The Flinders University of South Australia
History Department, Faculty of Social Sciences

Postal address: GPO Box 2100, Adelaide, SA, 5001

Associate Professor Peter A. Howell
Tel. (08) 8201 2375 *Fax.* (08) 8201 3350
Email: Peter.Howell@Flinders.edu.au

To the

Joint Select Committee on the Republic Referendum
Parliament House
Canberra ACT 2600

SUPPLEMENTARY SUBMISSION

Thank you for the opportunity to make a supplementary submission.

My first point is to draw attention to a third and still more important reason (in addition to those I offered in the submission I presented earlier this month) for the desirability of avoiding, wherever possible, use of the words 'Until the Parliament otherwise provides', which the Referendum Taskforce inserted three times in the proposed new section 63 of the Constitution of the Commonwealth. The 1998 Constitutional Convention gave no one a brief to propose this innovation, and in framing it the Taskforce seems to have forgotten its own professed guideline that it 'should not go beyond what is reasonably necessary to implement the Convention model'.

The additional reason for opposing use of 'Until the Parliament otherwise provides' springs from the essential nature of our constitutional arrangements. There is no nation in the world where the people may more truly said to be sovereign than they are in Australia. In our nation, sovereignty is shared by the people of the Commonwealth and the people of the States united in one indissoluble federal Commonwealth. The really important, indeed the vital, manifestations of popular sovereignty in this country are not simply that the people determine who are their lawmakers but also that the Constitution of the Commonwealth **is indeed the people's thing**. That Constitution was drawn up by delegates who were, for the most part, elected, by the people, expressly for the purpose of devising a scheme of federation. The draft Constitution was then ratified by decisive majorities of those voting in referendums held in each of the colonies that were to become the states of the new nation, and most authorities agree that it can now only be changed with the consent of the people, voting in a referendum. No other country better fulfils the ideal which Cicero set forth more than two thousand years ago in his treatise *De re publica*, namely, *res publica res populi*, meaning: 'The state is the people's affair.'

This is our heritage. The people are in command of the wording of the Constitution of the Commonwealth. Anything which unnecessarily diminishes this is to be deplored and ought to be avoided. There are a very few areas, as in making provision for the salaries of the Governor-General and Federal Ministers (ss. 3 and 66), where our Constitution-makers very properly gave the Federal Parliament discretion to vary what the Constitution decreed. There were other areas (e.g. s. 87) where a discretionary power that was unfortunately granted to the

Federal Parliament has been used to bring about dramatic change to the balance of the Constitution **without consulting the people**. But the rules governing the appointment of an Acting President (or a President's Deputy, if provision for such a person is deemed unavoidable) are not merely completely unrelated to vagaries in the value of our currency or the changing amount of revenue raised from duties of customs and excise. They are of a completely different order, being matters of high principle, intimately related to the very essence and success of our system of government, and so should not be changed without the consent of the people.

Unless the words "Until the Parliament otherwise provides" are deleted from the proposed section 63, the Referendum Bill will be subjected to ridicule from many quarters.

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Secondly, when stating, at the Joint Select Committee's Adelaide sittings, that traditional vice-regal prerogatives, such as the *de facto* head of state's exemption from income tax and excise duties, would become quite inappropriate and should be discontinued if the Commonwealth severs its link with the monarchy, **I should have made it plain that I am not at all opposed to the first four and a third lines of the proposed section 70A.** The prerogatives enjoyed by the Crown in right of the Commonwealth – and the States – are one of the features which make our constitutional arrangements superior to those of republics such as the United States. Exercise of prerogative powers can, for example, enable judges to amend defective legal instruments without the unconscionable trouble, delays and expense suffered by American litigants encountering analogous difficulties.

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Thirdly, I was disappointed to read the Referendum Taskforce's explanation of its refusal to give effect to the Constitutional Convention's recommendation for a constitutional provision that, if the House of Representatives refuses to ratify the removal of a President, the vote of the House would constitute a vote of no confidence in the Prime Minister. I submit that on this the Taskforce was being over-cautious. From my reading of the convention debates, it seems clear that what was intended was that such a vote would amount to a vote of no confidence in the government. The Convention made its recommendation in the belief that the necessity of securing the House's support for the dismissal of a President would be an important restraint to prevent the Prime Minister's power being used impulsively or capriciously.

In recent years – and admittedly the phenomenon has been more observable at the State than the Federal level of government – we have seen the rise of a tendency to flout some of the conventions of ministerial accountability that were more strictly adhered to in the first 130 years or so of parliamentary government in Australia. Any Prime Minister who loses the confidence of the House of Representatives should immediately either resign or advise the calling of a general election. But can we be certain that, in the future, this constitutional convention will always be adhered to without some prodding from the head of state, especially if the Prime Minister has power to remove an Acting President?

On reflection, I submit that Parliament should amend the Constitution Alteration Bill by replacing the full-stop at the end of the proposed section 62 with a comma, and adding:

> The vote of the House would constitute a vote of no confidence in the Prime Minister, obliging him or her either to resign or to advise the Acting President to call a general election.

My final comments concern the 'doomsday scenario' Mr Bob Charles so graphically summarized at the Joint Select Committee's Adelaide sittings.

Committee members may be interested to know that in 1996 the twelve members of the South Australian Constitutional Advisory Council (a broadly representative body which included three barristers nominated by each of the political parties represented in the State Parliament)) resolved unanimously that:

> Recommendation 10
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> The current rule that, in the event of the death, absence or incapacity of the head of state, the most senior of the State Governors should assume office as Administrator of the Government of the Commonwealth, **should be extended by making constitutional provision that if a President is dismissed for any reason, the most senior available State Governor should serve as Administrator for the whole of the remainder of the displaced President's Term.**

The Advisory Council explained that this would mean the disgruntled Prime Minister could not simply choose his or her own party puppet but would have to put up with whoever happened to be the longest-serving State Governor at the time. (*South Australia and Proposals for an Australian Republic*, p. 67). While our report received favourable comment from several speakers at the 1998 Constitutional Convention, no one there seems to have noticed our Recommendation 10.

After further consideration of the suggestion made by Mr Causley and Mr McClelland at the Joint Select Committee's Adelaide public hearing, I submit that it would be a most satisfactory compromise.

It could be effected by inserting, at the end of the first sentence of the proposed section 63 a new sentence reading:

> **Following the removal of a President by the Prime Minister, the Acting President shall serve until a new President has been appointed and has taken the oath or affirmation of office.**

Such a provision would forestall the 'doomsday scenario'.

Should the Parliament fail to make this or some comparable amendment, Joint Select Committee members may find some consolation in a further constitutional convention which would make it impossible for a Prime Minister to issue seven dismissal notices 'a second apart', as Mr Charles put it. It is the convention which has ordained that no suitably qualified individual actually becomes the person administering a government until that person has formally been installed in office.

For more than 175 years it has been the rule that no governor, lieutenant-governor, governor-general or other officer administering a government in Australia can assume office until that individual has been 'sworn in' before a judge of the superior court within the relevant political entity.

The Referendum Taskforce has made it clear that its members take it for granted that this convention will subsist if the Commonwealth severs its links with the Crown. So, in the event of the dismissal of a President, there **will not be** an Acting President until the longest-serving available state governor has been brought to Canberra and taken the oath or affirmation of office before a justice of the High Court. This means that a rogue Prime Minister could not dismiss an Acting President **until there is** an Acting President. If the Prime Minister did proceed to dismiss that Acting President, the next longest-serving state governor would have to

be asked to seek leave from his or her state ministers, make travel arrangements, journey to Canberra and be installed by a High Court Justice before that potential alternative Acting President became in reality the Acting President and could in turn be dismissed. Thus time must elapse between each dismissal, because no 'junior' state governor would apply for permission to leave the state until each and every longer-serving governor had, in turn, been installed as Acting President and dismissed.

If the rogue PM sought to short-circuit the process by persuading six Justices of the High Court to fly out, one to each state, and stand by to await instructions on precisely when to install a particular governor as Acting President, it could very safely be assumed that most if not all of the Justices would decline to oblige, invoking not merely their obligations to the parties scheduled to appear before them in Court but also their notions about the so-called 'separation of powers'. Moreover, it is possible that at least some of them might counsel, not just the Prime Minister, but also potential Acting Presidents, about the gravity of what the PM was contemplating.

I hope these further comments may be helpful.

P.A.K.

26 July 1999