CROWN OR REPUBLIC: THERE IS NO *VIA MEDIA*

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Reasonable people may differ on the issue of whether Australia should remain as a constitutional monarchy or whether Australia should become a republic.

It is my view that any move by the Australian people to a republican form of government would require enormous and unsafe alteration of our *Constitution*, such that a wholly new organic law would be the only safe alternative.

I have no idea what is proposed for Australia's republic other than populist, unserious pablum. My purpose here is to set out why any move to a republic would pose an enormous threat to our *Constitution*.

I PROVISIONS REQUIRING AMENDMENT

The central characteristic of the *Constitution* is the predominance of the Crown in every aspect of governmental powers.[1] To amend the *Constitution* to create a republic would, at the very least, require the altering of the following key provisions.

A *The Preamble*

The Commonwealth of Australia is, literally, constituted via these words and the *Constitution* that follows:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth

> under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

On any view, this preamble would have to change and a new sovereign authority found to replace the Crown. What would this new preamble read like? Also, would Australians still rely humbly on Almighty God? Will we be asked to vote God out of the *Constitution*? Will a more Jacobin approach be taken?

B *Chapter II of the Constitution*

Chapter II of the *Constitution* sets out the Executive Power of the Commonwealth – and it will all have to be significantly amended, or, more likely, replaced in its entirety.

Section 61 vests, explicitly, the Executive Power of the Commonwealth in the Sovereign, to be exercised by the Governor-General as the Queen's representative. The *Constitution's* vesting of executive power in the Crown means that, along with that power, we also derive from the Crown's existence our day-to-day Westminster governing norms of responsible government and, in a crisis, the reserve powers of the Crown. In any parliamentary crisis, such as in 1932 or 1975, it is the Governor-General's duty to ensure that the *Constitution* is maintained and the laws enforced, and, especially, to ensure that the Australian people decide through elections how a situation of government illegality or deadlock is to be resolved (hence the Governor-General's powers per section 5 to dissolve the House for fresh elections and per section 64 to appoint and dismiss the ministry).[2]

If the Crown is abolished, so too are its received understandings of how executive power is exercised. Inevitably any republic will create a vacuum in the exercise of executive power – and it cannot be filled by a jurisprudence of 'cut and paste/replace with a president' republicanism.

The fundamental problem will be one of mandates, both in terms of each of the new republican president and republican prime minister, as well as the inevitable competition that will arise between them.

Any president – regardless of whether she or he is elected by, say, members of the Parliament or directly by the people – will have an electoral mandate that no Governor-General, as the representative of the Monarch, can ever have, or seek to assert, as against the Prime Minister of the day.

It would be only human for an elected president with a national mandate, to assert – indeed, it would be Herculean to not assert – that you should have a role larger than that of any Governor-General. This would be true of even the most humble of presidential aspirants. Even then the temptations of executive power would be great indeed.

There is no safe replacement, either, of the Governor-General by a president who is appointed by the Prime Minister of the day – and thus has no security of tenure. Chapter II was drafted and operates on the basis that the Governor-General was, and is, the Monarch's representative and on those royal and constitutional terms would exercise the executive power on the advice of the elected government of the day. It would be a dead letter if its exercise hinged on likely dismissal by the Prime Minister of the day, rather than by the Monarch.

Chapter II cannot, now, after 117 years be tamed or warped into a republican provision. Instead, any republic would require wholly new provisions setting out what the republican president may or may not do in explicit terms, especially if that republican president is to 'cohabit' with a republican Prime Minister who already enjoys the confidence of the House of Representatives. The potential for frequent conflict between these two executive office holders – who both have their own national mandates – is obvious, as is the scale of the chaos that could well ensue if they are deadlocked.

C *Section 5 of the Constitution*

Section 5 allows the Governor-General to prorogue the Parliament and, where necessary, to dissolve the House of Representatives. The exercise of this power now is, almost always, only done on the advice of the Prime Minister of the day to cause a federal election. However, in times of crisis or deadlock, section 5's power may be exercised by the Governor-General to force new elections and ensure the Australian people are the ones to resolve a parliamentary crisis at the ballot box. It is hard to see how any future republican president possessed of a national mandate, where faced with an opposing Prime Minister, especially if that Prime Minister was unpopular, could avoid the temptation to dissolve the House and seek new elections that could remove the difficult Prime Minister. Absent the Crown and precedent regulating this power's exercise, one can foresee section 5 enabling the slow accretion of power to the presidential office by the frequent calling of elections for the House to remove opposing prime ministers.

D *Section 68 of the Constitution*

Section 68 sets out the Governor-General as the commander in chief. This command (in chief) proceeds, again, on the centuries-old royal understandings of a Monarch in command of the armed forces, a command exercised by the Crown only on advice of the elected government of the day.

In the republic, the issue of who would command in chief the armed forces and on what terms, remains at large. One presumes, perhaps wrongly, that the future president will have some powers of military command, while also having a national mandate of either parliamentary or popular vote.

One does not know what would happen to the Crown's prerogative power to deploy the armed forces and make war and make peace. Would a resolution of the republican legislature now be required for Australia to deploy its armed forces? Would the republican legislature have some additional provision for cessation of conflicts?

A clearer problem is what would the armed forces be expected to do when a President and the Prime Minister, both with an electoral mandate, disagree on matters of war and peace? What would happen in a time of domestic crisis should the President and Prime Minister disagree on what is to be done to suppress terrorism, riot, disorder, or an insurgency?

One should note here that section 119 obliges the Commonwealth to '...protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. This raises the obvious problem of who decides what the protection of the applicant state may involve.

The armed forces cannot be left to guess as to their chain of command and, in the long history of republican collapses, the republic has not infrequently been brought to an end by a putsch, or a coup, because of a civil war or economic slump. While such military stirrings against the civil power are anathema to our history and traditions, so too is the idea of a republic. If you will the republic, you do also risk the disorder that any republic entails? And you must include safeguards that stabilise rather than destabilise a system made fragile.

E *Section 126 of the Constitution*

Section 126 permits the Monarch to authorise the Governor-General to appoint any person, or any persons jointly or severally, to be deputy or deputies exercising powers. In the republic, who succeeds the republican president? Do we have a vice president? How is the president to be impeached or removed? What then?

F *The States*

What is to be done with the states, noting sections 106, 107, 108, and 118? Each Australian state has their own Royal Governor, their own constitutional foundation and their own relationship to the Monarch. Any federal move to a republic is not necessarily binding on the State Crown: each state and their people have a Governor and a State Parliament. The potential position of Royal states attempting to exist within a national republic is the stuff of constitutional minefields. (One should note that Western Australia has, already, a history of secessionism under the Crown.[3])

G *Provisions relating to qualifications*

The above are just some of the major provisions that will require amendments. Others, such as sections 16, 34 and 44(i), dealing with the constitutional qualifications of Senators and House members will have to be amended, entirely, as the concept of a 'subject of the Queen' will be rendered nugatory by the republic. Moreover, there can be little doubt, following on from the recent parliamentary citizenship debacles, that proposals will be made that persons with dual citizenship should be eligible for election to the House and Senate and, presumably, to then hold ministerial office. One awaits the referendum that asks Australians to agree to risk having dual citizens hold the offices of Prime Minister, Treasurer, Attorney-General, Home Affairs, Defence, National Security, and Foreign Affairs.

II THE REFERENDUM

Assuming that all of these (and, no doubt, other) necessary republican alterations can somehow be agreed upon by constitutional conventions and by the parliament, then the republic would still need to be approved by the Australian people in a way that satisfies section 128's 'double majority' requirement: the republic would need to be supported both by (a) a national majority of all electors and (b) a majority of the electors in a majority of the states. Over the past 117 years of the Australian Commonwealth, the Australian people have passed only 8 of the 44 referenda proposed, with the most recent 1999 referendum on an Australian republic being defeated in all states and succeeding only in the Australian Capital Territory. This history is not encouraging for major changes of the kind that will have to be proposed by the domestic republican movement.

III Some Observations

The rule of law, once lost, is extraordinarily hard to re-establish. The grisly fate of the Kerensky and Weimar republics – attempted as they were in the former and ancient monarchical states of Russia and Germany, respectively – should always be uppermost in anyone's mind. So should be the example of the British constitutional monarchies weathering, infinitely better, the twentieth century's storms and stresses of two world wars and a great depression, and without any shift away from constitutionalism to authoritarianism.

For over 117 years, the *Constitution* has survived wars, depressions, cold wars, hung parliaments, innumerate and ethically dubious governments, as well as, frankly, crooked representatives and senators.

Further, for well over a century, tens of millions of people have left their homelands to emigrate to Australia, with the security and stability of our *Constitution* and commitment to the rule of law an unspoken but foundational attraction.

It is said against monarchy that it is undemocratic, remote, and anachronistic. However, in my view, those are among the Australian Crown's key strengths. A monarch cannot be ejected by ambitious politicians of the day, many of whom resent that they may aspire only to be ministers of the Crown. The monarchy is a guardian of the *Constitution* and not some proto-dictator eager to dictate to the polity. The monarchy also, frankly, takes any chance for supreme power away.

And, yes, monarchy is irrelevant to our age. Its irrelevancy makes monarchy timeless – as does its utility, practicality, and value as an enduring institution that is beyond the petty politics of the day. The wise reposing by our *Constitution* of the

Executive Power in the Crown provides Australia with stability and order in the day-to-day operation of government, an umpire in the case of parliamentary deadlock, as well as a source of military traditions and non-partisan allegiance. The armed forces, police, prosecutors, and other coercive and powerful arms of the state serve the Crown, not the politicians of the day.

There is much to be said for such a distinction between the Crown that is served and to which allegiance is owed, and the day-to-day responsiveness of such public servants to the elected government, which changes with elections. One junks such traditions and practices of legality, stability, and good order, only at one's national peril.

Finally, I would add, perhaps quixotically, that the *Constitution* provides in Chapter I for a House composed of members representing the interests of their local electoral divisions and a Senate composed of senators representing the interests of their states. The *Constitution* does not – and was never intended to – foster an entrenched party system and a permanent political class. It was never intended to provide career tracks (or endless loops) for politicians, staffers, advisors, lobbyists, 'government relations experts', and a host of other vagabonds found in the postcode 2600 swamp.

It was said of the Roman General Lucius Quinctius Cincinnatus that when Rome was threatened he left his small farm, laying down his plough so as to wield his sword in Rome's cause, and that once Rome had been saved and the danger passed, Cincinnatus gave up power most willingly and returned to his farm where he returned his sword to its scabbard and plowed his fields once again.[4]

The story of Cincinnatus was well known to the early American republic. Indeed, General George Washington surrendered the American presidency after two terms to return to Mount Vernon.[5] As King George III noted of his once foe, Washington's readiness to lay down power made him the 'greatest man in the world'.

Nonetheless, this ancient model of political life and public service as a periodic vocation for serious people, not a career for swamp dwellers, must return in our own times if we are to have any hope of improving the standards of our Parliament and our governance. As Montesquieu wrote, 'The deterioration of a government begins almost always by the decay of its principles'.[6]

IV CONCLUSION

The republic debate, done properly, is an opportunity for all Australians to rediscover not just our *Constitution*, and the principles on which it is founded, but also defend them against those whose negligence and stupidity will threaten them and the basic law.

As for the rest of my fellow Australians, please remember that these debates will occur in respect of our *Constitution* and, as the ancient maxim found on war memorials across Australia and across the world goes, 'the price of liberty is eternal vigilance'.

It can be said of the Australian *Constitution* that it was drafted by geniuses so that Australia could be governed by fools. The *Constitution* is our fundamental law and, if it unravels, so too will the Australian nation that it, literally, constitutes.

As the Romans would say: 'Caveat'.

Endnotes

1 W A Wynes, *Legislative, Executive and Judicial Powers in Australia*, (Law Book Co of Australasia, 1962) 89.

2 See Keven Booker et al, *Federal Constitutional Law* (2nd Ed), (Butterworths, Sydney, 1988) at [7.44] and George Williams et al, *Australian Constitutional Law and Theory: Commentary and Materials* (6th Ed) (Federation Press, Leichardt, 2014) at [10.15]–[10.17].

3 Western Australia held a referendum on the issue of that State seceding from the Commonwealth of Australia on 8 April 1933. The referendum question succeeded but was of no legal effect. See Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95.

4 See the accounts of Florus, *Epitome of Roman History*, Book I, at [11], and Livy, *History of Rome*, Book III, [26]–[29].

5 See Garry Wills, *Cincinnatus: George Washington and the Enlightenment* (DoubleDay, 1984).

6 Charles de Montesquieu, *The Spirit of the Laws* (1748) Book VIII, Chapter 1.