



Changing Constitutions

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Betty O'Rourke
Director

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What is a Constitution?

A constitution is a set of rules defining a system of government. It describes the institutional structure, the conditions under which power is held and exercised, and the procedures through which the rules themselves may be changed.

Alan Fenna, *Essentials of Australian Government*. Croydon
Vic: Tertiary Press, 2000.

In principle, then, a constitution sits above the 'ordinary laws' that governments make day-to-day. It is the fundamental law that binds the political process.

Constitutions can consist of both written and unwritten components. The unwritten components are known as conventions, or accepted practices that constitute informal rules.

Today, virtually all liberal democracies have formally codified, or 'written', constitutions. The chief exception is the United Kingdom where the rules of its Constitution are scattered through a range of charter documents, parliamentary Acts, elements of the common law, and constitutional conventions.

The Constitution of the Commonwealth of Australia is a single document. The Western Australian Constitution, on the other hand, is found in two main and several supplementary documents.

Commonwealth Constitution

The Commonwealth Constitution provides the basic rules for the government of Australia. The Constitution is the fundamental law of Australia that binds everybody, including the Commonwealth Parliament and the parliaments of each State.

The first three chapters of the Constitution confer the legislative, executive and judicial powers of the Commonwealth on three different bodies that are



Cox Reid, 'Come, come my dear! You girls must all pull together you know! All in the Same Boat'
Ambrose Dyson, *Critic*, 17 June 1899
State Library of South Australia

The colonies had been settled at different times for different reasons and were in varying stages of economic development. There was a great deal of fear among the smaller colonies that the more populous New South Wales and Victoria would swamp them. NSW blew hot and cold over joining the Federation. Many problems arose from the ferocious rivalry that existed between NSW and Victoria. The cartoon portrays the arguments that ebbed and flowed around Federation as nothing more than the petty squabbles of idle girls.

established by the Constitution - the Parliament, the Executive Government and the Judicature. Legislative power is the power to make laws. Executive power is the power to administer the laws and to carry out the business of government. Judicial power is the power exercised by the courts.

Underlying the Constitution is the principle of 'representative government' - that is, government by representatives of the people who are chosen by the people. The Constitution established the Commonwealth Parliament comprising the Queen, a House of Representatives and a Senate. Sections 7 and 28 require regular elections for the House of Representatives and the Senate; and Sections 7 and 24 require members of the Commonwealth Parliament to be directly chosen by the people.

The Commonwealth Constitution was necessary to bring all parts of Australia together in a single federation in 1901. When framing the Constitution,

the writers were influenced by three other constitutional models from Britain, the United States and Switzerland. Certain aspects of these models were taken and adapted to suit Australian circumstances.

► The British Constitution was an obvious source of influence. Australia's system of government was modelled on Britain's version of parliamentary government, known as the Westminster system. Other influences include the acceptance of a constitutional monarchy and the reliance on democracy and the common law to protect individual rights.

► Our Constitution draws on the United States' model for the structure of the federal system of government, including the makeup of the Senate and the way that power is divided between the States and the Commonwealth. There is an influence, too, in the way the judiciary or court system works and the establishment of a strong Upper House.

► The use of the referendum or popular vote for constitutional change was derived from Switzerland. Section 128 of the Commonwealth Constitution has strong similarities to this aspect of the Constitution of Switzerland. What has been described by the courts as 'the sovereignty of the Australian people' is recognised by Section 128 which provides that any change to the Constitution must be approved by the people of Australia.

The Constitution framers adapted these influences to suit Australia, while developing other principles and institutions. Adaptations such as the use of conciliation and arbitration to settle industrial disputes, and a way to overcome deadlocks between the Houses of Parliament ensured that the Constitution was uniquely Australian.

Ways of Changing the Commonwealth Constitution

The words of the Commonwealth Constitution can only be changed by the referendum procedure set out in Section 128 of the Constitution.

The procedure requires:

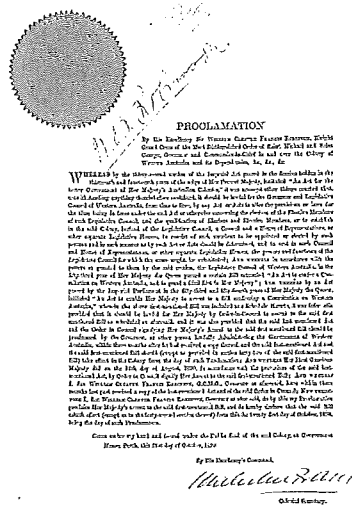
- A Bill proposing the change to be passed by the Commonwealth Parliament, or by one House of the Parliament twice;
- A referendum, or popular vote, in which the proposal is approved by a majority of voters throughout Australia, and by a majority of voters in a majority of States. Since there are six States, the majority needed is four. The Northern Territory and the Australian Capital Territory are not counted as States for this purpose;
- Assent to the Bill by the Governor General acting on behalf of the Queen.

The second last paragraph of Section 128 requires certain types of proposals to be approved by a majority of people in the States affected by them. In some cases, in practice, this requires majorities to approve the proposal in all States. This special procedure applies when a proposed change would:

- Lessen the proportion of a State's representation in either House of the Commonwealth Parliament (by, for example, changing the rule that each State is equally represented in the Senate);
- Lessen the minimum number of representatives from a State in the House of Representatives (currently five);
- Alter State boundaries, or affect the provision of the Constitution relating to them.

However, the operation of the Commonwealth Constitution may be affected in other ways. Changing the Constitution may mean:

1. Formal change to the written text itself (*the referendum procedure*);
2. Legal change to the application of the written text (*judicial interpretation by the High Court*);
3. Changing practices outside the written text (*conventions*);
4. Changing political constitutional realities that affect the way the Constitution works in practice (*tied grants*);
5. Political adjustments (*referral of powers*).



Proclamation of the *Western Australian Constitution Act*
21 October 1890
Colonial Secretary's Office, AN 24, Acc.752, 2964/90
State Records Office of WA

The Acting Chief Justice, Sir Henry Wrensfordley, read this document before an assembly including the newly arrived Governor, Sir William Robinson. The coming into effect of Western Australia's Constitution Act was proclaimed. It had been ratified by the British Parliament in an enabling Act, receiving the Royal Assent in August 1890.

Western Australian Constitution

Western Australia was proclaimed as a British colony on 18 June 1829. The Governor was the most powerful man in the colony and he and nominated officials could make laws on any matter, subject to the British Parliament's authority.

Representative government was attained in 1870 when 12 members were elected to the Legislative Council of Western Australia. In 1889, the Council passed the *Western Australian Constitution Act*, 1889 setting up a Parliament with full powers to make laws for the 'peace, order and good government' of the State.

Although the Act was created here, it was made law in Britain because that Parliament was the source of legal authority for the colony. Governor William Robinson proclaimed it on 21 October 1890.

Apart from some very limited residual British authority, the Colony was now effectively an independent and autonomous political entity.

In a survey of Western Australian electors in 1995, 79 per cent said they knew 'hardly anything' or 'nothing' about the State Constitution, or 'did not know' that it existed.

This is not surprising considering that, unlike the Commonwealth Constitution, there is not a single document called 'The Western Australian Constitution'.

The Western Australian Constitution is based on two main parliamentary Acts: the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899*. The former was re-enacted by the UK government to take effect, the latter by the WA government. Other important sources considered to be part of the WA Constitution include:

- ▶ The Commonwealth Constitution
- ▶ The *Australia Acts 1986* (Cwlth and UK).
- ▶ Other State legislation including the *Electoral Act 1907*, the *Supreme Court Act 1935* and the *Electoral Distribution Act 1947*,
- ▶ United Kingdom statutes such as the *Bill of Rights 1688*;
- ▶ Letters Patent (a source of constitutional authority for the Governor as the representative of the Crown as head of State);
- ▶ The common law (the prerogative powers of the Governor and the case law concerning the effect and interpretation of the above constitutional documents and sources); and
- ▶ Constitutional conventions (unwritten but well-established constitutional practices)

Western Australia's constitutional system gives the State its own separate links to the monarchy, whereby the monarch's functions are distinct from the operations and existence of the monarchy at Commonwealth level.

This operates in a manner similar to the workings of the monarchy in the Commonwealth arena: the Queen is the formal symbolic head of the State Government, who acts through the Governor. In practice, the exercise of executive power is carried out by the Governor, Premier and State Ministers.

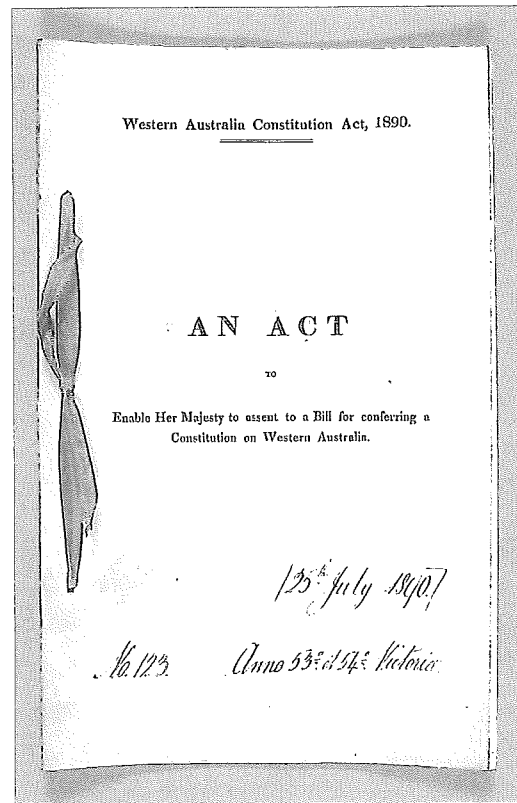
Ways of changing the State Constitution

The Western Australian Constitution was, for most of its history, different from the Commonwealth Constitution because a referendum was not required to change any part of it. Instead, it could be amended by State Parliament if both Houses agreed by an absolute majority.

However, in 1978, State Parliament amended section 73 of the *Constitution Act 1889* so that some of its provisions could only be amended by a State referendum. From that point on, major components of the WA Constitution became strongly entrenched. This was the most important constitutional amendment since 1905 and required that a referendum be held to:

- ▶ abolish or alter the office of Governor;
- ▶ abolish or reduce the number of the Members of Legislative Council or Legislative Assembly;
- ▶ provide that either House has members other than members chosen directly by the people.

To date no such referendum has been proposed.



The Western Australian Constitution Act - passed in the UK, 1890. House of Lords, UK

This document enacted the Constitution passed by the Legislative Council of Western Australia in 1889. The passage of this Enabling Act marked the transition from rule by the Governor with the assistance of an appointed Legislative Council, to a representative democracy.

The Constitution was amended again in 1989 to extend the life of any Parliament from a maximum of three years to a maximum of four years, an amendment that did not come under the referendum provision. That change was passed by both Houses and became law. By comparison, the Commonwealth could not instigate such a change without a referendum.

Despite many changes in the State and the role of government since 1890, the constitutional structure of Western Australia has remained largely unchanged.

The Balancing Act

In a federal system of government, both the Commonwealth and State Governments have powers. This is the balance of power.

This area is one of the most misunderstood aspects of government. At the time of Federation, the Commonwealth was granted some important exclusive powers, eg, customs and excise duties and coining money. The States surrendered all responsibility for these areas. But most of the powers were in fact concurrent - that is, they were given to the Commonwealth under Section 51 but not taken entirely from the States; power and jurisdiction were not divided but shared.

Since 1900, the Commonwealth has exercised its powers with ever increasing vigour, resulting in its encroachment on areas that were not originally expected to be its concern.

It should be noted that, under Section 109 of the Commonwealth Constitution, when a State law is inconsistent with a Commonwealth law, the Commonwealth law overrides the State law.

Dealing with problems of joint jurisdiction is an ever-present fact of life for Australian governments and over time the balance changes.

Under Section 51 of the Commonwealth Constitution, responsibilities given to the Commonwealth at Federation related to such matters as:

- ▶ Defence and external affairs;
- ▶ Navigation, quarantine and meteorological services;

- ▶ Immigration, citizenship, matrimonial status;
- ▶ International and interstate trade and commerce;
- ▶ Currency, non-State banking and insurance;
- ▶ Conciliation and arbitration for interstate industrial disputes;
- ▶ Industrial relations (beyond State borders);
- ▶ Postal and telecommunications services, conditional powers with respect to railways; and
- ▶ Invalid and old age pensions.

The Commonwealth Constitution does not list any powers of the States, but at Federation the States were considered to have sole responsibility for everything not specified in the Commonwealth Constitution. This included:

- ▶ Law and order within Australia;
- ▶ The regulation of commerce and industry;
- ▶ Transport services;
- ▶ Natural resources, including land;
- ▶ Essential services such as water supply, sewerage, drainage, electricity and gas;
- ▶ Local government;
- ▶ Education, housing and health;
- ▶ The environment;
- ▶ Industrial relations (within State borders).

At Federation, the Commonwealth and States shared a number of tax powers, but with the Commonwealth having exclusive power over customs and excise duties.

Referendums

A referendum is a vote by the people. Every citizen who is eligible to vote has the right to vote on a given issue. The people can accept or reject a government proposal put directly to them.

Constitutional Referendums

Under Section 128, the Commonwealth Constitution can be amended only by a referendum that gains a 'double majority', that is a national majority of all voters as well as a majority of electors in a majority of the States (ie, at least four of the six). This makes change difficult.

The Australian people have voted on 44 proposals for change in 20 constitutional referendums since 1901. Amending the Commonwealth Constitution has proved difficult. Only eight of the 44 proposals have been successful.

Make no mistake about referendums. Their results are notorious. You couldn't introduce free beer by referendum.

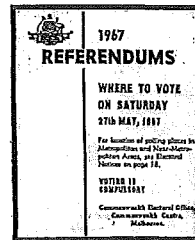
Sir John Walsh
Sydney Morning Herald, 4 June 1965.

Advisory Referendums

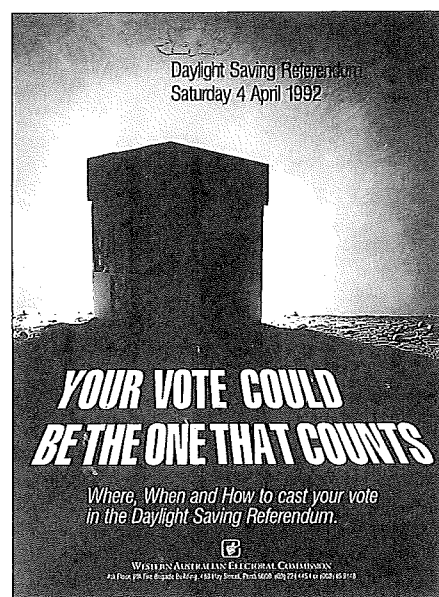
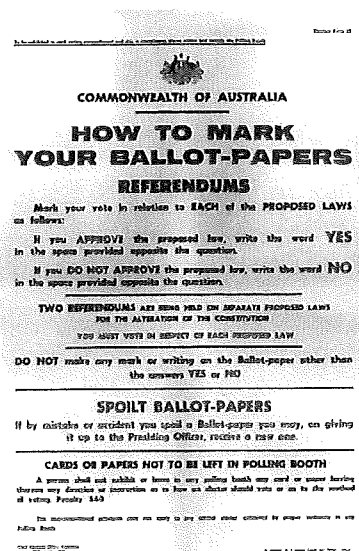
(also called plebiscites)

Governments can hold advisory referendums to test whether people either support or oppose a proposed action or issue. They are not bound by the 'result' of an advisory referendum as by a constitutional referendum. While Commonwealth, State and Territory governments are able to hold advisory referendums, they only occasionally exercise this option.

Western Australian Daylight Saving Referendum brochure
Electoral Information Booklet, cover, 1992
courtesy Western Australian Electoral Commission



Referendum papers
courtesy Australian Electoral Commission



Constitutional Referendums

Examples of unsuccessful constitutional referendums

1988 Rights and Freedoms

In September 1988, a 'rights and freedoms' proposal was one of four put to the people of Australia. It sought to:

- ▶ extend the right to trial by jury,
- ▶ extend freedom of religion, and
- ▶ ensure fair terms for people whose property was acquired by any Government.

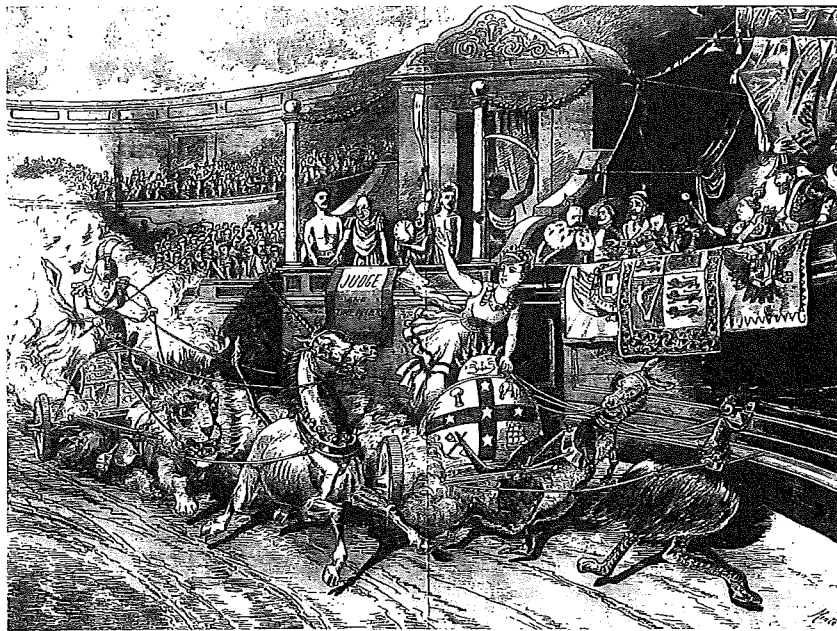
This and the other three proposals were rejected.

1999 Republican Referendum

On 6 November 1999, two questions were put:

- ▶ To alter the Constitution to replace the Queen and Governor General with a President elected by a two-thirds majority of the members of the Commonwealth Parliament.
- ▶ To alter the Constitution to insert a preamble.

Both were unsuccessful. However, the question of a Republic continues to be debated and, as the Queen observed during a recent Royal visit, the future of the monarchy in Australia was, and is, for '*The Australian people...alone to decide by democratic and constitutional means*'.



Australia First Montagu Scott, *Boomerang*, 1 February 1890
Mitchell Library, State Library of New South Wales

Republican movements in Australia have existed since the 19th century. In this cartoon, Young Miss Australia sweeps in triumph past the stands, beating portly Britannia, with Queen Victoria looking on. Republican Australia, with her youthful promise and sheer energy, easily outstrips the exhausted British Empire and all it stands for.

Examples of successful constitutional referendums

1946 Social Services Referendum

The 1946 referendum proposed to give the Commonwealth power to legislate on:

The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.

Section 51 (xxiiiA)

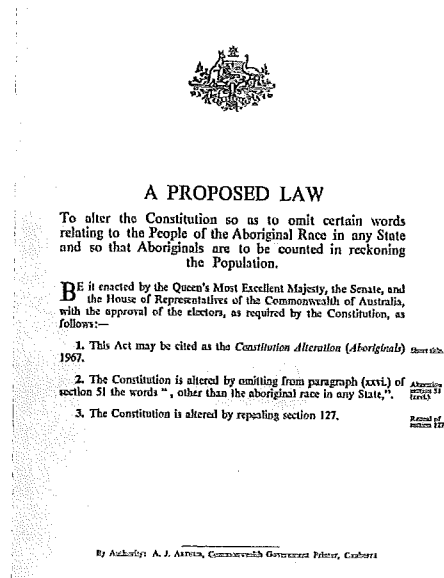
All States supported the proposal and it marked the biggest single transfer of powers from the States. Although three propositions were put in this referendum, only the one on social services was passed.

1967 Aboriginal Referendum

In 1967, the following two proposals were put:

- ▶ The first, referred to as the 'nexus question', was an attempt to alter the balance of numbers in the Senate and the House of Representatives.
- ▶ The second was to determine whether two references in the Commonwealth Constitution that prevented the Commonwealth legislating for Aboriginal people should be removed.

While the voters rejected the first question, the second question saw the highest YES vote ever recorded in a Federal referendum with all six States passing the referendum.



Referendum paper
courtesy Australian Electoral Commission



Members of the Aboriginal community wait on the progress of the counting of the referendum votes.
The West Australian, 29 May 1967
courtesy WA Newspapers

Advisory Referendums

Not all referendums are about changing the Constitution. All levels of governments use the advisory referendum process to determine the will of the people on a particular issue. Examples are: Daylight Saving and Secession (State) and Conscription (Commonwealth).



Westralia shall be Free
Bon voyage luncheon for the Secession delegation.
Savoy Hotel, Perth, 20 September 1934
Battye Library, BA 428/1

Farewell luncheon for the delegation who took the Secession petition to London where it was presented to the King, the House of Lords and the House of Commons.

Secession

After Federation, many Western Australians felt they had lost more than they gained by joining. By 1933, they became so dissatisfied that they voted overwhelmingly at an advisory referendum, by a two-thirds to one-third majority, to secede from the Australian Federation. A petition was sent to London where a Joint Select Committee of the British Parliament ruled it invalid because it had come from a State not the Commonwealth.

Though it was mainly seen as a protest vote against Commonwealth ignorance of the State's desperate circumstances during the early Depression years, secessionist calls continue to arise from time to time.

Many of the reasons underlying Western Australian feelings of resentment continue today. But the question is, having chosen to enter the Federation, can we leave? Or are we bound, as the preamble to the Commonwealth Constitution states, by the fact that the States have...*agreed to unite in one indissoluble Federal Commonwealth..?*



The West Australian
11 December 1974
courtesy WA Newspapers

Daylight saving

(Western Australian referendum)

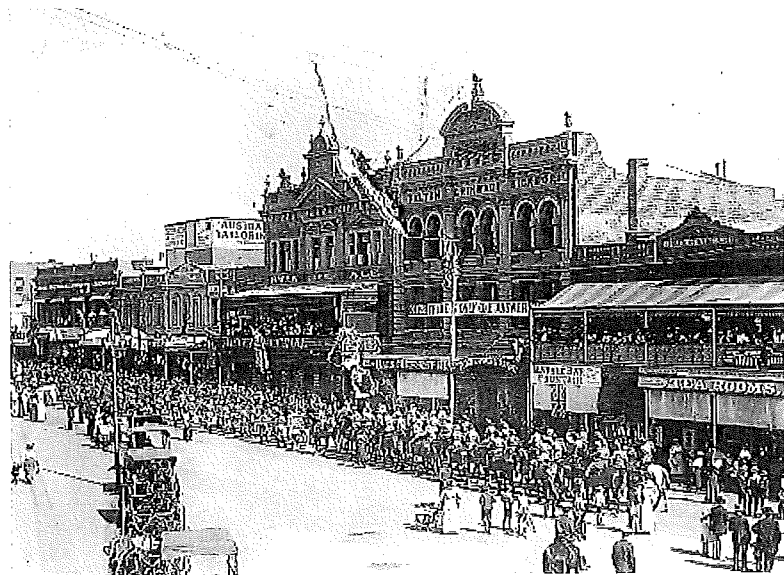
In Western Australia, three referendums have been held on daylight saving. This is an example of a local issue and highlights the fact that such a question can be put to the people more than once. In 1975, 1984 and 1992, people were asked to vote on whether they agreed to advance the standard time one hour from the last Sunday in October in each year until the first Sunday in the following March. In each instance the proposal was rejected.

Conscription

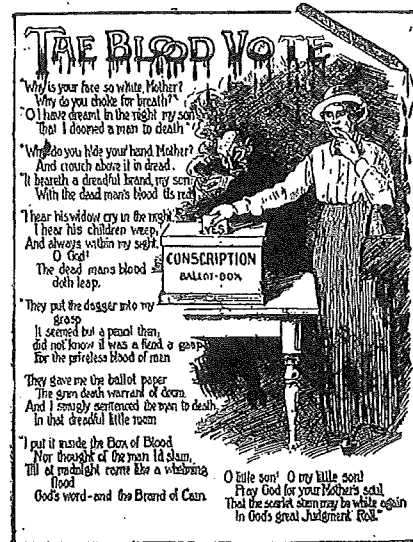
The two main examples of a Commonwealth advisory referendum or plebiscite were over the conscription issue in the First World War. To support the war effort, Prime Minister WM Hughes wanted to introduce conscription but, faced with divisions within his own party, did not wish to do so without the support of the people. To canvass public opinion, military service plebiscites were held in 1916 and 1917. On the first occasion the proposal was:

Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, outside the Commonwealth, as it now has in regard to military service within the Commonwealth?

On the second occasion, it sought to conscript men for overseas service in sufficient numbers to make the total reinforcements up to 7000 a month. The conscription issue divided the nation and was a matter of intense political debate. Electors in all States and Territories voted. Both plebiscites sought approval for conscription and both were defeated, though the majority of Western Australians voted yes on both occasions.



The march and rally prior to the Conscription Referendum, Perth.
Battye Library, 3045B/47, courtesy WA Newspapers



Written by W. R. Winespear and drawn by Claude Marquet, "Worker"
Office, Sydney.

The Blood Vote
Conscription referendum, illustrated poem -
vote 'No' leaflet (cover) Perth, 1917
Battye Library, PR 2160/16

The High Court



Justices of the High Court 1987-89, Canberra.
Standing, left to right: Sir Daryl Dawson,
the Hon. John Toohey, Sir Anthony Mason, Sir Ronald Wilson;
seated, left to right: Mary Gaudron, Sir William Deane,
Sir Francis Brennan
courtesy the High Court of Australia.

The interpretation of the Constitution through the decisions of the High Court is one of the main means by which important changes can be made to the way the Constitution operates.

The High Court of Australia was established by passage of the *Judiciary Act* in 1903. The first sitting of the High Court took place in Melbourne on 6 October 1903. It was a distinguished Bench, comprising three people who had been prominent in the Federal movement. They were:

- ▶ The Chief Justice, Sir Samuel Griffith, former Premier and former Chief Justice of Queensland.
- ▶ Sir Edmund Barton, the first Prime Minister of Australia and Leader of the Constitutional Conventions which led to Australia becoming a Federation in 1901.

- ▶ Richard Edward O'Connor, a former Minister of Justice and Solicitor-General of New South Wales, and the first Leader of the Government in the Senate.

In 1906, the Justices made representations to Parliament for an increase in their number to five, and in 1912 the High Court Bench was further increased to seven Justices. In its history, only two West Australians have been appointed to the High Court Bench. They are Sir Ronald Wilson and John Toohey.

From its beginnings the High Court played a crucial role in determining the balance of powers between the Commonwealth and the States. Up until 1920, the Court interpreted Commonwealth powers narrowly, seeing the Commonwealth and the States as separate and equal. This view was overturned by *The Engineers' Case*, which is seen as a turning point in Australian federalism. It produced an opinion by the High Court which gave the widest interpretation of Commonwealth powers and set a precedent for cases that have followed.

During the Second World War, the High Court was called upon to determine many issues related to the extent of the Commonwealth's defence powers as prescribed in the Constitution. The results generally widened the Commonwealth's powers, in time of war or immediate threat of war, at the expense of the States. The situation was found to be different, however, during peace-time. In the famous Communist Party Case of 1951, for instance, the Court ruled invalid an attempt by the Parliament to invoke its defence powers (in light of the Korean conflict then in progress) to declare the Australian Communist Party an unlawful association.

Decisions of the High Court

The Engineers' Case 1920

A dispute between a national union, the Amalgamated Society of Engineers and an engineering and saw-milling factory owned by the Western Australian Government was referred to the High Court. The Commonwealth sought to legislate for the union because it believed that under Section 51 (xxxv) of the Constitution, it had the power to make laws for State-based businesses when the dispute extended beyond State boundaries.

The High Court agreed, giving a much broader interpretation to Commonwealth industrial powers in the Constitution by ruling that Commonwealth industrial law could apply to Western Australian State agencies, and by implication, to other States. It brushed aside any belief that interpretation of the Commonwealth's powers should be limited by concern for the rights of the States, since the Commonwealth Constitution does not say anything about what those rights are.

The decisions and the principles laid down in *The Engineers' Case* have permitted Commonwealth laws to intrude into areas that would otherwise have been subject to State control. It has become a major precedent case for similar decisions expanding Commonwealth power at the expense of the States.

Uniform Tax Case 1942

Prior to 1942, income tax was payable to the Commonwealth and State Governments. In 1942, the Commonwealth Government passed a law assuming exclusive control over income taxes. The scheme had two essential features:

1. The use of Commonwealth taxing power to impose an income tax at a rate equal to the previous total of State and Commonwealth income taxes combined.
2. The second, was the use of the grants power contained in Section 96 of the Constitution. Each State was to be granted an amount of money approximately equal to that which it would have raised through the imposition of its own income tax, but on the condition that the State itself imposed no such tax.

The States challenged the Commonwealth and lost. The court upheld a Commonwealth legislative scheme that had the practical effect of excluding the States from the field of income tax. It was the greatest blow to the States' economic independence since Federation. It created the situation of vertical fiscal imbalance, whereby the States are financially dependent upon the Commonwealth to carry out a great many of their constitutional responsibilities.

FEDERAL ERA ENDS, SAYS MR MENZIES

In the opinion of Mr Menzies, MP, the Court's decision marks the end of the Federal era in this country. Henceforth, he believes, Australian Government will be much more of a unitary Government.

"STATES' ACTION JUSTIFIED"

Premier's Comment

Until he had the opportunity of studying the judgment in detail it would not be possible for him to offer comment, Mr Dunstan, Premier, said last night. The fact that legislation was upheld by a majority decision only showed that there was a distinct difference of opinion on the question. This fully justified the States in testing validity of such far-reaching proposals.

The question of possibility of moving for an appeal to the Privy Council has not yet been discussed by Premiers of the 4 States concerned, but opportunity for consideration will be afforded by the Premiers' conference to be held in Canberra probably on August 10, before the Loan Council meeting.

Mr Cain, Opposition leader, said he thought the decision would have the complete approval of the people of Australia. He hoped that Premiers of those States which had unnecessarily raised this question would recognise the judgment as final and would co-operate completely with the Commonwealth in a total war effort.

Argus, 24 July 1942
courtesy Newspaper Collection,
State Library of Victoria



The Man Who Pays the Fares Possibly Lebron
The Bulletin, 1 October 1930
 National Library of Australia

After Federation, the States progressively lost more control over their ability to raise revenue. This led to the States being financially dependent on the Commonwealth Government. In this cartoon, effete royalty, bloated politicians and bureaucratic 'fatcats' sit in comfort on the gravy train to Canberra. They ignore the poor little taxpayer, strap-hanging and stripped naked by taxes to pay for their comfort and privileges.

Vertical Fiscal Imbalance

The Australian States suffer from what is termed 'vertical fiscal imbalance' because they do not have access to sufficient tax revenues necessary to carry out their constitutional responsibilities. However, the Commonwealth has the capacity to raise revenue that exceeds its requirements. It passes on some of these funds to the States by way of grants. Western Australia relies on Commonwealth funding for about 50 per cent of its revenue.

Vertical fiscal imbalance is more extreme in Australia than in any equivalent federation. It exists because the States have been excluded from access to the two main sources of tax revenue: sales taxes and income taxes. Section 90 of the Commonwealth Constitution prohibits the States from imposing 'duties of custom and of excise'. This has been interpreted by the High Court as denying States the right to levy general sales taxes at all. The consequence has been to cut the States off from what is in other federations,

such as the United States and Canada, a major source of State revenue.

Income tax is another story. There is no constitutional prohibition preventing the States from levying income taxes. Indeed, for many years they did. However, in 1942 the Commonwealth passed its 'uniform tax' legislation as a wartime measure that allowed it to collect income taxes before the States. The States challenged the law in the High Court but lost when it upheld the Commonwealth legislative scheme that had the practical effect of excluding the States entirely from the field of income tax.

The scheme had two main features. First, the Commonwealth used its taxing power to impose an income tax that equalled the previous combined State and Commonwealth income taxes. Secondly, the Commonwealth's use of its grants power, under Section 96 of the Constitution, meant that it could grant to the States amounts approximately equal to what they would have raised through their own income taxes, on the condition that they forgo imposing such taxes.

The Commonwealth has enjoyed full control over all income tax revenue ever since.

The most significant development in federal finance since then has been the passage of the Commonwealth Government's GST legislation in 1999. This legislation imposes a new and much more comprehensive sales tax across Australia. The Commonwealth has agreed that all the revenue from the GST will go to the States, replacing a long-standing set of annual grants that had been subject to varying Commonwealth budgetary influences and a source of inter-governmental disagreement. The essential facts of vertical fiscal imbalance remain untouched, with the States being enormously dependent on Commonwealth funds, including those coming from the goods and services tax.

The Fallout for Western Australia

Grants make up about half of the State's total revenue from all sources.

Grants may be:

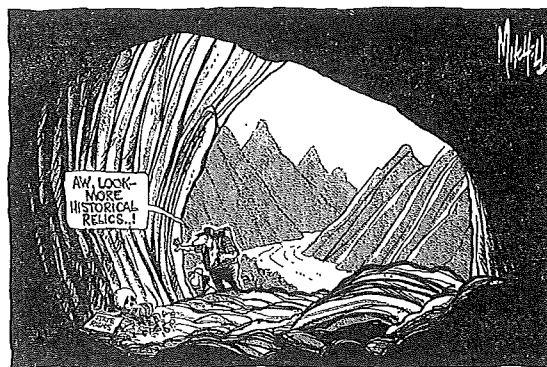
- ▶ general revenue grants to be spent as the States decide, or
- ▶ special purpose or tied grants, grants with conditions attached.

Under section 96, the Commonwealth may make grants to the States in any manner it sees fit. It may attach almost any conditions it likes to these grants even in areas for which it has no constitutional responsibility. Key areas of funding include health, housing, urban development, education and roads.

Tied grants enable the Commonwealth to specify what the States must do with the funds, and in many instances, involve matching arrangements requiring States to contribute. This has greatly reduced the freedom States have to choose how they spend funds within their budgets.

Under Section 51 of the Commonwealth Constitution, responsibilities given to the Commonwealth at Federation related to:

- ▶ Defence and external affairs;
- ▶ Navigation, quarantine and meteorological services;
- ▶ Immigration, citizenship, matrimonial status;
- ▶ International and interstate trade and commerce;
- ▶ Currency, non-State banking and insurance;
- ▶ Conciliation and arbitration for interstate industrial disputes;
- ▶ Postal and telecommunications services, conditional powers with respect to railways;
- ▶ Invalid and old age pensions;



Bill Mitchell *The Australian*, 4 July 1983
courtesy Bill Mitchell

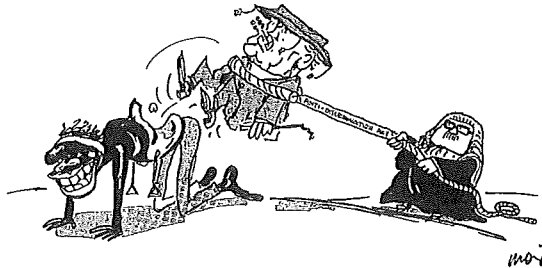
With the High Court finding in favour of the Commonwealth in the Tasmanian Dam case, the States were once again finding their rights were being eroded. States' Rights were becoming a thing of the past.

- ▶ The regulation of commerce and industry;
- ▶ Natural resources, including land;
- ▶ Local government;
- ▶ Education, housing and health;
- ▶ The environment; and
- ▶ Industrial relations.

The Commonwealth Constitution does not list any powers of the States, but at Federation the States were considered to have sole responsibility for everything not specified in the Commonwealth Constitution. This included:

- ▶ Law and order;
- ▶ The regulation of commerce and industry;
- ▶ Transport services;
- ▶ Natural resources, including land;
- ▶ Essential services such as water supply, sewerage, drainage, electricity and gas;
- ▶ Local government;
- ▶ Education, housing and health;
- ▶ The environment;
- ▶ Industrial relations.

Decisions of the High Court



Alan Moir *The Courier-Mail*, 13 May 1982
courtesy Alan Moir and State Library of Queensland

The High Court decision in the Koowarta Case, ruling the Racial Discrimination Act valid, was seen to be removing Bjelke-Petersen and the Queensland Government off the backs of Aboriginal people.

1982 Koowarta v. Bjelke-Petersen, Queensland

In 1976, John Koowarta convinced the Aboriginal Land Fund Commission to purchase a lease of land in Northern Queensland to enable an Aboriginal community to start a cattle property. Permission to lease the land was refused by the Queensland government led by Bjelke-Petersen, as it opposed Aboriginal people buying leasehold land.

The Koowarta group took the case to the High Court, arguing that the decision breached the Commonwealth 1975 *Racial Discrimination Act*. This Act implemented the terms of an international treaty that sought the abolition of all forms of discrimination based on race. In opposition, the Bjelke-Petersen government insisted that the Act should be declared invalid on the grounds that it extended the Commonwealth's external affairs power beyond that intended by the Constitution.

In 1982, the High Court ruled, by the narrowest of margins (4-3) that the Racial Discrimination Act was valid and that it could override State laws using the external affairs powers under section 51 (xxix) of the Commonwealth Constitution.



Here Comes the Judge ... Here Comes the Judge
Kev Bailey *The Mercury*, 1 July 1983
courtesy Kevin Bailey

Tasmania, and the rest of Australia, anxiously await the result of the High Court challenge to the proposed damming of the Franklin River.

1983 The Tasmanian Dam Case

The decision by the Tasmanian government to dam the Franklin River and flood a world heritage wilderness area led to a challenge in the High Court by the Commonwealth.

The court ruled that the Commonwealth had the power to prevent construction because Australia was party to an international convention protecting world culture and natural heritage. The Franklin River was listed on the World Heritage List and, because the Commonwealth held external affairs powers under section 51 (xxix) of the Constitution, it could bind the States to any international treaties to which Australia was a party.

The decision raised another issue for the States. The court ruled that statutory authorities such as the Tasmanian Hydro Electricity Commission (which generates electricity to sell) could be trading corporations under Section 51 (xx) of the Constitution and therefore subject to Commonwealth legislation that regulates the activities of such trading corporations.

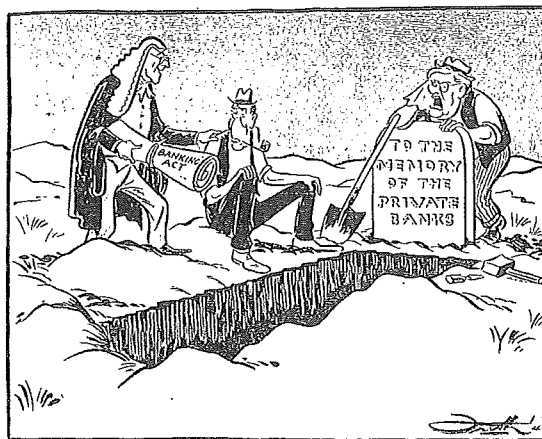
This case opened the door for future Commonwealth regulation because most State economic activities are carried out by trading corporations.

Not all High Court decisions have expanded the power of the Commonwealth. Examples of cases where the High Court has ruled against the Commonwealth are:

During the war, using the defence power of Section 51 (vi), the Chifley Labor government legislated to allow the Commonwealth Bank to purchase or nationalise the private banks. After the war, it sought to continue control over the private banking system. This prompted the High Court challenge that found that Chifley's Act was invalid.

In 1950, the Menzies Government passed a Bill to outlaw the Communist Party. The Communist Party immediately challenged this in the High Court. The High Court ruled against the Commonwealth. Menzies then held a referendum seeking to give the Commonwealth powers to make laws in respect of Communists and Communism. The proposal was not carried.

In 1992, the High Court brought down a decision in *Australian Capital Television v Commonwealth* that pioneered an implied guarantee of freedom of political speech in the Constitution. The court overturned a Commonwealth law that banned the broadcasting of paid political advertisements, outside of allocated quotas on radio and television, during Commonwealth and State elections. The High Court found against the Commonwealth arguing that Australian citizens must have the freedom to discuss public affairs, political and economic matters, and matters relating



Frith *The Sydney Morning Herald*, 12 August 1948
courtesy John Frith and State Library of New South Wales

The High Court decision against the Commonwealth effectively buried the Commonwealth's hopes of nationalising the banks.

JUDGMENTS GIVEN SEPARATELY

Constitutional Points Settled

MELBOURNE, Friday.—In the course of their separate judgments the six Judges of the High Court of Australia today said that Early Dissolution Act invalided these points:

- 1. That the power of the Commonwealth Parliament to make laws with respect to dissolution was limited to the issue that a state of peace exists.
- 2. That the Parliament cannot be authorized to make laws with respect to anything relating to an Act of state or to things which the Court is free to judge of.
- 3. That the power of the Commonwealth Parliament to determine the number of the High Court judges is not unlimited.
- 4. That the Court is determining whether a particular Act is valid or invalid.
- 5. That the Commonwealth power to make laws is not conditional on the Commonwealth's power to make laws.

The chairman to the rally of the Communist Party (Sovietist) and Negro Nationalist Party, which was held at the Lincoln Center in New York City, was the Communist Party's national chairman, Earl Browder. He was the only one of the speakers who was not a member of the Communist Party. He was the only one who was not a member of the Communist Party. He was the only one who was not a member of the Communist Party.

Sydney Morning Herald, 10 March 1951
courtesy State Library of New South Wales

[illegible]

Sydney Morning Herald, 17 January 1992
courtesy State Library of New South Wales

to the system of government, including
the right to criticise federal institutions.

Conventions



Proclamation spells out the end, 11 November 1975
David Smith, the official secretary to the Governor General, reads the proclamation dissolving both Houses of Parliament, as Mr Whitlam stands behind him on the steps of Parliament House. *The Age*, 12 November 1975
courtesy *The Age*

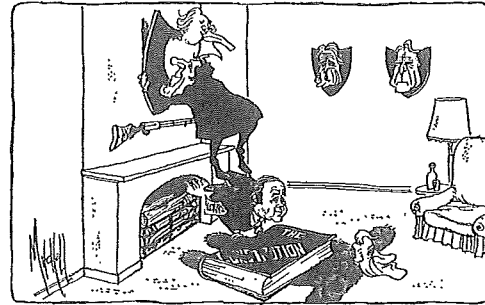
The dismissal of the Whitlam Government in 1975 has been described as the greatest political crisis in Australia's history. It began when the Senate refused to pass the government's Budget. The supply crisis and dismissal were possible because a number of longstanding conventions were broken.

Although a constitution is a formal legal document, its operation relies on the use of conventions, which are accepted practices and unwritten rules. For example, the Prime Minister is not mentioned in the Constitution and neither is the Cabinet but their roles are defined by conventions. Conventions are not laws but are recognised as useful and practical.

These unwritten rules are accepted by most of the participants in the political system. However, they have a degree of flexibility because they are not written and can be, and have been, broken.

In 1975, the perception was that:

- ▶ Two State governments ignored the convention that when a Senator resigns or dies, State



Bill Mitchell *The West Australian*, 12 November 1975
courtesy WA Newspapers and Bill Mitchell

Fraser adds another head to his collection as he makes his way to the Prime Ministership.

Parliament selects a replacement from the same political party.

- ▶ The Senate's decision to block Supply was considered by many as a breach of convention, exercising a power that was technically in the Constitution but which Oppositions had previously declined to exploit.

- ▶ A longstanding Westminster convention was broken that the government is formed by the party holding the confidence of the Lower House, and that the Upper House will therefore allow that government the funds to govern.

- ▶ In dismissing the Whitlam government, Governor General Sir John Kerr acted within the letter of the Constitution but he did not observe the convention that a Governor General should act on the advice of the Prime Minister.

- ▶ After Malcolm Fraser had been appointed caretaker PM, the convention that when the House of Representatives does not support a Prime Minister, the Prime Minister resigns, was not observed.

The breakdown of conventions and the way people thought the Constitution functioned, contributed to the 1975 constitutional crisis. One change that resulted from the crisis was that in 1977, Prime Minister Malcolm Fraser moved a successful referendum to formalise the method of choosing Senate casual vacancies. This reflected what it was assumed the convention had intended.

Referral of Powers

Sometimes States voluntarily hand over responsibilities to the Commonwealth. Under Section 51 (xxxvii) of the Constitution any State or States may ask the Commonwealth Government to be responsible for certain areas. This is known as the referral power.

It means that the Commonwealth has the power to make laws if the State (or States) refers that matter to them or hands over those powers to the Commonwealth. In 1977, the South Australian and Tasmanian governments transferred ownership and control of their country railway systems and, in 1996, the Kennett government in Victoria handed over arbitration power to the Commonwealth.

It means also that the States can cooperatively enact identical legislation to the Commonwealth to set uniform standards. This is how the Commonwealth achieved uniform standards in the offshore oil industry and air safety regulations.

The power of referral has been used on several occasions, but State governments are, for the most part, not enthusiastic about handing powers to the Commonwealth.

Mutual recognition

Another means of coordinating laws across Australia is achieved by the States agreeing among themselves to recognise each other's standards. This is termed mutual recognition.

Mutual recognition overcomes unnecessary obstacles to trade in goods and the movement of people in registered occupations. It means a person registered to practice an occupation in one State is entitled to practice an equivalent occupation in another State without having to undergo further testing or examination. In relation to goods, it overcomes differences in standards and other sale-related regulatory requirements. There are some exceptions and qualifications to these principles.



An expensive spouse Claude Marquet
Melbourne Punch, 15 August 1907
National Library of Australia

One of the earliest moves of the first national Parliament was the creation of the Commonwealth civil service in the areas of government that it had taken from, or had referred to it, by the States. The new public service quickly became a growth area. In this cartoon, Australia laments the increasing costs of Commonwealth Government.

To implement the scheme some States referred power to the Commonwealth under section 51 (xxxvii) of the Commonwealth Constitution. Under this section the Commonwealth can 'make laws for the peace, order, and good government of the Commonwealth' with respect to any matter referred to it by a State Parliament. This Commonwealth legislation only operates in the State that referred the matter, or States that, after the referral by another State, adopted the legislation. Some States have directly referred power to the Commonwealth (for example New South Wales) and other States, like Western Australia, have passed their own legislation adopting the Commonwealth Act.

Who can vote for Change?



ILLEGALLY ENTERING.

Illegally Entering

Ambrose Dyson, *Critic*, 15 August 1903
courtesy State Library of South Australia

In August 1903, Vida Goldstein became the first woman in the British Empire to nominate for a national parliament. The legality of her nomination was immediately questioned and her action aroused considerable hostility in the (predominantly male) Press.

Western Australian Constitution

Prior to 1870, the Governor appointed members of the Legislative Council. In 1870, 'representative government' was introduced and after this time, for the next 20 years, two-thirds of the members were elected. By 1890, the Legislative Assembly was fully elected and the Legislative Council followed in 1894. Not all men met the land ownership or wealth requirements necessary to be eligible to vote. It was not until 1893 that this was removed and all men were given the vote. Opinion was divided on including women.

It is not a question so much of what the women want as it is a question of what the men want, because, after all, we men have the power in this colony.

Premier John Forrest, December 1897

I ask why should I refuse them the right to vote when I have found, on so many occasions, their judgement correct, and their feeling right. We give the vote to drunkards and spiliers all over the colony; and we who support this principle ask you to place at any rate equal confidence in the sex that has produced your mothers.

Walter James, Member of Parliament, 1890s

In 1899, responding to increasing public pressure, both Houses of Parliament passed a motion in favour of women being given the vote and the law was changed accordingly. This was five years after South Australia, but before all the other States.

Commonwealth Constitution

At Federation all eligible male citizens over the age of 21 could vote, but only women in South Australia and Western Australia had the same rights. Women in these States were the only ones to vote on whether the colonies should create the Federation of Australia. The wording of the Commonwealth Constitution ensured that, by 1902, all women had the right to vote in Commonwealth elections on the same terms as men.

Although all States had adult suffrage from 1908, this did not include Aboriginal people. They were not given the right to vote in national elections until 1962.

Franchise was again expanded in the 1970s when the voting age was reduced from 21 to 18. With this, the only restrictions remaining on eligibility to vote are insanity, treason and imprisonment for a serious offence.

Bill of Rights?

Does Australia have or need a Bill of Rights?

Many people confuse our system with the American system but, in the case of citizens' rights, Australia is very different. Our system is based on the British model and relies on legislated rights and common law rights, though specifying rights does not always add to them or ensure their existence.

Both the Commonwealth and State Constitutions are mainly about the powers of law and government. In the Commonwealth Constitution there are few references to the rights and liberties of individuals. This has been of concern to some people. In 1988, a referendum was held to add several rights and freedoms to the Commonwealth Constitution but it was unsuccessful.

The Western Australian Constitution makes no references to an individual's rights either. Instead, Australians, like the British, have the right to do something unless the government says otherwise. Thus the Constitution has a part in the daily lives of all Australians.

Senator seeks bill of rights

CANBERRA

THE Australian Democrats plan to seek parliamentary support for a bill of rights to end what they say is a piecemeal approach to civil and political liberties.

The Government seems unlikely to support the proposal.

Democrats justice spokesman Sid Spindler said the party's proposed bill of rights would incorporate all the provisions of the International Covenant on Civil and Political Rights.

The High Court's historic ruling this week on an implied constitutional freedom of speech again raised the question of what framework judges had to use to interpret the rights of Australians, Senator Spindler said.

"It should be clear by now that judges are ruling on questions of individual rights when they are confronted with a case which raises these issues," he said.

The international covenant's provisions have effect only if domestic legisla-

tion is enacted. In some cases, such as the Tasmanian anti-gay sex laws, the States and not the Commonwealth have responsibility for the issues involved.

The Federal Government has introduced legislation to override the Tasmanian laws, but Senator Spindler said it acted only because it had been pressed.

The Government and Opposition ought to support the Democrats' bill of rights if they were sincere in their support for the covenant, he said.

A spokesman for Attorney-General Michael Lavarch reiterated that Government introduced a bill of rights in the mid-1980s but this had lapsed and there was no desire to repeat the process.

Senator Spindler said he planned to release early next year a discussion paper on what the bill of rights would cover and how it would work.

The Democrats then would prepare draft legislation for discussion ahead of introducing a Bill to Parliament.

After the dam victory comes a Bill of Rights

By BRIAN HILL

THE Federal Government will use its newly tested constitutional powers to draw up and enforce a national Bill of Rights following its successful High Court action to block the Franklin dam.

The Bill of Rights will operate to ensure a wide range of personal freedoms for citizens of the Commonwealth. According to the Bill of Rights, the federal government will have the power to make laws and legally enforce federal rights and responsibilities.

Yesterday the Attorney-General announced that the Bill of Rights would be based on Australia's unique constitutional system under the federal Government on Civil and Political Rights, to which the country is a signatory, but that he hoped the Bill would be passed by the end of the year.

ONE Queensland man testified on oral evidence at the dam site that a reporter from the ABC reported that despite the High Court decision, he and his friends would be back at work as miners.

"We are going to go on Monday, mate," he said. "We're happy to wait. And with the High Court decision, we can start the mine. We're going to go on Monday, mate."

"We're going to go on Monday, mate," he said. "We're happy to wait. And with the High Court decision, we can start the mine. We're going to go on Monday, mate."

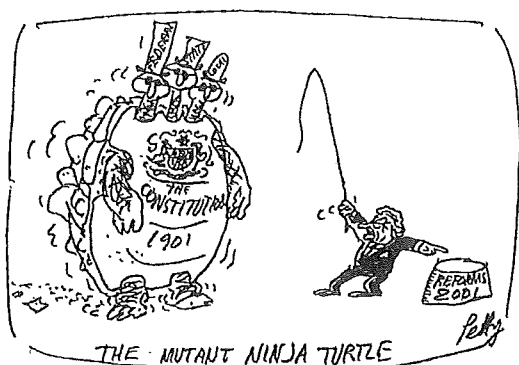


CONSERVATIONISTS celebrate outside the High Court in Canberra after hearing the decision

(top) *The West Australian* 15 October 1994
courtesy WA Newspapers

(bottom) Brian Hill, *Weekend Australian* 2-3 July 1983
courtesy *The Australian* and State Library of New South Wales

Where to now?



The Mutant Ninja Turtle Bruce Petty, *The Age*, 21 July 1990.
courtesy *The Age* and Bruce Petty

The establishment of the Constitutional Commission in 1985 was seen by the Hawke government as a way to bring about Constitutional change that would be supported by all parties.



Alan Moir, *Sydney Morning Herald*, 20 December 1985
courtesy Alan Moir and State Library of New South Wales

The advocates of citizens' rights and reform are invited to climb aboard the constitutional reform merry-go-round.

Commonwealth Constitution

Australia has seen many changes since Federation. Many people think amendments are needed to bring the Commonwealth Constitution in line with today's world and to achieve a balance in the Federation.

Possible areas for future changes include:

- ▶ the powers of the Senate;
- ▶ fixed term parliaments;
- ▶ the republican issue;
- ▶ the powers of the Governor General;
- ▶ restricting the powers of the Commonwealth government;
- ▶ how to ensure that States' concerns are protected;
- ▶ a Bill of Rights;
- ▶ a preamble incorporating the sovereignty of the people.

Western Australian Constitution

There are a wide range of views about whether the Western Australian Constitution needs to be changed. The issues include:

- ▶ Consolidating and or amending the 1889 and 1899 Acts;
- ▶ Changing the current amendment rules;
- ▶ Recognising the role of the Premier.

The question is do our Constitutions serve us well and reflect the needs of our modern society?

If change is proposed to either we need to consider:

- ▶ the consequences of the changes proposed;
- ▶ their true cost;
- ▶ will we be as safe under a new system; and
- ▶ will it improve our lives and that of succeeding generations?

It is up to you. Each voter has the power to influence change. The future is in your hands.

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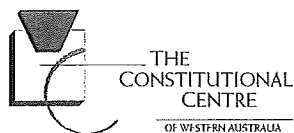
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(cover) Waiting for referendum results, Kalgoorlie 31 July 1900
A crowd in front of the Kalgoorlie Miner newspaper office
courtesy Battye Library, 54613P



Changing Constitution examines both the Commonwealth and Western Australian constitutions and the ways in which they have changed during the years, and the processes for bringing about change to each. The exhibition examines

both constitutions through formal change (eg via referendum) as well as ways in which interpretation can influence implementation. It provides an excellent introduction to the constitutions that guide our systems of government.



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