

You Take the Low Road, and I'll Take High Road...

Will Scottish Independence cause an Australian Republic?

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COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 2

Act to extend to the Queen's successors

The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SCHEDULE

OATH

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

SO HELP ME GOD!

AFFIRMATION

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE: The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.)

The Scottish Question

I have long wondered how an Australian Republic may come about without the need to be divisive to our culture and social fabric. It is a challenge to change our Constitution and the

1999 referendum on the question of a republic showed that there are still so many ways of actually drafting a republican constitution. Desires for change are one thing; the need for change is another. However, what if the need came about by virtue of we Australians not doing anything much at all? Is it possible that such a momentous change could arise within a short time and make us revisit the issue of a republic by default?

This article represents no more than my thoughts as an intellectual exercise and without the benefit of any debate, so these ideas may possibly be wrong (a conclusion I would resist with some little force yet). Nevertheless, what if the Crown of the "United Kingdom of Great Britain and Northern Ireland" no longer exists for Australian Constitutional purposes?

Scotland seems to be proposing that very step.

The Scottish Government will hold a referendum of the Scottish electorate on 18 September 2014 on the issue of independence for Scotland from the United Kingdom of Great Britain and Northern Ireland. The population of Scotland is some 5.3 million people. The hurdles being faced at the referendum are not inconsiderable.

Alex Salmond, First Minister of Scotland and leader of the Scottish National Party (SNP), proposes that Scots will be asked: "Should

Scotland be an independent country?"

The Scottish Government has produced a comprehensive guide to an independent Scotland called "Scotland's Future" which runs to 650 pages. The Guide sets out the facts and figures and tries to provide information on:

- How Scotland can afford to become independent.
- Scotland's economic strengths and how it can make the most of its potential.
- How independence will help ensure that everyone in Scotland gets a fair deal.
- The ways in which independence will strengthen Scotland's democracy.
- An independent Scotland's place in the world.

The SNP argues that an independent Parliament elected entirely by people in Scotland will replace the current Westminster system. Under that system, elected representatives from Scotland make up just 59 Scottish MPs out of 650 members of the House of Commons (nine per cent); the House of Lords is wholly unelected. If Scotland votes 'Yes' in the referendum, the Scottish Government will negotiate with Westminster and the European Union so that Scotland becomes independent on 24 March 2016. Scotland will become the 29th member of the European Union and the 194th member of the United Nations and join NATO in its own right and be a unicameral parliament.

At the first independent election, on 5 May 2016, voters will have the chance to choose a government and policies for Scotland's future. Importantly, the apportionment of the national debt of the United Kingdom - expected to peak at 86 per cent of UK GDP - almost £1.6 trillion, in 2016/17 - will be negotiated and agreed as part of the overall settlement on assets and liabilities and split. Using 1980 as the base year, Scotland's historic share of the UK national debt in 2016/17 is projected to be approximately £100 billion. This

is equivalent to 55 per cent of Scottish GDP.

On independence in 2016, the Queen is to be head of state. An independent Scotland will become the 17th member of the Commonwealth to share the same monarch. It is noted here however, that in each of those other Commonwealth States the Crown is represented by a Governor-General. This is not suggested for Scotland.

Creation of the United Kingdom

How did the 'United Kingdom' come about?

The Kingdom of England was formally established by 927 AD by King Athelstan (with the process of unification taking a further 100 years to complete). The Norman invasion was launched in 1066 and William was crowned king on 25 December 1066. Edward I conquered Wales in 1282. Wales was formally integrated with the Kingdom of England in 1535.

The Kingdom of Scotland was established in the 9th century and was ruled by the House of Stuart from 1371 up until 1707.

The Kingdom of Ireland was created by an act of the Irish Parliament in 1541, replacing the Lordship of Ireland, which had existed since 1171. The Crown of Ireland was established as a personal union (rather than dynastic) between the English and Irish crowns, with the effect that whoever was King of England was to be King of Ireland.

When Elizabeth I of England died in 1603 the heir to the English Throne was King James VI of Scotland. Generally called the 'Union of the Crowns', this dynastic union was in place from 1603 until 1653 (when the monarchy was officially abolished) and again from 1659 until the two nations were united in 1707. However, at all times England and Scotland continued to be sovereign states, despite sharing a monarch, until the Acts of Union in 1707.



“So it may now come to pass that due to matters evolving in Scotland and Westminster that Australian Constitutional Monarchists and Australian Republicans would be best served by renewing the debate on our future constitutional framework and with some urgency”

With the passing of the Acts of Union 1707 of the English and Scottish Parliaments the independence of the kingdoms of England and Scotland came to an end on 1 May 1707 when they merged the kingdoms of England and Scotland into the 'Kingdom of Great Britain'. This agreement is known as the 'Union of the Parliaments'. This entity also created a British Crown. The effect was to also create a personal union between the Crown of Ireland and the British Crown.

By the terms of the Act of Union 1800, the Kingdom of Ireland merged with the Kingdom of Great Britain

and created the sovereign state of the "United Kingdom of Great Britain and Ireland".

This was a time of the British Empire, on which, it was said, the sun never set.

It was under this single Crown of a sovereign United Kingdom that the people of the Original States of Australia agreed to federate in 1900 under our Constitution.

Yet shortly thereafter, following the establishment of the Irish Free State in 1922, Northern Ireland (which had been created earlier by Westminster in the Government of Ireland Act 1920, partitioning Northern Ireland

from Southern Ireland) exercised its option of withdrawing from the Irish Free State within one month of the treaty coming into effect. Having left the United Kingdom, Northern Ireland re-joined the United Kingdom within the month. On this occurring the remaining constituent parts of the United Kingdom were renamed the "United Kingdom of Great Britain and Northern Ireland". The Irish Free State remained a 'dominion' and part of the Empire until 1949, when it became the Republic of Ireland and withdrew from the Commonwealth.

Currently, the United Kingdom of Great Britain and Northern Ireland is constituted by four countries: England, Northern Ireland, Scotland and Wales. It is the 'United Kingdom of Great Britain and Northern Ireland' itself that is the sovereign state under international law (not its constituent united parts).

'Yes' to the Referendum?

The legality of Scotland, as a constituent country of the United Kingdom, attaining de facto independence (in the same manner as the origins of the Irish Republic) or declaring unilateral independence outside the framework of British constitutional convention, is uncertain. The referendum being put in 2014 seems to allay fears of such a declaration and works upon the understanding of further negotiation with Westminster in the event of a 'Yes' vote.

It is recognised that the United Nations Charter enshrines the right of peoples to self-determination, and the Universal Declaration of Human Rights also guarantees peoples' right to change nationality. The United Kingdom is a signatory to both documents.

How Scotland may achieve independence may be assisted by the experience of the Quebec Secession movement in Canada in the 1990s. In 1998 an advisory opinion of the Supreme Court of Canada was provided regarding the

legality, under both Canadian and international law, of a unilateral secession of Quebec from Canada. Its opinion presents serious issues for the Scottish independence movement to accommodate.

That Court provided an advisory opinion on two specific questions which, in essence, asked whether Quebec had a right to secede under Canadian Law and / or under International Law.

Whilst deciding that under the Canadian Constitution unilateral secession was not legal, the Court considered that should a referendum decide in favour of independence, the rest of Canada would have no basis to deny the right of the government of Quebec to pursue secession. The Court strongly opined that negotiations would have to follow to define the terms under which Quebec would gain independence, should it maintain that goal. This involved four interrelated and equally important principles or values: federalism, democracy, constitutionalism and the rule of law, and protection of Minorities.

Importantly, the Court determined that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state. The Court stated that the right of a people to self-determination was expected to be exercised within the framework of existing states, by negotiation, for example. Such a right could only be exercised unilaterally under certain circumstances, under current international law. In its opinion under international law, the right to secede was meant for peoples under a colonial rule or foreign occupation. Otherwise, so long as a people have the meaningful exercise of its right to self-determination within an existing nation state, there is no right to secede unilaterally.

So if the referendum passes, what happens when there is no longer a single 'Crown of the United Kingdom of Great Britain and Northern Ireland' (as it is now called), or, more

particularly, when there is arguably no longer a 'United Kingdom' in existence?

Will Scottish independence create one new state out of a continuing state of the current United Kingdom, being the Kingdom of Scotland (possibly so-named); or two new states: the Kingdom of Scotland and the Kingdom of England (as it resumes its historic name)?

If the factual and legal result is the creation of two new states, Scotland and the rest of the old United Kingdom, this will have consequences for membership of the European Union, NATO, international bodies and very likely, Australia and its States.

Some 'British' commentators (in the sense of the term 'Great Britain' which includes the Scots) argue that an independent Scotland is the one that becomes a new state. However, such a stance appears to ignore the realities of history and how the sovereign state of the 'United Kingdom' was itself created.

Clearly, Scotland has many legal and political issues to address to achieve its desired outcome.

Consequences for Australia?

Can Scottish independence impact on Australia's constitutional monarchical system of government and polity and its people who by our own Preamble to our Constitution, agreed to unite in one indissoluble Federal Commonwealth under "the Crown of the United Kingdom of Great Britain and Ireland" (which I shall refer to as the 'Original Crown')?

Arguably, it seems likely that it does.

By section 2 of the *Commonwealth of Australia Constitution Act* 1900 (UK) the provisions of the Constitution referring to "the Queen" extend to "Her Majesty's heirs and successors in the sovereignty of the *United Kingdom*".

That is, Australia's constitutional monarch is defined by reference to a continuing legal entity being the

'United Kingdom of Great Britain and Northern Ireland', not of a disunited Kingdom or some other sovereign nation as it may become.

Further, the Australian Constitution is unequivocal in that the legislative power of the Commonwealth consists of: the Queen (of the Original Crown), a Senate and the House of Representatives.

Under the Constitution it is this Queen (of the Original Crown) who has a representative in the Governor-General. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The oath of office prescribed in the Constitution is to the Original Crown with the name of the King or Queen of the United Kingdom of Great Britain and (now) Northern Ireland for the time being to be substituted from time to time.

So what may happen if there is a formal disuniting of the United Kingdom so that the Original Crown is no longer legally that of the 'United Kingdom of Great Britain and Northern Ireland'?

Historically after Australia adopted the *Statute of Westminster* in 1942 any alteration in the law touching the Succession to the Throne of the United Kingdom of Great Britain and Northern Ireland required the assent of the Parliament of Australia and the Parliament of the United Kingdom. Further, under this Act no law was thereafter to be made by the Parliament of the United Kingdom to extend to Australia as part of the law of Australia otherwise than at the request and with the consent of Australia.

The *Royal Styles and Titles Act* 1973 (Cth) of course did not change the sovereignty of the United Kingdom but rather assented to the style and title of the Queen being changed to "Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth".

The *Australia Acts* 1986 of the United Kingdom and the Commonwealth, respectively, formally ended all power of the Parliament at Westminster to legislate with effect in Australia "as part of the law of" the Commonwealth, a State or a Territory. Section 1 respectively provides:

Termination of power of Parliament of United Kingdom to legislate for Australia.

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

In *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 the High Court determined that the *Australia Act* (in its two versions), together with the State requesting and consenting to legislation, amounted to establishing Australian independence as at the date when the *Australia Act* (Cth) came into operation - on 3 March 1986.

However, if Scotland achieves independence the Parliament at Westminster will need to pass legislation to facilitate a matter touching on the succession to the Original Crown of a new fashioned, yet fundamentally altered United Kingdom (as it must inevitably become).

Must it approach the Parliament of Australia to consent to this? After all, it is likely to have an effect on the law of Australia. The answer is legally - no, as the *Australia Acts* make this clear. However, it is arguable, by the likely abrogation of the Union Act of 1707 that the continued Original Crown, being "in the sovereignty of the United Kingdom", for all purposes, will disappear. It may be logically extrapolated that Great Britain without Scotland is not Great Britain at all - but merely "Britain" (comprising England, Wales and Northern Ireland) and a separate Scotland.

I suggest that an Australian constitutional vacuum may arguably exist, which must then be filled as the legislative power of the Commonwealth currently requires the Original Crown.

The *Australia Act* is not likely to provide a solution as recourse to it to fill the vacuum would be an exercise seeking to refashion the identity of the Original Crown as defined under our Constitution and this is likely to be an unlawful amendment of the Constitution.

Therefore, it is likely that a referendum under the Constitution will be the only certain way to ensure the indissoluble federation continues on a lawful basis.

Yet what is the form of the continuing federation to take? Republican or some form of altered monarchical framework - English, Scottish or, perhaps, Danish (after all their next Queen will be an Australian)?

Whatever is to happen, it is no longer a matter for Australians to simply await a reargation of the republic debate after the passing of Queen Elizabeth. She may shortly not even be Queen of the 'United Kingdom of Great Britain and Northern Ireland' - nor, possibly, the 'Queen of Australia'.

So it may now come to pass that due to matters evolving in Scotland and Westminster that Australian Constitutional Monarchists and Australian Republicans would be best served by renewing the debate on our future constitutional framework and with some urgency.

Where does Australia go in this dynamic century and beyond?

An independent Scotland may yet give cause to the creation of an Australian Republic or even possibly our own monarchy (which would surely bring a smile to old William Charles Wentworth). ■

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