

THE WESTERN AUSTRALIAN SECESSIONIST MOVEMENT

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I INTRODUCTION

This article examines the growth of the secessionist movement in Western Australia, which culminated in the referendum of 1933 and the presentation of a petition to secede by the government of Western Australia to the British Parliament. The attempt by Western Australia to secede from the Australian Federation remains important today because it illustrates the problem which perennially arises with regard to secession in democratic federations. This problem involves the two defining elements of a democratic federation, viz. the democratic process and the federal structure. There are two competing alternatives in such situations. On the one hand, there is the view that the expressed will to secede of a majority of the electorate with a constituent part of a federation should be given effect, by virtue of the legitimising force of the democratic process. On the other hand, there is the view that such decisions represent only the expressed will of a minority, by virtue of that electorate being considered in relation to the entire population of the existing federal structure. The attempted secession of Western Australia, and the response of the Joint Select Committee of the British Parliament, shows how this problem was dealt with in the context of the *Australian Constitution*.

II THE AMBIVALENT ATTITUDE OF WESTERN AUSTRALIA TO FEDERATION

Western Australia had not been particularly eager to join the Australian Federation, and during the constitutional conventions of 1891 and 1897-98 delegates from Western Australia expressed serious reservations about doing so. Approximately half of Western Australia's revenue came from inter-colonial tariffs.¹ These tariffs enabled the economy of Western Australia, which was based primarily on mining and agriculture, to flourish. But under the proposed federal constitution, inter-state

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¹ Alan Shaw, *The Story of Australia* (1961) 195.

tariffs were to be prohibited.² The abolition of such tariffs would seriously harm that economy, a fact that was recognised by the delegates of all of the colonies.³ At the time, the people of Western Australia were enjoying unprecedented prosperity.⁴ Yet under the terms of the proposed constitution they were being asked not only to share their wealth with the other colonies, but to submit to the crippling of their own economy. This was very difficult for many Western Australians to accept. The situation was not made any better by the fact that there existed very little affinity amongst many Western Australians for Australians of the other colonies, due to the enormous distance that separated Western Australia from these colonies. Perth was more than twice as far from Sydney and Melbourne as those two cities were from New Zealand, and New Zealand had decided not to join the Australian Federation.⁵ There was also the issue of political power. Western Australia had only become a self-governing colony in 1890, and its leaders were reluctant to give up any of the political power which their colony had only so recently attained.⁶

As a result of these misgivings, Western Australia did not take part in the referenda of 1898 and 1899 which sought popular approval for the draft constitution, nor was it party to the subsequent petition to the Queen for the enactment of the draft constitution by the Imperial Parliament. It appeared that the new Commonwealth of Australia would come into existence without the involvement of Western Australia. This was reflected in the *Constitution Act* itself. The preamble does not refer to Western Australia, declaring only that ‘the people of New South Wales, Victoria, South Australia, Queensland and Tasmania’ had agreed to unite ‘in one indissoluble Federal Commonwealth...’. Covering clause III does refer to Western Australia, but only by way of offering the colony an option of joining. The preamble and covering clause III indicate that the five eastern colonies were prepared to federate without Western Australia.⁷

But as it turned out, Western Australia did join the Commonwealth as an original State. In a referendum held on 31 July 1900, a majority of the Western Australian electorate approved the draft constitution.⁸ This last minute change of heart was

² The *Australian Constitution* s 92 (which is comprised within the *Commonwealth of Australia Constitution Act 1900* (Imp), 63 & 64 Vict, c 12, s 9) specifies that trade, commerce and intercourse among the States ‘shall be absolutely free’. (The *Commonwealth of Australia Constitution Act* shall hereafter be referred to as the *Constitution Act* and section 9 of the said Act shall be referred to as the *Constitution*.)

³ John La Nauze, *The Making of the Australian Constitution* (1972) 213.

⁴ During the 1890s there had been an enormous boom in Western Australia’s economy, which had resulted from the exploitation of the goldfields in and around Kalgoorlie: Gregory Craven, *Secession: The Ultimate States Right* (1986) 32.

⁵ Section 6 of the *Constitution Act* includes New Zealand as one of the colonies that may be admitted as a State into the Commonwealth.

⁶ Christopher Besant, ‘Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire’ (1990) 20 *University of Western Australia Law Review* 209, 226-7.

⁷ La Nauze, above n 3, 247.

⁸ John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1976 ed) 248-50.

prompted by a number of considerations, which were mostly economic in nature. A special provision - section 95 - had been inserted into the *Constitution* in order to address Western Australia's concern over the abolition of the inter-colonial tariff. Section 95 permitted Western Australia, on condition that it entered the Federation as 'an original State', to maintain its inter-colonial tariff within the Federation for a period of five years, in a formula which decreased the tariff by twenty percent each successive year. A further economic inducement came in the promise of a transcontinental railway linking Western Australia to the eastern States.⁹

These offerings would probably not in themselves have influenced Western Australia to enter the Federation. But there was another factor in the equation, one which threatened the colony with extremely serious economic repercussions if it did not join the Federation. This involved the lucrative goldfields region of Western Australia. The discovery of gold had brought about an economic boom in Western Australia during the 1890s. It had also brought into the colony an enormous influx of settlers. Between 1890 and 1900, Western Australia's population increased from 47,000 to 179,000.¹⁰ The newcomers were overwhelmingly from the eastern colonies. This influx of easterners dramatically increased the population of Western Australia, and created two types of Western Australian resident. Along the western coast, centered around Perth, were the long-time residents of Western Australia, who were isolationist in attitude and, at best, indifferent to the other colonies. On the goldfields, in and around Kalgoorlie, were the more recent settlers, who, in most cases, felt an ongoing affinity and attachment to the colonies from which they had come.¹¹

The Western Australian delegates who attended the constitutional conventions of 1891 and 1897-98 were drawn for the most part from the traditional elements of Western Australian society.¹² Their approach to the notion of federation reflected the isolationist sentiments of their constituency. But these were not the sentiments of the goldrush settlers. When it became apparent that Western Australia might not join the proposed federation, the settlers formed the Eastern Goldfields Reform League. The Reform League began to agitate vigorously for the secession of the goldfields region from Western Australia and its integration into the Australian Federation.¹³ At this point the British Colonial Secretary, Joseph Chamberlain, intervened to pressure Western Australia into joining the Federation. On 27 April 1900, Chamberlain sent the acting Governor of Western Australia a telegram alluding to the secessionist movement in the goldfields and advising the Governor that in these circumstances it would be in the best interests of the colony to join the Federation.¹⁴ The loss of the goldfields would have been disastrous to Western

⁹ Edward Watt, 'Secession in Western Australia' (1958) 3 *University Studies in Western Australian History* 43, 64.

¹⁰ Besant, above n 6, 42.

¹¹ Ibid 227-8; Francis Crowley, *Australia's Western Third* (1960) 118.

¹² La Nauze, above n 3, 32, 103, 104.

¹³ Besant, above n 6, 228; Crowley, above n 11, 150-1.

¹⁴ Besant, above n 6, 228; La Nauze, above n 3, 260.

Australia, both from an economic and a political viewpoint. Therefore, a Bill was hastily introduced into the Parliament of Western Australia providing for a referendum on the draft constitution.¹⁵

The Premier, Sir John Forrest, initially proposed that the existing electoral roll be used for the referendum. This would have had the effect of excluding most of the settlers in the goldfields region. There was some concern about whether the new settlers were 'true' or 'genuine' Western Australians.¹⁶ But in the end it was decided that any person who had been resident in Western Australia for at least twelve months would be permitted to vote. Fifty thousand voters, the great majority of whom resided in the goldfields region, were thereby added to the electoral roll.¹⁷ With the addition of the settler population to the electoral roll, the referendum result became a foregone conclusion. The result of the vote was 44,800 in favour of the draft constitution and 19,691 against.¹⁸ There was thus a majority of 25,109 in favour. In the goldfields electorates a total of 28,143 votes were cast. Of this number, 26,330 votes were cast in favour, and 1813 against. If these figures are subtracted from the total number of votes cast, a different picture emerges; with 18470 in favour and 17,878 against.¹⁹ There was thus a very slender majority, of only 592 persons, in favour of federation throughout Western Australia, apart from the goldfields region. Had the electoral roll not been changed, it is questionable whether an affirmative vote would have been obtained at all or whether that vote would have been sufficient to legitimate the entry of Western Australia into the Federation.

Western Australia thus entered the Commonwealth in a very tentative manner.²⁰ The agitation on the goldfields and the pressure brought to bear by the Colonial Secretary had forced the issue to a considerable extent. Although section 95 provided a temporary measure of protection for Western Australia's agricultural sector, opposition to the Federation remained strongest in the agricultural electorates, where it was feared that the eventual loss of internal tariff protection would harm agricultural interests.²¹ Forrest himself did not think that the five year exemption for internal Western Australian tariffs would sufficiently protect Western

¹⁵ *Australasian Federation Enabling Act 1900*, 63 Vict, No. 55, Statutes of Western Australia.

¹⁶ Watt doubted that the settler population thought of itself as Western Australian at all, and Besant alleged that the goldfields region was no more than an eastern colony with eastern sentiments: Watt, above n 9, 64 and Besant, above n 6, 228.

¹⁷ Besant, above n 6, 229; Quick and Garran, above n 8, 249.

¹⁸ Quick and Garran, above n 8, 250.

¹⁹ For a breakdown of the Western Australian referendum results by region, see Quick and Garran, above n 8, 250.

²⁰ Although Premier Forrest campaigned in favour of Federation, he took care to reserve the right to withdraw from the Federation as well. In a speech to the Western Australian Legislative Assembly, he declared that 'an Act of the Imperial Parliament could sever us as it unites us'. His sentiments were echoed by Sir Winthrop Hackett, who told a Perth audience on 14 July 1900 that 'nothing in the world would prevent Western Australia from seceding through the united voice of her people': As cited in Besant, above n 6, 211.

²¹ Quick and Garran, above n 8, 250.

Australia's agricultural sector, but he was unable to obtain further concessions from the delegates of the other colonies.²²

III THE ADVERSE EFFECT OF COMMONWEALTH TARIFF POLICY ON WESTERN AUSTRALIA

One of the most important matters facing the colonies upon federation had been whether the Federation would adopt a policy of free trade or one of protectionism vis-à-vis other countries. Before Federation the colonies had taken decidedly different approaches to the issue of external trade policy. Victoria, for example, followed a policy of protectionism involving high tariff barriers, whereas New South Wales pursued a policy of free trade. Protectionism favoured the manufacturing sector, and was therefore supported by Australian capital and labour interests. Free trade favoured the agricultural sector, as it allowed farmers to purchase agricultural machinery at cheaper rates, and tended to open up international markets to their goods.²³

The delegates to the constitutional conventions decided that the tariff policy of the Federation should not be determined in advance, but rather should be decided by the federal Parliament upon its formation. Their decision is reflected in sections 88 and 90 of the *Constitution*. Section 88 states only that uniform duties of customs are to be imposed within two years after the establishment of the Commonwealth, without specifying whether a policy of free trade or protectionism should be adopted. Section 90 grants exclusive jurisdiction to the Commonwealth to impose duties of customs and excise, and therefore enables the federal Parliament to decide whether to adopt a policy of free trade or protectionism.²⁴

In 1901, the Commonwealth Parliament introduced a federal tariff against imported manufactured goods. This tariff was designed to protect the existing manufacturing sector within Australia, and to encourage further growth. However, it proved to be economically harmful to Western Australia. Apart from the goldfields, the economy of Western Australia was primarily agricultural in nature. There were no secondary industries of any consequence in Western Australia, and almost all manufactured goods sold there had been brought into the colony from elsewhere. Before Federation, many of these goods had been imported from overseas. But the federal tariff now prevented Western Australia from obtaining manufactured goods from overseas, and forced it instead to purchase such goods from the eastern States, even though the imported goods, apart from the tariff, were less expensive than those made in Australia. The federal tariff therefore ensured that the State would be forced to pay the very top prices for its manufactured goods. Moreover, section 92, which provided for freedom of inter-state trade, prevented Western Australia from developing its own industries, because in the free trade Australian market which

²² La Nauze, above n 3, 259.

²³ Peter Hanks, *Australian Constitutional Law* (5th ed, 1994) 507-8. See also Winston McMinn, *A Constitutional History of Australia* (1979) 98-9, 113.

²⁴ La Nauze, above n 3, 39, 41; Hanks, above n 23, 508.

section 92 created any incipient Western Australian industry would be unable to compete against the more established industries of the eastern States. The effect of section 92 was therefore to ensure that Western Australia remained industrially undeveloped, and its agricultural sector forced to compete in the open Australian market without the benefit of any tariff protection.²⁵

As soon as the federal tariff was implemented, the Legislative Assembly of Western Australia responded by adopting a resolution condemning the policy.²⁶ However, the economy of Western Australia was protected to a certain extent by section 95. It was not until 1906, when the benefits of section 95 expired, that the combined effect of the federal tariff and section 92 was felt in its full rigour in Western Australia. To make matters worse, the royal commission investigating the tariff decided in that same year that a tariff was required to protect Australia's agricultural machinery industry against American and Canadian competition.²⁷ This decision prompted the Legislative Assembly of Western Australia to draft a resolution which declared that Federation had 'proved detrimental to the best interest' of Western Australia, and which called for a referendum to canvass public support for 'the possibility of withdrawing from such a union'.²⁸ The resolution was adopted by the Assembly but did not receive the support either of the Premier or the Leader of the Opposition and no further action was taken.²⁹

By 1908 the federal government had become firmly committed to a policy of tariff protection, and thereafter the tariff was applied to an increasing range of goods.³⁰ The government of Western Australia claimed that this policy sacrificed Western Australia's predominantly agricultural economy to the industrial interests of New South Wales and Victoria. There was no doubt that the federal tariff policy was having an extremely deleterious effect on the economy of Western Australia. The Commonwealth Tariff Board, in its 1924 Report, described Western Australia as being 'on the road to serfdom' under the tariff policy, and predicted that Western

²⁵ John Robertson, '1930-39' in Francis Crowley (ed), *A New History of Australia* (1974), 432; Craven, above n 4, 33. See also *Fox v Robbins* (1910) 8 CLR 115.

²⁶ Craven, above n 4, 32.

²⁷ Gordon Greenwood, 'National Development and Social Experimentation, 1901-1914' in Gordon Greenwood (ed), *Australia: A Social and Political History* (1951) 196, 216.

²⁸ Western Australia, Legislative Assembly 1906 *Debates* Volume 29, page 1871.

²⁹ Watt, above n 9, 44. The Legislative Assembly of Western Australia was not alone in its discontent. In 1906 the Parliaments of New South Wales, Queensland, and Tasmania also expressed interest in the prospect of secession: Watt, above n 9, 44; Craven, above n 4, 56. The fledgling *Commonwealth Law Review* published an article that year on secession, in which the author noted that 'in the early days' of a union the units of a federation will 'never fail to disagree': Patrick Glynn, 'Secession' 3 *Commonwealth Law Review* 193, 193. As early as 1902 a member of the Western Australian Legislative Assembly had moved that the government secede from the Commonwealth, but the motion was never put to the vote: Western Australia, Legislative Assembly 1902 *Debates* Volume 20, page 1782, volume 21, page 1134.

³⁰ Greenwood, above n 27, 220.

Australians would become ‘hewers of wood and drawers of water’.³¹ Pursuant to this Report, the federal government appointed a royal commission to investigate the economic difficulties of Western Australia, South Australia and Tasmania. Amongst other things, the royal commission recommended that Western Australia be granted twenty-five years of tariff autonomy, and that changes be made to the *Constitution*. The federal government rejected the former proposal on the ground that this would result in the State’s virtual withdrawal from the Federation. It did, however, appoint yet another royal commission in 1927, to investigate possible changes to the *Constitution*.³²

IV THE CONSTITUTIONAL ASPECTS OF WESTERN AUSTRALIA’S ECONOMIC DIFFICULTIES

Much of the economic dislocation experienced by Western Australia in the years following the expiration of section 95 was the result of the constitutional structure of the Federation. Section 92 prohibited the government of Western Australia from erecting protective tariffs against the other States within the Federation, and section 90 granted the federal Parliament exclusive jurisdiction over customs and excise, thereby giving it sole power to determine Australia’s tariff policy with regard to international trade and commerce.

The trend in High Court constitutional cases during this period, which expanded the powers of the Commonwealth, served to aggravate Western Australia’s dissatisfaction with the *Constitution*. In the first two decades of Federation, the decisions of the High Court had tended to interpret the powers of the Commonwealth narrowly.³³ However, a dramatic shift in power took place during World War I as a result of the High Court’s interpretation of section 51(6), the Commonwealth’s defence power. In the case of *Farey v Burvett*³⁴ Isaacs J declared that in time of war the Commonwealth’s defence power was essentially paramount over every other provision of the *Constitution*. ‘All other powers and authorities - both Commonwealth and State - are necessarily dependent upon its effective

³¹ The Report of the Commonwealth Tariff Board confirmed the finding made by a Committee appointed in 1921 by the government of Western Australia to inquire into the effects of Federation on the economy of the State. The Committee found that the economic difficulties of Western Australia stemmed largely from the policies being pursued by the federal government. See Besant above n 6, 234; Craven, above n 4, 33.

³² Ronald Younger, *Australia and the Australians* (1970) 580. In a dissenting opinion Commissioner Entwistle went much further than his fellow Commissioners and declared that secession would be the only effective solution to the problems of Western Australia: Besant above n 6, 234; Craven, above n 4, 33. Entwistle, incidentally, was not from Western Australia: *Report By the Joint Committee of the House of Lords and the House of Commons Appointed to Consider the Petition of the State of Western Australia* United Kingdom: Parliamentary Papers of the House of Commons (1934-1935) Volume VI, No. 88, at page 45 (‘The Report’).

³³ Younger, above n 32, 511.

³⁴ (1916) 21 CLR 433. In this case a majority of the High Court held that in time of war section 51(6) was wide enough to enable the federal government to fix the price of bread.

exercise', he noted.³⁵ As a result, during the period of 1914-1918, the federal government was able to enact many legislative measures which would otherwise have been beyond its legal capacity, and it thereby established itself throughout Australia as the pre-eminent and dominant government.³⁶

This dominance by the federal government was of course contingent on the duration of hostilities, and was therefore temporary in nature. But in 1920 the High Court ensured the ongoing dominance of the Commonwealth government in its landmark decision *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* ('*Engineers*').³⁷ The issue in this case was whether laws enacted by the Commonwealth government could be binding on the States. In pre-war decisions the High Court had developed the doctrines of implied immunities and reserved powers, whereby Commonwealth powers were interpreted narrowly, thereby ensuring that neither level of government would be bound by the laws of the other level.³⁸ But in *Engineers*, the High Court abandoned these theories, and held that the ordinary rules of statutory interpretation, whereby words are given their full and literal effect, should be applied to the enumerated powers of the Commonwealth, without regard to the effect which this may have on the residual powers of the States.³⁹ This was a radically new approach to constitutional interpretation. Commonwealth powers under the *Constitution* were thereafter interpreted much more broadly by the High Court, and this greatly expanded the powers of the Commonwealth at the expense of the States.⁴⁰ The decision effectively reversed the intentions of the framers of the *Constitution*. The *Constitution* had originally been drafted with a view to limiting the powers of the federal Parliament. This was done by granting the Commonwealth a limited number of specific heads of power and allowing the residuum to the jurisdiction of the States. As Greenwood pointed out, the approach to constitutional interpretation adopted in *Engineers* would 'have

³⁵ (1916) 21 CLR 433, 454.

³⁶ Colin Howard, *Australian Federal Constitutional Law* (3rd ed, 1985) 478; See also Arthur Keith, *The Constitutional Law of the British Dominions* (1933) 353-4 and Sir Robert Garran, 'The Development of the Australian Constitution' (1924) 40 *Law Quarterly Review* 202, 206-207.

³⁷ (1920) 28 CLR 129.

³⁸ See Leslie Zines, *The High Court and the Constitution* (4th ed 1997) 1-7 for a review of the constitutional decisions of the High Court during this period.

³⁹ (1920) 28 CLR 129, 148-52.

⁴⁰ By virtue of *Engineers*, the States would thereafter be bound by laws enacted by the Commonwealth. The case had an immediate impact on Western Australia, as it rendered Western Australian State employees subject to federal labour laws. The decision in *Engineers* has without doubt been the single most important decision of the High Court in constitutional matters. It has provided the basis for almost all subsequent constitutional interpretation. For detailed appraisals of the importance of the *Engineers* Case in Australian constitutional law and its impact on subsequent cases see Sir John Latham 'Interpretation of the Constitution' in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 1, 27-34; Ross Anderson 'The States and Relations with the Commonwealth' in Rae Else-Mitchell (ed) *Essays on the Australian Constitution* (2nd ed, 1961) 93, 97-99; Geoffrey Sawer *Australian Federalism in the Courts* (1967) 87, 88, 129-135, 197-202; Howard, above n 36, 653-668; and Peter Hanks, *Constitutional Law in Australia* (2nd ed 1996) 233-36.

astonished those responsible for the phraseology in which the Commonwealth grant of power was drafted'.⁴¹

In addition to the enormous increase in power, which *Engineers* granted to the Commonwealth, there was also the issue of section 96, by which the Commonwealth was able to exert control over the States in areas of State jurisdiction. Section 96 reads as follows:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

In the 1920s such grants were made by the federal government to the States largely on an ad hoc and unconditional basis. But in 1926 grants were made to the States under section 96 pursuant to the *Federal Aid Roads Act 1926* (Cth), whereby the grants were made contingent on the States following certain Commonwealth directions involving the location and construction of roads. Two States sought a declaration from the High Court that this Act was ultra vires, on the basis that the subject-matter of roads came solely within the jurisdiction of the States. The High Court held in *Victoria v Commonwealth*⁴² that the Act was a valid exercise of the power conferred on the Commonwealth by section 96, whereby grants could be made to the States subject to whatever terms and conditions the Commonwealth saw fit. This decision enabled the federal government henceforth to intervene in any matter of State concern where there was financial need requiring a grant under section 96. The decision was of particular concern to Western Australia as it had been receiving section 96 grants from the federal government since 1910.⁴³

V THE GROWTH OF THE WESTERN AUSTRALIAN SECESSIONIST MOVEMENT

A royal commission to investigate constitutional change handed down its report in 1929 recommending that there be no major changes to the *Constitution*. The leaders of Western Australia were forced to conclude from this report that the disadvantageous situation in which Western Australia found itself within the Federation would be perpetuated indefinitely.⁴⁴ A real sense of grievance thereafter permeated State government circles and considerable anti-federal sentiment grew throughout Western Australia.⁴⁵ The *Sunday Times*, a prominent Western Australian newspaper, vigorously took up the cause of secession as the only viable solution to Western Australia's problems.⁴⁶

⁴¹ Gordon Greenwood, *The Future of Australian Federalism* (2nd ed, 1976) 72.

⁴² (1926) 38 CLR 399.

⁴³ McMinn, above n 23, 176.

⁴⁴ Craven, above n 4, 33.

⁴⁵ Younger, above n 32, 514.

⁴⁶ Besant, above n 6, 233

Although secession began to be advocated strongly in some quarters, it did not exercise any widespread appeal amongst Western Australian citizens during the 1920s.⁴⁷ The primary reason for this was that the 1920s, on the whole, was a time of great prosperity for Western Australians. This prosperity was due, in large measure, to the success of the agricultural sector. The importance of gold to the State's economy had gradually declined from 1904 onwards but this had been offset by an enormous expansion in agriculture and, in particular, by the wheat growing industry.⁴⁸ There was a worldwide demand for wheat during the early 1920s and prices were very high in the immediate post-war period. Moreover, farming methods and marketing techniques became much more advanced in the post-war period, and credit was readily available. The State government encouraged primary production and pursued a vigorous immigration policy to ensure its continued growth.⁴⁹

This era of prosperity came to an abrupt end in 1929, with the onset of the Great Depression. The collapse of international trade and finance throughout the world caused unemployment in Australia to rise to unprecedented levels, and brought about a serious decline in the standard of living. Sources of credit from the United Kingdom suddenly dried up. The Commonwealth and State governments, which were already heavily indebted to British financial institutions, had difficulty in making interest payments on existing loans let alone redeeming them as they fell due.⁵⁰ The Depression had a particularly devastating effect on Western Australia. The world price for primary products fell precipitously. The price of wheat, for example, fell from an average of 5s. 6d. a bushel in 1927-8 to 2s. 6d. in 1930-1.⁵¹ Drought made matters even worse. Many Western Australian farmers were ruined and those who did manage to hang on were reduced to desperate straits.⁵²

Neither the Commonwealth nor State government seemed able to deal with the economic crisis, and dissatisfaction with both levels of government became endemic in Western Australia. At the state level, this dissatisfaction was expressed in the defeat of the government. The Labour Party, under the leadership of Philip Collier, had been in power in Western Australia since 1924. In the State election of April 1930 it was replaced by a coalition of the National and Country Parties, led by the Nationalist leader Sir James Mitchell. The new government came to power promising a return to prosperity and full employment.⁵³ At the federal level,

⁴⁷ This is illustrated by the fate of the short-lived Secession League of Western Australia. The Secession League was formed in 1926 in order to effect the secession of the State from the Federation. It began its activities with great enthusiasm, but disbanded less than three years later: Watt, above n 9, 45.

⁴⁸ Crowley, above n 11, 156, 170, 180, 199-200.

⁴⁹ Ibid 199, 200, 203, 210.

⁵⁰ Robertson, above n 25, 429-30; John Fisher, *The Australians* (1968) 227.

⁵¹ Robertson, above n 25, 416.

⁵² Ibid 418.

⁵³ Crowley, above n 11, 269. Mitchell had been Premier of Western Australia during the halcyon days of 1919-1924, during which time his government had promoted primary production,

dissatisfaction with the Commonwealth government found expression in the rapid growth of the Dominion League of Western Australia. The Dominion League was formed in May 1930, only one month after the State election. Its sole purpose was to promote the secession of Western Australia from the Federation. It received immediate and widespread support from the electorate, and League membership grew rapidly. The League held frequent and well-attended public rallies, at which League speakers emphasised that the only real solution to Western Australia's problems lay in secession.⁵⁴ Their message fell on receptive ears. With the collapse in world prices of primary products, the economic disabilities to which Western Australia was subject were now vividly brought home to the average Western Australian farmer. It was during this time of economic crisis that the federal government announced, in June 1930, that it had decided to continue its high tariff policy on imported secondary goods, while declining to grant assistance to farmers for the production or export of wheat and wool.⁵⁵ This decision provoked outrage throughout Western Australia. The State Chamber of Commerce and the Primary Producers Association endorsed secession and threw their support behind the Dominion League. In the press the League had a constant advocate in the *Sunday Times*.⁵⁶

The Dominion League was careful to remain politically non-aligned, declaring that its sole political goal was the secession of Western Australia from the Federation. Its non-partisan approach enabled it to draw support from the entire political spectrum. Amongst Western Australia's three political parties, reaction to the League was mixed. The Country Party came out strongly in support of its aims, whereas the Labour Party declared its opposition, issuing an official statement to this effect in August 1930. The National Party had no official stance on secession. Some of its members favoured secession, and others did not.⁵⁷

VI THE REFERENDUM ON SECESSION

The proponents of secession were greatly encouraged when the new Premier, Sir James Mitchell, declared in November 1930 that he was personally in favour of secession.⁵⁸ Despite this, the State government took no action until the following year, when a prominent leader of the Dominion League threatened the Premier with political oblivion if he did not soon organise a referendum on the matter.⁵⁹ Thereafter the government undertook to prepare the legislation necessary for a referendum and in November 1931, a Bill was introduced into the Western Australian Parliament. The Bill was approved in the Legislative Assembly, but was

coupled with a policy of vigorous agrarian and demographic expansion: See Crowley at 227, 229.

⁵⁴ Besant, above n 6, 236.

⁵⁵ Ibid; Younger, above n 32, 526.

⁵⁶ Watt, above n 9, 46.

⁵⁷ Ibid 46, 50, 51; Crowley, above n 11, 274.

⁵⁸ Watt, above n 9, 47. Mitchell, however, also described himself at various times as 'a federalist who could not pay the price' and expressed his regret at the 'necessity' of secession: Ibid 51.

⁵⁹ Ibid 47.

amended by the Legislative Council in a manner unacceptable to the Assembly, and was therefore withdrawn. A second Bill followed, and by December 1932, this Bill had been enacted into law both by the Legislative Assembly and the Legislative Council.⁶⁰ The *Secession Referendum Act 1932*⁶¹ specified in section 2 that a referendum on the issue of secession was to be held on the same day as the next general election in Western Australia.⁶² In section 6 the Act set out the questions to be put to the voters in the referendum. Two questions would appear on the ballot. The first was as follows:

Are you in favour of the State of Western Australia withdrawing from the federal Commonwealth established under the Commonwealth of Australia Constitution Act (Imperial)?⁶³

The second question was as follows:

Are you in favour of a convention of representatives of equal number from each of the Australian States being summoned for the purpose of proposing such alterations in the *Constitution* of the Commonwealth as may appear to such convention to be necessary?⁶⁴

The second question was added to satisfy the Labour Opposition, which had up to that point been opposed to the Bill.⁶⁵ With the addition of the second question, Labour acquiesced in its passage through Parliament.⁶⁶

The State election and the referendum were set for 8 April 1933.⁶⁷ Between December 1932 and April 1933 secession became the primary issue of public debate throughout Western Australia. The Dominion League conducted the campaign for secession almost single-handedly, while the political parties remained largely silent on the issue. The Premier and the Leader of the Opposition in particular contributed virtually nothing to the debate. Mitchell was hamstrung by the division of opinion within his own party, and Collier did not want to alienate the powerful secessionist lobby at election time while his party's position was against secession. Only the Country Party gave unqualified support to the Dominion League and its aims.⁶⁸

The Dominion League's campaign was vigorous and intense. It concentrated on the traditional grievances of Western Australia: that the State government was unable to

⁶⁰ Ibid 47, 48; Craven, above n 4 34.

⁶¹ 23 Geo 5, Statutes of Western Australia, No 47.

⁶² Ibid 201.

⁶³ Ibid.

⁶⁴ Ibid 202.

⁶⁵ Watt, above n 9, 49; Craven, above n 4, 34.

⁶⁶ Watt, above n 9, 50, 51.

⁶⁷ See *Secession Act 1934*, 25 Geo 5, Statutes of Western Australia, No 2, preamble; also Robertson, above n 25, 432-3.

⁶⁸ Watt, above n 9, 50, 51.

act effectively because of the constraints of the *Australian Constitution*, that the political powers which the State did possess were being steadily eroded by adverse decisions of the High Court, and that the economy of Western Australia was permanently crippled by the very nature of Federation, which was geared to the interests of the larger populations and secondary industries of the eastern States.⁶⁹ The secessionists argued that these political and economic problems were endemic to the existing federal structure and could only be solved if the State became a self-governing dominion within the British Empire.

Opposition to the Dominion League came from a number of sources. Several local organisations - such as the Unity League and the Federal League of Western Australia - campaigned against secession, but they were overwhelmed by the much more powerful Dominion League.⁷⁰ In March 1933 several members of the Commonwealth government, including Prime Minister Joe Lyons and former Prime Minister Billy Hughes, travelled to Western Australia, in an attempt to promote the federalist cause. But the federal delegates encountered hostile crowds at almost every venue they visited and were frequently unable even to present their position in the ensuing tumult.⁷¹

The referendum result was overwhelmingly in favour of secession. Almost two-thirds of the electorate voted for secession; the vote on the first question was 138,653 in favour and 70,706 against.⁷² The constitutional conference alternative proposed in question two was rejected by a vote of 119,031 against to 88,275 in favour.⁷³ Every electorate in Western Australia voted for secession except those in the gold-mining districts.⁷⁴

The secessionists were jubilant. The *Sunday Times* declared the referendum results to be 'a magnificent victory', and there was much celebrating amongst members of the Dominion League.⁷⁵ But strangely, the same voters who had so strongly endorsed secession also elected to government the Labour Party, which opposed secession. This placed the new Premier, Philip Collier, in a difficult position as the referendum result ran directly counter to the position of his own party. Although the Labour Party had opposed secession, it did support the notion that the will of the electorate should be ascertained on important issues by means of referendum. The Party could now hardly fail to implement that will when it was so decisively expressed in the referendum. Collier therefore immediately announced that his

⁶⁹ Craven, above n 4, 34; Frank Beasley, 'The Secession Movement in Western Australia' (1936) 8 *The Australian Quarterly* 31, 31.

⁷⁰ Besant, above n 6, 251.

⁷¹ Watt, above n 9, 48; Crowley, above n 11, 274; Craven, above n 4, 34. At one point a plot was hatched to throw Hughes into the Swan River, but he managed to escape this indignity. See John Molony, *History of Australia* (1988) 269.

⁷² *Secession Act 1934*, 25 Geo 5, Statutes of Western Australia, No 2, The Second Schedule, s 7.

⁷³ *Ibid* 8.

⁷⁴ Crowley, above n 11, 274; See also Francis Crowley, *Modern Australia in Documents: 1901-1939*, (vol 1, 1973), 527 and Watt, above n 9, 52, 53.

⁷⁵ Watt, above n 9, 55; Besant, 252.

government would take 'all necessary steps to give effect to the majority decision of the people'.⁷⁶

VII FORMULATING THE PETITION TO SECEDE

Having decided to proceed with secession, the State government had to determine how best to achieve it. Three alternatives were open to the State government. It could attempt to effect a unilateral secession of the State from the Federation, it could seek an internal amendment to the *Constitution* through section 128, or it could petition the Imperial Parliament to amend the *Constitution Act* to enable it to withdraw from the Federation and be reconstituted as a separate, self-governing dominion.⁷⁷

The alternatives of unilateral secession and a section 128 amendment were quickly ruled out. Unilateral secession had never been favoured by those advocating secession. The very name of the Dominion League had been chosen to underline its loyalty to the Crown.⁷⁸ Its goal had always been to become a separate self-governing dominion within the British Empire. The continuation of the British connection was also essential to Western Australia from an economic standpoint, as the bulk of Western Australia's primary products was exported to the United Kingdom.⁷⁹ Unilateral secession was thus not an option.

There were two problems with the internal amendment procedure; one was legal in nature, and the other political. The amendment procedure under section 128 applied only to sections 1 to 128 of the *Constitution* itself and did not include the preamble and covering clauses I to VIII of the *Constitution Act*. From a legal standpoint, this limitation in the internal amendment formula was fatal to Western Australia's attempt to secede. As covering clauses III and VI referred to Western Australia, and as the preamble spoke of an 'indissoluble Federal Commonwealth', it would be necessary to amend these clauses, and this could not be done by resort to section 128. Only the Imperial Parliament could amend the covering clauses.

Resort to section 128 was also problematic from a political standpoint. Section 128 specified that any proposed amendment to the *Constitution* required the approval of an absolute majority from each of the two Federal Houses of Parliament, and the approval both of a majority of electors in a majority of States and of the majority of the Australian electorate. It was inconceivable that the Federal Houses of Parliament, a majority of the other States, or a majority of the Australian electorate would approve a proposal to dismember the Commonwealth.⁸⁰

⁷⁶ Watt, above n 9, 55, quoting the *Sunday Times*, 9 April 1933.

⁷⁷ Craven, above n 4, 46.

⁷⁸ Besant, above n 6, 236

⁷⁹ *Secession Act 1934*, 25 Geo 5, Statutes of Western Australia, No 2, The Second Schedule, 17 (XXV).

⁸⁰ Craven, above n 4, 47.

This meant that the State government could effectively proceed only by way of the third alternative, i.e. a petition to the Imperial Parliament to amend the *Constitution Act*. The secessionists foresaw no difficulties in seeking such an amendment. In their opinion, since the *Constitution Act* was a statute of the Imperial Parliament, that Parliament had full power to amend its own statute as it saw fit, including the preamble and the covering clauses. Moreover, the Imperial Parliament, if it did so amend the *Constitution Act*, could also enact legislation which would reconstitute Western Australia as a separate, self-governing dominion within the British Empire.

The State government announced in February 1934 that it was proceeding by way of petition to the Imperial Parliament, in order to effect the secession of Western Australia from the Federation. It also announced that a report would be prepared which would set out the reasons why the State was seeking to secede. This report would be distributed to the members of the Imperial Parliament and would serve as supporting evidence to the petition.⁸¹ The report, known in its abbreviated form as *The Case for Secession*,⁸² was completed by March 1934. In 489 pages it comprehensively detailed the grievances of Western Australia, setting out the constitutional, economic and political disabilities of the State within Federation. *The Case for Secession* emphasised that the disabilities of Western Australia could only be effectively resolved through secession because there was too great a divergence between the economic interests of Western Australia and those of the eastern States. The existing federal structure institutionalised the economic disabilities of Western Australia. It was therefore impossible to formulate a single policy that would meet the economic needs of both Western Australia and the eastern States.

Once the Petition and Report were completed, the State government enacted the *Secession Act*, which was given assent on 15 June 1934.⁸³ The *Secession Act* authorised the presentation of the Petition and the Report to the Imperial Parliament. In its second schedule, the Act reiterated briefly the major arguments set out in the Report, and then proposed an apportionment of current Commonwealth assets and liabilities, such as the public debt and Commonwealth property, between the Commonwealth and the new dominion of Western Australia.

⁸¹ Ibid 35; Watt, above n 9, 61.

⁸² The full title of the report was *The Case Of The People Of Western Australia In Support Of Their Desire To Withdraw From The Commonwealth Of Australia Established Under The Commonwealth Of Australia Constitution Act (Imperial) And That Western Australia Be Restored To Its Former Status As A Self-Governing Colony In The British Empire* (1934.) The report was referred to in its abbreviated form as *The Case for Secession* in the *Secession Act 1934*, 25 Geo 5, Statutes of Western Australia, No 2. It has also been abbreviated as *The Case of the People of Western Australia*: see Watt, above n 9, 60 ff.

⁸³ *The Secession Act 1934*, 25 Geo 5.

VIII THE LEGAL ISSUES INVOLVED IN PRESENTING THE PETITION OF SECESSION TO THE IMPERIAL PARLIAMENT

Western Australia's petition to secede was presented to the Imperial Parliament in November 1934 and its supporters were supremely confident that the petition would be received and acted upon. The secessionists had convinced themselves that the Imperial Parliament could not fail to recognise the justice of their claim. Their confidence was bolstered by a supporting legal opinion written by eight leading counsel.⁸⁴ It was therefore with some surprise that the Western Australian delegation learned, in December 1934, that the Imperial Parliament would not consider the petition until it had first determined whether it was properly receivable.

On 2 February 1935 the Imperial Parliament appointed a Joint Select Committee to determine this issue. The Committee was comprised of three members from the House of Lords, and three from the House of Commons. Its most prominent member was Lord Wright, the Law Lord.⁸⁵ In determining the receivability of the petition the Committee had to decide whether or not constitutional law and constitutional conventions then prevailing permitted the Imperial Parliament to consider the petition on its merits.⁸⁶

The starting point in determining this issue lay in the doctrine of parliamentary sovereignty, which was, and remains, the most fundamental rule of British constitutional law. In one of the standard texts of the period, *Introduction to the Law of the Constitution*, Albert Dicey declared that the doctrine of parliamentary sovereignty grants Parliament 'the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislature of Parliament'.⁸⁷

The doctrine of parliamentary sovereignty enabled the Imperial Parliament to enact laws which would operate in self-governing dominions such as Australia, and which would, moreover, render void any dominion legislation which was inconsistent with an Act of the Imperial Parliament.⁸⁸ The paramountcy of Imperial legislation was embodied in the *Colonial Laws Validity Act 1865 (Imp)*, which declared in section 2 that the laws of British colonial legislatures were subordinate to those of the Imperial Parliament, and that in a case of repugnancy between the two the dominion legislation would be void.⁸⁹

⁸⁴ Beasley, above n 70, 33

⁸⁵ The other members of the Committee were Viscount Goschen, Lord Ker and Messrs. Amery, Foot and Lunn: The Report, above n 32.

⁸⁶ Besant, above n 6, 277-78; Craven, above n 4, 47.

⁸⁷ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (6th ed 1902) 38. For contemporary restatements of the doctrine of parliamentary sovereignty see Stanley de Smith, *Constitutional and Administrative Law* (4th ed 1981) 73-74; Owen Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (7th ed 1987) 49, 59-60 and Jeffrey Goldworthy, *The Sovereignty of Parliament* (1999) 9-16.

⁸⁸ Kenneth Bailey, 'The Statute of Westminster' (1932) 5 *Australian Law Journal* 362, 362.

⁸⁹ *Colonial Laws Validity Act 1865*, 28 & 29 Vict, c 63.

The doctrine of parliamentary sovereignty was the linchpin of the secessionists' case. As the Imperial Parliament possessed the power to adopt, repeal or amend any legislation whatever, and as the Australian *Constitution Act* was an Act of the Imperial Parliament, the Imperial Parliament could amend or repeal that legislation as it saw fit, and could adopt any other legislation necessary to give effect to its purposes. In this regard Premier Forrest had pointed out in 1900 that an Act of the Imperial Parliament could sever Western Australia from the Federation in the same way that an Act of the Imperial Parliament had joined it to the Federation.

But the constitutional relationship of the United Kingdom to the self-governing dominions had been continually evolving from the time of Forrest's statement. From about 1900 onwards the dominions had gradually been acquiring an ever increasing *de facto* autonomy from the United Kingdom. At first, this autonomy extended only to their domestic affairs, but eventually it came to apply as well to their external affairs. Thus by 1919 the dominions had signed the *Treaty of Versailles*, and had been granted separate membership in the League of Nations.

As a result of this increasing autonomy a practice developed in the relationship between the United Kingdom and the dominions whereby the Imperial Parliament would not enact legislation relating to the affairs of the dominions unless specifically requested to do so by the dominion in question. At the 1926 Imperial Conference the status of the self-governing dominions vis-à-vis the United Kingdom was specifically addressed in the Balfour Declaration:

Their position and mutual relation may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations. ... Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form it is subject to no compulsion whatever.⁹⁰

The practice governing the relationship of the dominions to the United Kingdom, was enacted into law in 1931 when the Imperial Parliament adopted the *Statute of Westminster*, 1931.⁹¹ The effect of the *Statute* was to modify radically the legal rule that the Imperial Parliament preserved the power to make laws which would operate in a dominion as part of its law. This is set out in section 4, which forms the heart of the statute:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend to a Dominion as part of the law of that Dominion unless it has

⁹⁰ *Report of the Imperial Conference 1926, Summary of Proceedings* (1926) Cmd. 2768, 12-36, c. VI, 1.

⁹¹ Geo 5, c 4.

expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.⁹²

The corollary to this declaration was that a dominion Parliament had to be able to enact legislation which could be at variance with legislation enacted by the Imperial Parliament. Only in this way would a dominion Parliament be equal to the Imperial Parliament, as stated in the Balfour Declaration. Thus, section 2(1) provided that the provisions of the *Colonial Laws Validity Act 1865* (Imp) would not apply to any law made by the Parliament of a dominion after the commencement of the statute.⁹³ Section 2(2) of the *statute* provided that no law made after the commencement of the *Statute of Westminster* by a Parliament of a dominion would be void because it was repugnant to a law of England.⁹⁴

However, in those dominions where a federal form of government existed, such as Australia and Canada, there was some concern as to whether the provisions of the statute, and in particular section 2, might be used to alter the division of power between the two levels of government. It was feared in some circles that section 2, by excluding the federal Parliament from the operation of the *Colonial Laws Validity Act 1865* (Imp), might be interpreted as thereby granting the federal Parliament a plenary power equivalent to that of the Imperial Parliament to amend the *Constitution* as it saw fit.⁹⁵ It was decided, *ex abundanti cautela*, to insert additional provisions in order to eliminate this possibility. Sections 8 and 9 were therefore added to allay the concerns of the Australian State governments. Section 8 provided as follows:

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.⁹⁶

The effect of this section, with regard to Australia, was twofold: it prevented the Commonwealth from amending the covering clauses of the *Constitution Act*, and it prevented the Commonwealth from amending the *Constitution* itself (i.e. sections 1 to 128) otherwise than by resort to section 128.⁹⁷

Section 9 provided additional safeguards. Section 9(1) declared that nothing in the *Statute of Westminster* would be deemed:

⁹² Ibid 55.

⁹³ Ibid 53, 54. The powers conferred by the Statute in sections 2 and 4 to the Commonwealth did not extend to the State governments. This meant that the *Colonial Laws Validity Act 1865* continued to apply to laws made by the States, and thus that British statutes would continue to remain in force and to be paramount over Australian State law.

⁹⁴ 22 Geo 5, c 4, 54, 55.

⁹⁵ Kenneth Bailey 'The Statute of Westminster' (Part II) (1931-32) 5 *Australian Law Journal* 398-9.

⁹⁶ 22 Geo 5, c 4, 56.

⁹⁷ Bailey, above n 97, 399.

to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.⁹⁸

Section 9(2) went on to state that the concurrence of the Commonwealth *government* or Parliament was not required for any law made by the Imperial Parliament with respect to a matter within the jurisdiction of the States and not within the jurisdiction of the Commonwealth, where existing constitutional practice prior to the statute permitted the Imperial Parliament to make such laws without such concurrence.⁹⁹ Section 9(3) specified that the request and consent contained in section 4 referred to the Parliament and Government of the Commonwealth.¹⁰⁰

The effect of the *Statute of Westminster 1931* on the receivability of the petition from Western Australia was problematic for a number of reasons. Because of the fundamental rule of parliamentary sovereignty, the Imperial Parliament's legal power to act unilaterally if it so decided (i.e. to act without the consent of the dominion as required by section 4) could not be fettered by the statute. This was pointed out at the time by Professor Bailey in an article published in the 1932 edition of the *Australian Law Journal*. Professor Bailey noted that:

As a strict matter of legal theory, the Statute of Westminster does not bind the Imperial Parliament at all, and is merely declaratory in effect. It can, in strict legal theory, be repealed or even ignored, at any time. This is because, as Mr. Justice Dixon put it recently (*A G for N.S.W. v Trethowan* (1930) 44 CLR pp. 425-6) the legal doctrine of the sovereignty of Parliament means that the Imperial Parliament is 'supreme over the law'. It cannot therefore *by law* limit its own supremacy. To give to a Dominion Parliament *legal* equality of status with the Imperial Parliament is thus, in legal theory, impossible.¹⁰¹

Even if the Imperial Parliament did decide to act within the parameters set by the *Statute of Westminster*, section 9(2) raised another problem. Section 9(2) declared that the concurrence of the Commonwealth *government* was not required when the matter was one which was within the exclusive jurisdiction of the State. This raised the question as to whether the petition for secession by Western Australia was a matter which came exclusively within State jurisdiction, and if so, whether it was then possible to waive the concurrence of the Commonwealth Parliament, so that the Imperial Parliament could enact legislation solely at the request of the State government.

There was yet another problem relating to the statute, which arose by virtue of section 10. Section 10(1) declared that sections 2 and 4, *inter alia*, would apply to a

⁹⁸ 22 Geo 5, c 4, 56.

⁹⁹ Ibid 57.

¹⁰⁰ Ibid.

¹⁰¹ Bailey, above n 97, 402.

dominion as part of its law only if those sections were adopted by the Parliament of the dominion in question.¹⁰² In 1934, when Western Australia presented its petition to the Imperial Parliament, Australia had not yet adopted the *Statute of Westminster*. It was therefore questionable whether the statute applied to the situation at all.¹⁰³

But even if the *Statute of Westminster* did not apply to the situation at hand, there still remained the pre-existing constitutional practice whereby the dominions were considered autonomous entities by the United Kingdom, into whose internal affairs the United Kingdom would not interfere unless specifically requested to do so by the dominion in question. This raised the issue as to whether this constitutional practice bound the Imperial Parliament to act in a certain way. Constitutional practices are of two types: conventions and usages. A convention, as Wheare points out, is 'an obligatory rule', whereas a usage is simply 'a usual practice' which has 'not yet obtained obligatory force'.¹⁰⁴ After repeated implementation a usage may be transformed into a convention. However, it is also possible for a convention to arise from a single precedent or from agreement between the parties concerned.¹⁰⁵ A convention is a 'non-legal' rule, which is not enforceable by legal action.¹⁰⁶ The obligatory character of a convention therefore arises as a result of political considerations rather than legal ones.¹⁰⁷ A convention may thus nullify a rule of strict law, but it cannot abolish it.¹⁰⁸

There was little doubt that by 1935, the constitutional practice by which the United Kingdom would not interfere in the internal affairs of a dominion, except at the request of that dominion, constituted a convention rather than a mere usage. There remained the question of how this convention applied in the context of the Australian Federation, where jurisdiction was divided between two levels of government. Did the subject matter at hand determine which level of government had the right to request action from the Imperial Parliament? Moreover, could a State government make a request to the Imperial Parliament without the concurrence, and indeed in the face of the active opposition, of the Commonwealth government? The matter was further complicated by the referendum result, which

¹⁰² 22 Geo 5, c 4, 57.

¹⁰³ The *Statute of Westminster 1931* (UK) was not adopted in Australia until 1942, when the *Statute of Westminster Adoption Act 1942* (Cth) was enacted. Section 3 of the *Statute of Westminster Adoption Act 1942* (Cth) specified that sections 2-6 of the *Statute of Westminster* were to have effect as of 3 September 1939.

¹⁰⁴ Kenneth Wheare, *The Statute of Westminster and Dominion Status* (5th ed 1953) 10.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 19; Keith, above n 36, 99.

¹⁰⁷ Cf *Reference re Amendment of the Constitution of Canada* (1981) 1 SCR 753, 774-5 where a majority of the Supreme Law of Canada (Laskin CJC, Dickson, Beetz, Estery, McIntyre, Chouinard and Lamer JJ) noted that a convention, by its 'very nature' was 'political in inception' and depended 'on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time...' These characteristics of a convention, the majority declared, made it 'inconsistent with its legal enforcement'.

¹⁰⁸ Wheare, above n 106, 18. See also Hood Phillips and Jackson, above n 88, 113-28, for a contemporary account of constitutional conventions.

clearly indicated the will of the Western Australian electorate and had motivated the State government to proceed with the petition.

IX THE LEGAL ARGUMENTS OF WESTERN AUSTRALIA IN FAVOUR OF SECESSION

The Joint Select Committee convened on 27 March 1935 to hear submissions from Western Australia and the Commonwealth. At the outset, the Committee chairman, Viscount Goschen, informed counsel that the Committee would not be considering the petition on its merits but would determine only the question of its receivability.¹⁰⁹ Four days were taken up in the presentations of argument but, because these four days were spread across a period of four weeks, the hearing did not end until 17 April 1935.

Counsel for Western Australia, Professor J H Morgan KC, addressed the Committee first. Morgan's presentation, together with that of his junior, Paul Springman, took up three of the four days of argument. In his opening statement to the Committee, Morgan indicated that his presentation would comprise six points, which were:

- the right to petition the Imperial Parliament was co-extensive with the legislative jurisdiction of the Imperial Parliament;
- that the Imperial Parliament alone had jurisdiction to grant the Petitioners the relief which they sought;
- that the Commonwealth did not have power to do so;
- that Western Australia had a case for severance of the federal tie;
- that the people of Western Australia were determined to secede; and
- that this determination was not a transient thing.¹¹⁰

Although he had been advised by Lord Goschen that the Committee would not be considering the petition on its merits. Morgan nevertheless dealt with the merits at considerable length during the course of his presentation. Morgan's arguments may therefore be divided broadly into two categories, viz. those which address the receivability of the petition, and those which address its merits.

With regard to his arguments concerning the receivability of the petition, Morgan began by noting that there was a right to petition the Imperial Parliament whenever

¹⁰⁹ Report, above n 32. The Report may also be found in Australia: Commonwealth Parliamentary Papers (1934-1935) No. 153. A verbatim transcript of the arguments of counsel has been reproduced in the *Report* at pages 1-150. Summaries of the arguments of the two sides may be found in Enid Russell 'Western Australian Secession Petition - Arguments Before the Joint Selection Committee' (1935) 9 *Australian Law Journal* 141; Besant, above n 6, 278-84; Craven, above n 4, 50-53.

¹¹⁰ The Report, above n 32, 2.

the petitioner could not otherwise obtain redress. This right of petition, he asserted, was co-extensive with the legislative jurisdiction of the Imperial Parliament.¹¹¹ In this case the Imperial Parliament, and only the Imperial Parliament, had legislative jurisdiction to amend the *Constitution Act* as requested by the petitioners. The *Constitution Act* was made up of a preamble and nine covering clauses. Under the amending formula contained in section 128, it was possible, within the Australian context, to amend only those sections of the Act contained in covering clause IX. The petitioners, however, were seeking amendment to those clauses of the *Constitution Act* which were outside the ambit of section 128.¹¹² Only the Imperial Parliament had the legislative jurisdiction to amend the preamble and these covering clauses. Therefore the petition should be receivable, because receivability was co-extensive with legislative jurisdiction.¹¹³ Morgan argued further that the right to petition the Imperial Parliament had undoubtedly been held by each of the Australian colonies prior to Federation, and that this right had nowhere been taken away from them in the *Constitution Act*. It was therefore still one of the rights possessed by them by virtue of section 107.¹¹⁴

Morgan then addressed the issue of the Balfour Declaration and the *Statute of Westminster 1931*. He dismissed the Balfour Declaration as a 'mere resolution', which could not take away a right possessed by the States to petition the Imperial Parliament.¹¹⁵ In any case the wording of the Declaration, by referring to 'Dominion Acts' and 'Dominion Bills', did not extend to State Acts and State Bills, and therefore could not affect a petition from a State.¹¹⁶ With regard to the *Statute of Westminster*, Morgan argued that it did not apply, given that Australia had not yet adopted it, as required by section 10.¹¹⁷ Further, even if it did apply, it would not affect the Imperial Parliament's competence to amend the *Constitution Act* because section 8 of the statute specifically reserved that right in the Imperial Parliament.¹¹⁸ Moreover, section 4 did not prohibit the Imperial Parliament from acting to amend the *Constitution Act* without the concurrence of the Commonwealth government because such concurrence was limited by section 9(2) to matters which were within the legislative competence of the Commonwealth Parliament. As the Commonwealth Parliament had no jurisdiction to amend the covering clauses, its concurrence to such amendments was not necessary.¹¹⁹ Insofar as it was a State

¹¹¹ Ibid 14, 15, 122. See Maurice Gwyer, *Anson's Law and Custom of the Constitution Volume One* (5th ed, 1922) 390-397 for a review of the right of petition.

¹¹² The preamble, for example, declared that the Commonwealth was 'indissoluble'. Covering clauses III and VI made specific reference to Western Australia.

¹¹³ The Report, above n 32, 10-13.

¹¹⁴ Ibid 61, 62. Section 107 reads as follows: 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be'.

¹¹⁵ Ibid 64.

¹¹⁶ Ibid.

¹¹⁷ Ibid 74, 75.

¹¹⁸ Ibid 90, 91.

¹¹⁹ Ibid 82-7.

government rather than the federal government which was requesting the Imperial Parliament to enact legislation on its behalf, Morgan noted that the Australian State governments had continued to maintain a separate and independent relationship with the Imperial Parliament.¹²⁰ This was evidenced by the appointment of State Governors upon the direct recommendation of the State government without the intervention of the Commonwealth government,¹²¹ and by direct communication between the State governments and the Imperial government on other matters of State concern, which was confirmed by section 9(2) of the *Statute of Westminster*.¹²² Morgan emphasised that under the *Constitution* the Commonwealth government had been granted a certain number of specific heads of power, and its jurisdiction was limited to these areas.¹²³ The States, on the other hand, were granted residual powers. As the issue of secession did not fall within any of the enumerated heads of power of the Commonwealth government, its consent could not be required prior to the Imperial Parliament taking action at the request of the State government.¹²⁴

In addition to these arguments, Morgan also dealt at length with the various constitutional, political and economic grievances of Western Australia since becoming a part of the Australian Federation. Morgan considered the merits of the petition to be intrinsically connected to the issue of its receivability, because a petition to the Imperial Parliament should be available whenever a petitioner could not otherwise obtain redress for grievances suffered.¹²⁵ It was therefore necessary to show that Western Australia was indeed suffering grievances, which could only be redressed by way of petition to the Imperial Parliament. Morgan referred to constitutional decisions of the High Court, which had fundamentally altered the very nature of the Australian Federation. He laid particular emphasis on *Engineers*¹²⁶ and *New South Wales v Commonwealth (No.1)*¹²⁷ which had greatly increased the powers of the Commonwealth at the expense of the States, in ways which had never been contemplated by Western Australia when it had agreed to enter the Federation.¹²⁸ He pointed out that the Senate, which had originally been established with the intention of protecting the interests of the States at the federal level, had utterly failed to do so.¹²⁹ He also detailed the economic problems of

¹²⁰ Ibid 83.

¹²¹ Ibid 22.

¹²² Ibid 22, 65, 69, 72, 73.

¹²³ Ibid 13, 62, 63.

¹²⁴ Ibid 14, 23.

¹²⁵ Quoting from Anson that a petition should be available when no other remedies were available, because of 'the poverty of the Petitioner', Morgan remarked that those were 'words which are not irrelevant at the present moment': The Report, above n 32, 15. See also the comments of Springman in this regard: Ibid 144.

¹²⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹²⁷ (1932) 46 CLR 155 ('*Garnishee Case*').

¹²⁸ The Report, above n 32, 24, 26, 29.

¹²⁹ Ibid 31-37, 40-41, 52-57. In this regard John Macrossan and Alfred Deakin had made prescient statements at the constitutional conventions of 1891 and 1897, respectively, to the effect that members of the proposed Senate would vote not as State representatives but rather along party political lines: La Nauze, above n 3, 44, 188.

Western Australia, and emphasised that those problems could not be effectively redressed by Western Australia because of the provisions of the *Constitution*.¹³⁰ He pointed out that there had already been many investigations from various federal and State commissions into the problems of Western Australia within Federation. Although these commissions had repeatedly recommended that changes be made to the *Constitution*, no action had ever been taken by the Commonwealth.¹³¹ Western Australia itself had on many occasions attempted to secure constitutional change within the context of the Australian constitutional process, but had been repeatedly frustrated in its attempts to do so by the Commonwealth.¹³² Now, as a last resort, Western Australia was seeking redress from the Imperial Parliament.¹³³

X THE LEGAL ARGUMENTS OF THE COMMONWEALTH AGAINST SECESSION

Mr Wilfred Greene KC addressed the Committee on behalf of the Commonwealth. Greene first suggested various ways in which Western Australia's grievances could be redressed within the Australian context, asserting that it was not necessary for it to petition the Imperial Parliament.¹³⁴ He then continued by acknowledging that the Imperial Parliament was the only legislative body with the legal capacity to amend the preamble and covering clauses I to VIII of the *Constitution Act*.¹³⁵ However, this did not mean that there was an automatic right for Western Australia to present a petition to the Imperial Parliament or for the Imperial Parliament to receive it. The receivability of a petition was not co-extensive with legal capacity but rather must be determined by a preliminary examination of its nature and subject matter, in order to ascertain whether it was fit to be received.¹³⁶

Greene argued that the petition was not receivable, because although the Imperial Parliament alone had the legal capacity to amend the relevant sections of the *Constitution Act*, it did not possess the constitutional capacity necessary to act. This was because of the existence of the constitutional convention, which forbade the Imperial Parliament from enacting, amending or rescinding any legislation relating to the internal affairs of a self-governing dominion without the concurrence of that dominion.¹³⁷ When the dominion in question was a federal entity the convention required in almost all cases the concurrence of the federal government, because only then could the Imperial Parliament be certain that it was acting in a manner which reflected the will of the people of the entire dominion.¹³⁸ The only exception related to matters that were exclusively within State jurisdiction. But when the

¹³⁰ The Report, above n 32, 42, 48, 54-56, 59-60, 122.

¹³¹ Ibid 44, 45.

¹³² Morgan also pointed out that in the Federal House of Representatives there were 75 members. Five members came from Western Australia, whereas 48 members came from Sydney and Melbourne: The Report, above n 32, 3.

¹³³ Ibid 46-7.

¹³⁴ Ibid 91-2.

¹³⁵ Ibid 92.

¹³⁶ Ibid.

¹³⁷ Ibid 101.

¹³⁸ Ibid 99, 102.

matter was one that affected the entire Federation, only the Commonwealth government could approach the Imperial Parliament.¹³⁹ Secession, Greene argued, was a matter which vitally affected the entire Commonwealth. It could thus be dealt with by the Imperial Parliament only with the concurrence of the Commonwealth government. On this point Greene was emphatic:

The suggested right that my learned friend has put forward, a right to come in a matter which concerns the Nationhood of Australia, and in a manner which affects them as Members of the Australian nation, and not entities still preserving a separate existence outside Federation - such a right not only has never been exercised, it has never existed, it is inconsistent with the whole conception of Federation, and it has been steadfastly repudiated by all Governments concerned from the very beginning.¹⁴⁰

Greene concluded by arguing that the convention governing the relationship between the United Kingdom and the dominions, and its embodiment in the *Statute of Westminster*, included the right of the dominions to organise and to regulate their own internal affairs as they saw fit. It would therefore be an act of interference in the internal affairs of a dominion, and an egregious and highly improper breach of the convention, for the Imperial Parliament to discuss or consider a grievance emanating from one part of a dominion.¹⁴¹

In reply, Morgan made reference to the anomalous position of Western Australia upon entering Federation. The other Australian colonies, he noted, had been quite willing to federate without Western Australia.¹⁴² This was evidenced by the wording of covering clauses III and VI, which simply granted Western Australia an option to join.¹⁴³ If the presence of Western Australia had not been necessary in the creation of the Australian Federation, neither would its withdrawal affect its ongoing existence.¹⁴⁴ This argument was reinforced by the wording of the preamble, which did not refer to Western Australia as one of the colonies whose people had 'agreed to unite in one indissoluble Federal Commonwealth'.¹⁴⁵ Thus, even if Western Australia were to secede from the Commonwealth, this would not alter the relationship of the remaining States to the Commonwealth nor with one another under the wording of the *Constitution*.¹⁴⁶

XI THE DECISION OF THE JOINT SELECT COMMITTEE

The presentations of counsel finished on 17 April 1935, and the Joint Select Committee retired to consider the matter. It handed down its report some five weeks

¹³⁹ Ibid 94.

¹⁴⁰ Ibid 110.

¹⁴¹ Ibid 113, 114.

¹⁴² Ibid 119.

¹⁴³ Ibid 119, 121.

¹⁴⁴ Ibid 119.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 120, 121.

later, on 22 May 1935. Given the lengthy arguments of counsel, the decision of the Committee was surprisingly brief, comprising only thirteen paragraphs. In paragraphs 1 and 2 the Committee set forth the parameters of its jurisdiction, noting that its mandate was to determine whether the petition was 'proper to be received'.¹⁴⁷ The Committee's mandate required it to determine whether the petition was properly receivable 'in accordance with certain long established and clearly understood constitutional principles'.¹⁴⁸ There was no question about the legal rules. The fundamental rule of parliamentary sovereignty permitted the Imperial Parliament 'to legislate for the whole Empire'.¹⁴⁹ Equally, there was an 'undoubted and ancient right of Parliament to receive whatever Petitions it thinks fit' and a corresponding 'right of the subjects of the Crown to present Petitions to Parliament'.¹⁵⁰ But when the Imperial Parliament was dealing with the affairs of a self-governing dominion, these clear and 'undoubted' legal rules could only be exercised 'in accordance with certain long-established and clearly understood constitutional principles'.¹⁵¹ Those principles, moreover, had recently been given 'formal and statutory approval in the Statute of Westminster'.¹⁵² The issue before the Committee was therefore how to apply the legal rules in the light of these constitutional principles.

The case at hand was succinctly summarised by the Committee in paragraph 3. A petition from the *government* of Western Australia, 'conveying the wishes of the people of Western Australia, as ascertained in a referendum',¹⁵³ had been presented to the Imperial Parliament seeking the secession of Western Australia from the Australian Federation. This was 'contrary to any request or desire of the Commonwealth of Australia'.¹⁵⁴ The issue therefore was whether this petition was receivable by the Imperial Parliament in the light of the legal and constitutional principles discussed in paragraph 2.

In paragraph 4, the Committee completely disregarded the State's summary of grievances and hardships purportedly resulting from Federation. The Committee held that these matters were not relevant to the constitutional issue of the receivability of the petition.¹⁵⁵ The Committee likewise rejected, in paragraph 5, the Commonwealth's assertions that Western Australia had not availed itself of other remedies which were available to the State within the Australian context. Possible alternative remedies were not relevant to the issue of the petition's receivability.¹⁵⁶

¹⁴⁷ Ibid, paragraph 1, vi.
¹⁴⁸ Ibid, paragraph 2, vi.
¹⁴⁹ Ibid.
¹⁵⁰ Ibid.
¹⁵¹ Ibid.
¹⁵² Ibid.
¹⁵³ Ibid, paragraph 3, vii.
¹⁵⁴ Ibid.
¹⁵⁵ Ibid, paragraph 4, vii.
¹⁵⁶ Ibid, paragraph 5, vii, viii.

In paragraph 6, the Committee pointed out that only the Imperial Parliament had the legislative authority to give effect to the petition. The amendment procedure in section 128 did not extend to the preamble and covering clauses I to VIII of the *Constitution Act* which had created the Federation. Moreover, the Act did not grant any right to the States to secede from the Federation, nor did it grant the Commonwealth any power to amend the *Constitution* to enable a State to secede. Any such amendment had to be effected by the Imperial Parliament.¹⁵⁷

In paragraph 7, the Committee declared that the Imperial Parliament would act in the internal affairs of a dominion, such as Australia, only if requested to do so by the government of the dominion, in accordance with ‘a well established convention of the constitutional practice governing the relations between the Parliament of the United Kingdom and the other Parliaments of the Empire’.¹⁵⁸ The Committee declared that the convention meant a request made by the dominion ‘speaking with the voice which represents it as a whole and not merely at the request of a minority’.¹⁵⁹ This did not mean, however, as one might conclude by reading paragraph 7 alone, that all requests to the Imperial Parliament from a federal dominion must emanate from the central government of that dominion. Rather the division of powers between the two levels of government had to be taken into account when determining how to apply the convention to a particular request.¹⁶⁰ In other words, the States did have a limited right to present petitions to the Imperial Parliament, but a State could properly make a request only if the subject-matter of the petition fell within State powers.¹⁶¹ A petitioner such as Western Australia could not have *locus standi* in respect of a petition whose subject-matter appertained to the Commonwealth.

In paragraph 10, the Committee referred to the *Statute of Westminster* for confirmation of its position. The preamble of the statute stated that

it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to, any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.¹⁶²

In the Committee’s opinion, the statute was ‘there dealing solely with dominion affairs’.¹⁶³ This was so because State matters were dealt with in section 9(2), which provided that:

¹⁵⁷ Ibid, paragraph 6, viii.

¹⁵⁸ Ibid, paragraph 7, viii.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, paragraph 8, ix.

¹⁶¹ Ibid, paragraph 9, ix.

¹⁶² 22 Geo 5, c 4, 53, 54.

¹⁶³ The Report, above n 32, paragraph 10, ix.

the Parliament of the United Kingdom may deal with respect to any matters within the authority of the States of Australia, without any concurrence of the Commonwealth, that is, it may deal with such matters at the request of the States.¹⁶⁴

For the petition to be properly receivable it was therefore essential that its subject matter come within the authority of the States.

To ascertain whether this was the case, in paragraph 11 the Committee referred to the preamble of the *Constitution Act* noting that it referred to the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania as having 'agreed to unite in one indissoluble Federal Commonwealth under the Crown'.¹⁶⁵ Western Australia was not included in the preamble, but this did not mean that Western Australia had not agreed to be a part of this 'indissoluble Federal Commonwealth'; nor did it mean that the position of Western Australia within the Federation was different from that of the other States. Western Australia had joined the Federation under the option provided in covering clause III, and was therefore 'on the same footing' as the other States.¹⁶⁶ Western Australia therefore did not have any special status or prerogatives within Federation by virtue of the wording of the preamble and covering clauses of the *Constitutional Act*.

In paragraph 11, the Committee declared that when the Parliament of the United Kingdom created the Australian Federation, it gave 'effect to the voice of the people of the continent of Australia, and not to the voice of any State or States'.¹⁶⁷ The creation of the Australian Federation reflected the will of the people of the entire continent. It was only possible to 'vary or dissolve' that Federation in the same way, i.e. when the request to do so came from the entire people.¹⁶⁸ Secession was therefore a matter which concerned the entire dominion, not simply one State within that dominion. Given this fact, the request had to be made, as the Committee pointed out in paragraph 7, by the dominion 'speaking with the voice which represents it as a whole and not merely at the request of a minority'.¹⁶⁹

In paragraph 12, the Committee noted that it was legally possible, because of the rule of parliamentary sovereignty, for the Imperial Parliament to act 'against the wish and without the consent of the Commonwealth'.¹⁷⁰ But such action, although legally possible, would nevertheless be outside the competence of the Imperial

¹⁶⁴ Ibid, paragraph 10, ix.

¹⁶⁵ Ibid, paragraph 11, x.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, paragraph 7, viii. As early as 1906, Glynn, writing on the question of secession, had stated that the Imperial Parliament could repeal or amend the *Constitution Act* to effect secession, but that 'any Act of the Imperial Parliament, for the purpose should, in accordance with principles underlying all grants of self government, be passed only at the request of the Commonwealth and the States': Glynn, above n 29, 204.

¹⁷⁰ The Report, above n 32, paragraph 12, x.

Parliament because of the 'established constitutional conventions'.¹⁷¹ These constitutional conventions had to be observed, the Committee emphasised, because only by observing such conventions could:

the legal competence of the Parliament of the United Kingdom to legislate for the internal affairs of any Dominion or any self-governing state or Colony be reconciled with the fundamental conception of them as autonomous communities.¹⁷²

Thus, not only was the subject-matter of the petition not within the jurisdiction of Western Australia, but it was also 'beyond the jurisdiction claimed by the Parliament of the United Kingdom'.¹⁷³

The Committee therefore concluded, in paragraph 13, that the petition was not receivable because Western Australia, as a State, was 'not concerned with the subject-matter of the proposed legislation' and because the Imperial Parliament did not have jurisdiction to enact the request 'except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wishes of the Australian people as a whole'.¹⁷⁴

XII AFTERMATH OF THE DECISION

The decision of the Joint Select Committee elicited mixed reactions in Australian circles. On the federal side there was great relief that the petition had been rejected. Prime Minister Lyons declared that he was 'pleased' with both 'the substance and unanimity of the report', and emphasised that the discussion and resolution of Western Australia's 'special problems' should occur within Australia itself.¹⁷⁵ The Premier of Western Australia, Phillip Collier, who had dutifully promoted the secession petition in deference to the will of the majority, even though he and his party were opposed to such a course of action, must also have been relieved at the decision of the Committee. He did, however, use the occasion to press for alternative solutions to Western Australia's problems, and warned ominously that the Federation could not endure if these problems were not resolved.¹⁷⁶

Members of the Dominion League were bitterly disappointed. In a press release issued on 29 May 1935 the delegation in London stated that the decision was 'wrong in principle and unwise'. The following day in Perth the League issued a second statement, declaring that it was surprised by the decision of the Committee, and vowed to continue to work for the secession of Western Australia.¹⁷⁷ In the immediate aftermath of the decision, some individual members of the League made

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid, paragraph 13, x.

¹⁷⁵ Besant, above n 6, 295, quoting from 'Mr Lyons Pleased', *The West Australian*, 25 May 1935.

¹⁷⁶ Ibid 295.

¹⁷⁷ Watt, above n 9, 81, quoting from *The West Australian*, 29 May 1935, 30 May 1935.

intemperate statements. One of the London delegates, for example, was moved to threaten that secession would take place even if force were required to effect it, although the outburst was disavowed by the other members of the delegation.¹⁷⁸

The Dominion League had always sought to effect secession by legal means, and at this point it still recoiled from any resort to illegality. Moreover, the delegation had not yet lost all hope of a hearing by the Imperial Parliament. The Imperial Parliament was not bound to accept the decision of the Joint Select Committee, and the delegation therefore began to lobby members of Parliament sympathetic to its cause. Questions were put to the Prime Minister and the Attorney-General, and a petition was signed by sixty-nine members of the House of Commons requesting that the petition of Western Australia be considered in the House. But this never occurred. In November 1935, a formal response to the petition was issued by the Imperial Parliament, stating that the petition was not properly receivable.¹⁷⁹ The Dominion League, now desperate, reversed its long-standing policy and called for a unilateral declaration of independence. The Premier was urged to effect the unilateral secession of Western Australia by means of the Western Australian Legislature. Draft legislation was drawn up by the League and presented to the *government* of Western Australia but the call for unilateral action was simply ignored by the State government.¹⁸⁰

Thereafter the Dominion League, and the cause of secession, dwindled into insignificance. The League, which only a short time before had been so powerful that it could threaten to unmake politicians, quickly faded from the political scene with the rejection of the petition. The failure of the petition convinced most Western Australians that secession was not a viable political option. Moreover, by 1936 economic conditions in Western Australia had begun to improve, and the prospect of secession as a panacea for the State's problems had lost its appeal for the ordinary voter.¹⁸¹

The economic recovery was aided by the special assistance grants which Western Australia had begun to receive from the federal government from 1934 onwards, upon the recommendation of the Commonwealth Grants Commission.¹⁸² This Commission had been created by the federal government shortly after the State referendum, in response to the strong support shown for secession. It was an administrative body, whose function was to investigate the financial difficulties of the smaller States (particularly those arising as a result of the tariff policy of the federal government) and to make recommendations for special assistance grants to offset those difficulties. The Commission found that the federal tariff policy had created serious economic problems for Western Australia and grants to the State

¹⁷⁸ Ibid 297.

¹⁷⁹ Ibid 298-9; Watt, above n 9, 81.

¹⁸⁰ Besant, above n 6, 299.

¹⁸¹ Watt, above n 9, 81, 82.

¹⁸² These grants were made pursuant to section 96 of the *Constitution*.

were increased.¹⁸³ Western Australia thereafter received a special assistance grant in each year from 1934 to 1968.¹⁸⁴ Although the Commonwealth Grants Commission recognised that Western Australia's financial problems stemmed to a large degree from federal tariff policy, it did not conclude that there were problems inherent in the provisions of the *Constitution* which affected Western Australia's economic well-being. In its first Report in 1934, it recommended that no changes be made to the *Constitution*.¹⁸⁵ Once the decision to reject the petition had been made, the federal government no longer felt any need to amend the *Constitution* changes either, and in fact no changes have ever been made to the *Constitution* as a result of Western Australia's attempt to secede.

XIII CONCLUSION

A number of conclusions can be drawn from Western Australia's attempt to secede. The first matter which must be addressed is whether the electorate of Western Australia truly wanted to secede from the Australian Federation. Morgan had argued before the Joint Select Committee that the secession movement in Western Australia was a long standing cause and had widespread support from the community.¹⁸⁶ However, by 1927 the Secession League had folded because of a lack of support from the general public. Moreover, once the petition had been rejected by the Joint Select Committee, the strength of the Dominion League declined rapidly until it became a peripheral element on the Western Australian political scene. This hardly bespeaks a movement which had deep-rooted and enduring support from the general public. On the other hand, on 8 April 1933, the electorate of Western Australia voted by an almost two-to-one majority in favour of secession. This result would seem to indicate that at that particular moment, at least, there was strong and widespread support for secession amongst the people of Western Australia. Yet strangely, the same electorate which voted so strongly for secession also voted into government the one political party which was clearly opposed to secession. How can this be explained? This apparently contradictory behaviour can be rationalised on the basis that in both cases the vote was essentially a protest against the existing political situation. To vote for secession was to protest against the economic policies of the federal government. To vote for Labour in the State election was to protest against the current State government, which had come to power in 1930 on campaign promises of jobs and economic recovery, and which had dismally failed to deliver on those promises.¹⁸⁷

¹⁸³ McMinn, above n 23, 177; Younger, above n 32, 580. It is interesting to note that the evidence presented by Western Australia to the Grants Commission in support of its application for financial assistance under section 96 was virtually identical to the material contained in *The Case for Secession*: Greenwood, above n 41, 188.

¹⁸⁴ Hanks, above n 23, 587.

¹⁸⁵ Besant, above n 6, 296.

¹⁸⁶ The Report, above n 32, 2, 4.

¹⁸⁷ Beasley, above n 70, 31-32; Watt, above n 9, 83.

Whatever may have been the motivation of the electorate in voting for secession, the vote itself was certainly decisive. The electorate had responded to a direct and clear-cut question, and had indicated by a two thirds majority that it was in favour of secession. That result prompted the State government to petition the Imperial Parliament for secession. The referendum result was certainly one of the major weapons in the hands of the secessionists in their campaign to effect the secession of Western Australia. They argued that the people of Western Australia had expressed their will in a clear and democratic manner. This not only justified the State in seceding from the Federation, but legitimised the process of doing so, according to the secessionists.¹⁸⁸

The Joint Select Committee did acknowledge the strength of the referendum result in paragraph 3 of its *Report* when it noted that the petition of the *government* of Western Australia conveyed 'the wishes of the people of Western Australia, as ascertained in a referendum organised by the State authorities'.¹⁸⁹ But the Committee then went on to deny that the referendum result could in itself play a conclusive role in the proceedings. In the Committee's opinion, it was not sufficient for the electorate of one State to determine by referendum whether or not they wished to remain in the Federation or secede from it.¹⁹⁰ This conclusion flowed directly from the position taken by the Committee with regard to secession.

The secession of a State from the Australian Federation, the Committee held, was legally possible in certain circumstances. This was so despite the wording of the preamble of the *Constitution Act*, which declared that the Australian colonies 'had agreed to unite in one indissoluble Federal Commonwealth under the Crown'. Although the Committee made reference to this phrase twice in its *Report*,¹⁹¹ it apparently did not consider this language to be an insuperable legal barrier, because it proceeded to detail the manner in which secession could be legally effected.¹⁹² As a statutory preamble does not itself have binding effect, the wording of the preamble in the *Constitution Act* could not be relied upon to prohibit secession. As Craven points out, 'while the preamble may be part of the statute as a whole, because it precedes the enacting clause it does not form part of the substantive enactment'.¹⁹³ In other words, a preamble does not have 'the direct and immediate effect of a provision contained within the enacting parts' and can therefore only be referred to 'in the event that the words under consideration have first been found to be unclear or ambiguous'.¹⁹⁴ The case before the Joint Select Committee did not

¹⁸⁸ Morgan also laid great emphasis on the referendum results in his presentation to the Joint Select Committee: The Report, above n 32, 4, 5.

¹⁸⁹ Ibid, paragraph 3, vii.

¹⁹⁰ Ibid, paragraph 7, viii; paragraph 11, x.

¹⁹¹ Ibid, paragraph 6, viii; paragraph 11, x.

¹⁹² Ibid, paragraph 11, x; paragraph 13, x.

¹⁹³ Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1984) 15 *Federal Law Review* 123, 127.

¹⁹⁴ Ibid 127. See *Stowel v Lord Zouch* (1562) Plow 353, 75 ER 536; *Overseers of West Ham v Iles* (1883) 8 App Cas 386, 388; *Sussex Peerage Claim* (1884) 11 Cl & F 85; *Powell v Kempton Park Racecourse Co.* (1897) 2 QB 242, 269 (Lord Halsbury); *Bowtell v Goldsbrough Mort &*

involve any issue of unclear or ambiguous language within the enacting provisions of the *Constitution Act*.¹⁹⁵

Although the Committee allowed that secession could legally occur in certain circumstances, it held that an individual State could not legally effect its secession from the Australian Federation. In paragraph 6, the Committee declared that a State could not unilaterally secede because the *Constitution Act* granted 'no power to any State to secede'.¹⁹⁶ So the States did not possess a legal right under section 107 to petition the Imperial Parliament on any and every subject. In this regard, the Committee expressed its opinion in paragraph 8:

It is essential in this connection to keep in mind that Western Australia, in joining the Commonwealth, surrendered all those powers, previously enjoyed by it as a self-governing Colony, which under the *Commonwealth of Australia Constitution Act, 1900*, were vested in the Commonwealth, and that it has since the coming into operation of that Act, continued to exist as a political entity in respect only of the powers which remain vested in the States.¹⁹⁷

The unlimited right to petition the Imperial Parliament which the former Australian colonies possessed was necessarily modified by their entry into Federation, because they ceased to be entities existing in their own right and became instead parts of a larger whole. Upon becoming States within the Commonwealth under the *Constitution Act*, their right to petition with regard to certain subjects was by necessary implication withdrawn from them. Section 107 had to be read in this light.¹⁹⁸

Co. Ltd. (1906) 3 CLR 444, 451 (Griffith CJ). See also Craven, above n 193, 128-30 for a discussion of English and Australian cases relating to the role of a preamble within a statute subsequent to the Report.

¹⁹⁵ In *Federated Saw Mills v James Moore & Sons Pty. Ltd.* Isaacs J declared that the language in the preamble amounted only to 'pious aspirations for unity': (1910) 8 CLR 465, 535. In his 1906 article on secession, Glynn noted that the language of the preamble 'may be regarded as one of those preliminary flourishes addressed to the conscience, which are to be found in the preambles of instruments that suggest more than they accomplish': Glynn, above n 29, 204.

¹⁹⁶ The Report, above n 32, paragraph 6, viii. The Committee made no mention in its decision of the effect of covering clauses III and IV, which contain language which prohibits the unilateral secession of a State. Covering clause III provides that the Australian colonies shall be united in a Federal Commonwealth 'on and after a day therein appointed'. Covering clause IV likewise states that the Commonwealth 'shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed'. As Craven points out, the phrase 'on and after a day therein appointed' in covering clause III, and the equivalent words in covering clause IV, impose upon the Australian States an ongoing union by virtue of the 'unlimited futurity' of the language. No State can secede from the Federation without contravening this language. Although the Committee did not advert to this language in covering clauses III and IV its decision was consistent with the limitations imposed by the said clauses: Craven, above n 196, 137.

¹⁹⁷ The Report, above n 32, paragraph 8, ix.

¹⁹⁸ Cf. the comments of Barwick CJ in *Victoria v Commonwealth* (1971) 122 CLR 353, at pages 371 and 372: 'The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with

The States thus had a limited right of petition to the Imperial Parliament under the *Constitution Act*. They could petition the Imperial Parliament, by virtue of the constitutional convention,¹⁹⁹ to enact legislation on their behalf only with regard to matters with which the State government was 'primarily concerned'.²⁰⁰ This brought the Committee to the heart of the case: was the issue of secession primarily a matter of concern to the State of Western Australia only, or was it primarily a matter of concern to the entire Federation? At this point the Committee had to consider the nature and effect of secession upon a Federation. It concluded that secession vitally affected the entire Federation, and not simply an individual State within that Federation. In reaching this conclusion, the Committee drew directly from arguments made by Greene. As has already been seen, Greene had argued that secession, by its very nature, touched upon the 'Nationhood of Australia', and its occurrence would necessarily affect the entire country.²⁰¹ Western Australia had petitioned the Imperial Parliament to amend the *Constitution Act* to enable it to secede. But the *Constitution Act*, as the Committee pointed out, had been enacted to bring into existence the Commonwealth of Australia as a 'separate and integral national authority covering the whole area of Australia'.²⁰² The States were 'political entities within that area'.²⁰³ Any amendment to the *Constitution Act* which altered the composition and area of the Commonwealth must necessarily affect the Commonwealth as a whole. No individual State could unilaterally seek to have altered the *Constitution Act* without trenching on 'Commonwealth affairs'.²⁰⁴ As a result, secession was a matter which primarily concerned the Commonwealth.

Once the Committee had made this finding, it followed logically that the electorate of an individual State could not determine by referendum whether they wished to secede from the Federation. The citizens of one particular part of the country could

the former colonies, derived their existence as States from the Constitution itself: and being parts of the Commonwealth became constituent States ... The extent to which the former colonial constitutions and powers of government were transmuted into and continued by the Constitution as the constitutional and governmental powers of the States is fully expressed in s. 106 and s. 107 which are both subject to the Constitution.'

¹⁹⁹ The Report, above n 32, paragraph 7, viii.

²⁰⁰ Ibid, paragraph 9, ix.

²⁰¹ See *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J); *R. v Sharkey* (1949) 79 CLR 121, 148-9 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79. The latter High Court decisions, in invoking the concept of 'nationhood', were foreshadowed by Greene's argument that secession, by its very nature, was a matter which affected the 'nationhood' of the country. These decisions also saw the emergence of the notion that the Commonwealth possesses a 'nationhood power', i.e. a power to act with regard to matters of national concern, in addition to the specifically enumerated heads of power which it possesses under the *Constitution*. However, the source of the 'nationhood power' remains unclear and its ambit uncertain. See George Winterton, *Parliament, the Executive and the Governor-General* (1983) 140-4 for a discussion of the 'nationhood power'.

²⁰² The Report, above n 32, paragraph 8, ix.

²⁰³ Ibid, paragraph 8, ix.

²⁰⁴ Ibid.

not be given greater rights than those of the other parts of the country to determine a matter which concerned the entire country. Thus the Western Australian referendum result, although decisive within Western Australia, could represent no more than the viewpoint of a mere ‘minority’ within the Federation.²⁰⁵ When the matter affected the Federation as a whole, then the Federation must speak ‘with the voice which represents it as a whole and not merely at the request of a minority’.²⁰⁶

The secession of a State from the Australian Federation could not therefore occur, in the Committee’s opinion, through the unilateral action of that State. This did not mean that secession, or the dissolution of the entire Federation, could not legally occur, under certain circumstances. As the Committee pointed out in paragraph 11, it was ‘the people’ of the various Australian colonies who ‘had agreed to unite’ so that by enacting the *Constitution Act* the Imperial Parliament ‘was giving effect to the voice of the people of the continent of Australia’.²⁰⁷ It was therefore only possible for the Imperial Parliament to ‘vary or dissolve’ the Australian Federation by the same process, i.e. when the proposed dissolution or variance had been ‘invoked by the voice of the people of Australia’.²⁰⁸ This principle was forcefully re-iterated by the Committee in paragraph 13, where it declared that the Imperial Parliament could act only ‘upon the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole’.²⁰⁹ Secession, by its very nature, was a matter which vitally concerned the entire country, and which therefore had to be addressed by the population of the entire country.

²⁰⁵ Ibid, paragraph 7, viii.

²⁰⁶ Ibid. Cf the comments of Greene during his presentation to the Committee: ‘...once you are dealing with matters which affect the integrity and the existence of the Dominion as a Dominion, the States, in my submission, stand in precisely the same position as any other minority in Australia, and it would be just as improper to discuss or to legislate for their Australian grievances as Members of the Federation, as it would be to discuss those of any other minority’: The Report, above n 32, 98.

²⁰⁷ Ibid, paragraph 11, ix, x.

²⁰⁸ Ibid, paragraph 11, x.

²⁰⁹ Ibid, paragraph 13, x.