

The Secretary
Joint Standing Committee on Finance and Public Administration
Parliament House,
Canberra, A.C.T., 2680

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Submission re. Plebiscite for an Australian Republic Bill 2008

I appreciate fully that what follows is lengthy. However, it is written by a person with unarguable competence to comment, as he is fully qualified as a constitutional expert, historian and author.

In the interest of an **informed** electorate, I entreat your inclusion of it in your submissions. Whilst Mr Beazley's name is listed due to the date of it, the name Senator Brown should replace it as the comments apply equally to both.

Seldom does one see such a fully explained reasoning for opposing a non-constitutional plebiscite, and surely we are all entitled to examine both sides.

I submit it to you as an educational paper by an expert, as I could not possibly match it with my own comments.

The importance of reliable educational information is immense, as according to P.M. Keating's *Civics Expert Group*, only 18% of us have any knowledge of how our present system works – i.e. 82% don't. Go to www.nla.gov.au for the library nearest you which has it. It is kept by the High Court and leading universities. It is not on the net.

Since the vast majority of us have little or no understanding of our present system works, how can they possibly know if an alternative – republican – system would be better – or worse?

Yours Sincerely,
Antonia Canaris.

Chapter Eight: Mr Beazley and His Plebiscites

Professor David Flint, AM

The constitutional safeguards are there "...not to prevent or indefinitely resist change...but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible and inevitable".
(*Founding Fathers, Sir John Quick and Robert Garran*)

Introduction

When it comes to its amendment, our federal Constitution prescribes one method -- and one method only -- for change. This is the Australian referendum. (Or rather, the Australian adaptation of the Swiss referendum.)

Our Founding Fathers were well aware of the difference between a constitutional plebiscite and a Swiss-style referendum. While a plebiscite is an acceptable method of finding out the peoples' views on some aspect of legislative policy, it should *not* be used in Australia to achieve constitutional change. Why?

Because the Founders knew how easily a constitutional plebiscite could be an instrument of abuse and duplicity. Napoleon Bonaparte, and his nephew Napoleon III, had demonstrated precisely this. The Swiss were well aware of this because Bonaparte himself had tried out the constitutional plebiscite on them -- after he had invaded them. So the Swiss devised a way of ensuring that the people could *never* be duped. This requires the politicians seeking change to put all their cards on the table before the people vote. This is the Swiss referendum. It is this the Founders wrote into the Constitution.

Now we have a plan to circumvent, indeed to subvert, our Constitution. According to this plan, before any referendum on a republic, we are to have the French dictator's favourite device, the constitutional plebiscite. And not one, two! That alone is bad enough. But there is worse. Remember that this plan comes from the same people who failed, over the decade of the '90s, to come up with an alternative republican constitutional model which would work. They failed in 1993, and they failed again in 1999. Knowing this, they are now asking, they are inviting and indeed beseeching a vote of no confidence in the existing Constitution. If successful, this will next lead, of course, to a vote of no confidence in the flag.

If they can get a vote of no confidence in the Constitution, they actually intend this be followed by a constitutional vacuum to last over the decade. This is breathtaking in its irresponsibility.

So we are to have a "public education" campaign, then a second plebiscite, then some sort of a drafting exercise in which they will whip up yet another republican model (their third), and

finally a referendum the result of which they cannot guarantee. Given the quality of their work over the last decade -- at a direct cost of more than \$150 million of taxpayers' money -- it is more likely than not that their next, and third, attempt will also fail.

This is not the way the Founders prescribed for constitutional change. It goes against the spirit of the Constitution, which clearly and expressly prescribes only one way for constitutional change. This is the constitutional equivalent of going the wrong way in a one-way street.

How did we ever get to this point?

First let me remind you of the events that led up to the making of this plan. Then let me try to assess what is being proposed against what was so clearly intended by the Founders of our Constitution. And then I would like to say a few words on repeat referenda.

The 1999 referendum

The '90s were a decade of constitutional introspection, even instability. This was brought about by that small group who want constitutional and other change, against the general indifference of the Australian people. In 1998, Prime Minister John Howard, seeking a final resolution of the question, honoured an election promise made to the Australian people. He set up a Convention to choose a republican model to put to the people. Half elected, the other half was made up of State and federal government representatives, along with a few notables. Such is the fairness of our Prime Minister that a majority of the latter turned out to be ... republicans!

At that Convention, the Australian Republican Movement turned its back on the obviously flawed 1993 model which its best minds had developed. In the very last few days they suddenly revealed yet another model. Although it did not win the approval of the Convention, it was overwhelmingly the preferred choice of the republican delegates. It was put to the people in a referendum in 1999.

There, against overwhelming odds -- almost all of the mainline press, which actively campaigned for the model, about two-thirds of the politicians, a cast of celebrities, the Labor Party organisation, a good part of the Liberal Party organisation, the Australian Council of Trade Unions, and with great wealth -- the "No" vote won about 55 per cent of the electorate against 43 per cent. About 2 per cent voted informal or abstained.

Even where the Australian Republican Movement was most active, in New South Wales, 70 per cent of electorates voted "No". In the other States the number of electorates voting "No" ranged from 51 per cent in Victoria to 75 per cent in South Australia, 80 per cent in Tasmania, and 93 per cent in Queensland and Western Australia. No matter how apologists explain this landslide, the people clearly preferred the existing Constitution to what was on offer.

Australians could be forgiven for believing that the defeat of the 1999 proposal should have settled the issue -- at least for a decent interval.

In the aftermath of this devastating result the penny has dropped. The small but noisy group behind this have finally realised what is obvious. They are unable to produce a republican

model which, when grafted onto the 1901 Constitution, will maintain its integrity. Their ultimate weapon was that with the New Year of 1 January, 2000, with the Olympics, and with the Centenary of Federation, we would be demeaned, disgraced and ridiculed by the whole world because of our Constitution and our flag. This has now been shown to be lacking completely in either merit or truth.

A new proposal

So the Australian Republican Movement, which incidentally promised it would no longer exist on 7 November, 1999, come what may, now demands that the taxpayers waste more money and the legislators spend more time on a cascading series of plebiscites which is designed to ensure a decade of constitutional instability.

So what precisely is being proposed? Notwithstanding the clear message from so many Labor supporters, who like their flag and their Constitution, ALP Leader Kim Beazley announced this to the 2000 ALP National Conference:

"We need a process which gives all Australians a greater sense of ownership and genuine involvement in any proposal for a Republic. As I have said publicly, this could be achieved with the three-step consultative process which would begin with a plebiscite on the threshold question: do we want an Australian as our Head of State? If a majority of people agree, a second plebiscite would follow to determine the preferred mode of selecting the Head of State. Finally, a constitutional referendum would be held based on the outcome of the two plebiscites".

No doubt to the surprise of his audience, Mr Beazley disowned the model for which he had so vigorously campaigned in 1999. The fault, he said, was all Mr Howard's. The process Mr Howard "set up failed to deliver Australians a model they could accept"!

Mr Beazley indicated in a speech in Perth on 7 October, 2000 that the first plebiscite will be held in conjunction with the federal election *after* the next election. This could be in about 2004. This would be preceded by a programme of "community education", no doubt taxpayer funded. The first plebiscite would cascade into the second plebiscite, which will presumably coincide with the following election, perhaps in 2007. After some sort of drafting exercise involving conventions and forums, a referendum would be sometime later. (If it is to be like the campaign after the 1993 model was unveiled, it will be a republican propaganda campaign.) There is no indication that the States -- and Territories -- are to be simultaneously involved. Most State Constitutions require a referendum to change to a republic; it is inconceivable that any would be changed without one. It therefore seems we are to face up to eleven plebiscites and referenda. To date this process has cost \$150 million. It is difficult to be precise on how much more is to be spent before a republic can be achieved -- if it can.

The first plebiscite will be intended by its wording to achieve the result of a vote of no confidence in the 1901 Constitution. This process will no doubt be later replicated with the flag. (It should not be forgotten that it was intended that there be a change of our flag in time for the Centenary of Federation. This was thwarted by an amendment in 1998 to the *Flag Act*, introduced by John Howard. The National Flag can now only be changed after a majority of electors, voting at a plebiscite in which the Australian National Flag is included, choose a new flag. This is a good provision. Under this there can be no vacuum, for the plebiscite cannot invite a vote of no confidence in the present flag without immediately substituting

another.) After the flag, what then? The names of our States, our cities, our streets? The States themselves? What limits will there be to eradicate our heritage and our history?

The Honourable Richard McGarvie argues that the first plebiscite would be:

"...a process of drift, leaving the country without leadership and postponing resolution for a long time. What use would it be if we learnt in the first vote that, despite overwhelming support for an Australian Head of State, only a bit over half were prepared to vote in the dark in favour of an unidentified republic which they could not be satisfied would actually preserve our democracy? Unless a vote is on a model described in sufficient details for people to decide whether they are satisfied it would safely preserve their democracy in a republic and be otherwise satisfactory, it does little to advance resolution of the issue. Different republic groups would use the debate on the first plebiscite to promote the models they support. There would be great pressure on political parties to give some form and substance to the debate and seek political advantage by stating their preferred models. Once they did that they would in practice regard themselves as committed to promote their model. The debate would revert to adversary politics which would in practice place the issue beyond referendum resolution".

As with the flag, it is incumbent on those who want change to come up first with an acceptable constitutional model. If they want change they ought to be able to say what they want. To say you are republican is a useless observation. On many a respectable definition Australia is a republic. The question is, what sort of republic, and precisely which changes to the Constitution are proposed? This should be such that it can be either immediately substituted for the existing Constitution or be rejected. But the new strategy is to destroy confidence in the Constitution and the flag so that the task will be easier. The plan is that, eventually, the Australian people will give in and accept a second rate Constitution.

This process is designed to turn Australia into some as yet undefined form of republic, notwithstanding the clear evidence that Australians are just not interested in the question. As Mr Turnbull writes in his book, *Fighting for the Republic* (p.111), nobody is interested. This was confirmed beyond doubt by the Morgan Gallup poll taken immediately after the referendum.

Apart from the waste of taxpayers' money, as well as legislators', governments' and the people's time, this exercise should be condemned. Not only does it propose to subvert the Constitution. Worse, the clear intent is to create a loss of confidence in the present Australian Constitution without any guarantee that, after the resulting decade of instability, a new constitutional model will be produced which will be acceptable to the people. In fact, after Mr Beazley's speech, republicans began fighting over the best model to put to the people. In other words, while the proponents of change cannot agree on what is the best republican model, they also cannot agree on which model the Australian public will accept. In fact, they are so desperate that any republic will do, as long as it will pass a referendum.

The constitutional intention

To understand the danger of what is being proposed, let us go back to the work of our Founding Fathers. Our Founders carefully and exhaustively considered the question of how the Constitution should be amended. The Constitution they had drafted was to be a "binding

and indissoluble social compact" between the people of the Australian Colonies (now States). That the people of each Colony had to be involved at all stages, and finally approve the Constitution, was in fact the centrepiece of the process initiated by Sir John Quick at Corowa in 1893. Under this, neither the drafting of the Constitution, nor its final approval were to be exclusively in the hands of the politicians. This is not to denigrate the role of the politician in the Commonwealth. But the politician's role is to be limited in constitutional matters, a point confirmed in the 1999 referendum.

How then to involve the people in any amendment to the Constitution? The Founders well understood the use, and indeed the misuse, of the constitutional plebiscite. From the time of the French Revolution to the drafting of our Constitution, there had been a total of about 40 national plebiscites and referendums in the world.

Of these, 24 would be recognisable to Australians as a referendum. That is, the full texts of the amendments (or of the Constitutions) were already on the table, not hidden. There was an opportunity for a proper debate, and above all the country was a democracy. Surprisingly *all* 24 were in one country, Switzerland.

The remaining 15 were not what Australians would call referenda. They were all constitutional plebiscites. The first was actually held in Switzerland in 1802. But it was a Switzerland under French occupation. There, the Swiss were asked to approve of a Constitution drafted by the French. And although the "No" vote exceeded the "Yes" vote substantially, Napoleon decided the "Yes" case had won. This was done by treating all abstentions as affirmative votes. An early example of electoral fraud!

Then there were three plebiscites to approve of the installation of a monarch. These were in Greece in 1862, in Mexico in 1863 and in Romania in 1866. The Mexican plebiscite was held under the auspices of an invading French army. The Emperor, Maximilian, was the nominee of the French Emperor, Napoleon III. He was approved by 99 per cent of the people. This vote was not reflected among those who then fought for an independent Mexico. The unfortunate Maximilian, abandoned by Napoleon, was executed by a firing squad.

Then there was an aborted constitutional plebiscite in Mexico in 1867, but the votes were never counted. The Romanians also approved a constitutional change in 1864.

The remaining ten constitutional plebiscites, that is the bulk of them, were held in France. Almost all were held under authoritarian, if not dictatorial, regimes, with the probable exception of those in 1851 and 1852 which I will come to in a moment.

The French Revolution, from the Reign of Terror to the rise of Napoleon Bonaparte's dictatorship, produced seven plebiscites. These were to approve:

- In 1793 -- The Constitution of the Year I (so called because the revolutionaries hated the past so much they threw out the Gregorian calendar);
- In 1795 -- The Constitution of the Year III to introduce the *Directoire*;
- In 1799 -- The Constitution of the Year VII to introduce the *Consulate*;
- In 1800 -- The confirmation of Napoleon Bonaparte as Consul;
- In 1802 -- The appointment of Napoleon as Consul for Life;
- In 1804 -- The making of Napoleon Emperor of the French; and
- In 1815 -- The restoration of Napoleon's Imperial Constitution.

Two more constitutional plebiscites were used to install Napoleon III (Napoleon Bonaparte's nephew) as Emperor. The first was in 1851 to extend his term as President of the Second Republic to ten years. The second was in 1852 to make him Emperor. A last minute and unsuccessful reprieve to the Empire, by liberalising it, was approved in 1870 before France's defeat in the war with Prussia.

Incidentally, the collapse of the Empire and the installation of the Third Republic were never submitted to the people for their approval.

If we exclude those plebiscites to approve the name of a Sovereign in Greece and Romania, all but one of the constitutional plebiscites about which the Australian Founding Fathers would have been aware were held in France, or in a country under French occupation. And all of these were used either to confirm or to install some form of authoritarian or dictatorial rule.

It is not therefore surprising that the Founding Fathers, democrats to a man, would have found nothing at all attractive in the constitutional plebiscite! Even in a democracy, as France was in 1851 and 1852, a constitutional plebiscite could be so easily misused as it so clearly was. They were determined to prevent change made by stealth, something which is now being proposed in Australia to take up the first decade of the 21st Century.

So what did the Founders do? In 1891 the draft Constitution provided that amendments be first proposed by the federal Parliament and then submitted for approval by a majority of elected State Conventions. But at the Corowa Conference, a peoples' conference, it was decided that the process for constitutional approval, and by implication constitutional change, was to lie with the people. It was only when the politicians accepted this principle that the federation of Australia could proceed.

During the referendum campaign in 1999, Kerry Jones and I were called to appear before the Joint Parliamentary Select Committee on the Republic Referendum at a hearing on 5 July, 1999 in Sydney. One member asked me about cases concerning the removal of a Governor-General. I referred to various precedents in other Commonwealth countries which proved, in my view conclusively so, that unlike the President of the proposed republic, the Governor-General could not be removed instantaneously. The member replied that she was not interested in other countries.

I thought, but did not say, that it was indeed fortunate that our Founders, wise men that they were, were neither provincial nor myopic. In drafting the Constitution, they looked at the experience of the world's great democracies, and they learned from them. They knew that constitutional plebiscites can be so easily abused. They knew that the Swiss Constitution guarded against this. (That it also gives the people the right to initiate changes to the Constitution and to propose legislation is another issue.) In brief, our Founders knew how democratic the Swiss referendum was and how undesirable a constitutional plebiscite is.

It was on the same day, the 5th of July, that Mr Turnbull proposed to this same committee that the words "president" and "republic" be removed from the question on the referendum. Illustrating, if there need be such an illustration, the dangers of the constitutional plebiscite where any sort of question can be put to the people without any details.

So that is why our Constitution provides for a Swiss style referendum as the only way for change. Under s.128, a proposed law to change the Constitution has to be passed by an absolute majority in each House of Parliament, and then put to the people. (Where the Houses do not agree it is still possible for the Governor-General to submit the referendum to the people.)

Not only is a national majority of electors voting required, there must also be a majority of those voting in a majority of States -- that is, four States out of the six.

If so approved, the bill is then presented to the Governor-General for royal assent.

(A majority of electors voting in a State is necessary to approve any alteration:

- Diminishing the proportionate representation of that State in either House;
- Diminishing the minimum number of representatives of that State in the House of Representatives (the most relevant being the minimum for Tasmania of five);
- Increasing, diminishing or otherwise altering the limits of that State; or
- In any manner affecting the provisions of the Constitution in relation to that State.)

The experience of countries since federation confirms the misuse, and the potential for misuse, of constitutional plebiscites, even to this day.

For example, when the Quebec government decided in 1995 that it was time to secede from Canada, they knew they would need the support of the people in what was called a referendum but in reality was a plebiscite.

The honest approach -- the approach to ensure an informed vote -- would have been to put all the facts before the Quebecois. In particular, that there was no guarantee that even if Quebec were able to secede, the new state could retain the advantages it had enjoyed as part of Canada. Could Quebec continue to use the Canadian dollar? What would happen to the national debt? Would Quebec continue to be a party to each of Canada's treaties, for example, the free trade treaty with the US and Mexico? Would Quebec's boundaries remain the same? And what of the indigenous people, who preferred to stay in Canada? Could they secede from Quebec?

All of these unresolved issues were swept under the carpet by the secessionists. Instead, the question was devised, and deliberately devised, to attract a maximum uninformed vote. In brief, the question was designed to deceive the people. The question should have been, "Do you approve of Quebec leaving Canada and becoming a separate nation?", or words to that effect.

This was the actual question that the Quebecois voted on:

"Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and the agreement signed on 12 June, 1995?"

To say the referendum question was misleading is an understatement. Exit polls demonstrated that many people who voted "Yes" actually thought they were voting to stay in Canada! To

the credit of the Quebecois, they voted "No". But only by a hairsbreadth, because they were *not* properly informed.

In other countries there have been a handful of plebiscites and one referendum, in all about 13, to change to a republic. Most were of doubtful validity and several taken under dictatorships. Only the Australian referendum in 1999 allowed the people to see in advance what precisely was being offered.

Now some will say that this is all very well, but the Australian referendum makes it too difficult to change the Constitution. That is not so. As two of our Founders, Sir James Quick and Robert Garran wrote (*The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted in 1995, at 988), the safeguard in s.128 is:

"... necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible and inevitable".

It is even said that we still live under a "horse and buggy" Constitution. In other words, because it is old and successful it must be changed. The American Constitution is twice as old, yet I cannot recall it described as a "horse and buggy" Constitution!

We have approved eight changes to ours, the Americans twenty-five. But ten of these -- the Bill of Rights -- were made in 1791 and were necessary to secure its ratification. So since 1791 there have been fifteen changes to the US Constitution. Fifteen in two centuries compared to eight in our one century. A comparable record, I would say, especially if one excludes the two American amendments on Prohibition, one to impose it and one to remove it!

And it must be remembered too that in Australia, unlike Switzerland, the people cannot propose a constitutional change by way of an initiative. Nor can the States. Only the Houses of the Federal Parliament can propose constitutional change.

Repeat referenda

And what of repeat referenda?

Having rejected a proposal the Australian people have, at least until now, also rejected any subsequent similar proposal.

In fact, they have been asked to give these following additional powers to Canberra more than once, and they have repeatedly said "No":

- Monopolies (5 times).
- Corporations not already the subject of federal power (5 times).
- Industrial matters within the State (5 times).
- Intra-state trade and commerce (3 times).
- Marketing schemes (twice).

- Price control (twice).

(It could be said that some or most of these would be superfluous today because of the judicial interpretation of the Constitution.)

Attempts to impose simultaneous elections of the House and Senate have been rejected on three occasions. (While these proposals might at first glance seem sensible, they would have reduced the Senate's powers, and thus the influence of the smaller States.) The people have also twice rejected a proposal to include a guarantee of freedom of religion (once in a package, and once by itself), probably because they suspected a subterfuge. And in any event this freedom was already well and truly guaranteed.

So precedents suggest that when the people say "No" they well and truly mean "No". The small group who clamour for change just will not accept this.

Conclusion

This is a plan to circumvent the Constitution by the use of cascading constitutional plebiscites, which are designed to soften the people up before a final referendum. This is constitutional change by stealth and by fatigue. It irresponsibly invites a vote of no confidence in our Constitution so as to create a vacuum during at least a decade. This might be the sort of tactics that political parties might adopt over some minor issue. It is not the way to deal with something so fundamentally important as the Constitution.

Apart from the sheer irresponsibility of this approach, there is nothing in it for any of the political parties. It is a folly of monumental proportions beside which the Millennium Dome will appear as a minor glitch. There is nothing in it for the Labor Party -- that was clear from the way in which so many safe Labor seats voted. The issue is even less attractive to the Liberal Party, where it has already embittered a significant portion of the membership and supporters. And both the members and supporters of the National Party are overwhelmingly anti-republican.

There is one way, and only one way to undertake responsible constitutional change here. That is by the referendum. And this is not there to prevent or indefinitely resist change. It is there, as Quick and Garran said, to prevent change being made in haste or by stealth, to encourage public discussion, and to delay change until there is strong evidence that it is desirable, irresistible and inevitable