

The Crown and the States

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Premier of Victoria

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We live in exciting – if not frustrating – times. The excitement is in the potential we have as a nation to position ourselves for the twenty first Century and become a major economic player in the Asia Pacific region. The frustration comes from our seemingly chronic incapacity as a nation to take a longer term strategic view about our future.

A few weeks ago I attended a Premiers' Conference in Canberra. Most of the morning of the one day meeting was devoted to "set piece" presentations by the Prime Minister, Premiers and Chief Ministers.

I made the point to the gathering about the absurdity of sitting around a table making statements which appeared to be solely for the benefit of the assembled media scribes and television personalities.

I made the suggestion then – and repeat it now – that Australia would be better served if the Prime Minister, Premiers and Chief Ministers locked themselves away for a few days without all the officials and media hounds and got down to the business of finding workable solutions to our many national problems.

Of course my proposal received the response we've all come to expect from the seasoned and cynical Canberra political commentators.

Yet when one looks back to the first National Australasian Convention in 1891, one of the most notable events was when some of the key participants representing all the colonies of Australia, including Samuel Griffith, locked themselves away for several days on the Hawkesbury River on the Queensland Government steamer S.S. Lucinda, to negotiate the course which led to federation and, ultimately, the development of a nation of which we can all be proud.

The constitutional arrangements eventually agreed upon have served Australia well. They mirror a nation whose spirit is fiercely independent and whose people hold firmly to the ideal of freedom. They have assisted in the determination of Australia's destiny in the intervening years.

One of the architects of federation, Alfred Deakin, spoke of the Constitution as a lofty achievement.

"I venture to submit," he said, "that among all the federal constitutions in the world you will look in vain for one as broad in its popular base, as liberal in its working principles, as generous in its aim, as this measure."

Of course the relationship between the Commonwealth and the States envisaged by the founding fathers – particularly the fiscal relationship – has evolved and altered over the past ninety years. The outcomes have been mixed.

As we approach the twenty first Century we need to address and resolve a number of inefficiencies and difficulties that have developed within our federal system.

With goodwill and commonsense there is no reason why we cannot make changes that benefit all Australians while at the same time preserving our federal structure.

For example, duplication by the Commonwealth and the States in the delivery of government services and the question of fiscal equalisation are just two matters requiring resolution.

However these are issues better addressed another time and in another forum.

On this occasion my brief is more specific. I have been asked to canvass the issue of the Crown and the States.

In doing so it may come as no surprise that my remarks will relate in large part to the current debate on republicanism.

It is an issue that has captured a considerable amount of attention over recent months.

At the outset let me say that I welcome reasoned debate about Australia's constitutional future. I do wonder, however, why such an issue deserves the inordinate amount of attention it has received when our nation faces a level of unemployment above one million, a chronic trade deficit, a projected rate of economic growth that is nothing short of abysmal, and when national economic reform is moving with glacial slowness.

Most of the noise on the subject of a republican Australia has been generated by those committed totally to the cause, not by those who are prepared to listen and debate.

Of course, ever since the first National Australasian Convention there have been groups of ardent republicans whose popularity has waxed and waned over the years.

The 1993 version of the republic debate in Australia has been engineered primarily by the Prime Minister.

I have no difficulty with the Prime Minister arguing in favour of constitutional change. Any member of our community has a democratic right to espouse ideas which he or she considers should be accepted by the community as a whole. Arguments favouring constitutional change, however, require clear statements about the benefits which would flow from such change.

In a mature democracy, failure to provide citizens with the clear objectives and implications of proposed constitutional changes is unforgivable. To create a belief – deliberately or through misunderstanding – that what is proposed by those favouring an Australian republic is only a small, cosmetic, "minimalist" change to our Constitution, when in fact it is a fundamental and radical change to the legal framework in which our laws, judicial system and government operate, is deceptive and will prove divisive.

One of the main difficulties I have with the approach the Prime Minister has taken in arguing for constitutional change is his apparent obsession with symbolism and rhetoric, little of which matches up to the substance of our political, constitutional and social history.

As the Premier of one of the sovereign States in the Commonwealth I am certainly not fazed by necessary change. In the past nine months our reform programs in education, industrial relations, health and other areas of government activity have gone far beyond the efforts of our political opponents, who have long thought they alone held the monopoly on having a reformist agenda.

In times of recession, when political and social difficulties are most acute, it is essential that elected governments make and implement decisions on a day-to-day basis based on deliberations as to what will deliver the greatest long term benefit for the common good.

However there is a great difference between making the day-to-day decisions and proposing changes to the very fabric of our democratic structure.

Reform of the constitutional structures within which government operates must be made by the people, fully informed of the ramifications of the changes, conducted with caution and free of political manipulation.

There is something inherently sinister about those in government manipulating changes to the very structure of society without publicly canvassing the implications and consequences of any proposed changes.

There are two points to be kept in mind.

First, the federal system within which we operate provides the greatest protection against the abuse of power by a single government.

Second, without careful deliberation, it would be foolish to consider changing a system in which the checks and balances of federalism have ensured relative certainty and stability.

If by describing himself as a "minimalist" the Prime Minister wishes to convey that the change he proposes is not fundamental, nor fraught with difficulty, then he is failing to describe accurately the possible results of his proposed changes.

In a recent article in The Times newspaper, under the heading "No Charter For Revolution", William Rees-Mogg wrote:

"If human history teaches anything it is the difficulty and danger of changing the system of national authority and the extreme foolishness of doing so when it is working in a benign way."

With this warning in mind – and hopefully without lapsing into legal terminology – it is worthwhile canvassing some of the constitutional difficulties inherent in turning Australia into a republic.

First, to create a Republic of Australia the Constitution must be amended.

Section 128 of the Federal Constitution is a section which allows for such amendments. It requires the Commonwealth Parliament to pass an amending bill setting out the changes proposed, and then requires a majority of Australians and a majority of the States to agree.

Not for one minute do I believe the founding fathers of the Constitution contemplated this section would be a vehicle for removing the Monarchy.

It is not surprising therefore that it turns out to be entirely unsuited for the task, so much so that eminent constitutional lawyers of the calibre of Professor Lumb, Sir Robert Garran, HB Higgins, Professors Harrison, Moore, Sawyer, Howard and Lane and Dr Wyres have all raised serious doubts about whether the Constitution could – or should – be amended in this way.

Even those who believe that it can be so amended regard it as problematic and likely to lead to High Court challenges.

The problem arises because "The Constitution" is not an Act but is contained within an Act. To be precise, "The Constitution" is in clause 9 of the Commonwealth of Australia Constitution Act 1900.

An examination of its development shows that this was deliberate. The problem is that without some imaginative interpretation section 128 may amend "the Constitution", but not the covering clauses of the Act – clauses 1 to 8.

These other clauses clearly envisage the continuation of the Crown. Whatever arguments are made about their continued relevance, clause 2 both provides for the continuation of the Monarchy and prevents indigenous monarchies being instituted.

A number of distinguished Australians versed in constitutional law, including Sir Zelman Cowen, Professors Howard and Lumb (and even Senator Gareth Evans) have referred to the words "indissoluble Federal Commonwealth under the Crown" which occurs in these covering sections, noting that it gives rise to serious problems facing the proposal to create a republic.

It was probably envisaged by the founding fathers that alteration of these provisions would have to be carried out in the United Kingdom. However the Commonwealth closed off that possibility when the Australia Acts 1986 were passed in both the United Kingdom and Federal Parliaments.

The effect of those Acts is to ensure that the United Kingdom cannot amend the Constitution, and any amendments to the covering clauses must be carried out under section 15(1) of the Australia Acts with "the unanimous participation" of State Parliaments.

As the Australia Acts could not, and do not, give any further powers to section 128, despite the obscure wording of section 15(3) of those Acts we are left in a position which appears to fit the original intention of the founding fathers to enshrine the Westminster system.

If this analysis is correct then the Prime Minister's proposals cannot be carried out without the agreement of all State governments.

Second, alongside the section 128 barrier there is another of equal height.

The Constitution was the product of an agreement between the then six colonies. The process began with proposals in the Legislative Council of New South Wales in 1846 and culminated with the National Australasian Convention in 1891 and the Federal Conventions which continued in three States between 1897 and 1898. These were followed by referenda in each of the six colonies, followed by the enactment of the Commonwealth of Australia Constitution Act in 1900. The colonies became States which had undertaken collectively to create a Commonwealth Government which would operate in a federal system with them.

Fundamental to the Constitution are three institutions: the Crown, the legislature and the judiciary. The Crown has remained the unifying influence. All judges, ministers and public servants are servants of the Crown, not in the sense of servitude but in the sense that each owes a duty beyond self to the nation as a whole.

The Crown is therefore implicit in the Constitution. It is argued that to remove the Crown is not to amend the Constitution but to change it for another. This cannot be done by section 128. Constitutional commentators such as Dr Wyres, A Cannaway, J Quick, Sir Robert Garran, D O'Connell and Professors Sawyer and Lumb have also raised the problems and difficulties associated with this barrier.

Whatever the legalities of the argument to change Australia into a republic, instituting fundamental change of the same legal dimensions that was achieved by revolution in America requires much more than the support of fifty-one per cent of the population and four of the six Australian States.

A third legal barrier concerns the position of State Constitutions and State Governors.

While the Crown in right of the Australian Federal Government is the same as the Crown in right of each of the States, each is separate. Each State has a separate Crown, legislature and judiciary. There are seven separate parties to the Australian Federation.

The Commonwealth Government has defined and specific powers. The six State governments retain plenary unlimited power outside the specific areas reserved for the Commonwealth Government. I do not intend to delve here into a comparison of the arguments of those who favour the centralisation of power and those who prefer power to be decentralised, except to say that I belong to the latter camp.

The legal question is: can section 128 amend not only the Federal Constitution but also State Constitutions and remove the State monarchies and thereby State Governors?

Section 106 of the Federal Constitution preserves the Constitutions of the States, and section 7(1) of the Australia Acts preserves the monarchical system of the States.

The Chairman of the Prime Minister's Republic Advisory Committee has made off the cuff comments to the effect that, to get over the problem associated with amending State Constitutions, he might recommend that the Federal government becomes a republic and leave the State monarchies and State Governors intact.

Putting aside whether Her Majesty would be willing to place herself in such an embarrassing position, the general view of constitutional lawyers is that this would be highly undesirable and would certainly not achieve the Prime Minister's objectives. However as Professor Lumb points out:

"The republican amendment could do this directly or indirectly by requiring that the Head of State be an Australian citizen and not represent or be appointed by an official outside the country. This would be a demonstrable intrusion into the Constitutions of the States and will conflict with the Australia Acts...it should be seen...by the people of every State for what it is: not only an attack on the Crown but also an assault on our Federal system of Government."

On this particular point the eminent constitutional lawyer, Professor Geoffrey Sawer said "the answer is much disputed and without judicial authority even in the way of dicta".

Even those who support the republican case agree that despite the confusing wording of section 15(3) of the Australia Acts it would not be possible to remove recognition of State monarchies under that Act without the agreement of State governments.

States have their own constitutional restrictions on removing the Monarchy. Victoria requires an absolute majority in both Houses. Queensland requires a referendum. Western Australia has both such limitations.

These are the major legal difficulties facing those who are currently arguing that Australia should become a republic.

There are also other difficulties such as the possibility of express limitations on section 128 and whether this section can be used to amend itself.

Before leaving the legal difficulties facing the republicans I note that sub section 51 (xxxviii) may cater for radical change to the Constitution and covering clauses. It allows an amendment to any power under the Constitution that could only, at the time of the establishment of the Constitution, be exercised by the United Kingdom.

However the founding fathers restricted the use of this section to circumstances where all the States agreed.

A debate that pretends these problems do not exist is not an honest debate.

Claims of "minimalist" change without reference to the great deal of time consuming work, conflict and anxiety any attempted amendment would cause are misleading. Apart from those addicted to change at any price, Australians asked to agree to constitutional change cannot be expected to give a reasoned response unless they are in a position to balance the cost of the changes against the value of the benefits which are being alleged.

In fact there would be a minimum of thirty alterations to the Constitution to achieve the Prime Minister's so called "minimalist" amendments.

This brings me to the political costs. Changes of this magnitude should not be made unless the overwhelming majority of Australians in each of the States want the change.

To settle for anything less is to invite bitter division. What would happen if two of the six States voted against Australia becoming a republic and against their States losing the Crown? This is a possible outcome of a section 128 referendum. The governments of those States would be obliged to fight the proposed changes in the High Court. Win or lose, the prospect of deep division on State lines with Australian fighting Australian is deeply disturbing.

Even if every State voted for a republic, which on past indications is highly unlikely, it is still likely that a significant percentage of Australians would, on present polling, reject the proposed change. We could then face the unfortunate situation where an allegedly symbolic change, the sole benefit of which was to heighten national spirit, had caused a large minority of Australians to live under republican symbols which they opposed strongly, and could lead to continued bitterness and national division.

To add further insult and division, the final arbiter as to whether these Australians would have to accept their country becoming a republic would be a group of seven unelected judges sitting on the High Court.

Leaving aside the fact that dragging these eminent jurists into the middle of a national political dispute is unfair to the Court, Australians would never accept that such an issue should be solved by reference to legalities.

There are further costs and potential dangers that the republican lobby simply refuses to acknowledge.

Our constitutional structure is a living thing. It is constantly developing. Once we were a colony; then six colonies; then six independent States within a Federation; and now that Federation is constantly changing.

The territories have gained independence and today's relationship between the States and the Commonwealth Government is almost unrecognisable when compared with that which existed in 1901.

The relationship between Crown and State has evolved to the point where, following the Statute of Westminster and the Australia Acts, we are left with one of the finest democracies on earth; free from all monarchical restraint while retaining the Crown's unique capacity to act as a unifying influence and check on tyranny.

A Constitution must attempt to achieve two objectives.

It must equip government with sufficient power to run the State or country, while on the other hand providing checks and balances limiting that power to prevent its abuse.

The reason why modern constitutional monarchies have been so successful at achieving this objective and republics so unsuccessful is that the Monarchy, through tradition and convention, can provide a Head of State who is above politics but at the centre of national unity. On the other hand a president, no matter how chosen, can be enveloped in the politics of the day.

Whether by good fortune or design we have managed to evolve a system which delivers stable government without any of the risks and complexities faced by those less fortunate countries that have tried to manufacture such a structure.

The key to our good fortune is that although we have existed for only 200 years, we have been able to adopt a system which has taken 900 years to evolve. No amount of scholarly, intricate legislative drafting can ever hope to emulate the traditions and conventions which define the apolitical relationship between Crown and State, which is entirely independent of the person who occupies the position of Head of State, and which allows democratic governments which are the envy of the rest of the world to thrive.

Australia is not the only country to benefit from the calming and uniting security associated with such a system.

Along with Britain and Canada, the Netherlands, Denmark, Norway, Sweden and Spain are examples of the most free, most tolerant, stable and temperate societies in existence today. In fact half the 24 OECD countries have constitutional monarchies.

Any suggestion that Asian countries might think less of us because of our monarchical Constitution carries no weight, especially when it is remembered that Japan, Thailand and Malaysia all have constitutional monarchies.

Unfortunately many republics have not enjoyed the same stability and freedom from tyranny.

There is a particular reason for this. It is the hidden danger in the Australian republican kit bag that is kept firmly tucked away, and concerns the appointment of the president and the powers with which he or she is to be equipped. There has been a deafening silence by the republicans on this topic, which a cynic could interpret as a deliberate attempt to win popularity for the idea of a republican Head of State before revealing the dangers of that proposal.

As I have said, a president no matter how chosen can be enveloped in the politics of the day.

We should recall, for example, events in India in 1975 when the then Prime Minister, Mrs Gandhi, was convicted of breaches of electoral law. As a consequence her position was threatened. She immediately approached the President, whom she requested to make a proclamation of internal emergency. Given the politics of his presidency he did so, allowing Mrs Gandhi to imprison many of her political opponents. Hundreds were imprisoned. There was no time for constitutional court challenges.

The Queen's representative not observing the conventions and traditions of the office would be removed by the Queen upon the advice of the Executive. The Governor-General's responsibilities and loyalties are to the traditions of the Crown. They are not directed towards the Prime Minister of the day. Prime Ministers may come and go. A president, no matter how appointed or elected, is theoretically responsible to no one but himself or herself.

The theoretical power possessed by Governors and the Governor-General are extensive. The key to the limitation on their power is the convention binding them, through the Crown, in the use of those powers. The same powers conferred on a president would be disastrous. A president would not be bound by those conventions. Lawyers agree unanimously that any attempt to legislate those conventions would be fraught with conflicting legal interpretation and doomed to failure.

Some conventions have not yet surfaced. They are brought to bear as each unpredictable situation arises and is dealt with in accordance with the traditions and existing conventions of the Crown. Given that a president would be bound to act on the advice of the Executive, and would be obliged to do so without the limitations of conventions and traditions and without the constraints of the Crown, the Executive's power would be expanded dangerously.

There have been discussions about a number of possible methods of electing a Head of State.

The American system of an electoral college is not widely favoured by commentators; nor is the election by an Australia-wide constituency. The reason is that such a process would immediately politicise the Head of State.

A two-thirds majority of both Houses has been proposed. I am simply amazed to hear some republicans proposing that this would ensure the choice would retain the apolitical independence of the present Governor-General. Where have these people been living all these years? The Australian legislatures are highly political institutions. For those in doubt, may I recommend viewing the ABC documentary, "Labor in Power".

To obtain a two-thirds majority, political deals would have to be made.

Which eminent Australians of politically non-partisan, non-adversarial backgrounds would allow themselves to be the subject of political manoeuvring and lobbying, with the possibility of having their unsullied past achievements and private life publicly examined for the purpose of finding fault?

One of the enormous benefits of the monarchical system is that it does not matter who is appointed Governor-General — no matter how political a person was prior to their appointment.

The unique feature of this system is that once the office has been assumed, the traditions and conventions combine with the proximity and permanency of the Crown to produce an effect on both the incumbent and the public. The incumbent's past is as though it had never been.

Under our system, the Governor-General has the independence, the power and, by convention, the obligation to prevent the illegal abuse of power by the Executive. On the other hand, reserve powers without the convention and traditions emanating from the Crown are dangerous.

Simply the knowledge that the Crown is in that position is enough to prevent such abuses. Recent examples of the simplicity, efficiency and stability of this legislative system include the recent Tasmania Greens deadlock in 1989 and the Bjelke-Petersen political crisis in Queensland in 1987. Without reserve powers in a crisis, where responsible government is threatened a country could grind to a halt. Even worse, democracy could be defeated.

It is embarrassing to watch the republican movement wringing its hands in anguish as it labours to arrive at a way of delivering a truly apolitical figure to replace the Governor-General. They fail to see that history has fashioned for us a constitutional system unaffected by current voting patterns and guarding democracy by means of conventions and traditions shaped and fashioned over 900 years.

I hope we do not have to learn, to our everlasting regret, that we are simply unable to reproduce that priceless piece of our history. It should not be discarded through the whims of particular passing politicians with no convincing reason for such change.

To date convincing reasons have not been offered.

A crisis of government can occur at any time. Our present system works better than any other manufactured scenario so far designed. If the Australian people are to consider change from this system, it is imperative that they realise that a republican system tries to emulate the existing system, but cannot be achieved no matter how carefully engineered. The dangers such change carries must be understood clearly before the public can make a considered choice.

An argument put in favour of Australia becoming a republic is that because allegiance is owed to a Queen who does not even reside in Australia, we have not really achieved true nationhood. Such a proposition is demonstrably wrong and smacks of politics rather than reality. Our national sentiment and identity at home and abroad – whether in the world of sport, business or just when Australians meet Australians overseas – is not eclipsed by any other country.

The Governor-General, the Government and Australians are fulfilling their roles entirely independently of the Queen. Today the sole contribution of the Queen is the assurance that the role of our Head of State retains the benefits that our monarchical system has evolved.

Professor Whyte, recently of Queens University Law School in Canada, points out that one of the reasons why Canada makes no move to republicanism is that Canadians regard the Queen's place as vestigial, and have no difficulty with their Governor-General being a truly Canadian Head of State. It is hard to see Canada's success as one of the world's economic leaders being hampered by lack of national spirit. They have something special and are not about to give it up.

Neither should we give it up. If the Prime Minister wants Australians to give it up he should substantiate his case.

In discussions on republicanism I have detected a tendency to suggest that, given our rich multicultural society, our past connection with the United Kingdom is best forgotten or, at least, set to one side. The history of a country is not the prerogative of one particular group who draw curtains to hide those bits they did not like. Even if a nation could pick and choose its history (and the concept is absurd), any confident nation guards jealously its history and tradition.

From the good we gain pride; from the bad we learn; and from the totality of our past we gain our identity.

Our inheritance has shaped our institutions, and its history is treasured. Our continued growth as a diverse community is not served by rejecting European settlement and development in this country. To fail to capitalise on the extremely useful constitutional structure we have inherited is to cut off our nose to spite our face.

Regrettably, the work of the Prime Minister's Republic Advisory Committee will not advance the quality of public debate on constitutional change in Australia.

It is not, as the name suggests, a committee to advise and assist the Australian people in forming a view about the need for a republic. It is a committee whose members were picked for their republican sentiments, which has been asked to decide on the best options to implement the Prime Minister's desire for a republic.

There is no justification for putting the question of "how" before the question of "why".

A change to a republic can come only from an overwhelming desire of the Australian people. The nature of this committee and its terms of reference give the appearance of a desire to politicise the process by manipulating the Australian public through the republican gate before they have had the opportunity to make a reasoned decision on whether or not they wish to change constitutional paddocks.

In conclusion:

1. If the Prime Minister believes that to direct resources to the question of how Australia can become a republic is the proper choice of priorities at this time, then he simply does not appreciate the problems facing Australia.

2. It is perfectly proper and desirable that Australians continue to examine their constitutional institutions. However, if debate is to be reasoned it must include all relevant matters. It must be honest, not orchestrated for political purposes. Before a system which is working so well is changed, there must be compelling reasons for making change. The benefits and costs of moving to a republic must be examined in detail.

3. A change in our Constitution deals with the heart of our democratic society and therefore must be treated with caution. It should not be rushed or pushed by those who happen to be in political power at that time.

4. There are real costs and dangers associated with becoming a republic. Save for attempts at emotional calls to "nationalism" there has not been any benefit offered so far that carries sufficient weight to convince me the benefits outweigh the costs.

5. The irreplaceable benefits of our present system, that are the product of its history and inalienable from it, cannot be denied. More to the point, our present system needs to be preserved and nurtured.

6. We are a Federation of seven governments. Whether or not it is legally possible, it is politically delinquent and morally repugnant not to seek the agreement of all six States to a change which so dramatically affects the Federation they engineered, and in which they operate. Not to reach such agreement, and to proceed without including them at all stages, is to introduce bitter division within the Federation of States and the people of Australia.

I am more than happy to go out and argue the case for the retention of our constitutional monarchy. In doing so I think no less of those who disagree with me and argue in favour of Australia becoming a republic.

Those who wish to see new constitutional arrangements are no more or no less patriots than myself. However, I will remind those who seek change that the onus is on them to provide substantive arguments as to why Australia should forfeit a constitutional system which has served the nation with distinction.

Our current system of constitutional monarchy does not have to justify its continuing existence. It has served – and continues to serve – this nation well. As we approach the twenty first Century Australia is a proud, independent, thriving democracy. We enjoy political stability and a strong social fabric.

The challenge facing our nation as we approach the next century is not whether Australia should become a republic.

What we need to focus on is the real challenge of delivering a better quality of life for all Australians; preserving our vibrant democratic traditions, which have successfully buttressed the rule of law; and harnessing the human talent and physical resources of Australia to achieve greater prosperity.