

**AN AUSTRALIAN REPUBLIC?
MORE THAN A WASTE OF TIME AND MONEY:
A SIGNIFICANT OBSTACLE TO SERIOUSLY NEEDED
CONSTITUTIONAL REFORM**

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My subject today is that an Australian republic is more than a waste of time and money: it is a significant obstacle to constitutional reform. I look at this question in three parts. First, I examine some weaknesses of the *Constitution*. Second, I examine some fake proposals for constitutional change. Third, I suggest a real proposal for constitutional change.

I WEAKNESSES OF THE CONSTITUTION

The adoption of our superb *Constitution* was an extraordinary achievement. As those great Australians, Sir John Quick and Sir Robert Garren, wrote:

Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood. The States of America, of Switzerland, of Germany, were drawn together under the shadows of war. Even the Canadian provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth, the fifth great Federation of the world, came into voluntary being through a deep conviction of national unity. We may

well be proud of the statesmen who constructed a Constitution which, whatever may be its faults and its shortcomings, has proved acceptable to a large majority of the people of five great communities scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble Social Compact.¹

We should never forget that after the people took over the process to make our nation from the politicians under the Corowa Plan, this was completed in less than four years, including two referendums and putting the *Constitution* through Westminster, all without air travel and the internet. The New South Wales Government cannot today lay a simple tram track through George Street, Sydney in that time.

Although ours is truly a superb constitution, however, it has weaknesses which demand reform. I set out these six weaknesses below. Most of these weaknesses are unknown to Australians as they are distracted by various proposals for false reforms such as the endless search for some politicians' republic. The one area which is working and has no need for reform is the Australian Crown.

The first weakness is that only federal politicians can initiate constitutional change. The founders curiously ignored Alexander Hamilton's warning not to leave the initiative to amend only with those who have a conflict of interest, that is the federal politicians.²

The second weakness is that the judges enjoy an absolute unreviewable power to interpret the *Constitution*. Despite Hamilton's belief that the judiciary would be the weakest of the three branches,³ the Supreme Court of the United States seized an untrammelled power to interpret the *United States*

Constitution and to invalidate legislation it concluded to be inconsistent with its provisions.⁴

Our founders were surely aware of the second occasion when the Supreme Court declared legislation to be invalid. This was the decision in *Dred Scott v Sandford*,⁵ where it was held that slavery was constitutionally protected and that slaves and their descendants could not become citizens nor have standing to sue in the courts. *Dred Scott* is seen by many as a significant contributing cause of the Civil War. Presumably, the founders would have also been aware of the suspicion of the Swiss concerning judicial interpretation demonstrated by the provision in the present Swiss Constitution denying the Supreme Court the power to interpret the *Switzerland Constitution*.⁶

Although the Colonial Secretary Joseph Chamberlain required the Premiers to include provision for some appeals to the Privy Council,⁷ it is surprising the founders did not make provision to ensure the High Court did not become a tool of centralism. For example, the power to make appointments could have been rotated among the states, the judges could have been appointed for a term, and interpretations could have been susceptible to review by referendums initiated by, say, the states, the Senate or by the citizenry.

The third weakness is that the states are not guaranteed the right to raise their own revenue, nor are they required to do this. The founders ignored Hamilton's warning that: 'In a federation, the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants'.⁸ Consequently, the power to make conditional grants to the states under section 96 of the *Constitution* should have had a very limited life. Instead it was for ten years 'until the Parliament otherwise provides'.

Experience has shown that it is in no party's political interest to terminate such a powerful tool to control the states.

The fourth weakness is that it is too difficult to form new states from existing states, such as New England or North Queensland. This is because any such proposals must be approved by the politicians in the existing state, who to keep their powers, are invariably hostile.⁹ In Switzerland it is the people of the existing state and not the politicians who must approve. Among comparable countries, Australia has fewer states than most.¹⁰

The fifth weakness is that the electoral system is excessively centralised and under the control of the federal politicians. Unlike the United States of America, any defect in the system will be made uniform across the country. So if the system is changed and as a consequence is more open to fraud, that will extend across the nation, rather than being limited to a state.

The sixth weakness is that the system of representative democracy has been weakened not so much by the emergence of the two-party system, but by the fact that the parties can be and have been captured by cabals of powerbrokers. Consequently, members and supporters of the parties have been rendered impotent; they become disillusioned and leave. In most comparable democracies, rank and file involvement in the choice of candidates and of the leader is normal.

In discussions associated with the 1891 Constitutional Convention, the South Australian Premier Charles Kingston raised a proposal which would have blocked this development through the introduction of citizen-initiated referendums. He was dissuaded from formally raising this by Alfred Deakin on the ground that responsible government would ensure the requisite control over government.¹¹

Just as a free enterprise economy can be captured by monopolists, so a representative democracy can be captured by parties controlled by cabals of powerbrokers. That sadly is the situation in Australia today.

Apologists for the present situation in Australia almost invariably quote Edmund Burke to defend representative democracy. This was where he famously declared that: 'Your representative owes you, not his industry only, but judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'.¹²

However, they usually ignore what follows when he rails against the controls which are commonplace in Australia's major political parties:

But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,-- these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

What would Burke say about the choreographed theatre which Canberra dares call question time, where the questions, at least half of the answers and the choice of speakers are determined in advance by the party whips?

The consequence of these various weaknesses has been an undermining of fundamental federal principles. About 80 per cent of taxes are collected by the federal government and about half handed to the state governments, much of which is subject to instructions on how to spend it. This is a violation of the fundamental principles of federalism, namely that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the

supply of their own wants.¹³ This leads to an enormous amount of waste and duplication and excessive regulation.

II FAKE PROPOSALS FOR CONSTITUTIONAL CHANGE

The *Constitution* is a compact about the formation of and the governance of the Commonwealth. It is self-evident that the only reason to change the *Constitution* is to improve, significantly, the governance of Australia. Accordingly, any proposal which is not on the face of it a proposal to improve, significantly, the governance of Australia is not a genuine proposal to change the *Constitution*. I call that a fake proposal.

There have been many calls for Australia to become a republic over the years, which I address below. But not one of the major proposals over the years to remove the Crown has been to improve the governance of Australia. They have been fake proposals.

A *White Republic*

A republican movement emerged in the nineteenth century in opposition to Chinese immigration during the Gold Rush. Because the Imperial authorities were particularly liberal in relation to immigration, this movement was formed to establish an exclusively white Australian republic.

When it became obvious that with federation, the power with respect to immigration would devolve onto the federal authorities, interest in republicanism waned, so much so that no republican proposal was made at the federation convention of 1891 or the mainly elected convention of 1897-98.

B *Communist Republic*

Another republican movement aimed to establish in Australia a Soviet Socialist Republic. This began with the International Workers of the World which developed into the Communist Party of Australia, established in 1920. Except for winning a seat at a Queensland election, the party made no electoral impact.¹⁴ However it did make an impact among the unions, becoming a dominant force in key strategic unions.

With the invasion of Czechoslovakia and the collapse of the Soviet Union, the party has declined and split, although its successors remain committed to Australia becoming a socialist or communist republic.

C *Politicians' Republic*

The most important and influential republican movement was championed by Paul Keating and Malcolm Turnbull in the 1990s. It did not draw from the world's most successful republics, but rather attempted to graft what Australians for Constitutional Monarchy ('ACM') called with devastating effect a 'politicians' republic'. The proposal did not bear any relationship to, nor draw anything from the two most successful republics in the modern world, the United States of America and the Swiss Confederation. I would argue that it did not propose Australia become a real republic.

In its final form, the proposal gave a sinister power to the politicians and especially to the Prime Minister. ACM argued that it would have removed the constitutional controls that the Crown provides under the *Constitution*. This is summarised in the old adage that the Crown is important not so much for the power it wields, but rather the power it denies others.

The extraordinary feature of the politicians republic was that it would have been the only republic in the world in which it would have been easier for the Prime Minister to dismiss the President than their cook! Under the *Constitution Alteration (Establishment of Republic) Bill 1999*, the Prime Minister could dismiss the president without notice, without grounds and without any right of appeal under which the President could be restored to office.

When Ted Mack (who was an independent politician and a real republican) and I debated against Malcolm Turnbull and another republican at Corowa in 1999, I raised this issue in a separate conversation with Ted Mack. I said to him that I had difficulty in making the Australian Republican Movement understand that their model endowed the Prime Minister with excessive and dangerous powers which were inimical to a parliamentary democracy. He replied: 'They understand. That is exactly what they want'.

ACM took the view that the attention of the people should be drawn to this. We argued that the question should not only indicate how the president would be elected, but also how he could be dismissed. Just before we appeared before the Parliamentary committee to argue this, Kerry Jones, David Elliott and I saw Malcolm Turnbull leaving, looking worried and followed by hordes of journalists. We learned later that he had also proposed the question be changed. He wanted two words deleted. One was 'president' and the other, believe it or not, was 'republic'.

ACM argued that this republic would have been a dangerous departure from constitutional principles. But it was supported by over two-thirds of sitting politicians (with most of the others maintaining their silence), by most of the mainstream media to the extent that they vigorously campaigned for a 'Yes'

vote, by vast numbers of celebrities and other elites, and even by some experts who had criticised its weaknesses and failings.

The referendum was defeated in what in electoral terms was a landslide. The 'No' vote nationally was 54.87 per cent with the referendum defeated in every state and 72 per cent of electorates. The Australian Capital Territory voted 'Yes'. If those who did not vote and those who voted informally are added to the 'No' vote, it can be argued that 57.45 per cent of the electorate were happy with our crowned republic.

D *Covert Republic*

The current republican movement either doesn't know what sort of republic it wants, or it is keeping its preferred model a secret. It is as though current republicans are marching down the street chanting: 'We want a republic! But we haven't the foggiest idea what sort of Republic we want!'

The proponents demonstrate an extraordinarily cavalier and irresponsible attitude to constitutional change, seriously proposing a vote of no confidence in a key institution in the *Constitution* without specifying what the change should be. Not only is this a fake proposal, it is a fake process.

Under their proposal for a covert republic, republicans are suggesting two plebiscites. The first plebiscite will invite a vote of no confidence in the existing system without proposing what should replace it. This will disenfranchise Tasmanians, Queenslanders, South Australians and Western Australians by flouting the constitutional rule that decisions not be made only by the most populous states. It will probably be by post and taken without proper precautions.

The second plebiscite will require the people indicate which of a select group of republics they want, without any

detail and without being able to choose the existing system. It will be even more problematic than the first plebiscite. If passed, a convention (probably appointed rather than elected) may then follow to settle the details.

This will be presumably followed by a referendum. There won't be much change out of a billion dollars.

This process differs from an Australian constitutional referendum, which is the correct way to change the *Constitution*. Under a referendum, the details are on the table in the form of a bill before the people vote. By contrast, a plebiscite is a blank cheque. If signed, the details will be filled in after the vote. All the voters see in a plebiscite is a question. If the vote is favourable, the details are delivered afterwards.

A plebiscite was used in France to change the constitution between 1879 and 1870 on nine occasions, all under authoritarian governments.¹⁵ Only four of these attracted a 'Yes' vote of less than 99 per cent. Of these, three were over 90 per cent, except the 1870 referendum to liberalise Napoleon III's regime which attracted a 'Yes' vote of 82.7 per cent.

A recent example of a plebiscite was the Québec secession plebiscite. The question was:

Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Québec and the agreement signed on 12 June 1995?¹⁶

It is not surprising that the exit polls revealed that many people who voted in favour of the proposal by voting 'Yes' thought they were voting to stay in Canada. They would have been counted as voting for secession. To the credit of the Québécois, they voted 'No' but only by a hair's breadth.

Now republicans are proposing to use this process in Australia, contrary to the *Constitution*. It is not as if the question has not been fully examined mainly at the taxpayers' expense. To date there have been twelve major votes and inquiries on how to turn Australia into a republic.¹⁷

III PROPOSALS FOR REAL CONSTITUTIONAL CHANGE

There remains a need for real constitutional change. The politicians, with the connivance of activist judges, have trashed the *Constitution*, turning us into the most fiscally centralised state among comparable countries.

Not only that, the parties have captured our representative democracy. The result is that standards have fallen dramatically.

In my view the only solution is to do what we did to federate this country. Federation was taken out of the hands of politicians under the Corowa Plan and placed in the hands of a (mostly) directly-elected convention, whose conclusions were put to the people and not the politicians for decision.

The task of a convention today would be to make proposals which would significantly improve the governance of this country. The aim would be to make the politicians accountable to the people and not just in confected elections every three or four years. The politicians have to be made accountable in the same manner as everybody in employment, in business or in practice is made accountable. Only then could we see and entrench a significant improvement in the governance of our country.

Endnotes

- ¹ Sir John Quick and Sir Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 225.
 - ² *The Federalist Papers*, No. 85.
 - ³ ‘The Executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments’.
- This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power. ‘The Federalist Papers’: No. 78.
- ⁴ *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).
 - ⁵ 60 US. (19 How.) 393 (1857).
 - ⁶ In the current iteration, *Federal Constitution of the Swiss Confederation* of 18 April 1999 (Status as of 1 January 2018), Article 189(4): Acts of the Federal Assembly or

the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law.

⁷ Quick and Garran, above n 1, 228-249.

⁸ *The Federalist Papers*, No.33.

⁹ *Constitution*, s 124.

¹⁰ For example, Germany has 16, Canada has 10, Switzerland has 26 and the United States of America has 50.

¹¹ David Flint and Jai Martinkovits, *Give Us Back Our Country* (Connor Court, 2nd ed, 2014) 274, 320-321, 346, 352-353.

¹² Edmund Burke, *Speech to the electors of Bristol*, 3 November 1774.

¹³ *The Federalist Papers*, No. 85.

¹⁴ Fred Paterson was member for Bowen from 1944 to 1949.

¹⁵ These were under the revolutionary First Republic and during the reigns of the Emperors Napoleon I and Napoleon III. Some did refer to documents actually before the legislature.

¹⁶ David Flint, *The Cane Toad Republic* (Wakefield Press, 1999) 154-156.

- ¹⁷ Republic Advisory Committee, 1993; *Plebiscite for an Australian Republic Bill 1997*; Convention Election 1997; Constitutional Convention, 1998; Referendum, 1999; Corowa Conference, 2001; *Republic (Consultation of the People) Bill 2001*; Senate Inquiry: Road to a Republic Report, 2004; *Plebiscite for an Australian Republic Bill 2008*; 2020 Summit, 2009; Senate Finance and Public Administration Report, 2009; *Plebiscite for an Australian Republic Bill 2010*.