Appendix I

Addresses Launching Upholding the Australian Constitution, Volume 1

1. The Rt. Hon. Sir Harry Gibbs

I wish to say something about the proposed review of the Constitution which, it seems, is intended to proceed until the year 2000. The review is to commence, we are told, with a public process of education – a suggestion which is no doubt well meant, although some might find it patronising and others might wonder exactly what are the constitutional theories which it is intended that the members of the public should be taught.

The sort of amendments to the Constitution that are likely to be approved at a referendum will depend very much on the attitude and belief of the electors. If the public can be convinced that a unitary form of government would be preferable to a federation, or that the Commonwealth Parliament is prevented from enacting beneficent legislation because its powers are too limited, they will be likely to favour the increase in the powers of the Commonwealth that will undoubtedly be proposed.

If the public can be persuaded that the wise policies of the executive government are likely to be frustrated by an uncooperative Senate, or even by the possible exercise of the reserve powers of the Governor–General, they might agree to the removal of some of the checks and balances that remain in the Constitution.

On the other hand, if the public does not believe that Canberra has a monopoly of wisdom and efficiency, or that it is good for the nation to have two sets of bureaucrats dealing with the same questions, or that the States should be reduced almost to impotence, they might support amendments that would confine, rather than expand, Commonwealth powers.

Since in the end no constitutional amendment can be made without the approval of the electors, it is important that any process of education should give them an accurate and balanced view of constitutional theory and practice, and not a slanted one.

Federalism is of the essence of the Australian Constitution. That seems to me self evident, but such is the diversity of opinion on constitutional questions nowadays that I suppose there are some who would disagree.

It is a necessary characteristic of a federation that the functions of government are divided between governments at two levels, and it would seem natural to conclude that the division should be made by allocating to the States all those functions which they are able to carry out effectively, and by giving to the central government only those functions which the States are unable to perform for themselves. Indeed any other basis of division would seem purely arbitrary.

Clearly, it was the intention of the framers of the Australian Constitution that the functions of government should be allocated between the States and the Commonwealth in that way. That intention has however been defeated. So wide a meaning has been given to some of the provisions of the Constitution that the Commonwealth has become, if not quite omnipotent, certainly omnipresent – it can intrude into literally every field of government.

Two developments, in particular, have made possible this expansion of Commonwealth power. The first is that some of the powers specified in Section 51 of the Constitution have been given a meaning far wider than the framers of the Constitution ever contemplated.

As everyone here is no doubt aware, the provision that does most to make Commonwealth power ubiquitous is that which enables the Parliament to make laws with respect to "external affairs". It is hardly an exaggeration to say that it would not make any practical difference if the word "anything" were substituted for "external affairs" in that provision.

One particularly dangerous side effect of the broad interpretation of this power should be noticed. Section 109 of the Constitution, which renders invalid any law of a State which is inconsistent with a law of the Commonwealth, usually works well enough. If a State law becomes invalid, there is usually a Commonwealth law on the same subject – there is no vacuum. But under the external affairs power the Commonwealth has enacted laws which prevent the States from legislating on those subjects although there is no Commonwealth legislation relating to those subjects. That was the effect of the first Mabo decision by which a State law, with respect to lands within the State, was held invalid. A new limitation on State power was added to those expressed in Chapter V of the Constitution.

Another instance of an expansive construction of a constitutional power which has had side effects which were presumably unintended is provided by the history of Section 51(xxxv), which gives power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. I shall not take time to trace in detail the development of the artificial doctrine of paper disputes, and of the principle that a union has a capacity greater than that of the employees it represents. It is enough to say that the important role – indeed the essential role – which the Courts gave to the unions in the working of the system of conciliation and arbitration was directly responsible for the great increase in trade union power that occurred in Australia during this century, and gave Australian trade unions a strength greater than that which they have almost anywhere else in the world. The situation of unions in Australia is exceptional, but many people regard it as natural because they are accustomed to it.

A second cause of the expansion of Commonwealth power has been the extensive use of Section 96 of the Constitution, which enables the Parliament to make grants of financial assistance to any State on such terms and conditions as the Parliament thinks fit. The Commonwealth now collects about 50 per cent more revenue than it requires for its own purposes. Out of the excess it makes grants to the States, which themselves raise only about half of the revenue they need.

The States are hampered in establishing a workable tax base by the fact that they are prevented by the Constitution from imposing duties of excise – an expression which has been construed widely, and in some cases unpredictably. The States thus depend on the grants which the Commonwealth provides, often on conditions which require the States to apply the money for purposes which the Commonwealth has no power to effect directly.

True it is that there is probably no subject in respect of which the Commonwealth could not legislate if it went through the right motions to invoke the external affairs power, but where it presently has no other power it can get its way by financial coercion.

These distortions to the working of our federal Constitution do not inevitably follow from the fact that the provisions which confer power on the Commonwealth have been given an expansive interpretation. The Commonwealth is of course not obliged to exercise its powers expansively. It might conceivably take to heart Shakespeare's dictum that it is excellent to have a giant's strength but tyrannous to use it like a giant. However, the Commonwealth is unlikely to embrace any such policy of self restraint. History shows that power, once tasted, is addictive. Those who have it resent limits and restraints on its exercise. It is certain that in any review of the Constitution the Commonwealth will seek further powers.

It is almost certain, also, that the Commonwealth will seek to include in the Constitution a guarantee of what will be described as basic rights. The question will then arise what rights should be guaranteed.

It is certain that, if a bill of rights comes to be framed, all those pressure groups, to whose influence our politicians so readily succumb, will urge that their own interests be made the subject of constitutional guarantees. Indeed, some of those groups have already announced that this is their intention.

Unfortunately it is a characteristic of many special interest groups, in Australia and elsewhere, that they tend to exaggerate a case which is not without some merit, and make claims which are distinguished neither by fairness nor moderation. Politicians give in to such claims, as some recent legislation in Australia shows. Thus in a bill of rights we might expect to find guarantees of gender equality (whatever that may mean), and of the special rights of indigenous inhabitants, trade unions and so–called ethnic groups, and even of the protection of the environment.

The effect that would be given to constitutional provisions of that kind is entirely beyond conjecture but what is clear is that they could seriously inhibit the powers of elected legislatures to carry out policies for which they had a mandate and which the majority of the community supported.

Even if no provisions of that kind were included in a bill of rights, and protection was afforded to such apparently desirable objects as life, liberty and property, the Courts would be drawn into political controversies which in a democracy should be settled by the elected representatives of the people. The experience of the United States shows how in the result both the democratic process and the integrity of the courts may suffer. As President Lincoln said, in 1861: "If the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in original litigation.....the people will have ceased to be their own rulers". The decisions of the Courts, under an entrenched bill of rights, would prevail over legislation even if that had been supported by an overwhelming majority of Parliament and of the electorate.

The actions of a later American President showed how the Courts themselves may be affected if they take it on themselves to decide political questions. In the 1930s President Roosevelt found that the Supreme Court consistently overruled his New Deal legislation and similar laws of the States. He believed that he had a strong public support for his legislation and blamed the conservatism of the elderly justices; six of the nine were over 70. In 1937 Roosevelt proposed to Congress that the law should be changed to permit him to appoint an additional justice for every one aged 70 who did not resign, so that the size of the Court might be increased to 15. Within a very short time the Court staged something of a constitutional revolution, and began to uphold legislation of the kind that it had previously invalidated – it was said at the time that a switch in time had saved nine.

No lawyer can approve of Roosevelt's proposal, but no wise lawyer can fail to see the moral taught by those events. Subsequently, American Presidents have not found it necessary to go so far, but Presidents and Senates alike have shown that they often look more to social and political attitudes than to legal ability when making judicial appointments.

If Australian Courts had the power to decide purely political questions, as they could under a bill of rights, no one can doubt that they would become similarly politicised, or that their capacity to perform their essential role, of impartially protecting rights and freedoms under the law, would be put at risk. At present the rights and freedoms of our citizens are protected without a bill of rights at least as successfully as they are in the United States or in any other country which has a bill of rights.

I have mentioned only a few of the issues that would arise when constitutional amendment comes to be discussed. There are no doubt some minor changes, of no great importance, which might with advantage be made to our Constitution, and upon which everyone might agree. When it comes to reforms that would really matter, there will be much greater difficulty in reaching agreement.

Those attempts to amend the Constitution that have failed in the past have often been seen as politically motivated. If any effort has been made to involve the public in the process of formulating proposed amendments, rather than entrusting the task to persons picked by the Government, it has not been successful. If it is intended now to make a genuine attempt to involve representatives of all sections of the public in a serious discussion of possible constitutional reforms, without any preconceived commitment to change of a particular kind, that will be welcome. However, as I have endeavoured to suggest, conflicting views are held on matters of fundamental principle and those views are wide apart.

When federation was achieved there was general jubilation in Australia. The future was viewed with hope and confidence. Today living conditions are generally very much more comfortable than they were in 1901, but optimism has evaporated. The public attitude is one of disillusion, pessimism and even despair.

Whether the distortions that have occurred to what was a workable federal system have played a part in this deterioration is a matter for debate. Certainly the drift to centralisation has resulted in a multiplication of bureaucratic interference and of cost that we can ill afford. If the Commonwealth needs further powers, they should not be such as to provide further avenues of intrusion into State affairs, or to result in overlapping and unnecessary administrative expense.

Any review of the Constitution should not lose sight of the fact that the best reform might be to make the Constitution work as it was originally intended to do, providing for a true federation and a true democracy.