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## **The dilemmas of drafting a Constitution for a new state\***

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### ***Introduction***

Most State Constitutions were first written in the 1850s and later revised, consolidated and re-enacted but not fundamentally re-written. Hence the wording of many provisions can be traced back to the 1800s, and sometimes even before that, as they were often based upon British provisions from the 1700s and before. There are two main exceptions to this proposition. On the one side is the Western Australian Constitution, which is to be found in two statutes from 1889 and 1899 and has never been revised or re-enacted. It continues to operate in its gloriously chaotic and confusing scheme, without substantial reform. On the other side is the Queensland Constitution, which was substantially re-written in 2001. It retains, however, old provisions from the 1867 Constitution that cannot be amended or repealed without a referendum. So it is a hybrid Constitution — both new and old. The challenge in writing a Constitution for a new State is to find the appropriate balance between the old and the new. Use of old terminology drawn from existing State Constitutions has the value of stability and plenty of judicial precedents concerning its meaning. It is therefore much easier to predict how it will be interpreted by a court. However, it has the disadvantage of being potentially incomprehensible to the people that the Constitution binds and the risk of being misleading to those unfamiliar with the constitutional principles that surround the interpretation of this archaic terminology. This is not only problematic from a public education point of view, but it is likely to give rise to particularly acute difficulties if the draft Constitution must be first approved by a constitutional convention comprised of people who are not experts in constitutional law and then

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\* This paper was delivered at the ASPG Annual Conference, Darwin, 3–5 October 2012. It discusses dilemmas that arose in drafting a ‘Constitutional Framework Document’ for the Northern Territory, a copy of which is appended to: Northern Territory Legislative Assembly, Legal and Constitutional Affairs Committee, *Report on the Statehood Program* (16 February 2012), Appendix E, pp 25–48: <http://www.ntstate7.com.au/sites/default/files/page-files/ConstitutionalFrameworkDocument.pdf>.

approved by the people in a referendum. The main challenge faced by the drafter, therefore, is the difference in the audiences to which the Constitution is directed. In the short-term, the Constitution must make sense to the people who must vote to approve its terms, both in a constitutional convention and a referendum, before it can have life as a Constitution at all. This is therefore an essential, rather than an optional, requirement. In the longer term, however, it must operate also as a document that is applied by Parliaments, Governments and the courts, in a consistent and predictable manner, with as few crises and controversies as possible. It must be comprehensible to both the people and the cognoscenti in quite different ways. It must also be practical and capable of amendment to deal with changing circumstances. It must therefore be all things to all people, which is extremely difficult to achieve. In this paper I will discuss some of these dilemmas, with a particular focus on the drafting of a new Constitution for the Northern Territory if it achieves statehood.

### ***Entrenchment***

When most people think of a Constitution, they think of it in terms of a document which has a higher status than ordinary legislation and which cannot be altered without undertaking a particularly arduous process, such as a referendum. People tend primarily to think of the Commonwealth Constitution and the United State Constitution, which are both fully entrenched Constitutions. State Constitutions, however, have always been different. They were enacted as flexible Constitutions, meaning that they can be changed by ordinary legislation, except in relation to particular provisions which may be entrenched. This was not necessarily the desire of the colonies in which they were first enacted. When the NSW Constitution was drafted in NSW in 1853, it was intended to be completely entrenched. The Select Committee of the NSW Legislative Council which prepared it, took the view that only limited amendments in relation to electoral boundaries and representation should be possible and that even these changes would require special majorities of two-thirds approval of the members of both Houses. Other provisions would not be able to be amended locally at all. One of the main founders of that Constitution, WC Wentworth, said:

It was the object of the committee who framed this Bill to frame a Constitution in perpetuity for the colony — not a constitution which could be set aside, altered and shattered to pieces by every blast of popular opinion.<sup>1</sup>

The British, however, took a different view and inserted in the *Constitution Statute* 1855, which approved the enactment of the NSW Constitution, a provision that permitted the NSW Parliament to amend or repeal provisions of the Constitution by ordinary legislation.<sup>2</sup> The British Parliament had always taken the view that it should not shackle the independence of its successors. It considered that the wisdom

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<sup>1</sup> W C Wentworth, second reading speech, *Constitution Bill* 1853 (NSW), 16 August 1853, in C M H Clark (ed.), *Select Documents in Australian History 1851–1900* (Angus & Robertson, 1955) p 335.

<sup>2</sup> 18 & 19 Vic, c 54 (1855) (Imp), s 4.

and foresight of current politicians would not necessarily be greater than that of their successors who ‘will possess more experience of the circumstances and necessities amid which their lives are lived.’<sup>3</sup> It was therefore a matter for every generation to shape and amend its Constitution to suit the circumstances in which it lived. Hence the Constitutions of the Australian colonies were deliberately made to be flexible Constitutions, rather than rigid Constitutions.

The reason why the Commonwealth Constitution had to be a rigid Constitution was because Australia is a federation and the respective powers of the Commonwealth and the States needed to be protected from unilateral amendment by either side. But this is not a problem for State Constitutions, which remained largely flexible. Today, the States are bound by both the Commonwealth Constitution and the *Australia Acts* 1986 (UK) and (Cth). Section 2 of the *Australia Acts* 1986 gives the States full legislative power, subject to the Commonwealth Constitution. As a State cannot unilaterally override the *Australia Acts*, this means that a State can’t abdicate the legislative power conferred upon it by the *Australia Acts*. A State Parliament cannot, for example, effectively legislate to deny itself the power to amend or repeal a law in the future, or to require someone else’s approval before it enacts or amends a particular law.

There is an exception, however, in s 6 of the *Australia Acts*. It says that where a State law is one with respect to ‘the constitution, powers or procedure’ of the State Parliament, it shall be of no force or effect unless it is made in such ‘manner and form’ as required by the Parliament. That ‘manner and form’ requirement might be approval by the people in a referendum or approval by a special majority of members of Parliament. This allows a limited category of State laws to be entrenched so that they can only be amended or repealed in the future by following such a manner and form of enactment. This category covers laws with respect to:

- the *constitution* of the Parliament (eg, how many Houses it has, how they are comprised, and the features which go towards giving the House its representative nature, such as single or multi-member electorates and redistributions);
- the *powers* of the Parliament (eg, powers with respect to deadlocks or powers to suspend or expel members); and
- the *procedures* of the Parliament (eg, provisions re standing orders).<sup>4</sup>

Section 6 of the *Australia Acts* does *not* support the entrenchment of other provisions, such as those concerning the courts or local government or human rights. Whether or not such provisions can be entrenched by reliance on other sources, such as s 106 of the Commonwealth Constitution, has not been resolved by

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<sup>3</sup> *McCawley v The King* [1920] AC 691, 703 (Lord Birkenhead LC), explaining the general British approach to the issue.

<sup>4</sup> See further on each category: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), pp 276–82.

the courts, but is doubtful.<sup>5</sup> It is likely that the provisions of the *Australia Acts* now cover exclusively the issue of entrenchment. Nonetheless, some jurisdictions, such as Victoria, have purported to entrench a wide variety of provisions, on the basis that even if the entrenchment does not have legal effect, it has a powerful political effect.<sup>6</sup> If the Constitution says that a referendum is required to change a particular provision, then the people will most likely feel cheated if they are denied the right to vote in a referendum. It would, of course, depend upon the importance of the provision. For example, in Queensland a provision concerning the appointment of public servants, which was purportedly (although not effectively) entrenched by a requirement that a referendum be held before it could be amended or repealed, was actually repealed by ordinary legislation. There was no great fuss and no one challenged the constitutional validity of the repeal.<sup>7</sup> If the provision, however, had been one protecting human rights, or Aboriginal land rights, for example, it is likely that the political furore arising from its repeal by ordinary legislation would be such that no government would be game to do it, despite the fact that the purported entrenchment was legally ineffective.

Entrenchment should ideally be preserved for fundamental matters, not details. Otherwise, when details need to be changed, Parliaments end up having to pass terribly convoluted and contorted provisions to avoid the cost of holding a referendum to fix a minor problem. For example, the NSW Constitution has an entrenched provision which requires voters to vote for at least 15 people in upper house elections in order for the vote to be valid. This meant that when the State moved to optional preferential above-the-line voting, each group above the line needed 15 members to ensure that if a person only voted 1 for a single group, the vote would be valid. Then there was the problem with what happened if one of the 15 died before the poll, so complicated 'death of a candidate' preference flows had to be included.<sup>8</sup> A great deal of care and an extraordinary degree of foresight needs to be exercised in order to predict how entrenched provisions might be used in the future and what constitutional implications might be drawn from them. It needs to be remembered that unentrenched provisions cannot give rise to binding constitutional implications, because later laws simply impliedly repeal or amend the constitutional provision, leaving any implication completely impotent. Entrenched provisions, however, have the potential to give rise to binding constitutional

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<sup>5</sup> *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 [70] (Gleeson CJ, Gummow, Hayne and Heydon JJ) regarding the application of s 106 of the Commonwealth Constitution; and [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); and [214]–[215] (Kirby J) regarding the application of the *Ranasinghe* principle.

<sup>6</sup> *Constitution Act 1975* (Vic), s 18.

<sup>7</sup> See s 146 of the *Public Service Act 1996* (Qld) which repealed s 14(1) of the *Constitution Act 1867* (Qld) and amended s 53 of it by removing reference to s 14 as an entrenched provision. See further: Anne Twomey, 'The Entrenchment of the Queen and Governor in the Queensland Constitution', in Michael White and Aladin Rahemtula, *Queensland's Constitution — Past, Present and Future*, (Supreme Court of Queensland Library, 2010) 185, 208–9.

<sup>8</sup> *Parliamentary Electorates and Elections Act 1912* (NSW), s 81C.

implications that may not be anticipated at the time. For example, in 1978 when the Western Australian Government entrenched a requirement that Members of Parliament be ‘chosen directly by the people’,<sup>9</sup> little did it know it was inserting an implied freedom of political communication in its Constitution.<sup>10</sup>

Another example of unexpected consequences happened in Queensland in 1977. The Parliament entrenched the provision which confers legislative power on the Parliament, being the power to make, amend and repeal ordinary laws. What it didn’t realise was that in doing so, it effectively limited its ability to entrench other provisions in the future. This was because any new entrenchment clause would impliedly amend or affect the Parliament’s ordinary legislative power, therefore requiring a referendum.<sup>11</sup> Western Australia followed Queensland in 1978 and made the same inadvertent error.<sup>12</sup>

These examples show that you have to be incredibly careful in entrenching provisions in the Constitution, because it can lead to unexpected consequences and real problems when entrenched provisions need to be changed in the future.<sup>13</sup> In my view, entrenchment should be limited to a very few, necessary provisions — such as those dealing with fixed term Parliaments, where a limit on parliamentary power is genuinely needed. Anything more is generally asking for trouble. The issue of entrenchment will be a major one that will need to be faced by a constitutional convention in the Northern Territory. It will have to decide:

- which provisions should be entrenched and which should remain flexible;
- whether to confine entrenchment to those provisions that can be legally entrenched under s 6 of the *Australia Acts* or to extend purported entrenchment to other provisions, even if this might be legally ineffective; and
- the nature of the manner and form requirements imposed — i.e., whether in all cases it should be a referendum, or whether it should be a special majority, or whether to have different levels of entrenchment, with some provisions being more deeply entrenched than others.

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<sup>9</sup> *Constitution Act 1889 (WA)* s 73(2).

<sup>10</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

<sup>11</sup> See further: EARC, *Report on Consolidation and Review of the Queensland Constitution*, August 1993, para 4.110; and S Ratnapala, *Australian Constitutional Law — Foundations and Theory* (2<sup>nd</sup> edn, OUP, 2006) 350.

<sup>12</sup> See further: Peter Congdon, ‘The History, Scope and Prospects of Section 73 of the *Constitution Act 1889 (WA)*’ (2012) 36(2) *University of Western Australia Law Review* 82.

<sup>13</sup> See: Peter Congdon and Peter Johnston, ‘Stirring the Hornet’s Nest: Further Constitutional Conundrums and Unintended Consequences Arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation’ (2012) 36(2) *University of Western Australia Law Review* 295.

### *Terminology*

The next dilemma is how to deal with terminology. Old forms of words have established meanings in constitutional law, but may be misleading to the general public. For example, when legislative power is conferred upon a Parliament, it is normally a power to make laws for the ‘peace, order and good government’ of the State.<sup>14</sup> Members of the public might then seek to argue that a law is not one with respect to ‘peace’ or is not a law with respect to ‘good government’. The judiciary, however (apart from a couple of minor deviations),<sup>15</sup> has long accepted that this phrase means that a full, or ‘plenary’, legislative power has been conferred upon the Parliament and that a court cannot strike down a law on the ground that it is not for the ‘good government’ of the State.<sup>16</sup> There is a risk that if different terminology is used, it might be interpreted in a different way — yet if the old terminology is used, it might be misleading to the general public.

Another example is the reference to a Governor holding office ‘at the Queen’s pleasure’. It encompasses the notion that a person continues to hold office at discretion, not for a fixed term, and that he or she may be removed at any time and for any reason or no reason at all, without the need for the application of natural justice. It probably also incorporates the concept of non-justiciability. How is such a concept to be conveyed in so few words without using this archaic and misleading terminology? It is misleading, of course, as it has nothing to do with whether or not the Queen is pleased with the performance of a Governor and everything to do with how the Queen is advised by her Premier under s 7 of the *Australia Acts*.

Many of the archaic phrases used in Constitutions concern the Crown — such as ‘office of profit under the Crown’, holding office at ‘the Queen’s pleasure’ or the reservation of bills ‘for the signification of Her Majesty’s pleasure’. This leads to the further question of whether in drafting a new Constitution for a State, one should draft with an eye to the future and minimise any references to ‘Crown’, ‘Queen’ and ‘royal’ in the Constitution. Is it preferable to talk about ‘assent’ rather than royal assent, or the ‘State’ or the ‘Executive Government’ rather than the Crown? This is particularly relevant to entrenched provisions.

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<sup>14</sup> Note that some Constitutions substitute ‘welfare’ for ‘order’. See the various formulations: *Constitution Act 1902* (NSW), s 5; *Constitution Act 1867* (Qld), s 2; and *Constitution Act 1889* (WA), s 2. *Constitution Act 1934* (SA), s 5 and *Constitution Act 1934* (Tas), s 9, relate back to the grant of legislative power given by the *Australian Constitutions Act 1850* (Imp) for ‘peace, welfare and good government’. Victoria is the only State to use different terminology, with s 16 of the *Constitution Act 1975* (Vic) giving its Parliament power to ‘make laws in and for Victoria in all cases whatsoever’.

<sup>15</sup> *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382–5 (Street CJ); *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2001] QB 1067, [57] (Laws LJ); and [71] (Gibbs J).

<sup>16</sup> *R v Burah* (1878) 3 AC 889; *Hodge v The Queen* (1883) 9 AC 117; *Powell v Apollo Candle Co* (1885) 10 AC 282; *Ibralebbe v The Queen* [1964] AC 900; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9–10.

In another case of an ill-thought-through act of entrenchment, the Victorian Government, in 2003, in widening the scope of its entrenched provisions, inadvertently entrenched references to ‘royal assent’ in s 18 of the Victorian Constitution so that both an absolute majority and a referendum is required to remove them. Prior to 2003, Victoria only required the support of an absolute majority in each House to implement a republic at the State level. It is likely that the Bracks Labor Government did not intend its 2003 amendments to increase the difficulty of cutting its ties with the Queen if Australia became a republic at the national level, by requiring in addition a State referendum as well as an absolute majority, but this is what it achieved.<sup>17</sup> So a further factor to contemplate, along with the removal where possible of archaic and misleading terminology is the extent to which a new Constitution should be drafted in contemplation of future change, but without pre-empting such change. It also raises issues of current views and contemporary standards. Is it still appropriate for Members of Parliament to make oaths of allegiance to the Queen, or would it be more in keeping with contemporary Australian life for Members of Parliament to pledge their loyalty to Australia and to the people of the State?<sup>18</sup>

### ***The inclusion of constitutional principles and offices***

A further significant issue in drafting a new State Constitution is the question of whether the Constitution should include reference to certain offices, bodies and principles, that form part of the ‘constitution’ in its broader sense but which have not, historically, been included in the written version. For example, it is often remarked that the Commonwealth Constitution contains no reference to the Prime Minister or the Cabinet. Should a new State Constitution refer to the Premier and the Cabinet and make some reference to their constitutional role? In addition, should the Constitution refer to the basic constitutional principles that underlie the Constitution, such as individual and collective ministerial responsibility? For example, the following provision could be included in a new State Constitution:

- (1) There shall be a Cabinet consisting of the Premier and all the other Ministers.
- (2) The Cabinet has the general direction and control of the government of the State and shall make policy decisions on behalf of the Government.
- (3) The Cabinet is collectively responsible to the Parliament for the performance by the Government of its functions and its exercise of executive power.

This, of course, gives rise to concern about justiciability. It may well be considered unwise to include such a provision if it were to result in courts adjudicating upon

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<sup>17</sup> See further: Anne Twomey, ‘One In, All In — The Simultaneous Implementation of a Republic at Commonwealth and State Levels’ in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010), pp 23–4.

<sup>18</sup> See, for example, New South Wales, where in 2006 the oath of allegiance of Members of Parliament was changed to a pledge of loyalty. In 2012 a further amendment was made allowing Members to choose whether to take an oath of allegiance or a pledge of loyalty when being sworn in: *Constitution Act 1902* (NSW), s 12 (for Members of Parliament) and s 35CA (for Executive Councillors).

questions of individual or collective ministerial responsibility. However, an express non-justiciability provision could be included, which would apply to all those provisions which ought not be made justiciable. The benefit would be to make constitutional conventions and principles clear both to those who must apply them and to the general public, making the Constitution more comprehensible and reducing the area for dispute while not expanding the scope for litigation. Other principles or conventions which might be included in the Constitution could include the principle upon which the Premier is appointed, for example:

- (1) The Governor, by commission, may appoint to the office of Premier a person who, in the Governor's opinion, can form a government that is best able to command the confidence of the Legislative Assembly.

It might also be wise to clarify when the Governor must act on advice, when the Governor may exercise discretion, and that when discretion is exercised it should be exercised in accordance with existing constitutional conventions and principles. Again, any such provision would need to be classified as non-justiciable.

### *New approaches*

Finally, there is the issue of whether new constitutional approaches should be taken in a new State Constitution. For example, should the Premier be appointed by the Parliament, rather than the Governor?<sup>19</sup> Should the Governor's reserve powers be codified or removed? Should there be an entrenched bill of rights in the Constitution or a set of guiding principles for Parliament in the enactment of its laws? Should executive power be defined and limited? Should there be a capacity to appoint a small number of Ministers from outside the Parliament?<sup>20</sup> While there are some constitutional constraints upon a State, such as the requirements of the Commonwealth Constitution and the *Australia Acts* 1986, there is still a lot of scope for innovation in the governmental system of a new State. The question to be asked is — what makes this new State different from the others, and how should the Constitution be shaped to accommodate this difference or to promote it by improving upon the constitutional systems in the existing States? One aspect of difference in the Northern Territory is its significant Aboriginal population. What aspects of Aboriginal governance, culture and rights could be drawn upon to shape a different Constitution for the Northern Territory? Again, it is a matter of balancing the benefits of stability and security in tried and true systems against the potential benefits of a better calibrated constitutional system that is shaped to meet the requirements of its people today and for the future. This is the challenge that the Northern Territory will face as it moves towards statehood. ▲

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<sup>19</sup> See, for example, the Australian Capital Territory.

<sup>20</sup> See further: Alysia Blackham and George Williams, 'The Appointment of Ministers from Outside of Parliament' (2012) 40 *Federal Law Review* 253.