

THE PECULIARLY AUSTRALIAN PREOCCUPATION WITH REMOVAL OF A HEAD OF STATE

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INTRODUCTORY REMARKS

The inclusion in the last volume of a separate paper on removal of a Head of State under a republic is justified by the course of the Australian debate. It is remarkable nevertheless. One of the many points in Campbell Sharman's paper¹ with which I agree is that the significance of removal has been exaggerated, notwithstanding the characteristics of the Australian constitutional system that have prompted its rise to prominence.

All parts of a constitutional system are interwoven. Inevitably, it is difficult to discuss one aspect of one institution in isolation from the rest. As far as removal of the Head of State is concerned, however, the exercise is particularly artificial. Whether a removal mechanism is appropriate and effective depends in part on the wider range of requirements and procedures of which it forms part.

Depending on the context, these may include the arrangements for an acting Head of State after an incumbent has been removed; the potential for use of 'caretaker procedures' until controversial aspects of a removal are resolved; and the mechanism for appointment of a new successor Head of State.

The 1999 republican model was a case in point.² It was tolerable only if the collective effect of associated features were taken into account. The potential for summary and unjustified removal of the President would have been tempered in practice by the prospect of a State Governor as Acting President³, armed with the same discretionary powers and by the

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¹ Sharman, C. 'The Pink Slip: Removing the President' (2001) 3 *UNDALR*, 83.

² Constitutional Alteration (Establishment of Republic) Bill 1999 (Cth).

³ Clause 63 of the Constitutional Alteration (Establishment of Republic) Bill 1999 (Cth) would have empowered the Parliament to 'otherwise provide', thus weakening the sanction but at least putting the choice of Acting President beyond the power of the Prime Minister.

(2002) 4 *UNDALR*

need, eventually, to set in train the elaborate procedure for appointment of a new President.

I note in passing that use of the State Governors in this or any other role in relation to the national position of Head of State in an Australian republic raises conceptual and practical questions that the device of the monarchy has masked. Should State Governors (by whatever name called) be sought for a role in a future republican model, it would be desirable to seek some assurance that they will be chosen in a satisfactory way. If, as in 1999, the solution is to provide a means to exclude some or all Governors if necessary, some guidance as to the alternative would appear appropriate.⁴

The conceptual question is more difficult. In outward form, under a monarchy, all vice-regal officers represent the Queen. This has made it possible to pretend that using a Governor chosen by one jurisdiction to represent the country as a whole raises no issue of legitimacy.⁵ This rationale, at least, would not be available under a republic although it may be that an explanation based on federal comity would find acceptance instead.

These issues are peripheral to the central procedure for removal, which is Campbell Sharman's particular concern. In what follows, I first comment upon Sharman's paper, and then deal in greater detail with some of the underlying causes of the Australian preoccupation with removal.

THE SHARMAN PAPER

The paper canvasses very well the range of options for removal of a Head of State, drawing on comparative experience, involving a variety of constitutional institutions and procedures. Sharman concludes that most of these would work well enough in the Australian context. He prescribes only two 'essential' requirements. The first is that the removal procedure must be entrenched in the Constitution. The second is that it must not involve the head of government 'at any stage of the procedure'.

I agree with much of the Sharman paper, including his two essential requirements. I sympathise with his impatience over the emphasis that

⁴ The effect of cls 63 was that 'the longest serving State Governor available' would have automatically become Acting President 'until the Parliament otherwise provides'.

⁵ Winterton, G. The Constitutional Position of Australian State Governors. IN Lee, H. and Winterton, G. (eds) *Australian Constitutional Perspectives*. Sydney: Law Book Co., 1992, 274.

⁶ See generally: Howard, C. and Saunders, C. Blocking of the Budget and Dismissal of the Government. IN Evans, G. (ed) *Labor and the Constitution 1972-75*. Heinemann, Melbourne, 1977, 251.

THE PECULIARLY AUSTRALIAN PREOCCUPATION WITH REMOVAL OF A HEAD OF STATE

has been placed on removal of the Head of State in the Australian debate, and I agree with his diagnosis of the causes. In large part they lie in the long arm of the events of 1975, when the Governor-General dismissed the Prime Minister.⁶ The non-Labor parties remain defensive about those events. For this reason, at least, they would be likely to oppose codification of the powers of the Head of State in a way that would prevent dismissal of a Prime Minister or nullify the power of the Senate to reject supply.⁷ Supporters of the Labor party are still aggrieved by 1975 and more likely to oppose codification so as to acknowledge the power to dismiss a Prime Minister.⁸ Both sides of politics were easy prey for the view that in Australia the Head of State is held in constitutional check by the potential for removal from office by the Prime Minister. For those who accept this somewhat dismal perspective, it follows that the Prime Minister's power of removal must be retained under a republic, to prevent the unreasonable exercise of the unspecified discretionary powers of the Head of State.

On this score, there is an instructive analysis of the Australian problem in the Sharman paper. He uses a matrix of power and responsibility to suggest that, at least in comparative terms, the present Australian model for the position of Governor-General provides a distinctive mix of substantive power and low legitimacy. While Sharman himself does not approve of the result, arguably the level of legitimacy has served to constrain the use of the power and in that sense to balance it. The balance would be disturbed to a degree if the Head of State were to be accorded greater legitimacy, through a different method of appointment. Sharman thus uses his matrix to argue that the causes of the concerns that surfaced in relation to the mechanism for removal during the debate on the republic lie in other aspects of the office of Head of State. To the extent that they require resolution, the answer therefore does not lie in the quick fix of a power of summary removal. I have no doubt that he is right, on both scores, although he had no opportunity to examine the wider issues in this piece.

Finally, I note that Sharman assumes that any procedure for removal of a Head of State should specify the grounds on which removal may take place. I agree that this is important, for the accountability and integrity of the institutions involved. The point may be worth elaborating further. In crafting procedures for early removal, it may be useful to distinguish between different types of grounds and to stipulate different procedures for illness or incapacity on the one hand, and misbehaviour

⁷ See for example Withers, R. *Report of the Constitutional Convention*, Vol 3, 3 February 1998, 167.

⁸ Senator Faulkner, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-13 February 1998*, Vol 3, 4 February 1998, 285.

(2002) 4 *UNDALR*

on the other. This is the case in Israel, for example, where sections 21 and 22 of the *Basic Law on the President* distinguish between removal of the President for 'conduct unbecoming his status...' and vacation of the post of President for reasons of health. In either case, whatever the procedure, reasons should be given. Australian practice has long since assumed the importance of reasons or at least a public explanation for major as well as minor public decisions.⁹ Even in relation to double dissolutions of the Parliament it has become the practice for the Prime Minister to advise explicitly on the reasons for the dissolution and for the Governor-General to ensure that the reasons are in the public domain.

TACKLING THE CAUSES OF THE PROBLEM

Having taken the view that the issue of removal of a republican Head of State has been blown out of proportion in Australia, Sharman's paper deals only in passing with the reasons why this is so and what might be done about it in the future. He assumes that the problem lies in the powers of the Governor-General; including uncertainty about their reach and that this problem will and should be overcome in the design of a future, successful Australian republic. I agree with the aspiration, while recognising the difficulty of achieving it in the Australian political climate. In what follows, I therefore examine the significance of failure to specify the powers of the Head of State for the design of a mechanism for removal. In this context I consider whether the various scenarios that have been claimed to call for quick and unaccountable removal of a Head of State are in fact worth worrying about. I also ask whether there are ways of dealing with any residual concerns in a manner that is consistent with good principles of constitutional design. Finally, I conclude with some general observations about how the project of articulating the powers of the Head of State might be successfully pursued.

Removal Of A Head Of State In The Absence Of Specification Of The Power Of The Office

The perceived need for a Prime Minister to be able to remove a Head of State is linked to the present ambiguity and disagreement about the discretionary powers of the Governor-General. If the scope of these powers were controlled by the Constitution, there would be no argument for Prime Ministerial control through the threat of early removal. The most straightforward approach therefore would be to specify in the Constitution what the Head of State is empowered to do.

⁹ For a requirement for reasons for administrative decisions, see: *Administrative Decisions (Judicial Review) Act 1977* (Cth) s13.

THE PECULIARLY AUSTRALIAN PREOCCUPATION WITH REMOVAL OF A HEAD OF STATE

Campbell Sharman has written his paper on the assumption that this will happen and I agree with him that it would be the best course. Nevertheless, it is worth considering how failure to specify powers might affect the procedure for removal on the assumption that, for whatever reason, this more limited exercise is undertaken.

The procedures for removal identified by Sharman variously involve both Houses of the Parliament, special or general courts or tribunals for the referendum. Between them, they cover the procedures suggested by the experience of other countries. None involves unilateral action by the Prime Minister or even by a single House of the legislature. The reason, following Sharman, is that removal is or ought to be a serious business. This does not mean that Australia could not craft its own unique system. The purpose of the present exercise, however, is to consider whether Australian circumstances make these other, statelier procedures, inappropriate. For the moment, therefore, I confine my discussion to the range of possibilities in Sharman's paper.

If the Australian republican model does not define the powers of the Head of State, the reason is likely to be that agreement on the powers was not possible or at least was judged to be not possible. In these circumstances, it is more difficult to determine whether a removal procedure is effective or not because effectiveness in part will be in the eye of the beholder. Again, some assumptions are necessary. For the purposes of the present discussion, let us therefore assume first that Australians want a Prime Minister with a majority in the House of Representatives to be able to govern until the next election subject to any impediments constitutionally placed in the way by the Senate or the courts. Secondly, let us assume that Australians want the Governor-General or a republican Head of State to provide a check on a Prime Minister who is acting unconstitutionally. Those who do not accept these assumptions can adjust the discussion and the conclusions accordingly.

Four categories of circumstances can be identified in Australia in which early removal of a Head of State might be considered: (1) illness of the Head of State; (2) misbehaviour of the Head of State; (3) action by the Head of State to the detriment of a government without the confidence of the House of Representatives; and (4) action by the Head of State to the detriment of a government with the confidence of the House of Representatives.

Early removal of a Head of State in fact is a rarity, in any country. The most likely reason for early removal is illness or some other form of incapacity. Of the various procedures identified by Sharman, the most appropriate for this purpose would appear to be action by both Houses or, perhaps, a judicial procedure. Certainly, there is no reason in

(2002) 4 *UNDALR*

principle why either of these procedures should not be used. I do not accept that incapacity of a figure as important as the Head of State is so private a matter that parliamentary or judicial procedures to deal with the consequences are inappropriate.

Misbehaviour of a Head of State, legally or perhaps socially, also could be dealt with through these procedures. There is some potential in these circumstances for removal to become a party political issue. On the other hand, if removal were to be blocked in such a case, given the relative openness and accountability of Australian government, it may be a sign that the problem was not so serious as to require precipitous action.

The third category envisages circumstances in which the Head of State is poised to exercise a discretionary power to the detriment of a Prime Minister who does not have the confidence of the House of Representatives. Powers most likely to be involved include refusal to dissolve the House of Representatives, refusal to prorogue, or dismissal of the Prime Minister. The actions of the Head of State in these circumstances are bound to be controversial. It is unlikely that any of the Sharman removal mechanisms could be activated quickly enough to save the Prime Minister. On the other hand it is not obvious that the Prime Minister should be saved in such a case. Governments draw their legitimacy from the House of Representatives. Australian constitutional development has tended to endorse a role for the Governor-General in ensuring compliance with this principle. On the assumptions that I made earlier, there is no reason to distort the removal procedure to deal with actions in this category.

The fourth category is the most difficult. As the Australian constitutional system has evolved, representatives of the Crown have exercised power without advice against governments with the confidence of the Lower House; most notably in 1975. It is this precedent in particular that has focussed attention on the procedure for removal of the Head of State under a republic. The Sharman removal mechanisms would favour the Head of State in the sense that there would be no realistic possibility of removal of the Head of State as a deterrent to precipitate action.

I note, however, that if the power of the Head of State to dismiss a Prime Minister in these circumstances would be a problem under a republic, it is a problem now. The Prime Minister was effectively dismissed in 1975, despite the potential for the Prime Minister to advise the Queen to remove him. The risk may be exacerbated under a republic, to the extent that the procedure for appointment increases the legitimacy of the Head of State, without clarifying or limiting the powers of the office. Even so, there is a question whether it is worth taking special measures to prevent it, at the risk of distorting other aspects of the constitutional system. The

THE PECULIARLY AUSTRALIAN PREOCCUPATION WITH REMOVAL OF A HEAD OF STATE

conjunction of events that made 1975 possible is most unusual. The end product is an election which, however unfair to an incumbent government and inconsistent with principles of representation, at least is democratic. The assumptions about the base motives of public figures on which the argument for Prime Ministerial removal draws are unattractive and, as far as we know, unfounded. In my view, it would be a mistake to encourage them in the design of a republican model.

In any event, any special measures should be directed to the manner of the exercise of power by the Head of State, not to the removal of the Head of State. For example, even without specifying the extent of the Head of State's discretionary powers, it would be possible to put in place special procedures to be followed before a power is exercised without or contrary to the advice of a Prime Minister with the confidence of the House of Representatives. Such a procedure might involve consultation with a constitutional council. The body advocated by Richard McGarvie, for different purposes, comprising former occupants of vice-regal positions, might be adapted for this purpose. However constituted, the aim would be to preclude either the reality or the perception of political partisanship on the part of the Head of State, without which removal would be inappropriate anyway.

Specification Of The Powers Of The Head Of State

A more straightforward alternative would be to specify the scope of the discretionary powers of the Head of State in the Constitution. Depending on the prevailing view of what those powers should be, it may be necessary also to remove or limit the powers of the Senate to reject supply bills.

Clearly, this approach faces some difficulties in Australia for several reasons. The Senate has assumed its role as a significant check and balance in the Australian system of government. There would be opposition to removal of the Senate's power over supply if the consequence were perceived to be diminution of its scrutiny function. Lingering disagreement over the propriety of the dismissal of the government in 1975 would complicate full prescription of the powers of the Head of State, which inevitably must favour one side or the other. To further aggravate the task, the long period of constitutional evolution behind the formal façade of the Constitution has left some with a belief that there may be further unacknowledged discretionary powers of the Governor-General, available for use in an emergency, which would be inadvertently removed by codification.

Other papers have dealt with the powers of the Head of State and I do not wish to elaborate on the options at length. I therefore confine myself to some general points.

(2002) 4 *UNDALR*

First, if we are serious about specifying the powers of a republican Head of State, it would be more productive to begin debate about what powers the Head of State should have, rather than to pursue the question of how to codify the status quo. While either exercise is likely to be complex, codification is impossible, and unnecessarily divisive, because of disagreement about the present rules.

Secondly, if we propose to retain a system of responsible government, we should define the powers of the Head of State by reference to its core features, so as to ground them in principle and reinforce the coherence of the constitutional system. Two such features are the requirement for the government to have the confidence of the House of Representatives and for government to proceed in a way that ensures accountability for the exercise of power between and at the time of elections. The powers of the Head of State can and should be defined so as to further these aspects of the operation of the system. This approach could also assist with the vexed issue of the power of the Head of State to dismiss a Prime Minister who retains the confidence of the House, if this power were retained under a republic. As I suggested earlier, in recognition of the distinctive issues that arise in cases of this kind, special consultative procedures might be imposed on the Head of State in the interests of impartiality and accountability.

Thirdly, we should at the same time at least consider adopting a model under which executive power is vested in the government, subject to specific powers conferred on the Head of State for substantive or symbolic reasons. The only reason to retain the existing, essentially monarchical form of Chapter II of the Constitution in the event of a move to a republic would be to enable the Head of State to exercise supervisory authority over the exercise of general executive power, directly or through an executive council. Whether the Head of State should have such a role depends on the debate still to come. Despite the inevitable persuasive weight of long-standing practice, I am sceptical about the utility of this form of supervision by the Head of State, as long as we retain parliamentary responsible government.

A related point concerns other features of the system which owe their origin to the long history of the relationship between the Crown and Parliament and which may no longer be needed under a republic. The two most obvious are the requirement for assent to legislation that has passed both Houses of Parliament¹⁰, and the power to prorogue the Parliament.¹¹ As long as these functions remain, they are a potential source of additional complication in the debate about the powers of the

¹⁰ *Commonwealth Constitution* s58.

¹¹ *Commonwealth Constitution* s5.

THE PECULIARLY AUSTRALIAN PREOCCUPATION WITH REMOVAL OF A HEAD OF STATE

Head of State. Neither is significant in practice. The decision about the scope of the discretionary powers of the Head of State would be simplified by eliminating both.

CONCLUSION

In summary, I would not expect an Australian procedure to remove a Head of State to be used any more than those of other countries. Necessarily, however, we must have such a procedure. Campbell Sharman's paper identifies a range of possibilities. The final decision will depend at least in part on the manner in which the Head of State is chosen in the first place. Whatever the final decision, the mechanism we use should be appropriate to the dignity of the office.

The reason for the peculiarly Australian preoccupation with removal of the Head of State is linked to the uncertainty about the discretionary powers of the office, coupled with some history of creative use. The appropriate response, in designing a republican model, should be to clarify the uncertainty and specify the powers. If we are unable or unwilling to do so, there is a small risk that the power of the Head of State vis-à-vis the Prime Minister will be augmented in extreme circumstances. There may be other measures that we can use to contain this possibility. Giving power to the Prime Minister to dismiss the Head of State at will should not be one of them.

