

Attachment 1

Submission to Nationhood, National Identity and Democracy Inquiry
(Geoff Robin)

A LAYMAN'S DISSECTION OF THE AUSTRALIAN CONSTITUTION

Seventeen redundant sections of the Constitution:

SECTION		
26	Gives interim number of people to be elected to the House of Representatives by state.	This was a transitional measure and is now redundant
34	Qualifications for a House of Representatives candidate. Aged 21+ entitled to vote and a resident, and a subject of Queen, naturalised or 5 years naturalised under UK law, or a colony or State.	This was a transitional provision which is now redundant (spent). (CCF33) ⁱ
41	Right to vote in elections	The High Court has ruled it was transitional only. (CCF35)
65	Ministers shall not exceed seven in number	This section is now redundant (CCF61)
69	Sets dates for the transfer of certain powers from the states to the Commonwealth.	This section is transitional and redundant
70	Transfer of power from Colonial governors to Governor General	This section is transitional and redundant
74	Appeals to UK and Privy Council	The jurisdiction of the Privy Council no longer extends to Australia

85	Transfer of property payment of compensation to states from State to Commonwealth	This section is now redundant. Compensation was finally agreed in 1927 and arrangements are now covered by Section 105A (CCF80)
87	Transfer of funds during first ten years of Commonwealth	This section is redundant
88	Employment rights of people transferred from to Commonwealth	This section is redundant (spent). (CCF81)
89	No money shall be drawn from Treasury without appropriation. First month after Federation money can be drawn to pay for transition.	This section is redundant (spent). (CCF82)
93	Establishes free trade within Australia. Other provisions dealing with goods imported before uniform laws take effect.	This section is redundant (spent) (CCF85)
95	Book keeping provision	This section is redundant
101	Establishes free trade within Australia. Other provisions dealing with goods imported before uniform laws take effect.	This section is inoperative (CCF90)
103	Establishes free trade within Australia. Other provisions dealing with goods imported before uniform laws take effect.	This section is inoperative (CCF90)
102	Book keeping provision	This section is redundant
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Twenty five sections which are at least partly flawed

Sections		
2	The Governor General may "...subject to this Constitution exercise such powers and functions of the Queen as Her Majesty may be pleased to assign to him ."	<p>This section is flawed in the sense that the Queen does not have a role in the day-to-day running of Australia. On the advice of the Prime Minister, the Queen appoints the Governor-General who thereafter acts on the advice of the Prime Minister. Some Monarchists would object to this being described as a 'flaw' and argue that it is symbolic and a tradition. That view is respected but not agreed with.</p> <p>From <foundingdocs.gov.au></p> <p>The Prime Minister and the Premiers of the six States reached agreement at conferences held in 1982 and 1984 to introduce legislation in each of the parliaments for a uniform change. Each State, and the British Parliament, passed individual Acts before the Commonwealth enacted its own Australia Act. A Proclamation, signed by Queen Elizabeth II at Government House in Canberra on 2 March 1986, stated that the Act would come into effect at 5.00 am Greenwich Mean Time the next day. The Governor General exercises power <u>by convention</u> on advice of the Prime Minister. The Prime Minister is not an entity recognised in the Constitution. Also this section suggests that the Governor General has to be a man, which clearly is not the case.</p>
3	"There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provide, shall be	This section is flawed because the Queen is not paid out of Consolidated Revenue and she does not pay the Governor General.

	ten thousand pounds.”	
5	Gives the Governor General powers over dissolving Parliament, summoning Parliament etc. Says Parliament to be summoned to meet within 6 months of establishment of Commonwealth...	This section is flawed because it does not lay down period for return of writs. (CCF p19) The last part of this section is redundant.
6	There will be a session of the Parliament once at least in every year.	This section is flawed because it is potentially open to abuse. Parliament could meet its Constitutional obligation by sitting on only one day or one week a year. (Note: the National People’s Congress in China meets for two weeks once a year. Critics scorn this as tokenism. To be robust, the Constitution should specify a minimum number of sitting days for at least two sessions a year.
10	Dealing with State laws on the role in election of senators	This section is flawed because is largely redundant (spent) except as a source of power for the Commonwealth to legislate (CCF22).
13	Dealing with rotation of senators and election lead times	This section is flawed because it does not set a criteria for determining, after a double dissolution, which senators should serve three years and which six. The Senate term begins on July 1 but an election can be held any time within the previous 12 months. (CCF 23)
15	Dealing with conditions for filling Senate vacancies	This section is flawed because it does not deal with replacing an independent senator or senator from a party which has ceased to exist.
24	Rules for composition of the House of Representatives. Electorates as near as possible to equal. Number twice that of Senate. Minimum of 5 MPs per state.	This section is flawed because it establishes a nexus between the two houses. This is leading to a serious population bloating of electorates. It is also flawed because it does not guarantee roughly one vote one value. (Note: CCFp29 comments on High Court decision)
25	If by law any state all persons of any race are disqualified from voting, they shall not be counted.	This section is flawed because it potentially undermines the rights of citizens according to the dictates of a State. CCF suggests it could be removed. In any event it

		could be replaced by a guarantee of the right to vote or at least prohibit disqualification from voting on racial grounds (CCF 29).
27	Subject to nexus, Parliament has the power to increase or decrease number of MPs	This section is flawed because the qualification means that the House of Representatives is restricted in its power to increase the number of electorates in line with population increases.
30	Deals with qualification of electors	This section is flawed because the High Court has ruled that the section was transitional and is now redundant (spent). Only the limit of one vote per person remains relevant. (CCF32)
31	State electoral rules apply until the Commonwealth passes legislation	This section is flawed because it is redundant, except to the extent that it gives Commonwealth power to make electoral law.
48	Payment of MPs	This section is flawed because It is redundant (spent) except to the extent that it empowers Parliament to legislate for a remuneration system.
58	Gives Governor General power to assent to bill or to withhold assent or reserves assent pending for the Queens pleasure.	This section is flawed because the Governor General can no longer reserve assent pending 'the Queens pleasure'. The Governor General does not have independent discretion.
59	The Queen may annul any law for a year after Governor General's assent.	This section is flawed because it is contrary to the principles of parliamentary government for the executive to be able to override legislation properly passed by government in this way.
60	A proposed law reserved for Queens pleasure (S58) shall not have any effect for two years	This section is flawed because the Queen should not be able to withhold consent to a Bill in the Australian Parliament for up to two years. This power might be used on the advice of the Australian government but it is unlikely. This provision should be removed.
63	The Governor General in Council shall be construed as the Governor General acting on the advice of the executive council	This section is flawed because: "it is 'potentially misleading... by convention, the Governor General must act on advice, whether or not the Executive Council is mentioned. Even when the Executive Council is not mentioned at all, the Governor

		General may receive advice through the Council'. (CCF60).
66	There shall be payable to the Queen, out of consolidated revenue... for the salaries of Ministers of State an annual sum	This section is flawed because the salaries of ministers of state are not paid to the Queen, and the Queen does not pay Ministers of the Australian Parliament.
73	Details of powers and task of judges.	This section is flawed because the last paragraph of this section is now 'spent' – i.e. redundant. (CF69)
83	No money shall be drawn from Treasury without appropriation. First month after Federation money can be drawn to pay for transition.	This section is flawed because the second part of the section is redundant
84	Employment rights of people transferred from to Commonwealth	This section is flawed because it is largely redundant (although CCF can see possible application) (CCF79)
90	Employment rights of people transferred from to Commonwealth	This section is flawed because the second part of the section is redundant (spent). (CCF 83).
97	Establishes free trade within Australia. Other provisions dealing with goods imported before uniform laws take effect.	This section is flawed because this section is largely redundant (spent) (CCF88)
119	Commonwealth must protect states against invasion	This section is flawed because Australia is a nation. The suggestion that any state is a separate entity and might not be defended if it were not for this section is absurd.

Twenty two sections which warrant debate

Preamble	<p>Whereas the people etc....relying on the blessing of Almighty God... “have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain <u>and Ireland</u> and under the constitution is hereby established:</p> <p>And whereas it is expedient to provide for the admission into the Commonwealth of other Australian colonies and possessions of the Queen.</p>	<p>Debate is warranted because although historically accurate, Australia is now a fully integrated nation. There is no longer a Queen of Ireland. Ireland became a republic in 1949. The preamble does not acknowledge the people of the ACT or the NT. Is it appropriate for our Constitution to record Pacific Island nations as ‘possessions’? Is it appropriate for the Head of State of Antigua and Barbuda, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, Tuvalu, and the United Kingdom to also be Head of State of Australia?</p>
28	House can sit for up to three years but can be dissolved earlier by the Governor General	<p>Debate is warranted because this means Australia is always in election mode. This makes citizens weary of politics and less likely to engage. Should we again consider fixed four year terms for both Houses. Why not adopt the fixed term principle, as the Constitution does for the Senate? Most states and the House of Commons have fixed terms for the lower house.</p>
29	This gives the state power to determine electoral boundaries. Commonwealth legislation (not the Constitution) defines electorates.	<p>Debate is warranted because it does not guarantee roughly one vote one value. Supplementary legislation allows a ten percent variation between electorates. This section relies on precedent and Commonwealth legislation but does not guarantee or define the voting system. The only principle is that the Parliament of each state may make laws for determining the divisions in each state. Should the fundamental rights of voters be cemented in the Constitution?</p>
35	Election of the Speaker	Debate is warranted because the way the Speaker is elected can

		be improved. Should we follow the UK system where candidates for Speaker must be nominated by at least twelve members, of whom at least three must be of a different party from the candidate? This would ensure a non-partisan respected speaker.
42	Taking oath of office (words at end of Constitution)	Debate is warranted because MPs swear to be faithful to the Queen. Does this mean anything given that under the Australia Act the Queen has no role in Australia? Would we not be more ethical for MPs to swear allegiance to the citizens of Australia and to undertake uphold a reformed Constitution?
44	This section lists five grounds on which a person is disqualified from sitting in Parliament. 44(i) a person who acknowledges allegiance, obedience or adherence to a foreign power or is entitled to rights or privileges from a foreign power.	This section warrants debate according to many MPs including the former Deputy Prime Minister after the High Court decision on dual citizens of 27/10/2017.
46	Fines person who sits in Parliament ignoring 44 and 45	Debate is warranted because of the High Court ruling on the meaning of this section in 2017
51	Establishes Commonwealth heads of power:	<p>Debate is warranted because it lists the subjects on which the Commonwealth can legislate. After 120 years, and many changes as a consequence of new technologies, new international treaties etc., this should be reviewed.</p> <p>Several observations:</p> <p>(i) The Constitution distinguishes between interstate and intrastate trade. The Commonwealth cannot legislate over trade within one state (intrastate trade). Is this still appropriate?</p> <p>(iv) "Postal, telegraphic, telephonic and other like services" deals with an era before widespread radio, television, the internet with its broadband and cyber world.</p>

		<p>(vi) Obliges the Commonwealth to protect the states against....domestic violence. Is this still appropriate?</p> <p>(xix) The Commonwealth has no power to legislate for citizenship. Should it have, especially as it can legislate for 'naturalisation'?</p> <p>(xx) The present Corporations Law, which operates nationally, is the result of intergovernmental co-operation, not as a Commonwealth power.</p> <p>(xxxiiiA) gives the Commonwealth social security powers, '(but not so as to authorise any form of civil conscription)'. CCF describes this as mysterious.</p> <p>(xxix) The Commonwealth may only legislate to implement a treaty: it may not pass laws generally on the subject matter of the treaty which, apparently, should be handled in a 'treaties council' of Commonwealth and states.</p> <p>(xxx) is redundant because external affairs powers have been consolidated</p> <p>(xxxviii) Mysterious power but redundant because it is voided by the 1986 Australia Act)</p>
52	Gives Commonwealth have exclusive power over ACT.	<p>Debate is warranted because the High Court has found that the effect of the exclusivity power is that no state law applies in places acquired by the Commonwealth. This appears to extend to places such as post offices etc.</p> <p>CCF notes that this 'inconvenient result' has been avoided by a cooperative scheme with the states. (CCF49)</p>

62	Creation of Executive Council	Debate is warranted because under a constitutional monarchy the executive council advises the Queen (Governor General). The constitution does not give power to Cabinet or to Ministers but to the Governor General and the Executive Council. While there is a broad understanding of the accountability of the Government, should our Constitution be more explicit? CCF notes that 'on the face of it, section 62 suggests that the Governor General has a free hand in choosing executive councillors. This is not the case'.
64	Governor General appoints officers i.e. Ministers and PS to administer departments	Debate is warranted because the Governor General does not have discretion in making most appointments. CCF (p60) says 'while this is not very clearly expressed, this section requires there to be a system of responsible government under the Constitution'. Should this fundamental provision be expressed clearly?
68	The Governor General is commander in chief of naval and military forces	Debate is warranted because while this is formal and symbolic it raises the opportunity to examine whether the people's representatives should have a say in the deployment of the military. Note: The Constitution of the United States divides the war powers of the federal government between the Executive and Legislative branches: the President is the Commander in Chief of the armed forces (Article II, section 2), while Congress has the power to make declarations of war, and to raise and support the armed forces ...
91	Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver or other metals, nor from granting, with the consent of both Houses of Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.	Debate is needed because it provides exceptions to the exclusive Commonwealth power over bounties. There is tension between the Commonwealth and States on this issue and confusion for the mining industry. Is there a case for this issue to be rationalised?
100	Protection of the right of States to 'reasonable' use of water	Debate is warranted because the term 'reasonable' does not

		make sense. Does this law deal adequately deal with contemporary issues including the Murray Darling and other interstate rivers?
106	Protection of state constitutions	Debate is warranted because of the relationship between state constitutions and the British crown. Under the Australia Act State Governors and Premiers still have a relationship with the Queen, even though there is apparently no power involved. Should State Governors report to, be appointed by, the Governor General if we are an independent nation? Is it time to reform the relationship between the Commonwealth, state constitutions and citizens?
107	Protects power of states	Debate is warranted because State powers are those which existed at Federation apart from those taken by the Commonwealth. Is there an argument that residual powers should rest with the Commonwealth not the States?
108	Protects power of states	
117	Subjects of the Queen can travel freely interstate	Debate is warranted because Australian citizens should not need a constitutional guarantee to their right to travel within their own country. It leaves open to farcical entertainment the status of tourists travelling interstate.
125	Establishes seat of government for the national parliament	Debate is warranted because it suggests ACT must remain a territory. as the ACT is now self-governing, should this section be amended so that ACT citizens have the same powers as other Australians (e.g. in referendums).
128	This Constitution shall not be altered unless approved by (1) a majority of the States (2) a majority of all the electors	Under criteria (1) a Tasmanian vote is more than 13 times the value of a NSW vote, a South Australian vote more than four times the value of a NSW vote, a West Australian vote more than 3 times, a Queensland vote is 1.5 times the value of a NSW vote and Victorian vote is 20% more valuable than a NSW vote.

		Although there are about as many voters in the ACT and NT combined as there are in Tasmania, the votes of their 435,206 people are excluded because they are not living in a state. Why should the value of a person's vote vary according to his/ her address? Should so called States rights over-ride democracy to this extent? What real power would changing this really take from senators? Would the nation be better served if this complicated arrangement was replaced by one requiring, say, a 60% majority of voters to approve a change in the Constitution?
OATH	Oath promising true allegiance to heirs and successors of Queen Victoria	Debate is warranted. Should MPs be promising allegiance to Australia and its citizens in the same way that naturalised citizens do?

^{i i} CCF Constitutional Centenary Foundation – *The Australian Constitution (Annotated) 1996*: The numbers refer to pages in this document.