# CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999

**Submission to Joint Select Committee on the Republic Referendum**
**by The Hon Malcolm McLelland QC[1]**

[*Section references are to the Constitution as proposed to be amended, unless otherwise indicated*]

## A. INTRODUCTION

1. Australia, like every other organised society, is likely from time to time to encounter periods of political stress and difficulty, during which the structure of the Constitution may be tested to its limits. The Constitution must be so fashioned as to successfully withstand any such foreseeable test, preferably without litigation. This requires (a) an analysis of all foreseeable political contingencies (whether probable or not) which could put the Constitution under strain; (b) the filling of any constitutional gaps revealed by that analysis, and (c) a high degree of drafting precision designed both to cover the field and to avoid ambiguity or doubt.

2. The following perceived problems are put forward as requiring consideration in the light of these principles, and possible remedies are suggested.

## B. APPOINTMENT OF THE PRESIDENT

***Problem***

1. It may in particular circumstances be uncertain who is, or is entitled to be, the Leader of the Opposition. Furthermore the Leader of the Opposition may not be personally available. To require as a matter of law that the motion for appointment of a President be seconded by the Leader of the Opposition may cause unnecessary difficulties. This seems to be a superfluous formal requirement since, if there is a distinct Opposition, its support would almost certainly be necessary to gain the two thirds majority required, and as a matter of practice its Leader, if available, would be likely to second the motion.

***Remedy***

2. S 60, 2nd paragraph:
Delete: “seconded by the leader of the Opposition in the House of Representatives, and”.

3. If it is desired to retain a reference to the role of the leader of the Opposition, but avoid any technical problem of the kind referred to above, a further amendment to s 60 could be made as follows:
S 60 1st paragraph:
Add new sentence as follows:
"The Prime Minister's motion shall be seconded by the leader of the Opposition in the House of Representatives, if present and willing, but no breach of this requirement shall invalidate any appointment of a President."

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## . C. REMOVAL OF THE PRESIDENT

***First Problem***

1. S 62 is obscure in its intention and effect. In particular, it fails to specify what is to be the consequence of a failure by the House to approve. This is too significant a matter to be left to implication, or to the hope that a satisfactory convention may ultimately develop, or to the discretion of the Prime Minister.
2. There should be a distinct and substantial sanction, commensurate with the seriousness of the event, and since it would involve the inability of a Prime Minister to gain the support of the House in a matter of such symbolic importance as removal of the President, an appropriate sanction would involve the Prime Minister's removal from office and being ineligible for re-appointment for the life of the then House, or, if the Prime Minister so chose, an immediate dissolution of the House and general election.

***Remedy***

3. S 62, 2nd paragraph:

Delete the paragraph and substitute the following:

> "If, at the expiration of thirty days after the Prime Minister removes the President, the House of Representatives has not passed a resolution approving the removal of the President, the Prime Minister shall thereupon cease to hold that office unless within that period the Prime Minister has advised the acting President to dissolve the House and to cause writs to be issued for a general election. The acting President shall forthwith act in accordance with that advice. A Prime Minister who ceases to hold office under this section shall not be eligible for re-appointment as Prime Minister until after the next general election.
>
> If, (i) within the above period of thirty days, the House expires or is dissolved, or
> (ii) before the removal, the House had expired or been dissolved, but a general election had not taken place,
>
> the said period of thirty days shall be extended to seven days after the House next meets."

***Second Problem***

4. The machinery of removal contemplated in s 62 is the mere signature by the Prime Minister of a document, which is to have effect "immediately" and therefore without any delivery, publication or other notification to anyone. This is a highly undesirable procedure. No doubt its purpose is to prevent the President from pre-empting his or her own dismissal by dismissing the Prime Minister. But that can be achieved, and ultimate control vested in the Prime Minister, in a more acceptable way, namely by building in a delay in any dismissal of the Prime Minister (or any other Minister) by the President, while requiring notification of dismissal of the President by the Prime Minister.

***Remedy***

5. S 64, 1st paragraph:

Add the following:

"The President shall not dismiss the Prime Minister or any other Minister of State without giving to the Prime Minister notice of the President's intention not less than 72 hours (or such shorter time as the Prime Minister may agree to) in advance."

S 62, 1st paragraph:

Delete the paragraph and substitute the following:

"The Prime Minister may, by instrument signed by the Prime Minister, remove the President from office. Such removal shall not take effect until the instrument (or a copy) is:

(i) tabled in either House of the Parliament;
(ii) delivered to the President;
(iii) left at the office or official residence of the President; or
(iv) published in the Commonwealth Gazette."

## D. ACTING PRESIDENTS

***Problem***

1. The major benefit claimed for the "bipartisan appointment" republican model, namely that it will produce presidents having bipartisan support, also suggests a major weakness, namely that it will not produce a president at all in the absence of bipartisan agreement. Under this model no President can be appointed unless both the Prime Minister and the Leader of the Opposition (and a two-thirds majority of a joint sitting of both Houses) agree upon who it should be. Agreement cannot be enforced. Neither the Prime Minister nor the Leader of the Opposition can be compelled to act reasonably or in good faith, even if some practicable and acceptable criterion of reasonableness or good faith could be established, which itself is unlikely. In difficult times, or in the face of some crisis, the demands of perceived short term interest may outweigh constitutional nicety.

2. In the event that bipartisan agreement cannot be reached, and there is no existing President willing to continue in office, the Presidential powers will fall to be exercised by an acting President until such time as bipartisan agreement can be reached, which may be a considerable, indeed indefinite, period. For this reason, and also because vacancies in the office of President (necessitating the exercise of Presidential powers by an acting President) are likely to occur from time to time as a result of death in office or unexpected resignation, the position of acting President is one of vital constitutional significance.

3. S 63 makes provision "(u)ntil the Parliament otherwise provides", for the appointment of an acting President. The acting President is to be "the longest-serving State Governor available". By s 63 a State Governor is not "available" if he or she has been removed (as acting President) by the current Prime Minister.

4. Under ss 62 and 63, the Prime Minister may unilaterally remove not only the President (if any) but, successively, all eligible acting Presidents, leaving the Commonwealth without any person lawfully authorised to exercise the powers of the President, or any ready means of obtaining such a person. These are dangerous powers to vest in a single individual and would represent a serious structural flaw in the Constitution. So far as practicable, there should always be someone who (subject to being sworn in) is lawfully entitled to exercise the powers of the President. In certain circumstances (eg if the House of Representatives has been dissolved, or the Parliament prorogued), it may be impossible for a President to be appointed in the absence of an acting President.

***Remedy***

6. The Prime Minister's unilateral power of peremptory removal should be confined to the President, and not extended to any acting President. This could be achieved as follows:

S 63, 1st paragraph:

Delete the 2nd sentence.

S 63, 3rd paragraph :

Delete "sections 60 and 61" and substitute "sections 60, 61 and 62".

7. It is desirable to have an alternative procedure available for removal (but not by the Prime Minister alone) of an acting President (who, eg, may be, or become, unfit or incapable). One possibility is for the power to be vested in the Prime Minister subject to the support of a resolution of the House of Representatives. This could be achieved as follows:

S 63:

Insert after paragraph 3 a new paragraph 4 as follows:

"The Prime Minister may, by instrument signed by the Prime Minister, conditionally remove an acting President. Such conditional removal shall not take effect until the instrument (or a copy) is:

(i) tabled in either House of the Parliament;
(ii) delivered to the acting President;
(iii) left at the office or official residence of the acting President; or
(iv) published in the Commonwealth Gazette.

Such conditional removal, provided it is the first occasion of conditional removal during that term of office of that acting President, shall immediately suspend for thirty days the power of the acting President to remove the Prime Minister, or to remove a member of the Executive Council or Minister of State except on the advice of the Prime Minister.

If within thirty days of such conditional removal the House of Representatives resolves to approve the removal of the acting President the removal shall thereupon be effective and unconditional.

If, (i) within the last mentioned period of thirty days the House expires or is dissolved, or
(ii) before such conditional removal, the House had expired or been dissolved, but a general election had not taken place,

the said respective periods of thirty days shall be extended to seven days after the House next meets."

## E. TENURE OF HOLDERS OF PUBLIC OFFICE

***Problem***

1. At common law, all servants of the Crown held office "during the pleasure" (*durante placito*) of the Crown, and on the death or abdication of the Monarch (the "demise of the Crown"), the tenure of all persons holding office under the Crown ceased.[2]

2. After the Revolution Settlement of 1689, the position was gradually altered by a series of Imperial Acts, culminating in the Demise of the Crown Act 1901[3] which provided:
"The holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown."

3. That Act would have no application to persons holding office under a republican Constitution, and it might be argued that the common law position would be restored in relation to holders of office "during the pleasure" of the President (replacing the Monarch as head of state), so that the tenure of all such office holders appointed by a particular President would terminate when that President ceased to hold office.

4. Executive Councillors and Ministers are to be appointed by the President, and are to hold office "during the pleasure" of the President (ss 59 and 64). It might be argued that this expression itself implies (as a constitutional requirement) that they cease to hold office when the President by whom they are appointed ceases to hold office. If such an argument were correct, the consequences would be highly inconvenient.

***Remedy***

5. To avoid doubt, there should be a general provision in the Constitution analogous to the Demise of the Crown Act 1901. This could be achieved by adding a new paragraph to s 61 as follows:

> "No Member of the Executive Council, Minister of State or other officer of the Commonwealth shall cease to hold office by reason only that the President ceases to hold office."

6. The references to holding office at the pleasure of the President should be removed and replaced by references to dismissal from office by the President. This could be achieved as follows:

S 59, 2nd paragraph:

> Delete: ",and shall hold office during the pleasure of the President".
> Add new sentence: "A member of the Council may be dismissed by the President."

S 64, 1st paragraph:

> Delete: "Such officers shall hold office during the pleasure of the President."

Add new (third) sentence: "A Minister of State may be dismissed by the President."

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[2] "The demise of the Crown dissolved the Privy Council, and put an end to the tenure of all the officers of state and all commissions in the army. In effect it left the country without an executive government and without an effective army." – Holdsworth: A History of English Law (1938) Vol X p 434

[3] 1 Edw 7 c 5

## F. RESERVE POWERS AND CONSTITUTIONAL CONVENTIONS

***Problem***

1. S. 59 provides that the President "may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of the power". The natural meaning of that provision is to convert those constitutional conventions not only into rules of law, but into mandatory rules of law, so that the legal validity of a purported exercise of a reserve power by the President can be challenged in the courts on the ground that it was not in accordance with applicable constitutional conventions. That this was not the intention of the Government appears from para 5.17 of the Explanatory Memorandum ("Proposed s 59 is intended to preserve the existing status of the constitutional conventions as rules of practice rather than rules of law. It is not intended to make justiciable decisions of the President in relation to the exercise of the reserve [powers] that would not have been justiciable if made by the Governor-General").

2. The provisions of item 8 of Schedule 3 ("The enactment of the *Constitution Alteration (Establishment of Republic) 1999* does not prevent the evolution of the constitutional conventions relating to the exercise of the reserve powers referred to in section 59 of this Constitution.") does not save the situation, but appears to suggest that the conventions, though legally binding, may nevertheless evolve, similarly perhaps to the common law.

3. Much confusion and uncertainty would be created, and much litigation would be likely to ensue, if constitutional conventions relating to the exercise of reserve powers were to be treated as legally binding rules, at least without precisely identifying the reserve powers and clearly stating the constitutional conventions applicable thereto.

***Remedy***

4. The position may be rectified as follows:

S 59 3rd paragraph:
Delete the paragraph.

Schedule 3, item 8:
Delete the item and substitute the following:
"The enactment of the *Constitution Alteration (Establishment of Republic) 1999* does not affect the application to the exercise of any powers of the President, of any constitutional conventions which before such enactment applied to the exercise of equivalent powers of the Governor-General, subject to any subsequent evolution of those conventions, but no such conventions are by this provision given the force of law."

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(Malcolm McLelland)