DISCUSSION NOTE

CONSTITUTIONAL INVALIDITY AND AMENDMENTS TO ACTS

By Dennis Rose*

The purpose of this note is to discuss, in the light of the High Court decision in *Attorney-General (N.S.W.)* v. *The Commonwealth; ex rel. McKellar*,[1] an issue raised by the present writer in Chapter 6 of *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer*.[2]

In Chapter 6 of the *Commentaries* the author suggested that the approach taken by the High Court in *Commissioner of Taxation* v. *Clyne*[3] should not be followed in the situation where an Act, as purportedly amended, would be unconstitutional. In that case the High Court held that, even if the provisions of section 79A of the Income Tax Assessment Act 1936 (Cth) were inconsistent with section 51(ii) or section 99 of the Constitution, only the purported amendment to insert section 79A would be invalid, and that the pre-"amendment" legislation would therefore be unaffected. The author suggested[4] that it would be better to take the text *as altered* and then determine the constitutional validity of that text—taking account, of course, of the principles of reading down (whether by severance or distributive application).[5] It was mentioned that this approach would have the advantage that an individual challenger such as Clyne (and not only a State Attorney-General) would have standing to challenge the provisions alleged to be discriminatory or preferential.[6]

In a review[7] of the *Commentaries* Sir Anthony Mason drew attention in this regard to the judgments in *McKellar* (decided after the book went to press but before its publication). In that case Gibbs and Stephen JJ. expressly followed the approach in *Clyne* when they held that the 1964 legislation purporting to omit certain words from section 10 of the Representation Act 1905 (Cth) was invalid, leaving the previous valid section unaffected.[8] Jacobs and Aickin JJ. agreed

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[1] (1977) 51 A.L.J.R. 328, referred to as "*McKellar*".

[2] L. Zines (ed.), 1977 referred to as *Commentaries*; the book went to press before commencement of the proceedings in *McKellar*.

[3] (1958) 100 C.L.R. 246.

[4] *Op. cit.* 199-200.

[5] *E.g.*, Lane, *The Australian Federal System* (1972) 899 ff.

[6] See the *Commentaries*, 198; of course, the alternative possibility of reforming the rules on standing should not be overlooked.

[7] (1977) 8 F.L. Rev. 502, 505.

[8] (1977) 51 A.L.J.R. 328; 337-338 *per* Gibbs J.; 341-342 *per* Stephen J.

with them on this point.[9] Mason J.[10] agreed with Stephen J.'s reasons. Murphy J.[11] reached the same conclusion but did not state his reasons on this point. Barwick C.J. expressly refrained from deciding that particular question but commented as follows:[12]

> I apprehend that it has been thought that such a conclusion as to the invalidity of the method of distribution now provided by s. 10 ought to lead to the conclusion that only the Representation Act, 1964 (the amending Act), amending s. 10 to its present form, is invalid: and that striking down the amendment only, the former s. 10, being in terms of the constitutional formula, would stand valid. This course savours somewhat of the doctrine of dependent relative revocation in another sphere of the law. I doubt if it has any place in the case of a statute repealed and replaced by a new provision. There would seem to be no Parliamentary intention that if its amendment should be invalid, the former provision should continue to operate.
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> But the particular form of s. 3 of the amending Act, in merely omitting from s. 10 the words "greater than one half of the quota", may seem to raise a different consideration. If that amendment is void, the words are not omitted. It would be sufficient on this view in this instance to declare the amending Act void, though in truth in itself and divorced from the terms of s. 10, the words omitted by the amendment have little meaning.

These comments by Barwick C.J. seem to suggest that a distinction might be drawn in this respect between (a) a repeal of a provision and the substitution of new provisions in its place, and (b) the mere amendment of provisions (*e.g.* by omitting words from a provision). Moreover, Gibbs J.[13] with whose reasons Jacobs and Aickin JJ. agreed, noted that the Representation Act 1904 (Cth) "did not repeal s. 10 (of the Representation Act 1905-1938 (Cth)) and replace it by a new provision", but "simply amended" the section by omitting certain words. Stephen J.,[14] with whom Mason, Jacobs and Aickin JJ. agreed, expressly put aside the question of repealing legislation.

In his review[15] of the *Commentaries* Sir Anthony Mason referred in this regard to the "well-established" distinction (but one that is often difficult to draw) between the "amendment" of a statute and "repeal and re-enactment". (By "re-enactment" he presumably means the substitution of new provisions.) However, the cases[16] that he cites apart from *McKellar* concern the drawing of this distinction for certain common law and statutory purposes, such as the application of provisions in Interpretation Acts concerning the effect of a "repeal". With respect,

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[9] *Id.* 344-345 *per* Jacobs J.; 350 *per* Aickin J.

[10] *Id.* 342.

[11] *Id.* 345.

[12] *Id.* 332.

[13] *Id.* 337.

[14] *Id.* 341.

[15] *Op. cit.* 505.

[16] *Beaumont* v. *Yeomans* (1934) 34 S.R. (N.S.W.) 562; *Mathieson* v. *Burton* (1971) 124 C.L.R. 1. See also *Samuels* v. *Songaila* (1977) 16 S.A.S.R. 397.

the reasons why this distinction needs to be drawn in those contexts do not seem at all relevant to the question of determining validity.

It seems difficult to see why, for the *constitutional* purposes in question, one should draw any distinction between repeal/substitution and mere "amendments". If, as Sir Anthony Mason suggests, a fictional intention is to be attributed to the legislature to keep an unamended provision on foot in the event that the amended provision would be unconstitutional, why should we not attribute an intention not to repeal the former provision if the new provision would be invalid?

It is interesting to note that in *A.N.A.* v. *The Commonwealth*[17] Dixon J. (with whom Rich J. agreed)[18] managed to infer[19] that there was no intention to repeal a sub-regulation purporting to omit the former one and to insert in its stead a new sub-regulation—clearly a case of repeal-substitution in the present sense, and not merely an "amendment". He held that only the "purported amendment" (*i.e.* the purported repeal/substitution) was void for conflict with section 92 of the Constitution.

Sir Anthony Mason's suggestion, although attractive in that it would avoid temporary legislative gaps, is not without its difficulties. While it seems appropriate in simple cases, in many matters it would, with respect, be unrealistic to attribute any such intention to the Parliament. To take an example suggested by the circumstances in *Clyne*,[20] substantial advantages might be purportedly given by way of reductions in the assessable income of persons in a particular area; in related legislation, the tax rates might be substantially increased in order to compensate for the loss of revenue from the favoured area. Mere invalidation of the discriminatory amendment in such a case would not be a sufficient solution since legislation would be needed in order to restore the previous tax rates (if Parliament so wished).

Of course, speculation about Parliament's "intention" could be avoided or reduced by appropriate statutory provisions. Thus amending or repealing legislation could include provisions indicating a presumption to the effect that, if the purportedly substituted provisions are invalid, the previous legislation is intended to continue. A standing general presumption to this effect could be included in the Acts Interpretation Act 1901 (Cth). Such provisions (either *ad hoc* or standing) could be useful in the case of legislation to amend the Senate (Representation of Territories) Act 1973 (Cth) to increase the number of Territory senators, or legislation to increase the number of Territory members in

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[17] (1945) 71 C.L.R. 29. Starke and Williams JJ., who also appear to have held the new sub-regulation to be wholly invalid, did not comment on the question whether the former reg. 79(3) continued in force (see 79-80 and 112-113). Latham C.J., who held the new sub-regulation to be valid in relation to Territorial services, appears to have thought that it wholly repealed the former sub-regulation (see 69).

[18] *Id.* 73-74.

[19] *Id.* 96.

[20] See, for example, the legislation considered in *Clyne* (n. 3 *supra*)—the Income Tax Assessment Act 1945 (Cth), s. 11, and the associated Income Tax Act 1945 (Cth).

the House of Representatives. It would counter any attempt (which might have the support of at least Barwick C.J., Gibbs and Aickin JJ.[21]) to confine *Clyne* and *McKellar* to the particular kinds of amending legislation in those cases, in order to strike down the whole legislation providing for Territory representation, and not merely to strike down the amendment to increase the numbers of senators or representatives.

Incidentally, it should be mentioned that the remaining criticisms made by Sir Anthony Mason of the author's remarks in the *Commentaries* are, with respect, misconceived. For example, he suggests[22] that the statement in the *Commentaries* about Parliament's possible intention is a "little fanciful" as applied to the Income Tax Assessment Act 1936 (Cth) as amended. This suggestion by Sir Anthony Mason incorrectly assumes that the statement in the *Commentaries* about Parliament's possible intention is a suggestion that the *test* to be applied to legislation, in determining its validity, requires the ascertainment of Parliament's actual intention. A reading of the chapter in question will show that this is not so. Instead, the chapter's references to Parliament's possible intentions were given merely as "background" reasons for adopting the test of reading the Principal Act as altered by the amending text, and then deciding the questions of validity (taking account of the established principles on severance and distributive application). The chapter suggested that, if *that* approach had been applied to the Income Tax Assessment Act 1936 (Cth) as amended, it would have been "very much open to question whether section 79A would have been severable"[22a] and that it was "not necessarily absurd" to refuse to make such a severance,[23] but that there could be justification, based upon the particular historical context, for a severance of section 79A. All of this is far removed from the account given by Sir Anthony Mason.

Finally, reference should be made to Sir Anthony Mason's statement[24] that the "citation in footnote 26 on page 200 [of the *Commentaries*] . . . in support of a proposition dealing with statutes that have been declared totally invalid is incorrect". In support of his statement he writes that "the Royal Commissions Act 1912 (Cth)[25] was not declared totally

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[21] See *Queensland* v. *The Commonwealth; Western Australia* v. *The Commonwealth* (1977) 52 A.L.J.R. 100.

[22] *Op. cit.* 505.

[22a] *Commentaries*, 200, n. 25.

[23] *Id.* 202.

[24] *Loc. cit.*

[25] Sir Anthony Mason's reference to the Royal Commissions Act 1912 (Cth) might suggest that the Privy Council was concerned only with the question whether that *amending* Act was valid. However, the legislation the validity of which was considered by the Privy Council was the "consolidated . . . *Royal Commissions Act* 1902-1912": see (1913) 17 C.L.R. 644, 645—referred to later in the judgment as "the Royal Commissions Acts". Moreover, the relevant references by Fullagar J. in *Lockwood* ((1954) 90 C.L.R. 177, 182) to "the Act" were to the whole Royal Commissions Act "as it stood in 1912"; Fullagar J. referred to "s. 1A", *i.e.* s. 1A of the 1902-1912 Act, not to any section of the 1912 Act. It should be noted that this approach—*i.e.* considering the whole Act as purportedly amended, and not just the amending Act—is consistent with the approach proposed in the *Commentaries* and inconsistent with the approach favoured by Sir Anthony Mason.

invalid in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Company Ltd.*[26] Indeed, Fullagar J. explicitly so held in *Lockwood* v. *The Commonwealth.*[27] With respect, Sir Anthony Mason seems to have overlooked the fact that, at the pages cited in the *Commentaries* footnote (*i.e.* 90 C.L.R. 177, 183-184), Fullagar J. *was* dealing with the situation that would have existed if the Privy Council had excluded the common law doctrine of severability—*i.e.* if the Royal Commissions Act 1902-1912 (Cth) had been wholly invalid. In the cited passage Fullagar J. discussed the effect of the enactment of section 3 of the Acts Interpretation Act 1930 (Cth), which inserted the original section 15A in the Acts Interpretation Act 1901 (Cth), and which for present purposes is indistinguishable from an amendment of the Royal Commissions Act 1902-1912 (Cth) inserting a special retrospective reading-down provision in terms of section 15A of the Acts Interpretation Act 1901 (Cth). Hence the passage in *Lockwood* was clearly relevant to the point for which it was cited in the *Commentaries.*

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[26] (1913) 17 C.L.R. 644.
[27] (1954) 90 C.L.R. 177.