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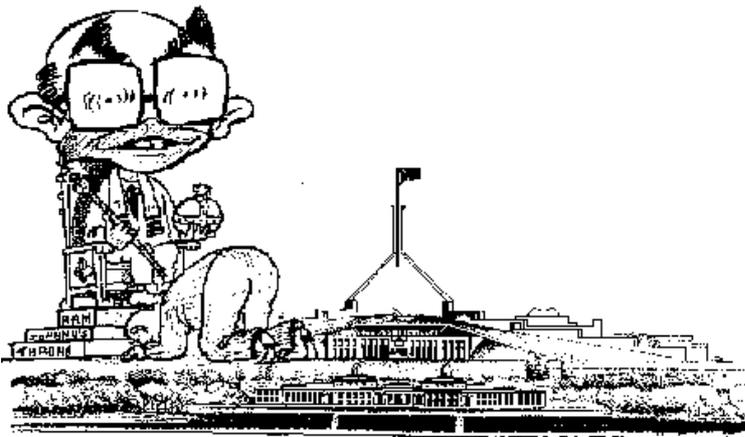
# AUSTRALIAN COMMUNITY ORGANISATION PUBLICATIONS

P.O. Box 136 Surry Hills NSW 2010 Ph : (02) 9360 0610 Email : funance@easy.com.au

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## Our Constitutional CRISIS IN WAITING

The following analysis will show that the operation of Section 62 (Removal of President) and Section 63 (Acting President and Deputies) allow a 'rogue' Prime Minister to hold the nation to ransom with no legal address. Together these sections are a recipe for a *constitutional crisis in waiting*.

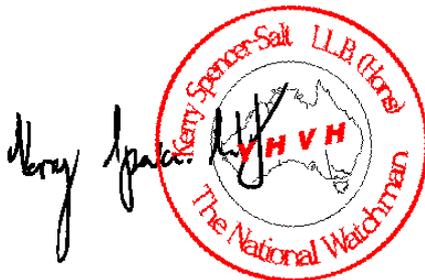


When an Acting President is dismissed by the Prime Minister a 'presidential vacuum' is created with no manner of constitutional resolution possible. Situations, not unreasonable, exist where with no President in office there is no manner for the people or the Parliament to install a caretaker President.

with a starter motor! At the extreme the proposed changes can be said to allow (if they exist through inadvertence) or create (if they exist through conspiracy) *a constitutional dictatorship*.

Simply stated the republican democratic engine does not come

That such consequential crises are unlikely is not an answer. Constitutions must exist over decades, generations and centuries. They must be able to constrain power at the limits of abuse. **This the republican constitution cannot do!**



This is the final message in *The National Watchman's* republic series. I sincerely hope they have benefited you and that they have contributed to the learned debate required to create a truly great nation.

Kerry Spencer-Salt B.E., LL.B (Hons)  
National Co-ordinator, Australian Community Organisation  
P.O. Box 136, Surry Hills NSW 2010 Phone : (02) 9360 0610  
E-Mail : funance@easy.com.au  
Website : www.rockroll.com.au/watchman



# Australian Community Organisation

P.O. Box 136, Surry Hills NSW 2010, Ph : (02) 9 360 0610 Email : funance@easy.com.au

Written and authorised by Kerry Spencer-Salt B.E. LL.B (Hons), *The National Watchman*, on behalf of the *Australian Community Organisation*

## OUR CONSTITUTIONAL CRISIS IN WAITING

### Introduction

Traditionally constitutional crises occur upon the dismissal of Head of States; not on their selection. For this reason Section 62 (Removal of President) is viewed by many as the most important section governing the operation of the Presidency. However of equal importance is Section 63 (Acting President and Deputies) which governs the operation of the Acting President AFTER the incumbent President has been dismissed by the Prime Minister.

Analysis will show that these two sections allow a 'rogue' Prime Minister to hold the nation to ransom with no legal address; they are a recipe for a *constitutional crisis in waiting*. Thus the use of Section 62 has both immediate and consequential dangers.

### Acting Presidents and the 'Presidential Vacuum'

One consequential danger will occur when an Acting President is dismissed by the Prime Minister. Here there is no President in office and no manner for the people or the Parliament to install a caretaker President.

**This situation is referred to as the 'presidential vacuum'**. Here all parties must await the installation of a permanent President. This must be done through the processes set out in the *Presidential Nominations Committee Act*. These processes can only start with the approval, consent and written notice of the Prime Minister who had just sacked a President and Acting President.

The extreme danger is that, when the Parliament has been dissolved and the Acting President dismissed, there is no power in the Constitution to kick start the engine of *responsible government* ; there can only be *constitutional dictatorship*.

That such consequential crises are unlikely is not an answer. Constitutions must exist over decades, generations and centuries. They must be able to constrain power at the limits of abuse. **This the republican constitution cannot do!**

## Section 62 - The Immediate Dangers

The dangers are that

- i. The Prime Minister can dismiss the President unilaterally. The dismissal is effective without notifying anybody, i.e. the Parliament, the Senate or the President. Note that the order takes effect **AS SOON AS THE PRIME MINISTER SIGNS THE ORDER.**
- ii. There is no provision for the Senate to make any objection!
- iii. Even if the House of Representative objects they cannot reinstate the President. While approval must be sought from the House of Representatives two conditions exist under which this does not need to be done at all.

### *Section 62 - Removal of President*

The Prime Minister may, by instrument signed by the Prime Minister, remove the President with effect immediately.

A Prime Minister who removes a President must seek the approval of the House of Representatives for the removal of the President within thirty days after the removal, UNLESS:

- (i) within that period, the House expires or is dissolved; or
- (ii) before the removal, the House had expired or been dissolved, but a general election of members of the House had not taken place.

**The failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who was removed.**

## Section 63 - Operational Aspects

### *Section 63 - Acting President and Deputies*

Until the Parliament otherwise provides, the longest serving State Governor available shall act as President if the office of President falls vacant. A State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.

Until the Parliament otherwise provides, the Prime Minister may appoint the longest serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.

The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.

**(Five paragraphs of Section 63 follow the above but are not presented as they do not relate to the argument presented to the reader)**

When a President is sacked Section 63 provides that **“the longest serving State Governor available shall act as President.”** This is a legitimate answer to the need for providing for continuance of the presidential office.

In regards to the Acting President all the **“provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.”** Thus, the Acting President may be sacked using the power of Section 62 in the same manner as the original President.

That this is an unlikely case does not mean it is an impossible scenario. **The important element is that the constraint to the second sacking is only political; it is not**

**constitutional; it is a matter of political power, judgment and balances; it is not a question of law.**

## The Constitutional Crisis in Waiting

A constitution is not like normal government legislation that is designed to handle to immediate conditions of the nation. Rather it must be so designed to handle the possible; even the improbable, i.e. the extreme of the extreme. So let us ask one simple question.

What happens if the Prime Minister dismisses the State Governor who is acting as the President?

Here Section 63 provides that a “State Governor is **NOT** available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.” The words are simple and clear; this leads to the next obviously needed question.

Who becomes the ‘Acting President’ when the Acting President is dismissed?

## The Presidential Vacuum.

The answer is one word : No- One can. There a ‘presidential vacuum’ in the Constitution. Section 63 makes clear that a State Governor is not available.

“A State Governor is **NOT** available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.”

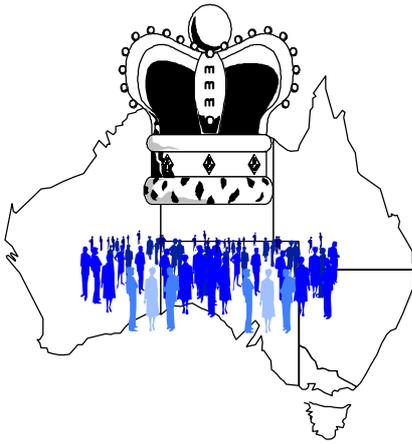
But, at the same time, the republican Constitution makes a State Governor the only constitutional entity who can be Acting President. After this the only thing that can be done is the selection and empowerment of a new President under Section 60.

HOWEVER the installation of a President in this manner is AFTER the report of the *Presidential Selection Committee* and AFTER the Prime Minister has instituted the Committee!! This, even normally, is of necessity a difficult and lengthy process. However the *Presidential Nominations Committee Act* 1999 Section 8 states,

“A Presidential Nomination Committee has 32 members appointed by the Prime Minister by giving written notice to the appointee.”

Thus this process is one that **MUST BE INSTIGATED BY THE PRIME MINISTER.**

## Existing Protection and Safety Lost



The ‘presidential vacuum’ would, in the interests of a stable democracy, call for more immediate action. However the only method to restart democracy is premised on the rogue Prime Minister, who has just sacked the President and Acting President, appointing the necessary *Presidential Nominations Committee*.

Under our present constitutional arrangement this possible *cascading* of tenure of the Head of State would be handled by the English Monarch. They would provide an independent, politically neutral, dignified operation to our constitutional woes.

We can expect that the Monarch would not to allow the second sacking or, if they did, they would still retain the power to reinstate an appropriate person, say an ex-High Court judge, whose sole role would be to restore the functioning of a stable democracy.

## And if there is no representatives ?

So, if we accept a republic, we trade the a secure, tested and stable system of a Constitutional Monarchy for the potential of a ‘presidential vacuum’. And it is even worse than the consequential effects, presented above, might suggest for our whole system of responsible government could be well destroyed in the process.

Let us image that the Prime Minister dismisses the President after the Parliament has been dissolved by the President. (The republicans cannot claim that his is unlikely for it is the scenario that is expressly provided for in Section 62.)

**What happens if a second sacking occurs in this situation?** Of course there is the ire and wrath of the citizens who may believe that responsible government is under threat. But the answer to the conceptual destruction of responsible government will not be in a philosophical determination of the citizens of Australia but rather it will be **STRUCTURALLY**, **CONSTITUTIONALLY** and **PERMANENTLY** bound in Australia’s supreme law.

## No, No, NO NEVER - NO MORE

Simply there is no way provided, in the *presidential vacuum*, with the Parliament dissolved to start up the Parliamentary engine, our guarantee of democracy, ever again - **EXCEPT WITH THE PERMISSION AND ASSISTANCE OF THE ROGUE PRIME MINISTER.**

The proroguing of Parliament, i.e. the bringing of all the elected members together can only be done under the power of the President. (Section 5 - *Australian Constitution*) But,

### **THERE IS NO PRESIDENT**

- A. There is no power in the Constitution, after the second sacking, to put in place an Acting President.
- B. The Rouge Prime Minister may not install a *Presidential Nominations Committee*. In this event there will never be a President again.

**AND THUS THERE CAN NEVER BE A PARLIAMENT EVER AGAIN. There is no President to prorogue the Parliament into being!**

### **History Repeats Itself**

So even if, by dubious political processes, an election is called and the representatives selected they can never be placed into the Parliament. Such power exists only in the President who no longer exists.

#### **CAUTIONARY NOTE**

THE READER IS CAUTIONED TO REMEMBER THAT HERE WE ARE DISCUSSING A SPECIFIC SITUATION. **THE DISMISSAL OF THE ACTING PRESIDENT WHEN THE PARLIAMENT IS DISSOLVED.**

The extremes of the discussion are somewhat academic for at these stages there hardly likely to be a *Rule of Law* in operational effect.

It is a situation very reminiscent of the constitutional hurdles in England in 1688. Here James II continuing legal ownership of the throne provided a constitutional dilemma. Firstly there could be no Parliament without the King's *command and his presence* but the King had departed the country. Secondly the King had to be removed

from the throne in law; but how? <sup>1</sup>

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<sup>1</sup> This will be very similar to the events of 1688 when the *Bill of Rights* was proclaimed in England. James II had left England: but, at law, he had not left the throne. A simple placement of William I, and Mary, on the throne inherently was constitutionally flawed in light of James II continuing legal tenure to the throne.

The result was to be a bootstrap process; with time meetings grew in numbers. With each meeting confidence grew; the physiological equipment, required to confront the formidable constitutional challenge that lay before them, was prepared by the Legislature.

Thus E. Neville Williams (*The Eighteenth - Century Constitution 1688- 1815 Documents and Commentary* The syndics of the Cambridge University Press London 1960 at 2) appropriately, describes the grouping of parliamentarians after this as a "convention" and NOT a "Parliament" which "proceeded to work out formulae which would decently cover the unpleasant rents in the fabric of the constitution. The first task was no simple one, for continuity had been broken in the two chief organs of government: the king had fled, and had burned many of the writs for the calling of parliament. **It was now a question of stretching theory till it covered facts ."**

## Prime Minister for President

Can the rouge Prime Minister make himself President ? or Acting President ? Strictly speaking the answer is NO.

BUT the necessity of the situation will mean that the question will probably be answered politically and not legally. A government is required to run the country; note the looseness of the words in Section 60 (Selection of President) which provides for the selection process of the President. “The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.”

# WHO DESIGNED THIS MONSTER AND WHY ???

## Words Worth Repeating

(AT THIS STAGE WORDS ARE REPEATED FROM A PREVIOUS NATIONAL WATCHMAN CONSTITUTIONAL UPDATE. Here it was said that,

“ **T**he hidden reality of Section 70 A, Section 62 and Section 59<sup>2</sup> was the creation of a new Constitution. The end result is that there is a new sovereign power to replace the Monarchy. **THE NEW SOVEREIGN POWER IS THE PARLIAMENT.**

It will take time for this change to develop but what is important is that there is no constitutional safeguard to stop this fundamental transfer of sovereignty. There is rather a *constitutional crisis in waiting*.

The danger is that, when the full potentiality of change is completed, the sovereign power of the nation and the law making machine will reside in one constitutional entity, i.e. the Parliament. **AT IT EXTREME IT WILL REST IN A SINGLE PERSON, I.E. THE PRIME MINISTER.**

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<sup>2</sup> A. Prerogative and Reserve powers become subject to and modifiable by the Parliament (Section 70 A).  
B. The Head of State can be removed at any time by the Prime Minister without consultation with Cabinet, the Senate or the House of Representatives (Section 62).  
C. The President **MUST** act on the advice of the Prime Minister or his Ministers. There is no independent EXECUTIVE discretion (Section 59).

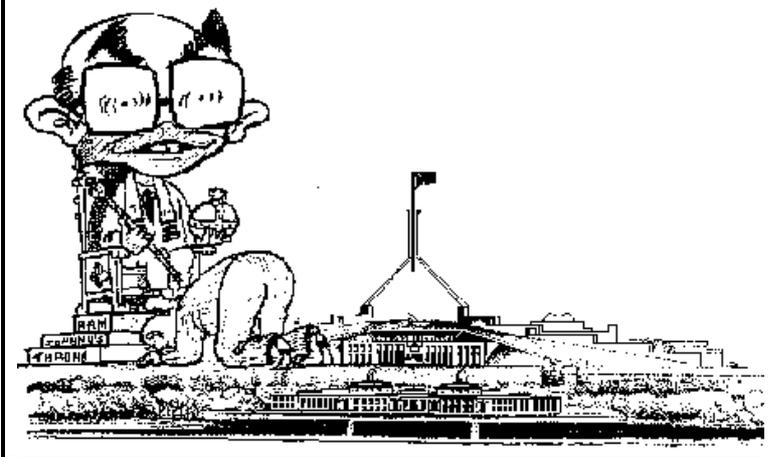
## The Word Game

With this understanding one might say that *the President is only the President for the time being*. There will come a time when the true sovereign, as created by the republic's Constitution, will announce themselves.

**“Aahh! The REPUBLICAN THRONE. Now I can sack this Puppet President without notice.**

**Turnbull's model has given me, EL PRESIDENTE HOWARD, the powers of the Governor General as well as the powers of the Prime Minister.**

**HA! I am like God. STRUCTURALLY, CONSTITUTIONALLY and PERMANENTLY bound in Australia's supreme law. Not bad for a Monarchist, eh !”**



Constitutions are only words. There is no word that is not important. The worst possible analysis that can be put on the scenario provided is that there are those who understand the true meaning, nature and intent of the words that they have inserted in the proposed Constitution. **They have planned the constitutional takeover of Australia and seek its ratification by the Australian people.**

Interestingly, there is a hint of such a possible agenda in the republic's Constitution in the definition for President (Section 127). As with all important changes it came at the last minutes when the Bill went to the Senate. This was on the last possible day; the Bill came back

with the following important definition added. "[The President means the President for the time being](#)". The reading of this change was endorsed by all major parties. The total debate on these words of warning are footnoted below.<sup>3</sup>

<sup>3</sup> Page 7316 SENATE HANSARD Wednesday, 11 August 1999

**Senator ELLISON** (Western Australia— Special Minister of State) (6.06 p.m.)—I move: (2) Schedule 2, item 41, page 13 (after line 14), after the definition of *The original States*, insert: *The President* means the President for the time being.

This amendment is in relation to the tenure of office holders. The term 'President' would be defined in proposed section 127 to mean the President from time to time. Proposed section 63 would provide that provisions relating to the President extend and apply to any person acting as the President. Together these sections would mirror the current operation of the first part of section 4 of the Constitution and put beyond doubt that persons holding office during the pleasure of the President under the Constitution do not cease to hold office on the expiration of the term of a President or an Acting President. The government submits that this would enhance the technical operation of the bill. I commend the amendment to the chamber.

**Senator STOTT DESPOJA** (South Australia— Deputy Leader of the Australian Democrats) (6.07 p.m.)—The Democrats will be supporting this machinery provision, if you like. I am just wondering why 'for the time being' was chosen rather than acting or serving.

**Senator ELLISON** (Western Australia— Special Minister of State) (6.08 p.m.)—It is a drafting point. 'For the time being' is a common expression used which gives an office or some situation an ongoing nature. If you said specifically 'the President or Acting President', that is always rather specific, and I

## The Republic's Law made Simple

Remember the words introducing Section 70 A, “Until the Parliament otherwise provides”. These allow the Parliament to vary the Prerogatives at its discretion, at any time it wishes. Add to this that Section 59 that the President must act on the advise of the Prime Minister and all independence of the position of Head of State is no more than an illusion. And Section 62 says that the Prime Minister can dismiss the President at any time !! The republic's law is simply the following,

**“Ensure that the President's decisions are controlled by his Ministers, let a the Prime Minister sack the President on the spot but specify that he does not have to be replaced and allow the Parliament to remove all of the powers of the President”.**

## The Watchman's Final Comment

That such consequential crises are unlikely is not an answer. Constitutions must exist over decades, generations and centuries. They must be able to constrain power at the limits of abuse. This the republican constitution cannot do!

When an Acting President is dismissed by the Prime Minister a ‘presidential vacuum’ is created with no manner of constitutional resolution possible. Situations, not unreasonable, exist where, with no President in office, there is no manner for the people or the Parliament to reinstate a install an independent, politically neutral President.

Simply stated, in these situations, the republican democratic engine does not come with a starter motor! At the extreme the proposed changes can be said to allow (if they exist through inadvertence) or create (if the exist through conspiracy) a constitutional dictatorship.

The kindest thought and perspective that can be placed on all this is to say that the structure of the constitution, its power flows, checks and balances do not seem well thought out. **But should we adopt a generous attitude to those who have presented us with this debacle when we could end up with a Parliament where there is no House of Representative, no Senate, no President and only a Prime Minister is left?**

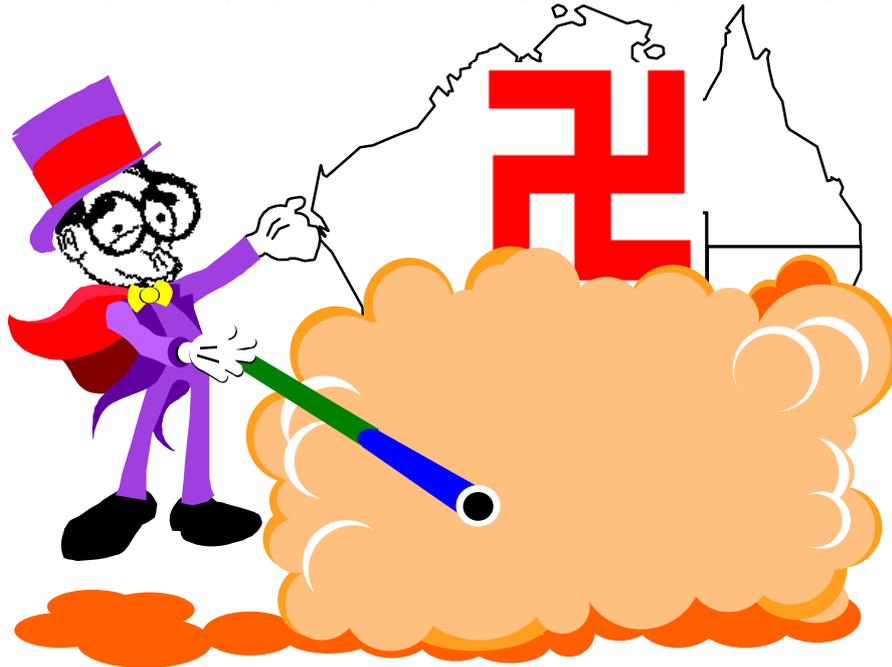


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think that really the phrase that the government has adopted is one that is more widely understood. I think that really covers it adequately. It is simply a drafting aspect.

**Senator BOLKUS** (South Australia) (6.09 p.m.)—The opposition supports this minor amendment. Amendment agreed to.

**PRESTO**



**IT ALL HAPPENS ON NOVEMBER 06.  
THE REPUBLIC SEALS THE FATE OF  
AUSTRALIA . AND THERE WILL BE**

**NO GOING BACK**