Chapter Nine

A Note on Referendum Majorities

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Majorities simple and absolute: Parliament and the amendment of the Constitution of Australia

At the 2002 Conference of The Samuel Griffith Society, His Honour Mr Justice Kenneth Handley, AO, then of the Court of Appeal of the New South Wales Supreme Court, delivered an address on the counting of the vote at a referendum to alter the Commonwealth Constitution under s. 128.[1] He dealt with a part of s. 128 which reads as follows:

> "And if in a majority of the States a majority of the electors voting approve the proposed law [to alter the Constitution], and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent".

The essence of Justice Handley's proposition was that informal votes were, nevertheless, votes. Thus, for a proposal to alter the Constitution to be successful under s. 128, the numbers voting in support of the change had to exceed all others – informal votes as well as "No" votes – by at least one. In the Justice's words, "informal votes had to be counted in order to determine whether 'a majority of all the electors voting' approved the law".[2]

What the Constitution says

This short paper takes up another part of this story, but on the same theme. Its purpose is to explain that the principle contained in the Constitution's provision for determining the success or otherwise of a proposal for change – that the numbers voting in favour should exceed all other votes being cast – is reflected in the antecedent proceedings in Parliament leading to the referendum, but with the significant qualification, to be considered below, that under specified circumstances, a proposed law may be presented to the electors, voting as a whole, and as States, although it has passed only one House by the required absolute majority.

No proposal to alter the Constitution can be put before the people unless it is supported by an absolute majority in at least one House of the Parliament. Section 128 provides, *inter alia*, that the "proposed law for the alteration thereof [of the Constitution] must be passed by an absolute majority of each House of the Parliament ..". The succeeding paragraph addresses a situation in which there is a disagreement between the Houses about a proposed law to alter the Constitution. It stipulates that where either House passes a proposed law to alter the Constitution by an absolute majority, and the other House "rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree", and it is again passed by an absolute majority after an interval of three months, and the proposed law is again rejected, amended unacceptably or simply does not pass, the proposed law can be submitted "to the electors in each State and Territory qualified to vote for the election of the House of Representatives". (In other words, the deadlock procedures contained in s. 57 do not apply to bills to amend the Constitution.)

The proposed law, as submitted to the electors, can be in the form "as last proposed by the first-mentioned [that is, the initiating] House, and either with or without any amendments subsequently agreed to by both Houses".

If a proposed law is to go forth to the people it must be passed twice by "an absolute majority", either by each of the two Houses where they are in agreement, or by the initiating House where there is a disagreement.

The requirement for an "absolute majority" is unusual in the Constitution. The general rule for voting in both the Senate and the House of Representatives is a "majority of votes". Thus, s. 23 states:

> "Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative".

The comparable provision for the House is embodied in s. 40:

> "Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then shall have a casting vote".

These two sections embody the widely recognised principle of parliamentary voting in the 19th Century in Parliaments created in the Westminster mould. The *British North America Act*, s. 49, by way of illustration, states that:

> "Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote".

There is a similar but not identical provision for the Canadian Senate:

> "Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all cases have a vote and when the voices are equal the decision shall be deemed to be in the negative"(s. 36).

(This provision ensures that provincial voting strength is not affected by arrangements for the presiding officer; as noted above, the second sentence of s.23 of the Australian Constitution makes similar provision.)

The strength of the simple majority principle in a Westminster Parliament was vividly illustrated in 1911 in the *Parliament Act* of that year. This was the legislation which essentially removed the powers of the House of Lords over money bills, and reduced powers over other legislation to a suspensive veto of two years (two successive sessions). In these circumstances it might have been thought that a special majority would be required; for example, an absolute majority in the House of Commons, given that the views of the other House were to be overridden, to guard against surprise or chance majorities in the House of Commons. But there is no such qualification or precaution: it is sufficient only that the legislation pass the House of Commons in the usual manner on the prescribed number of occasions with the necessary intervals between votes.

"Absolute majority" – discussion at the constitutional conventions

The "absolute majority" requirement of s. 128 was adopted quite consciously by the framers of the Australian Constitution. The matter was actively considered when it came before the first Convention

in Sydney in April 1891. When it was introduced James Munro, Premier of Victoria, noted that "there must be an absolute majority of the two houses. That is right enough; . . .". There was even a little exchange which had the effect of leaving the matter beyond doubt:

> "An Hon. Member: It must be an absolute majority of the House!
> Mr. MUNRO: They may have an absolute majority of the members present.
> An Hon. Member: No; of the whole house!".[3]

When the Convention at Adelaide (April 1897) returned to the matter of altering the Constitution there were a number of changes. The most important was provision for the people to vote at referendum on alterations to the Constitution, changes to be approved by a majority of the people and a majority in a majority of the States. This provision replaced another in the 1891 text clearly derived from the Constitution of the United States – namely that amendments, once agreed by the two Houses of the Parliament, could not become law until ratified by specially elected State conventions.

The requirement for "an absolute majority" in both Houses remained. None other than Alfred Deakin was immediately on his feet. Though he thought it "a small matter", he nevertheless contended, given the terms of the proposed clause (clause 121), " that there should be an absolute majority of the Senate and House of Representatives is surely unnecessary" because the "question of reform is practically remitted to the people". He wanted "an absolute majority" to be replaced simply by "a majority", thereby bringing the votes in the two Houses within the scope of normal parliamentary procedure as stipulated earlier in the Constitution.[4]

It does not need any prizes to guess that Deakin's strongest supporter would be Isaac Isaacs:

> "I should like to point out the meaning of the clause. There is power given for the intervention of the people on the question of the amendment of their Constitution, but that power is merely by way of veto. Unless the proposed amendment of the Constitution first succeeds in passing an absolute majority of both Houses of the Legislature the proposition never reaches the people for their determination at all".[5]

In continuing, he complained that "[i]t is possible for an absolute majority of either House to prevent the people from expressing their views on the amendment of the Constitution. I think that is wrong . .". He thought "a mere majority" would amount to "too easy a mode" of altering the Constitution, but not in circumstances where "the decision of the Legislature is not intended to be final". Given the proposed "sanction of a majority of the States and people", "[n]ow, surely that is safeguard enough".[6]

But the terms proposed (that is, the absolute majority) had some robust defence. Some big names came forward. Sir Edward Braddon, Premier of Tasmania, argued that:

> "I think the feeling in regard to this clause has been that it should be made as difficult as possible to amend the Constitution. The idea underlying the clause is to provide that, while an amendment of the Constitution is not made absolutely impossible, the Constitution shall not be so easily capable of amendment that in any fluctuation of public opinion, any change of feeling on the part of the people in some crisis of a temporary character, it might be changed . . . I do not think this is too much to ask in such an important matter as an amendment of the Constitution, and, while I would not say the Constitution should be such as could only be amended by force of arms, I hope we shall provide all necessary safeguards against its being lightly amended".[7]

Another luminary, Dr John Cockburn, Minister for Education in South Australia, thought likewise:

> "An amendment of the Constitution should not be made too easy, but on the other hand it should not be made too difficult. In America it is too difficult. . . . What is provided for is an absolute majority, and that only means one more than half of the House. It means that there is to be no catch vote, and it is well to provide against that. I cannot imagine a case where a majority of the house wishes to see an amendment carried that the majority cannot be got together to vote. . . . .The decision should rest on the deliberate will of the House instead of on a catch vote".[8]

The President of the Legislative Council of Victoria, Sir William Zeal, went so far as to argue for absolute majorities at the second and third readings. When Barton, the Leader of the Convention, replied: "It is not necessary. Supposing they have some different mode of procedure", Zeal responded: "If Mr. Barton does not consider my amendment necessary I withdraw it".[9]

The matter did not arise again at the September 1897 meetings in Sydney, but it was a big item at the February 1898 meetings in Melbourne. Victoria again sought to delete the requirement for an absolute majority. McMillan of New South Wales repeated the previous argument:

> "It seems to me that such an enormous change as that of an alteration of the Constitution should certainly require an absolute majority of each House of Parliament. We do not want to make the Constitution too rigid, but, on the other hand, we should not go to the opposite extreme. I do not approve of the rigidity of the American Constitution, and I think that we should have a means of making an alteration if thought desirable; but, at the same time, it seems to me that a matter of such paramount importance should receive the assent of an absolute majority of both Houses of the Legislature".[10]

Deakin, on this occasion, said, in view of the previous discussion [in Adelaide], he did not propose "to request the Convention to reconsider the point, because this is a comparatively minor matter . . .".[11] The Convention then proceeded to discuss the question of ratification of alterations to the Constitution by the people: as Isaacs put it, "a very wise provision".[12]

Isaacs then asked, what would happen if the Houses disagreed? If a proposal received the requisite majority in one House but not in the other? Should one House have the power to prevent a proposed amendment coming before the people?

Isaacs had his own answer. He argued that an alteration to the Constitution could be sought on the basis of an absolute majority in one House alone (Senate or House of Representatives), because the vote in Parliament was not final; it was preliminary to a popular vote, in which there had to be not only a majority of the people but popular majorities in a majority of the States. He supported his case with reference to what he called "the now admitted inherent defect in the American Constitution" (see below).[13]

Isaacs' amendment was negatived (31-14). His supporters included not only Victorians Deakin, Higgins, Peacock, Quick, Trenwith and Sir George Turner, and South Australians Holder, Kingston and Cockburn, but, significantly, the New South Wales Premier, G H Reid, and his protectionist opponent, William Lyne.[14]

As will be well known, the new text of the Constitution settled at Adelaide did not achieve the required statutory majority in NSW. At the subsequent Premiers' Conference of January-February 1899, the alteration clause was again considered, and this time Isaacs' view prevailed notwithstanding that he himself was not present.[15] The unanimous decision of the Premiers was that, "Neither House alone should have power to prevent a reference to the people of a proposed alteration of the Constitution. A proposed alteration, if twice passed by one House, and twice rejected or obstructed by the other, might be submitted by the Governor-General to the people".

The result was s. 128 as it now exists in the Constitution.

The flexibility thus allowed has only been activated on one occasion. In 1974, proposed alterations supported only by the House of Representatives were voted on at the same time as the simultaneous elections for the two Houses in that year. All proposals failed.

There have been other occasions when amendments supported only by the Senate, when the government has not had a majority there, have been proposed. These have never been put before the electors; a notable case was in 1913-14, when Labor had a substantial majority in the Senate and was keen that proposals defeated in referendums held simultaneously with the 1913 federal elections should again be submitted. The Governor-General refused to do so, on the basis that he could only act on the advice of his Ministers.

So far as I can discover, among the many proposals to alter the Constitution, none has sought to abandon the absolute majority principle at the parliamentary stage. The arguments advanced during the 1890s have held their ground. This is in contrast to unsuccessful attempts to reduce the need for popular "majorities in a majority of the States" from four, as it is at present, to majorities in at least half the States.

The Final Report of the most recent Constitutional Commission, headed by Sir Maurice Byers, QC, recommended that alteration of the Constitution could be initiated by "not fewer than half the States", providing the States involved represented "a majority of Australians overall". Of relevance to this paper is that the recommendation, including the draft bill to effect it, did not include any provision for voting in the various Houses of the State legislatures.[16]

Parliamentary practice

The constitutional provisions relating to amendment of the Constitution are appropriately reflected in the procedures of the House of Representatives and the Senate. Thus, in the case of the House of Representatives:

> "If, on the vote for the third reading [of a Constitution alteration bill], no division is called for and there is no dissentient voice, the Speaker draws the attention of the House to the constitutional requirement that the bill must be passed by an absolute majority and directs that the bells be rung. When the bells have ceased ringing the Speaker again states the question and, if no division is called for and there is no dissentient voice, the Speaker directs that the names of those Members present agreeing to the third reading be recorded by the tellers in order to establish that the third reading had been carried by an absolute majority".

An absolute majority is likewise required where the House agrees to an amendment by the Senate to a bill to alter the Constitution.[17]

Odgers' Australian Senate Practice also addresses the requirement for an absolute majority. It observes that:

> "[a]n absolute majority is required only for the third reading, and it is possible for a Constitution alteration bill to progress to a third reading without an absolute majority during the early stages of its passage. This allows the Senate freedom to consider a Constitution alteration bill at earlier stages while enforcing the constitutional requirement at the stage of the final passage of the bill".

The standing orders provide that a roll call must take place immediately before the third reading of a bill to alter the Constitution. It notes that a roll call does not oblige a Senator to vote.[18]

The United States Constitution and Bryce's comments

The US Constitution figured in discussions about a framework for amendment of the Australian Constitution. Article V provides as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . .".

Only one provision of the US Constitution is exempt from the above procedure: it is the provision that, "No State without its consent shall be deprived of its equal suffrage in the Senate".

In practice, all amendments to the US Constitution have been accomplished at the initiative of the Congress and ratified by three quarters of the State legislatures.

The framers of the Australian Constitution had, as a major source of information about American constitutional practice, James Bryce's *The American Commonwealth*, first published in 1888. It is thus of interest to note what Bryce had to say about the question of amendment to the Constitution:

> "Ought the process of change to be made easier? Say by requiring only a bare majority in Congress, and a two-thirds majority of States? American statesmen think not. A swift and easy method would not only weaken the sense of security which the rigid Constitution now gives, but would increase the troubles of current politics by stimulating a majority in Congress to frequently submit amendments to the States. The habit of mending would turn into the habit of tinkering. There would be too little distinction between changes in the ordinary statute law, which require the agreement of majorities in the two Houses and the President, and changes in the more solemnly enacted fundamental law. And the rights of the States, upon which congressional legislation cannot now directly encroach, would be endangered".[19]

Bryce also made some observations about practice in two continental practices of the time:

> "The French scheme [Third Republic], under which an absolute majority of the two Chambers, sitting together, can amend the Constitution; or even the Swiss scheme, under which a bare majority of the voting citizens, coupled with a majority of the Cantons, can ratify constitutional changes drafted by the Chambers, in pursuance of a previous popular vote for the revision of the Constitution, is considered by the Americans dangerously lax. The idea reigns that solidity and security are the most vital attributes of a fundamental law".[20]

He concluded with an insight which certainly has some bearing upon the course of Australian constitutional history:

> "From this there has followed another interesting result. Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend, or usage may modify, the express provisions of the apparently immovable and inflexible instrument".[21]

Endnotes:

1. Justice Kenneth Handley, AO, *When "Maybe" means "No"*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 141-6.

2. *Ibid*., p. 142.

3. *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April,1891, (Sydney, 1986), 8 April 1891, p.885.

4. *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May, 1897, (Adelaide,1897), 20 April 1897, p. 1021.

5. *Ibid*..

6. *Ibid*..

7. *Ibid*..

8. *Ibid*., p. 1022.

9. *Ibid*., p. 1023.

10. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January to 17 March, 1898, p.176.

11. *Ibid*., p.716.

12. *Ibid*., p.717.

13. *Ibid*., p. 718.

14. *Ibid*., p. 765.

15. J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p.243; see also W G McMinn, *George Reid*, Melbourne University Press, 1989, chapter 17.

16. *Final Report of the Constitutional Commission* (Chair: Sir Maurice Byers, QC), vol.2, Canberra, AGPS, 1988, para. 13.1 (i), p.851.

17. I C Harris (ed.), *House of Representatives Practice*, 5th ed., Department of the House of Representatives, 2005, p. 379.

18. Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th ed., Department of the Senate, pp. 260-1; see also pp. 224-5.

19. James Bryce, *The American Commonwealth*, vol. 1, London, Macmillan and Co., 1888, p.490.

20. *Ibid*..

21. *Ibid*., p. 491.