CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) BILL 1999

SUBMISSION BY GAVAN GRIFFITH Q.C.

1. As I understand the position, the main concern of the enquiry is to be satisfied that the Constitutional amendments do no more than give effect to the model for a republic endorsed by the Constitutional Convention.

2. I confine myself to points of comment. I omit comments which go purely to consistency or drafting style as these may be both lengthy, and unfortunately, uninfluential. I merely note that the drafting person should have read Horace, Shakespeare and the Gettysburgh address. Indeed it is a pity that one of their descendants were not retained rather than the Office of Parliamentary Council who are better employed drafting a taxation act rather than a constitution.

Constitution Alteration (Establishment of Republic) Bill

Schedule 1 amendments

3. Schedule 1 Item 3 would substitute a new section 59 vesting the executive power of the Commonwealth in the President and providing for the exercise of that power. The third paragraph would provide that:
   (i) the President 'shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State'; but
   (ii) a power which was a reserve power of the Governor-General may be exercised 'in accordance with the constitutional conventions that related to the exercise of that power by the Governor-

General'.

4. Presently the Constitution is silent as to the exercise of the constitutional power by an executive constituted by the Prime Minister and Cabinet. The entire exercise of executive power is expressed by reference to the Executive Council. Perhaps it is inevitable, but the new sections 59, 60, 61, 62 and 63 now embrace the role of the Prime Minister in respect of appointment of the President. What concerns me is the entirely new inclusion of the Prime Minister, and any Minister, as part of the ordinary exercise of executive power. Section 59 is stated to be in substitution for the present sections 61 and 62.

5. It is not at all clear what is the precise effect of the first part of the last paragraph of section 59, providing "the President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State;". This is a completely new provision. It is incorporated as a chapeau to the remainder of that paragraph dealing with the exercise of reserve powers. But at the same time this provision has the effect of writing into the Constitution something not previously expressed. The recommendations of the Constitutional Convention could be enacted on a minimalist basis without this new articulation of executive power.

6. Also, the rule that the Governor-General acts on ministerial advice is itself a matter of convention, which now is elevated to a rule of law. This goes beyond the minimal requirements of establishing a republic.

7. The requirement quoted in para.3(i) above is unspecific as to when the President is to act on each of the specified sources of advice. There are presently in existence conventions (or at least practices) governing when advice is taken from the Prime Minister, the responsible Minister or the Attorney-General (see Republic Advisory Committee, *An*

Australian Republic: The Options (1993), Vol.2, p.244). It is not clear whether these conventions would continue to operate (especially given that other conventions are expressly adopted) and, if not, how the President should determine the proper source of advice. In this connection it should also be noted that the Executive Council, a purely formal body, has no role in advising the Governor-General except where a power conferred by the Constitution or by statute is to be exercised 'in Council'. Presumably it is not intended to alter this position; however, the draft makes this less than clear.

8. Hitherto the High Court has been quite comfortable dealing with executive power to found defined sections 61 and 62. It may be that there are matters of constitutional significance which will arise if the Constitution comes specifically to recognise the concept of advice, not merely from the Federal Executive Council, but also any of the Prime Minister or another Minister of State. There is constitutional significance in the establishment of disjunctive (and apparently equal) sources of advice of the Prime Minister or a single Minister. Hitherto the convention is that the advice to the Governor-General is given by the Federal Executive Council, rather than by individual Minsters. The proposed last paragraph of section 59 raises the possibility that there may be conflicting sources of advice. A President may be put in a position of constitutional uncertainty as to whose advice he should act on. Having entered into this new area, it is difficult to suggest a satisfactory provision. There is no reference to the advice of Cabinet, the most obvious source of advice other than the Prime Minister. This is breaking new constitutional ground. It may become a great thing for constitutional lawyers. But it certainly goes beyond the minimalist approach on which these amendments are stated to be based. It makes me anxious.

9. In conformity with the decisions of the Constitutional Convention the approach of continuing the constitutional conventions has been adopted in the last paragraph of section 59 in preference to an attempt to codify the reserve powers. As to this I comment -

(1) By providing that the reserve powers may be exercised 'in accordance with the constitutional conventions that related' to the powers of the Governor-General, the draft provision arguably adopts those conventions *as conventions* and does not make them rules of law. However, the reference to the conventions imposes an express constitutional requirement on any exercise of the reserve powers. Indeed, reference to the existing body of conventions is necessary in order to identify the reserve powers, so that the conventions comprehensively define the power that is conferred on the President rather than merely limiting it. As it stands, section 59 probably does give legal force to the body of conventions that defines the reserve powers.

(2) The elevation of the conventions to the status of constitutional requirements would not of itself make the purported exercise of a reserve power by the President a justiciable issue. The High Court might well take the view that as the content of the relevant conventions (which must necessarily be established if a breach of the requirement is to be established), are indeterminate and essentially political, and hence incapable of judicial determination. It should follow that this limb of section 59 does not give rise to judicially enforceable obligations. However, given the complexity which attends the notion of justiciability generally (as to which see e.g. Lindell, 'The Justiciability of Political Questions: Recent Developments' in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992), 180) and the willingness of the High Court to inquire into, for example, whether the requirements of section 57 have been complied with (*Cormack v*

Cope (1974) 131 CLR 432; *Victoria v Commonwealth* (1975) 134 CLR 81; *Western Australia v Commonwealth* (1975) 134 CLR 201), it may or may not be found that the Court would take that view of the proposed provision. It is a matter of assumption rather than expressed certainty.

(3) The Explanatory Statement to the draft Bill asserts (at para.5.6) that the proposed provision would allow the conventions to continue to develop. In my view, that is not necessarily so. The drafters may have had future development in mind in using the formulation 'may exercise … in accordance with' rather than providing for the conventions to 'apply'. However, the draft provision still imposes rules for the exercise of power by reference to 'conventions that related to the exercise of … power by the Governor-General'. The scope for continued development might be assisted if the reserve powers were able to be exercised 'in accordance with the system of constitutional conventions …' (a system which included the capacity for development over time) rather than the particular conventions themselves.

10. The proposed section 60 (Schedule 1 Item 3) contains qualifications for selection as President, but there is no provision for a President to cease to hold office if, after appointment, he or she ceases to satisfy those qualifications. Until recent times, not being an Australian citizen might be suggested as a qualification for Vice-Regal office. This is in contrast to the position of Members of the Parliament (see section 45). Para.28 of the Convention's Communique (reproduced as an Attachment to the Explanatory Statement) is headed 'Qualifications for office' and reads 'Australian citizen, *qualified to be a member* of the House of Representatives' (emphasis added) – a form of words which (especially when read with para.56) tends to suggest that the Convention favoured a parallel provision to section 45 as well as an adoption of the effect of

section 44.

11. Perhaps the other references to the Prime Minister (and, in the second paragraph of section 60, even to the Leader of the Opposition) are necessary. They also are breaking new ground in recognising an office for particular purposes which has not hitherto been admitted by the Constitution. The amended provisions of the present section 15, dealing with casual Senate vacancies are drafted in a form which should appear in no constitution. Perhaps it is inevitable to have a provision along the lines of the second paragraph of section 60 faithfully to reflect the recommended processes of choosing a President. But there must be a better way to express it.

12. The Explanatory Statement argues (at para.6.11) that it would be inappropriate to include 'automatic' disqualification provisions which might require judicial determination, and that the issue of removal should be left entirely to the Prime Minister. While the force of this argument must be acknowledged it should also be noted that -

    (i) proposed section 60, although expressly saving the validity of things done by a person appointed as President who was not qualified to be chosen, does not exclude a judicial determination that a person was not properly appointed because he or she was not qualified.

    (ii) leaving the question of removal to the Prime Minister leaves open the (admittedly extreme) possibility that a serving President could, for example, join the governing political party and undertake obligations of membership while continuing in office.

13. Proposed section 61 (Schedule 1 Item 3) provides for the remuneration of the President. That remuneration is not to be altered during the

President's term of office, so as to prevent inappropriate pressure on, or inducements to, the President. However, the Explanatory Statement notes (para.7.10) that the present wording would allow the President's remuneration to be altered if he or she continued in office after the end of a five year term because a new President had not been chosen. This raises the (again, extreme) possibility that a Prime Minister could delay the appointment process by several months and keep the existing President in office, with a promise of greatly increased remuneration for that period, in order to secure favourable treatment. That possibility could be excluded, given the terms of the last paragraph of proposed section 61, if the second paragraph were to provide that '*the President's term continues* until the term of office of the next President begins'.

14. Proposed section 62, in allowing the President to be dismissed with immediate effect, would work some practical change to the present position. One (or perhaps the) factor which led Sir John Kerr to conceal his intentions from Prime Minister Whitlam in the 1975 was his belief that Mr Whitlam would have him removed. Despite the unreasonable fears of Sir John Kerr, the procedures for summary dismissal of the Governor-General have not been tested. Clearly they do not presently embrace dismissal *instanter* by the Crown on receipt of Prime Ministerial advice, if for no other reason than that the practicalities of transmitting advice to the Queen and receiving her response and also the time differences between Australia and Britain. In any event, before acting on such advice, the Queen might be expected to warn, counsel and advise. The implicit delay in the present scheme could be of critical importance. It makes pre-emptive dismissal unattractive for a Prime Minister who comes into conflict with a Governor-General. Contrast the proposal for immediate pre-emptive dismissal in section 62. This also is a worry. It is a substantial change to present procedure. But it does

reflect the Constitutional Convention's recommendation.

15. Of course, if the Prime Minister were to exercise the power of instant removal in an attempt to prevent his or her own dismissal by the President, the Prime Minister would have to submit that removal for approval in the House of Representatives. Also, he or she would have to contend with an Acting President (not chosen by the Prime Minister) who might be of the same mind as the removed President, and the obligation to conduct a bipartisan appointment process for a new President. That may be a relevant deterrent to the summary exercise of the power. But the proposal represents a subtle shift from the present balance, which carries unexpressed delay.

16. Section 63, providing for Acting Presidents and Deputies. Here the combination of confusion and bad (to the point of hopeless) drafting which mandates the complete withdrawal and re-writing of the power. First, it is unhelpful to predicate the provision for Acting Presidents upon some States retaining links with the monarchy. It is necessary to make some effective provision for Acting Presidents to fulfil the function of an administrator appointed by the Queen, as is now provided for under section 4 of the Constitution. It is another thing to re-write the, (almost constitutionally dead), powers under section 126, which confer upon the Queen the power to authorise the Governor-General to appoint deputies. The deputy is a dormant office, rooted in concepts of imperial power. Its only current use is to enable the Chief Justice to swear in members of the Parliament. With good reason, its continued relevance has been neglected and ignored until its unfortunate re-appearance in this new section 63. Section 63 fails to deal clearly with the requirement that there must be appointment of a person, whether designated as Acting President or otherwise, to act when the office is vacant, or when the President is incapacitated or otherwise unable to act or is on leave

or (but not necessarily) overseas. The present practice is for the appointment of an Administrator by the Queen under section 4. The provisions of section 126 are not called in aid for such appointments.

17. To my mind, it is wholly inappropriate to seek to adapt the provision for deputies in section 126 as the vehicle for the appointment of persons to act for the President in circumstances equivalent to where an administrator is now appointed by the Queen to act in the stead of a Governor-General who is not available to act. Section 63 should be reformulated to provide appropriately for the appointment of an Acting President, preferably not by reference to the office of State Governors, to carry out the duties presently equivalent to that of administrator where the office is vacant, or where the President is incapacitated or on leave or otherwise unavailable to act. It is most undesirable that the provisions for appointing a deputy be retained or adopted for a Republic. Section 126 should be repealed. There should be no provision to enable the President himself to appoint deputies. Section 63 is not even a fair adaption of the present section 126. It is inappropriate for the constitutional provision to provide that the President may appoint deputies.

18. Alternatively, if there must be such a provision (which, to my mind, is wholly unnecessary) at the least it should be stipulated that such appointment must be on the advice of the Executive Council. Further, as the proposals are so ill thought out and poorly expressed, the entire provision should be expressed as subject to "until the Parliament otherwise provides". This chapeau is made respectable by existing provisions for the Constitution, such as sections 46, 47 and 48.

19. In summary, section 63 is a complete mess. The Explanatory Statement is quite misleading. Section 63 should be entirely re-written without any reference to section 126 powers to appoint deputies. Section 126 should be repealed.

Schedule 2 amendments

20. As a minor matter for useful amendment, it would be useful if section 64 (Schedule 2) could be amended specifically to provide that more than one Minister may be appointed to administer one Department of State. The present practice of multiplicity of appointment of Ministers to one department rests merely on my opinion. Were that opinion not upheld, the consequences would be grave, at least for the Ministers concerned. I do not have doubts, but having regard to the fact that the High Court repudiated the legitimate interests of the people of Australia in striking down the cross-vesting laws, it would be best to avoid the possibility of recourse to the High Court on this issue. It would be very useful to put the issue beyond constitutional doubt.

21. Item 41 would bring into the Constitution, as new sections 126 and 127, the substance of covering clauses 5 and 6. The purpose of these insertions is not clear, since (apart from preamble issues) the covering clauses themselves would remain and there is no attempt to exclude them from consideration in the interpretation of the Constitution. It would seem that the drafters have in mind making the Constitution a free-standing instrument, complete in itself. This does not constitute an attempt at achieving legal autochthony (that would involve a breaking of the link between the Constitution and the *Commonwealth of Australia Constitution Act 1900* (UK) of which it forms part). However, it might be portrayed as such by persons opposed to the proposed changes.

22. The proposed new section 58 (Item 23) would require the President to 'assent' to a law or 'withhold assent'. This is different to the existing section 58 which requires the Governor-General to 'declare' that he or she assents or withholds assent. While a sensible interpretation of the new provision would require some manifestation of assent or withholding, it is probably preferable that the existing requirement to 'declare' assent or withholding be retained. It might be argued that the existing provision entrenches a requirement that laws be made in public. (Paras 12.52 and 12.53 of the Explanatory Statement suggests that this change has not been appreciated: para.12.52 paraphrases the existing section 58 as requiring merely assent or withholding, while para.12.53 describes the new section 58 as requiring declaration.)

23. Several Items in Schedule 2 arguably go beyond mere 'consequential' amendments, in the sense of amendments made necessary by the replacement of the Queen and Governor-General by a President. This does not make them objectionable, but it does mean that they require independent justification. These Items fall into two categories.

24. The first category involves the removal of vestigial links with Britain which (correctly, in my view) are seen as inappropriate.

    (1) Item 15 would alter the effect of section 34(ii) by removing the possibility that a 'subject of the Queen' who was not an Australian citizen might be chosen as a member of the Parliament. That possibility is slight, given that the operation of section 34(ii) has been excluded by Parliament 'otherwise providing'. However, as the Explanatory Statement acknowledges (para.12.33), section 34(ii) could theoretically revive if existing laws were repealed; and given the terms of covering clause 2 that would result in some persons who were not Australian citizens becoming eligible to sit

in the Parliament. The exclusion of non-citizens from the Parliament is not a strict requirement of republican government.

(2) Nor is the amendment to be made to section 44 by Item 20 a strict requirement of the change to a republic. The words to be deleted (those referring to officers or members of 'the Queen's navy or army') would, as para.12.47 of the Explanatory Statement points out, become redundant by reason of changes to section 44(iv) (and persons owing allegiance to the Queen of the United Kingdom as members of that country's armed forces would presumably be disqualified under section 44(i) in any event). Their removal is a matter of tidying up the section.

(3) Items 33 and 34 would remove provisions relating to appeals to the Privy Council which at present have no operation. The last paragraph of section 73 is to be replaced on the ground that it is spent, not because its removal is required. While it is clearly correct as a practical matter that section 74 is (as para.12.74 of the Explanatory Statement says) 'wholly expended', it remains theoretically possible for the legislation preventing appeals to the Privy Council from the High Court to be repealed. It is also theoretically possible, although practically unthinkable) for an Australian republic to decide that the High Court should be subject to review by the Privy Council. Item 34 is therefore not strictly necessary although it is clearly desirable.

(4) Items 38 and 39 would limit the protection of section 117 (which currently applies to a 'subject of the Queen' resident in a State) to Australian citizens.

25. The second category comprises repeals of spent provisions that refer to the Queen or the Governor-General. This approach is understandable, since amending these provisions to refer to the President would be pointless (and anachronistic) while leaving them in place would be

confusing. However, this raises a question of consistency of approach. The opportunity has not been taken to remove spent provisions generally. The Items in this category are as follows:

(1) Item 29, which would repeal section 69. Although section 69 probably is spent, its removal would mean that the essential trigger for the application of section 52(ii) was no longer to be found in the Constitution.

(2) Item 35, which would repeal the second sentence of section 83.

(3) Item 36, which would delete from section 85(i) the words limiting the vesting of property in the Commonwealth by reference to a declaration of the Governor-General in Council.

26. A possible alternative approach is suggested by the paragraph which Item 31 would add to the end of section 70. Provisions which applied to the period immediately after federation could be left as they stand (pending further action to deal comprehensively with spent provisions) and supplemented by some provision to the effect that, to the extent that they have any continuing effect, the President is to be substituted for the Governor-General. This would lack the concision of the present draft, but would arguably be more consistent with the overall purpose of the amendments.

Schedule 3 amendments

27. Schedule 3 would add a new Schedule 2 to the Constitution containing transitional provisions which, in the view of the drafters, should not be allowed to clutter up the main text of the Constitution.

28. Proposed Item 3 would allow the Parliament to make laws, which are required to be made by the principal amendments, in advance of the establishment of the Republic. The obvious main purpose is to allow a nomination and selection process to be established and completed

before 1 January 2001 so that the first President of the Republic can take office on that day. There can be no argument with this. However, the language of the provision is alarmingly inelegant. A better attempt is called for. The provision is meant to speak in the present during the transitional period (i.e. pre-republic) but refers to laws that the Parliament 'could have made after that time' – a phrase which can only make sense from the standpoint of the republican future.

29. Proposed Items 5 and 7 would deal with the position of the States. There is clearly an expectation that individual States will act to sever their links with the Crown, and provide for the appointment of a resident to perform the functions of the 'head of state', with effect from 1 January 2001 (or possibly before). However, no attempt is made to bring about the severance of State links with the Crown by force of the Commonwealth Constitution (which, in my opinion, would clearly be possible). Item 5, to my amazement, provides for the maintenance of a State's links with the Crown until the State alters its laws to sever that link. Item 7 would allow amendment by the Commonwealth of section 7 of the *Australia Acts 1986*, which currently provides that the representative of the Queen in each State is the Governor (and which, absent a constitutional amendment, can only be amended at the request of all of the States).

30. I have great difficulties with the constitutional concept embraced by the Constitutional Convention, based, as they were, on what I regard as a misconceived and plainly wrong constitutional advice on this issue. My own view is that the concept of any continuation of State links with the Crown under a Republic is incompatible with the inherent status of Australia as an independent nation. It is a constitutional aberration to contemplate that the head of a foreign state may have any constitutional status in the government of a State forming part of a Commonwealth

Republic. It is self-evident that there may be no constitutional role in any State for, say, the King of Spain, President Clinton or President Milosevic. In my opinion, upon Australia becoming a republic, such status in a State for the Queen of England (who will cease, even in name, being the Queen of Australia) is equally bizarre.

31. It must be hoped that the conceptual issues will be avoided by all States electing for the republican model at the same time as the Commonwealth.

32. Further, in my opinion, on Australia becoming a republic, and whatever are the amended terms of the *Australia Act,* there will exist an inherent constitutional power in the Commonwealth to legislate to eliminate the head of a foreign state, including the English monarch, from any constitutional relationship with a State. This was a view taken by the then Government in 1986. An *Australia Act* was passed in identical form by enactment by the Commonwealth in the form of the *Australia Act* 1986 and, upon request of the requesting Act passed by the Commonwealth, in the terms of the imperial *Australia Act* 1986. The controversy as to whether or not the Commonwealth itself could complete the residual links exercise without an imperial Act was consciously avoided by the proclamation of identical Acts to come in force, not merely on the same day, but at the same instant, namely 5.00 am. Greenwich Mean Time on 3 March 1986. In my opinion, *Kirmani v. Captain Cook Cruises* (1985) 159 CLR 351 is confirmatory of the power of the Commonwealth to pass valid laws to eliminate the English monarch from the constitutional structure of a recalcitrant State.

33. I accept that this is some controversy as to the extent of this Commonwealth power. Those advising the Commonwealth and the Constitutional Convention got it wrong. It is an issue on which I do not

have constitutional doubts. But I do have my doubts that a majority of the current High Court necessarily would see the constitutional doctrines with such clarity.

34. In any event, were a specific constitutional provision to confirm the possibility of the Crown continuing in a State under an Australian Republic, the following points should be noted:

(1) The reference in Item 5 to 'the monarch of the State' is clearly enough a reference only to the monarch of a State which chooses to retain one. It would not have the effect of entrenching the monarchy at State level. That effect is sometimes claimed for section 7 of the *Australia Acts*, but Item 7 will allow that impediment to be removed.

(2) By providing for who the monarch of a State is to be, Item 5 would implicitly limit the options open to a State to the retention of the existing Crown or the creation of a non-monarchical system. It would not be open to a State, for example, to install a local hereditary head of state. There might be a case for the Constitution to limit the options further, by insisting that any 'head of state' other than the Queen be an Australian citizen. However, the prospects of a State choosing a non-Australian head of State seem remote.

(3) Item 5 does not, of course, apply to the Territories, which for constitutional purposes are under the exclusive jurisdiction of the Commonwealth. The replacement of the Queen and Governor-General by a President automatically ends each Territory's link with the Crown.

35. Item 6 would provide that the amendments to be made by the Bill will not 'affect the unity of the federal system of government and law established under this Constitution'. The Explanatory Statement

(para.13.15) does little to elucidate the purpose of this provision. The terms of paras 13.15-13.16 suggest that it is intended to deal with the concern addressed (but not endorsed) in Republic Advisory Committee, *An Australian Republic: The Options* (1993), vol.1, 125-126. However, like this concern itself, the language of Item 6 is rather diffuse. If the provision is necessary (which I doubt), it would be preferable if the nature of the 'unity', or the possible effects on it which are to be excluded, could be made clear. Unqualified references to broad concepts of 'unity', even in a transitional provision, could in the hands of activist Justices of the High Court become a basis for the implication of new and unintended constitutional doctrines.

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