CONFIDENTIAL

SUBMISSION NO. 660

FOR CABINET

COPY NO. 33

CONSTITUTIONAL AMENDMENTS : SECTIONS 24 to 27, 51(xxvi.), 127.

The purpose of this Submission is to seek Cabinet's approval to the introduction, at the commencement of the March Sittings, of Bills to alter section 24 and repeal sections 25, 26 and 27, to repeal section 127 and to alter section 51(xxvi.) of the Constitution, and the submission of those Bills to a referendum, in accordance with section 128 of the Constitution, as soon as practicable after the Bills are passed by both Houses.

Section 24

2. Section 24 of the Constitution makes provision for the composition of the House of Representatives. It lays down a number of basic requirements. These are -

(a) the House is to be composed of members directly chosen by the people of the Commonwealth;

(b) the number of members shall be, as nearly as practicable, twice the number of senators;

(c) the number of members chosen in the several States shall be in proportion to the respective numbers of their people; and

(d) five members at least shall be chosen in each Original State.

In addition, section 24 provides for a method of determining the number of members in each State by means of a formula that is to operate until the Parliament otherwise provides. This method is as follows:-

'(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

'(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.'

3. The Representation Act in 1905 picked up the Constitutional provision and stated it substantially without alteration. The 1964 amendment of that Act, however, modified the constitutional provision in one important respect. Whereas under section 24 an additional member was to be conceded to a State only if there was a remainder greater than one-half of the quota, by virtue of the 1964 amendment of the Representation Act an additional member is to be conceded for <u>any</u> remainder, however small.

4. The 1964 amendment will result in a slightly larger House of Representatives; on the most recent figures, a House of 124 plus the members representing the Australian Capital Territory and the Northern Territory. But any further significant increase in the size of the House would in fact have to be accompanied by an increase in the size of the Senate, having regard to the requirement referred to in paragraph 2(b) above that the number of members is to be <u>as nearly as practicable twice the number of Senators</u>. There is room for difference of opinion as to the limitation imposed by the underlined words. But I think it must be accepted that they could not with safety be regarded as permitting more than a marginal increase of some two or three members without altering the number of senators.

5. The continued expansion of Australia's population means that the number of members of the House of Representatives

must increase from time to time if the number of persons represented by a member is not to become unduly large. I think myself that the time has come when approval should be sought by referendum for the removal of the provision tying the number of members to the number of senators. This, as Ministers will be aware, was one of the recommendations made by the Constitutional Review Committee (see Report from the Joint Committee on Constitutional Review, 1959, Chapter 3).

6. At the time of Federation, the 2:1 ratio was regarded as a vital principle designed to preserve the position of the Senate as an influential and important factor in the Parliament. The then attitude to the ratio is indicated in Quick and Garran's Annotated Constitution of the Commonwealth of Australia in the passage set out in Annexure "A" to this Submission.

7. The Constitutional Review Committee pointed out that the course of history had shown that the original concept of the Senate in the Federal Parliament had not been realized. The original concept was, in truth, a dual concept - that it should serve as a Chamber of Review and, even more importantly, that it should represent States and protect the interests of the States as equal partners in the Federation.

8. The Committee observed that, as a Chamber of Review, experience had shown that the Senate did not, and indeed could not be expected to, exercise an independent role; that it had been the party system that extended directly into the Senate that had been the decisive factor governing the extent to which the Senate was prepared to take a stand in respect of the legislation of the House of Representatives; while in some circumstances there had been major conflicts between the two Houses, these had largely arisen because the Government, which

necessarily commanded a majority in the House of Representatives, had not had sufficient strength in the Senate to ensure that its legislation was agreed to by the Senate. The Committee concluded (paragraph 99 of their 1959 Report) that the functions which the Senate performed as a House of Review did not justify any further increase in the number of senators. It pointed out that the effective performance of the function of review did not rest on numbers alone and in fact increased numbers might impair the effectiveness of an upper House in the discharge of its functions. The Committee pointed out that even in the United States, with a (then) population of more than 170 million and 50 States, there were only 100 senators.

9. It could be said that to increase the number of members of the House of Representatives would put undue importance on the Senate's 60 members. While recognizing this as a possibility, I accept the view which I think is necessarily implied in the recommendation of the Constitutional Review Committee, namely, that the primary position of the House of Representatives justifies a gradually increasing ratio of members of the House of Representatives to senators.

10. The concept of the Senate as a States House has, for the same reasons as mentioned in relation to its role as a House of Review, not been realized in practice. Leaving aside the question of the deadlock procedure (to which I refer in paragraph 14, below), the Senate would sufficiently safeguard State interests with a representation of 10 senators per State. The important thing in preserving States' interests is that the representation should be equal and of reasonable numbers. This affords, in my view, no reason why the number of senators should

be increased merely because it was considered necessary, in order to ensure adequate representation, that the number of members of the House of Representatives should be increased.

11. The Constitutional Review Committee concluded that it was inescapable (paragraph 88 of their 1959 Report) that the original notion of the Senate as a States House was not realized and therefore did not justify further increases in the number of senators even though increases in the number of members of the House of Representatives would probably occur.

12. The changed role of the Senate invalidates, in my opinion, the arguments that were, at Federation, regarded as justifying the restrictions imposed by the 2:1 ratio.

13. It is, of course, under present provisions, open to the Parliament to increase the number of senators at any time (Constitution, section 7), provided that an equal representation of original States is maintained. This power would remain under my proposal.

14. The abandonment of the 2:1 ratio would, in due course, have an impact on section 57 (provision for disagreement between the Houses). At a Joint Sitting of the two Houses under that section, a proposal that is affirmed by an absolute majority of the total number of members of the Senate and the House of Representatives is to be taken to have been duly passed by both Houses. If section 57 is to remain in its present form, any proposal to increase the size of the House of Representatives would need to have regard to this provision and at some stage it could be a ground for increasing the number of senators if substantial increases in the number of members of the House of Representatives takes place. But I would not think the existence of the section should operate against the alteration of section

24 that I propose.

15. If the 2:1 ratio is abandoned as I propose, some limitation of the power of the Parliament to increase the number of members of the House of Representatives must, in my view, be imposed. I have given careful consideration to the proposals made by the Constitutional Review Committee in this respect and consider that they offer a satisfactory solution to the problem. A copy of the new section (section 24) suggested by the Committee to give effect to their proposals is attached as Annexure "B".

16. The limitation suggested by the Committee was that the number of members for a State should be ascertained by dividing the number of people of the State by a number prescribed by the Parliament from time to time, being not less than 80,000 and being the same for each State. If on such a division there was a remainder of more than one-half of the divisor, the number of members would be increased by one, but otherwise any remairder would be disregarded. The respective numbers of the people of the States were to be taken to be the numbers declared by the Parliament to have been those numbers according to statistics of the Commonwealth, at a specified date, not being earlier than the date as at which the latest census of the people of the Commonwealth was taken.

17. Adoption of the Committee's proposals would involve a departure from the policy embodied in the Representation Act 1964, as it would mean taking account of a remainder after a division by 80,000 or other prescribed number only where the remainder exceeded one-half of the divisor. However, the amendment of the Representation Act in 1964 did not represent the adoption of a basic decision that a remainder however small

ought to justify an additional member. It was designed to meet the situation that some States with increasing populations would suffer a reduction in the number of their representatives. The Committee's proposals would effectively avoid such a situation.

18. The adoption of the Constitutional Review Committee's proposalswould mean that the number of members of the House of Representatives that Parliament could declare would automatically increase as the population of the Commonwealth increased, if the Parliament did not change the prescribed number that it originally fixed. Thus, as the following table shows, if a basic number of 80,000 was adopted, as the present population of some 11,000,000 (which would justify a House of some 137 members) increased to 12,000,000 - probably in 1968 - the size of the House that would result would increase to some 150 members. The table below shows the approximate figures for these two population figures on the basis of prescribed numbers (quotas) of 80,000, 85,000 and 90,000.

| Quota | Population | Number of Members. |
|---|---|---|
| 80,000 | 11,000,000 | 137 |
| | 12,000,000 | 150 |
| 85,000 | 11,000,000 | 129 |
| | 12,000,000 | 141 |
| 90,000 | 11,000,000 | 122 |
| | 12,000,000 | 133 |

The numbers of members shown above would be subject to small variations depending upon the incidence of remainders.

19. I have already indicated that I did not propose that there should be any constitutional limitation on the numbers of senators. The Constitutional Review Committee recommended that there should be an upper limit of 10 senators for each

original State. This would mean that the Senate could not be increased beyond its present size unless a new State was created or a Territory was granted representation in the Senate under section 122. I do not myself think that such a limitation should be imposed. While in theory the removal of the 2:1 ratio requirement, and the adoption of a limitation on the number of members of the House of Representatives by reference to a minimum divisor (see paragraph 16, above), would seem to require that some limit be imposed on the number of senators, I think that the practicalities are such that a constitutional limit is unnecessary. An increase in the number of senators would always be in the hands of the Government of the day and I cannot conceive a Government wishing to expand the Senate unduly.

20. The Constitutional Review Committee recommended that its proposals with respect to the number of members of the House of Representatives be implemented by repealing and replacing existing sections 24 and 27 by a new section 24 (see Annexure "B" to this Submission for the text of the suggested new section). At the same time, the Committee recommended that sections 25 and 26 be repealed. Section 25 provides that, for the purposes of section 24, if by the law of a State all persons of any race are disqualified from voting at elections for the more numerous House of Parliament of the State, then, in reckoning the number of the people of the State or the Commonwealth, persons of that race residing in that State are not to be counted. Section 25 should, in my view, be repealed as being of an apparently discriminatary character. It has not, as the Constitutional Review Committee observed, ever had any practical application and could in any event be

very simply avoided by a State if it so desired. I think its repeal as part of the group of sections to be replaced by a new section 24 might well result in the section 24 proposals receiving some additional support from persons who were sensitive to discriminatory provisions.

21. Section 26 makes provision for the number of members of the House of Representatives each State was to have in the first Federal Parliament and its operation is, of course, completely exhausted. Its repeal would merely be of a tidying-up character and would have no political significance.

22. To summarize my proposals in respect of sections 24 to 27, I recommend -

(a) that a Bill be drafted forthwith to the effect of the Constitutional Review Committee's recommendations, that is to say, repealing sections 24 to 27 (inclusive) of the Constitution and substituting a new section 24 which will -

(i) omit the requirement that the number of members of the House of Representatives be as nearly as practicable twice the number of senators;

(ii) empower the Parliament to declare the number of members of the House from time to time but restrict the Parliament's power by requiring that the number of members for a State be ascertained by dividing the number of people in the State by a number determined by the Parliament - but not being less than 80,000 - and allowing an additional

member for a remainder exceeding one-half of the determined number;

(iii) provide that the numbers of people in the States for the purposes of section 24 be the numbers declared by the Parliament to have been the numbers according to statistics of the Commonwealth, at a specified date, not being earlier than the date as at which the latest census of the people of the Commonwealth was taken; and

(iv) preserve the requirements of existing section 24 that the House of Representatives be composed of members directly chosen by the people of the Commonwealth and that the number of members to be chosen in an original State be not less than five. (The existing requirement that the number of members chosen in the several States be in proportion to the respective numbers of their people would necessarily be retained by the proposal referred to in sub-paragraph (ii)); and

(b) that the Bill be introduced as soon as possible after Parliament resumes and the referendum be held as soon as possible after the Bill is passed by both Houses.

23. If there is to be a possibility of the proposed alterations to section 24 being effective for the purposes of an election in December, 1966, it will be essential that the Bill to amend section 24 be submitted to the Parliament as soon

as it meets in March and that the consequential referendum be held at the earliest possible date thereafter. I set out as Annexure "C", for the information of Ministers, a possible time-table that would achieve this result. This time-table is intended principally to illustrate the need for the matter to be put in hand immediately, but it serves to show, I think, that given favourable circumstances, the new proposals could become a reality for the purposes of the next election.

Section 127.

24. Section 127 provides that in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

25. It would, in my view, be politically inexpedient, in the present climate of public opinion, to put any proposals for Constitutional amendments to a referendum without including in those proposals the repeal of section 127. Moreover, the inclusion of this proposal would, I think, tend to create a favourable atmosphere for the launching of the proposal regarding section 24.

26. Cabinet considered the question of the repeal of this section in considering the Report of the inter-Departmental Committee on Racial Discrimination in September, 1964. It felt then that there might be a case for its repeal, but thought that it was not clear that all the practical considerations surrounding the taking of a referendum would justify, or even permit, action to initiate a referendum on this subject alone. It therefore held over a final decision on section 127.

27. The Constitutional Review Committee considered that section 127 should be repealed and so recommended in its Report (1959 Report, paragraph 398).

28. One of the reasons for the inclusion of section 127 seems to have been the practical difficulties that would be encountered in satisfactorily enumerating the aboriginal population. There were no doubt real difficulties in 1900 in ensuring that a census of aborigines could be effectively taken. In modern times, however, this would be by no means impracticable and any argument in favour of retention of section 127 based on difficulty in ascertaining the numbers of aborigines has little force. Moreover, whatever was the original position, the existence of section 127 is hardly related to the qualification of aborigines as voters. Section 41 of the Constitution has always guaranteed an aboriginal the right to vote at Federal elections if he had a right to vote at elections for the more numerous House of the Parliament of a State. However, the amendments of the Commonwealth Electoral Act in 1962 removed all disabilities in respect of voting at Federal elections so far as aborigines are concerned. At the same time, the amendment made it clear that aborigines were not to be compelled to enrol.

29. As aborigines are consequently now entitled to enrol and to vote, they should, I think, undoubtedly be recognised as forming part of the population of their State for the purposes of the Commonwealth Constitution.

30. There would assuredly be international approbation of any move to repeal section 127, as it savours of racial discrimination. Its repeal could remove a possible source of misconstruction in the international field.

31. I accordingly recommend that a Bill to amend the Constitution by repealing section 127 be introduced as soon as the Parliament meets in March and that the Bill be submitted as

soon as possible to a referendum.

32. I have referred in paragraph 20 of this Submission to my proposal that section 25 be repealed as part of the Bill to provide for a new section 24. Section 25 has been criticized as being of a discriminatory nature and it appears to me that its repeal is a natural concomitant of the proposal to repeal section 127.

Section 51(xxvi.)

33. Paragraph (xxvi.) of section 51 provides that the Parliament may make laws for the peace, order and good government of the Commonwealth with respect to 'The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

34. When Cabinet considered the Report of the Inter-Departmental Committee on Racial Discrimination in September, 1964, it stated that it did not support the proposal to amend section 51(xxvi.) by omitting the underlined words.

35. I wish to raise this matter again for Cabinet's consideration. In the joint Submission by my colleague, the Minister for External Affairs, and myself, on which Cabinet expressed its earlier view, no firm views on the merits of the deletion were expressed and no recommendation was made; the matter was merely mentioned for Cabinet's consideration.

36. The Constitutional Review Committee did not make any recommendation on this matter, although a number of representations were made to it to delete the underlined words, for the reason, as it said in its 1959 Report, that it had not been able to complete its enquiries on all aspects of the matter. (1959 Report, paragraph 397).

37. I think that the public believes that the underlined

words in section 51(xxvi.) amount to a discrimination. I do not personally accept that in truth they are; indeed, I think that their inclusion in the section constitutes a protection rather than a discrimination. But I think we must have regard to the electors' view of the matter. The deletion of the words would have the consequence that the Commonwealth would have concurrent legislative power to make laws with respect to people of the aboriginal race as such and in this I see no harm.

38. I think also that the average elector would feel that either the Commonwealth should have the power in section 51(xxvi.) in relation to all races, including people of the aboriginal race, or ought not to have the power at all; and I believe that failure to include a proposal to delete the underlined words might well prejudice the success of a referendum that sought the repeal of section 127.

39. I might mention that the Darwin Conference of Commonwealth and State Ministers on aboriginal welfare held in July, 1963, resolved that 'in view of the widely varying conditions in different States and the fact that so many aspects of Aboriginal welfare are in the State law-making field, it would not be in the best interests of the Aboriginal people to have uniform Commonwealth legislation or uniform administration. The whole tendency in Australia is to eliminate laws that apply specially to the aboriginal people'. However, if the Commonwealth were given the power to legislate it would not follow that it would exercise its powers and so long as the State - and Territory - laws were operating satisfactorily, the Commonwealth Parliament need not intervene.

40. I therefore recommend that a Bill be drafted forthwith to omit from section 51(xxvi.) the words 'other than the aboriginal race in any State' and that the Bill be introduced as soon as possible after Parliament resumes and be submitted to a referendum as soon as possible after it has been passed by both Houses.

Separate Bills.

41. I think that it would be highly desirable that the amendments proposed in this Submission, if approved by Cabinet, be drafted and introduced as three separate Bills, namely -

(i) a Bill to repeal sections 24 to 27 inclusive and insert the new section 24;

(ii) a Bill to repeal section 127; and

(iii) a Bill to amend section 51(xxvi.).

This would enable the Bills to be considered and voted on in Parliament, and even more importantly, by the electors, as separate matters.

(B.M. SNEDDEN)
Attorney-General.

22 February, 1965.

ANNEXURE "A"

EXTRACT FROM QUICK AND GARRAN IN RESPECT OF THE "TWO TO ONE" RATIO.

This "two to one ratio" is a rigid element and basic requirement of much importance and significance; it is embedded in the Constitution; it is beyond the reach of modification by the Federal Parliament, and can only be altered by an amendment of the Constitution. It was adopted after due consideration and for weighty reasons. It was considered that, as it was desirable, in a Constitution of this kind, to define and fix the relative powers of the two Houses, it was also but fair and reasonable to define their relative proportions, in numerical strength, to each other, so as to give that protection and vital force by which the proper exercise of those powers could be legally secured. It was considered extremely necessary to prevent an automatic or arbitrary increase in the number of members of the House of Representatives by which there would be a continually growing disparity between the number of members of that House and the Senate; and to give some security for maintaining the numerical strength, as well as the constitutional power, of the Senate. It was argued that if the number of the members of the Senate remained stationary, whilst the number of the members of the House of Representatives were allowed to go on increasing with the progressive increase of population, the House would become inordinately large and inordinately expensive, whilst the Senate would become weak and impotent. It was said that to allow the proportion of the Senate towards the House of Representatives to become the merest fraction, would in course of time lead practically to the abolition of the Senate, or at any rate, to the loss of that influence, prestige, and dignity to which it is entitled under the Constitution.

The Annotated Constitution of the Commonwealth of Australia, p.452.

ANNEXURE "B"

SECTION 24 AS PROPOSED BY CONSTITUTIONAL REVIEW COMMITTEE.

24.-(1.) The House of Representatives shall be compos of members directly chosen by the people of the Commonwealth.

(2.) The numbers of members of the House of Representatives to be chosen in the several States shall be declared by the Parliament from time to time in accordance with this section. The numbers of members for all the States shall be declared at the one time.

(3.) The number of members to be so declared in respect of a State shall be the number ascertained by dividing the number of the people of the State by a number prescribed by the Parliament from time to time, being not less than eighty thousand and being the same number for each State. If, on such a division, there is a remainder greater than one-half of the divisor the number of members shall be increased by one, but otherwise any remainder shall be disregarded.

(4.) In the application of the last preceding sub-section in relation to a law declaring the numbers of members to be chosen in the several States, the respective numbers of the people of the States shall be taken to be the numbers declared by that law to have been those numbers, according to statistics of the Commonwealth, at a specified date, not being earlier than the date as at which the latest census of the people of the Commonwealth was taken under a law of the Commonwealth.

(5.) Notwithstanding anything contained in this section, the number of members of the House of Representatives to be chosen in an Original State shall not be less than five.

(6.) Where an alteration is made to the number of members to be chosen in a State, the alteration does not apply in relation to any election before the first general election takes place after the Governor General in Council has by Proclamation declared that there is an appropriate number of electoral divisions for the purpose of the election of the altered number of members.

(7.) The Parliament may make laws for carrying this section into effect.

ANNEXURE "C"

Possible Time-Table for proposed Constitutional Amendments that would enable Redistribution for Elections in December 1966.

| | |
|---|---|
| 16 March 1965: | Introduce Bills to amend Constitution. |
| 7 April 1965: | Bills passed through both Houses. |
| 22 June 1965: | Issue Writ for referendum. |
| 5 July 1965: | Complete Distribution by Chief Electoral Officer of Arguments for and against proposed Amendments. |
| 7 August 1965: | Hold Referendum. |
| 31 August 1965: | Return of writ for referendum. |
| 2 September 1965: | Present Bills to amend Constitution for assent. |
| 3 September 1965: | Introduce Bill to amend Representation Act. |
| 5 October 1965: | Representation Bill passed through both Houses and assented to. |
| 6 October 1965: | Appoint Electoral Commissioners. |
| 6 May 1966: | Commissioners report to the Minister. |
| 10 May 1966: | Present report to the Parliament. |
| 31 May 1966: | Report approved by both Houses. |
| 3 June 1966: | Proclamation of Divisional boundaries published under s.24 of the Commonwealth Electoral Act. |
| 3 June 1966: | Initiate printing of Rolls. |
| 3 December 1965: | Printing of Rolls completed. |
| 17 December 1966: | Election for House of Representatives. |

C O N F I D E N T I A L

COPY No. 28

# C A B I N E T  M I N U T E

Canberra 23rd March 1965

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Decision No. 787

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Submission No. 660 - Constitutional Amendments : Sections 24 to 27. 51(xxvi). 127.

The Cabinet began a consideration of the proposals for Constitutional amendment and the timetable put forward in the Submission.

Certified true copy

K. J. Bunting

Secretary to Cabinet.

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C O N F I D E N T I A L



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CABINET MINUTE

Canberra, 7th April, 1965

Decision No. 841

Constitutional Amendments and Amendment of the Commonwealth Electoral Act.

The Cabinet has agreed as follows:-

(a) that it is desirable that the nexus established by the Constitution between the numbers of Senators and the numbers of Members of the House should now be broken, so that the House may have a flexible future;

(b) that for this purpose a referendum should be held;

(c) that it is impracticable to think in terms of holding the referendum and, if the vote is affirmative, of completing the additional Parliamentary and re-distribution action necessary to conduct the next elections on the amended basis;

(d) that the objective will be to bring down a Bill for a referendum not later than the Budget Session of this year, and to hold the referendum during the life of the present Parliament;

(e) that the question of the abolition of Section 127 of the Constitution be put to referendum at the same time as the question of the nexus;

(f) that there should be no re-distribution in this Parliament on the basis of present numbers of Members of the House;

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Cabinet Decision No. 841 Cont'd.

(g) that the amendments which the Government has in mind in relation to the Commonwealth Electoral Act should not wait upon the referendum and should proceed without delay - that is to say, with the objective of having the Bill introduced and passed in the current session.

2. The Cabinet also discussed the desirability of -

(a) appointing as Chairman of the Distribution Commissioners in each State a Judge or an ex-Judge;

(b) moving away from the practice of appointing as one of the Distribution Commissioners the Surveyor-General in each State, and appointing instead a Commonwealth officer of suitable qualifications;

(c) arranging for the Distribution Commissioners of each State to agree upon uniformity of administration and distribution procedures;

(d) requiring representations to the Distribution Commissioners to be in writing and available as a matter of public record to interested persons.

The Cabinet left each of these matters open for further consideration. It noted that the appointment of a Judge and the replacement of the State Surveyors-General may already be within the administrative competence of the Government without need to amend the Electoral Act. In relation to representations to the Commissioners, it was noted that the Minister for the Interior will be putting proposals before Cabinet in the near future.

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R. J. Bunting

Secretary to Cabinet.