

A PATHWAY TO A REPUBLIC

George Winterton Memorial Lecture 2011

THE UNIVERSITY OF SYDNEY

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1. I acknowledge the Gadigal people of the Eora nation on whose traditional lands we are gathered this evening – a people to whom this City is irredeemably indebted. That acknowledgement is particularly fitting at the commencement of this, the George Winterton Memorial Lecture in succession to the Inaugural Lecture by the Hon. Robert French, Chief Justice of Australia. These two men, friends from their days at the University of Western Australia, were two of the founders of the Aboriginal Legal Service in that State and in later years contributed much in their respective ways to the elimination of the inequalities to which Aborigines have been subject in this country. For those who knew George, or read his work, he was the profound and uncompromising scholar. After I retired, I was privileged by his request to co-teach a class on the High Court, in the course of which I discovered the riches of his research into the institution from which I had recently departed and, as a virtual student, I benefitted from his erudition. He was a convinced republican and, although our views about some aspects of a republican Constitution were proximate but not co-incident, I am delighted to honour his memory by speaking about a pathway to an Australian Republic.
2. But why should we trouble? Australia is, as Donald Horne said, the lucky country. We have been born into, or have become citizens of, a free society under the rule of law, enjoying a comparatively relaxed way of life, a good educational system, a stable political democracy, an economy which survived the global financial crisis, a

reasonable level of health care and a shared set of values which make for a peaceful and productive life in a rich, wild and beautiful land. With Dorothea Mackellar, most Australians would say “Her beauty and her terror - The wide brown land for me!”¹ Living in such a peaceful country and enjoying such freedoms, why should we trouble ourselves about changes to our Constitution? Monarchists sum up this view with the aphorism “If it ain’t broke, don’t fix it.”

3. But our Constitution – the principal charter of legislative, executive and judicial power whether federal or state - does need fixing. Our Constitution was given to us as a Schedule to the *Commonwealth of Australia Constitution Act* 1900, an Imperial Statute. Appropriately to our status in 1900 when Australia was colonial in sentiment and in law², we were given the British Monarch as our Head of State by Covering Clause 2 which provided that references to the Queen in the Constitution “shall extend to Her Majesty’s heirs and successors *in the sovereignty of the United Kingdom*”. Yet, a century later, the United Kingdom has been found to be a “foreign power” whose citizens are ineligible to sit in our Parliament³. It is both anachronistic and anomalous to maintain the sovereign of the United Kingdom, a foreign country, as our Head of State.

4. The sovereignty of the United Kingdom is determined by the *Act of Settlement 1701*, which opened the way to the union of England and

¹ “My Country”: *I love a sunburnt country, A land of sweeping plains, Of ragged mountain ranges, Of droughts and flooding rains. I love her far horizons, I love her jewel-sea, Her beauty and her terror - The wide brown land for me!*

² Per Barwick CJ in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 183.

³ *Sue v Hill* (1999) 199 CLR 462.

Scotland three centuries ago. It was enacted in an age of male primogeniture and religious intolerance. Nowadays its provisions sit uneasily with notions of gender equality and with s 116 of our Constitution. That section guarantees that Australians may adhere to any religion of their choosing or to none⁴, yet the *Act of Settlement* requires the Australian Head of State to “join in communion with the Church of England” and would be ineligible to be our Head of State if she or he “shall profess the popish religion or shall marry a papist”. There are some suggestions that these provisions may be removed by the United Kingdom Parliament. But it is surely anomalous that Australia should have to rely on the legislative will of a foreign power to broaden the criteria for selection of our Head of State⁵. Our Constitution should accord with the reality of our political organization.

5. Proposals for change excite objections, just as there were objections to Federation. Then, free inter-colonial trade was a major objection that had to be resolved. That was an issue of policy but the objection to a Republic is largely political, social and emotional. Tony Abbott has said⁶ that “[t]he wellsprings of [the Monarchy’s] appeal are instinctual as much as rational: more akin to loyalty to a team, solidarity within a family or faith in a church than they are to

⁴ *Church of the New Faith v Commissioner of Payroll Tax (Vict.)* (1983) 154 CLR 120, 132.

⁵ Assuming that any amendment to the *Act of Settlement* could affect the selection of an Australian Head of State: See the discussion in the Final Report of the Constitutional Commission (Vol 1, 1998) pp 80-82.

⁶ Neville Bonner Memorial Lecture, Australians for Constitutional Monarchy 11th National Conference, 21 November 2010.

support for a policy. Deep down, they are the heart's reasons that reason doesn't know".

6. There are many Australians who are monarchists because they are proud of their British origins, of the values which we have inherited from British sources (not least a commitment to the rule of law), and who wish to keep continuing ties with Britain; many are attached to the symbolism of the Union Jack in our flag and are proud to have fought wars under the King's or Queen's colours; many feel a personal warmth towards Her Majesty and respect her lifetime devotion to duty as Monarch, wife and mother. These and similar factors lead many Australians to reject the republican proposal as antithetical to their tradition and culture.
7. But there are many Australians who, while they share the same sentiments, view a move to a republic as a natural, perhaps inevitable, development – a Republic which owns its history, its culture and its institutions and gratefully acknowledges their origins, but a nation which should now bring its Constitution into conformity with its independent status in the world community and its destiny as a nation completely separate from the United Kingdom. Many of our indigenous citizens, proud of their culture and their historical custodianship of our country, understandably do not share Tony Abbott's affection for the Monarchy.
8. And, of course, there are many Australians who come from different traditions and cultures and who do not identify with the traditions

and cultures of earlier generations of Anglo-Celtic Australians. For many of these Australians, the Monarchy has no significance except as an anachronistic element of our current form of government.

9. All of these views are deserving of respect but it is not possible, either by argument or the niceties of textual drafting, to reconcile opposing views which owe so much to familial history and sentiment and to differing visions of our national identity and destiny. Yet republicans might well respect the sentiments of the monarchists in choosing the appropriate time for Australia to become a republic.

10. The next occasion when Covering Clause 2 will remit the selection of our Head of State to the provisions of the *Act of Settlement* will be at the end of the reign of Her Majesty Queen Elizabeth II. Monarchists and many republicans hold Her Majesty in great respect and affection. It might well accord with majority opinion to select the end of the Queen's reign as the time for an Australian Republic. That would mark the affection and respect in which Australian people hold Her Majesty and deny to the *Act of Settlement* any further operation. But Australians will not assent to a Republic without understanding and agreeing to the form of government that would result from the constitutional change.

11. No simple change of "Queen" to "President" in the Constitution would allow a stable form of government to survive. To fashion a republican Constitution, we need to understand how the present

Constitution fashions the form of government we now enjoy. I assume that we would not want to alter the structures of the Parliament or the Judiciary⁷ but we would introduce an Australian President as the principal repository of Executive power and our Head of State. There are three major issues to be addressed. First, do we wish to retain our Parliamentary system of government with a Prime Minister whose government is responsible to the Parliament and depends on the confidence of a majority of the House of Representatives? Second, what is the preferable mode of selecting a President? And, third, will the States be republican if we have a republican Commonwealth?

12. To respond to these issues, I see a need for a small Constitutional Council to supervise the exercise of a President's reserve powers, an Electoral College to select a President, an amendment to s 106 to maintain the self government of the States within a republican Commonwealth and, finally, a repeal of Imperial laws including the Preamble and Covering Clauses of the *Constitution Act* in favour of a constitution resting on the will and authority of the Australian people. I focus on the maintenance of responsible government, not on the mode of selecting a President, as the primary issue of substance.

⁷ Any proposed reforms of the Parliament or the Judiciary should be considered on their merits, separate from the proposal for a Republic.

The powers and functions of a President

13. At present, the Government is responsible to the Parliament for executive decisions, even though many of the most important decisions are taken in the name of the Governor-General. The Founding Fathers recognized⁸ that responsible government rests on control of executive power by the elected government. This is effected by requiring the Governor-General to exercise executive power only on the advice of the Government in accordance with long established convention. Sir Anthony Mason has explained:⁹

“The principle that in general the Governor defers to, or acts upon, the advice of his Ministers ... is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government.”

14. Informed by practical experience, former Governor Richard McGarvie observed:¹⁰

“The basic constitutional convention that binds the Governor-General to exercise powers as advised by Ministers of the elected Government is the essential link between the exercise of those powers and the sovereignty of the people.”

15. When the Governor-General acts on advice by ministers in the elected Government, the political consequence of such action is borne by the Government which is responsible to the Parliament. The convention is sustained by a long history and by contemporary practice. But convention may not always be sufficient to control a

⁸ See, for example, the speeches of Mr Barton in the Debates of 19 April 1897, p 910.

⁹ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364.

¹⁰ Richard E McGarvie, “*Democracy – choosing Australia’s republic*” (Melbourne, MUP, 1999), p 61.

fixed term President – whether directly elected or not. A fixed term President could not be threatened with removal, a constraint on a recalcitrant Governor-General¹¹. Although it has been suggested that existing conventions *should* bind a President¹², I venture to suggest that law is the preferable constraint to ensure that a President acts only on ministerial advice. But the law would have to discriminate among the powers presently exercised by the Governor-General.

16. These powers fall into three classes: first, the executive power of the Commonwealth which s 61 vests in the Queen to be exercised by the Governor-General¹³; second, powers vested in the Governor-General in Council¹⁴; and third, powers simply vested in the Governor-General. Convention requires that all these powers are exercised only on the appropriate governmental advice but, exceptionally, the powers vested simply in the Governor-General may be exercised without or even contrary to ministerial advice in particular circumstances and then the powers are known, somewhat loosely, as the reserve powers. Australians became familiar with the

¹¹ The 1999 Referendum proposal maintained governmental control of Presidential powers by conferring the power to terminate the appointment of the President on the Prime Minister, who is presently empowered to effect the termination of a Governor-General's appointment by advising the Queen to do so. Sir Zelman Cowen, Sir Anthony Mason and I publicly acknowledged that the change would be effective to preserve responsible government even if the proposal was not ideal. The rejection in 1999 of the Prime Ministerial power to terminate excludes it from current consideration.

¹² See para 25 below.

¹³ Professor Winterton accepted that, at least since 1926, s 61 should be read as "exercisable only by the Governor-General": see *Parliament, the Executive and the Governor-General* (Melbourne, MUP, 1983) p 51.

¹⁴ Section 63. "These are powers which the framers of the Constitution considered to be purely statutory or which had, by custom or statute, been detached from the prerogatives of the Crown": Final Report of the Constitutional Commission (1988) vol. 1 p 342, par 5.147. But cf par 5.148.

term when Prime Minister Whitlam was dismissed by the Governor-General on 11 November 1975. The major constitutional issue to be resolved if Australia should become a Republic is control of the reserve powers, a question addressed below.

17. The general executive power of the Commonwealth is the power needed by the Executive Government to administer the affairs of the Commonwealth. By vesting the executive power of the Commonwealth in the Queen, it was understood that the Queen's common law prerogative powers¹⁵ supplied many of the powers needed for administration of the Commonwealth just as her prerogative supplied for the Executive Government of the United Kingdom many of the powers needed for the administration of the United Kingdom¹⁶.

18. The royal prerogative is of ancient origin. It is a "special pre-eminence which the King hath over and above all other persons and out of the course of the common law"¹⁷. It extends "to all powers, preeminences, and privileges, which the law giveth to the Crown"¹⁸. In *Cadia Holdings Pty Ltd v State of New South Wales*¹⁹, (where the issue was the classification of a mine producing gold and copper), the plurality judgment noted that the prerogative "concerns the

¹⁵ *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (the Wooltops case)* (1922) 31 CLR 421, 437, 461; *The King v Hush; ex parte Devanney* (1932) 48 CLR 487, 511; *Johnson v Kent* (1975) 132 CLR 164, 174.

¹⁶ See per Dixon J in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 304; and per Gummow, Crennan and Bell JJ in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 89 [233].

¹⁷ 1 Bla.Com.239 cited by Chitty "*The Law of the Prerogatives of the Crown*" (1820, London) p 4.

¹⁸ *Coke on Littleton*, 90b.

¹⁹ [2010] 84 ALJR 588, 606; [2010] HCA 27, par. 75.

enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen²⁰ or, more specifically, of an exceptional right which partakes of the nature of property.²¹” The outer limits of the prerogative power have never been determined – historically the King’s powers waxed and waned and it is accepted that the full extent of the prerogative cannot be defined²².

19. The executive power conferred by s 61 includes as much of the prerogative powers of the Queen as “is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution”, to adopt the words of Mason J in *Barton v The Commonwealth*²³. The plurality majority judgment in *Cadia*²⁴ said:

“The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law.²⁵”

²⁰ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [214].

²¹ *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 320-321; *Attorney-General (NSW) v Butterworth & Co (Aust) Ltd* (1938) SR (NSW) 195, 246-247.

²² In *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75, 99; Lord Reid observed “[i]t is not easy to discover and decide the law regarding the royal prerogative and the consequences of its exercise.” And Nourse LJ in the English Court of Appeal *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* (1989) QB 26, 56 observed that – “It has not at any stage in our history been practicable to identify all the prerogative powers of the Crown. It is only by a process of piecemeal decision over a period of centuries that particular powers are seen to exist or not to exist, as the case may be. From time to time a need for more exact definition arises”.

²³ (1974) 131 CLR 477, 498.

²⁴ [2010] 84 ALJR 588, 608; [2010] HCA 27, par. 86.

²⁵ *Barton v The Commonwealth* (1974) 131 CLR 477, 498; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 61-62.

As the prerogative is vested in the Monarch personally, the introduction of a republic might arguably eliminate the prerogative and all the “powers, pre-eminences and privileges” carried by the prerogative²⁶. If the non-statutory executive power did not extend beyond the powers attributable to the prerogative, as George Winterton and Peter Gerangelos would hold²⁷, the introduction of a republic might arguably eliminate a major content of the executive power of the Commonwealth. However, the executive power contains more than the prerogative. It includes powers conferred by statute and certain non-prerogative capacities. In the *AAP Case*²⁸ Mason J held that s 61 confers on the Executive Government “power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’”. I adopted this criterion in *Davis v The Commonwealth*²⁹ and, subject to certain qualifications not presently relevant, that was followed by the majority plurality judgment in *Pape*³⁰. In the same case, French CJ may have gone further. He said³¹:

“Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.”³²

²⁶ See per Dixon J in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 304.

²⁷ “Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis” in HP Lee and PA Gerangelos (eds) *Constitutional Advancement in a Frozen Continent* (Sydney, The Federation Press, 2009) p189.

²⁸ (1975) 134 CLR 338, 397.

²⁹ (1988) 166 CLR 79, 93.

³⁰ Gummow, Crennan and Bell JJ (2009) 238 CLR 1, 87.

³¹ (2009) 238 CLR 1, 60 [127].

³² Note also that Hayne and Kiefel JJ (2009) 238 CLR 1, 119 held that “the ambit of the Commonwealth executive power is to be identified having regard to the whole of the constitutional structure”. The wide construction given to s 61 in *Pape* has been criticised: see

Whatever be the scope of the executive power conferred by s 61 and whatever be the content derived from the prerogative, it would be desirable to provide that the scope and content of the executive power is unchanged by a transition to a Republic, though it be vested in and be exercisable by the President. A “no change” provision would confirm that the law affecting the exercise of the executive power developed in the cases over the last century would be applicable to the new provisions. Thus the common law conditions on the exercise of a prerogative power³³ would inform the law governing the exercise of a corresponding power under a republican successor to s 61. The Executive Government’s control of the general executive power would be maintained by an express provision that the President would act, but act only, on ministerial advice. That provision would extend to the function of the Commander in Chief of the defence forces under s 68³⁴.

20. In a republican Constitution, no change would be needed to the powers now vested in the Governor-General in Council³⁵. They are expressly required³⁶ to be exercised on advice by the Executive Council and would be so exercised by a President. Apart from some obsolete provisions, these powers relate to the issuing of writs for

“Pushing the Boundaries of the Executive Power – Pape, the Prerogative and Nationhood Powers” by Anne Twomey in (2010) 34 *Melbourne University Law Review* 313.

³³ See, for example, *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 and *Burma Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

³⁴ *Lane v Morrison* (2009) 239 CLR 230, 249-250; and see Vol 1 p 346, par 5.175 of the Final Report of the Constitutional Commission (1988).

³⁵ Sections 32, 33, 64, 67, 70, 83 and 103.

³⁶ Section 63.

the election of members of the House of Representatives³⁷, the establishment of departments of State³⁸ and the appointment and removal of Justices of the High Court and other Courts created by the Parliament³⁹.

21. Then there are powers vested in the Governor-General personally. Leaving aside some mechanical functions⁴⁰ and powers which have become obsolete, they are powers to appoint and to dismiss the Prime Minister and Ministers (sections 62 and 64), to prorogue the Parliament and to dissolve the House of Representatives (sections 5 and 28), and to dissolve both Houses of Parliament when section 57 permits a double dissolution. These are ordinarily exercised only on ministerial advice but, in particular circumstances, a Governor-General may exercise these powers without, or even contrary to, ministerial advice.

22. On 11 November 1975, Sir John Kerr exercised the reserve power under section 64 to dismiss Mr Whitlam and to appoint Mr Fraser as Prime Minister, then, acting on the advice of Mr Fraser, he dissolved both Houses of Parliament under section 57. The controversy which followed the dismissal demonstrates the importance of prescribing a mechanism for supervising the exercise of the reserve powers, especially if Australia adopts a republican form of government.

³⁷ Sections 32 and 33.

³⁸ Section 64.

³⁹ Section 72. A power to appoint members of the Inter-State Commission also requires the advice of the Federal Executive Council: s.103.

⁴⁰ See sections 7, 15, 17, 19, 21, 35, 37, 42.

23. Sir Harry Gibbs, in a paper written for Australians for Constitutional Monarchy⁴¹, explained the need for reserve powers:

“According to the conventions, there are some powers which the Governor-General may exercise according to his own discretion, and without the advice, or even contrary to the advice, of the Ministry. These powers, which are rather misleadingly called ‘reserve powers’, are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the principles of responsible government and representative democracy, or in other words, to ensure that the Ministry is responsible to Parliament and that the ultimate supremacy of the electorate will prevail. The reserve powers provide an essential check against abuse of power by the Executive or by Parliament. In Australia, . . . they fill a real need in relation to the Executive.”

24. At present, if a Governor-General were minded to exercise a reserve power unjustifiably, the disincentive would be the risk of peremptory removal from office by the Queen on the advice of the Prime Minister. Sir John Kerr had to face that prospect on 11 November 1975 but, with the support of Sir Garfield Barwick, he attributed his authority to dismiss Mr Whitlam to a convention permitting the dismissal of a Prime Minister who could not secure supply. Professor Winterton, however, stated the convention differently, submitting that the reserve power of dismissal depended on the Prime Minister losing the confidence of the House of Representatives⁴².

25. Despite the uncertainty and controversy that the events of November 1975 created and the conflicting views of eminent constitutionalists about the content of relevant conventions, the 1998 Constitutional

⁴¹ “Reserve Powers of the Governor-General and the Provisions For Dismissal” 21 August 1995.

⁴² “1975: The Dismissal of the Whitlam Government” in G Winterton and HP Lee (eds) *Australian Constitutional Landmarks* (Melbourne, Cambridge University Press, 2003) 229, 243–245.

Convention proposed that undefined reserve powers and relevant conventions should continue to exist⁴³. Accordingly the 1999 Bill would have authorized the exercise of a reserve power by a President “in accordance with the constitutional conventions relating to the exercise of that power”⁴⁴, accepting at the same time that the conventions should be allowed to evolve⁴⁵. How would that formula have been applied to the Dismissal? In the United Kingdom, the convention is that dismissal is warranted only when the Commons (which controls supply) loses confidence in the Government⁴⁶, but in Australia, where the Senate has ability to block supply, may the Barwick view of the convention be justified as an antipodean evolution of the United Kingdom convention? The question illustrates an objection to the proposition that reserve power can be controlled merely by reference to “constitutional conventions”. It is too uncertain to be a sufficient control on the exercise of reserve power by a President who has a fixed term in office. Judicial supervision would not be available to enforce conventions unless they were enacted as law but that would fetter their practical utility. To quote Professor E.A. Forsey⁴⁷:

“To embody them in an ordinary law is to ossify them. To embody them in a Constitution is to petrify them.”

⁴³ Final Resolutions of the Constitutional Convention, Canberra 1998 (1998) 9 *Public Law Review* 55, 56; See comment by Sir Harry Gibbs 21(3) *UNSWLJ* 882, 884.

⁴⁴ Section 59 as proposed in Schedule 1 to the Constitution to be inserted by Clause 3 of the Bill.

⁴⁵ Paragraph 8 of proposed Schedule 2 to the Constitution (inserted by Clause 3 of the Bill).

⁴⁶ See Winterton, “1975: The Dismissal of the Whitlam Government”, above n 42, 244 and *New South Wales v Bardolph* (1934) 52 CLR 455, 509. See also *Egan v Willis* (1998) 195 CLR 424, 453 and 503.

⁴⁷ *Evatt and Forsey on the Reserve Powers* (Sydney, Legal Books, 1990) p.xc.

26. A codification of the conventions was suggested by Dr H V Evatt⁴⁸ and was considered by the 1993 Republic Advisory Committee⁴⁹, but, as Forsey points out⁵⁰:

“A law covering, with precision, all the possible circumstances which might call for the exercise of even a single reserve power, let alone the lot, is surely beyond the wit of even the most learned and imaginative draftsman.”

27. If conventions were reduced to constitutional or statutory text, the text would be subject to judicial interpretation and enforcement would require exposure to judicial review involving inevitable delay and uncertainty. Delay and uncertainty are incompatible with the timely and effective exercise of reserve power in exceptional circumstances. Sir Harry Gibbs pointed out the dilemma⁵¹:

“If the conventions are not enforceable by the courts, the President might ignore them, even though the Constitution stated that they continued; all those considerations which obliged a Governor-General as representative of the Monarch to observe the conventions, would not exist in the case of a President. On the other hand, if the courts can enforce observance of the conventions, the resulting delay and uncertainty could be very damaging in a time of crisis.”

An exercise of a reserve power would ordinarily be required in a situation of urgency (and therefore without judicial intervention) in the event of any breach of the rule of law by the Executive Government – say, by withdrawing funds from consolidated revenue without an appropriation – or any breakdown in the operation of representative and responsible government – say, by a Prime Minister

⁴⁸ *The King and His Dominion Governors* (London, Frank Cass and Co, 2nd ed 1967), 7-9, 285.

⁴⁹ Report Vol 1 pp 95 ff.

⁵⁰ *Evatt and Forsey on the Reserve Powers* (Sydney, Legal Books, 1990) p lxxxiii.

⁵¹ “Some Thoughts on the Constitutional Convention” (1998) 21(3) *UNSW Law Journal* 882, 884.

who, defeated in a no confidence vote of the House of Representatives, refused to resign or advise an election.

28. The problem is not to define the powers which a President may exercise, but the circumstances in which a reserve power may be exercised. It is difficult – indeed, impossible – to define in advance every eventuality which may attract an exercise of a particular power. Professor Forsey observed that the circumstances in which the reserve powers need to be exercised “are not easy to set out in detail, comprehensively and with precision. They have a disconcerting way of popping up in utterly unforeseen, even unforeseeable, guise”⁵². The reason why the content of conventions is uncertain and fluctuating is that “[c]onventions are political, not legal: political in their birth, political in their growth and decay, political in their death, political in their sanctions.”⁵³ They are valuable indicia of political situations in which the exercise of reserve power may be needed, but they cannot be exhaustive. Codification of some conventions would be acceptable if the conventions are both clearly established and their application would not be reasonably open to factual controversy that might delay and frustrate the exercise of a reserve power⁵⁴. But codification cannot

⁵² *Evatt and Forsey on the Reserve Powers*, above n 50, p.lxxxiii; Professor Forsey recalled that in 1985 “an Australian Constitutional Convention [in Brisbane] recognized and declared 18 ‘principles and practices’ which ‘should be observed as Conventions in Australia’ governing the exercise of reserve powers ‘exercisable through the Governor-General’” but then demonstrated their inadequacy in a number of practical situations.

⁵³ *Ibid*, p lxxxix.

⁵⁴ See G Winterton “The Resurrection of the Republic” *Law and Policy Paper No. 15* (Sydney, Federation Press, 2001) p 17.

exhaust all the circumstances in which a reserve power might justifiably be exercised.

29. George Winterton, conscious of the need for extraordinary circumstances to justify an exercise of reserve power, stated a criterion in general terms: is the exercise “*absolutely necessary* to preserve the rule of law and protect the operation of responsible government from abuse by the executive”⁵⁵? Similar terms were used by the Executive Government Advisory Committee⁵⁶ to the Constitutional Commission – their formula being “that there is no other method available to prevent”.

30. A President must have authority to exercise the reserve powers flexibly and efficiently in the political milieu⁵⁷, but only when an exercise is absolutely necessary. The open textured phrase “absolutely necessary” itself needs some mechanism for supervising its application to concrete political situations. That is why I suggest the need for a small council – a Constitutional Council to review any proposed exercise of a reserve power. The Council would determine whether the President has reasonable grounds to believe that it is absolutely necessary to exercise the reserve power proposed in order to ensure compliance with the general law or the effective operation

⁵⁵ G. Winterton (1993) 12 *U Tas LR* 249 at 256; *The Resurrection of the Republic*, above n 54.

⁵⁶ Final Report of the Constitutional Commission, vol 1, p 326 para 5.66.

⁵⁷ The Canadians experience of prorogation in 2008-2009 illustrates both the importance of timing in the exercise of reserve power and the difficulty in reaching agreement on the content of relevant conventions: see

http://findarticles.com/p/articles/mi_qa3683/is_201004/ai_n54369026/?tag=content:coll. For an Australian example, see G Winterton “The Constitutional Position of Australian State Governors” in *Australian Constitutional Perspectives* (Sydney, Law Book Co., 1992) 274, 304-335.

of representative and responsible government under the Constitution. The Council must be capable of speedy consultation and be constituted by persons whose competence and impartiality are not open to question. It would be composed of three members who have previously served as Governor-General or President or as Chief Justice or a Justice of the High Court or as Chief Justice of a State or a federal superior Court. Any exercise by a President of a reserve power, if approved by the Constitutional Council, would be conclusively valid and non-justiciable. Decisions by the Constitutional Council would be non-justiciable. Judicial intervention would be eliminated except in the highly unlikely event of an exercise of a reserve power which the Constitutional Council would not approve. A negative response by the Constitutional Council would warrant judicial intervention to consider whether the President had acted beyond power.

31.If a republican President is to exercise the same powers and functions as the Governor-General now exercises and is constitutionally constrained to exercise those powers and functions in like manner, the method of selecting a President becomes a secondary question.

The Selection of a President

A Prime Minister's ability to secure the appointment or removal of a Governor General disappears with a transition to a Republic. And the defeat of the 1999 Referendum shows that the electorate will not

allow a Prime Minister to appoint a President, even with the concurrence of the Leader of the Opposition and a majority of the Parliament⁵⁸ or to remove a President, even with the concurrence of a majority of the House of Representatives.⁵⁹ A President, as Head of State, vested with the powers we have discussed but constitutionally controlled in their exercise, should have a secure tenure for a fixed term, say, 5 years. The President should be removed from office only by vote of both Houses of Parliament on the ground of proved misbehaviour or incapacity⁶⁰.

32. In the public mind, the preferable method of selecting a President is direct election. In 1999, republicans who were opposed to direct election feared that a directly elected President would be a threat to the stability of our representative and responsible system of government. George Winterton explained⁶¹—

“that a directly elected President will challenge government policy in speeches, perhaps addresses on television, and by meeting foreign and domestic leaders both at home and abroad, leaving both the Australian people and foreign governments confused regarding government policy, destabilising government, and jeopardising the political neutrality of the presidency. Barry Jones graphically described such a system as ‘a car with two steering wheels’,⁶² and John Howard has warned that it

‘would alter for all time the nature of our system of government. It would entrench rival centres of political power. ... [A]n Australian president, having a popular mandate, would feel infinitely more powerful in dealing with an incumbent Prime Minister than would

⁵⁸ Bill for *Constitution Alteration (Establishment of Republic) 1999*, s 60 in Schedule 1.

⁵⁹ Bill for *Constitution Alteration (Establishment of Republic) 1999*, s 62 in Schedule 1.

⁶⁰ Analogously to the procedure for removing Federal judges under S 72(ii).

⁶¹ “The Resurrection of the Republic” *Law and Policy Paper No 15* above n 54 p13.

⁶² B Jones, ‘*Framing a New Australian Republic*’, paper presented at Australian Academy of the Humanities, 30th Anniversary Symposium, Canberra, 3 November 1999 (unpaginated).

any Governor-General, irrespective of the formal powers which might be given to that president.⁶³”

33. These concerns would be diminished by constitutional constraints on the exercise of Presidential powers. Even so, direct election raises some difficult practical issues. How would candidates get to know, and get known by, voters in every part of the Commonwealth? Would voters in the more populous States prefer local candidates to the prejudice of candidates from smaller States? Could any citizen nominate a candidate, or would the power of nomination be limited? Curiously, a preference for direct election over Parliamentary appointment was said to avoid the creation of a “politicians’ President” but an Australia-wide election campaign for the Presidency would inevitably be funded and managed by party political machinery.

34. Another consequence of direct election would be the virtual impossibility of selecting eminent, non-political citizens as candidates for the Presidency. If we bear in mind recent Governors-General who have served with distinction in that office after achieving eminence in a non-political field – Sir Zelman Cowen, Sir Ninian Stephen, Sir William Deane, for example – we must doubt whether they would have engaged in an electoral campaign for the office. Popular election is designed to secure suitable candidates to implement policies, but that is not the business of an apolitical Head of State.

⁶³ J Howard, ‘Mr Keating’s Mirage on the Hill: How the Republic, Like the Cheshire Cat, Came and Went’, in *Upholding the Australian Constitution*, Vol 3: Proceedings of the Third Conference of The Samuel Griffith Society (1994) 115 at 130-131.

35. Although these are some of the disadvantages of direct election, they could be largely eliminated and the strong democratic desire for direct election could be accommodated by an Electoral College system which is a feature of other geographically large democracies: Germany, India and the United States. An Electoral College of modest size, popularly elected, could efficiently nominate and select a President. The College might be composed of two or four members chosen directly by the people of each State and one or two members chosen directly by the people of each mainland Territory. Members of Parliament could be excluded. An Electoral College could be elected in parallel with a general election for the House of Representatives. The Chief Justice of the High Court might be an ex officio member and chairperson of the College, responsible for convening the members and notifying the selection of the President.

36. Of course, that is not the only Electoral College model. A model suggested by the German and Indian Constitutions⁶⁴ would engage the members of both Houses of the Parliament sitting together with nominees of the State and Territory Parliaments. Although that model would be dominated by politicians, they would have been popularly elected to both the Parliament and the Electoral College.

⁶⁴ Article 54 of the Constitution of the Federal Republic of Germany; Sections 54 and 55 of the Indian Constitution. Both of these Constitutions added votes from the Legislatures of the Lander or the States to the votes of the members of the national Parliament. See also Cheryl Saunders "Beyond Minimalism" in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Sydney, The Federation Press, 2010) 54, 77.

The Chief Justice could preside at College meetings⁶⁵. A majority, say, 70% of those present and voting, could be specified to ensure that the government of the day did not control the process. As Parliamentarians generally are knowledgeable about and responsive to the views of their constituents and as the majorities in the two Houses of Parliament are not always, or usually, of the same political party, selections made by an Electoral College so constituted might well accord with popular expectations.

37. Whatever the composition of an Electoral College, its procedure could be prescribed by law susceptible to amendment in the light of experience. If desired, it could sit in camera. Unless we choose to have a nation-wide contest among public figures, managed and funded by political parties, there seems to be no practical way other than an Electoral College of giving effect to the popular vote.

The Monarchy and the States

38. There would be some support for the proposition that each State should determine for itself whether it wishes to adopt a republican form of government⁶⁶. This was proposed by George Winterton⁶⁷

⁶⁵ It is customary now for the Chief Justice of the High Court to preside over the swearing in of the Members of the House of Representatives after an election.

⁶⁶ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Melbourne, Cambridge University Press 2006) p 339; Anne Twomey: "One In, All In – The Simultaneous Implication of a Republic at Commonwealth and State Levels" in Sarah Murray (ed) *Constitutional Perspectives on an Australian Republic* (Sydney, Federation Press, 2010) 20, 38, 40.

⁶⁷ *Monarchy to Republic: Australian Republican Government* (Melbourne, OUP, 1986), pp 103-105.

and adopted in connection with the 1999 referendum⁶⁸. The Monarchy is entrenched in some State constitutions and the State procedures which might lead to a republican form of government vary from State to State⁶⁹. In addition, s 7 of the *Australia Act* provides for State Governors to be representatives of the Queen. Prior to the 1999 referendum, however, the States laid the foundation for excluding the operation of s 7 by unanimously requesting the Commonwealth⁷⁰ to enact a law allowing each State to pass a law having that effect⁷¹.

39. It would be a curious constitutional mélange to maintain a republican Commonwealth with monarchical States. Sir Anthony Mason said it would be a “constitutional monstrosity”⁷². The Constitution, as Quick and Garran observed, provided

“one grand scheme ... in which the new national elements are blended harmoniously with the old provincial elements, thus producing a national plan of government having a Federal structure.”⁷³

40. The States derive their constitutional status and powers from the Commonwealth Constitution⁷⁴ and from the *Australia Act*

⁶⁸ See Janine Pritchard “Monarchical States under a Commonwealth Republic” in Sarah Murray (ed) *Constitutional Perspectives on an Australian Republic* (Sydney, Federation Press, 2010) 106, 107.

⁶⁹ Anne Twomey: “One In, All In...”, above n 66, 24.

⁷⁰ As provided for in s 15(1) and (2) of the *Australia Act*.

⁷¹ The several Acts were entitled the *Australia Act (Request) Act 1999*, and were intended to add to s 7 of both the UK and Commonwealth versions of the *Australia Act* subsections authorizing the State Legislature to exclude the operation of the earlier subsections of s 7. See, for example, Act No 33 of 1999 (Vic.).

⁷² “Constitutional Issues relating to the Republic as they Affect the States” (1998) 21(3) *UNSW Law Journal* 750, 756; See the collection of descriptions listed by Janine Pritchard in “Monarchical States under a Republican Commonwealth” in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (The Federation Press, 2010) 106.

⁷³ *Annotated Constitution*, p 930.

⁷⁴ *McGinty v Western Australia* (1996) 186 CLR 140, 171-173, 189, 208-209, 216, 251 and cases there cited: *Victoria v The Commonwealth* (1971) 122 CLR 353, 371; *New South Wales v The*

(Commonwealth) which was enacted pursuant to s 51 (xxxviii) of the Constitution⁷⁵. The *Australia Act* lifted restrictions on the powers of the Parliaments of the States, terminated all responsibility of the United Kingdom government for the States⁷⁶ and conferred ultimate authority to assent to State legislation on the State Governor⁷⁷. Section 7 of the *Australia Act* declared State Governors to be the Queen’s representatives in the respective States but the only State function left to the Queen is a formal power to appoint and to terminate the appointment of the Governor – a power exercised on the advice of the Premier⁷⁸. That formality can be discharged by a President without affecting the operation of a State constitution or the political authority of a Premier. There is no logical reason to retain a monarchical form of government for a State provided the transition leaves in place every other element of the State Constitution. What should be avoided is any attempt either to impose any change of substance on the constitutions of the States or to affect the capacities which the States respectively enjoy to alter their constitutions⁷⁹. Section 7 of the *Australia Act* could be

⁷⁵ *Commonwealth* (1975) 135 CCLR 337, 372; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 182; Also see *Yougarla v Western Australia* (2001) 207 CLR 344, 369; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (Sydney, Legal Books, 1901, 1976 Reprint) 930; cf *Western Australia v Wilsmore* [1981] WAR 179.

⁷⁶ *Port MacDonnell Professional Fishermen’s Association Inc. v South Australia* (1989) 168 CLR 340, 381; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 571.

⁷⁷ Section 10.

⁷⁸ Section 9.

⁷⁹ Section 7(3).
See Twomey “One In, All In...” above n 66, 37. They are immune from Commonwealth legislative impairment of their structure or capacity to function: *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 56, 60, 66, 74, 82; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 139-140, 213-215, 280-281; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217-218, 226-227, 231, 232, 248, 260; *Re Australian Education Union*; *Ex parte Victoria* (1995) 184 CLR 188, 230-232, 248-249; *McGinty v Western Australia* (1996) 186 CLR 140, 173; *Austin v The Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 83 ALJR 1044.

repealed and the Queen's formal power of gubernatorial appointment could be transferred to a republican President by a Commonwealth Act passed at the request of all State Parliaments pursuant to s 15(1) of the *Australia Act* and s 51 (xxxviii) of the Constitution – the procedure followed by the States in 1999 to exclude the operation of s 7 of the *Australia Act*⁸⁰. If that unanimity is no longer achievable, the same result would follow from an appropriate amendment of s 106⁸¹. To allow voters, if they wish, to distinguish between the Commonwealth and the State governments, an amendment to s 106 could be submitted to a referendum separate from, but contemporaneously with, the referendum to introduce a Commonwealth republic.

41. There is a question whether an amendment to allow the repeal of s 7 of the *Australia Act* would attract the operation of paragraph 5 of s 128 which requires, in addition to the referendum majorities, a majority of voters in a State to approve certain laws relating to the State. Stephen Gageler, supported by Jack Richardson, Gerard Carney and Anne Twomey, does not think that such an amendment would attract the operation of paragraph 5 of s 128⁸². However,

⁸⁰ See footnote 71; See also Gerard Carney *The Constitutional Systems of the States and Territories* above n 66, 331.

⁸¹ Section 15(3) of the *Australia Act* avoids the possibility that the regime created pursuant to that Act and secured by s 51(xxxviii) of the Constitution could not be affected by a constitutional amendment of s 106.

⁸² Gageler "Amending the Constitution through s 128" in *Constitutional Perspectives on an Australian Republic*, p.19; Richardson *Opinion in the matter of s 128 of the Constitution* reprinted in App A of Report of Standing Committee B to Executive Committee p 18 in Proceedings of the Australian Constitutional Convention and Standing Committee Reports (Melbourne 1975); Carney *The Constitutional System of the Australian States and Territories*, above n 66; A. Twomey *The Constitution of New South Wales* (2004) 788-791; Quick and Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney, Legal Books, 1976) p 991.

McHugh and Gummow JJ in *McGinty v State of Western Australia*⁸³ made “passing reference” to that paragraph as applicable to “provisions of the Constitution in relation to a State”. This broad view of the paragraph might be only tentative. The former view seems preferable.

The Problem of Constitutional Amendment

42. The Constitution proper is a schedule to the Imperial *Constitution Act* 1900. The preamble to the *Constitution Act* recites an agreement to unite “under the Crown of Great Britain and Ireland” and the Covering Clauses proclaim a monarchical form of government. As Sir Anthony Mason has commented⁸⁴ to amend the Constitution while leaving those provisions in place would create “a veritable constitutional camel”. Despite the inelegance, however, an amendment of the Constitution introducing a Republic would be effective even if the Preamble and Covering Clauses remained⁸⁵. The removal of monarchical references in the Constitution would leave the Preamble and the monarchical provisions of the Covering Clauses ineffectual. The 1999 Referendum Bill simply ignored those provisions. Nevertheless, it would be desirable as well as elegant to repeal the *Constitution Act* other than the Constitution

⁸³ (1996) 186 CLR 140, 237, 275.

⁸⁴ “Constitutional Issues relating to the Republic as they affect the States” (1998) 21(3) *UNSW Law Journal* 750, 753.

⁸⁵ See Opinion of Dennis Rose QC, reprinted in the Republic Advisory Committee, *An Australian Republic – The Options* (1993) Vol 2, Appendix 8; Stephen Gageler “Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations” in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Sydney, Federation Press, 2010) 6,16-17.

proper. A succession of Imperial Statutes raises some interesting questions about the steps that need to be taken to achieve that repeal. These questions have been addressed in a series of scholarly articles which identify the problems and propose some solutions⁸⁶. I list some of the sources to which I am indebted and, at the end of the written paper, I have appended some draft clauses which might be considered in drafting a Bill for a referendum to amend the Constitution.

43. In 1900, no repeal of the *Constitution Act* would have been possible: it would have been repugnant to a law of the Imperial Parliament and therefore “absolutely void and inoperative” by force of s 2 of the *Colonial Laws Validity Act* 1865. That provision was repealed in its application to laws of the Commonwealth by s 2 of the *Statute of Westminster* 1931⁸⁷ but s 8 of that Statute declared that the repeal did not confer any power to repeal or alter the *Constitution Act*. By s 8 the Imperial Parliament denied Australia’s power to repeal or alter the *Constitution Act* either by the referendum procedure under s 128 or by an ordinary law of the Commonwealth.

⁸⁶ Quick and Garran, *The Annotated Constitution of the Commonwealth* (Sydney, Legal Books, 1901, 1976) 989-990; George Winterton, *Monarchy to Republic – Australian Republican Government* (Melbourne, OUP, 1986), Ch 8; Anne Twomey, *The Constitution of New South Wales* (Sydney, Federation Press, 2004) 788-791; Opinion of Dennis Rose QC, reprinted in the Republic Advisory Committee, *An Australian Republic – The Options* (1993) Vol 2, Appendix 8; Stephen Gageler and Mark Leeming, ‘An Australian Republic; Is a Referendum Enough’ (1996) 7 *Public Law Review* 143; Geoffrey Lindell and Dennis Rose, ‘A Response to Gageler and Leeming: “An Australian Republic: Is a Referendum Enough?”’ (1996) 7 *Public Law Review* 155; Sir Anthony Mason “Constitutional Issues relating to the Republic as they affect the States” (1998) 21(3) *UNSW Law Journal* 750, 755; S Gageler, “Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations” in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Sydney, The Federation Press, 2010) 6,16.

⁸⁷ Adopted by the Commonwealth in 1942.

44. In 1986 the *Australia Act* was enacted here⁸⁸ and in the United Kingdom⁸⁹ “to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth...as a sovereign, independent and federal nation.” Section 1 provided that thereafter no United Kingdom statute could extend to the Commonwealth or the States or Territories. Section 15 provided for the repeal or amendment of the *Statute of Westminster* and of the *Australia Act* itself by an Act of the Commonwealth Parliament, enacted *either* at the request or with the concurrence of all State Parliaments⁹⁰ *or* in exercise of a power conferred on the Parliament by a s 128 amendment to the Constitution⁹¹. Thus the Commonwealth Parliament acquired the power to remove the last legislative Imperial fetters on Australian legislative power, dependent on either the unanimous approval of State Parliaments or the approval of the necessary majorities of the Australian people to carry a referendum. Once the *Statute of Westminster* or at least s 8 thereof is repealed in either of the ways provided by s 15 of the *Australia Act*, the preamble and the Covering Clauses of the *Constitution Act* can be repealed and any provisions having continuing relevance to our Constitution (for example, Covering Clause 5) can be translated into the Constitution proper. There seems

⁸⁸ Pursuant to the States’ request under s 51(xxxviii).

⁸⁹ In accordance with the Commonwealth’s request and s 4 of the *Statute of Westminster*.

⁹⁰ Section 15(1) and (2). No such law has been proposed, but note the unanimous request Acts in 1999, fn 71 *supra*.

⁹¹ Section 15(3). This subsection may merely confirm the power already available under s 128: see L Zines *The High Court and the Constitution* (Sydney, Federation Press, 5th ed 2008) pp 421-423.

to be a consensus about the sufficiency of that procedure⁹². Repeal of s 8 also opens the way to empowering the Parliament to repeal any or all Imperial Acts applicable to Australia, consistently with s 2 (2) of the *Statute of Westminster*.

45. Another view, endorsed by the 1988 Constitutional Commission, is that, once it is recognized that the Commonwealth is a “a sovereign, independent and federal nation” and that the British Parliament has renounced authority to legislate for Australia, s 8 of the *Statute of Westminster* no longer limits the scope of the amendments which can be effected by the referendum procedure under s 128, that section being sufficient by itself to “[encompass] all matters relating to our mode of governance”⁹³. In *Marquet’s Case*⁹⁴ a majority of the Court observed that constitutional arrangements in Australia have changed in fundamental respects and that “constitutional norms, whatever be their historical origins, are now to be traced to Australian sources”. But the *Australia Act* is an Australian source and it affirms the operation of the Statute of Westminster, including s 8, unless the Statute is amended as s 15 provides. With respect, the view of the Constitutional Commission must be of doubtful validity.

⁹² See Mason, “Constitutional Issues relating to the Republic as they Affect the States” (1998) 21(3) *UNSW Law Journal* 750, 754; Geoffrey Lindell, “Why is Australia’s Constitution Binding?” (1986) 16 *Fed LR* 29, 40; Stephen Gageler and Mark Leeming, “An Australian Republic: Is a (1996) 7 *Public Law Review* 143; Geoffrey Lindell and Dennis Rose, “A Response to Gageler and Leeming” (1996) 7 *Public Law Review* 155, Stephen Gageler, “Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations” in Sarah Murray, *Constitutional Perspectives on an Australian Republic* (Sydney, Federation Press, 2010) 6,16; Appendix 8 to The Report of the Republic Advisory Committee (AGPS, 1993), Advice by Dennis Rose QC as Acting Solicitor General, paras 1-29; Anne Twomey *The Constitution of New South Wales* (Sydney, Federation Press, 2004), 781-782; Anne Twomey *The Australia Acts 1986* (Sydney, Federation Press, 2010) 339-341.

⁹³ Vol 1, Final Report of the Constitutional Commission, pp 122-123, par 3.123.

⁹⁴ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570.

46.If repeal of s 8 of the *Statute of Westminster* is desirable before a republican Constitution comes into effect, a Referendum Bill should include two provisions in addition to those prescribing the republican form of government. One provision would authorize the Parliament under s 15(3) of the Australia Act to repeal s 8; the other would delay the coming into effect of the republican provisions until the Parliament had repealed s 8.

47.When s 8 is repealed, the present preamble and Covering clauses of the Constitution Act should be repealed and a new preamble reciting the sovereignty of the Australian people as the source and sustaining force of the Australian Constitution should be inserted. This is no novelty. In *Kirmani's Case*⁹⁵ Deane J said that “whatever be the theoretical explanation, ultimate authority in this country lies with the Australian people” and, in *ACTV*⁹⁶, Mason CJ recognized “that ultimate sovereignty reside[s] in the Australian people”. This assertion of Australian authority is accepted in a number of High Court judgments⁹⁷. It accords with the de facto independence of our polity and the independent, egalitarian ethos of the Australian people. Geoffrey Lindell contends that the will and authority of the Australian people give the Constitution its “legally binding and

⁹⁵ *Kirmani v Captain Cook Cruises Pty Ltd (No. 1)* (1985) 159 CLR 351, 442 and see per Murphy J at 384.

⁹⁶ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 138.

⁹⁷ See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J); and *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 523 (Kirby J); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 (Gleeson CH, Gummow, Hayne and Hayden JJ).

fundamental character” and it “coincides with popular understanding”⁹⁸. It is time that we assumed constitutional authority over our own Constitution, repealing the *Constitution of Australia Act* 1900 except for the Constitution proper and declaring that we, the Australian people, give to ourselves our Constitution. To that end, I would like to see a new beginning in terms like these:

“We, the people of Australia –

- *Recognizing* the dignity, culture and spirituality of our Aboriginal and Torres Strait Islander citizens and their historical occupancy and custodianship of our lands and seas;
- *Conscious* of the contributions to our national life made by Australians of different ethnic origins, nationalities, religions, traditions and cultures;
- *Proud* of our democratic system of government under the rule of law;
- *Respecting* the inherent dignity of every person and
- *Willing* to participate in the building and maintenance of international peace;

Confirm and give to ourselves this Constitution.”

48. Thus we would affirm our constitutional independence from all Imperial laws, our freedom to mould our Constitution to the exigencies of our future and our reliance on the genius of our people to shape the character of our nation. For me and, I would hope, for many Australians this would reflect our grateful acceptance of our

⁹⁸

See Geoffrey Lindell “Why is Australia’s Constitution Binding?” (1986) 16 *Fed L.R.* 29, 37.

history and of our present multicultural society, our tolerance, our outward vision and our pride in a free and confident nation.

Suggested clauses for consideration in Bills to amend the Constitution:

The Commonwealth Bill

The Parliament of Australia, with the approval of the electors, as required by the Constitution, enacts:

1 Short title

This Act may be cited as the *Constitution Alteration (Establishment of Republic - Commonwealth) 2011*

2 Schedules

The Constitution is altered as set out in the Schedules

3. Commencement:

- (1) Schedule 1 comes into force when this Act receives Royal assent.
- (2) Schedule 2 comes into force either –
 - (a) on the repeal of section 8 of the Statute of Westminster, or
 - (b) on the termination of the reign of Her Majesty Queen Elizabeth II
 whichever is the later.

Schedule 1—Amendment of the Constitution

Section 51.

Insert subsection (xxxviiA):

“the repeal of –

- (i) section 8 of the Statute of Westminster;
- (ii) the *Commonwealth of Australia Constitution Act* other than the Constitution the repeal to come into force when Schedule 2 of the *Constitution Alteration (Establishment of Republic - Commonwealth) 2011* comes into force;
- (iii) section 7 of the *Australia Act 1986* (Commonwealth and United Kingdom) the repeal to come into force when Schedule 2 of the *Constitution Alteration (Establishment of Republic - Commonwealth) 2011* comes into force;”

Schedule 2—Amendment of the Constitution

1. Short title, Preamble and Governing Clauses

- (a) Insert after the words “The Constitution” the words “of the Commonwealth of Australia”
- (b) Delete the words “The Schedule” after the words: “Chapter VIII.- Alteration of the Constitution” and insert in lieu thereof the following:

“We, the people of Australia –

- *Recognizing* the dignity, culture and spirituality of our Aboriginal and Torres Strait Islander citizens and their historical occupancy and custodianship of our lands and seas;
- *Conscious* of the contributions to our national life made by Australians of different ethnic origins, nationalities, religions, traditions and cultures;
- *Proud* of our democratic system of government under the rule of law;
- *Respecting* the inherent dignity of every person and
- *Willing* to participate in the building and maintenance of international peace;

Confirm and give to ourselves this Constitution:

Covering Clauses:

- A. This Constitution and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all ships whose first port of clearance and whose port of destination are in the Commonwealth.

- B. *The Commonwealth* shall mean the Commonwealth of Australia established on 1 January 1901.
- C. *The States* shall mean the States of New South Wales, Queensland, Tasmania, Victoria, Western Australia, and South Australia, and such territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a *State*.

D. **New Offices of State:**
The President

- (1) The President is the Head of the Commonwealth and must be a citizen of the Commonwealth capable of being chosen as a member of the House of Representatives;
- (2) The first President shall be the Governor-General in office when this section comes into force and shall hold office for a term of 2 years thereafter.
- (3) The President shall hold office for a term of 5 years from the date on which he enters upon his or her office but is eligible for re-election once and shall continue in office after the expiration of his or her term until his or her successor enters upon his or her office.
- (4) The President shall hold no other office of profit.
- (5) The President shall not be removed from office except on the certificate of the President of the Senate and the Speaker of the House of Representatives stating that both Houses in the same session have resolved to remove the President on the ground of proved misbehaviour or incapacity.
- (6) The President may resign office by writing addressed to the President of the Senate.
- (7) In the temporary absence or inability of the President to discharge his or her functions, the senior State Governor shall assume the duties and functions of the President.

The Electoral College

- (1) The President shall be elected by the members of the Electoral College composed of –
 - (a) The Chief Justice of the High Court who shall preside at meetings of the Electoral College;
 - (b) Two members chosen by the people of each State;
 - (c) One member chosen by the people of each mainland Territory.
- (2) If any chosen member shall be unavailable to take part in the proceedings of the Electoral College, the person next most favoured in the ballot which chose the unavailable member shall take that member's place.
- (3) The Electoral College shall meet to elect a President not less than 60 nor more than 90 days prior to the expiration of the term of a President or at any time in order to fill an occasional vacancy in the office
- (4) The procedures for choosing members of the Electoral College and the procedures of the Electoral College may be prescribed by law

The Council of State

- (1) There shall be a Council of State to advise the President in the exercise of power under s 61(3) of the Constitution.
- (2) The Constitutional Council shall consist of three citizens –
 - a. one of whom has served as Governor-General or President of the Commonwealth of Australia or as a Governor of a State;
 - b. one of whom has served as Chief Justice or as a Justice of the High Court of Australia or as Chief Justice of a superior federal court or of the Supreme Court of a State; and
 - c. one of whom has served in one or more of the offices referred to in paragraphs (a) and (b) of this subsection.
- (3) Subject to subsection (4) members of the Constitutional Council shall remain in office until their successors are appointed in accordance with paragraph (5)(a).
- (4) A member of the Constitutional Council –

- (a) may resign office by writing under her or his hand delivered to the President;
 - (b) shall not be removed except by the President in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.
- (5) (a) The President, after consultation with the Prime Minister, shall appoint members of the Constitutional Council within 3 months after the day on which the House of Representatives is summoned to meet after a general election;
- (b) If, at any time prior to the issuing of writs for a general election, there be a casual vacancy in the Constitutional Council, the President, after consultation with the Prime Minister, shall appoint an eligible person to fill that vacancy.

2. Section 2.

Delete s 2.

3. Section 51.

Insert after subsection (xxxviiA)(iii):

- (iv) “the *Australia Act* 1986 (UK) and the *Statute of Westminster* 1931, and
- (v) any other laws enacted by the Parliament of the United Kingdom in so far as they are part of the law of the Commonwealth, a State or a Territory:”

4. Section 61.

Delete Section 61 and insert in lieu thereof

- (1) The executive power of the Commonwealth including the prerogative power and all other immunities, powers, privileges and functions which were vested in or exercisable by the Queen or by the Governor-General before the *Constitutional Alteration (Establishment of Republic - Commonwealth) 2011* came into force are vested in and may be exercised by the President.
- (2) Subject to subsection (3), the President shall exercise or refrain from exercising any power conferred upon him or her by this Constitution only in accordance with advice tendered to the President by the Federal Executive Council, the Prime Minister or, in the case of a

power conferred by or under an Act of the Parliament, a Minister of State responsible for the administration of the Act.

- (3) The President may, without the advice prescribed by subsection (2) –
- (a) following the death or resignation of a Prime Minister, appoint as Prime Minister the person who, in the opinion of the President, is most likely to form a government which will have the confidence of the House of Representatives;
 - (b) decline to prorogue the Parliament, to dissolve the House of Representatives or to dissolve the Senate and the House of Representatives simultaneously if the President is not satisfied that–
 - (i) there are reasonable grounds to warrant the prorogation or dissolution; or
 - (ii) the Parliament has granted or will grant sufficient funds to enable the administration of the Commonwealth during the period ending when the Parliament might next meet if the President were to prorogue the Parliament, to dissolve the House of Representatives or to dissolve the Senate and the House of Representatives simultaneously on advice tendered in accordance with subsection (2);
 - (d) exercise or refrain from exercising a power conferred by section 5, 28, 57 or 64 if the President is of the opinion on reasonable grounds that the proposed exercise of power is absolutely necessary to ensure compliance with the general law or the effective operation of representative and responsible government under this Constitution.
- (4) In the exercise of power and the formation of opinions under this Constitution, the President and the Constitutional Council shall have regard to the conventions affecting those functions when performed by the Governor-General before the Commonwealth of Australia became a Republic and to any conventions subsequently established.
- (5) A certificate issued by the Constitutional Council that there are reasonable grounds for the President’s opinion under paragraph (3)(d) is conclusive evidence of the existence of such grounds and that certificate shall not be called in question in any court.

i. Section 64

Delete Section 64 and insert in lieu thereof:

The President may appoint a Prime Minister and other Ministers of State for the Commonwealth to administer such departments of State of the Commonwealth as the President in Council may establish.

Subject to this Constitution, the Prime Minister and other Ministers of State holding office when the Republic commenced shall continue in their respective offices.

The Prime Minister holds office until he or she resigns office by notice to the President or is dismissed by the President under this Constitution.

Ministers of State other than the Prime Minister hold their respective offices during the pleasure of the President but no Minister of State shall hold office for a longer period than three months unless the Minister is or becomes a Senator or a member of the House of Representatives.

The Parliament of Australia, with the approval of the electors, as required by the Constitution, enacts:

1 Short title

This Act may be cited as the *Constitution Alteration (Establishment of Republic- States) 2011*

2 Schedules

The Constitution is altered as set out in the Schedule

3. Commencement:

The Schedule comes into force when Schedule 2 of the *Constitution Alteration (Establishment of Republic - Commonwealth) 2011* comes into force.

The Schedule—Amendment of the Constitution

Section 106

(a) Renumber the paragraph as subsection (1)

- (b) Delete the words: “as at the establishment of the Commonwealth” and insert in lieu thereof: “as at the coming into force of the *Constitution Alteration (Establishment of Republic - State) 2011*”;
- (c) Insert subsection (2) to read: “Notwithstanding the repeal under s 51(xxxviiA)(v) of any law enacted by the Parliament of the United Kingdom, the provisions repealed in so far as they were part of the law of a State immediately prior to the repeal shall be deemed to be a law of the State unless and until the Parliament of the State shall otherwise provide”;
- (d) Insert subsection (3) to read: “A law made by the Parliament of a State under subsection (2) respecting the constitution, powers or procedures of its Parliament shall be of no force or effect –
 - (i) unless it is made in such manner and form as may be required by a law made by that Parliament;
 - (ii) insofar as it purports to confer or vest any power, privilege or function in the Sovereign of the United Kingdom or of any other foreign power;
- (e) Insert subsection (4) to read: “The powers, immunities, privileges and functions which were vested in or exercisable by the Queen or by the Governor immediately prior to the *Constitution Alteration (Establishment of Republic - State) 2011* coming into force are vested in and may be exercised by the Governor”;
- (f) Insert subsection (5) to read: “Notwithstanding section 61(2) the power to appoint and the power to terminate the appointment of a Governor of a State is vested in the President acting on the advice of the Premier of the State.”