion of the Commonwealth Parliament conclusive had been omitted. Fifth, the clause enabling Parliament to exercise its new legislative authority without regard to certain other constitutional restrictions was altered so that the only restriction that might be disregarded was that contained in Section 92, and then only in relation to Commonwealth price–fixing or marketing legislation. Sixth, cooperation between the Commonwealth and State Governments would be facilitated by a new sub–section authorizing State and local governing authorities to assist in the execution of any of the new post–war reconstruction powers to be granted to the Commonwealth Parliament."

As already noted, the outcome of the Commonwealth Government's change in tactics, in the light of the widespread opposition to the original Constitution Alteration (War Aims and Reconstruction) Bill 1942 was the substitution, as a preferred method of vesting the Commonwealth Parliament with additional powers, of a reference of powers by the State Parliaments under section 51 (xxxvii) of the Constitution for the original proposal for a referendum in conformity with section 128 of the same Constitution. Sir Paul Hasluck has recounted how the Convention resolved this and continued:

".... Curtin was willing to try the procedure, provided that the powers to be granted were adequate, that they were granted for a long enough period, that any revocation should be made impossible without the approval of the electors of the State in question – an interesting example of the proposed use of the referendum as a blocking mechanism – and that the Premiers and Leaders of Oppositions at the Convention should agree to do their utmost to pass the legislation and to do so within a reasonably short period. Details of the legislation which it was proposed should be passed by State Parliaments were worked out in a drafting committee under Evatt's chairmanship."

Apart from Evatt himself, the other members of the drafting committee were the Federal Parliamentary Leader of the United Australia Party and Deputy Leader of the Opposition, Mr W M Hughes, and the six State Premiers, of whom only Thomas Playford of South Australia and Albert Dunstan of Victoria were not leaders of Labor governments. Dunstan described the approach of the drafting committee to the Victorian Legislative Assembly on 9 December, 1942 as follows:

".... The committee sat behind locked doors. The press were not admitted, and only the most formal announcements as to progress were made.
"It was clear from the beginning that the sharpest divergences of opinion would occur among the members of the committee. Naturally, the Commonwealth Attorney–General sought the widest of powers. The other Commonwealth representative [Hughes] had himself sought, on many occasions in the past, additional powers for the Commonwealth, and had announced publicly that he had voted in favour of every referendum that had been held... The political philosophy of some of the Premiers was such that they were practically committed to a policy of unification, and, consequently, in committee, were willing to confer very wide powers on the Commonwealth. The remaining Premiers were willing to transfer to the Commonwealth only such powers as could be shown to be necessary for post–war reconstruction, or, in the terms of the resolution unanimously carried by the Convention, adequate powers for the Commonwealth to deal with post-war reconstruction.
"The real work of the Convention was accomplished by this committee. After sitting almost continuously for two and a half days, the committee had made such progress that it was able to suggest the heads of power which might be included in referential legislation to be passed by all States. Working through the night and into the morning, the draftsman managed to make available on the morning of the last day of the Convention a printed draft of a model Bill. This was fully considered by the committee during the morning, when the Prime Minister took the chair. The parliamentary draftsmen from Victoria and South Australia were also present. The Bill was presented to the Convention upon a unanimous report from the committee, and finally adopted without amendment, though a few members of the Convention accepted it with some reservations."
One member of the Convention, but not of the drafting committee, was the Commonwealth member for Kooyong, R G Menzies, a former and a future Prime Minister but then no more than an Opposition back bencher. According to a report in the Melbourne Argus of 15 December, 1942 (almost a fortnight after the Convention had concluded):
"Mr Menzies strongly criticized the attitude of the [Commonwealth] Government in its desire to obtain the powers sought in the proposals at a time when the people of Australia were concentrating their thoughts and energies on the war effort. It was unseemly and untimely to bring up such a measure now. Powers asked for by the Government for dealing with employment and unemployment were extraordinarily wide, and could only be regarded as most dangerous."
This was not a favourable portent.
The particular powers to be referred by the State Parliaments to the Commonwealth Parliament "until the expiration of a period of five years from the date upon which Australia ceases to be engaged in hostilities in the present war" were as follows:
(i) the reinstatement and advancement of those who have been members of the fighting services of the Commonwealth during any war, and the advancement of the dependants of those members who have died or have been disabled as a consequence of any war;
(ii) employment and unemployment;
(iii) organized marketing of commodities;
(iv) companies, but so that any law shall be uniform throughout the Commonwealth;
(v) trusts, combines and monopolies;
(vi) profiteering and prices (but not including prices or rates charged by State or semi–governmental or local governing bodies for goods or services);
(vii) the production and distribution of goods, but so that
(a) no law made under this paragraph with respect to primary products shall have effect in a State until approved by the Governor in Council of that State; and

(b) no law made under this paragraph shall discriminate between States or parts of States;
(viii) the control of overseas exchange and overseas investment; and the regulation of the raising of money in accordance with such plans as are approved by a majority of members of the Australian Loan Council;
(ix) air transport;
(x) uniformity of railway gauges;
(xi) national works, but so that, before any work is undertaken in a State, the consent of the Governor in Council of that State shall be obtained,and so that any such work so undertaken shall be carried out in cooperation with the State;
(xii) national health,in cooperation with the States or any of them;
(xiii) family allowances; and
(xiv) the people of the aboriginal race.

The State Parliaments Confer to Refer

Only two State Parliaments legislated to give full effect to the agreement reached at the Canberra Convention so-called. These were the Parliaments of New South Wales and Queensland. The Labor Party held office in both States: in New South Wales that party controlled both Houses, while Queensland's Parliament, as a unicameral legislature, presented no problems to its Labor government in passing the necessary legislation. In the other States it was a different story, although each State differed in different ways.
A Commonwealth Powers Bill, to give effect to the agreement, was introduced into the Victorian Legislative Assembly by the Premier, Albert Dunstan, and it proceeded smoothly to the second reading. The Assembly resolved itself into Committee and accepted Clause 1 or the short title of the Bill on 16 December, 1942. On 27 January, 1943 further consideration of Clause 1 of the Bill was resumed with the Premier moving:
"That the following sub-clause be inserted:
(2) This Act shall come into operation on a day on which the Governor in Council declares by notification published in the Government Gazette that he is satisfied that legislation the same or substantially the same as this Act has been enacted in each of the other States of the Commonwealth."
Labor's Leader of the Opposition, John Cain senior, claimed that the Dunstan government was responding to the influence of the United Australia Party, and of business pressure which had spread from South Australia: on that latter point I shall subsequently have more to say. In spite of objections from Labor members, this sub-clause was duly inserted into the Bill, and on 16 February, 1943 the third reading of the Bill was passed by the Assembly by a very large majority.
By the time the Bill was received into the Victorian Legislative Council on 23 February, 1943, it was clear, as Clifden Eager, KC, pointed out, that the Tasmanian Parliament, but more specifically the Tasmanian Upper House, had rejected the Commonwealth Powers Bill introduced by the Tasmanian Labor Premier, Robert Cosgrove, into the House of Assembly and duly passed by that Chamber. Referring to sub–clause (2) of clause 1 of the Commonwealth Powers Bill before the Victorian Legislative Council, and its significance for any future proclamation of that Bill as an Act, Mr Eager added:
".... So far, the Tasmanian Parliament has not shown any intention to change its decision not to pass the Bill introduced by the Premier of that State. If the Tasmanian Parliament persists in that attitude, any Bill passed by the Victorian Parliament will never come into operation if this Bill retains its present form. We know that the Assembly of the South Australian Parliament has made very serious amendments in the Bill introduced into that Parliament and the amendments render that measure substantially dissimilar to the Bill now before this House...in four or five

respects... Of course we cannot take very much notice of what has been done in the South Australian Assembly until that Parliament has disposed of the measure, because we do not know what will be the fate of the Bill in the Upper House."

Clifden Eager's expectation of continuing obduracy by the Tasmanian Upper House was in the event fulfilled; the Tasmanian Legislative Council resisted all entreaties to have the Commonwealth Powers Bill passed.

The South Australian contribution to the ultimate frustration of the Canberra Convention's agreement deserves an extended treatment. I have had the advantage of reading a memorandum by Mr Ian McLachlan (senior), in which he recalled the circumstances surrounding the establishment of the Constitutional Powers Committee in South Australia immediately after the announcement of the agreement reached at the Canberra Convention; and I propose to quote from it with his permission:

"A group in Adelaide, consisting of A C Rymill and myself, who having been discharged from the Army were two of [the] very few younger members about then, and a group of older men, the names of whom, as far as I can remember, were, O L Isaacshen, of the Bank of Adelaide, E W Williamson, of Executor Trustee & Agency Company, a Mr Sanderson... of Elder Smith's, H Grose and H Powell, got together to consider how best to persuade our Premier Tom Playford not to hand over these powers, as he had indicated he was prepared to do.

"A meeting was held, I believe at Sir Wallace Bruce's house, where it was decided that the best method of persuading Playford to change his mind was to create as much uproar and vocal opposition as possible. This was done through organizations like the Bank of Adelaide, which had many country branches, and Elder Smith's and Grose's organization (flour milling), through their country Managers talking to their clients and persuading them to send telegrams of objection to the Premier.

"We also apprehended that, if every other State handed over the powers, the pressure would be too much for Playford, especially as he had already more or less committed himself. As days went by it became fairly clear that the Western Australian Cabinet had more or less committed itself, and Victoria looked as though it would grant the powers.

"In order to bring some pressure to bear on Western Australia and Victoria, it was thought a good idea to get a couple of eminent lawyers to address meetings of businessmen in those States with a view to getting them to do something along the lines of what was happening here, and so at our behest Mr F Villeneuve Smith, KC, went to Western Australia and Mr G Ligertwood, KC, went to Victoria, where meetings were called by people who were known to some of the older members of our Committee....

"Generally speaking these meetings were a success, and perhaps were responsible for holding up the adoption by Parliament of Evatt's proposal...."

This claim by Mr McLachlan senior of success and its consequences is, in my judgment, far from excessive. Some old lecture notes of mine contain the following:

".... In both Western and South Australia the Bill was amended `almost out of recognition', and Western Australian amendments betrayed South Australian influence. In those States, the employment, marketing, production, monopolies and other powers were emasculated. In South Australia, the Premier, Mr (later Sir) Thomas Playford was deserted by his own party when it refused to follow his lead in sponsoring the Bill, whilst in Western Australia, the anti–Labor Legislative Council was again the destructive agent.

"By 3 February, 1943 the Prime Minister, John Curtin, conceded that the method of `reference' appeared to have failed. The matter dragged on unresolved for eighteen months, however, before the [Federal] Government put the proposals to the people in the unsuccessful referendum of August, 1944."

As to some of the legal implications of this proposed reference of powers, I can do no better than quote from a Ministerial statement to the Victorian Legislative Assembly by the Premier, Mr Dunstan, on 26 January 1943, which was the day before he introduced the amendment concerning the condition antecedent to the Bill's proclamation as an Act, to which I have already referred. The Premier stated inter alia:

"In the first place, Mr G C Ligertwood, KC, an eminent South Australian counsel, who was asked by a group of Adelaide businessmen to consider the Bill, stated that in his opinion the Bill did not give legal effect to the intention that the reference should be limited in time, nor to the intention that laws passed under the reference should cease to have all force and effect after the expiration of the five year period referred to in the Bill. About the same time Mr Hannan, KC, the Crown Solicitor of South Australia, had raised doubts as to whether the Bill as drafted did give legal effect to the Canberra Convention. Mr Ligertwood based his opinion on the fact that certain words contained in the New South Wales Commonwealth Powers (War) Act of 1915 had been omitted from the Bill, and that the result of the omission of these words was that the matters referred to in Clause 2 of the Bill were not limited in time. Mr Ligertwood proposed to insert the words omitted from the New South Wales Act, and also to add a definite statement that all Commonwealth laws passed under the reference should contain a provision limiting the operation of the laws to the five–year period.

"Mr Ligertwood, in reply to a specific question, said that in his view the State could transfer powers under the Constitution for a limited time, as the Bill sought to do, but he made it clear elsewhere in the opinion that the amendments he suggested to the Bill were necessary in order to produce that result. Subsequently, Sir Robert Garran, Sir George Knowles and Professor K H Bailey, the legal advisers of the Commonwealth, stated in a joint opinion that they entirely disagreed with Mr Ligertwood's opinion, and were satisfied that the Bill as drafted did contain an effective time limitation on the matters to be referred.

"In the next place, an opinion on the Bill was obtained, at the instance of certain Victorian business interests, from Mr Fullagar, KC. Mr Fullagar's opinion may be summarized shortly in this way:

(1) The Bill, as drafted, expresses the intention to limit the reference to five years.

(2) But it is not possible constitutionally to limit a reference in time. Clause 4 of the Bill is, therefore, invalid, and the result of this invalidity would probably be that the whole reference attempted by the Bill would fail, though there was a danger that the invalid Clause 4 would be severed from the rest of the Bill, and there would be a permanent reference of matters to the Commonwealth.

"The clause imposing the time limit might be held to be bad, but the clause referring the power might be held to be good, and in that event the power would be referred on a permanent basis. Mr Fullagar also indicated that, if the reference could constitutionally be limited to a five year period, Commonwealth laws made under the reference during the period would continue to operate at the expiration of the period.

"As a result of the doubts raised by those opinions, the Government sought the opinion of Mr [Wilbur] Ham, KC, of the Victorian Bar. Mr Ham's opinion, generally agreeing with that of Mr Fullagar, may be shortly paraphrased as follows:

(1) The Bill does not carry out the intention of the Canberra Convention to refer matters for a limited time, for the reason that no State has power to refer matters limited in time.

(2) It is not possible under the Constitution for a State Parliament to grant to the Commonwealth Parliament power to make laws in respect of the matters proposed to be referred, and at the same time to limit the period during which such laws may operate.

"The result of the opinions therefore, to this stage, seems to be that :

(1) The three Commonwealth legal advisers and Mr Ligertwood thought that a reference might be limited in time. The Commonwealth advisers thought that the Bill effectively limited the reference in time, but Mr Ligertwood suggested the insertion of certain words in order to bring about that result.
(2) Mr Ham and Mr Fullagar thought that a reference to the Commonwealth could not be limited in time, and Mr Ham agreed to the inclusion of certain amendments only on the basis that, if the Bill were proceeded with, the inclusion of the words would make it more likely that the whole reference would fail completely.
"Since the publication of the opinions of Mr Ham and Mr Fullagar, a number of attempts – some of which have been criticized by the Commonwealth legal advisers – have been made in South Australia to find a form of words which would make it even more certain that the whole reference must fail if a time limitation on the reference were held to be bad, and those new proposals have been submitted by the Victorian Government to counsel, so that the intention that the powers proposed to be referred should be limited in time will be more definitely safeguarded.
"It must be realized, however, that there are two definite limitations on any drafting amendments that can be made. In the first place, it does not seem possible by any form of drafting to overcome the point raised by Messrs Ham and Fullagar that this Parliament has no power to place a time limitation on a reference. Secondly, Mr Fullagar raised the point – tacitly agreed to by Mr Ham – that if a time limitation can be placed on a reference, Commonwealth legislation passed during the period of the time limitation will continue to operate beyond the expiration of the period. It is doubtful whether it is possible by any form of drafting to place it beyond doubt that this point is completely and effectively overcome.
"Mr Ligertwood had attempted to provide definitely against this contingency, but his suggestion was not approved either by Mr Fullagar or by Mr Ham. A further joint opinion by the Commonwealth legal advisers has, however, been furnished, and it appears that the reasoning in that opinion would support Mr Ligertwood's attempt, though his suggested amendment now appears to have been abandoned in South Australia.
"I have had the advantage of studying those opinions, but there is such a violent conflict in them that one is in much the same position as before one has read them. I am a layman, and therefore any opinion I express on the legal aspect of the question will not be of much value. I suppose we shall not be able to say who is right and who is wrong until somebody has tested the matter in the High Court of Australia."
As it happened, this matter was never put to the test in litigation before the High Court because of the failure of the Parliaments of Victoria, South Australia, Western Australia and Tasmania to follow the course which the Parliaments of New South Wales and Queensland had already taken.

The "Fourteen Powers" Referendum 1944.

Sir Paul Hasluck in his official history takes up the narrative as follows:
"The Constitution Alteration (Post–War Reconstruction) Bill, 1944 – the measure to inaugurate the procedure for constitutional change – was introduced into the House of Representatives by Evatt on 11th February [1944]. It was in substance the one which had been drafted at the Constitution Convention and which the States had agreed to pass. After reviewing the history of the matter he said that there was no practical method for laying a sound constitutional basis for Australian post-war reconstruction except by an appeal to the people. A referendum was not being forced on the States. The Canberra Convention had agreed that adequate powers for post–war reconstruction should be conferred on the Commonwealth Parliament and the States had failed to adopt the only legal method by which a referendum to give those powers could be avoided.

"Interjections revealed that on the Labor side there were still those who would have liked a permanent transfer of powers to the Commonwealth Parliament, and on the Opposition side those who feared that at the end of five years the referred powers might not return to the States. Evatt said that the Commonwealth would not go beyond the agreement reached at the Canberra Convention. He saw the five years of a temporary grant of power as a period `on probation'. The step now proposed was not final. At the end of five years it would be retracted, or the people by referendum, or State parliaments by reference, could make the transfer of powers permanent."

By the time the Curtin Government proceeded to initiate this referendum, as a means of acquiring the fourteen powers which the States as a whole had not ceded to the Commonwealth by reference, the state of parties in the Federal Parliament had undergone a significant change as a result of the 1943 election. The Curtin Government had been confirmed in office by a landslide – whereas in the previous Parliament, it had had to rely on the votes of two Independents – and it had also obtained a majority in the Senate. After the election Menzies had regained the parliamentary leadership of the United Australia Party and became Leader of the Opposition. Unlike the Country Party leader, Arthur Fadden, who had led the Opposition from 1941 until 1943, Menzies had not given his support to the agreement reached at the Canberra Convention in late 1942, and had indeed voiced criticisms of it. Untrammelled by any prior commitment, Menzies felt free, therefore, to lead his party in opposition to the referendum.

Professor Geoffrey Sawer has partly summarized the opening of the Opposition's case:

"Menzies in his second reading speech claimed that the powers sought fell into three classes: some were unnecessary, since adequately covered during the transition to peace by the existing defence power; others went beyond what a non-socialist programme of post-war reconstruction would require; others might be supported if they could be made permanent, but their exercise could lead to confusion if they were given, as proposed, only for a limited period."

In a fuller summary, however, Sir Paul Hasluck pointed out that much of Menzies's speech concentrated on powers the Commonwealth already possessed independently of the defence power, including the external affairs power, which Evatt as a High Court Justice had interpreted very broadly in The King v. Burgess ex parte Henry in 1936.

Incidentally, Menzies in some lectures he gave at the University of Virginia in 1966 had this to say on the external affairs power:

"Let the Evatt interpretation be adopted by the Full High Court (and he would be a very brave man who denied the possibility), and I have no doubt that many domestic problems so far regarded as not within Commonwealth power will be made the subject matter of some international agreement for the very purpose of attracting Commonwealth legislative power.

"And so regarded and so employed, the power of `external affairs' would be seen more and more as a power over `internal affairs', and provide us with what our late friend W S Gilbert called a `most ingenious paradox'."

I consider that if Sir Robert had survived well in the 1980s he, for one, would not have been surprised by the majority decision of the High Court in the Franklin Dam Case of 1983.

Sir Paul Hasluck's summary of the conclusion of Menzies's contribution to the second reading debate will have to suffice in lieu of the full text of an amendment Menzies moved, namely:

".... that existing powers were not shown to be inadequate for the immediate post–war tasks of reinstatement and advancement of servicemen and others displaced from normal peacetime occupations, and for the reconstruction of primary and secondary industry. Any doubt on this point should be resolved by constitutional amendment, but no amendment should be approved which `would authorize the socialization of industry, the undue centralization of administration, or the maintenance of such laws as unnecessarily interfere with the liberty of citizens to choose their own means of living and to exercise their rights as free people'; that the House was

concerned at the surrender of legislative powers to administrative officials; that the Bill should be withdrawn and redrafted so as to declare or provide that the Commonwealth Parliament had or should have certain listed powers during a period of five years from the termination of hostilities, but should not have power to enable the Executive to engage in any civil production, industry or commercial process not authorized by its existing powers; that during the period of possession of additional powers matters of a legislative nature should be dealt with by Parliament or laid before it; and that within two years of the termination of hostilities an elective popular convention should be set up for the review of the structure and working of the Constitution.

"As the debate continued, differences of viewpoint and particularly of emphasis were revealed among the Opposition, and at the division on the amendment moved by Menzies, Spender crossed the floor to vote with the Government. Otherwise the vote was on party lines and the amendment was defeated by 46 to 18. On the motion for the second reading, although there was no call for a division from the Opposition, a division was held in order to establish that there was the absolute majority required for a Bill to alter the Constitution. The result was 55 to 10, the members of the Country Party and [Billy] Hughes joining Spender in voting with the Government."

Some semblance of harmony was restored to the Opposition in the vote on the third reading, when both Opposition parties joined to vote against the Government, leaving Spender (in the absence of Hughes) as the only member of the Opposition to vote with the Government. Hasluck explained the Country Party's change in attitude as being due to their inability to enlist the support of the Government in the Committee stage to enable it to make any impression there, "while both in Committee and subsequently in the House they suffered from brutishness in the chair". The legislation passed through all stages in the Senate and was then put to the electors in the States on 19 August, 1944. All fourteen powers sought by the Commonwealth were bracketed together as a single package on which the electors could give a single verdict: Yes or No.

The Labor Party appointed "Yes" committees in each State, but membership was not necessarily confined to people active in that party. In some States the open association of the Communist Party with the "Yes" committees led to the formation of a "non-party `Yes' committee".

Hasluck was to record:

".... the most emphatic and extensive opposition to the referendum came from the Constitutional League in New South Wales, Victoria, Western Australia and Tasmania, and to a less extent from organizations like the Citizens Vote No League in South Australia and the Save Our State League, Freedom League and Liberty Defence League in Western Australia. The Constitutional League was formed to combat the referendum proposals, and drew to itself most of the active support for federalism and State rights, guided by such people as [Professor] F A Bland....

"Government members were not all active, although tours by Ministers were numerous enough in the small States, particularly Tasmania, Western Australia and South Australia."

The referendum resulted in a convincing defeat for the Government. The percentages in all States and in Australia as a whole were:

	Yes.	No
New South Wales	45.44	54.56
Victoria	49.31	50.69
Queensland	36.52	63.48
South Australia	50.64	49.36

Western Australia	52.25	47.75
Tasmania	38.92	61.08
Australia	45.99	54.01

Sir Paul Hasluck had this comment to make on the result:
"Relating the results to the state of the parties in the House of Representatives, and to the election results, how did the Government, which had got in on a landslide only twelve months before, fare in this request to the people for greater powers in peacetime? All Opposition electorates and the electorates of the two Independents (Coles in Henty and Wilson in Wimmera) rejected the proposals. (Coles and Wilson had favoured the proposals.) All the electorates which changed to Labor at the 1943 elections save two (Adelaide and Swan, in Western Australia) rejected the proposals. Of the 35 electorates which had returned Labour at both the 1940 and 1943 elections, 15 rejected the proposals. Out of the total of 74 electorates, only 22 voted "Yes"; in Queensland and Tasmania all electorates returned `No' votes."
I agree with Lord Blake's contention: "The historian should frankly admit when he is baffled"; and I find some features of these results baffling. On the performance of the Australian electors in referendums, certain conclusions can be drawn. First and foremost, the lack of bipartisan support for a proposal virtually ensures its defeat, but there have been instances when bipartisan support has not proved a sufficient condition to enable a referendum proposal to be carried. But in cases of failure where the defeat is not inflicted in all States, a commentator is more often than not unable to explain why one or more States voted affirmatively. So it is with the 1944 referendum!
Why was the defeat registered so strongly in Queensland and in Tasmania, but not so strongly in New South Wales and only marginally in Victoria? And why was the proposal carried in South Australia, however narrowly as it happened, and in Western Australia slightly more convincingly? I cannot hope to explain, except in the case of Queensland to acknowledge the presence there of large numbers of voters from other States based there for defence purposes.

A Cautionary Tale for Mr Keating?

There are two issues affecting Mr Keating's administration which have been the subject of papers at this conference and which present Mr Keating with a warning of sorts derived from the experience of Mr Curtin and Dr Evatt in their quest for broadening the scope of Commonwealth powers in 1944. These two issues are of course the consequences of the High Court decision in the Mabo case and Mr Keating's determination to convert Australia into a republic.
It is no more likely that Mr Keating will succeed in gaining the cooperation of the States on the Mabo issue by a high-handed comportment, and the taunt that they can take his proposals or leave them, than Dr Evatt did in pressing ahead with a referendum in 1944. Is Mabo an issue on which he can go on a frolic of his own, invoking Commonwealth powers to the full extent permitted to him by the courts, including such powers as the external affairs power, without risking serious electoral damage? I think not! And then there is the question of how much backing such Premiers as Mr Goss can count on from their own Parliaments, and from their own constituencies, for any ill considered agreement they reach with Mr Keating which is hastily cobbled together as was the case at the so– called Convention in 1944.
Mr Keating's grand design for an Australian republic has some similarity with the constitutional controversies resulting in the 1944 referendum, and it could founder on any number of reefs. The

obsession of Dr Evatt with post-war reconstruction was, on his own admission, founded on considerations affecting Australia as a belligerent in the Second World War, and the responsibilities these imposed on Australia as a member state in the international community. Recall if you will all his talk of the Atlantic Charter and the four freedoms.

To listen to Mr Keating, you could conclude that nothing less than the adoption of a republican Constitution will enhance Australia's international standing to whatever our present and future exigencies require. I state this not because I agree with what he claims: indeed, to me it is the least convincing of his arguments, but then one could have said the same of Dr Evatt's reliance on international considerations in 1942–44. But there I feel the broad similarity with the 1944 referendum ends.

Dr Evatt's obsession with Australia in the post–war world was at first unveiled as a design to arrogate to the Commonwealth sweeping powers, in the assertion of which the Commonwealth Parliament alone would have the ultimate discretion; in the face of widespread opposition, the design was then narrowed to a set of proposals putatively to be discharged on probation for a five year period dating from the cessation of hostilities. Mr Keating's republic seems to be moving in the opposite direction. It was unveiled as a proposal which would involve the minimum rewriting of the Constitution to attain his objective, but Mr Keating's own advisory committee seems to have moved beyond that, and there is of course the unsolicited advice flowing from the involvement in the debate by Mr Hawke, who has called into question another topic discussed at this conference: the continued existence of Australia's federal system.

On the face of it there seems to me to be no warrant in republicanism for a reference of powers by the States to the Commonwealth as was unsuccessfully attempted in 1944, but there is surely a need for some sort of cooperation from the States in the rewriting of their Constitutions to convert them to a republican mode. And without their cooperation, can a referendum be carried to change the Commonwealth Constitution to a republican one? Even if the Commonwealth Constitution can be changed to that effect with significant opposition from one or more of the States, could continued opposition in one or more of the States be overborne by a sweeping enough amendment to the Commonwealth Constitution, through the agency of a referendum within the terms of section 128, to bring about the desired changes in the State Constitutions?

The republican grand design introduces far more complications than Curtin and Evatt had to contend with in 1944. Supposing those two had succeeded in the 1944 referendum. Within the scope to which they had limited themselves, such a referendum result would have concluded the matter. There might have been subsequent litigation in the High Court, but there would have been a very strong likelihood that the issues raised would have been resolved to the satisfaction of the Curtin Government, in that that administration might have found itself with broader powers than it thought it had gained. With the republican design, if Greg Craven's views are correct, it is just possible that even a successful referendum result might not complete the matter in respect of the Commonwealth Constitution alone, let alone in respect of the State Constitutions.

The real cautionary tale for Mr Keating, however, may be this: that when great issues of constitutional import are raised in our democracy, and particularly when they are raised by over–mighty overlords in Canberra, they usually tend to generate a growing groundswell of public debate, at first, and then resistance. As the record by Mr Ian McLachlan senior, referred to earlier, illustrates, and as the formation of this Society, and the program of this conference, further attest, proposals to increase even further the powers already concentrated in Canberra have a nasty habit of coming back to confound their proponents. They do so by foundering, not so much upon the resistance of their party political opponents (at any rate in the first instance),

but upon the resistance of everyday Australians banding together, like Mr McLachlan senior and his colleagues, "to create as much uproar and vocal opposition as possible".

Endnotes: