

SECTION 15 OF THE AUSTRALIA ACTS: CONSTITUTIONAL CHANGE BY THE BACK DOOR

By

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Introduction

The defeat in September 1988 of four referenda to amend the Commonwealth Constitution (hereafter "the Constitution") reveals once again the great difficulty of achieving constitutional change by way of the referendum process in s. 128 of the Constitution. Counting the four defeated proposals of September 1988, fewer than one-fifth of the proposals for constitutional change that have been put to the Australian electorate since Federation have secured the necessary majorities under s. 128 to become law.¹

Whatever be the underlying causes of the Australian voters' conservatism when it comes to changing (or rather, not changing) the Constitution, it is clear that the referendum process of s.128 will, in most cases, be of little use in bringing about constitutional change at the federal level. If the Australian people, rightly or wrongly, continue to reject most constitutional changes, is there available a process whereby governments and politicians can by-pass the electorate, ignore s. 128, and change the Constitution without involving the electorate at all? Apart from incremental changes by High Court case-law, the procedure laid down in s. 15 of the *Australia Acts*² emerges as a distinct possibility — although, as will be noted later, the s. 15 process merely replaces one set of political difficulties (those arising out of the referendum procedure) with another. Despite this, it is my intention to show in this article that, since the entry into force of the *Australia Acts* on 3 March 1986, there now exists a method to amend the Constitution independently of the electorate's will under s. 128 of the Constitution. This method will depend for its efficacy solely on the ability of Australian state and federal governments to co-operate and agree.

Some background to the *Australia Acts* is needed at this point. They are two pieces of "mirror" legislation, identical in content and section numbering, though not in preambles. One is an Act of the Commonwealth parliament relying for its validity on s. 51(xxxviii) of the Constitution.³ The other is an Act of the United Kingdom parliament, passed pursuant to s. 4 of the *Statute of Westminster 1931* (U.K.),⁴ and following upon appropriate requests from the parliaments and governments of the Commonwealth of Australia and the six Australian states.⁵ The U.K. version was passed to overcome any constitutional difficulties that might attach to the Australian Commonwealth version,⁶ and it is the British version

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1. See Lumb R.D. *Australian Constitutionalism* (Butterworths 1983) at 131.

2. There are two: the *Australia Act 1986* (Cth) (no. 142 of 1985) and the *Australia Act 1986* (U.K.) (1986 c. 2).

3. See the preamble to the *Australia Act 1986* (Cth).

4. See the preamble to the *Australia Act 1986* (U.K.).

5. See the account of this in Lumb R.D. *The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change* (1988) 15 Uni of Qld LJ (No. 1) 3 at 26; and in Lindell G.J. *Why Is Australia's Constitution Binding? — the Reasons in 1990 and Now, and the Effect of Independence* (1986) 16 Fed L Rev 29 at 34 n. 21.

6. Lumb *supra* n. 5 at 26; also see page 2 of the Explanatory Memorandum accompanying the Commonwealth's *Australia Bill 1986* and the *Australia (Request and Consent) Bill 1985*.

with which this article is principally concerned.

The Acts were passed to give effect to Commonwealth-State agreements made in 1982 and 1984.⁷ These agreements had several objectives. One was to terminate any remaining theoretical power of the British parliament to legislate for Australia. Another was to remove the fetter of the "repugnancy" doctrine from Australian state parliaments. Yet another was to terminate "per saltum" appeals in non-federal matters from state supreme courts to the Privy Council. A further aim was to tidy up the rather messy law governing the relationship between Governors of Australian states and the British government. Still another aim was to confirm a substantial (though not unlimited) degree of extraterritorial legislative power now enjoyed by state parliaments under the common law. In short, the *Australia Acts* aimed at nothing less than the complete severance of any remaining constitutional, executive or legislative ties⁸ between an independent Australia and the former Imperial power.

In pursuance of these aims, various Imperial paramount statutes have been repealed, in whole or in part, by the *Australia Act*.⁹ Several sections of the *Statute of Westminster 1931* are among these.¹⁰ Some sections of the Western Australian and Queensland state constitutions were also directly amended by the *Australia Act* to bring them into line with the new regime of total Australian independence from London.¹¹ From this short summary, it can be seen that the *Australia Act* has become a vital foundation stone for the Australian Commonwealth and the states, to be included with such fundamental statutes as the *Commonwealth of Australia Constitution Act 1900* (U.K.) (hereafter the "Constitution Act") and the *Statute of Westminster* (hereafter the "Statute").

The enhancement of state legislative powers by the *Australia Act* is accomplished primarily by ss. 2 and 3(2). Section 2, in broad terms, confirms the extraterritorial legislative competence of state parliaments.¹² Section 3(2) abolishes the rule¹³ which invalidated state legislation that was repugnant to British paramount legislation. These increased state legislative powers are subject to two express limitations, namely ss. 5 and 6 of the *Australia Act*. Section 6 re-enacts the "manner and form" limitations on state parliaments formerly found in s. 5 of the *Colonial Laws Validity Act 1865* (U.K.) and is not presently material. Section 5¹⁴ of the *Australia Act* in broad terms prevents state parliaments using their new legislative powers to alter the *Australia Acts*, the *Constitution Act*, the Commonwealth constitution and the *Statute of Westminster*.¹⁵

It should be noticed at this point, though, that s. 5 nowhere mentions the powers of the Australian Commonwealth parliament. Indeed, apart from a reference in the preamble of the U.K. *Australia Act* to the Commonwealth parliament's request for a British version of

7. See the preamble to the *Australia Act 1986* (Cth).

8. Except the status of the Queen as Queen of Australia and the individual Australian states: see e.g. the Explanatory Memorandum *supra* n. 6 at 1; and the *Qld Parl Debates* vol 300 at 1500 (26 September 1985).

9. These repeals are effected by ss. 3(1), 4, 11(2) and (3), and 12 of both versions of the *Australia Acts*.

10. Sections 4, 9(2) and (3), and 10(2) of the *Statute* are repealed by s. 12 of the *Australia Acts*.

11. See ss. 13 and 14 of the *Australia Acts*.

12. This section has already created debate: see Gilbert C.D. *Extraterritorial State Laws and the Australia Acts* (1987) 17 Fed L Rev (no. 1) 25; Griffin P.M. *Division 30 of the Stamp Duties Act: Territoriality and the Australia Acts 1986* (1988) 17 Aust Tax Rev (no. 3) 142; and Moshinsky M. *State Extraterritorial Legislation and the Australia Acts 1986* (1987) 61 ALJ 779. For a High Court view of the matter, see *Union Steamship Co. of Australia Ltd v King* (1988) 62 ALJR 645 at 650.

13. Found in s. 2 of the *Colonial Laws Validity Act 1865* (U.K.). The latter Act has now been repealed specifically in relation to the Australian states by s. 3(1) of the *Australia Acts*.

14. The section is fully set out in the text immediately preceding n.42 *post*.

the *Australia Act*, the Commonwealth parliament and its powers are not mentioned at all in the *Australia Act* (U.K.) — except in s. 15. This section contains the “manner and form” for amending the *Australia Acts*, and in my opinion provides a back-door method whereby the state and federal governments may, in concert with each other and their respective parliaments, amend the Commonwealth constitution without using the referendum procedure in s. 128 of the Constitution.¹⁶ Although lengthy, s. 15 must be set out in full:

Section 15.

Method of repeal or amendment of this Act or Statute of Westminster

- (1) This Act or the Statute of Westminster 1931 as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to sub-section (3) below, only in that manner.
- (2) For the purposes of sub-section (1) above, an Act of the Parliament of the Commonwealth that is repugnant to this Act or the Statute of Westminster 1931, as amended and in force from time to time, or to any provision of this Act or of that Statute as so amended and in force, shall, to the extent of the repugnancy, be deemed an Act to repeal or amend the Act, Statute or provision to which it is repugnant.
- (3) Nothing in sub-section (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.

For the moment, the most important thing to note about s. 15 is the power given to the Commonwealth parliament to both amend *and* repeal the *Australia Act*. Any exercise of this power must be accompanied by the request or concurrence of *all* the Australian state parliaments: let us call it the “unanimity procedure”.

2. Use of s. 15 to amend the Constitution without a referendum

The first step would be simplicity itself. Using the unanimity procedure, all Australian parliaments (through the agency of the Commonwealth parliament) agree to amend s. 15 of the *Australia Act* so that the *Constitution Act* and the federal constitution itself are expressly included in the powers of repeal and amendment in s. 15, in addition to the presently included *Australia Act* and the *Statute of Westminster*. Once s. 15 is thus amended, the unanimity procedure of the section can subsequently be used to amend the Commonwealth constitution in whatever ways the relevant governments have agreed to. It might be an amendment to dilute the “majority of states” rule in s. 128. It might be an amendment to exempt certain sections of the Constitution from the processes of s. 128, substituting instead easier if less democratic amendment procedures. Or it might be a total repeal of s. 128, replacing it with some other amendment machinery more suitable to the politicians

15. John Goldring has suggested that s. 5 of the *Australia Act* subjects the *entire* Act to the Commonwealth Constitution and the Statute of Westminster: see Goldring J. *The Australia Act 1986 and the Formal Independence of Australia* (1986) Public Law 192 at 201. But see *post* the text accompanying nn. 42, 43 and 44.

16. Geoff Lindell has also recognised this possibility. See Lindell *supra* n. 5 at 40.

of the day — perhaps the unanimity procedure of s. 15 itself. These are merely some suggestions; the possible variations are many.

I am not suggesting for a moment that s. 15 of the *Commonwealth's* version of the *Australia Act* could be used in this two-stage way to circumvent s. 128 of the Constitution. The Commonwealth version of the *Australia Act* was passed in purported reliance on s. 51(xxxviii) of the Constitution. But this legislative power, like all the others in s. 51, is expressed to be "subject to this Constitution". Thus, s. 51(xxxviii) is subordinate to, amongst others, s. 128. Accordingly, s. 51(xxxviii) cannot be used to get rid of s. 128 or decrease its ambit.¹⁷ So, s. 15 of the Commonwealth's *Australia Act* cannot be used to subvert s. 128 of the Constitution.¹⁸

However, my argument relies on the enabling effects of s. 15 of the *United Kingdom's* version of the *Australia Act*. The U.K. version of s. 15 is not necessarily subject to s. 51(xxxviii) of the Constitution. The U.K. parliament's s. 15 can thus be interpreted as widely and as freely as its words allow. In my view, the wording of the U.K. version of s. 15 is wide enough to permit the evasion or even replacement of s. 128 as outlined above — provided all Australian governments and their parliaments can agree.

3. Does the U.K. parliament have the power to enact an unrestricted s. 15?

This question might be asked in a slightly different way: Did the British parliament have the power in March 1986 to bestow upon the Australian Commonwealth and states a combined ability to avoid or even destroy s. 128 of the Constitution? We thus need to look at some of the arguments concerning the existence or otherwise of a U.K. power to legislate with respect to the Australian constitutional structure prior to the British abdication of legislative power on 3 March 1986.

The simplest argument is to say that the doctrine of British parliamentary sovereignty allows the U.K. parliament to amend the *Constitution Act* and/or the Constitution contained therein by way of any later, appropriately worded Act of Parliament.¹⁹ Since the *Australia Act* is an Act of the U.K. parliament, is later in time than the *Constitution Act* and Constitution, and (on my argument) clearly creates procedures that can ultimately be used to circumvent s. 128, s. 15 of the *Australia Act* is a repeal or amendment *pro tanto* of the Constitution. By a valid Act of the paramount British legislature, the unanimity procedure of s. 15 now lawfully exists to modify s. 128. So the argument would run.

It is quite clear that, up until the moment that the U.K. parliament abandoned²⁰ its remaining powers over Australia on 3 March 1986, the British legislature retained some law-making powers over Australia, even if one goes no further than s. 4 of the *Statute of Westminster* (now repealed). This famous provision allowed the U.K. to pass laws for Australia if such laws were requested and consented to by the parliament and government of the Commonwealth. Indeed, the *Australia Act* (U.K.) was itself a product of this request-and-consent procedure, accompanied by requests and consents from all the Australian states.

Is there any reason why the request-and-consent procedure in s. 4 of the *Statute* could *not* be used to establish a process (s. 15) that could conceivably get around s. 128? Let me make it clear that I am not here concerned with a related matter that has agitated some

17. *Ibid.* at 42. See also Craven G. *Secession: The Ultimate States Right* (Melbourne Univ Press 1986) at 185-186.

18. Accord: Lindell *supra* n. 5 at 42.

19. There is some judicial support for this. See *R v The Minister for Justice & A.G. (Qld) ex p. Skyring* an unreported judgment of Connolly J of the Queensland Supreme Court 17 February 1986 at pp. 5-6 of the transcript.

20. In constitutional law terms, these powers can almost certainly never be reclaimed. As was said in the South African case of *Ndlwana v Hofmeyr* [1937] AD 229 at 237: "freedom once conferred cannot be revoked". See also the references collected in Lumb *supra* n. 5 at 16 n. 51.

commentators, viz., could the U.K. parliament ignore the request-and-consent provisions of s. 4 and unilaterally impose on Australia a constitutional structure that was at variance with the British-approved federal settlement of 1900?²¹ Although the answer is perhaps “no”, that is not our situation here. In passing the *Australia Act*, the U.K. has sought scrupulously to abide by s. 4 of the *Statute of Westminster*.²² So, does the *Statute* authorise British legislation, with Australian consent, that probably varies the Constitution and, in particular, potentially subverts s. 128?

Commentators and judges have been divided on the question of whether the U.K. parliament, after 1901, was or was not disabled by s. 128 from amending the Constitution. At one end of the spectrum, the late Mr. Justice Murphy of the High Court was of the opinion that the federation of the Australian colonies in 1901 created instantly an independent nation over which the British legislature immediately lost all power.²³ Although the High Court ultimately rejected this view,²⁴ several commentators have advanced variations of a modified “independent nation” doctrine to explain their view that the request-and-consent procedures of the *Statute’s* s. 4 could not be used by an Australian government in concert with a compliant British government to circumvent the referendum processes of s. 128.

Thus, Geoffrey Marshall thought that any attempt to use s. 4 of the *Statute* to amend the Constitution would fail unless the “request” pursuant to the section was authorised by an appropriate referendum under s. 128.²⁵ This was because, in his view, the request and consent by the parliament and government of the Commonwealth (as required by the *Statute*) had to be a request and consent by the Commonwealth defined by reference to its function under the Constitution. In other words, “the parliament of the Commonwealth”, when it came to altering the Constitution, was defined by reference to the legislative processes of s. 128 which, of course, included a referendum.²⁶ Marshall’s view does not explain, however, why the Commonwealth would need British help under s. 4 of the *Statute* if a proposal to alter the Constitution has secured the requisite majorities under s. 128. Surely British legislative assistance would then be quite unnecessary.

Using a slightly different argument, Professor Lumb has similarly opined that the Australian government could not use the *Statute’s* s. 4 as a backdoor method of changing the Constitution.²⁷ His argument is that a combination of Australia’s evolving status as a self-governing Dominion and then independent nation, coupled with s. 8 of the *Statute of Westminster*, brought about the result that, by 1942 at the latest,²⁸ the British parliament had lost any remaining power to legislate for Australia’s Constitution. In Kelsen’s terms,²⁹ the “grundnorm” of Imperial legislative supremacy over Australia had been replaced by the “grundnorm” of the supremacy of the Australian Constitution, including especially s. 128.

21. Although the point is now merely academic in the light of s. 1 of the *Australia Act*, it has been thoroughly discussed in Craven *supra* n. 17 chapter 5.

22. See the preamble to the British version of the *Australia Act*; and also the *House of Commons Debates* 6th series vol. 91 at 82 (3 February 1986).

23. See his judgments in e.g. *Bisticic v Rokov* (1976) 135 CLR 552; and *Kirmani v Captain Cook Cruises Pty. Ltd.* (1985) 59 ALJR 265.

• 24. See *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172; and *Southern Centre of Theosophy Inc. v South Australia* (1979) 145 CLR 246.

25. Marshall G. *Parliamentary Sovereignty and the Commonwealth* (Oxford Clarendon Press 1957) at 116-117.

26. As authority for this interpretation, Marshall relied on the South African Supreme Court’s decision in *Harris v Minister of the Interior* [1952] 2 SALR 428. But *Harris* was concerned with whether the *South African* parliament could legislate contrary to a “manner and form” provision in the British — enacted South African constitution, using s. 2 (2) of the *Statute of Westminster*, and not with whether the *British* parliament could legislate contrary to that “manner and form” provision, using s.4 of the *Statute of Westminster*.

27. Lumb R.D. *Fundamental Law and the Processes of Constitutional Change in Australia* (1978) 9 Fed L Rev 148 at 153 ff.

28. *Ibid.* at 154-155.

29. The concept of the “grundnorm” or “basic norm” is discussed in Kelsen H. *General Theory of Law and State* (N.Y. Russell & Russell 1961) especially chapters X and XI.

There is no doubt that, by the late 1930s, custom and convention had for most practical purposes conferred a large measure of independence upon the Commonwealth of Australia.³⁰ Thus custom and convention usually dissuaded British legislative intervention in Australian constitutional affairs unless the Australian government requested such intervention.³¹ But the mere fact that a legislative power is not used for a long time does not necessarily mean that the power is non-existent.³² Indeed, s. 8 of the *Statute of Westminster*, apart from making it clear that the Commonwealth parliament could amend the Constitution only in accordance with s. 128, expressly preserved the pre-*Statute* law concerning alterations to the Constitution. Professor Lumb states that this reference in s. 8 to the pre-*Statute* law means that the section was adopting and confirming an amalgam of pre-1931 law, custom and convention which allegedly deprived the British parliament of all power to change the Australian Constitution, even if asked to do so by the Australian government.³³ In this way then, the *Statute's* s. 8 was confirming the exclusivity of s. 128 as the only way of constitutional alteration.³⁴

This "section 8" argument is correct only if pre-1931 law, practice and convention really shows that the (then) Imperial parliament did not, or would not, pass laws concerning Australia's constitutional structures *even if* asked to do so by the authorities in Canberra. I do not think either the pre-1931 or the post-1931 situation bears out Professor Lumb's premise.

It is true that the parliament of the U.K. has not made a single change directly to the document known as the Commonwealth Constitution since its enactment in 1900. Yet, the British parliament has enacted since 1901 (normally with Australian approval) a number of Acts that have directly affected the constitutional structure of the Commonwealth and its constitutional powers. None of these was ever submitted to the Australian electorate pursuant to s. 128. The *Statute of Westminster* is the most famous pre-World War Two example; apart from the seminal importance of s. 4, it removed two constitutional limitations under which the Commonwealth parliament had laboured since Federation — the "repugnancy" fetter embodied in the *Colonial Laws Validity Act 1865* (U.K.)³⁵ and the inability to pass laws having full extraterritorial effect.³⁶ Even after the *Statute* was passed, but before its adoption by the Commonwealth in 1942, the U.K. legislature passed several statutes expressly extending the legislative powers of the Commonwealth parliament in ways not then allowable under the Constitution. Thus, in 1934, s. 15 of the *Whaling Industry (Regulations) Act* (U.K.) expressly empowered the Commonwealth parliament to enact extraterritorial laws for the purpose of implementing an international convention on whaling to which the British Empire had become a party. In 1937, s. 2 of the *Geneva Convention Act* (U.K.) explicitly authorised the Commonwealth parliament to pass laws implementing

30. Barwick Chief Justice of the Australian High Court thought that Australia became an independent nation at some indeterminate time between the passage of the *Statute of Westminster* in 1931 and the making of the Convention of the territorial Sea and the Contiguous Zone in 1958: *Bonser v La Macchia* (1969) 122 CLR 177 at 189. His Honour made further reference to the point in *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172 at 183.

31. At least where such intervention would concern the Constitution of the Commonwealth of Australia. See the discussion of the British parliament's refusal in 1935 to consider Western Australia's secession petition, in Craven *supra* n. 17 at 53-54. It is an amplified version of this convention, of course, which found legislative expression in the third preamble to and s. 4 of the *Statute of Westminster 1931*.

32. As was demonstrated dramatically in November 1975 when the Governor-General of Australia exercised his hitherto never-used "reserve powers" under the Constitution to dismiss a federal government, that of Mr Whitlam. See also Craven *supra* n. 17 at 136-141.

33. Lumb *supra* n. 27 at 157.

34. *Ibid.*

35. For the pre-*Statute* situation at federal level, see *Union Steamship Co. of N.Z. Ltd v The Commonwealth* (1925) 36 CLR 130. The "repugnancy" fetter was removed from the Commonwealth parliament by s. 2 of the *Statute*.

36. Section 3 of the *Statute* gave the federal parliament full power to pass extraterritorial laws.

parts of the Geneva Convention of 1929, removing any constitutional doubts that may have arisen because of the extraterritoriality rule and possible limits on Canberra's treaty powers under s. 51(xxix) of the Constitution. Just before the outbreak of war in 1939, s. 5(1) of the *Emergency Powers (Defence) Act* (U.K.) expressly allowed Canberra to pass extraterritorial laws for certain defence-related purposes. The following year (1940), the British parliament enacted s. 3(1) of the *Army and Air Force (Annual) Act* (U.K.) which explicitly allowed the Australian federal parliament to pass extraterritorial laws governing the Australian armed forces, even if such laws conflicted with otherwise-binding British defence legislation.

Admittedly, none of the last four mentioned Acts directly amended the Constitution as such. Yet they all augmented Commonwealth legislative powers in ways that may have been otherwise impermissible under s. 51 of the Constitution as it then operated. Presumably, all of them were enacted with the approval of Canberra.³⁷ None of them was submitted to the voters in terms of s. 128. There was no legal need to; they were all Imperial paramount Acts passed with Australian Commonwealth consent.

However, if any further demonstration is needed of British parliamentary power, post-*Statute of Westminster*, to pass laws affecting Australian constitutional matters at the request of Canberra and, where appropriate, the states, without resort to s. 128, then the *Australia Act* (U.K.) itself is proof enough. Here, we have legislation that fundamentally alters the constitutional relationship between Australia and Great Britain. We have legislation that changes dramatically the powers of the Australian states. We have, in s. 15 of the *Australia Act*, a new and arguably complete power of constitutional alteration residing in the Commonwealth and state parliaments acting in concert, and potentially at variance with s. 128. This is constitutional change of the first water, enacted by the British parliament in 1986 under s. 4 of the *Statute*, with not a s. 128 referendum in sight.

I am not alone in maintaining that (up until 3 March 1986) the U.K. legislature possessed powers pursuant to s. 4 of the *Statute* to enact constitutional changes for Australia without any need for a referendum under s. 128. W. Anstey Wynes, writing in 1976, stated flatly that the British parliament technically retained the legal power to alter the Commonwealth Constitution.³⁸ He did not even mention the *Statute of Westminster* as a factor possibly limiting British parliamentary power as he understood it. Gregory Craven, writing ten years later, stated that there was no doubt that, during the first thirty years of Federation, the strict legal power of the U.K. to pass laws on Australian constitutional matters was "untrammelled".³⁹ If this is correct (and I think it is), s. 8 of the *Statute of Westminster* would, subject to s. 4, preserve that position, given that the *Statute* was enacted almost exactly thirty years after Australian federation. It is a judicially noted⁴⁰ fact that during the early 1970s the federal Labor government of Gough Whitlam considered using the s. 4 procedure to bring about constitutional change without having to run the gauntlet of s. 128. So, our own federal government (at least in the 1970s) believed that a British power of constitutional amendment existed under s. 4 of the *Statute*, independently of the Constitution's referendum procedure.

37. Although, interestingly, none of them expressly mentions that Australian Commonwealth request or consent accompanied the legislation. There was no need to, since Australia did not adopt the *Statute of Westminster* till 1942. One may presume that the (then) normal conventions operated to secure the Commonwealth's approvals for these four Acts.

38. Wynes W.A. *Legislative, Executive and Judicial Powers in Australia* 5th ed. (Law Book Co. 1976) at 543.

39. Craven *supra* n. 17 at 110. Michael Detmold writes, too, that "imperial power" survived in Australia till about 1926: Detmold M. *The Australian Commonwealth* (Law Book Co. 1985) at 89. 1926 is significant as the year of the Balfour Declaration, whose principles of Dominion freedom and equality within the British Commonwealth were embodied in the *Statute of Westminster* five years later. The Privy Council also thought that British sovereignty over the Dominions remained theoretically unimpeded, as late as 1935: see *British Coal Corp v The King* [1935] AC 500 at 520.

40. See post n. 41 and accompanying text.

Finally, there is Australian judicial support for the existence of such a power. In his judgment in *R. v Minister for Justice & Attorney-General of Qld. ex parte Skyring*,⁴¹ in February 1986, Connolly J. of the Queensland Supreme Court said of the case before him:

It resembles the situation which arose in the 1970s, when a Government of the Commonwealth toyed with the notion of obtaining amendments of the Constitution of the Commonwealth by overriding Imperial legislation . . . (I)n point of legal theory, such legislation may well have been effectual, if Her Majesty's Government in the United Kingdom could have been persuaded to introduce it and if the Imperial Parliament had agreed to enact it, although, in political terms, it would have been seen as a fundamental breach of faith with the Australian people.

Accordingly, I think the better view is that, before 3 March 1986, the U.K. parliament possessed power under s. 4 of the *Statute of Westminster* to pass laws altering Australia's constitutional arrangements, even if that involved by-passing s. 128 of the Constitution.

4. Has the British power been exercised: Construing the Australia Act.

If we accept that the British parliament possessed power under s. 4 of the *Statute of Westminster* to confer upon the Commonwealth and state parliaments, at their request, the means of circumventing or even altering s. 128 of the Constitution, we need to consider next, whether the *Australia Act 1986* (U.K.) is an actual exercise of that British power.

Central to this question is the relationship between the *Australia Act* and the Constitution. Also of vital importance is the relationship between the latter two enactments and the *Statute of Westminster*. First, we shall look at the *Australia Act* and the Constitution.

The Constitution and the *Constitution Act* are mentioned three times in the *Australia Act*; in ss. 5, 15 and 16. Section 16 is the definition section, and defines (amongst other things) the "Constitution of the Commonwealth" as being, for the purposes of the Act: . . . the Constitution of the Commonwealth set forth in section 9 of the Commonwealth of Australia Constitution Act, being that Constitution as altered and in force from time to time;

There is nothing unusual or controversial about this definition.

Section 5, though, is much more significant and, along with its heading, is here set out in full:

Section 5.

Commonwealth Constitution, Constitution Act and Statute of Westminster not affected.
Sections 2 and 3(2) above —

- (a) are subject to the Commonwealth of Australia Constitution Act and to the Constitution of the Commonwealth; and
- (b) do not operate so as to give any force or effect to a provision of an Act of the Parliament of a State that would repeal, amend or be repugnant to this Act, the Commonwealth of Australia Constitution Act, the Constitution of the Commonwealth or the Statute of Westminster 1931 as amended and in force from time to time.

The heading to s. 5 suggests that the whole of the *Australia Act* is subject to the Constitution, the *Constitution Act* and the *Statute*.⁴² If this were so, then my entire argument fails.⁴³ However, a quick perusal of the section reveals that this is not so. Only ss. 2 and 3(2) of the *Australia Act* are expressly made subject to the *Australia Act*, the *Constitution*

41. *Supra* n. 19.

42. *Supra* n. 15.

43. Because s. 15 of the *Australia Act* would then be subject to s. 128 of the Constitution.

Act, the Constitution itself and the *Statute of Westminster*. Accordingly, the misleading language of the heading to s. 5 cannot affect the unambiguous language of the section's text.⁴⁴ When one turns to ss. 2 and 3(2) of the *Australia Act*, one discovers that they are concerned with the legislative powers of *state* parliaments only. Section 2(1) recognises the power of state parliaments to pass laws having extraterritorial effect. It does for the states what s. 3 of the *Statute of Westminster* did for the Commonwealth parliament. Section 2(2) declares that state parliaments have full legislative power commensurate with that of the U.K. parliament, subject to an exception concerning inability to enter into foreign relations. Section 3(2) removes the "repugnancy" fetter from state parliaments, giving them full power to enact laws that repeal or amend formerly paramount Imperial Acts. This sub-section does for the states what s. 2 of the *Statute of Westminster* did for the Commonwealth parliament.

The interplay among ss. 2, 3(2) and 5 of the *Australia Act* is thus clear. Sections 2 and 3 give full legislative independence to the states by empowering their legislatures to pass extraterritorial laws, laws that are repugnant to formerly paramount Imperial Acts, and, in general, to exercise law-making powers as plenary as those of the old Imperial parliament. However, it is necessary to make sure that these enhanced powers cannot be used by the states to rend or disrupt the Australian federation. Thus, s. 5 makes it clear that the states' new powers do not embrace the *Constitution Act*, the Constitution itself, the *Statute*, or the *Australia Act*.

In other words, s. 5 has nothing whatsoever to say about the powers of the *Commonwealth* parliament with respect to the Constitution or the *Constitution Act*, let alone the *Statute* or the *Australia Act*.

Indeed, the only mention in the *Australia Act* of the powers of the Commonwealth parliament with respect to the Constitution or any of the other Acts is in s. 15, whose terms have already been fully reproduced earlier in this article. Sub-sections (1) and (2)⁴⁵ explicitly give the Commonwealth parliament a power to alter or repeal the *Statute* or the *Australia Act*, provided what I have called the "unanimity procedure" (i.e. the concurrence of all state parliaments) is complied with. The Constitution is referred to only in subs. (3), where it is apparently provided that the referendum process of s. 128 can be used to affect the *Statute* and the *Australia Act*, notwithstanding the "manner and form" (i.e. the unanimity procedure) established in sub-section (1).⁴⁶ In other words, sub-sections (1) and (3) provide two independent ways of amending or repealing the *Australia Act* or the *Statute*: either by way of the unanimity procedure in s. 15(1), or by way of referendum pursuant to s. 128 of the Constitution.

Earlier in this discussion, I have suggested that the way to get around s. 128 is to use the unanimity procedure in s. 15(1) of the *Australia Act* to amend s. 15 so that the *Constitution Act* and the Constitution are both expressly made subject to the unanimity procedure, in addition to the presently included *Australia Act* and the *Statute of Westminster*. Is there anything in s. 15, or the *Australia Act* overall, that would stop such an interpretation being given to the power of amendment in s. 15(1)?

Several features of s. 15 may indicate that the section is intended to be subject to the Constitution. The section's heading refers to repeal or amendment of the *Australia Act* and

44. See Pearce D.C. and Geddes R.S. *Statutory Interpretation in Australia* 3rd ed. (Butterworths 1988) at 90-92.

45. Sub-section (2) is essentially a definition provision. It says that if a Commonwealth Act is "repugnant" to any provision of the *Australia Act* or the *Statute*, that repugnancy is a repeal or amendment for the purposes of subs. (1). This would then trigger the "unanimity" requirement of the latter provision.

46. See Lindell *supra* n. 5 at 35 n. 22, and 40. See also the references to the Commonwealth parliamentary debates *supra* n. 50.

the *Statute of Westminster* only. These two Acts are also the only ones mentioned in subs. (1) and (2). Sub-section (3) seems to allow the referendum process of s. 128 of the Constitution to be used in relation to the *Australia Act* and the *Statute*, but is silent on the topic of using the unanimity procedure of s. 15(1) for amending the Constitution.

Yet, there are several countervailing factors which in my opinion are stronger. The power of amendment created by s. 15(1) is a power to repeal as well as amend. This language is eminently wide enough to permit a change to the section by increasing the list of Acts that are subject to the amending process of s. 15(1); i.e. by adding the *Constitution Act* and the Constitution.⁴⁷ But, most important, s. 15 is *nowhere* in the *Australia Act* expressed to be subject to the *Constitution Act* or the Constitution. It would have been quite simple for the drafters of the *Australia Act* to have included such a clause. After all, where they have wished to make sections of the Act subject to the Constitution they have done so: ss. 2 and 3(2) are classic examples, as discussed earlier. But this was not done with s. 15.

British parliamentary debates throw little light on the legislative intention behind s. 15. Indeed, the minister's Second Reading speech in the House of Commons on 3 February 1986⁴⁸ contains no reference at all to s. 15, let alone what it means. Neither is there any mention of the section in the ensuing debate. The truth of the matter is, almost certainly, that the British parliamentarians were simply enacting a measure that had in reality been drafted by the Australian authorities and requested by them, so the House of Commons felt no need to enquire closely into the Bill's ramifications. The British were just doing a necessary constitutional courtesy for the Australians.⁴⁹

Although hardly admissible on the point of British legislative intention, Australian parliamentary debates on the various Bills that preceded and accompanied the U.K. version of the *Australia Act* are only a little more instructive. The ministerial Second Reading speeches on the Commonwealth's version of the Australia Bill in the Senate and the House of Representatives do refer explicitly to clause (now section) 15.⁵⁰ The speeches indicate a clear understanding that the unanimity procedure of the section is designed for changes to the *Australia Act* and the *Statute of Westminster*. However, no mention is made of any possibility of s. 15 being used in relation to the Constitution. The idea either never crossed any Australian politician's mind, or if it did, they kept quiet about it. Similarly, the Explanatory Memorandum accompanying the Commonwealth's Australia Bill reveals no more and no less about s. 15 than do the ministerial Second Reading speeches in the Commonwealth parliament.⁵¹

Therefore, the parliamentary evidence on the point under discussion shows that the British probably had no thoughts either way about s. 15, while the Australians probably just assumed that s. 15 would only operate in respect of future changes to the *Australia Act* and the *Statute*. It is doubtful that this rather weak evidence of parliamentary intention would be enough, on its own, to rebut the expansive interpretation of s. 15 for which I am arguing.

5. Can s. 15 be limited by the Statute of Westminster?

One possible way of limiting the ambit of s. 15 might be to argue that the *Australia Act*

47. In *Kirmani v Captain Cook Cruises Pty. Ltd.* (1985) 59 ALJR 265 at 291 Brennan J refers approvingly to the principle that, in construing an organic law which confers legislative power on a Dominion parliament, "that construction most beneficial to the widest possible amplitude of its powers must be adopted". The *Australia Act* is certainly an "organic" statute, and s. 15 clearly confers a legislative power upon the Commonwealth parliament, subject to the section's "manner and form" requirements.

48. *Supra* n. 22.

49. *Ibid.* at 82-83.

50. See the *House of Representative Debates* 13 November 1985 at 2686; and the *Senate Debates* 29 November 1985 at 2553.

51. *Supra* n. 6 at 8-9.

is intended to be construed *in pari materia*⁵² with the *Statute*. This requires that the two Acts are to be interpreted as complementing each other; that neither is to be construed as intended to interfere unnecessarily with the particular constitutional arrangements established by the other. In other words, the two Acts are each part of a single design. That design consists of two parts; one part being defined by the *Statute* and the other being defined by the *Australia Act*. The overall design is the total independence of Australia from the U.K. The *Statute of Westminster* defines that part of the independence package that concerns the Commonwealth, while the *Australia Act* defines that part of the package that relates to the states.

The Commonwealth's part of the independence package is found primarily in ss. 2, 3, 4 and 8 of the *Statute*. Section 2 gave the Commonwealth power to overrule paramount British statutes. Section 3 conferred full extraterritorial law-making power on the Commonwealth. Section 4 guaranteed no more British legislation for the Commonwealth unless Canberra requested it. Section 8, though, made it clear that the Commonwealth's newly-granted independence from British paramount Acts could not be used to override its own *Constitution Act*.⁵³

Using the *in pari materia* argument, the *Australia Act* did nothing to change this scheme, so far as the Commonwealth is concerned. The Act of 1986 was merely intended to complete the scheme begun in 1931, by extending to the Australian states similar independence from Britain, subject to some modifications because of the Commonwealth Constitution. Thus, s. 3 of the *Australia Act* gave the states full powers to do away with paramount British enactments. This paralleled s. 2 of the *Statute*. Section 2 of the *Australia Act* gave the states powers of extraterritorial legislation. This more or less⁵⁴ complemented s. 3 of the *Statute*. Section 1 of the 1986 Act terminated all U.K. legislative powers over Australia, including the states. This paralleled (indeed went further than⁵⁵) s. 4 of the *Statute*. Finally, to complete the scheme of which the *Statute* and the 1986 Act are complementary halves, s. 5 of the latter made the states' newly enhanced powers subject to, *inter alia*, the Commonwealth Constitution. Section 5 of the Act of 1986 is thus the counterpart of the *Statute's* s. 8. In this way then, s. 8 of the *Statute of Westminster* and s. 5 of the *Australia Act* operate side by side, subject to nothing else, to ensure the supremacy of the Constitution over Commonwealth and states. On this interpretation, s. 15 of the *Australia Act* would not be intended to upset the neat dovetailing of the *Statute's* s. 8 and the *Australia Act's* s. 5. Accordingly, s. 128 of the Constitution reigns supreme over both statutes, including s. 15 of the 1986 Act.

Unfortunately, there is one massive problem with this otherwise attractive argument. The whole of the *Statute of Westminster* is expressly made subject to the unanimity procedure in s. 15(1) of the *Australia Act*. Section 8 of the *Statute* is not exempted from s. 15 of the 1986 Act.

* 52. An American definition of this phrase is as follows: "Statutes are *in pari materia* which relate to the same person or thing or to the same class of persons or thing" — per Hosmer J in *United Society v Eagle Bank* (1829) 7 Conn 457 at 470 quoted in Pearce and Geddes *supra* n. 44 at 53. For a general discussion of the *in pari materia* doctrine, see *ibid.* at 53-56.

53. *Kirmani v Captain Cook Cruises Pty. Ltd.* (1985) 59 ALJR 265 at e.g. 291 per Brennan J. The point is also discussed in Craven G. *The Kirmani Case — Could the Commonwealth Parliament Amend the Constitution without a Referendum?* (1986) 11 Syd L Rev 64.

54. I have argued elsewhere that s. 2 of the *Australia Act* is not as wide as s. 3 of the *Statute*: see Gilbert *supra* n. 12. See also *Union Steamship Co. of Australia Ltd. v King* (1988) 62 ALJR 645 at 650.

55. This is because s. 1 (together with s. 12) of the 1986 Act terminates the possibility of Britain legislating for Australia at the request and with the consent of the Commonwealth, previously permitted by s. 4 of the *Statute*.

So, if s. 8 of the *Statute* were thought to impede my expansive interpretation of s. 15, the unanimity procedure could be used to repeal s. 8. The way would then be clear for the s. 15 process to be used to bring the Constitution within the section's ambit. The only alternative would be to read some kind of unexpressed implication protective of s. 8 into the language of s. 15.⁵⁶ Yet this would do great violence to the crystal-clear intent in s. 15 to subject *all* of the *Statute of Westminster* to the unanimity procedure established by the section.⁵⁷

6. Conclusion: Democracy, grundnorms and the future

My interpretation of s. 15 will not, of course, solve the historical difficulties of having referenda carried pursuant to s. 128 of the Constitution. Instead of trying to put together the relevant majorities under s. 128, sponsors of constitutional change will have the equally difficult task of securing the agreement of all Australian governments and parliaments. Because all seven Australian parliaments are seldom if ever controlled by the same political party at the same time, it can be confidently predicted that the unanimity procedure of s. 15 would be complied with only on the rarest of occasions. This is not impossible however; all Australian governments and parliaments, of differing political persuasions, were able to agree on the package of measures that became the *Australia Acts*. Historically though, unanimous intergovernmental agreements on constitutional reform in Australia are few and far between, so the procedures of s. 15 of the *Australia Act* would seldom be used to bypass the referendum procedure of s. 128 of the Constitution.

The biggest argument against my interpretation of s. 15 of the *Australia Act* is that it would enable the democratic safeguard of s. 128 of the Constitution to be avoided by an agreement among politicians under s. 15 of the *Australia Act*. Politicians in Australia have enough unreviewable and unaccountable powers as it is, without interpreting the *Australia Act* in such a way as to give them more. This argument of politician's power versus the will of the people is not just a political one. It directly relates to the fundamental legal rule of recognition, or "grundnorm", underlying the whole Australian constitutional system.

Now that the British parliament has abdicated all remaining legislative power over Australia, it will be necessary to find a new legal grundnorm for the Australian constitutional and legal system. Before the *Australia Acts*, the underlying grundnorm of Australia's basic laws such as the Commonwealth Constitution and the *Statute of Westminster* lay in the fact that they had been passed by a paramount legislature — the British parliament — which was recognised as having the power to pass laws for Australia, even if that power was subject to certain constraints such as s. 4 of the *Statute of Westminster*.⁵⁸ However, s. 1 of the *Australia Act* has now abolished the old grundnorm of ultimate British parliamentary supremacy in Australia. What is to take its place? Several commentators and judges⁵⁹ have suggested that the new basic rule of recognition in the Australian constitutional system must be the democratically expressed will of the Australian people. The Commonwealth Constitution is no longer solely valid as the expression of will of a legally paramount British

56. The High Court is occasionally prepared to make implications into the Constitution protecting essential elements of the federal compact: see *Melbourne Corp. v The Commonwealth* (1947) 74 CLR 31; and *Queensland Electricity Commission v The Commonwealth* (1985) 59 ALJR 699. Perhaps the court would do something similar to protect the democratic safeguards of s. 128 from the apparent reach of s. 15.

57. Notwithstanding the cases cited in n. 56 *supra* the High Court generally prefers not to make implications that would restrict the otherwise clear ambit of the Commonwealth's constitutional powers: *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

58. *Kirmani v Captain Cook Cruises Pty. Ltd.* (1985) 59 ALJR 265 at 302-303 per Deane J. and at 310 per Dawson J.

59. See *supra*.

legislature. That legislature no longer has power over Australia. In so far as the Constitution continues to be accepted by the Australian people as the basic law governing the Australian legal, constitutional and social structure, the validity of that Constitution now rests upon the democratic assent of the Australian people. This democratic will finds its ultimate legal expression in s. 128 of the Constitution, and this section has in effect become the new Australian legal grundnorm. Geoff Lindell,⁶⁰ Professor Lumb,⁶¹ Murphy J.⁶² and possibly Deane J.⁶³ all support the idea that the will of the Australian people, expressed through continued acceptance of the Constitution, is now the new basic rule of legal recognition in the Australian system.

However, both Lindell and Lumb have recognized that s. 15 of the British version of the *Australia Act* poses a potential threat to the supremacy in the Australian legal system of s. 128 of the Constitution. Geoff Lindell has specifically recognized a possible interpretation of s. 15 similar to the one I have advanced in this article.⁶⁴ He makes some tentative suggestions as to how this interpretation might be avoided, but ultimately he leaves the point open, while saying of the interpretation that "it stands a greater chance of acceptance at a time far removed from the present."⁶⁵ Professor Lumb is much more emphatic in rejecting the potential supremacy of s. 15. He says that there is a hierarchical relationship between s. 128 of the Constitution and s. 15 of the *Australia Act*, and that s. 15 is subject to s. 128.⁶⁶ The reason for this, in his view, is that s. 128 is now the fundamental rule of legal recognition in the Australian system and thus cannot be touched by s. 15.⁶⁷ The Lumb argument is certainly attractive because it appeals to Australian democratic sentiment and tradition. Yet it does not necessarily follow that, because a constitution depends for its legal validity upon acceptance by the people it governs, it should only be changed by way of democratic processes similar to the one in s. 128. The United States constitution is an excellent example of this. American constitutional theory ascribes the validity of the U.S. constitution to the will of the American people.⁶⁸ But none of the two methods of changing the American constitution involves the direct popular vote.⁶⁹ Indeed the method of change that has been responsible for the vast majority of amendments to the American constitution has been the one involving U.S. congressional initiatives coupled with ratification by three-quarters of American state legislatures.⁷⁰ In other words, the American constitution which owes its legal validity to the popular will is almost always changed by the actions of American politicians, not by the people voting in referendum. The situation in Canada is not dissimilar. Canada is a federation under the Crown similar to Australia. Canada is a typical western industrial democracy. The United Kingdom parliament abandoned its last vestiges of legislative power over Canada in 1982.⁷¹ Yet, although Canada is a democracy, the mechanisms for changing its federal constitution nowhere involve a direct popular vote. Changes to the Canadian constitution must be ratified by the federal parliament in Ottawa

60. *Supra* n. 5 at 37.

61. *Supra* n. 27 at 154-155.

62. See his judgment in *Kirmani's case* (1985) 59 ALJR 265 at 276.

63. See his judgment in *ibid* at 302-303.

64. *Supra* n. 5 at 40.

65. *Ibid.* at 41 n. 44.

66. *Supra* n. 5 at 32.

67. *Ibid.*

68. Craven *supra* n. 17 at 67.

69. The two amendment procedures are contained in the United States constitution, Article V.

70. Pritchett C.H. *The American Constitution* 3rd ed. (New Delhi Tate McGraw-Hill 1977) at 26-27.

71. *Canada Act 1982* (U.K.) s. 2.

and by a specified majority of provincial legislatures.⁷² No-one would doubt the modern democratic foundations of Canada, but as in the United States, the Canadian rules of constitutional change vest the ultimate power of change in politicians, not the people.

Consequently, if my expansive interpretation of s. 15 is accepted, we now have two grundnorms, not one. Section 128 of the Constitution and s. 15 of the British version of the *Australia Act* now exist side by side as parallel grundnorms. Until, that is, one is used to change the other. In my view, neither s. 128 nor s. 15 is yet subordinate to the other, although one can be lawfully used to change the other. That change may of course involve making one section subordinate to the other. The referendum process of s. 128 could be used in the future to restrict the unanimity procedures of s. 15. Conversely, s. 15 could potentially be used to lessen the ambit of s. 128. Which way the process goes, if indeed the process is ever initiated, will depend on which section is invoked first. The idea of two parallel grundnorms may sound contradictory — how can one have two basic rules of recognition? Surely they will clash. The answer is that they do not clash unless or until one is invoked in an effort to downgrade the importance of the other. It is quite theoretically possible that both s. 128 and s. 15 could be used to bring about various constitutional changes without necessarily treading on each other's toes. Yet the possibility always remains that s. 15 can potentially be used to downgrade the importance of s. 128, or vice versa. Also, it has been noted that the American constitution contains not one, but two independent methods of alteration.⁷³ If one method of constitutional change corresponds to one grundnorm, the American constitution thus contains two grundnorms not one. Similarly, on my interpretation of s. 15 of the British version of the *Australia Act*, the Australian constitutional system now has two grundnorms for the time being: s. 128 of the Constitution and s. 15 of the *Australia Act*.

The *Australia Acts* have brought about the formal, legal independence of Australia, even though, in a practical sense, Australia has been independent of Great Britain since at least the end of the Second World War. The *Australia Acts* were intended to be the formal culmination and recognition of a process that had matured into practical independence many years ago. Yet, on my view of s. 15, the *Australia Act* has achieved more than just the formal independence of Australia and the enhancement of the powers and positions of the Australian states. The Act provides a backdoor method of constitutional change, independent of s. 128 of the Constitution. If Australian politicians can reach unanimous agreement among themselves, and if they do not wish to run the formidable gauntlet of the democratic process under s. 128, they can use the procedures of s. 15 to bypass the will of the Australian people. It is not that my suggested interpretation of s. 15 provides a politically easier method of constitutional change than s. 128. My alternative would probably be equally difficult and equally rare to achieve in practice. Throughout modern Australian history, state and federal governments have not been renowned for their frequency of unanimous agreement on constitutional matters. But that is what s. 15 would require if s. 128 were to be bypassed. Section 128 involves the practical challenge of convincing enough people Australia-wide and in a sufficient number of states. Section 15 of the *Australia Act* will involve the equally great practical problem of convincing not just enough, but all, Australian governments and parliaments, state and federal.

72. See Part V of the *Constitution Act 1982*, contained in Schedule B of the *Canada Act 1982* (U.K.). Even the so-called "Meech Lake" proposals of June 1987 to amend, amongst other things, the constitution alteration provisions of the Canadian constitutional settlement of 1982, do not contemplate introducing anything remotely resembling a popular referendum into Canada's constitutional arrangements.

73. *Supra* nn. 69, 70.