

Seven Fatal Flaws

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The Federal constitutional monarchy established by the Australian Constitution has lasted a century without a genuine crisis. Will the November 6 proposal do as well?

IN August, the Commonwealth Parliament settled the exact form of republic to be presented to the Australian people on 6 November 1999. There are a number of serious problems in the final referendum proposal which have not yet been widely publicly debated.

FLAW 1—ARBITRARY DISMISSAL POWER

The proposed republic inverts the source of sovereignty by making the President's tenure completely dependent on the Prime Minister for appointment and dismissal. The Prime Minister would possess the power summarily to dismiss the President in writing.

Such a dismissal would be subject to a procedural vote by the lower house of Parliament but could not be undone. This toothless vote will not restore the President to office; it will not trigger an election; it will not involve the Senate and it will not unseat the Prime Minister.

Constitutional experts and political scientists agree that currently the Queen can refuse a Prime Minister's request to exercise reserve powers where there is an intent to breach the constitution or subvert the system of democratic government. This constitutional safeguard has been used on at least three occasions in the British Commonwealth.

The proposed republic would remove this check without replacing it with any alternative. In every other democratic republic in the world a president cannot be dismissed unless on specified grounds of misbehaviour or incapacity, and a due process must be followed to examine evidence.

According to Professor George Winterton, a public advocate for the 'Yes' case, 'Such presidential vulnerability is unprecedented among world republics and greater presidential security might have encouraged frankness between President and Prime Minister in a constitutional crisis like that of 1975.'

The Winterton assessment is a complete rebuttal of Mr Malcolm Fraser's recent and bizarre claim that the 'Yes'

model could have 'saved' the Whitlam Government.

In 1993, the Turnbull Committee argued strongly against an arbitrary Prime Ministerial power to dismiss a President. It stated that 'The Committee encountered an almost universal view that, regardless of the integrity of any Prime Minister, the head of state should not hold office at the Prime Minister's whim, and must be safe from in-

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stant removal to ensure appropriate impartiality.' This concern remains as valid now as it did then.

The proposed republic model posits *de facto* sovereignty in the Prime Minister and leaves the people powerless spectators in the choosing, and un-choosing, of the head of state.

FLAW 2—PRIME MINISTER'S POWER TO APPOINT

Proponents of the so-called 'bipartisan' model argue that a political figure would not be appointed because the Opposition Leader must second the nomination which goes before Parliament. This claim ignores the likelihood that most appointments will be made as a result of a backroom deal between power-brokers in the established parties. Besides, the final Presidential nomination itself is chosen by the Prime Minister alone.

It is no safeguard that the Opposition Leader must second the nomination. The referendum proposal fails to define the term 'Leader of the Opposition'. A government can use its numbers in the House of Representatives to amend Standing Orders to redefine or remove a Leader of the Opposition.

We have, in essence, a two-party system today—but that could easily change in the future. Of 29 OECD nations, 23 have multi-party oppositions. It would not be unusual if a wider number of parties were elected in Australia over the next century. Yet in the proposed section 60, the Prime Minister does not need to get his nominee endorsed by all party leaders in the Parliament, even though the official Opposition may possibly have fewer politicians than other parties.

Most importantly, in this model, the Australian people themselves have no final say as to whether they would accept a Prime Minister's choice as President.

FLAW 3—A PRESIDENT FOR LIFE

Another serious flaw is the absence of an effective expiry date for a President's term of office.

Proposed new section 61 purports to describe the President's term of office as five years, yet in the same sentence it allows an exception. This exception is that the tenure of each President will continue indefinitely until a new President can be found. Section 60 widens the loophole because it does not compel the Prime Minister to put a nomination for President. It only says he 'may' propose a nomination to Parliament.

Various scenarios can result from this. First a Prime Minister would only need to seek the ratification for an appointment from Parliament just once, and could avoid seeking a renewal of the President's term.

Other scenarios arise where Parliament becomes deadlocked on who to appoint as a successor. In this case the President can continue well beyond five years until either the incumbent Presi-

dent dies, resigns, is dismissed, or until Parliament surrenders to the Prime Minister's selection of a replacement. A Prime Minister can exploit this mechanism by nominating a partisan figure, who would clearly be unacceptable to opposition parties. This way the Prime

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Minister cannot be accused of bypassing Parliament: instead he can contrive a deadlock which has the same effect.

Whichever loophole is used, a Prime Minister can keep a politically loyal President, even one who may have lapsed into partisanship, misdemeanours or incapacity. This system encourages Presidents to become politically biased, in return for a 'Life Peerage'.

As Harry Evans, Clerk of the Senate, says, 'A Prime Minister could keep a compliant President in office indefinitely, and ensure that compliance by offers of continuation of the presidential term'.

FLAW 4—CROWN REPRESENTATIVES AS PRESIDENT

The main arguments for a republic are based on symbolism and emphasise separation from the British Crown. Yet the referendum proposal would create the symbolic contradiction of an incomplete republic. Under the proposed constitutional changes, if the Presidency falls vacant, then the most senior State Governor will automatically take over the President's powers. This job opening as 'Acting President' extends to the Governors of all States, including those which remain as monarchies. This would allow the anomaly of a Queen's representative acting as President of the republic.

Accordingly, it is false to claim that this republic would sever links to the Crown. Rather we would see an incomplete republic which could be pocketed

with State monarchies and even governed over by a Crown representative. This model has focused excessively on removing checks on Prime Ministerial power, and gives insufficient attention to creating a technically complete republic.

FLAW 5—COERCION OF THE STATES

The proposed constitutional amendments say that States can remain as monarchies (Schedule 1, clause 5). By spelling out the obvious, this section creates a precedent that the Commonwealth Constitution should spell out State constitutional arrangements. This device might be used in future to coerce a State into arrangements against the will of its citizens.

This proposed interference with State constitutions has not had adequate expert scrutiny, just as there has been insufficient debate on the other transitional provisions, which would be squirrelled away in a 'Schedule' at the back of the Constitution.

FLAW 6—NATIONAL ICONS

The main argument put by the proponents of the 'Yes' case is that a republic achieves a symbolic severing of foreign ties. This excessive focus on symbols implies, by extension, allowing Parliament to dump other 'symbols' which link Australia to its heritage.

Unlike the 'compromise' republicans who support the proposed model, for me, the value of a conversion to a republic is the opportunity it provides to give Australia a better system. A directly-elected president would not just be a symbolic change, it would provide for greater public participation in our democratic institutions.

The Australian Republican Movement has previously sponsored a competition for new flag designs and Malcolm Turnbull even became a director of Ausflag Ltd, a corporation which exists solely to change Australia's flag.

Paul Keating said to the Parliament in 1992, 'I make these points clear: I do regard the flag as an ambiguous representation of our nation and I believe it ought to be changed.'

Labor's original strategy was to push the republic and a change to the flag simultaneously. Public outrage at plans to tamper with the flag forced Labor's republicans to opt for a simple strategy – first change to a republic and then later change the flag. That is why the Coalition legislated to ensure that the flag can only be changed by plebiscite. However,

if a future government took up the Keating agenda, then they could use a simple vote in Parliament to repeal this plebiscite legislation and change the flag.

FLAW 7—MARRYING THE GOOD WITH THE BAD

The November referendum will pose only one question, yet it packages together 69 separate changes to the Constitution. Together this swag of amendments will alter almost half the Constitution in a single hit.

Because there is much more in this republic model than meets the eye, the major changes should have been proposed by their supporters as clearly separate questions. It is not fair to expect the Australian public to accept 69 constitutional changes in one hit, encompassing a range of complex issues and unexplained agendas.

THE PATH TO A REPUBLIC

Opinion polls have made it quite plain, over a number of years, that the Australian people want a President who they directly elect.

I have recently outlined a model for a republic with a directly-elected President, including key elements of its operation. This is a vision for a democratic republic where the President is constrained to non-executive powers. Other republics such as Ireland and Austria

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have non-executive Presidents who are democratically elected by the people.

The 'Yes' republicans claim that this will establish a mandate for a competing source of political authority. They do not explain why a similar result would not arise under their proposal, where the President would have the vote of two houses of Parliament, against the Prime Minister's support in just one house.

Their claim implies that a non-executive President could illegally acquire executive powers without legal challenge or public outrage. It also ignores the capacity of the Parliament to legislate to restrict donations, limit campaigning and otherwise enact provisions to buttress the non-executive character of the office of President. In Ireland, elected presidents have respected the limits of their position.

Supporters of the proposed model believe that public nominations provide a sufficient sop to the democratic spirit. Professor Craven argues that some candidates may receive 'thousands of public nominations'—a form of elite-level political campaigning. But they do not believe that Australians are intelligent enough to participate in the final selection of candidate and want this power reserved for politicians. They never justify why the wisdom of the politicians is superior.

Such a system would only strengthen the sense of alienation in our political system which has been growing for many years. The perceived legitimacy of our constitutional system is not a trifling matter.

Given the numerous flaws in the proposed republic model, it is over-optimistic to hope for a patch-up job in future referenda. If a model is misconceived in principle and so defective in design that it requires immediate repair, then it does not offer a better system of government.

In 1898, the original model for Federation failed to receive sufficient votes at referendum. An improved model was then accepted a year later. I believe that Australians should only vote for constitutional changes which are constructed in a measured way. If the current proposal fails at the ballot box, then a better republican model should be drafted, based on popular election. It should be drafted and scrutinized by a new Constitutional Convention and then submitted to the people at a subsequent referendum.

A 'Yes' vote in November will entrench a third-rate compromise, giving power to politicians which they will never again relinquish. A 'No' vote is a necessary first step on the road to a democratic participatory republic.

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The 'R' Files

ALAN MORAN

Shuffling the Deck on Gambling

THE AUSTRALIAN GAMING INDUSTRY

This industry is large and has grown rapidly over recent years as liberalization has been introduced in most States. It employs about 110,000 people, takes net revenues of \$11 billion and is responsible for a net \$6 billion in GDP. This last figure approaches 1.5 per cent of GDP. In employment terms, the industry is rather larger than mining and about twice the size of gas, electricity and water.

Like any other avenue of spending, gambling brings benefits to the buyers that are greater than those they gain from their alternative spending patterns. Gaming expenditure is money spent on pastimes which people, in their consumption decisions, value above their alternative expenditure choices. The overwhelming economic case for gambling is the same as that for any other activity that people enjoy: opera, mountain climbing, eating out, etc. Denial of the opportunity to engage in these activities reduces the real income of those affected. It shifts their spending to other goods and services from which they obtain less value.

The Productivity Commission puts the gross benefits from gambling by consumers—over and above the benefits they would obtain from spending the same money on their next best preferences—at between \$8 and \$11.3 billion.

It downgrades these estimates to \$5-6 billion by excluding most of the pleasure obtained by 'problem gamblers'. The Commission continues its alchemy by then reducing benefits further by adding costs of lost productivity, marriage breakdown, depression, thought of suicide and a host of other factors. These are said to amount to between \$1.1 and \$5.2 billion per year. The 'problem gamblers', according to the Commission, represent 35 per cent of total spending. There is considerable debate about how to treat the satisfaction this group gains from gambling: the Commission effectively treats their free choices as negative income.

The Commission estimates that the net annual benefit ranges from a slender



\$150 million to \$5.2 billion. And, as the Commission says, over the long term—because consumers who are denied their preferred expenditures shift to their next best preferences—the measured economic costs of not having gambling will be appreciably less than this. This is the case with all goods and services.

The net benefits of gambling could be undermined by one of two caveats:

- that people, or large numbers of people, are enticed into the activity in such a way that it makes them unhappy—the 'addiction' issue; or
- that the activity encourages a set of values that have the capacity to undermine the basic fabric of mutual respect, and general concern for the community as a whole, which is the glue holding together society.

PROBLEM GAMBLING

How great is problem usage? To measure this, the South Oaks Gambling Screen is the Commission's test of choice. If a person scores 5 or more (SOG 5) out of a possible 20, they are deemed to be a pathological gambler. But as the Commission acknowledges, the test is a screen and will over-state numbers. And although it says that there are 329,000 problem gamblers, it also argues that only half of these report a significant problem (cf. 90 per cent of those with a score of SOG 10).

While a great many goods and services are over-consumed by certain people, we do not, as a rule, use this as a reason to deny usage. The first survey of gamblers conducted in Australia put problem usage at a level of SOG 10 because SOG 5 classed an implausible 6.6 per cent of the