

Code Red for the Australian Constitution

By Laurie Kennedy

Most people know as much about the Australian Constitution and our system of laws as they do about the operation of computer viruses.

It's not surprising really, as both are complex sections of written (*or unwritten*) code that binds and control procedural systems operating on an 'if/then' basis.

The 'Code Red' worm targets the Internet Servers that distribute the users files. This type of viral attack has a two pronged impact as the legal owners of the system are denied the right to use their system in the way they see fit while the recipients of the dummy messages sent by the worm suffer from a 'denial of service' attack.

The latest version of 'Code Red' inserts a 'back door' into the server, which allows the perpetrators to regain control. Fortunately the 'back door' can be easily detected although the infected hard disk must be formatted before system integrity can be restored.

You might ask what has a computer virus got to do with the Australian Constitution?

Viruses like to inhabit the grey areas of any type of system whether they are biological, computer, political or even outside the scope of their own creators.

Just for a start they both operate under 'if/then' type rule based procedures and if anything the Australian Constitution is at the pinnacle of a large procedural system in which all citizens have a stake.

Just like the hard disk format required to remove the Code Red 'back door', the will of the Australian people is enshrined in the Australian Constitution through its preamble where all 'have agreed to unite in one indissoluble Federal Commonwealth' under the constitution.

In a fundamental way this agreement of the people provides a basic safety catch that prevents other programs from being run that could subvert the control of the system.

Unfortunately some politicians and their advisors think that preambles are non-legally binding and therefore unlock this safety catch. As preambles just express the intent of the legislation in a summary format their legal status has nothing to do with the legal bindingness of the legislation contained in any proclaimed act itself.

The main difficulty with preambles not being legally binding is that there would be nothing to legally hold the people to the Constitution and the Australian legal system.

A closer look at our history can shed some light on this matter.

In the first instance, we can compare the process taken over a century ago with the unheralded one back in 1986 to gain a perspective on the situation.

In the late 1800's the people of the States voted in referendums for a Federation, the Commonwealth of Australia Constitution Act was created and established as an act of the Parliament of the UK in 1900, while the act itself was finally proclaimed in 1901.

After 1901 the consent of the Australian people was required to modify this act. In 1926 Australia and Britain were acknowledged to be of equal status.

In 1985 the Australia Act was established, introduced into the Federal Parliament and in 1986 it was proclaimed without any possibility that it could be withheld or disallowed, let alone be constitutionally approved or celebrated by the people.

The Australia Act, through its preamble, brings constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and Federal nation.

This wording is unique in Australian Legislation.

The Act itself requires that it can only be repealed by politicians, while modifications to our Constitution require a referendum 'yes' vote in a majority of the states.

Why should any constitutional powers originally held by the Parliament of the UK (*equal since 1926*) and the Federal Council of Australasia (*then less equal*) at the establishment of the Australian Constitution in 1900 and claimed through the preamble to the Australia Act, be expected to actually exist in 1986?

In the second instance, we can see the referendum of 1999, through questions intending to give clear constitutional title to the Federal parliament, was rejected by the people on both accounts, even though one was just a proposed preamble change.

As Paul Keating stated, while the people may have the right to change the Constitution by voting at referendums, the politicians have the right to determine what questions are to be asked.

In this respect, responsibility for the present state of the Australian Constitution lies squarely at the feet of the recalcitrant minority who phrase referendum questions, not to the liking of the people.

The perceived right to determine our own 'Head of State' on a national and state basis pales into a hollow gesture through the major structural changes contained in the Australia Act.

While all State Governors lost the power to withhold or disallow legislation (like removing the US State Governors and Presidents powers of veto), the state Premiers gained the power to 'direct' the State representatives of the monarch (the Governors) in the 'exercise of their powers' to complement the Prime Ministers 'unwritten' power over the Governor General.

Are our politicians so perfect that they require no supervision?

Why would you bother to vote for anybody, in any position, who, if elected, could not be expected to exercise his or her own free will?

Could this cynical/democratic exercise be considered democratic/cynical?

In the third instance, we can wonder about the entire Australian Defence Forces being stood down for a day before being restored under the Minister for Defence, instead of the Governor General, as the Prime Minister commands our Nations military forces like it was just another arm of cabinet.

It seems one question that will never be asked of the Australian people will be 'would you like to change Australia from a Constitutional Monarchy to a Constitutional Republic with a popularly elected President and popularly elected State Governors who have all the original powers of the Monarch between them, through the Australian Constitution, as approved by the people'?

Would you treat your computer like our politicians treat the Australian Constitution, and, could you afford to?

Just like 'Code Red', the Australia Act 1986 should be considered hostile code that snatches the right of the people to determine the sovereignty and independence status of the type of system currently running in this country.

Surely, just like control of a computer system by its lawful owners, national sovereignty status should be in the constitutional domain of the people and should not be locked up in a legislative tower under the executive custodianship of our politicians?

It just goes to show that if you feel like you have lost control, things don't seem to function as they did previously and there appears to be no obvious way to restore the original settings, your system probably is suffering from a virus.