The Proposal

Most Australians are aware that we have a federal Constitution, but few will have seen it.[1]

Very few Australians would be aware that our federal Constitution forms part of a *United Kingdom* Act of Parliament. In view of our place in the world as an independent nation**,** I am urging that our Constitution should be transferred or 'relocated' to an *Australian* document.

But before exploring what this might mean, it may be helpful to give some background. (Please skip Sections 1 , 2 and 3 and go straight to Section 4 if you are familiar with the background topics. You may also skip the detail in the footnotes.)

Section 1

What is the Constitution?

The 'federal Constitution' (sometimes called the '*Commonwealth* Constitution' or the '*Australian* Constitution') is the document that creates the Commonwealth of Australia and the various organs of the Commonwealth Government, such as the Parliament, the Executive and the Judiciary (courts).

The Constitution gives the Parliament power to make laws that affect every Australian in every corner of the country, and sometimes overseas as well.

The Executive makes decisions that affect the economy and many other aspects of our lives, including whether our country goes to war.[2]

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[1] A copy of the Constitution may be downloaded as an App or by viewing or downloading from the internet: https//www.legislation.gov.au/Browse/ByTitle/Constitution. If you do not have internet access, you should be able to find the Constitution through your public library's internet service. A *printed* copy can be purchased from CanPrint Communications in Canberra, phone (02) 6293 8387 or online at https://www.legislation.gov.au/Content/PrintCopies. A delivery charge will apply.

[2] Section 61 of the Constitution says: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative . . . '. In *practice*, however, the executive consists of the Prime Minister and other Ministers, particularly the inner body of senior Ministers known as 'the Cabinet'. We may therefore distinguish the *formal* head of the executive (the Queen)

The Judiciary, especially the High Court, interpret our laws and decide the most significant cases in our legal system.

As a sporting nation, it might be useful to think of the Constitution as our nation's 'rule book'. It contains the basic or fundamental rules, but not *all* the rules; most are made by the Parliament under the authority of the Constitution.

Section 2

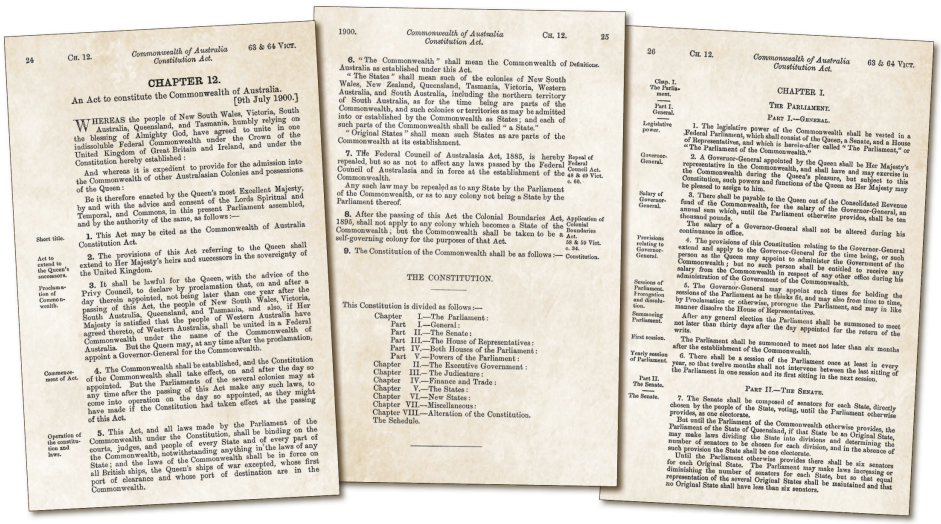
What are the fundamental features of the Constitution?

The first fundamental feature of the Constitution is that it is contained within, and forms part of, *another* document: the Commonwealth of Australia Constitution Act, which I will refer to throughout as 'the ***Constitution Act***'. As previously mentioned, this is an Act of the UK Parliament.

The Constitution Act consists of 9 sections, the last of which contains the text we usually refer to as 'the Constitution'. We can see where the Constitution starts in the middle of the three pages in the image reproduced below. The heading 'THE CONSTITUTION' that follows the line

9. The Constitution of the Commonwealth shall be as follows:—

is the point at which the Constitution begins (and continues on the following pages).



CHAPTER 12.

An Act to constitute the Commonwealth of Australia.

[9th July 1900.]

THE CONSTITUTION.

CHAPTER I.

THE PARLIAMENT.

In those pages, note that there are two groups of sentences numbered '1', '2', '3' etc. To avoid confusion between the

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from the *effective* head of the executive. The reason we need to make this distinction is explained in the next section.

two groups, those in the first group (beginning on the left-hand page in the image) are described as 'covering clauses', while those in the second group (beginning on the right-hand page) are called 'sections'.

From our vantage point in the early 21st century, this structure with its duplication of numbers seems clumsy and confusing.[3] To anticipate a point to be addressed later, it would simplify things significantly if the covering clauses that are still necessary for the continuing operation of the Constitution[4] could be moved to a point *within* the text of the Constitution itself (of course in their new location they would need to be renumbered).

The second point is that the preamble (beginning with the word 'WHEREAS' set out on the left-hand page of the image near the top) is a preamble to the Act as a whole, and not specifically a preamble to the Constitution set out in covering clause 9.

The Constitution consists of 128 sections that occupy some 35 pages when printed. The text runs to about 12,300 words.[5]

One important feature *not* apparent on the face of the Constitution Act is that its text was almost entirely devised and drafted by Australians in Australia. In 1891 and 1997-8 delegates representing the colonies (which later became states) came together and negotiated that text. Their draft was then approved at referendums held in each of the colonies. The Constitution Act was finally enacted by the UK to give legal effect to their text. (The story is outlined in more detail in Section 3 below)

Another important feature of the Constitution is that the many references appearing to confer unfettered powers on the Queen

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[3] From the point of view of those drafting these provisions, there was no doubt a certain logic: the preamble, words of enactment and covering clauses could be seen as the sphere of the Westminster Parliament, then the superior law maker, while the Constitution that follows was the colonial bit.

[4] See covering clauses 2, 5 and 6. On the other hand covering clause 3, for example, which provides for the proclamation **of** the Commonwealth of Australia, is no longer needed because the proclamation has already been made; the provision has done its job and can be safely omitted (subject to a 'savings' clause to be inserted elsewhere to preserve the effect of this and other 'spent' or obsolete provisions).

[5] If the *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983*) had been put to the voters and approved, about 1,800 obsolete and spent words could have been omitted. This represents almost 15% of the total text.

and Governor-General, do not in fact do so.[6] As noted, the Constitution was drafted in Australia to be enacted in Britain. George Winterton explains that the Australians would have preferred its provisions to indicate the actual holder of the power (for example 'the Minister') rather than its formal holder ('the Queen' or 'the Governor-General'). They were concerned, however, that the British law officers (who would scrutinise the draft before its enactment into British law) would think the more direct approach a sign of colonial ignorance of the constitutional 'niceties'. The older venerable forms dated back to times before the emergence of modern parliamentary government when the sovereign did in fact exercise the powers expressed on the face of the legislation.[7]

The influence of the US Constitution on the *content* of the Australian document is another fundamental feature. The US Constitution influenced the general *structure* of the Australian Constitution *and* much of its *language*. These features are present in the Constitution as it operates today.

So far as its structure is concerned, the Australian Constitution is divided into different 'chapters' — literally like a book.

For example, Chapter 1 of the Constitution provides for the Parliament.[8]

Chapter 2 provides for the Executive — in other words, Ministers of State.[9]

Chapter 3 provides for the Judiciary — meaning the High Court and other courts exercising federal jurisdiction.[10]

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[6] There are 25 provisions that include at least one reference to the Queen, and 39 that refer to the Governor-General. For a very readable, helpful guide to understanding the language of the Constitution see Helen Irving *Five Things to Know About the Australian Constitution*, 2004. Irving makes the point that while much of the language of the Constitution is reasonably straightforward, there are parts of the Constitution that do not mean what they say and parts where the Constitution does not say what it means (see Irving, p 5).

[7] See G Winterton, *Parliament, the Executive and the Governor-General*, 1983, pp 2 and 3 (reproduced in *Winterton's Australian Federal Constitutional Law: Commentary and Materials*, 3rd edn, p 37.) See also how Helen Irving 'rewrites' section 68 of the Constitution which appears to give the Governor-General actual command of the defence forces of the Commonwealth (*Five Things to Know About the Australian Constitution*, 2004, p 17).

[8] Section 1 of the Constitution (at the beginning of Chapter 1) indicates that the *legislative* power of the Commonwealth power shall be vested in a Federal Parliament.

[9] Section 61 of the Constitution (at the beginning of Chapter 2) indicates that the *judicial* power of the Commonwealth power is vested in the Queen and is exercisable by the Governor-General.

This kind of structure reflects the idea of the separation of powers, which is an important feature of the US Constitution. In other words, the idea that one branch of government should not interfere with the activities of another branch.[11]

The choice of language in the Australian Constitution similar to that in the US Constitution was a smart move on the part of the delegates. It meant that when Australian courts began interpreting their Constitution, they could more readily draw on the accumulated precedents of US courts — more than 100 years of experience. While not *obliged* to follow those precedents (because the US Supreme Court is the court of a foreign country), those decisions were, and are, available to Australian courts as a potential resource. In the years that have followed, a body of Australian precedents has gradually been established.[12]

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[10] Section 71 of the Constitution (at the beginning of Chapter 3) indicates that the *executive* power of the Commonwealth power is vested in the High Court, other federal courts and [State] courts invested with federal jurisdiction.

[11] The *structure* of the Australian Constitution was a factor in the decision of the *Boilermakers'* case (1956). The High Court drew attention to 'the strength of the logical inferences from Chs I, II and III and the form and contents of ss 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement.' The decision emphasised the critical role of the Judicature for the maintenance and enforcement of the *boundaries* within a federal system. These functions require that courts established under Chapter III exercise *only* judicial functions, or powers incidental to judicial powers. In *Boilermakers*, the High Court held that such a court could not exercise non-judicial jurisdiction. Yet the same strict separation is not seen between the legislature and the executive. If that were so, it would not be possible for the Parliament to delegate powers to the Governor-General or other authorities to make regulations and other rules. In *Dignan's* case (1931) it was acknowledged that logically or theoretically the Parliament should be the exclusive repository of legislative power. The practice rested less on juristic analysis and more on the history and usages of British legislation and theories of English law. And while courts are the ultimate arbiters of the proper exercise of legislative power (including regulations and other rules), the separation of powers in one of its expressions forbids the courts from 'impeaching' parliamentary proceedings, members and witnesses. The purpose of the resulting immunity and freedom of speech is to enable each House of Parliament to function effectively. These rights were crystallised in the UK Bill of Rights Act, 1688 and carried into effect in Australia under section 49 of the Constitution as declared by the *Parliamentary Privileges Act 1987*.

[12] The decision in the *Engineers'* case in 1920 — within weeks, incidentally, of the death of the first Chief Justice, Sir Samuel Griffith, who played such a critical role in the first draft of the Constitution in 1891 — is seen as a major turning point in the High Court's approach to interpreting the Constitution. This also affected the court's attitude to US decisions. The High Court said: ' . . . we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state [which include — in Australia — responsible government], be recognised as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution. . . . We therefore look to the judicial authorities which are part of our own development, which have grown up

While the American influence on the Constitution is significant, it's equally important to realise that the Constitution operates against a background of British ideas, history and law. For example, the principles of responsible government[13] and ideas such as the long-established principle that the Queen and her governors must act on the advice of the government of the day.[14] The colonies at their foundation received a body of English statute and common law. From the beginning the colonies began to add to and modify that body of law to suit the (sometimes novel) circumstances they found themselves in. Although covering clause 5 of the Constitution Act makes it clear that the Constitution is the *supreme* law of the land, that body of law provided the context in which the Constitution was to operate. It also affected the culture of the lawyers who had to interpret the Constitution; it engendered a deep respect for the history of the law and its institutions. In particular, there is a sense in which the common law and its spirit has somehow permeated the provisions of the Constitution.[15]

All of these things were very familiar to the delegates of the colonies who negotiated the terms of the Constitution. Those in colonial governments had lived and worked with these

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beside our own political system, have guided it, have been influenced by it and are consistent with it . . .'

[13] This means, in effect, a system where a party or group that controls a majority of the votes in the lower house of a parliament forms government, and its leader becomes premier or prime minister. Ministers of such a government are said to be 'responsible' to the house for the way they administer their portfolio. If they lose the 'confidence' of the house as indicated, for example, by defeat on a major vote in the house, they are expected to resign.

[14] The advent of internal self-government in the colonies (generally in the 1850s) involved the adoption of responsible government. Not surprisingly, the federal Constitution later included provisions to underpin the same system in the Commonwealth Parliament. The High Court decision in *Lange v ABC* (1997) identifies the provisions the court saw as relevant to a parliamentary system of government: these were section 6 (annual meetings of Parliament required); section 49 (powers, privileges and immunities of each House — which the court saw as securing freedom of speech in debate; sections 62 and section 64 — which in combination had the effect, in the court's view, of providing for the executive power of the Commonwealth to be exercised on the initiative and advice of Ministers; the court noted that section 64 also prohibited a Minister holding office longer than three months unless he or she is, or becomes, a member or senator; and finally, section 83, which the court said, ensures that the Parliament controls 'supply' — meaning funds to carry on government.

[15] On the other hand we must be careful not to overstate the status of the common law in our legal system. Despite earlier doubts, the so-called Glorious Revolution of 1688 laid the foundation for the rise of Parliament and the supremacy of statute law over the common law. Sometimes people speak as if the common law gives them an additional body of rights over and above statute law. In most cases, however, property and business transactions operate within a *statutory* framework where the common law 'fills the gaps' as it were.

principles, and ideas and laws under their colonial constitutions for many years. In other words, it's fair to say that our Federal Constitution is equally indebted to Britain and the US, but also owes a lot to the colonial experience of government.[16]

Speaking of matters colonial, the Constitution contains some provisions that betray its colonial origins. For example, section 59 gives the Queen power to 'disallow' (in effect, repeal) any law made by the Parliament within one year of its assent. This kind of power was inserted in colonial constitutions to give the British Government (who advised the Queen on its exercise) power to set aside legislation regarded as contrary to Imperial interests. It was rarely used in the Australian colonies and has never been used against the Commonwealth. Apart from the fact that the power is not appropriate for an independent, democratic country, the power is now ineffective. This is because the British Government had agreed by about 1930 that powers vested in the Queen would henceforth be exercised only on the advice of Commonwealth Ministers rather than British Ministers.

It should also be noted in passing that the delegates considered the Canadian Constitution, and even adopted a few of its provisions[17], but on the whole thought that it gave too much power to the central government.[18]

Another idea copied from the US is the way that the Parliament's law making powers are conferred. The Commonwealth cannot make laws on any subject it chooses; it can only make laws on the subjects listed in the Constitution. The following list (incomplete and much simplified) indicates some of those subjects:

(i) interstate trade and commerce;
(ii) taxation
(vi) defence

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[16] In the *Boilermakers'* case (1956), a majority of the High Court said that '[p]robably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism.'

[17] See La Nauze, *The Making of the Australian Constitution*, p 51.

[18] La Nauze, *The Making of the Australian Constitution*, p 27. Having regard to the enormous growth of the Commonwealth at the expense of the States, this now seems a little quaint.

(xiii)	banking
(xv)	weights & measures
(xvii)	bankruptcy
(xix)	naturalisation & aliens
(xx)	foreign, trading and financial corporations
(xxi)	marriage
(xxii)	divorce
(xxiii)	invalid & old age pensions
(xxix)	external (ie foreign) affairs
(xxxi)	the acquisition of property on just terms
(xxxvii)	matters referred to the Commonwealth by a State or States
(xxxvii)	matters incidental to any power vested in the legislature, the executive or the judiciary.

Most of these are subjects where it is either necessary — or at least sensible — to have uniformity for the whole country. For example, defence, foreign affairs and something as 'nuts and bolts' as weights and measures.

The States, on the other hand, can make laws on almost any other subject. For example, Section 16 of the Constitution Act 1975 of Victoria provides:

> The Parliament shall have power to make laws in and for Victoria *in all cases whatsoever*. [emphasis added]

These are *general* law making powers; note the language of the Victorian provision: 'in *all* cases *whatsoever'*. The Commonwealth, on the other hand is limited to *specific enumerated* subjects on which it can make laws.

But if a State makes a law about something on the *federal* list of powers, and it collides with a federal law, the federal law will prevail.[19] A limited list of Commonwealth powers suited the colonies, because, as most of the delegates saw it, the Commonwealth would never really amount to much!

Another idea adopted from the US is the principle of judicial review. We see this in operation when the High Court declares unconstitutional an Act (Commonwealth or State) or some other kind of government action. There is no express

[19] See section 109 of the Constitution.

mention of judicial review in either the US or Australian Constitutions. It arises from the court's role in interpreting the Constitution. It was first articulated, or crystalised, in the early days of the US Constitution in a decision of the US Supreme Court.[20]

The delegates negotiating the Australian Constitution did not, however, follow the example of the US Bill of Rights in protecting personal liberties.[21] Part of the reason for this is the British idea that our rights are best protected by our representatives in Parliament, not some high-sounding guarantees in a constitution. In Australia's case, however, it seems that there was also a sense among the delegates that a Bill of Rights might limit the hand of government in dealing with groups of people it wanted to exclude from Australia or exclude from principles like 'equal protection'.[22]

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[20] *Marbury v Madison*, decided in 1803. This decision, and the judicial function it recognises, was acknowledged in the famous *Communist Party* case in the High Court of Australia. The court referred to 'the great case of *Marbury v Madison*' and said that 'in our system the principle of *Marbury v Madison* is accepted as axiomatic'. So well known is this idea that even while the Constitution was being debated, it was assumed that the future High Court would be undertaking judicial review. In one exchange, a Victorian delegate, Henry Higgins — in later years, Mr Justice Higgins of the High Court — pointed out that 'The [High] court has that function even if it is not mentioned' (Conv deb, Melb, 14/2/98, at p 902).

[21] As La Nauze points out, however, three provisions in the Australian Constitution are based on US precedents. These are sections 80 (guarantee of jury trial), section 116 (religious freedom) and 117 (discrimination against a citizen because of the state in which the citizen resides), see *The Making of the Australian Constitution*, p 227. La Nauze comments that these are 'of small importance in practice'. On the whole this is still the case, partly because of the narrow interpretation the provisions have been given by the High Court. Sawer's *The Australian Constitution*, 3rd edn, ch 10 — published some 30 years after La Nauze — takes a broader approach to the subject. First, Sawer distinguishes between rights *expressly* protected and those which are *implied* under the Constitution. In his list of express rights Sawer would include (in addition to those identified by La Nauze), the requirement for 'just terms' when the Commonwealth acquires property (s 51(31). Sawer also considers sections 41 (right to vote) and 92 (freedom of interstate trade), which appear to confer express rights, but indicates that the High Court explains those provisions in different ways. Sawer also discusses implied rights which operate as restrictions on government power based on implications drawn from the text and structure of the Constitution. One of these, the implied freedom of political discussion, was first recognised by the High Court in the early 1990s — after La Nauze was published. It is seen as an essential feature of our system of representative government under which our representatives are required to be chosen directly by the people. Sawer would also include in the category of implied rights the notion of the rule of law. At its heart he says is the idea that individuals should not be subject to any arbitrary or capricious exercise of power by government officials. Sawer also mentions the independence of the judiciary. Second, Sawer casts his net wider: he notes that Australia is generally regarded as a free and democratic society *despite* the absence of substantial constitutional guarantees; he appears to say (though he does not use these words) that ultimately our human rights are based on the community's acceptance of democratically elected parliaments.

[22] La Nauze, *The Making of the Australian Constitution*, p 231.

Despite this dark side of Australia's history, the High Court has said that the notion of the 'rule of law' is one of the underlying assumptions of our Constitution. It certainly implies that governments (state and federal) must themselves obey the Constitution and laws made under its powers. But what else does it mean? We usually contrast 'law' with the arbitrary actions of a despot. But even a law made in Parliament in accordance with the regular *processes* might still seek to achieve something that is cruel or wicked. In other words, if the rule of law is to mean anything, our laws must not only have *objectives* that are just and fair, and they should also seek to achieve those objectives by *means* that are just and fair. This sense of the rule of law, as I see it, is one of the principles — one of the assumptions — that is meant to guide the way our Constitution operates. How far we achieve this in the day to day life of the nation will vary from time to time.

The final point in this brief survey of the Constitution is the mechanism for its amendment under section 128. The process begins with a Bill that must pass both Houses of the Parliament before being submitted to the voters for consideration at a referendum.[23] To ensure that the States with the bulk of the population (NSW and Victoria) do not engineer an amendment contrary to the interests of the States with smaller populations, section 128 requires a special 'double majority'. In other words, a referendum must not only be approved by a majority *nationally*, it must also achieve majority approval in a *majority of States* — in effect four States. But experience shows that even if a proposal has

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[23] Although the Constitution provides for 'each House' to pass the Bill, section 128 contains a deadlock provision. In theory at least, a Bill can be submitted to the voters after being passed by only *one* House. The deadlock provisions are similar to those in section 57 for ordinary Bills: one House passes the Bill, and the other rejects it, fails to pass it or passes it with amendments that the first House does not accept; then, three months later, the first House *again* passes the Bill (with or without amendments) and the second House *again* rejects it, fails to pass it or passes it with amendments that the first House does not accept. At this point the Governor-General 'may' submit the Bill to the voters. Unlike section 57, the mechanism enables *either* House to have its Bill dealt with. In other words, the Senate, which was intended to represent State interests, could pass a Bill and submit it to the voters: a nice example of the 'federal' principle in operation. Except that *responsible government* means that the government of the day, necessarily with a majority in the House of Representatives, controls the giving of advice to the Governor-General. In 1914 the Governor-General declined to submit to the voters some Bills passed by the Senate in accordance with section 128 (see *Odgers' Australian Senate Practice*, 14th edn, 2016, ch 12). In 1988, the Constitutional Commission, in its Final Report, recommended that the Constitution be amended to enable a constitutional amendment supported by three State Parliaments to be put to the voters without the involvement of the Commonwealth Parliament at all (see paras 13.1-13.205, Vol 2, pp 851-889).

support amongst political parties at the national level — an unusual thing — opposition expressed by a State, or a well-known public figure, is enough to make approval of the proposal more difficult. More than anything else, however, the greatest problem seems to be in reaching, and gaining the understanding of, the voters.[24] The process of consultation so often seems a token thing, almost a relatively brief 'add-on' after perhaps years of work on a proposal.[25] The result of all of this is that of the 44 referendum proposals put to the voters since 1901, only 8 have secured the necessary 'double majority'. There is good reason to believe that at least some proposals failed not because of outright opposition, but because the voters did not know what the proposal was about[26], or perhaps were not interested.[27] The text of the Constitution has proved a lot more difficult to change than the delegates ever imagined.[28] The last changes to the *text* of the Constitution were achieved in 1977 when three amendments were approved.[29]

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[24] In *People Power*, George Williams and David Hume survey the history and future of the referendum in Australia. They point out that Australia has found it difficult to change its Constitution, even when there has been broad agreement that reform is necessary; when a valuable reform is rejected because of bad management of the process, there is a serious problem. They say that reform can be achieved if it is built upon five pillars: 1 bipartisanship; 2 popular ownership; 3 popular education; 4 sound and sensible proposals; and, 5 modern referendum process.

[25] The Constitutional Commission went to great lengths to consult with the public and experts, see paras 1.49 to 1.79 of its Final Report. It is sobering to realise, therefore, that not one word of its recommendations has become part of the Constitution, though four referendums (Fair Elections, Local Government, Parliamentary Terms and Rights and Freedoms) were at least put to the electors in September 1988 — and defeated.

[26] In their analysis of the 1999 referendum campaign about the Preamble, Williams and Hume quote from a survey by *The Age* indicating that in the week of the referendum 40% of respondents said they had never read or heard about the Preamble question.

[27] In our efforts to get voters more involved in the referendum process, we need to think realistically about the nature of our culture. Our history leads us to commemorate Anzac Day, but we have no 'Fourth of July', or 'Independence day'. In the 1980s changes to a voting form were met with howls of protest about its complexity. One commentator pointed out that the document was no more complicated than the Tatts-Lotto forms people were filling out each week.

[28] Delegates seemed to take the view that the provision for local amendment would save continual referral back to Westminster. The constitutional lawyer, Geoffrey Sawer once described Australia, constitutionally speaking, as the frozen continent see *Australian Federalism in the Courts*, 1967, p 208**.**

[29] As Professor Sawer has argued, however, the Commonwealth has been completely transformed beyond anything the Convention delegates could have imagined. In effect the *operation* of the Constitution has been significantly changed with almost no change to its text. This is the result of a number of factors including the broad way in which the High Court has interpreted the Constitution; in conjunction with this, the circumstances of the Second World War enabled the Commonwealth to gain financial ascendancy over the States. This, in turn with the so-called 'grants' power in section 96 of the Constitution has enabled the Commonwealth, by the conditions it could impose on those grants, to enter fields of activity previously regarded as 'State' matters. Yet another factor has been the gradual emergence of the Commonwealth, since at least the end of the Second World War, as an internationally recognised nation rather than a part of the

Section 3

How did we get our Constitution?

In the late 1800s the colonies of Australia (as the States then were) feared the territorial ambitions of some of the European powers in the Pacific. And, while it might now seem hard to believe, a trip within Australia to, say, Melbourne or Adelaide could involve a customs inspection of your baggage at the colonial border! Many could see the benefits that would flow from a common market and customs union within Australia.[30]

These were some of the reasons why the colonies had been talking on and off for years about some kind of closer co-operation. A 'Federal Council of Australasia' was provided for under a UK Act in 1885. While some saw it as a vehicle for future constitutional development, only a few colonies chose to join. It did little more than provide a venue for discussion and was a constitutional dead-end.

After an inter-colonial conference in 1890 it was recognised that the best form of co-operation would be a federation that would create a national government. A national government could do some things (such as defence) on behalf of all the

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British Empire. Australia's international status has enabled it to use the 'external affairs' power in the Constitution to enact legislation giving effect to international treaties on all sorts of subjects — some of these also having an unexpected operation in areas previously regarded as 'State' matters. More recently, the High Court's interpretation of the 'corporations' power has further widened the potential scope of Commonwealth legislative activity.

[30] Most writers, for example, Quick and Garran in *The Annotated Constitution of the Australian Commonwealth*, and John La Nauze in his study, *The Making of the Australian Constitution*, give the federal movement a longer history, reaching back as far as the late 1840s. As to the factors giving rise to federation Helen Irving says that there was not a single cause; cultural, social, economic, technological and political tales all need to be told together as part of the story (*To Constitute a Nation*, p 1). As Irving points out, one of the interwoven tales concerns the movement for womens' suffrage. And technology, for example, in the form of the railways, the steamship and the telegraph, made a contribution by helping to break down the old isolation between the colonies. John Hirst (*The Sentimental Nation*) sees the creation of the Commonwealth as more than a business transaction; he identifies the growing sense of people as being of one blood, stock or race, speaking the same language, sharing a common religion (ignoring the Catholic/Protestant divide), swearing allegiance to the one crown, even being influenced by the geography of the country in their sense of sharing the one continent; Hirst sees a growing sense of nationhood expressed in poetry published from at least the 1870s. In explaining why certain things happened at certain times we might also note the role of some remarkable individuals (whatever their motives): Sir Henry Parkes in engineering the inter-colonial conference in 1890, John Quick's role at the Corowa Conference in 1893 and George Reid's abrupt change from opponent to ardent supporter at the 1897 Convention. In the framing and shaping of the Constitution we might even acknowledge the influence of a book: *The American Commonwealth* (1888) by James Bryce.

colonies more effectively than any single colony. While the colonies were all self-governing (some had had 40 or so years of experience), their legal powers beyond their borders were limited. Barring a US-style revolution, the only way that a federation could be created would be for the United Kingdom Parliament to pass legislation that would apply across the whole of Australia. A federation would also involve curtailing some powers of the colonies in favour of the new national government. Because the colonial constitutions were based directly or indirectly on UK legislation, only a UK enactment could provide a sound legal and political basis for the new federal Constitution. And perhaps the prestige of the great Imperial Parliament at Westminster would be seen as adding some lustre to the foundation document of the infant nation.

But before any UK legislation could be enacted, the *terms* on which the colonies would federate needed to be settled in some way. As a matter of law the UK Government, through the Parliament at Westminster, could have simply imposed a system of federation or another form of national government. But after a long period of self-government, and growing aspirations of the colonies, this would have been politically impossible. In any event the UK Government with all its other concerns would not have been interested in taking on such a task. If federation was to occur, the Australians would need to take the lead and demonstrate to the UK Government that the colonists supported the proposal.

As a result, any process to develop a set of acceptable proposals needed to negotiate a number of difficult obstacles. It was one thing to talk about 'federation', but what *kind* of federation? How should powers be divided between the states and the national government? If the national assembly were elected on a population basis, how would the states with smaller populations be protected? While it was often said that Australians were 'one people' with a more or less common culture, there were plenty of hurdles to prevent them coming together. These included parochialism and mutual suspicion between some of the colonies as well as jealousies and rivalries among at least some of the politicians involved. It also did not help that some of the colonies seemed to have diametrically opposed economic interests; NSW was moving to 'free trade' while others pursued a policy of protection.

Despite all these difficulties, in 1891, a 'constitutional convention' composed of delegates from the Australian colonies and New Zealand[31] negotiated and drafted a federal constitution. The convention did this in only six weeks — an extraordinary achievement. Although significantly revised later, it provided the foundation for the Constitution we have today. However, not long after the Convention adjourned, George Reid vigorously attacked the 1891 draft in the NSW Parliament.[32] Politics was at play, and while the draft languished in NSW ('the mother colony'), the other colonies saw no point in proceeding.[33] And in the following few years in the east of the country[34] there was a drought, recession, bank failures and changes of government in some of the colonies. This serves to emphasise that federation was never inevitable — there was always quite a bit of opposition to it — especially in NSW.

But amazingly, a couple of years later, the federation movement revived as a grass-roots movement. The federal cause had been kept alive by various popular organisations particularly the so-called 'Australian Natives' Associations'[35] and the Federation leagues. Women's suffrage organisations were also active.[36] The Corowa Conference in July 1893 was a significant milestone. The federation movement had been embraced at times by the colonial governments, but was always at risk of being ignored or put to one side because of more pressing political priorities. Co-ordinated action was difficult because a delay by one government would delay the whole process. At the conference John Quick successfully moved to the effect:

- that each colony should pass an enabling Act to elect representatives to attend a Convention to consider and adopt a draft to establish a federal constitution

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[31] All of whom were men; at this time women could not be elected to parliament, and in practice the same was true for Aboriginal and Torres Strait men.
[32] John Hirst, *The Sentimental Nation*, chapter 6.
[33] John Hirst, *The Sentimental Nation*, p 111.
[34] But in the West, gold had been discovered in a number of places culminating in Kalgoorlie in 1893. Western Australia, previously a colony with a tiny population, only achieved self government in 1890. As a result of these economic changes the population massively increased, which in turn affected the federation movement in the colony.
[35] Whose members were Australian born men of European ancestry.
[36] Though some women were powerful advocates *against* federation. In Australia, women first gained the vote in South Australia in 1894, and in Western Australia in 1899.

- that upon adopting the draft it was to be submitted by referendum to the verdict of each colony.

As Quick and Garran pointed out, the novel element was the idea of mapping out the whole process in advance by Acts of Parliament.[37] The idea of the 'Enabling Acts', as they came to be known, was refined and developed as a model Act for each colony to adopt. The Act provided for the election of 10 representatives by the voters in each colony.[38] The scheme also covered a number of procedural aspects for the operation of the proposed Convention.

In January 1895 a conference of colonial premiers agreed to adopt Quick's scheme. Delays followed but by October 1896 each of the colonies — except Queensland — had passed an Enabling Act for its representation at a Convention. The Convention met in Adelaide, Sydney and Melbourne in 1897 and 1898.[39] At this Convention, the delegates went through the whole constitution-making process again, but at least had the 1891 draft as their starting point. Finally, in March 1898, the President of the Convention, Charles Kingston, declared the proceedings of the Convention closed.

The draft was then submitted to the voters in each of the Australian colonies for approval at referendum. A group of delegates then travelled to London to negotiate with the British Government the enactment of a Bill to give the draft legal effect. While the delegates were in London, Western Australia, the last of the Australian colonies, gave its approval to the draft. The Bill was passed by the UK Parliament in 1900 and came into operation on 1 January 1901.

As a postscript to this, I also need to point out that there are two other UK Acts that also form part of our enacted constitutional law. These are the Statute of Westminster 1931 and the Australia Act 1986.[40] They are mentioned only to make

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[37] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, p 154; as they put it, 'making statutory provision for the last step before the first step was taken'.

[38] The Western Australian Act, however, provided for the *Parliament* to elect its representatives.

[39] Although Queensland did not send representatives to this Convention, its residents took part in the referendum on the draft that emerged from the Convention. New Zealand took no part in the Australian federation movement after the 1991 Convention.

[40] There was also an *Australia Act 1986*, enacted by the Commonwealth, in almost identical terms to the UK Act that commenced at the same time.

the point that the Constitution Act is not a complete statement of our enacted constitutional law.

Section 4

The Constitution as a UK statute

The curious result of all this is that while the text of the Constitution (in effect, its *content*) was negotiated by Australians in Australia, as a matter of *form* it was, and is, part of a UK statute. It is formally known as the Commonwealth of Australia Constitution Act (as noted in Section 2, I am referring to it as the ***Constitution Act***).

That Act, of course, was only one of a number of UK Acts passed in 1900. If you had access to a volume of UK statutes passed in that year, you would notice that the Act passed immediately before the Constitution Act was the Uganda Railway Act. Similarly, the Act passed immediately after was an Act about County Council elections. In the same year other Acts were passed on subjects as diverse as raising money for the war in South Africa and prohibiting child labour in underground mines.

In other words, our federal Constitution, while the product of significant thought and negotiation in Australia, began its life in a fairly unremarkable way. It was just another statute in a stream of legislation issuing from a Parliament that had as part of its business the management of a vast empire stretching across the world. While Australia occupies a large land mass, its colonies were merely a handful out of many in almost every corner of the globe.

Yet after a century of federation, in a world very different from 1900, it seems odd that our federal Constitution still 'sits' on the UK statute book.

What is 'relocation', and what does it involve?

At the outset I proposed that our Constitution should be transferred or 'relocated' to an *Australian* document. So what does this mean?

Sometimes ordinary legislation might provide, for example, 'section 12 is relocated as section 29'. It's a bit like moving the furniture around. It simply means changing where a

section or other provision sits in a law or document by renumbering it, but otherwise it remains the same.

The essence of my proposal is that the provisions of the Constitution would be moved to *another* document (which I'll call the ***Australian instrument***). This would be identified as the document certified by delegates appointed by the Australian parliaments.[41] At the end of the process, the provisions of this document would become the Australian Constitution.[42]

I am suggesting a scheme or proposal to enable this to be done with the subsidiary aim of making that document the *single point of reference* for our fundamental enacted constitutional law.

The relocation has been devised to occur with no change in the day to day operation of the Constitution, and no disruption of the daily activities of government, business or community life. Its legal effect would remain virtually unchanged.[43]

On the other hand, the proposal, if adopted, would clearly involve the most radical restructuring since 1900 of the *form* of the Constitution. Obviously we need to make sure that we get it right. For this reason it is important for specialists in this area to be closely involved with the proposal as it develops. In consulting with the Australian community as a whole the process needs to be one that is respectful of the fact that as individuals we often see things differently.

Some other issues

To anticipate an obvious question, would the proposal make Australia a republic? No, the Constitution would operate in exactly the same way as it does now with the Queen as Head of State represented by the Governor-General.

The proposal would not change the flag or the national anthem.

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[41] These would be distinguished Australians, including leaders of different communities.

[42] In this instance of relocation, the provisions of the Constitution would have been moved *without* being renumbering.

[43] The difference would be the absence of section 25, which is discussed below.

Reasons for relocation

But if the Constitution, as relocated, would operate without any change in its operation of effect, why bother? The reasons for relocation may be summarised as follows:

- **Appropriateness:** in view of our status in the world as an independent nation our Constitution should be found in an *Australian* document.
- **Simplicity and coherence:** the covering clauses[44] in the Constitution Act that still have effect[45] would be moved into the text of the Constitution itself; relocation would have the effect of bringing together four constitutional enactments[46] into a single instrument which would contain all of Australia's enacted constitutional law.
- **Australian source:** relocation would make it clear that the Constitution has an Australian source; the relocation would in effect complete the labours of the Convention delegates who negotiated and drafted the Constitution in and for Australia.
- **Increased profile and 'ownership':** the participation of specially elected delegates in a national signing ceremony would raise the profile of the Constitution and give it increased ownership in the Australian community.
- **Continuity:** relocation would not make Australia a republic — provisions about the Queen and Governor-General would remain; nor would relocation affect the balance of Commonwealth and State powers. Though a major event in the life of the nation, relocation would not disrupt the life of Australians or their governments.
- **Reaffirmation:** relocation would provide an occasion for celebration — an opportunity for people to reaffirm their Constitution.
- **Ease of implementation:** although the details may appear complex, and lengthy consultation with voters would be necessary, relocation could be achieved with a vote at a single referendum.

While much of this may seem idealistic, and perhaps not worth the trouble, the second point — simplicity and coherence — indicates *practical* benefits flowing from relocation. The

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[44] See the first group of provisions reproduced in the graphic in section 2 above.
[45] As previously noted, these are clauses 2, 5 and 6.
[46] These are the Constitution Act, the Statute of Westminster, 1931, the Australia Act 1986 (UK) and the Australia Act 1986 (Cth).

structure of the Constitution would undoubtedly be *simpler* because it would no longer be necessary to distinguish between the covering clauses and the provisions of the Constitution itself. The Constitution would also be more *coherent* because all the enacted constitutional law affecting the Commonwealth would be brought together in the one place.[47] In other words, the relocation envisages removal from the scene of the enactments *other than* the Constitution, which would itself promote simplicity.[48]

Can we do it? (the question of legal authority)

Yes we can! Section 128 of the Constitution gives power to alter the Constitution. In view of the Australia Act, in particular, there can be no reasonable doubt that section 128 confers as much authority as required to give effect to a relocation.[49]

I am proposing, therefore, that we would use the normal procedure laid down by the Constitution. In other words, a Bill would be introduced into the Commonwealth Parliament to alter the Constitution (but only after a long period of consideration and consultation). The Bill would need to pass both houses and be submitted to referendum. And the proposal would be structured so that it did not take effect unless voters in *every* State supported it.

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[47] As Professor Lindell has pointed out, this would simplify constitutional law for student and teacher alike, see 'The Australian Constitution: Growth, Adaptation and Conflict — Reflections About Some Major Cases and Events', 1999, 25 Monash Law Rev 257, 293. Lindell has repeated this point in 'Further Reflections on the Date of the Acquisition of Australia's Independence' in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution*, Federation Press, 2003, 51 at p 58. Apart from students and teachers, any other person who has anything to do with the Constitution would find it easier to work with.

[48] I am referring, of course, to the Statute of Westminster, 1931 and the Australia Acts (Commonwealth and UK). The significance of these Acts is now largely historical.

[49] The courts have always said that section 128 needs to be read broadly. At the same time it must be acknowledged that the traditional view of section 128 could be described as 'contextual'. In other words, that the term 'this Constitution' in section 128 comprehends only the text of the Constitution that sits in covering clause 9, and does not include the preamble or the covering clauses (both of which are elements of the relocation proposal). The Constitutional Commission, however, took the view that an amendment of provisions relating to the organisation and powers of government in a country is, in its ordinary meaning, concerned with 'the Constitution'. Others have pointed to the democratic features of the referendum process and the difficulty of obtaining the necessary majorities; these are seen as factors that would disincline the High Court to recognise limitations without there being very strong and compelling reasons for recognising their existence. For these reasons, there are legitimate grounds for arguing for a broad view of the section. The interpretation of section 128 has also been affected by a growing awareness of our national independence, as further heightened by the withdrawal of UK legal sovereignty more than 30 years ago by virtue of the Australia Act.

Assuming we can do it, is it 'safe'?

The Constitutional amendment to give effect to the relocation could insert a new temporary section (perhaps numbered '128A') into the Constitution. Its core provisions could include something along the following lines:

> The objects of this section are:
>
> (a) to transform the legal environment of this Constitution from a United Kingdom Act of Parliament to an Australian document by relocating its provisions to the Australian instrument in keeping with the status of Australia as an independent nation; and
>
> (b) to maintain the identity, continuity and continued effect of this Constitution in the Australian instrument . . .

The elements mentioned in paragraph (b) are intended to make it clear that the relocated Constitution is to have effect as the *same* Constitution, not a new Constitution. To avoid any doubt, paragraph (b) would be supplemented by savings and transitional provisions of the kind commonly found in normal legislation.[50]

I realise that some might demand to know why we should make *any* change if there is the *slightest* risk of something going wrong; of something unforeseen happening. My response is that the proposal assumes a long and careful study of its details and implications. In this way risks can be reasonably managed. There were risks and uncertainties facing the Australian colonies when they came together; we too face risks and uncertainties in our own time. We face them in our personal life; when we start a new relationship, when we bring a child into the world, when we start a business or take a job overseas. Everything of value carries with it risks. Unless we face risks we will not grow, either as individuals or as a nation.

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[50] Bearing in mind that section 128A would be no more than a temporary mechanism to *effect* the relocation and would not be *part* of the relocated Constitution, the effect of paragraph (b) would need to be preserved by a provision mirroring its effect in the relocated Constitution (perhaps in existing Chapter VII of the Constitution or in a new 'Transitional Provisions' Chapter. The suggested savings and transitional provisions could be located in the same place or perhaps in separate legislation specially authorised for the purpose.

How much 'furniture' should we move? (the scope of the relocation)

Choices would need to be made about the *scope* of the relocation. The Constitution could be relocated with minimal change, or the opportunity could be taken to do some housekeeping along the way.

Reasons to ditch or polish up some of the furniture:

1. The Constitution is more than 100 years old and contains a lot of dead wood (for example, section 84 deals with the transfer of officials from the States to the Commonwealth in 1901 as a result of changed functions. A junior staff member aged 15 at that time would now be approaching 130 years of age! — in other words, there is no one alive who might be affected by that provision).
2. Some provisions reflect colonial or outmoded practices (for example, section 59 gives the Queen a power to disallow any law passed by the Parliament within a year of its making; the power has never been exercised, and the Queen does not have this kind of power in relation to the Australian States or the UK)
3. The Constitution reflects outmoded assumptions about the place of women: its provisions assume that each of the Governor-General, senators, members and voters is a 'he'; (Not so long ago, both the Governor-General and Prime Minister were a 'she'!)
4. Generally, the Constitution uses a more elaborate form of writing than is used in legislation nowadays (for example, 'section twenty-one of this Constitution' rather than 'section 21')
5. The preamble at the beginning of the Constitution Act should be made a preamble to the Constitution, and the covering clauses that still have effect should be incorporated in the Constitution
6. Section 25 does not reflect current community values and should not be relocated: it implies that the States might seek to disqualify voters on racial grounds[51]

[51] Section 25 provides:

25 Provisions as to races disqualified from voting

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

7. Provisions equivalent to the Statute of Westminster, 1931 and the Australia Act 1986 (UK)) should go into the relocated Constitution.

While all of the items in the preceding list deserve attention, I have regretfully come to the conclusion that only the last *three* items should be given effect in the relocated Constitution. After speaking on many occasions[52] to various community groups, I am convinced that the proposal needs to be somewhat simplified. This could be achieved by reducing the number of provisions requiring change. This would be best achieved by narrowing the scope of the relocation.

It might be asked whether the relocation idea affects or might be affected by constitutional proposals about Aboriginal and Torres Strait people discussed in recent years. The proposed relocation would operate on the Constitution as it stood at the time of relocation. In the event, therefore, that express provisions about Australia's First Nation's people found their way into the Constitution *before* relocation, those provisions would be relocated along with the rest of the Constitution as it then stood.

More housekeeping

As part of the relocation exercise, the suggested section 128A would require the State Parliaments to request the Commonwealth Parliament to repeal (to the extent they apply in Australia) the then superseded (1900) Constitution Act (and Constitution), the Statute of Westminster, 1931 and the Australia Acts (UK and Commonwealth).

Complications and a challenge

There is no doubt that this proposal would require co-operation between the Commonwealth and States, and significant leadership in its presentation to the Australian people.
As already explained, the Constitution is *very* difficult to amend. I am also conscious that much of what I propose might seem too complicated and perhaps over-ambitious. In this regard I am encouraged by the assessment Williams and Hume make in their book *People Power* about the 1928 referendum.[53] They describe that proposal as 'complicated' and yet it was passed because it had a lot of support. On the

[52] As at November 2018, more than 100 talks about the proposal had been given.
[53] Page 113.

other hand, the two referendums that failed in 1926 were 'straightforward'. So why not set our sights high? Is it really impossible for us as a nation to develop and ultimately agree on an Australian 'home address' for our own national Constitution?

How many metres of Constitution do we need?

As one who has been to the Archives Office in Canberra and gazed on one of the original copies of the 1901 Constitution, I must say it is a disappointing experience (though the display in the Federation Gallery is well worth a visit). All that can be seen is a small booklet bound with red ribbon whose cover proclaims it to be the Commonwealth of Australia Constitution Act. Not a word of its text is visible. If we ever did relocate our Constitution into an Australian document, wouldn't it be wonderful if we could see it all — displayed Bayeux tapestry-like? I would like to look at the certifying signatures spread out along its length, and then at the helpful notes forming part of the display telling me something about the people who had appended their signatures. A little snapshot of some of the amazing people of this wonderful land.

An earlier version of this essay provided the basis of the article, 'Ending a legal anachronism', published in The Canberra Times (supplement) *Public Sector Informant*, *February 2011*, p 24.