

Hidden Landmines in 'Minimal' Changes

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A camel is a horse designed by a committee—just like the proposed republic.

ANY amendment to the Australian Constitution involves the insertion of specific words into a written law. The legislative design of the third paragraph of the proposed new section 59 of the Australian Constitution, proposed by the *Constitution Alteration (Establishment of Republic) Bill* is a disaster waiting to happen.

This third paragraph has two arms. The first is:

A. 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State;...'

The Explanatory Statement accompanying the proposed amendments says:

Proposed s.59 provides expressly for the President to act on the advice of the Government of the day in accordance with the principle of responsible government which governs the exercise of nearly all of the Governor-General's powers.

The proposed section does no such thing.

THE CONCEPT OF RESPONSIBLE GOVERNMENT

'Responsible government' was a recognized concept at the time of Federation. It really means *Cabinet* government.

By the time of Federation, the concept of 'responsible government' was well and truly established. In the British Dominions (of which Australia was one), the discretionary power of the Crown, other than the 'reserve powers' (discussed later on) were not exercised by the representative of the Crown himself, but on advice from popularly-elected legislators.

So it is in the Australian Constitution. Quick and Garran analysed the existing section 63 of the *Constitution* thus:

(the object of s.63) is to make clear that wherever in the Constitution there is a provision that the Governor-General in Council may do cer-

tain Acts, such provision refers to the Governor-General acting with the advice of the Executive Council. This, as we have already seen, means *the advice of the select committee of the Federal Executive Council known as the Ministry*.¹

The operating presumption is that when the head of state hears advice from a representative of Cabinet, the advice given will be fully supported in both parliamentary and public forums.

Sir Paul Hasluck, a previous Governor-General, thought it was not appropriate for Ministers to have an argument in Executive Council about the merits of a particular proposal. They should go away and come back when the *Cabinet* can express a united view.²

He thought it appropriate for a Governor-General to hesitate to follow the advice of a Prime Minister where there was reason to believe that the Prime Minister was at odds with his own Cabinet or his own party.

In that case, the Governor-General in Council might seek confirmation that he is acting on clear advice and not taking sides in an unresolved argument. In the case of a coalition government, if there were any substantial doubt about the unity of the coalition partners, he might find it advisable to seek assurances from the leader of any coalition party as well as from the Prime Minister.³

The proposed amendments not only require the President to exercise powers on the advice of the Executive Council, but also on that of the Prime Minister or a Minister of State.

If you have, for example, a fractious government of the sort hinted at by Sir Paul: when does the President act with the advice of his Executive Council? Or the Prime Minister? Or a mere Minister of State?

Even in the exercise of an 'ordinary' power, such as the commencement of a piece of legislation, or the appointment of someone to a board or committee

(leaving aside issues such as ministerial reshuffles or dismissals), there is a chance that a fractious multi-party government may exist, possessing different views.

Giving three separate people (or a group of people) a statutory right to advise a President in the fashion proposed can raise the spectre of an unseemly race to Government House so that the Prime Minister may beat a Minister with relevant administrative responsibility for an Act, or an 'Executive Council', to tender advice, on which the President 'must' act.

Do these provisions create a contextual implication that the Prime Minister, as the principal adviser to the President, may give advice *notwithstanding* a decision of Cabinet?

Alternatively, on the occasion of an A-grade political spat, does it allow a Minister acting as an emissary of Cabinet to advise the President of the view of the majority of the Cabinet, and that the President *must* act on that advice? That would accord with the standard concept of 'responsible government'.

Yet can the Prime Minister then go back to Government House, and advise a reversal of the decision, again something the President might *have* to do. After all he is the boss. And the President *must* act on advice tended by (*inter alia*) the Prime Minister.

A disaster in waiting. Courtesy of the design of the Constitution as it is proposed to be amended.

The second arm of the third paragraph of the proposed new section 59 reads:

B. '... but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to that power'.

The third paragraph of the proposed section 59 says that the 'reserve' powers may be exercised 'in accordance with the constitutional conventions that related to the exercise of the power by the Governor-General.'

There is abundant constitutional literature which discusses the concept of 'reserve powers'. The trick is identifying what they actually are.

The Explanatory Statement says that there are **probably** four:

- appointing a Prime Minister;
- dismissing a Prime Minister;
- refusing to dissolve a Parliament; and
- forcing a dissolution of Parliament.⁴

It is quite something to put into a Constitution a concept with such an uncertain ambit.

L.F. Crisp identifies a 'constitutional convention' as being an extra-legal rule of structure or procedure or principle, established by precedent, consolidated by usage and generally observed by all concerned.⁵

The Explanatory Statement suggests that:

There can be circumstances, however, where there is no generally agreed convention to control the exercise of the Governor-General's reserve powers. Such a situation arose in 1975 when the Governor-General, Sir John Kerr, dismissed the Prime Minister, Mr Whitlam, after the Senate failed to pass the Supply Bill for Mr Whitlam's (sic) government.⁶

So, there may have been a convention to deal with the 1975 scenario. Or maybe not.

Professor Winterton observes that there is uncertainty about the actual contents of the conventions relating to responsible government.⁷ Equally, L.J.M. Cooray accepts that in any analysis of the operation of conventions in Australian law there is a degree of uncertainty.⁸

It needs to be said that 'conventions' are nothing more than the application of common sense in the operation of government. They are not the sort of thing that can really be set down in writing. Because they are applications of common sense, they can change with circumstances.

For instance, in his work *Cabinet Government* Sir Ivor Jennings recorded that the convention that Cabinet takes collective responsibility for decisions made by it in the Parliament was not followed in the United Kingdom in 1932 because of 'exceptional political conditions'. In that case, the Government was a coalition formed of three parties with distinct organizations, set up for specific purposes. As the relevant issue (tariff reform) was not one of those purposes, members of the Cabinet could speak and vote against it.

So, what counts as a 'convention' is a settled thing. Unless it makes sense not to follow it.

The Supreme Court of New South Wales observed in *Greiner v. Independent Commission Against Corruption* that the rules relating to the dismissal of the government are vague and uncertain. The only certainty being that it was a power exercisable only in 'most extreme circumstances'.⁹

So, even assuming that there are 'reserve powers' (an open question), and that there are settled conventions to guide their exercise (an equally open

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question), the better view is that they may only be exercised in 'extreme circumstances'.

What is 'extreme' to you, may not be to me. I can prove this by asking one question: were the events leading up to 11 November 1975 'extreme' enough to justify the dismissal of the Whitlam Government? Ask that one at a party.

YET ANOTHER REASON FOR THINKING THAT THE AMENDMENTS ARE A CONSTITUTIONAL CAMEL

Reserve powers and constitutional conventions aren't conveniently listed anywhere. They are merely derived from usage and practice. As a matter of statutory design, it is very bad practice for a term of art, such as 'convention' or 'reserve power', to be contained in legislation, where the ambit of the term cannot be clearly determined.

The very best terms of art should be well known like the Ten Commandments: 'Thou shall not kill; thou shall not steal'. Or a term like a baker's dozen. Most people know that that *means* 13 of something.

When terms of art are used in a statute, their ambit should be well known, so that those well-known concepts can be applied to the facts of the case at hand. Under no circumstances should a term

of art be inserted into anything, particularly a constitution, where the ambit of a term can only be defined as *probably* constituting something.

One is left with the thought that the 'Bipartisan Appointment of the President Model' has in mind the political landscape of today, without anticipating that as the years turn into decades, things may change. The political certainty of today may not exist tomorrow.

Attempts to express the concept of responsible government in the Constitution in a way better than those of the founding fathers have been unsuccessful, largely because of the use of technical terms of art which, when it comes to the crunch, are of indefinite meaning. The proposed section 59 is another reason why the proposed republican amendments should be regarded as a constitutional camel.

NOTES

- 1 Quick, J. and Garran, R., *The Annotated Constitution of the Commonwealth*, 1976 reprint, Legal Books, Sydney, page 707. See also L.F. Crisp, *Australian National Government*, Longman Australia, Melbourne, 1977, pages 350-7. Also generally Sir Ivor Jennings, *Cabinet Government*, Cambridge University Press, Cambridge, 1969, pages 13ff. W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1997 reprint), Legal Books, Sydney, page 168; L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Legal Books, Sydney 1979, pages 66-8.
- 2 Paul Hasluck, *The Office of Governor-General*, Queale Memorial Lecture, Adelaide, 1972, page 18.
- 3 *Ibid*, page 19.
- 4 Paragraph 5.13 of the Explanatory Memorandum accompanying the *Constitution Amendment (Establishment of Republic) Bill* 1999.
- 5 Crisp, *op.cit.*, page 352.
- 6 Paragraph 5.15 of the Explanatory Memorandum accompanying the *Constitution Amendment (Establishment of Republic) Bill* 1999.
- 7 Winterton, G., *Parliament, the Executive and the Governor-General, a Constitutional Analysis*, University of Melbourne Press, Melbourne, 1983, page 2.
- 8 Cooray, *op. cit.*, page 90. The author does say, however, that the degree of uncertainty is not as great as it is often portrayed to be.
- 9 Volume 28 of the *New South Wales Law Reports* 125 at page 144.

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