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Assessing the Legitimacy of Referendums as a Vehicle for Constitutional Amendment: Reform and Abolition of the Legislative Councils in Queensland and New South Wales

Ian Loveland*

1. INTRODUCTION

Prior to the 1970s, the use of referendums as an element of the lawmaking process was an exotic, almost alien element of the United Kingdom's constitutional discourse.[1] In Australia the referendum was, in contrast, a familiar feature of the constitutional landscape. For most United Kingdom constitutional lawyers, that familiarity was likely limited to an awareness of the Privy Council's judgment in *Trethowan v Attorney General for New South Wales*.[2] In *Trethowan*, the Privy Council had upheld a majority judgment of Australia's High Court deciding that s 5 of the Colonial Laws Validity Act 1865 (hereafter CLVA 1865) empowered New South Wales' legislature to enact entrenching devices for certain purposes which the courts would enforce even in the face of subsequent 'Acts' which purported to repeal or amend those entrenchment devices. The distinctly superficial nature of Lord Sankey's Privy Council judgment[3] perhaps explains why the *Trethowan* episode is often afforded only similarly superficial attention in the United

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1 For an insightful review of the place of referendums within the United Kingdom's constitutional tradition see M Gordon, 'Referendums in the UK Constitution: Authority. Sovereignty and Democracy after Brexit' (2020) 16 *European Constitutional Law Review* 213.

2 [1930] 31 SR (NSW) 183 New South Wales Supreme Court); (1931) 44 CLR 394 (High Court of Australia); [1932] AC 526 (Privy Council).

3 The judgment consists largely of a recitation of the background facts. It contains only 3 pages of reasoning: the only judicial authority which Sankey cites is the Australian High Court judgment in *Trethowan* itself.

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Kingdom's constitutional scholarship.[4] More careful consideration of the litigation and its various contexts may offer help to identify the yardsticks against which we might calibrate the acceptability of referendums as a means to find answers to difficult constitutional questions in modern democratic polities.[5]

2. THE EMERGENCE OF THE REFERENDUM AS A LAWMAKING DEVICE IN COLONIAL AUSTRALIA

The various British colonies in Australia were granted a significant degree of governmental autonomy from the mid-1850s. All initially chose to have a bicameral legislature composed of a Legislative Assembly and a Legislative Council. South Australia and Victoria adopted 'elected' Legislative Councils. These were designed to provide a firm foothold within the legislative process for conservative, even reactionary political sentiment, by setting high property-based qualifications for the electorate and even higher ones for Council members. In New South Wales and Queensland, the Legislative Council would be an appointive body. De jure the power of appointment was granted to the colony's Governor. Other than requiring that Councillors be British subjects, no formal qualification for membership were identified. Nor was there any statutory limit to the number of members. Appointees would hold office for life, subject to a personal power to resign if they so wished. The colonies' respective Constitution Acts were also silent on the question of the extent to which colonial Governors would act on the advice of their ministers and/or the Imperial government in appointing new Council members.

For the most part, the colonial legislatures would make law in the 'ordinary' British fashion: by a bare majority (of members voting) in each house plus (per the Governor) the royal assent. There were however some exceptions to that presumption. In New South Wales—and subsequently in Queensland—some areas of legislative competence were expressly subject to a more politically demanding lawmaking process.

S. 17 of New South Wales' original Constitution Act 1855 provided that any colonial Act altering the number of members in the Legislative Assembly or the boundaries of its constituencies had to be approved by a bare majority of all eligible members of the Council and a two-thirds majority of eligible members of the Assembly at both second

4 For analyses of varying degrees of thoroughness and sophistication see inter alia W Friedmann, 'Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change' (1950) 24 *Australian Law Journal* 103; HRW Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172; R Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: reconsidering Jennings and Wade' (2009) Public Law 519; J Goldsworthy, 'Trethowan's Case' in G Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2007).

5 In the eras discussed here (1908–1932), both Queensland New South Wales had systems of responsible government with an institutionally and ideologically fused legislature and executive, near universal adult electorates, frequent general elections, a firmly developed party system offering voters distinct ideological agendas, and a vigorous and politically quite pluralistic newspaper industry which frequently treated political and constitutional questions with great descriptive and evaluative rigour.

and third readings.[6] S.42 required that any Act altering the composition of the Legislative Council to a partly or wholly elected basis had to be passed by a two-thirds majority of all eligible members in both houses at second and third reading.[7]

Such protections against bare majoritarian reform—even if enacted on the basis that they would be enforceable in the courts—soon proved legally illusory. In both New South Wales and Queensland those purportedly entrenched provisions were repealed through colonial Acts passed in 'the ordinary way'; the rationale for this ostensibly bizarre state of affairs being that because the entrenched provisions were not themselves entrenched they could be repealed by a subsequent colonial Act passed in 'the ordinary way'. In New South Wales, ss. 17 and 42 lasted for just two years. Both provisions were repealed by the Constitution Act 1857. No member in either house suggested during that measure's passage that enhanced majorities were required, and the validity of the 1857 Act was not subjected to legal challenge. In Queensland, s.10 was repealed by the Constitution Act 1871. That measure was enacted amid fierce controversy in both houses that repeal of s.10 required enhanced majorities, but no legal challenge to the repealing Act's validity was brought.[8]

Despite the presence of these (not very) entrenched provisions in the (then) colonies' constitutions, it had seemingly not occurred to any colonial constitutional architects in the 1850s settlements that a referendum—even one involving the small portions of the population then enfranchised—was an appropriate means to demarcate certain political values as having an enhanced legal status, still less that it might serve as an element of the lawmaking process for more prosaic political issues. By 1910, that position had changed significantly.

2.1. Referendums as an Element of Sovereign Power in Australia's 'National Constitution'

The idea that referendums might be used a means to make (and repeal) legislation was a central element of the political programmes offered by the emergent Labour parties in colonial Australia from 1890 onwards.[9] By 1900 there had been lively debate in all of the colonies as to the relative merits and weaknesses of referendums both as a supplement

6 An identical proviso appeared in s.10 of Queensland's Constitution Act 1867.

7 Reproduced in Queensland as s.9 of the Constitution Act 1867.

8 See I Loveland, *McCawley and Trethowan, The Chaos of Politics and the Integrity of Law: Volume 1: McCawley* (Hart, 2021) 56–58, 127–31; (hereafter Loveland, *McCawley*). The sponsor of the bill, Charles Lilley (formerly Premier and soon to became Chief Justice of Queensland) described it as a 'singular omission' that the 1867 Act had not sought to entrench ss 9–10 by requiring that their repeal or amendment would also require a two thirds Council majority; *Queensland Legislative Assembly Debates* (hereafter *QLAD*) 1 December 1870 p166. *The Law and the Constitution* (University of London Press, 5th edn 1959) 144–71.

9 P Kildea, 'The Law and History of State and Territory Referendums' (2022) 44 *Sydney Law Review* 31.

to the ordinary bicameral legislative process and as an alternative to the assent of the upper house in respect of bills which had passed in the legislative assemblies.[10]

The legitimacy of the federation process had hinged substantially on its approval in referendums in all the colonies. That process lent the (national) constitution building project obvious roots in a formative notion of 'popular sovereignty'. But the referendum device also contributed to a continuing manifestation of the popular sovereignty concept.[11] Many 'Australian' politicians involved in creating the constitutional text enacted by the Imperial Parliament as the Commonwealth Constitution Act 1900 were familiar with, and some were very much enamoured of, the political and legal principles underlying the United States constitutional settlement, and in particular the need to differentiate between 'fundamental' and 'ordinary' law. In that sense, the Act obviously followed the United States rather than British constitutional principle and practice by removing amendment of its own provisions from the ordinary lawmaking process. But it broke with the American example by creating an internal sovereign lawmaker[12] (in s 128) premised on a multiple referendum system which required bare majority support for the proposed amendment both on an overall national basis and in a majority of States. With remarkable rapidity, the referendum became—at least in theory—not just an orthodox but an almost sanctified feature of Australia's political landscape.[13] That status was perhaps underpinned by the brute political fact that 'the people' (to use a legally inexact but symbolically powerful political term to characterise the s 128 lawmaker) consistently rejected amendments proposed by the national government. S 128 was therefore rapidly established as a populist check on what might be regarded as the ill-conceived and unwanted ambitions of the colony's political class.[14]

2.2. First Usage in New South Wales—the 1903 Reforms to the Legislative Assembly

The referendum first appeared in New South Wales as a 'constitutional' State lawmaking device in 1903. Its use was targeted at a narrow question; namely the number of seats that the (now, post-1901) State should have in its Legislative Assembly. The measure was promoted by a centrist administration, with Labour party support, and enacted as the Reduction of Members Referendum Act 1903.[15] The Act simply made provision for a referendum to be held. The question set was should the Legislative Assembly

10 For a contemporaneous account and critique see L Tomn, 'The Referendum in Australia and New Zealand' (1897) *Contemporary Review*; (https://adc.library.usyd.edu.au/data-2/fed0043.pdf.).

11 The differing notions of 'popular sovereignty' at play within Australian political thought and practice at this time are explored in B Saunders and S Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30 *Public Law Review* 36.

12 In terms of legal theory, the Act was always subject to amendment or repeal by the Imperial Parliament.

13 For an overview see Saunders and Kennedy, op cit fn 11.

14 See generally R Miles, *Matters of the Heart and the Heart of the Matter: the Constitutional Referendum in Australian Politics* (Sage, 200) chs 1–2, and more concisely, R Miles, 'Australia's Constitutional Referendum: a Shield not a Sword' (1998) 35 *Representation; Journal of Representative Democracy* 237.

15 https://www.austlii.edu.au/cgi-bin/viewdb//au/legis/nsw/num_act/romra1903n13334/

(which then had 125 seats) be reduced to a 100, 90 or 80 seat chamber. The electorate was defined as those entitled to vote in national Senate elections, (which since the passage of the national Commonwealth Franchise Act 1902 had included women and men aged 21 or over and did not impose any property qualification). Voters were invited to list their desired result in order of preference, with second choices to be considered if no option attracted 50 per cent+1 support of first preference votes. No minimum turnout was specified as a prerequisite of a valid result. Perhaps more significantly, the Act's text did not even try to attribute any binding consequences to the result of the vote. In strict legal terms, the referendum outcome could be no more than advisory. The then Premier, Sir John See, nonetheless suggested during the bill's passage that he would consider himself obliged to promote a bill to implement that result, that the legislature would similarly be obliged to enact that bill, and that pre-emptive approval in a popular vote would lend any enacting legislation (passed in the ordinary way) an enhanced normative status in future, at least in a moral sense:

> The question is whether the present proposal is the best means of ascertaining the voice of the people on the question of reduction of members. In my judgement it is the best way and the only way. A vote of this House would have no effect. If I carried a bill through Parliament that the number should be reduced to seventy or eighty, the next Parliament might undo it.[16]

The previous year, the legislature had—somewhat haphazardly[17]—overhauled the New South Wales Constitution Act. That statute had not made any provision for holding referendums. The 1903 legislation passed through the legislature with seemingly little thought being given to its constitutional implications, whether in terms of the 1902 Act or whether it might fall within s 5 of the CLVA 1865. Shortly afterwards, a rather more constitutionally informed variation on the referendum theme surfaced in Queensland's legislature.

3. THE REFERENDUM AS AN ALTERNATIVE LAWMAKER—QUEENSLAND'S 'CONSTITUTIONAL' REFORMS 1908–1022

Queensland's first Labour government was a minority administration which held office for barely a week in 1899. The party's first significant experience of government was from 1903 onwards, as the numerically and ideologically dominant partner in a coalition administration nominally headed as Premier by the leader of the smaller (politically more centrist) coalition party.[18] William Kidston, ideologically a Fabian rather than a socialist, was briefly (and by far) the leading figure within the Labour party

16 *NSWLAD* 12 November 1903 p4203. In the event, the 90 members option attracted 73% of the first preference votes, a result given legal form in the Electorates Redistribution Act 1904.

17 Discussed in Loveland, *McCawley*, 202–06.

18 On the government's programme, which was notably radical and in the main successfully implemented, see D Cook, 'The Crucible – Labour in Coalition 1903–7' in D Murphy, R Joyce and C Hughes (eds), *Prelude to Power* (Jacaranda Press, 1970).

before leaving it in 1907 to form his own more conservative party, which governed in loose coalition with Labour after the 1907 elections.[19]

Kidston's programme embraced significant labour market and welfare policy reforms, as well as enfranchising women. Although commanding an effective Assembly majority, Kidston faced considerable obstruction in the Legislative Council, where the clear majority of members, even if not formally aligned to an opposition party, were of distinctly conservative political predisposition and frequently had little compunction in voting against government bills. Such obstruction of the lower house was neither a new nor an exclusively anti-Labour phenomenon. It had occurred frequently in the nineteenth century, both before and after the Assembly was contested on the basis of clearly organised political parties, as a means for conservative political sentiment to block progressive initiatives approved in the Assembly. Deadlock had occasionally been broken by the Governor accepting advice from his ministers to appoint additional pro-government members to the Council to secure the passage of particular bills, but by the early 1900s there was neither a legal nor conventional basis for assuming that a Governor should do so to give a government a consistent working majority in the Council.[20]

Kidston supporters in the Council were few and far between. But rather than press the State's various Governors to create a pro-government majority in the Council, Kidston proposed the use of referendums to overcome a Council rejection of bills approved in the Assembly. Kidston's government had resigned in November 1907 and been granted a dissolution on this question. The proposal had formed the main plank of the Kidston party and the Labour party's campaign in the February 1908 election, which election left the coalition with 47 (25 Kidston; 22 Labour) of the Assembly's 72 seats.

3.1. The 1908 Acts

The first step in the reform initiative was an Act—passed in the ordinary way—to remove the requirement in s.9 of the Constitution Act 1867 that any Act altering the composition of the Council had to have been supported by two-thirds of eligible Council members at both second and third reading.[21] This measure, to be called the Constitution Act Amendment Act 1908, would then be followed by an Act—again passed in the ordinary way—providing that if a bill had passed the Assembly in two consecutive sessions but had on each occasion not been passed in the Council then the Assembly could the send the bill for consideration in a referendum. The proposed

19 See D Murphy, 'William Kidston; a Tenacious Reformer' in D Murphy and R Joyce (eds), *Queensland Political Portraits* (University of Queensland Press, 1978); B. Wanka, 'William Kidston – the Dilemma of a Powerful Leader' in D Murphy, R Joyce and C Hughes (eds), *Labour in Power: The Labor Party and Governments in Queensland 1915–57* (University of Queensland Press, 1980).

20 See generally Loveland, *McCawley* 133–41.

21 Repeal of s 9 had been raised but was ultimately not pursued when s 10 was repealed (in the ordinary way) in 1871; see Loveland, *McCawley* 123–31.

referendum electorate would mirror that entitled to vote in State and national elections, there would be no minimum turnout requirement, and a bare majority of votes would determine the result. If approved in the referendum, the bill could then (but would not have to be) be sent for the royal assent, which when granted would give the bill the status of an Act.

The rationale for this two-stage process of reform echoed what had happened in New South Wales in 1857 and in Queensland in 1871. Kidston's reasoning[22] was that as matters then stood a referendum bill would fall within the scope of s 9, and so required a two-thirds majority in the Council, a majority which—unless the Governor acceded to a 'packing request'—Kidston had no prospect of achieving. S 9 itself however could be repealed in the ordinary way, whereupon the referendum statute could also be enacted in 'the ordinary way'.

Both steps perhaps ought to have been harder to achieve than they proved in practice. A peculiar constitutional law idea had emerged in Queensland law in 1906–1907, to the effect that Queensland's Constitution Act 1867 (and by implication such Acts in all the other States, as the Queensland principle was approved in the High Court of Australia) could not be amended by a statute passed in 'the ordinary way'. Rather, the Constitution Act was subject to what might be termed 'Two Act entrenchment'. The legislature would have to enact a statute (in the ordinary way) expressly providing that it intended to amend specified provisions of the Constitution Act in a subsequently enacted statute and then effect that amendment through a second statute which expressly effected the alteration; (what we might call 'an empowering Act' and 'an effecting Act').

Two Act entrenchment had unusual origins. It first appeared as a defence argument in a criminal prosecution; (the relevant case is *Cooper v Commissioners of Income Tax*)[23] brought against the State's then Chief Justice, Pope Cooper, for non-payment of his income tax. Cooper's argument was that imposing such liability altered a proviso of the Constitution Act 1867 and so could only be effected by the Two Act process. The idea had no root in the 1867 Act's text, nor in legislative discussions leading to its enactment. Neither was there any judicial authority supporting the idea. Nor had the process ever been used on the many occasions when Queensland's legislature had amended the 1867 Act. Australia's High Court nonetheless approved the principle in a unanimous judgment.

But, despite having the High Court's imprimatur, *Cooper* had little traction on political activities. Strictu sensu, both of the 1908 Acts were invalid if *Cooper* was correct, as each was 'an effecting Act' and so should have been—but neither was—preceded by 'an

22 The legal analysis appears to have come from Kidston's Attorney General, William Blair, a lawyer-politician of some considerable expertise and integrity, who subsequently became the State's Chief Justice; Biography—Sir James William Blair—Australian Dictionary of Biography (anu.edu.au).

23 [1907] ST R Qd 110 (Queensland Supreme Court); (1907) 4 CLR 1304 (High Court of Australia). See generally I Loveland, '"Embarrassing and Even Ridiculous": the Short-Lived Rise and Fall of Chief Justice Pope Cooper's "Two Act Entrenchment" Thesis in Early Twentieth Century Queensland' (2023) 42 *University of Queensland Law Journal* 29.

empowering Act'. The point was not taken by any member of either house during the bills' passages, nor was any legal challenge immediately made.

The s 9 repeal bill passed easily through the Assembly,[24] but garnered a majority of just two at Council second reading.[25] In the subsequent Assembly debates during the passage of the Parliamentary Bills Referendum Act 1908[26] Kidston and his ministers portrayed the referendum as a vehicle for the exercise of 'popular sovereignty':

> Once this Bill becomes law, it will undoubtedly be true that the destinies of the people of Queensland, in a political sense will be in their own hands … it will really give the people of Queensland complete power over their own destinies.[27]

Kidston suggested however that this 'complete power' would rarely, if ever be used. His presumption evidently was that conservative or reactionary majorities in the Council would be so fearful of having their opposition to a bill overturned by a referendum that they would almost invariably accede to the government's wishes.

In contrast to what had occurred in New South Wales in 1903, these Acts were clearly seen as having 'constitutional' status.[28] But their short-term political effect was entirely insignificant, as immediately after their passage Kidston then stepped firmly to the political right, abandoning his alliance with the Labour party and fusing his own party with the former conservative opposition. Having led the new party to a comprehensive victory in the 1909 Assembly election, Kidston retired from political life without making any use of the referendum mechanism.[29] Some seven years later, the referendum route to constitutional reform finally became a live political issue and the legality of the 1908 Acts was raised in the Queensland courts by the State's third Labour Premier, Tom Ryan.

3.2. The *Taylor* Litigation and the 1916 Referendum

Ryan was much the dominant figure in Queensland politics in the first world war era.[30] The son of illiterate and impoverished Irish immigrants, Ryan qualified as a barrister and built a thriving trade union and employment law based practice before winning

24 *QLAD* 19 March 1908 p231; 20 March 1908 p276. The Act is at Constitution Act Amendment Act of 1908 (8 Edw VII, No 2) (austlii.edu.au).

25 *Queensland Legislative Council Debates* (hereafter *QLCD*) 2 April 1908 p495.

26 Parliamentary Bills Referendum Act of 1908 (8 Edw VII, No 16) (austlii.edu.au).

27 *QLAD* 6 April 1908 p572.

28 See the speech of Kidston's Attorney-General William Blair at second reading of the referendum bill; *QLAD* 6 April 1908 pp 566–67.

29 In an ironic political moment, use of the referendum Act was first threatened (in 1912) by Kidston's successor as Premier, Digby Denham, a conservative politician who had vehemently opposed the measure's enactment on the basis of its constitutional illegitimacy, when he found the Council obstructing his proposed alcohol licencing reforms.

30 D Murphy, *T.J. Ryan: A Political Biography* (University of Queensland Press, 1975) is the most thorough account of Ryan's career. A condensed account is provided in D Murphy, 'Thomas Joseph Ryan: Big and Broadminded', in Murphy and Joyce op cit fn 19 supra.

a State Assembly seat for Labour in 1909. By 1912 Ryan had become party leader. In the 1915 Assembly election Labour won 45 of the house's 72 seats.

Council abolition was a key part of Ryan's political programme, as he had anticipated—unsurprisingly and entirely correctly—that the Council majority would block much of his government's intended legislative programme. An abolition bill passed the Assembly in November 1915 and was rejected by the Council. Those events were repeated in September 1916, whereupon Ryan announced that he would put the question to a referendum under the 1908 Act.[31] The rationale echoed Kidston's parliamentary speeches during the Act's passage—that the wishes of 'the people' should prevail over the preferences of the Council.

This prompted a legal challenge from William Taylor, a Council member since 1886. The crux of the appellant's argument in *Taylor v Attorney-General*[32] was threefold. Firstly, that there was no mechanism within State law permitting abolition of the Legislative Council; that was an objective that could only be achieved by Imperial legislation. Secondly, alternatively, following *Cooper,* both of the 1908 statutes were invalid because they had not been enacted in accordance with the Two Act entrenchment principle. Thirdly, again alternatively, if the 1908 referendum legislation was valid, its lawmaking process could not be used to abolish the Legislative Council because the Assembly plus referendum plus royal assent process should be seen as having created a delegated legislature whose powers did not extend to altering the identity of its creator.

Ryan stood as his government's leading counsel in *Taylor.* The crux of his argument was that Queensland's legislature had the capacity, enacting legislation in the ordinary way, to alter its composition; such capacity being found either in cl 22 of the State's (qua colony) founding Order in Council or in s 5 of the CLVA 1865. Despite Ryan's best endeavours, Taylor's argument succeeded on all grounds in the State Supreme Court.[33]

That decision was then reversed in the High Court, whose members unanimously accepted Ryan's submissions that that s 5 of the CLVA 1865 provided an adequate legal basis for enacting the 1908 referendum legislation and that 'the legislature' comprising a bare majority in the Legislative Assembly, a bare majority in the referendum, and royal assent enjoyed just the same lawmaking competence as the legislature in its original form.[34]

That legal success proved pyrrhic in political terms. The referendum was subsequently held on 5 May 1917. 61 per cent of voters rejected the abolition proposal. This should perhaps not be seen as a popular endorsement of the appointive upper

31 The scheme of the Act required the government to issue a proclamation making provision for holding the referendum, which Ryan did in April 1917.

32 [1917] St R Qd 208.

33 *Ibid.*

34 It seemed not to have occurred to anyone involved in the case (or if it had occurred to Ryan he kept very quiet about it) that 'Two Act Entrenchment' might be a 'colonial law' within the meaning of s 5 of the CLVA 1865.

house. Ryan's biographer has suggested the referendum question was framed in potentially confusing terms to the careless reader.[35] The substantive question in issue was whether the bill to abolish the Council should be enacted. That question was presented to voters in the following form with the instruction to mark the appropriate box:

- I vote *for* 'A Bill to amend the Constitution of Queensland by abolishing the Legislative Council.'
- I vote *against* 'A Bill to amend the Constitution of Queensland by abolishing the Legislative Council'.

The suggestion was that some voters simply fastened on the start and finish of each question; ie 'I vote for … the Legislative Council' and 'I voted against … the Legislative Council' and so ended up miscasting their votes. Whether the criticism is well-founded is unclear. But the State's conservative press certainly took some pleasure in seeing Ryan' appeal to 'the people' go so badly awry.[36]

The Privy Council subsequently refused permission (at an oral hearing)[37] for an appeal in *Taylor*, in part because the specific issue concerning the abolition referendum was then moot, and in part because the Court (Viscount Haldane presiding) thought the broader issue of the scope of CLVA 1865 s 5 should only be argued in circumstances where other colonial governments had the opportunity to intervene.

The next year, Haldane cast considerable doubt on the legality of using referendums as a lawmaking device in any colonial setting where there was no explicit authorisation to do so in an Imperial statute. The Privy Council judgment in *Re Initiative and Referendum*[38] concerned an attempt by Manitoba's Legislature to use a referendum as an alternative rather than just an addition to the usual legislative process. The particular provincial statute was considered ultra vires the Province's powers under the British North America Act 1867 as it affected the lawmaking role of the Crown, but Haldane[39] also suggested that he would take some persuading that a colonial legislature could bring an 'alternative legislature' into being, whatever form that alternative might take:

> No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* [(1881) 9 AC 117], the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to

35 Murphy (1975) op cit fn 30 245–46.

36 See for example the collection of articles in the *Brisbane Courier* 8 May 1917 p7.

37 [1918] St R Qd 194.

38 [1919] AC 935.

39 Haldane was much the dominant figure on the Privy Council in the later 1901 and 1920s matters pertaining to colonial constitutional law. See J Robinson, 'Lord Haldane and the British North America Act' (1970) 20 *University of Toronto Law Journal* 55; S Wexler, 'The Urge to Idealise: Viscount Haldane and the Constitution of Canada' (1984) 29 *McGill LJ* 608.

> taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.[40]

Whether Kidston's 1908 referendum legislation would have survived Privy Council scrutiny had *Taylor* been argued on substantive grounds is an open legal question. But in Queensland that legal question was—at least for the purposes of the continued role of the Legislative Council—about to become politically redundant.

3.3. The Abolition of Queensland's Legislative Council

Ryan, his eye firmly on becoming leader of the national Labour party, resigned as State Premier in 1919 to take a seat in the House of Representatives.[41] His successor, Edward (Ted) Theodore, was equally committed to abolishing the Legislative Council, but pursued that end through rather different means. By this point the Privy Council, in *McCawley v The King*, had dismissed as 'embarrassing and even ridiculous'[42] the Two Act entrenchment principle upheld by the High Court in *Cooper* and *Taylor*. In *McCawley*, Ryan's government had persuaded the Privy Council firstly—and in principle most importantly—that Queensland's legislature had the power to enact all manner of legally enforceable restrictions on its own lawmaking competence; and secondly that while 'Two Act entrenchment' could be regarded in theory as such a restriction it had never actually in practice been created as an element of Queensland law. Any such entrenchment device would only be enforceable in court if it was identified with 'meticulous precision' in either Imperial or Queensland legislation.

McCawley—if only *sub silentio*—seemingly confirmed (contra Haldane's musings in *Re Initiative and Referendum*) that the referendum route to Legislative Council abolition would prove valid if put to the test before the Privy Council. But given that there was no 'meticulously precise' device in Queensland law granting any entrenched legal status to the Council, it was also evident that—in purely legal terms—the route to abolition could be found in ordinary bicameral bare majority legislation. This was Theodore's favoured method, likely because he assumed that a single issue referendum would, as in 1917, not deliver a majority.

The first stage of the process required Theodore to take a step of unimpeachable legality but questionable legitimacy. In January 1920 Theodore successfully prevailed upon the departing State Governor to appoint as Lieutenant Governor, pending the arrival of the Governor's successor, one William Lennon, a senior Labour party politician. The Lieutenant Governor would exercise all of the Governor's legal powers

40 [1919] AC 935, 945.
41 Ryan died of pneumonia in 1921when only 45 years old.
42 [1920] AC 691, 705.

during the short interregnum. Lennon promptly appointed 14 new Labour members (dubbed in the local press 'the Suicide Squad') to the Council, thereby creating a majority to pass an abolition bill if and when the time arrived.

Theodore then made abolition by an ordinary Act a central plank of the Labour Party's 1920 election campaign. Labour won 39 of the Assembly's 72 seats at the election; an abolition bill was eventually introduced in October 1921. Ryan's 'Suicide Squad' subsequently performed as he anticipated when they were appointed, and the Council was abolished later that month.[43] No legal challenge to the validity of the abolition legislation was made. Imperial legislation[44] required that the Act be reserved to the Imperial government for assent. Insofar as the then Secretary of State for the Colonies (Winston Churchill) saw a constitutional issue in play, it was only whether the matter should be viewed as one of purely Queensland concern, and as such not something with which he should interfere. And that was indeed the view he took.[45]

One obvious consequence of abolition was that Kidston's referendum Act, while not formally repealed, had become entirely redundant. A lawmaking mechanism to overcome a Legislative Council veto had no role to play once the Council had been abolished. The more intriguing questions are perhaps why Theodore had no compunction, and the electorate offered no evident objection, about resorting to swamping the Council with government supporters rather than using the 1908 Act to pursue the Council's abolition.

Theodore had chosen the same route to achieve a second major element of constitutional reform in 1921. The Judges Retirement Act 1921 imposed a 70 year old retirement policy on the State's Supreme Court judges. The government had promoted the measure as a wholly non-partisan modernisation initiative. That its principal immediate effect was to remove from the bench several judges (including Cooper) who had consistently decided cases against both Ryan and Theodore's administration rather gave the lie to that assertion.

But Theodore's use of the swamped Council rather than referendum tactic was certainly not electorally damaging. At the 1923 Assembly election, Labour increased its representation in the 72 seat house from 38 to 43. The notion that a referendum was the most, still less the only, legitimate way to effect constitutional change had seemingly not fastened itself at all, let alone firmly, in Queensland's contemporary political culture.

4. THE REFERENDUM AS AN ENTRENCHMENT DEVICE—NEW SOUTH WALES' 'CONSTITUTIONAL' REFORMS IN 1929

Abolishing the State's Legislative Council was a constant element of the New South Wales' Labour party programme in the early twentieth century. The first serious

43 The abolition legislation was styled as the Constitution Act Amendment Act 1922.

44 The Australian States Constitution Act 1907.

45 Churchill's despatch to that effect is in the *Brisbane Courier*, 31 March 1922 p8.

attempt to enact the policy was made in 1926 by an administration led by Jack Lang which had a small Assembly majority.[46] Echoing Theodore's strategy, Lang had assumed he had laid the ground to achieve abolition—through the ordinary bicameral legislative process—by persuading the then Governor to appoint sufficient new Labour members (a new South Wales variant of Queensland's 'Suicide Squad') to the Council to create a government majority there for the abolition bill. A clutch of Labour Council members however deserted the party in the crucial vote, and the bill was not passed.[47] Before the matter could be pursued anew, Labour was defeated at the 1927 Assembly election, and replaced by a Conservative administration headed by Sir Thomas Bavin. As the 1930 general election approached, it seemed clear that Lang would again win an Assembly majority and again seek to abolish the Council. That was an eventuality Bavin sought to prevent by promoting a bill to alter one aspect of the State's constitution. The referendum was the device chosen to effect this change. And unlike the situation which had prevailed in New South Wales in 1903, that the choice had constitutional implications dominated political debate.

The legal path toward doing so had been clarified by the Privy Council in *McCawley*. Properly understood, the ratio of *McCawley* had not been that the Queensland Constitution Act *could not* be protected by 'Two Act Entrenchment', but that it *had not* been so protected. It was within the competence of Queensland's legislature to pass legislation in 'the ordinary way' that created all manner of entrenchment devices within the State's constitution which courts would uphold. Such power derived, as Ryan had argued in *Taylor*, either from cl 22 of the Order in Council or s 5 of the CLVA 1865.[48] There was no obvious equivalent of cl 22 in New South Wales' constitutional structure, but s 5 was as relevant there as in Queensland. Careful reading of *McCawley* presented credible grounds for believing that a 'meticulously precise' entrenchment device would survive legal scrutiny.

4.1. The Bavin/Peden Proposal and s 7A of the Constitution Act 1902

The ostensible purpose of the amendment to the New South Wales Constitution 1902 (which took the form of a new s.7A) was to prohibit the abolition of the Legislative Council unless the 'Act' which effected abolition was enacted in a manner that comprised *four* distinct steps rather than the ordinary three. S.7A apparently required that after the relevant bill had passed (inferentially by simple majority vote) in the Assembly and Council it had to be put to and approved by a (bare) majority of

46 On Lang see variously B Nairn, *The 'Big Fella': Jack Lang and the Australian Labour Party 1891–1949* (Melbourne University Press, 1995): and the collection of essays in H Radi and P Spearritt (eds), *Jack Lang* (Hale and Iremonger, 1977).

47 See H. Radi, 'Lang's Legislative Councillors' in Radi and Spearritt op cit fn 46.

48 The point is more clearly made in the dissenting High Court judgments of Isaacs and Rich, which judgments the Privy Council endorsed unreservedly; (1918) 26 CLR 9: [1920] AC 691, 701.

voters in a referendum before the Governor could give his assent. To preclude the possibility that this entrenchment device could be repealed by ordinary legislation, as had happened in 1871 in New South Wales and 1908 in Queensland, s.7A also provided that s.7A itself could only be repealed by an Act which had gone through that same four step process.[49]

The scheme and wording of S.7A seems to have been primarily the work of Sir John Peden, who had been for many years the Dean of the University of Sydney Law School. Peden had been appointed to the Council in 1917 and had become its President at Bavin's behest in 1927. Despite his role in formulating the text of s.7A, and despite his status in the Council, Peden played no more than a de minimis role during the legislative debates on the measure. In an extra-legislative speech, Peden expressed doubts that a court would uphold s.7A against a subsequent repealing Act passed in the 'ordinary way'.[50] It does however seem clear that the Bavin/Peden bill was piloted through the Assembly and Council not on the basis that it *would certainly be* legally effective, nor even that *it might be* legally effective; but that it *would not be* legally effective. Bavin and his ministers were quite candid in debate that they perceived s.7A to be an impediment that would exist only in the political sphere. Whether such assertions were sincerely made is impossible to gauge. That they were repeatedly made is not in doubt. The clearest exposition comes from Bavin's Attorney-General, Francis Boyce:

> I will admit at once that this bill[*sic*] could repealed by another Parliament. I do not suppose anyone needs authority for that … but I read from Dicey on the "Law of the Constitution" where that gentleman says:
>
> That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure … .[51]

It seemed not to have occurred to Boyce or any of his party colleagues that *McCawley* provided an obvious counterpoint to this position, and that per *McCawley* s 5 of the

49 This 'double entrenchment' appears in the South Africa Act 1909. That Act empowered South Africa's Parliament to make almost all laws by the ordinary bicameral bare majority plus assent process. S.35 provided that a person could be deprived of his/her voting rights on the basis of her/his race only by an Act passed by a unicameral joint sitting in which at least two thirds of eligible members approved the relevant bill. S.152 then provided that s.35 and s.152 themselves could only be repealed by the two thirds majority unicameral process. Such 'double entrenchment' might have prevented the 'ordinary way' repeal of the enhanced majority provisos in the New South Wales (in 1857) and Queensland (in 1871 and 1908) Constitution Acts. The double entrenchment mechanism was put forward by the then Premier of the Cape Colony, John Merriman; see I Loveland, *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa 1855–1960* (Hart, 1999) 121–28. Merriman was perhaps inspired (this is no more than a guess) by the contemporaneous observations of the esteemed constitutional law commentator Arthur Berridale Keith concerning events in Queensland in 1908 in his *Responsible Government in the Dominions*, 127–29 (Stevens and Sons, 1909) that such a device would be legally effective.

50 In a lecture to the New South Wales Constitutional Association, reported in the *Sydney Morning Herald,* 1 April 1930, 10.

51 *NWSLCD* 10 May 1928 p505. See also Bavin at *NSWLAD* 12 March 1929 p3264: '[W]e do not seek to bind future Parliaments. We could not do that, even if we wanted to do that'.

CLVA 1865 offered colonial legislatures a means to enact at least some types of entrenching legislation. And in some senses, the text of the bill could certainly be portrayed as having the 'meticulous precision' which Birkenhead had identified as a necessity in *McCawley*.[52]

Bavin's justification for the bill in political terms was targeted primarily at what he portrayed as the illegitimacy of Lang's previous unsuccessful attempt to abolish the Council through swamping it with government supporters. This was allied with what was presented as a more general concern with constitutional principle:

> I do not think any hon. member will object to the principle which is embodied in this measure. That principle is that before a fundamental alteration is made in the Constitution of the State the people must be consulted.[53]

Bavin also defended this proposition by suggesting the State's constitution should be aligned with Australia's national constitution by recognising that a distinction should be drawn in terms of lawmaking process between 'fundamental' and 'ordinary' law.[54] His speech on this point is distinctly unconvincing. This is in part because he insisted that the 'fundamental' versus 'ordinary' law distinction was one concerned only with laws controlling the nature of the lawmaking process ('fundamental') and all other laws ('ordinary'). The distinction makes no sense if one is seeking to root it in the national constitution. Much of the 'fundamental' law contained in Australia's Constitution Act was concerned with demarcating the substance of the laws which the national Parliament and the State legislatures respectively could enact. Furthermore, Bavin's bill was limited to the single issue of Council abolition, rather than being applicable to any and every alteration to the State's Constitution Act 1902 as was s 128 in the context of the national constitution.

These weaknesses seemed to pass the Labour party by. Lang and other Labour members had attacked the bill primarily on the grounds of legitimacy rather than legality. In prosaic terms, that argument was that the legitimacy of Bavin's bill was compromised by the fact that its own enactment was not dependent upon its approval in a (bare majority) referendum. Bavin's unpersuasive response to this criticism was that since his party had put the proposal before the electorate in the 1927 Assembly election, 'the people' of the State had already both been consulted on and approved its enactment. [55]

Lang's parting shot in parliamentary debate was however aimed at the bill's legal rather than political character:

52 Although Peden and Bavin evidently gave no thought—for the text of the bill did not broach the issue—to how the entrenchment provisos would be enforced. No sui generis jurisdiction was granted to any court, nor was any reference made to any existing jurisdiction which might be used for that purpose.

53 *NSWLAD* 12 March 1929 p3619.

54 *Ibid*, 3620.

55 *Ibid*, 3620–623, 3627. Bavin was not willing to acknowledge that his unwillingness to subject his bill to a referendum flatly contradicted his own justification of it, namely that: 'before a fundamental alteration is made in the Constitution of the State the people must be consulted'; fn 53 supra.

> I look upon the bill as so much waste paper, for what an Act of Parliament can do an Act of Parliament can undo. The Constitution cannot be amended in the way which the government pretends to be amending it by this bill. If this bill becomes law it will be an Act of Parliament, and nothing else, and an Act of Parliament can always be repealed.[56]

The Labour party's very substantial success in the 1930 election—it won 55 of the 90 Assembly seats—soon presented Lang with the opportunity to put that assertion to the test.

4.2. The *Trethowan* Litigation

The new Lang government promptly promoted bills to repeal s 7A and thereafter to abolish the Council. Lang had not succeeded in persuading the then Governor to swamp the Council with Labour nominees, but the opposition parties had decided not obstruct the bill in the upper house in order that s7A's legal efficacy could be tested. Lang promoted the bills in accordance with the position he had adopted in opposing the 1929 reforms and which had apparently informed Bavin and Boyce's thinking: that whatever might have been enacted in 1929 had no bearing on the legislature's capacity to repeal any such enactment by new legislation passed in 'the ordinary way'; that the obstacle created existed only in the realm of politics, not of law.[57]

In the absence of any explicit judicial regime having been created to enforce s 7A, the litigation began at Trethowan's[58] instigation as an application before the Supreme Court—sitting as a first instance tribunal—under the terms of the State's Equity Act 1901[59] for an injunction to prevent the President of the Legislative Council (who was, with nice irony, still Sir John Peden). The 'others' in the case name *Trethowan v Peden and Others*[60] were of course Lang and his ministers. Peden's role was purely formalistic. He played no part in the proceedings. The idea that he would enter a defence to establish that he was entitled qua President of the Council to take a step which the Act he had conceived evidently prohibited him from taking lay somewhere between the bizarre and the surreal.

Four of the five judges sitting in the State Supreme Court hearing[61] accepted Trethowan's submissions that *McCawley* had confirmed that the CLVA 1865 s 5 had

56 *NSWLAD* 14 March 1929 p3777.

57 See especially the speech of Albert Willis, Labour's leader in the Council, at *NSWLAD* 3 December 1930 pp 97–99.

58 Arthur Trethowan was a long-standing Council member, then sitting for the opposition Country party.

59 Presumably per s 16: 16 (1) An injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made, and whether there be a prayer for an injunction or receiver or not, and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just.

60 The initial hearing (on 11 December 1930) does not seem to have been officially reported. The presiding judge—Long Innes J—granted an interim injunction and set the matter down for prompt hearing on the merits.

empowered Australia's State legislatures to enact legally binding entrenchment devices in respect of their own composition and procedures. The Chief Justice, Phillip Street, had been in office since 1925, having been appointed in effect by Bavin, then Attorney-General in a (conservative) coalition government. Street CJ began his opinion by accepting that if the CLVA 1865 s 5 had indeed made it possible for the legislature to create a politically more onerous form of lawmaking to protect the existence of the Legislative Council, a referendum was a perfectly proper device for doing so:

> A referendum, that is to say a direct vote of the whole of the electors upon any particular matter or any particular measure, is unknown to the British Constitution, but in other parts of the civilized world it is a well-recognized method of ascertaining the will of the people on any question that may be submitted to them. It is not only provided for in the Commonwealth of Australia Constitution Act as part of the prescribed manner for effecting alterations in the Constitution, but on one previous occasion, at least, in New South Wales it has been prescribed by the Legislature as a means of ascertaining the wishes of the people on a question of public importance.[62]

As to whether such power existed, Street CJ felt no assistance could be derived from invocation of Dicey's analysis of the sovereignty of the United Kingdom Parliament. New South Wales was a subordinate legislature; its lawmaking competence was controlled by Imperial statutes. That competence, insofar as it encompassed an authority granted by the CLVA 1865 s 5 to create legally binding departures from the ordinary way of legislating was correctly identified in *McCawley*. S 7A had created a (per s 5) special 'manner and form' of legislating for the two specific purposes of abolishing the Legislative Council and for its own repeal. Three of Street CJ's colleagues agreed with this analysis. But the Chief Justice was the only judge who also strayed into sentiments which had obvious echoes of some of the political ideas that Bavin had expressed during the 1929 Act's parliamentary passage:

> Parliament in its wisdom might well think that there were possible changes of so important and so far reaching a character that a special procedure ought to be followed before they could become law, and it might also think that in respect of some of such changes the need for hastening slowly was such that the provision for a special manner of procedure should not be liable to be repealed by a simple Act passed in the ordinary way.[63]

Abolishing the Legislative Council was a constitutional innovation:

> … of so far reaching and so monumental a character … which Parliament might not unreasonably consider of such importance that a special form of procedure should be made compulsory and that it should not be left to be determined by the passage of an Act in the ordinary way through both Houses.[64]

61 Judgment is at (1930) 31 NSW SR 183. Long Innes J was the only dissentient.
62 *Ibid*, 197.
63 *Ibid*, 202–03.
64 *Ibid*, 203.

Lang promptly pressed an appeal to the Australian High Court. The five judge bench divided three to two in Trethowan's favour. [65]

The position adopted by the two dissentients (Gavan Duffy CJ and McTiernan J) was that while CLVA 1865 s.5 permitted the legislature to modify its identity for certain law-making purposes, and in so doing make the enactment of laws politically more difficult to achieve than provided for by the 'ordinary way', that modification could not extend so far as empower to add an external fourth element in the form of a referendum to the lawmaking process. The rationale for this conclusion (better developed in McTiernan's opinion)[66] was that a referendum could not perform some key tasks which a legislature discharged, namely to consider the merits of or propose and effect amendments to a bill's original formulation. Gavan Duffy and McTiernan appeared to accept that the CLVA 1865 s 5 did permit such entrenchment device as enhanced majorities in either or both chambers, or the requirement of particular forms of words, but a referendum device simply could not be a 'manner and form' proviso within s 5.[67]

The majority judges (Dixon, Rich and Starke JJ) took a wider view of the types of departure from the 'ordinary way' of legislating that might fall within the s 5 'manner and form' concept. They saw no basis to exclude a referendum from the innovations that s 5 might permit. That conclusion seemed to be driven in large part by the normalised status that referendums had by this point occupied as a constitutional lawmaking device in the national political arena. As Dixon J put it, the referendum could now be seen as a 'natural' element of the lawmaking process:

> An interpretation which restricts the application of the words of the proviso to conditions occurring, so to speak, within the representative legislature confines to matters of procedure part of a constitutional provision basal in the development of the self-governing Colonies. The more natural, the wider and the more generally accepted meaning includes within the proviso all the conditions which the Imperial Parliament or that of the self-governing State or Colony may see fit to prescribe as essential to the enactment of a valid law.[68]

For Rich J, both the legal and political defensibility of s 7A was entirely clear:

> McCawley's Case … reaffirms the full power of such a legislature as that of New South Wales, which passed sec. 7A, to regulate its own constitution. Such a power naturally

65 (1931) 44 CLR 394.

66 *Ibid*, 447–48.

67 The dissenting judges did not note that a referendum device would not have been in the contemplation of 'Parliament' in 1865 when the CLVA was enacted, as it was not a mechanism that had ever been used in the British constitutional context. Given how small the British electorate was at that time (some two years had still to pass before Disraeli's 1867 electoral reform Act was enacted) the notion of an appeal to 'the people' as a part of a lawmaking process would have been quite fantastical. Had the point been taken it would have raised interesting questions as to whether the 1865 Act should be read as 'always speaking' so that a 'no referendum' original construction might be construed in the light of the subsequent use of that device in s 128; (or indeed in Queensland since 1908).

68 (1931) 44 CLR 394, 432–33.

> extends to the enactment of safeguards aimed at restraining improvident or hasty action. There is no reason why a Parliament representing the people should be powerless to determine whether the constitutional salvation of the State is to be reached by cautious and well considered steps rather than by rash and ill-considered measures.[69]

By the time *Trethowan* reached the Privy Council Lang's government was staggering precipitously from one political crisis to another: the success or otherwise of the appeal likely ranked low on his list of political priorities. Lang expressed no surprise when the appeal was lost. The court, presided over by Lord Sankey, curtly approved the *McCawley* rationale (albeit without citing the authority) that CLVA 1865 s 5 empowered colonial legislatures to enact legally enforceable departures from 'the ordinary way' of lawmaking, and further approved the High Court majority conclusion that adding a referendum to that process was such a departure:

> [T]he words "manner and form" are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent .... A Bill, within the scope of sub-s. 6 of s. 7A, which received the Royal assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature. It would be ultra vires s. 5 of the Act of 1865.
>
> Indeed, the presentation of the Bill to the Governor without such approval would be the commission of an unlawful act.[70]

When judgment was issued, Lang had been dismissed as Premier by the State Governor, and Bavin's successor as leader of the opposition, Bertrand Stevens, installed as a caretaker Premier pending a new Assembly election.[71] Steven's success in that election led promptly to an amendment of the Legislative Council's composition. The Constitutional Amendment (Legislative Council) Act 1933 replaced the original Council with a 60 member body, 'elected' (after a fashion) by an electorate comprised solely of members of the Assembly and Council itself. Notwithstanding the evident peculiarity of this proposal, it was approved in the referendum required by s 7A, albeit only by a narrow majority.

Stevens' government also successfully promoted legislation[72] which—following Kidston's 1908 reforms in Queensland—created a legislative role for a referendum in all circumstances where the Council persistently refused to approve a bill that had been passed in the Assembly. The device was subsequently brought into play in 1961 in circumstances where the Council had blocked a Labour government bill to abolish the Council. As in Queensland in 1917, voters chose not to approve the proposed

69 (1931) 44 CLR 394, 420.

70 [1932] AC 526.

71 See J M Ward, 'The Dismissal' in Radi and Spearritt op cit fn 46 supra. Lang's own (not necessarily very reliable) account is at J Lang, *The Turbulent Years* (Alpha Books, 1970) ch 21.

72 Enacted as a new s 5A and 5B in the Constitution Act 1902.

legislation, even though—again echoing events in Queensland, the Labour party soon afterwards secured an increased Assembly majority at a general election.

5. CONCLUSION: FROM LEGALITY TO LEGITIMACY

There are obvious limits to the utility for the purpose of analysing the role that referendums might appropriately play in modern political societies of telling constitutional stories from times long ago and lands far away. It would be a gross exaggeration to suggest that events in early twentieth century could provide us with anything approaching universal truths in respect of that question. But the specific Queensland and New South Wales experiences do offer several salient points of broader relevance and application.

One of the more important of these is to underline the fact that geographically contiguous polities which have clear and profound similarities in terms of their demographic, ideological and institutional identities can (more or less) simultaneously make very different uses of the referendum within their respective constitutional cultures. These differences manifest themselves in several ways.

Perhaps the most obvious is that the Queensland and New South Wales experiences give the lie to suggestions that referendums invariably emerge in defence of conservative ideological standpoints. Bavin and Peden's referendum device in New South Wales was certainly a creation of the political right, designed to operate as a hindrance to one specific legislative ambition of the political centre-left.[73] In contrast, Kidston's Queensland's initiative emerged from the political centre left as in effect a Damoclesean sword hanging over the generic legislative power of the political right.

The issue specific nature of New South Wales s 7A referendum and the universally applicable scope of the Queensland mechanism provides a further point of distinction between the State's respective innovations; as does the essentially contingent, alter ego role assigned to the referendum within Queensland's lawmaking process in contrast to the omnipresent, addendum character of the s 7A mechanism.

One cannot credibly refute the proposition that s 7A made the lawmaking process (for the two issues within its reach) more difficult politically to achieve. Adding a third forum (albeit one acting on bare majoritarian basis)[74] to the previous bicameral process[75] inevitably created an obstacle—even if only in terms of time and expense if not the need to garner sufficient voter support—to the enactment of legislation. Whether Kidston's

73 Although in what might be seen as a good example of the law of unintended consequences, in the immediate aftermath of the Privy Council's *Trethowan* judgment Queensland's then Labour government promptly hijacked Peden's entrenchment device and promoted a bill, passed in the Assembly, which added a bare referendum majority to the ordinary legislative process for any Act recreating a Legislative Council. In Queensland, the s 7A device had become a legal tool to protect a core ideological concern of the political centre left against the legislative ambitions of the political right.

74 And a bare majority of people actually voting, not of those eligible to vote.

75 By 1929 there was little realistic prospect that the Governor's de jure power to refuse assent to bills would ever be exercised in respect of matters which had no obvious Imperial dimension.

referendum had the same effect is a more nuanced question, the answer to which is complicated by the brute political fact that the device was only ever used once, in the *Taylor* imbriglio. Certainly in terms of mere logistics the lawmaking process created by the 1908 Act was more difficult to implement, if only because the referendum could only be held once the 'ordinary' legislative process had run its course in both houses. But this may be allowing legal form to obscure political reality. As noted above, Kidston had evidently hoped that the threat of a referendum defeat would lead a(C)conservative Council majority to acquiesce in the passage of bills to which it was ideologically opposed; in effect that politics would render law unnecessary. Ryan's defeat in the legislature over the abolition bill in 1915 and 1916 might suggest that assumption was ill-founded, but the result of the 1917 referendum indicated that it was the Assembly rather than the Council that had erred in its assessment of popular sentiment.

In a more abstract sense, the most significant question raised in these episodes is perhaps what might be termed the 'transactional asymmetry' pervading the s 7 A reform; ie that s 7A sought to create an entrenchment device by fashioning a lawmaking process which was politically more onerous to effect than the process through which the device itself was created. As noted above, the Labour opposition had objected to Bavin's bill in part on this basis, suggesting its legitimacy as a constitutional device demanded that it be approved in a referendum before being brought into force.[76]

The entrenchment created by s 7A was not particularly deep. The referendum augmented the bicameral bare majority manner of lawmaking which the State's legislature ordinarily deployed by an adding that extra step to the legislative process. The extra step obviously added the additional obstacles of some expense and delay to enactment of the relevant statute. But there was no requirement that the 'winning vote' be anything other than a bare majority of the electors taking part; nor that a certain turnout had to be reached before that bare majority vote became effectual. It is nonetheless perfectly credible to assume that party political loyalties which voters might determinedly hold in respect of the overall package of policies and personnel which various parties offered at a general election might be jettisoned in the context of a single issue vote in a referendum. Different, perhaps better, arguments might be required to win a referendum majority than were needed to build a parliamentary majority.

S 7A itself did not have to overcome those obstacles. It was enacted in the 'ordinary way'. Its own enactment process and the entrenchment process it created were essentially (and perhaps significantly) asymmetrical. The politicians who enacted s.7A were seeking to place a legal constraint over their successors which they were unwilling (and perhaps unable) to surmount themselves. Labour members had suggested during s.7A's passage that the 'honourable' way for Bavin to proceed was to hold a referendum on the desirability of enacting s 7A itself. Bavin's professed motive in not doing so was that such approval could be deduced from the result of the previous Assembly election,

76 I have developed this idea in Loveland, *McCawley*, 176–80. See also T Rozkowski and J Goldsworthy, 'Symmetric Entrenchment of Manner and Form Requirements' (2012) 23 *Public Law Review* 216.

although he may also have been influenced by his apparent belief that s 7A would not be legal effective or—perhaps most likely—that any such referendum vote would be lost.

The potential significance—both politically and legally—of Bavin's referendum adventure did not become apparent (at least in theory) until the conclusion of the *Trethowan* litigation. Neither the majority judges in the High Court nor the Privy Council evinced any concern that the legality of s 7A might be affected by its essentially asymmetrical nature. It seems entirely likely that the Privy Council would have upheld an entrenchment device—enacted in the ordinary way—that demanded a two thirds majority in one or both houses instead of (or in addition) to a referendum, which might itself be subject to enhanced majority provisos. The obvious inference to be drawn from reading *McCawley* and *Trethowan* in tandem was that bare majorities in Australia's State legislatures might enact through the ordinary legislative process much more onerous entrenchment devices than a bare majority referendum. In the event no such initiatives were taken, an omission which leaves us with the Bavin referendum's main claim to constitutional fame being the substantial contribution it has made to continuing debates about the United Kingdom Parliament's capacity to enact legally effective entrenching legislation.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).