Chapter One
Why the Prime Minister's Proposals Would Dismantle the Constitution

Harry Evans

The Prime Minister's proposals for changes to the Constitution, as set out in his discussion paper of 2003, are described as seeking to improve the procedures for resolving deadlocks between the two Houses of the Parliament.

They would do far more than that. They would involve a massive shift in power from the legislature to the Executive government, in particular to the office of Prime Minister. More than that, they would involve a breach of the compact which underlies the Constitution, and amount to a dismantling of the constitutional structure itself.

The foundation principle

It is well known that the constitutional provisions for the Senate, representing the people of each of the States equally, and possessing a veto over all proposed legislation, was *the* condition for the establishment of the Commonwealth. Federation would not have been agreed to if this condition had not been met.

The basis of these provisions was the principle of a double majority: any law would have to be passed by a majority of all the people of the Commonwealth, and a majority of the people of a majority of States, both majorities represented by their elected delegates in the two Houses of the Parliament.

This arrangement was to ensure that the legislative majority in both Houses would be geographically distributed across the Commonwealth. It would not be possible to form a legislative majority from the representatives of a minority of States, specifically, from the representatives of Sydney and Melbourne. The structure of the legislature would compel the legislative majority to come from at least a majority of States. This was repeatedly stated to be the very foundation principle of Federation, the essential ingredient of the federal compact.[1]

The fact that electors in all States now vote for the same political parties does not invalidate this foundation principle: the votes of the outlying States still count in the formation of the overall legislative majority to a far greater extent than they would without the Senate.

The two proposals and the principle

The first of the Prime Minister's proposals, that he should be able to hold a joint sitting of the two Houses to pass any legislation rejected or unacceptably amended by the Senate after an interval of three months, without first holding an election for both Houses, would remove this constitutional foundation. In effect, the Senate's power would be reduced to an ability to delay legislation for three months, a lesser power than that possessed by the House of Lords.

In normal circumstances it may be expected that a government's majority in the House of Representatives, even after a very close election, will outweigh its minority in the Senate. That is because the House electoral system is non-proportional, and the Senate's is approximately proportional. In a House election forty-odd per cent of the electors' votes can deliver a substantial majority, in some cases even when more people vote for the other major party. In a Senate election such a result is not feasible.

Thus under the first proposal, even a government elected with fewer votes than the "losers", as in 1998, would be able to pass any of its legislation with only a three-month delay

(if the three-month period of the current s. 57 of the Constitution is replicated). A three-month delay is little inconvenience; most legislation takes more than three months to pass in any case, even if it is uncontentious. So a government would simply accumulate for that minimal period the bills not acceptable to the Senate, and then force them through at a joint sitting just as they can be forced through the House of Representatives. There would be no incentive for a government to compromise with different views represented in the Senate, or to accept even the most improving amendments. The Executive would control the legislative process entirely.

This would devalue the votes of the electors of the outlying parts of the Commonwealth. In order to gain the necessary legislative majority, that is, the majority required to pass laws, political parties and governments would need to concentrate only on the three large eastern urban areas from which such a majority could be formed, and could neglect the outlying regions and States.

This is precisely the situation which developed in Canada, where governments and legislative majorities were formed from the seats surrounding Toronto and Montreal, and were able largely to ignore the ineffective Upper House. This led to the extreme alienation of the outlying Provinces, which bedevilled the politics of that country. Having effectively the same constitutional arrangement in Australia would ultimately produce the same situation. The secession movements which gained majority support in Western Australia and appeared in other States in the 1930s, and which have resurfaced from time to time, would soon reappear, as the electors of those States realised that governments relied for their legislative numbers on the three eastern cities. The condition on which Federation occurred, and which has since helped to hold the country together, would be removed.

The Prime Minister's second proposal, that he be able to hold a joint sitting to pass disputed bills after any general election, would undermine the foundation principle. Under the current provisions, a government must risk its own existence, at least six months before its term has expired, and also risk all of its Senate places, in order to have a joint sitting. Only after taking that risk, and achieving the necessary numbers in the House of Representatives, can a government use its House majority to override its Senate minority, in respect of legislation in dispute before the election. The proposed provision would allow the government to achieve that goal without the risk. Indeed, there would be an entirely risk-free method of passing the disputed legislation: simply by waiting until the next general election is due. If a government were returned with all but the narrowest of margins in a regular election, the Senate effectively would not count for all legislation previously in contention.

Dismantling safeguards

There is a broader sense in which the Prime Minister's proposals would dismantle the Constitution.

Our constitutional structure was intended to be one of divided power, with strong safeguards against the concentration of power in any office-holder or institution.

This commitment to such safeguards is illustrated by one of the debates at the constitutional conventions which drew up the Constitution. Some delegates to the conventions opposed the adoption of the British system of having a Cabinet, formed out of the majority in the Lower House, as the effective Executive government, and they recommended a different kind of Executive. They did so on the basis that the Cabinet system led to a concentration of power inconsistent with the division of power in the other provisions of the Constitution. There were references to Prime Ministers as the new autocrats.[2] While those who opposed the Cabinet system lost that argument, the constitutional structure which emerged was remarkable for its safeguards against concentrated power.

Leaving aside the division of power between the Commonwealth and the States, and the specification of the Commonwealth's legislative powers, which was to be the greatest

safeguard of the federal system, the following safeguards applied to the central government.

In the Executive government:

(1) The Governor-General would perform the role of the constitutional Monarch, with the prestige and independence and sufficient powers to act as a constitutional umpire and guard the integrity of the Executive.

(2) The Cabinet system, notwithstanding the criticisms by its detractors, would ensure that government decisions were collective decisions of the ministry. This institution of collective executive decision-making was reinforced by the references in the Constitution to the Governor-General in Council, that is, the constitutional Monarch acting with the advice of the ministry.

(3) Under the arrangement called responsible government, the ministry would be responsible to the House of Representatives, so that the House could at any time remove a ministry which had lost the House's confidence and install another, with the possibility, but without the necessity, of a general election.[3]

In the legislature:

(4) The two Houses of the Parliament, differently constituted and with virtually equal powers, would ensure that no law passed without the special majority already mentioned.

In the judiciary:

(5) Federal judges would be appointed by the Governor-General in Council, by the constitutional Monarch on the advice of the ministry, ensuring great integrity in appointments, and they would be irremovable except by the two Houses and the Crown acting together on grounds of proved misbehaviour or incapacity. This was especially significant for Justices of the High Court, who would interpret the Constitution.

Most of these safeguards have been removed or significantly weakened by political practice, not by amendment of the Constitution, since the constitutional structure was established:

(1) The Governor-General is now the appointee of the Prime Minister, dismissible by the Prime Minister. The aura of the Crown has largely dissipated, and the office no longer has the authority and independence to perform the major constitutional role assigned to it. (Much of the prestige and independence of the office derived from its link to what was called the Imperial Government; while we would not wish to restore that situation, the safeguard value of the office is diminished by its absence.)

(2) The Cabinet's deliberations are secret, but most of what we know about its operations indicate that, while it may debate matters, the Prime Minister's will is the deciding factor. Executive decision-making rests with the Prime Minister, perhaps in consultation with a few close ministerial supporters.

(3) The Executive government has a built-in, unfailing majority in the House of Representatives, which is notoriously a rubber stamp for government decisions. The perceived function of government backbenchers is to be a cheer squad for the Executive. Governments are not in any meaningful sense responsible to the House, and not even accountable to it, in that the government can use its ever-reliable numbers to suppress any serious accountability procedures. With the gag and the guillotine, the government determines whether and for how long any matter will be debated. Much the same complaints are made about Lower Houses in all so-called Westminster systems, but the Australian House is more rigidly controlled by the government than any other.[4]

(4) With one House of the Parliament under Executive control, the supposed separation of legislative and executive powers is undermined. The legislature operates as such

only to the extent that the Senate is not under government control. Legislative/Executive relations are Senate majority/Executive relations.

(5) It is widely accepted that, behind the mask of Cabinet, judges are the Prime Minister's appointees, and that he appoints judges who are on his ideological wavelength. This is significant when constitutional interpretation is permeated with ideology. Political parties tend to regard judges as "ours" or "theirs". Depending on when appointments are able to be made, a Prime Minister in office for any substantial length of time can have "his" judges, and determine the character of the High Court and the nature of its decisions. The difficulty of removing judges is still important for judicial independence, but ultimately depends on the Executive not controlling the Senate. If the government completely controlled the legislature, a judge appointed by a previous administration would have to be doubly careful not to commit any indiscretions which could provide plausible grounds for removal.

Thus, apart from the somewhat damaged independence of the judges, the only safeguard which survives to any extent is the ability of the Senate to exercise legislative powers when not under government control. Legislative and executive powers have otherwise largely fallen into the office of Prime Minister. Few systems called democratic exhibit such a concentration of power in one office-holder.

The Prime Minister's proposals for constitutional change would significantly increase this concentration of power.

The first proposal would essentially remove the last remaining safeguard. A Prime Minister would control law-making with only a three month delay.

The second proposal would also greatly increase prime ministerial power. One of the most serious defects of the unmodified "Westminster" design of the Lower House is that it gives a Prime Minister the ability to choose the time for a general election, so that an election can be held when it is most politically advantageous. Under Australia's constitutional arrangements, there are a number of disincentives to calling early elections for partisan advantage. An early election for the House of Representatives alone puts the two Houses out of synchronisation, and requires either another early House election or a separate Senate election, either of which may well be disadvantageous to the government. A double dissolution election in the first half of a year has much the same effect, by the backdating of Senators' fixed terms.

The proposal that a Prime Minister be able to hold a joint sitting to pass disputed bills after any general election would weaken these constraints. Indeed, the proposed provision would give Prime Ministers an additional excuse for early elections: it could be claimed that an early election is necessary to resolve disputed legislation, and that this is the constitutionally-mandated method. Early elections would thereby become respectable.

In effect, a Prime Minister would have a choice of an ordinary election, early or not, or a double dissolution election, both being equally advantageous from the point of view of passing legislation. Undoubtedly, the one chosen would be that which is otherwise most politically advantageous. If a Prime Minister wished to preserve the government's numerical advantage amongst the long-term Senators, as is believed to be the case with the current Prime Minister (and this is probably largely the reason for the issue of the discussion paper), an ordinary election would be chosen. If the political advantage for the government lay in sending all Senators to election, that option would be taken. In short, the proposal would simply increase the scope for prime ministerial manipulation of the electoral system, and the subjection of the Parliament to the prime ministerial will.

It has to be kept in mind that every addition to the Prime Minister's constitutional powers also strengthens his hold over his own party. The ability of a Prime Minister to call an election at any time has always been thought to encourage unquestioning loyalty amongst his

backbenchers. The so-called simultaneous elections proposal, which has been put to referendums, unsuccessfully, four times by successive governments, was objectionable partly because it would have allowed a Prime Minister to take the Senate to an election at the time of his choosing, thereby imposing the same insecurity on government party Senators. Giving Prime Ministers more room to manipulate the electoral cycle would be objectionable for the same reason.

The Prime Minister's proposals would not simply change the Constitution, but dismantle it. A system of separated powers with a representative legislature would finally be changed into a system of prime ministerial autocracy. Every three years, or at a time of the Prime Minister's choosing, the electorate would be able to select the autocrat to rule for the next three years or so. It would be more akin to the Second French Empire, with an Emperor ruling with endorsement by plebiscite, than a system of constitutional government.

Control of electoral and accountability laws

That comparison is not exaggerated, because a Prime Minister with full control over law-making would be able to alter any law to suit himself, including the electoral law under which elections take place, and other laws under which governments are accountable, such as the law governing the office of Auditor-General, the *Freedom of Information Act*, and so on.

The proposed new joint sitting mechanism might be used only once: to pass amendments of the electoral legislation to ensure permanent government control of the Senate. Then all other accountability legislation would be at the government's mercy.

The authors of the Prime Minister's discussion paper show some awareness of this fatal flaw in its proposals.

Thus the paper contains a suggestion that accountability legislation might be exempt from the proposed joint sitting mechanisms. How this would be set out in justiciable form in the Constitution, for future application to all such legislation, is not explained. The list of accountability legislation would be very long. The *Acts Interpretation Act* and the *Parliamentary Privileges Act* would have to be included, otherwise the ability of the Senate to disallow regulations could be removed, and the Senate's inquiry powers could be legislated away. It would not be sufficient, however, simply to list the legislation which could not be amended. If the government were prevented from amending the *Freedom of Information Act*, for example, it could very easily change the effective operation of the Act by passing other legislation.

It has also been suggested (not in the discussion paper but by others) that the proposed joint sitting mechanism could be confined to "money bills". This would not be an effective restraint. It would be very easy for a government to turn every bill into a "money bill" simply by including a large appropriation, especially as money appropriated does not have to be actually spent.[5] The only constitutional limitation on Appropriation Bills is that those for the ordinary annual services of the government must relate only to those services. This is not a justiciable limitation, as s.54 of the Constitution, the relevant provision, refers to proposed laws, not laws. Thus, even if the proposed joint sitting mechanism were confined to Appropriation Bills for the ordinary annual services, the government could load all its objectionable measures into those bills, secure in the knowledge that the prohibition in s.54 would be unenforceable. Currently the section can be enforced only by the Senate rejecting an offending bill.

The suggestion in the paper that the joint sitting mechanism be confined to "election commitments" could not be made justiciable unless it were limited to the actual texts of bills released before elections. How could the High Court otherwise determine that a piece of legislation conformed with an "election commitment"?

Extending the "waiting period" for a government to hold a joint sitting, another

suggestion in the paper, would provide little amelioration of the first option. Absolute power after four months is not much better than absolute power after three months.

Legitimising autocracy

It has been commonly suggested that the Prime Minister was not serious in advancing these proposals, and had no intention of ever submitting them to a referendum or campaigning for them. They were, it is surmised, simply a way of dramatising supposed Senate obstruction and putting pressure on other parties in the Senate.

There is one consideration in favour of this interpretation. The current Prime Minister must know that, if the proposals were successful, he would gain virtually absolute power for a time, but that power would also be delivered to every one of his successors. Even if he were able to keep his own party in office by doctoring the electoral law, future Prime Ministers could easily repudiate all his works. He would be able to pass his favourite legislation, but a future Prime Minister would be able to reverse it with equal ease. It would be a remarkably unreflective and short-sighted Prime Minister, however dazzled by his own power, who could not see that.

Even by raising these proposals, however, the Prime Minister has done some of the damage which would be incurred by proceeding further with them. His party have always represented themselves as the defenders of the Constitution; indeed, as defenders of the division of power and safeguards of the Constitution. Their main rivals were supposed to be the believers in centralised and concentrated power and the would-be destroyers of constitutional safeguards. The raising of these proposals legitimises the ideology of Executive absolutism. It will now be much more difficult for the current Prime Minister's party to resist any power-concentrating and safeguard-dismantling measures which may be put by others in the future.

Endnotes:

1. For example, *Australasian Federal Convention Debates,* 23 March, 1897, p. 28; 30 March, 1897, pp. 326, 340; 17 September, 1897, p. 784.
2. The major debates on the proposal to jettison the Cabinet system are recorded in *Australasian Federal Convention Debates,* 18 March, 1891, pp. 464-473; 17 September, 1897, pp. 782-793. A reference to Prime Ministers and Premiers as the "modern autocrat[s]" is at p. 787.
3. This was stated to be the essence of the British system by Walter Bagehot's classic exposition, *The English Constitution,* 1867, which was referred to by the framers of the Australian Constitution.
4. A collection of assessments of the debilitated state of the House of Representatives is in S Bach, *Platypus and Parliament: the Australian Senate in Theory and Practice,* 2003, pp. 240-242.
5. Examples of how the limitation in this proposal could easily be circumvented are contained in an advice to Senators incorporated in *Senate Debates,* 13 October, 2003, pp. 16118-16119.