Chapter Four

Keeping Government at Bay: The Case for a Bill of Rights

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Let me begin by quoting a notable American president: "Were it left to me to decide whether to have a government without newspapers or newspapers without government, I would choose television every time."
That was Ronald Reagan sidestepping Jeffersonian sententiousness. Here is a morsel of Confucius in compensation to those who miss Jefferson: "Government requires food, weapons and the confidence of the people. It could, if necessary, do without the first two but never without the last."
I lean somewhat to Reaganian reasoning in framing some of my positions on the Constitution. Were it left to me to decide whether Australia should be a constitutional monarchy or a democratic republic, for example, I would unhesitatingly settle for either.
But I am not certain we have taken the necessary steps to make sure we have that choice. In particular, I believe that our Constitution provides insufficient safeguards for our democratic institutions in the absence of a monarch, and that we cannot count on the monarchical system's indefinitely retaining enough popular confidence to survive.
The present republican movement is frivolous in the sense that it concerns itself almost exclusively with getting rid of the Queen, and very little with replacing the monarchy with something of value. But I think Kenneally, Turnbull and the other fashionable republicans voice, in their way, a still somewhat incoherent but widespread Australian uneasiness with the monarchy.
The tepid public response to the Queen during her recent visit reflected, if not indifference, a degree of discomfort, of people holding back because they were not sure of their own feelings. The Queen's reception was on a par with that accorded President Bush, who preceded her by a short span, and was known just to be dropping in on his way somewhere else.
Bush had an advantage as a politician of being able repeatedly to describe his welcome as extraordinarily warm, a benchmark in the annals of state visiting. He soon had us convinced this was the case. In fact, the President did okay. He is an affable man with a cheerful wife and we responded cordially.
We were, moreover, fairly interested in the content of the visit, which got a boost and a plot line from the President's promises – subsequently honoured – not to get too much in the way of Australian wheat exports while turning the heat on Europe's agricultural protectionists.
We offered a comparable level of friendliness to the Queen.
We have known her a long time, and she has lived up to our best expectations. But before she had been here long you had the impression that this was not so much a royal visit as a celebrity visit by the mad dogs of Fleet Street. There were headlines about Mrs Keating not curtseying, Mr Keating laying hands on Her Majesty's waist. We saw Mr Keating boring the Queen with dissertations about our Asian future, and Beefy Botham taking offence at our jokes about her.
A few alert constitutionalists pointed out that Her Majesty was the Queen of Australia and that we were quite capable of taking care of her without any help from pompous Poms. But most

people accepted the appropriateness of British criticism, whether irritated, amused or indifferent. One might ask, therefore: what is the point of having a Queen if a lot of people don't really think she is yours, and you are none too sure yourself?

The virtues of a constitutional monarchy in contemporary times are numerous. One observes the greater stability enjoyed since World War II by the West European countries that have retained the monarchy – including Britain. Franco's brilliant decision to restore the royal family in Spain, and its admirable consequences for the Spanish, provide dramatic evidence of the power of the institution. It is difficult to think of any other means by which Franco could have ensured the preservation of Spanish nationhood after his own death.

For most of the past 400 years Japanese militarists have been able to control their country by effectively seizing the person of the Emperor. It is significant that even the most ruthless and self-confident Tokugawa dictators, let alone the sword-swinging admirals and generals of the 1930s, were unwilling to claim absolute power in their own right.

Moreover, it can be argued that by surrendering its power to the people at large, as it has largely done since the Occupation, the throne of Japan has enhanced its effective authority and made itself safer from Tokugawa kidnappers of the future. His person is now defended by a palace guard several million strong.

In Thailand recently, a constitutional monarch invoked the reserve powers whose existence denies to anybody else legitimate aspiration to final power, and guided his country back from the brink of civil war, publicly humiliating and then dismissing a prime minister who had not hesitated to turn guns on his own countrymen.

In theory, preserving our constitutional monarchy is the best way for Australians, as well, to guarantee our future stability and continuity of government, and keep a brake on the excessively ambitious and authoritarian.

In practice, though, the monarchy's influence seems to be fading. It lost much of its potency with the passing of the Australia Act of 1986. This is by no means a welcome reality, for the fading of the Crown's residual authority is creating a power vacuum and some rather sinister shapes are starting to swirl around it.

I am aware that the inaugural position of The Samuel Griffith Society may be a desire to defend the present Constitution and counter authoritarianism through its federalist provisions. With a symbolic royal presence in our future by no means guaranteed, however, I am not altogether confident that the authority of the States as presently defined will be sufficient to resist a determined centralist power grab. Nor do I detect any mechanism, absent the monarchy, by which we will be able to guarantee ourselves open and responsible State governments.

A perfectly logical response to this is, of course: why even entertain the idea of giving up the monarchy? It is a matter of accepting the advice of Confucius. I fear it may be an uphill struggle for any federal government, no matter how great the will, to win popular support for an essentially absentee Queen or King.

Consider the informal infrastructure that supports modern monarchies. There are the huge families they have begat and, for the most part, continue to beget despite marital difficulties. All those thousands of brothers and sisters, uncles and aunts, nephews and nieces, cousins to almost incalculable degrees, successors to the throne meticulously numbered into the hundreds, have their parts to play.

They comprise a powerful network, binding society rather like steel mesh does concrete structures. They give shape to a permanent social hierarchy, relatively unassertive these days, but comfortingly immune to election upheavals and stock market explosions. The outer royals, by swimming with the fish like coroneted Maoist guerrillas, defend the monarchy against fossilisation and keep the inner royals more or less, and somewhat hazardously up-to-date and in

tune with the society in which they live. Note that qualification: up-to-date with the society in which they live.

The extended royal family extends ripples of glamour to nearly all corners of that society. Even drunk or boring or both, a royal – even a collateral royal – spices up a party. A royal opening one's new domestic science block nudges the event into the outskirts of history.

The outer royals get help in gluing society together and washing it with a patina of glamour from numerous aristocratic families, some of whose members continue to make use of their privileges to become exceptional individuals. Around them is a relatively large number of citizens who have been conspicuously rewarded by the monarch for outstanding achievement or long public service.

For no good reason that I can see, we have forsaken such painlessly retainable institutions as, for example, conspicuous recognition in the Queen's name. The Order of Australia is, for instance, much less conspicuous than a barony or a knighthood and, practically speaking, does not demand the intervention of the Queen.

When we attempt to sustain a monarchy in Australia, therefore, we do so without some of its most important bulwarks and accoutrements. Even the social excitement that once surrounded the activities of the monarchs and their representatives seems to have faded. I am aware of no Government House that is these days considered a glittering salon. At least in Sydney there seemed no perceptible quickening of the social pace during the Queen's most recent visit.

When I put the question to several people encountered during the past week, I found at least a couple of handfuls who remembered more or less why President Bush had come here and what he had done. But nobody with whom I raised the matter remembered the reason for the Queen's visit, or what she had done, except somehow be insulted.

I do not make these somewhat disagreeable observations in the belief that the monarchy has not served Australia very well, or that it could not continue to do so. But we possess too few of the trappings, and have recently discarded so many of the traditions we once honoured, to be sure that a foreign monarch will remain sufficiently attractive to Australians to override the claims of constitutional alternatives.

Geoffrey Sawer makes a tongue-in-cheek assertion that Clause Two of the Constitution's preamble may prevent Australia's ever discarding the monarchy. It is part of a statute of the British Parliament, which having forsworn under the Australia Act of 1986 any further meddling in Australian affairs, so cannot amend Clause Two, which appoints the British monarch our head of state. But where there is a will there is a way, and I fear Australians may develop a growing will to put aside this admirable remnant of their past.

Whether one accepts this possibility or vigorously denies it, however, the time has come to examine our Constitution without piety or unsceptical assumption. It is the main instrument by which we will determine what follows the monarchy, if we are deprived of it. It is our main defence against those who misguide us into thinking that continuity will be guaranteed if we simply change the title Governor-General to President and the title governor to, well, governor – or discard governors entirely.

I come to this subject with certain biases, having lived for nearly half the past 30 years in the United States and had close American associations for much of the rest of the time.

Shortly after returning here in 1989, after a decade in the United States, I had a lengthy conversation with the present prime minister. It was much more cordial than prickly, but the few prickly bits seemed to occur when I said or implied, "But can the government really do that?"

At the end, Mr Keating mildly upbraided me for having suffered an American brainwashing and said, "People expect more of government in Australia than they do in America."

My unspoken thoughts were: "Well, they're mugs if they do," and "I'll bet they don't." My conclusion, after four years' observation and contemplation, is that unspoken thought number two is closer to being the right one.

Australians seem no keener than Americans to accept the interventions governments seek incessantly to thrust upon them. Americans simply are more practised at rebuffing governments, and have more efficient and accessible means of doing so. Their main instrument of defence is the first ten amendments to their Constitution, which have come to be called the Bill of Rights. The Bill has helped them achieve a much higher level of independence and self-reliance than we have done, with little if any greater systemic loss of order – despite what you sometimes see on television.

The American Constitution differs importantly from ours in that it draws its authority directly from – as its preamble states – "We, the People." Ours takes its authority from the established authority of the throne. According to an intriguing popular contemporary theory, the American constitution also recognises an essential duality in democracy.

In a recent book from the Harvard University Press, Bruce Ackerman claims the concept of duality as the United States's most original contribution to political thinking. He writes: "Above all else, a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy.

"The first is a decision by the people; the second by their government."

By creating a dualist Constitution, the Americans, according to Ackerman, sought "a solution to the problem of self-definition posed by the struggle between two great Western traditions." The first tradition, derived from the Greeks, asserts that the life of political involvement serves "as the noblest ideal for humankind". The second tradition reflects Christianity's suspicion of secular perfection, and holds that the salvation of souls is a private matter and that "the secular state's coercive authority" represents, in fact, the greatest threat to the highest human values.

According to Ackerman, the Constitution makes Americans neither "perfectly public systems, nor perfectly private persons". Its framers, in recognising the continuous struggle for ascendancy "in Western thought and practice, does not seek an easy victory of one part of ourselves at the cost of the other". Instead, the Constitution proposes using the conflict to provide creative energy.

Dualist democracy provides for decisions to be made daily by government, only rarely by the people. The people, says Ackerman, have neither the capacity nor interest to engage in the town meeting, participatory democracy about which Ross Perot chattered recently. They have better things to do.

However, decisions made by the people have the "higher legitimacy," in Ackerman's phrase. It was as a consequence of decisions by the people that the Bill of Rights was added to the Constitution. Two major re-interpretations of the Constitution were accomplished by decisions of the people-one after the Civil War and the other in the wake of the New Deal.

From a pedantic view, the abolition of slavery in America was unconstitutional, since the 18th century Constitution did not ban it, and the South was coerced by the North after the War into accepting laws which many opposed. However, by a succession of actions at the ballot box, the people exercised their right to change their minds, and ultimately imposed the higher legitimacy of their authority by ratifying appropriate amendments.

On the other occasion of broad intervention, having perceived a failure by the market to work in the interests of human wellbeing, the people acted to provide constitutional underpinnings for Roosevelt's social and economic quasi-revolution.

Ackerman argues that a dualist Constitution enables the people to assert themselves at crucial moments to reorganise society so it may better deal with changed circumstances. He adds drily that a dualist constitution "prevents elected politicians from exaggerating their own authority."

Not everybody will accept Ackerman's assessment of the nature of American society. His analysis is worthy of respectful consideration, and in its light the absence of a dualist approach may be thought a distinct weakness of the Australian constitution. The American document was derived from ideas about individual liberty already enjoying considerable currency in the separate American colonies – which, it should not be forgotten, enjoyed some 200 years of history before the advent of the United States.

The Australian document was, essentially, adapted from a single established model of government, the Westminister system, with some structural guidance from elsewhere.

I like this description by Martyn Webb, emeritus professor of geography at the University of Western Australia: "The Westminster system, born as it was out of the absolute monarchies of the middle ages, acts like a cuckoo in the nest of democracy. It cannot rest until it has, by some means or another, managed to secure complete and absolute control. The Westminster system was never designed to achieve a democratic society. Instead, its objective was to create through the device of the monarch in parliament, a means by which the royal prerogatives could be exercised by a sovereign parliament free from direct interference by either the monarch or the people."

It is also worth recalling Jim Spigelman's remark that Westminister is among the most secretive of systems.

Martyn Webb is the co-editor with Patrick O'Brien, a senior lecturer in politics at the University of Western Australia, of an important book called The Executive State. It is a study of WA Inc in the context of the Westminister system's coming drastically to grief, and our constitution's lacking the resources to put Humpty together again.

O'Brien and Webb make the point that the effective banishment of the Crown by the passing of the Australia Act left royal prerogatives – residual though they may be – lying about like a box of priceless jewels, without a recognised owner. Brian Burke was the first politician to fall for this glittering temptation in a big way.

Of course, we do not have to think deeply to remember others who flirted with temptation – some even before the passage of the Australia Act.

Sir John Kerr dismissed a government on suspicion that it planned to house-keep with money it was not authorised to spend, a classically kingly sin. The same government also skirted the edge of constitutionality in procedures both followed and omitted to follow, when it attempted to borrow large sums of money to finance unannounced political programs.

In Queensland, Victoria and South Australia in recent times the executive seized public funds to go into business in its own right, demonstrating a high-handedness and incompetence that was hardly less than royal.

But in Western Australia, Burke and his retinue went further towards usurping royal prerogatives than anybody else has so far dared. The king being constitutionally dead, or all but, it was a case in Western Australia of Long live the counterfeit king. Because of the long-running Royal Commission – royal in misnomer only, since it is really responsible to the premier – Burke's is a fairly well documented usurpation.

It is clear that even if his government had been supremely capable, and all the material outcomes of its regime beneficial, WA Inc would have been a constitutional disaster. Moreover, I doubt that such a threat to democratic order could arise in this way in any country with a democratically elected government other than Australia, not to mention one with a sophisticated federal structure.

Under the American constitution, Burke would have been checked by any number of defensive devices before he got into his stride. Had he slipped through the outer protective perimeter the doctrine of separation of powers would certainly have seen him impeached. The same fate might well have befallen Gough Whitlam, Joh Bjelke Petersen, John Cain and John Bannon – to name but a few members of executive government who have grossly exceeded the authority we intended to depute to them.

Non-Americans often speak in awe – and/or derision – of the enormous power of the American presidency. Many are astonished by the idea of one man being allowed to choose (if not actually appoint) all members of cabinet, none of them elected. Most of the astonishable do not even take into account that the President could choose almost the entire public service if he felt like it, and doesn't have to have a cabinet if he doesn't want one.

But seeing him apparently able to do so much without the help of parliament and caucus fills many outsiders with wonder. Consider, though, O'Brien's assessment of the authority of Brian Burke in his days of pomp, in relation to those of George Bush and his predecessors: "If an American president had the powers, de facto or otherwise, of an Australian premier, he would be able to stack the courts, not having to concern himself with gaining senatorial approval for his nominees. Nor would he have to concern himself with gaining senatorial approval for other...executive commissariat or agency appointments.

"If Congress was frustrating him/her or junior congressmen (that is, backbenchers) giving trouble...he/she could prorogue Congress or call an election at a time most suitable for his own and his party's re-election. And probably most significant of all the powers in modern government, he would be assured of his budget's passage through Congress.

"The thought of such powers being vested in their chief executive would horrify most Americans."

Recalling that Premier Carmel Lawrence instructed the governor to prorogue the West Australian parliament, in order to frustrate two parliamentary inquiries, O'Brien sardonically notes that this was an offence for which King Charles was executed.

No doubt the O'Brien/Webb scenario regarding WA Inc will appear to some to have overtones of High Noon and The Terminator. There may be an inclination, also, to blame this assault on parliamentary democracy by recent West Australian administrations on the feebleness and failure of the Opposition and the media.

But it would be risky and unwise to exclude from consideration the contribution to pervert government of a flawed constitution. An Australian premier has many ways of subduing opposition and media without breaking the law or breaching the constitution.

Tony Fitzgerald listed some principal ones in his report on Queensland's misgovernment. A premier can reduce parliamentary sitting times, which both Bjelke-Petersen and Burke did. (So, incidentally has the present federal government). He and his ministers can persistently refuse to answer parliamentary questions. Paul Keating recently, with perfect accuracy, noted in the federal parliament that Question Time was a courtesy granted to legislators by the executive.

The executive can stack the public service politically. The West Australian government went further than probably anybody else has dared in this respect, and with even worse consequences than Fitzgerald may have envisaged – because it depends what you mean by "politically." In the vast wallow that WA Inc created it is likely that many of the "political" appointees had no intention whatsoever of engaging in the cooperative power-sharing and striving for the common good that "politics" implies.

O'Brien documented some 300 outside appointments to the West Australian public service between 1983 and 1986. Many if not most were made through what was called the Policy Secretariat – in effect, the inner circle of the Department of the Premier and Cabinet, or the

monarch and his court, to put it another way. Premier Burke claimed (or confessed, I guess, his circumstances having changed) that he personally vetted most of these appointments. The invaders crammed in especially large numbers into the Treasury, from which senior professionals were moved sideways within the public service and sometimes given little or nothing to do.

But the West Australian executive was at its most kingly in creating new agencies, or remaking existing ones beyond all recognition. WADC, EXIM, SGIC, WAGH, SSB, SECWA, Goldcorp were among these power bases. FUNDSCORP was another. That sounds particularly valuable. When WA Inc, the Musical, comes along it must surely include The Acronym Rag.

Most of these agencies were situated beyond the control of theoretically responsible ministers. The monarchic executive managed to exclude even the auditor general from any study of the activities of some.

By courtesy of the "Royal" commission we have been afforded some glimpses of how Western Australia's de facto monarch and members of his royal court divided up the State's money and privileges among themselves. In all probability Burke's court was no more raffish, sleazy and packed with self-seekers than your average royal court over the course of history. But they were better-organised for looting – and repression where needed – than at least their British royal predecessors over the past 500 years. That is because the West Australian court was effectively free of the checks and balances imposed by the ceaseless struggle for the upper hand between crown and parliament within the Westminster system.

Some members of the West Australian Court have fallen on hard times because of their own business incompetence or through application of the blind justice of the New York Stock Exchange. A handful seem likely to suffer punishment as criminals for absentmindedly abandoning aristocratic privilege and reverting to variations on the commoner's practice of exchanging bank notes in brown paper bags.

But one sees little prospect of anybody's being punished for subversion of the sort of government we have chosen, and thought we had ensured ourselves of getting. In any case, punishing subversion seldom does much good. The trick is to stop it.

It may be argued that WA Inc was an aberration and that, forewarned, political parties, the law and the media will stop it from happening again. But that is taking an unnecessary gambler's risk with our future. It is within our power to strengthen our constitutional defences against the threat of usurpations by counterfeit kings.

Whether we wish to separate legislature and executive as sharply as the Americans have done is a subject too large for my present endeavour. But I do suggest that we would benefit from adding specific guarantees of individual liberty to our constitution, although this is not entirely to discount Geoffrey Sawer's argument that the freedom of Australians to conduct themselves as they choose within the law is, in effect, guaranteed by the absence of formal restrictions on their doing so.

It is true that Australians don't risk the torture chamber or firing squad for speaking their minds or deriding the boss class. But I think we have been nudged by the tireless persistence of our leaders and officials into taking a more docile attitude to authority than is natural or productive for us, or accepted by our contemporaries in numerous other countries. In some respects, we are natural marks for counterfeit kings.

A Bill of Rights would be of double value in emboldening us as individuals to become more fully the masters of our fate, and in defining the limits of governmental authority. It would add to our constitution the elements of dynamism and democratic authority which Ackerman perceives to emanate from the dualistic American constitution.

Whether we would need to consider all ten of the American amendments in the process of writing our own Bill of Rights is also a matter for large debate. Indeed, I feel entirely unqualified to make a detailed proposal for a Bill of Rights.

I believe, however, that we would come close to achieving one that suited us by addressing three principal areas – those of freedom of speech, property rights and equal treatment by government of all citizens. We might also benefit from being more explicit in our existing constitutional provision for freedom of religious practice. We might not then fall into the American trap of seeming to espouse freedom from religion, or the present Australian one of manufacturing episodes of sectarian suzerainty, as recently occurred at Coronation Hill.

My professional experience gives me, I suppose, some modest expertise in the area of freedom of speech.

The American First Amendment places a profound and often misunderstood responsibility on government. The relevant passage from it reads: Congress shall make no law..abridging freedom of speech, or of the press.

This does not mean simply that Americans can speak their minds without fear of retribution or that journalists can write whatever they like within the law. Australians can do that without a Bill of Rights. It is a kind of clan myth that Australian journalists are more restricted by law and regulation than their American counterparts, or that Australian reporters with the intelligence, will and energy of Woodward and Bernstein could not achieve investigative coups like Watergate.

American libel law provisions in respect of public persons would be welcome. They might prevent our politicians and officials from hiding wrongdoing behind a screen of writs, often launched at public expense. But Australian journalists can mostly do what they are supposed to do.

However, true, constitutionally upheld freedom of speech and of the press obliges politicians and officials to inform the people about the actions of government. Anybody is entitled to ask and everybody on the public payroll is supposed to answer.

In the United States this has become a core element of national culture. Certainly one hears frequently of cover-up scandals. Not all officials actually enjoy revealing what they are up to. But a cover-up scandal in the United States is routine procedure in Westminister-secretive Australia.

Let us consider a few of the practices and institutions that would come under question if we had a Bill of Rights with a clause genuinely equivalent to the First Amendment.

We have come to accept that all statements about executive action by government should come from ministers, with public servants holding their tongues. It would probably be unconstitutional to silence the public servants under a constitution guaranteeing freedom of speech and of the press.

No longer could politicians blame "departmental oversight" for their own mismanagement or dishonesty. No minister would dare say, as Kim Beazley did recently, that ministers would get nothing else done if they read everything that went out under their signature. They would have to guard their signature as a precious public possession.

Telling untruths to the public, including via the media, would become a very serious offence for an official. Governmental information services, paid for with public money, would come under scrutiny. If judged propagandistic rather than informative they would probably be unconstitutional.

It would be none of the government's business who owned newspapers or publishing houses or, probably, TV stations. The notion of a government's banning TV commercials or ordering up quotas of certain kinds of program would be thought preposterous.

Any law enabling British publishers to obstruct the import of American books would be judged a total thigh-slapper. The ABC might well turn out to be unconstitutional.

I could go on at some length on these lines. Suffice to conclude, however, by suggesting that it would be wrong to consider our Constitution as something immutable, or to turn our eyes away from any potential exemplar in our constant efforts to perfect it.