

Democracy in Australia

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In 1989, the American scholar Francis Fukuyama wrote a famous essay called *The End of History?*. This is the way he subsequently summarised the argument in the essay.

I argued that a remarkable consensus concerning the legitimacy of liberal democracy as a system of government had emerged throughout the world over the past few years, as it conquered rival ideologies like hereditary monarchy, fascism, and most recently communism. More than that, however, I argued that liberal democracy may constitute the “end point of mankind’s ideological evolution” and the “final form of human government”, and as such constituted the “end of history”. That is, while earlier forms of government were characterised by grave defects and irrationalities that led to their eventual collapse, liberal democracy was arguably free from such fundamental internal contradictions.

The original article excited great controversy. To clarify his argument and counter some of the criticism Fukuyama explained that his use of the term history was not history understood as the occurrence and sequence of events but “history understood as a single, coherent, evolutionary process, when taking into account the experience of all peoples in all times”.

The End of History? is a useful place to begin a discussion of democracy because it poses many important questions:

- To what extent can it be argued that the movement to establish democracies, understood as institutional arrangements in which all adults have the power to vote through free and fair competitive elections for governments of their

choice, has been a continuous evolutionary political process?

- To what extent is democracy the institutional arrangement to which citizens globally aspire?
- Are there other systems of government that may in particular circumstances be more appropriate than democracy?
- Is it not possible that in times of national crisis citizens in many societies, especially those lacking well established democratic traditions, will look to strong rather than to democratic government?
- Is it not the case that fledgling democracies are constantly vulnerable to attack from corrupt power seekers?

There is a plausible argument to support each of these propositions. From the time of Magna Carta (1215), when the English barons forced on King John a series of formal concessions, there has been a clearly evident increase in commitment to democratic ideals and their incorporation into formal constitutions and laws. Magna Carta includes a famous clause:

No freeman shall be arrested or imprisoned or disseised [wrongfully dispossessed of property] or outlawed or exiled or in any other way harmed. Nor will we [the king] proceed against him, or send others to do so, except according to the lawful sentence of his peers and according to the Common Law.

With some minor modifications Magna Carta was later adopted by the English Parliament and proclaimed by subsequent English monarchs.

Over succeeding centuries the English Parliament progressively gained in authority. Following a tumultuous period under the Stuart kings, William of Orange and his consort Mary were invited to become the king and queen of England. But this offer was in effect made subject to the new monarchs' agreement to a Declaration of Rights, which was later incorporated in the *Bill of Rights* (1689). Among its other provisions, the *Bill of Rights* stipulated:

- that the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal
- that levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament is illegal
- that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law
- that election of members of parliament ought to be free
- that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament
- and that for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be frequently held.

From this time on the supremacy of the parliament was never seriously challenged.

A century later, in 1791, ten amendments, together forming the US *Bill of Rights*, were added to the American Constitution of 1788. The 5th Amendment contained a clause “No person shall ... be deprived of life, liberty, or property, without due process of law”. This was a refined and extended version of the Magna Carta clause cited above. The Declaration of Independence which preceded the drafting of the Constitution contained an even more striking statement

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

In the 19th century, democratic forms of government were slowly adopted in other countries, many in former English

colonies. The great acceleration of development took place during the last 50 years of the 20th century. During that time, democracies of one form or another were progressively established in country after country. Currently there are some 120 democracies in the world.

The history of the 20th century also tells us an alternative story. In the first half of the century many fledgling democracies collapsed. The hardship caused by the 1929 Great Depression caused much disillusionment and weakened democratic governments. This led to the rise of fascist regimes in Europe and South America. Communist states also came into being, beginning with that in USSR following the Russian revolution in 1917. While the USSR communist regime has subsequently collapsed and fragmented, the Chinese government has proved much more flexible in its economic and domestic management. There are few signs at the moment of a transformation from communist to democratic rule in China and Vietnam.

Regularly democracies are threatened from within and without. This is despite the fact that in the last 50 years there have been no major economic depressions; it has been a period of sustained global economic growth. Serious conflicts have been regionally confined so that fragile democracies have not been put under serious pressure. How many would be able to survive a worldwide conflict, a major depression or a significant environmental catastrophe such as global warming is a debatable question.

What Kind of Democracy Should We Seek?

What does Fukuyama mean when he refers to liberal democracy?

Democracy comes in many forms. There are minimalist and much more expansive definitions of democracy. An example of a minimalist definition is that of Seymour Martin Lipset and Jason Lakin:

An institutional arrangement in which all adults have the power to vote through free and fair competitive elections for their chief executive and national legislature.

Such a definition embraces representative democracy, meaning the selection of the government by the people, and parliamentary democracy, where governments are appointed by parliamentary representatives. It is not, however, a full and adequate definition of liberal democracy, where the ability of the elected representatives to exercise decision-making power is subject to the rule of law, where the executive (the government) is subject to the will of the parliament, where there is an independent judiciary, where the rights and freedoms of individuals are protected by law, where political leaders are required to be accountable for their actions and where the rights of minorities are protected against discrimination exercised through the will of the majority. It does not include direct democracy where citizens participate in decision-making through the use of referendums as in countries such as Switzerland. Least of all does it embrace participatory democracy where there is active engagement of citizens in local decision-making and where there is a well established and strongly supported civil society actively engaged in political debates.

A more expansive definition of democracy would begin with the minimalist definition but would list a number of essential rights and liberties and checks and balances of the kind discussed above. These arrangements would need to be underpinned by two important principles. The first is the rule of law. The rule of law requires that governments and individuals can only act in accordance with publicly known laws that are adopted and enforced in a manner consistent with well-established traditions, conventions and procedures. All citizens come within the scope of the law.

The second principle is the separation of powers between the legislature, the executive and the judiciary. The legislature (the parliament) has the power to make laws; the executive (the government) has the power to implement the law; and the judiciary (the legal system) has the power to interpret and administer the law. The parliament and the judiciary are fully independent of the government and of each other.

The Democratic Audit of Australia, Australia's pre-eminent research centre on democratic theory and practice, has set down four additional standards that need to be met in a properly functioning democracy. They are political equality, popular control of government, civil liberties and human rights, and high quality of public deliberation.

Democracy in Australia

Australia inherited its democratic traditions from the British Isles. The significance of that inheritance and the way that Australia eventually surpassed even the legal traditions that had been established by centuries of struggle in Britain is only dimly known to most Australians. In *Australia's Democracy* John Hirst notes that at the time of the arrival of the first fleet in 1788, every English man and woman had the same legal rights.

Their homes could not be invaded by the police, unless the police had a warrant from a court; if they were arrested they had to be put on trial in open court; and if they were to be punished severely they had to be found guilty by a jury. Everyone had the right to petition the king for mercy. Ordinary people knew their rights and were proud of them. ... Though the king could appoint the judges, he could not dismiss them. By insisting on the independence of the law and the legal rights of subjects the landowners had limited the power of the king. (Hirst pp 3 & 4)

Nevertheless Hirst points out that only one man in ten and no woman had the vote and furthermore that ownership of property was a condition of the right to vote.

These legal traditions and individual rights were carried by English people to the colonies which they established. Australia was not, however, like other colonies because it was initially a convict settlement. In England convicts did not enjoy the rights of other English people so it could well have been expected that the Australian convict settlements would be governed by military authority. But Thomas Townshend, Lord Sydney, then Home and Colonial Secretary, made a fateful determination that English law would apply in the new colony. By virtue of this decision "the law,

the traditional protector of English liberty did not have to be re-established in this oddball society; it was there from the start". It meant that people accused of crimes were presumed to be innocent until proved guilty, guilt or innocence was determined by judge and jury, witnesses were cross examined and if the evidence was questionable the charge was dropped. Remarkably it also allowed convicts to bring actions against free men or against each other. It is not without reason that Hirst describes Lord Sydney's decision as one of the most significant in Australia's history.

There was another tradition in English colonies and overseas settlements. It was that occupation of land owned by Indigenous people could only take place if there was a treaty entered into with them. When the English government sent the first fleet to New South Wales it decided that a treaty was unnecessary on the erroneous assumption that Aboriginal people as hunters and gatherers did not own their land. This assumption was a major influence in the treatment of Aboriginal people for the next two centuries. It was not until the High Court decision in the Mabo case in 1992 that the assumption of terra nullius (land belonging to no-one) was overturned.

Thus the first settlements in Australia were established with one very fortunate decision about the rule and application of the law and one very unfortunate decision about Indigenous rights.

Much of the early part of the following century was occupied with demands for self-government. In 1842 the British government set up a new partly elected Legislative Council in New South Wales, which at the time covered the whole of the eastern seaboard of Australia including areas now part of Victoria and Queensland. Two thirds of the members were elected and the balance appointed. In 1850 South Australia and Tasmania were given partly elected councils. It was also decided that Victoria would be separated from New South Wales and be given a partly elected council. Lord Grey, the minister for the colonies, remained strongly opposed to self-government but in 1852 his government lost office. The previous year gold had been discovered. The new minister announced that the each of the colonies, other than

Western Australia which had not asked for it, would become self governing. Notably at about this time South Australia became the first country in the British Empire to separate Church from State.

The constitutions drawn up by the legislative councils in each of the colonies matched the structure in Britain, an elected lower house, the Legislative Assembly and an upper house, the Legislative Council. The question facing Australian settlers was what form the upper house should take since there was no Australian aristocracy similar to the English aristocracy from which the House of Lords was drawn. An attempt was made in New South Wales to create colonial lords who could form an upper house. This proposal was effectively ridiculed by Daniel Deniehy as the creation of a bunyip aristocracy and eventually deleted from the constitution sent to the Privy Council in England for ratification. There was no such movement in Victoria, Tasmania and South Australia; elected upper houses formed part of the constitutions submitted for ratification by the British Parliament.

The next struggle was to extend the franchise to those excluded from the right to vote. Closely associated with the struggle for electoral reform was the land question. The liberals and democrats wanted to increase popular power so that they could rewrite the land laws to allow ordinary people to have access to land. The first achievement was the introduction in Victoria in 1856 of the modern form of the secret ballot. The design of the system, for which Henry Chapman was responsible, required some ingenuity to make sure that voters could not be identified from ballot papers and that copying of ballot papers and thus multiple voting could not take place. Chapman's system was widely copied. It became known as the "Australian ballot".

In 1856, South Australia gave the vote to all men by eliminating professional and property qualifications. It was not, however, until the 1880s that the movement towards a real democracy began. In 1894, South Australia gave the vote to women. In the 1890s, the colonies also adopted the principle of one vote per person. These were initiatives that placed the Australian colonies at the forefront of democratic innovation. It was also in the 1890s

that the Labor Party was formed. Although, according to Hirst, it was not the first political party in Australia, it quickly developed new levels of organisation and discipline; other parties at the time were more like movements sharing the same broad ideas. The Labor Party was in this way a forerunner of the party political system that we enjoy today. Two other initiatives deserve mention. The first was payment for members of parliament; it enabled working men to devote themselves to politics and made possible the development of a more professional political elite. It was also in this period that the principle that the upper house should not refuse supply bills submitted by the lower house was first established as a means of ensuring that governments could continue to function without threat of political paralysis.

In the early 1890s the movement for a democratic commonwealth led by Henry Parkes began to take shape. It eventually led to the creation of a national government and, in 1901, the Australian nation came into being. In the new Constitution, Aboriginal and Torres Strait Islander people were excluded from the census. Edmund Barton, the first Prime Minister, had planned that the vote should be given to all men and women, including Aboriginal people. There was objection from Queensland and Western Australia and the proposal was shelved.

Under the Australian Constitution, Aboriginal people did, however, have the legal right to vote in Australian Commonwealth elections if their State granted them that right. From the time of Federation this meant that all Aboriginal people outside Queensland and Western Australia technically had a full legal right to vote but in practice they continued to be systematically excluded from voting. It took High Court challenges and several pieces of legislation, culminating in legislation passed in 1962, to confirm the right of all Aboriginal people to vote in Commonwealth elections.

The Federal Constitution

The balance of this chapter concentrates on the federal political system. In Australia's federal system, established in 1901, there are

two chambers, the House of Representatives and the Senate. The House of Representatives is modelled on the United Kingdom House of Commons, while the Senate is modelled on the United States Senate. Governments are formed by majorities in the lower house, the House of Representatives. The Senate is a house of review.

The method of election to the two houses differs. Members of Parliament are elected to the House of Representatives in individual electorates. The benefit of this system is that it leads to clear-cut election results and strong government. The limitation of the system is that it does not accurately represent voter preferences. The system of election to the Senate is different. Each state has a fixed number of Senate seats which are not determined by the size of the population alone but by the requirements of equality of Senate representation between the states as determined in the Constitution. The strength of this system is that it more accurately reflects public opinion and allows members of smaller parties to gain Senate seats. Its weakness is that it is biased in favour of smaller states. This combination of voting systems, nevertheless, has many combined benefits. It is a much fairer system than those operating in many other countries.

The Constitution provides the structure for Australia's political system. It establishes the Commonwealth Parliament (the Senate and the House of Representatives) as the legislative branch of government. It specifies the powers of the Parliament and the broad structure of executive powers. It establishes a judiciary with powers vested in the High Court. It also acknowledges the continuing role of the states, restricted only by the powers vested in the Commonwealth.

The Constitution is, however, silent about many aspects of the current system of government. The interpretations of the Constitution have developed through judgments by the High Court of Australia. The Australian Constitution furthermore includes a minimum set of citizen rights. They are: the right to trial by jury; the right to freedom of religion; the right to just compensation; and the right to freedom from discrimination in

one state when a resident of another state. The High Court has also found that there is an implied but limited right to freedom of speech. Notably the Constitution does not include a bill of rights.

One other distinctive aspect of the Australian political system is compulsory voting. (It is not strictly compulsory voting since there is full opportunity to cast an invalid vote. Few people, however, do.). Thirty-two countries have some form of compulsory voting. In the 2004 election, voter turnout in Australia was estimated to be among the highest in the world: 94.3% for the House of Representatives and 94.82% for the Senate. In the United States, where voting is not compulsory and there are other limiting institutional and cultural factors, voter turnout commonly hovers around 50%.

This overall system has for the most part served Australia well. Most of Australia's main democratic institutions remain robust today, but because so many of them rely on unwritten conventions, they are vulnerable to attack by determined executive efforts to limit democratic freedoms and to reduce political accountability. Although compulsory voting, for example, represents a valued principle of universal suffrage, it could be abolished overnight by a government with a majority in both houses. This is because there is no reference to it in the Constitution.

Australia's Political System

How does Australia's political system rate against the underlying principles of the rule of law and the separation of powers discussed earlier in the chapter and the four standards of political equality, popular control, the protection of human rights and the quality of public debate set down by the Democratic Audit of Australia?

The rule of law. Martin Krygier, Professor of Law at the University of New South Wales, argues that there are four essential principles underlying the rule of law. They are universality of the scope of the law, clarity for all citizens, supportive and culturally appropriate institutions and an appropriate legal culture. Australia's legal and political system meets these criteria

handsomely. It is nevertheless important to recognise that the rule of law significantly depends on legal precedent and unwritten conventions for its active maintenance. Hence the importance of supportive institutions such as auditor-general and ombudsmen offices, anti-corruption commissions and of legislation such as charters or bills of rights.

The separation of powers. The separation of powers is a significant feature of Australia's polity. The parliament, the executive (government) and the judiciary all have clearly distinguishable and independent roles. In the last two decades there has, however, been a significant growth of executive power. This is threatening the independence of the parliament and in some instances even that of the judiciary.

Political equality. The right to vote is freely exercised in Australia. It is, however, contingent on a number of factors. The first is enrolment. If limitations are placed on new enrolments or on re-enrolments as has recently occurred with the passage of a recent Howard Government amendment to the *Electoral Act*, large numbers of people can be debarred from voting. A second is the design of ballot papers. The current design of ballot papers for the Senate can be very confusing leaving voters who choose to follow party tickets with little idea to whom their second, third and fourth preferences may be directed. Furthermore, the right to vote and electoral equality (for example, one vote, one value) are not guaranteed in the Australian Constitution nor have they been incorporated into federal law. There may be an implied right in the Constitution but this is a matter of debate. Since the introduction of their respective charters of human rights, the right to vote and electoral equality have, however, been incorporated into Australian Capital Territory and Victorian legislation.

Popular control. Popular control is primarily exercised through the ballot box. Notwithstanding the comments made above, the Australian electoral system is in nearly all respects a free and fair one. Once elected, the members of the House of Representatives and Senators, as representatives of the people, are charged with

acting in the interest of the people. The scope of an elected government to act of its own free will, contrary to the wishes of the majority of its citizenry, is influenced by three considerations. The first is the limitation placed on government by the Constitution. Certain actions, especially changes to the Constitution, can only be made following a referendum involving a popular vote. The second is the degree to which the Government controls the Senate. The third, the question of electoral mandate, is not so clear cut. Governments claim the right to implement policies forming part of their electoral platforms and for the most part it is accepted that they have this right. It is also generally accepted that governments must be free to initiate new policies. If, however, the policies are contentious, the charge that the government has exceeded its mandate is regularly heard. The verdict is largely left to the people. A government can be severely punished for an unpopular policy not forming part of its electoral platform. This was the case with Work Choices in the 2007 election.

The protection of human rights. One of the great achievements of the United Nations following the conclusion of the second world war was the unanimous adoption in 1948 of the Universal Declaration of Human Rights. Today it has the distinction of being the most translated document in the world. Among its many provisions, the Declaration sets out that:

- everyone has the right to life, liberty and security of person
- no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- no-one shall be subjected to arbitrary arrest, detention or exile
- everyone has the right to freedom of opinion and expression.

While the Declaration and its Covenants form part of customary international law, they cannot be enforced in Australian courts. This is because the Covenants have not been incorporated into Australian law.

There are now charters or bills of rights incorporating these rights in all major common law countries. Slowly Australia is also following suit. As already mentioned, there are now enacted charters or bills in Victoria and the Australian Capital Territory and public inquiries examining public attitudes to charters or bills in Western Australia and Tasmania. One of the justifications of a charter of rights is to protect citizens from arbitrary, racist and unjust treatment. Another is to set out principles for the practice of government and to give them statutory force.

The quality of public debate. Freedom of speech, freedom of information, and freedom of the press determine the quality of public debate. Freedom of speech refers to the right to speak freely without censorship (defamation, libel and slander are excluded). Freedom of information and freedom of the press ensure that citizens have access to public information, including governmental documents. In May 2007, a campaign called “Australia’s Right to Know” was launched by eight leading media organisations. At the launch of the campaign, News Ltd Chairman John Hartigan noted that Australia now lags well behind most major democracies in press freedom; the latest worldwide press freedom index, compiled by the independent organisation Reporters Without Borders, ranked Australia 35th — equal with Bulgaria and behind nations such as Bolivia (16th) and South Korea (31st). The Right to Know Campaign commissioned former Independent Commission Against Corruption (ICAC) Commissioner, Irene Moss, to conduct an independent audit of free speech in Australia. The Moss Report, released on 31 October 2007, found that free speech is being “whittled away by gradual and sometimes almost imperceptible degrees”. According to the audit, Australians are being denied information that should be made public and this is happening across all levels of government. The report concludes: “Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency”.

Key Issues Facing Democracy in Australia Today

Australians are proud of their country's democratic traditions but know little about them. They are largely unaware of the centuries-long struggles to bring democracies into being and to establish systems of law that respect the rights of individuals. They are little informed about the evolution of democracy in Australia. They are unaware of the constant threats to public accountability, transparency and democratic traditions. They pay little attention to the warning of Sir William Deane, former Governor General of Australia: "The strong and vibrant democracy we have inherited should never be taken for granted". Even Michelle Grattan, a political columnist highly respected for her balanced and insightful commentaries, was able to describe a joint intervention calling for higher levels of public accountability by former Labor Prime Minister Gough Whitlam and former Liberal Prime Minister Malcolm Fraser during the 2007 federal election as a "boutique issue".

It is not a boutique issue. It is a matter that goes to the heart of our nationhood, its democratic traditions, its transparency, the fairness of our political systems and the rights of individual citizens. Why should we all be concerned? There are four main reasons.

The Australian Constitution says nothing about many aspects of our current electoral, parliamentary and executive arrangements and contains a minimal set of citizen rights. Our political system therefore relies on unwritten conventions and is thus vulnerable to attack by determined governments in a period of unprecedented growth in executive power. A government with a majority in both houses can introduce and pass legislation with minimum debate. Where the conventions are not set out in legislation, governments can act at their will. Strengthening formal accountability rules and regulations is thus of great importance.

Second, there is increasing evidence that Australian have lost faith in their politicians and governments. Opinion poll after opinion poll has shown a significant decline in confidence in government and in the moral standards of members of parliament

over the past two decades. Restoring faith in democratic institutions is therefore an important challenge for Australia's political future.

Third, there has recently been significant erosion of democratic practices. Australia's formal democratic institutions remain robust but there have been many recent failures of public accountability. They include breaches of ministerial and parliamentary standards, restrictions on the powers of the Senate, silencing of dissent, limitations of freedom of speech, distortion of freedom of information procedures and the stacking of public offices. These accountability failures represent significant threats to democracy in Australia.

Fourth, other major democracies have in recent years been acting purposefully to strengthen public accountability and extend democratic practices. Australia once led the world in democratic innovations. Today, we have fallen far behind other countries such as the United Kingdom, the United States, Canada and New Zealand. Until very recently we have had an inadequate code of conduct for ministers and no restrictions on lobbying after ministers leave office. We still have no code of conduct for members of parliament, and no Parliamentary Standards Commissioner. All of these are common arrangements in other major democracies. Australia has no independent system for appointments to public offices such as are to be found in the United Kingdom and Canada. Australia alone among major countries in the English-speaking world has no national charter or bill of rights.

Fundamental to the argument in this chapter is that Australia should aspire to the highest possible standards of democratic life. We not only have to be constantly vigilant about the erosion of democratic practices but also fully aware of the initiatives being taken in other countries to strengthen democracy and extend public accountability.

More than anything we need to find ways of breathing life and excitement into democratic debates and education about democracy. The battles that were won in the name of legal rights and democracy have been some of the most dramatic and hard fought in the history of mankind.

In Australia democratic rights have also been hardly won. Many of the things we take for granted today as normal and unexceptional had to be fought for over many years. The further extension of those rights is just as stoutly resisted today. Telling these stories and dramatising these struggles might help young people better understand what has been achieved, why it is so precious and why continuing efforts are so sorely needed.

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