

## Amending the Constitution

*John Hyde*

Most Labor politicians feel that the Constitution gets in the way of proper reforming zeal, but my money says that they will get few of the Constitutional amendments they want. Mr Hawke could ask the electorate to increase a Commonwealth government's powers, relative to the Governor General, the Senate, the States and the people. But he won't, because if he did the amendments would be rejected, recollections of Whitlam Labor would come flooding back, and the horses would be greatly frightened. Mr Hawke needs all his political strength for the economy. Rather than throw office away he will back off the Constitution, as he did the ID card.

Labor has tried quite hard to get its way. The membership of the Constitutional Commission was carefully chosen to legitimise their favourite amendments. However, that ploy will fail because the Commission does not have the standing or the arguments that will change the public's deep-felt distrust of concentrated power. Were the intention to disperse and reduce governmental power, I am sure the public's attitude to constitutional changes would be totally different.

Australians are not innately conservative. Two thirds of all State referenda and most of those Federal referenda that do not give the Commonwealth more power have been carried. The truth is simply that most referendum proposals emanating from Canberra favour Canberra, and that is what most people do not want.

Australian constitutional debate has been dominated by the unseemly squabbling of state and federal politicians about the rights of their own bailiwicks. Until the current Bill of Rights debate, there had been little discussion about the rights of individuals against all governments---local, state or federal. This is probably because Australians' rights are fairly well protected by the common law and liberal tradition. However, there are some gaps which a decent Bill of Rights might plug.

Before we place too much faith in constitutions, we should remember that constitutional law, like tax law, is as effective as the compliance it enjoys. Unfortunately, Australian governments regard their constitutions as challenges. They finance a large and successful constitution-avoidance industry. For instance, although the founding

fathers thought Section 92----"...trade, commerce, and intercourse between the states...shall be absolutely free"---- was unambiguous, modern governments contrive to make a mockery of it.

Nevertheless, a Bill of Rights which, among other things, attempted to protect people's rights to work and to choose their children's education would have some modest success. At present these basic rights are restricted by overbearing and discriminatory employment awards, or from tax-subsidy arrangements which favour state schools. Needless to say, these amendments are not on Labor's agenda. Neither has Labor recommended protecting other economic rights, such as the right our children should have not to be taxed to pay for our budget deficits.

Economic rights are central to economic recovery. Most modern economists and many public administrators now accept Mancur Olson's proposition that, the longer a society enjoys political stability, the more it is that powerful special-interest lobbies develop within it. By garnering special privileges for themselves, usually in the form of discriminatory laws, these lobbies make the economy inefficient, which reduces relative living standards. There is no better exemplar of the Olson thesis than Australia.

There can be no real doubt that our governments and parliaments legislated us into our economic mess by trying to satisfy vested interests which were demanding monopolies, tariffs, tax breaks and other rorts. In the absence of constitutional provisions to the contrary, our parliaments had all the legal authority they needed to award privileges and incur debts. This begs the question: is it practical to tie our legislators' hands with constitutional provisions which would prevent them favouring narrow interests over general interests and the present over the future?

To some extent it is. Several states in the USA restrict their legislatures' ability to incur debt. The U.S. Senate judiciary committee (which included the notorious 'wet', Edward M Kennedy) noted: "Such constraints have proved workable and have not inhibited significantly the ability of state governments to perform their most widely accepted functions". Now President Reagan has proposed an "economic bill of rights" which requires the Federal Government to balance its budget and any tax increase to be passed by more than a simple majority of the Congress. Its reception will be instructive and amusing to watch.

I think Australians would approve a similar amendment to our Constitution, but there is a more general and a surer way of making our legislators take less notice of narrow interests and more notice of what Olson called "encompassing interests". It is the Swiss, Italian, Californian, etc. practice of referring legislation to the people at referendum. It is advocated convincingly in the CIS publication, "Initiative and Referendum: The People's Law" by Geoffrey Walker.

If the Australian Constitution were to be amended so as to allow a modest number of voters, say 50,000, to demand a referendum asking for the repeal of federal laws, including

those authorising deficits, politicians would soon get out of the habit of passing the sort of laws the public would subsequently reject. The experience, where it has been tried, is that the public is less willing to make favourites, more liberal, more fiscally responsible, and more far-sighted, than the legislature. That is to be expected; they are too many to be bought or bullied by vested interests.

What is more, legislation which is not vetoed acquires a new legitimacy. This legitimacy will be needed when it comes to making economic recovery possible by stripping away the privileges of vested interests.

If, in the coming months, Mr Hawke should be casting about for a popular Constitutional amendment, I suggest "The peoples' veto" to him.

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