Constitutional Lies, Damned Lies and Plebiscites

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Most people doubtless know the famous quote from Benjamin Disraeli (who, however, attributed it to Mark Twain) that "there are three kinds of lies: lies, damned lies and statistics".

So in Australia today we have three kinds of constitutional lies: constitutional lies, damned constitutional lies and plebiscites.

For some twelve years now, via The Samuel Griffith Society [www.samuelgriffith.org.au], I have been looking into aspects of our Commonwealth Constitution, as interpreted by the High Court of Australia, and observing the constitutional deceits of our lawyers - not to mention our politicians and our journalists. My conclusion is that, just as war is said to be too important to be left to the generals, so constitutional legal matters are far too important to be left to such practitioners.

Lies, including damned lies, appear across the whole constitutional spectrum, and before coming to my main theme I mention a couple of prime examples.

Perhaps the damnedest lie in Australia's constitutional history was that perpetrated in 1920 by the Isaacs High Court. That Court purported to find, in the notorious *Engineers'* case, that particular words of our Constitution could and should be read in isolation from the rest of it. In particular, it held that no weight should be given, when interpreting some particular passage, to the overriding fact that our whole Constitution was a *federal* one (without which it would never have existed). This fact, blindingly obvious to anyone reading the 1890s constitutional Convention debates, was swept aside by those Justices (aided by a brilliant young barrister, one Robert Gordon Menzies).

Another such damned constitutional lie, again perpetrated by a succession of High Courts, but reaching its apogee in 1983 in the *Tasmanian Dams* case, consists in the interpretation of section 51 (xxix) of our Constitution, which gives the Commonwealth government power "to make laws for the peace, order and good government of the Commonwealth with respect to . . . external affairs".

That power, any sensible person might think, would give the federal government authority to set up Australian embassies, engage in discussions with foreign powers on matters of mutual interest, and so on; but not, surely, to take to itself powers which our Constitution-makers plainly denied it (such as the right, in the *Tasmanian Dams* case, of Tasmanian governments to run their own affairs in areas where the Constitution plainly gave the Commonwealth no role whatsoever). Yet a majority of High Court Justices found that, because the Commonwealth government had ratified the United Nations Convention for the Protection of the World Cultural and Natural Heritage, and had subsequently enacted Commonwealth legislation purporting to give effect to some aspects of that Convention, then it followed that it now possessed a power which the Australian people had never given it.

A former Chief Justice of the High Court (and now President of The Samuel Griffith Society), the Right Honourable Sir Harry Gibbs, has commented on the practical effect of this interpretation. Its effect, he says, is that most of the detailed but carefully restricted powers accorded to the Commonwealth in section 51 of our Constitution - powers which were the subject of years of discussion in the 1890s Constitution-framing process, and confirmed by referendums in all six Colonies, now States, of the Federation - can be effectively discarded and replaced by one word: "anything".

If the *Engineers'* case largely set aside the federal nature of our Constitution, the *Tasmanian Dams* case (and one or two earlier such cases) tore it up almost entirely.

Shameful though these facts are as general illustrations of the depths of constitutional untruth to which our highest Court has, over the years, periodically sunk, I focus here on a particular area of constitutional lies. Specifically, I refer to such lies insofar as they bear on the revival by the Leader of the federal Opposition of the proposal, recently rejected by the Australian people, that our constitutional monarchy should be made into a republic. So I wish, in what follows, to do three things.

First, I recall some of the lies with which the constitutional issues pertinent to the republic proposal have been perennially embroidered.

Second, I focus upon one of them - a damned constitutional lie indeed - namely, that we need to make Australia a republic *so that we can have an Australian as our Head of State.*

Finally, I say something about the methodological lie - the plebiscite - which Labor proposes to employ to attain its ends.

Some Constitutional Lies

Not all the constitutional lies Australians have been offered on the role of the Crown, and the role of our Governor-General, were uttered in the context of the republic debate, but all of them bear upon it. Thus:

(1) For decades we have been told that Her Majesty became Queen of Australia via the Whitlam Government's *Royal Style and Titles Act* 1973. We had to wait for a Labor Prime Minister (who happens to be one of Mr. Latham's personal mentors) to effect that change. Only such a Prime Minister had sufficient national pride to do so.

The only problem about this piece of Whitlamite hagiography is that, like so much else in that hagiography, it is untrue. The Queen became Queen of Australia not in 1973, but 20 years earlier, when the Menzies Government passed the *Royal Style and Titles Act* 1953, along with, importantly, the *Royal Powers Act* 1953.

Now that may not seem, within the pantheon of constitutional lies, a very big one. I mention it, and shall return to it, because the origins of that 1953 legislation, particularly the *Royal Powers Act,* have an important bearing on that damned constitutional lie noted earlier.

(2) Next, I refer to "the Dismissal", as all good A.B.C. journalists still describe it. In 1975 the then Governor-General, Sir John Kerr, withdrew the commission of the then Prime Minister, Mr. Whitlam, and commissioned Mr. Fraser as Prime Minister, subject to certain conditions. This incident gave rise to some extraordinary constitutional lies. For example:

(i) Mr. Whitlam claimed on numerous occasions that the Governor-General could act only on, and in accordance with, the advice of his Ministers. Given the reserve powers of the Constitution, including section 61 (the Executive power) in particular, this was a blatant constitutional lie even by Mr. Whitlam's standards.

(ii) Mr. Whitlam also claimed on numerous occasions that under the Constitution, supply (that is, spending authority) was a matter solely under the control of the House of Representatives. There is no basis for that grab for executive power. Section 53 of the Constitution merely prevents the Senate from *originating* appropriation (money) bills, or bills imposing taxation. The same section specifically provides that "the Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein". Or the Senate may simply fail to pass such bills, as it did in 1975 prior to Mr. Whitlam's dismissal.

What is important here to note is that Sir John Kerr's action constituted the most powerful possible evidence that our Governor-General possesses, *and can use*, the prerogative power, which is the supreme attribute of any Head of State.

To underline that point, note also that an appeal to Her Majesty by the Labor Speaker of the House of Representatives against Sir John's action also elicited from Buckingham Palace the very clearly stated view that "the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen in Australia".

(3) The republic issue itself had been dead in Australia for a century, but Prime Minister Keating breathed new life into it in 1992 with a whole series of constitutional lies - some petty, some much more significant. At their most general, as Sir David Smith said in his first paper to The Samuel Griffith Society on this general topic in 1992:

"We are told that our independence and our nationhood are at risk while we remain tied to the British Monarchy, the British government and Britain".

Their inherent non-credibility apart, those claims are the more astonishing given that Mr. Keating had been a senior Minister in the Hawke Government. In 1984 and 1986 that government had taken specific steps to remove the last vestigial elements of our constitutional relationships with Britain - elements which had long ceased to have any practical significance, but which to someone with Mr. Keating's powers of exaggeration could, I suppose, have been previously held to constitute "ties" of some kind.

Thus, in 1984 (and again, we are indebted to Sir David Smith for drawing this to public notice) the Hawke Government had arranged for the legal instruments appointing the Governor-General to be amended to remove any possibility that it could be thought in future that our Governor-General acted as a mere delegate of The Queen.

And in 1986, via the *Australia Acts* (Acts passed not only by the Commonwealth government, but also by the governments of the United Kingdom and all six Australian States), the last vestiges of those "ties" to which, six years later, Mr. Keating was still taking such violent exception, were removed.

Again, in 1988 the Constitutional Commission, appointed in 1985 by Mr. Keating's ministerial colleague, then Attorney-General Lionel Bowen, concluded after exhaustive investigation that

"although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it".

The changes in question were those made in 1984 by the Hawke Government, referred to above; and the statement is the more significant in that Mr. Whitlam was a member of the Commission.

(4) At much the same time as an Australian Prime Minister was spouting such ignorant nonsense, nonsense of a different kind was emanating from a prominent academic lawyer, Professor George Winterton, of the University of New South Wales. In *The Independent Monthly* Professor Winterton told us that it would be simple to change our Constitution to a republican form: we would merely need to, in effect, "white out" all references to "Queen" and "Governor-General" and replace them by the word "President".

The Independent Monthly, like this remarkable proposition, is now defunct, and Professor Winterton, whom I would never describe as a liar, can therefore only have been deeply confused. Even so, it remains a mystery as to why, after the extent of his confusion had been pointed out, Professor Winterton should have so long continued to affirm it.

(5) Last on my very abbreviated list of constitutional lies is the one implicit in the republican catch-cry, "We want an Australian as our Head of State". Of all the falsehoods advanced by the republicans in the lead-up to the 1999 referendum, none received more emphasis - and, in my judgment, none struck greater public resonance - than that damned (implicit) constitutional lie.

How often did we see assorted notables, whether in a spirit of self-promotion or after having been persuaded to "do their bit in a good republican cause", step forward to say that they wanted a republic so that their children could at least aspire in future to be our Head of State?

Now while some of these people would say almost anything if they could be guaranteed some favourable media attention by doing so, I believe that many of them were simply unaware that their implied claim was untrue. More importantly, I am certain that most of the general public with whom this claim resonated were certainly so unaware. And because I have a high regard for the innate decency of the Australian electorate, I am sure that, if those who did respond to that falsehood had known the truth, the republic referendum would have been defeated even more resoundingly than it was.

A Damned Constitutional Lie

So I suggest that, of all the constitutional lies told during the republic debate, the damnedest constitutional lie of all *is that which implicitly denies that we already have an Australian as our Head of State.*

There are two main streams of evidence that, in our Governor-General, we already have an Australian as our Head of State. These consist in:

(i) an examination of the legal position of the Governor-General within our Constitution; and

(ii) an examination of the nature of the duties which a Governor-General carries out.

A thorough examination of the Governor-General's constitutional legal position would itself require a long article. Fortunately, the task has already been superbly and comprehensively undertaken in Sir David Smith's submission to the Senate Legal and Constitutional Committee's Inquiry into an Australian Republic [www.aph.gov.au/Senate/committee/legcon_ctte/republic03/submissions/sublist.htm]. Indeed, that submission will probably prove to have been one of that Inquiry's few useful products.

In brief, Sir David's key points are:

- Our Constitution, from day one, has endowed the Governor-General with all the powers exercisable by a Head of State; and in particular with the prerogative powers which, by definition, are *only* exercisable by a Head of State. Although not described as such, the Governor-General is, and always has been, our Head of State (as distinct from, of course, our Sovereign, now Queen of Australia).
- Any uncertainty on that score was largely clarified when, prior to the Queen's 1954 visit to Australia, the Menzies Government found that, without specific Commonwealth legislation authorising her to do so, the Queen would have been constitutionally disbarred from carrying out any of the functions constitutionally conferred upon the Governor-General, such as presiding over a meeting of the Executive Council. Those powers were then conferred upon her, when present in Australia, by the *Royal Powers Act* 1953 (which however in no way diminished the powers of the Governor- General).
- Any remaining uncertainty was further clarified, in the most emphatic manner, in 1975. The then Governor-General, all other reasonable remedies having been exhausted in the face of an obdurate Prime Minister, exercised his supreme prerogative power, dismissing that Prime Minister and commissioning another (subject to specified conditions). If ever there were any doubts that the Governor-

General was our Head of State, that action - later overwhelmingly endorsed by the electorate - should have totally dispelled them.

- The Queen's subsequent response to the Speaker of the House of Representatives, quoted earlier, fully confirmed that view.
- In 1984, the Hawke Government oversaw the crossing of the t's and dotting of the i's on the matter when, as noted earlier, it had the instruments appointing the Governor-General amended to spell out that his authority derived solely from our Constitution itself, and to remove any basis for suggesting that he acted as The Queen's "delegate".
- Finally, that view was endorsed in the 1988 Report of the Constitutional Commission in the passage quoted earlier.

And that, but for Mr. Keating's powerful need to find an issue with which to placate his Left, would have been that.

As to the second stream of evidence - the nature of the duties, including duties as a Head of State, which a Governor-General carries out - here again we are indebted to Sir David Smith. His 1997 paper to The Samuel Griffith Society, "The Role of the Governor-General", detailed the statutory duties which, almost daily, the Governor-General carries out; as well as the duties imposed upon him by the Constitution itself, such as issuing the writs for general elections of the House of Representatives, which only he can carry out.

The fact is, moreover, that for many years now the Governor-General, when travelling abroad on state visits to foreign countries, has been everywhere received as Australia's Head of State, with full diplomatic and other courtesies (for example, 21 gun salutes and so on).

There is, in short, no substance in the cry that "we want an Australian as our Head of State", for the very good reason that we already have one, and one fully acknowledged abroad as such.

One point does, however, arise.. Although it would be almost universally agreed that no future Prime Minister would recommend to the Sovereign the appointment as Governor-General of a non-Australian, it is nevertheless true that our Constitution does not require him (or at some future time, perhaps, her) to be Australian. So I suggest that, if anything at all useful is to emerge from this debate, it could be a proposed amendment to the Constitution to clarify that point, and also the point of nomenclature. A single sentence added to the present text of section 2 would be all that would be needed, namely:

"He [which in the Constitution comprehends both "he" and "she"] shall be Australia's Head of State, and shall be a native-born Australian".

Such a referendum proposal, which would emulate the US Constitution's requirement for that nation's President, would, I predict, be approved overwhelmingly.

Plebiscites

So finally I come to plebiscites; and here again, with the assistance of other authorities, I can be brief.

In an address to The Samuel Griffith Society in 2001 entitled "Mr. Beazley and his Plebiscites", Professor David Flint pointed out that the proposal for a series of plebiscites on the republic issue was first and foremost an underhand device to undermine respect for our present constitutional arrangements. The republicans' desperate hope then is that, that undermining once achieved, Australians will eventually submit to a referendum proposal for a republic, even though they might not care for the particular model proposed.

In the words of the late Richard McGarvie, himself a republican (albeit what I term a "respectable" one) and also a long-time Labor man, a plebiscite which simply asked people

whether Australia should become a republic without providing any of the details necessary for properly considering such an important question would, if approved, produce "a process of drift, leaving the country without leadership and postponing resolution for a long time".

Having mentioned one "respectable" republican, let me mention another - namely, Professor Gregory Craven, now Professor of Government and Constitutional Law at Curtin University of Technology. His submission to the Senate Inquiry into an Australian Republic, although made from a different standpoint from my own, will nevertheless also prove to have been one of that Inquiry's few useful products. I quote Professor Craven:

"The plebiscite proposal should not be seen as a genuine attempt to engage the Australian people in the republican debate . . . Rather it is an essentially cynical attempt to extract from the electorate a premature statement of preliminary opinion on the basis of a deliberately inadequate debate, and to use that statement as a gag with which to stifle republican criticism of the canonised model".

I have also had the privilege of access to another paper by Professor Craven (to the Australian Study of Parliament Group) which, although still in draft, is nevertheless worth noting. Entitled "Referenda, Plebiscites and Sundry Parliamentary Impedimenta", it is directly addressed to the plebiscite device. I disagree with a number of its judgments, and particularly with its apparent tolerance (albeit lukewarm) of the proposal for a "first stage" plebiscite. Nevertheless, Professor Craven is entirely correct when he says that "plebiscites . . . tend to promote a shallow, lackadaisical consideration of the issues to which they relate" - especially, I might add, when directed to a proposition of great generality, such as whether Australia should become a republic.

Professor Craven does not stop there. Plebiscites, he says:

"will operate advantageously in respect of . . . measures possessing a strong surface appeal, but which also involve underlying difficulties which are not immediately apparent . . . For this reason, proposals that would stand no chance at a full referendum may well pass a plebiscite . . . [T]he tendency will be to advantage shallow, flawed proposals [such as direct presidential election] with much to shout about and more to hide . . . By eliciting from the population a premature answer based upon a shallow discussion of the relevant issues, they can be employed to lock-in a particular policy option, . . .".

Just so. And there are other questionable aspects of the plebiscite approach. For example, if Mr. Latham's proposed first plebiscite (on the general question) were to be carried nationally, but were to fail in three States (say, Queensland, Western Australia and Tasmania), would Labor still regard it as having been "approved"?

Conclusions

I have three conclusions:

1. Within the now revived republic debate, the damnedest constitutional lie is that implicit in the catch-cry, "We want an Australian as our Head of State".

2. Because this catch-cry has had, throughout, the most effective populist appeal to those vaguely attracted (but not committed) to the republican cause, it should be confronted head on for the damned constitutional lie that it is. Even a deeply biased media should find it, eventually, difficult to go on supporting a catch-cry which so clearly flies in the face of all the evidence.

3. Constitutional monarchists should also propose, and press for, an amendment to section 2 of our Constitution via the addition of a single sentence, namely:

"He [that is, the Governor-General] shall be Australia's Head of State and shall be a native-born Australian".

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