4th February 2009

The Standing Committee on Finance and Public Administration
The Senate
Parliament House
Canberra ACT 2600

Public Submission re Inquiry into the Plebiscite for an Australian Republic Bill 2008

This submission to the Senate is in opposition to Senator Bob Brown's Private Member's Bill proposing the holding of a plebiscite on the question of whether voters want Australia "to become a republic". Apart from the specific question proposed by Senator Brown, I would respectfully suggest his broader notion of holding one or more vaguely-worded plebiscites to claim "mandates" for profound constitutional change is both repugnant to Australian parliamentary democracy and aims at subverting Australian constitutional practice.

Australia's form of representative democracy is built squarely on the bedrock of the Westminster system. The drafters of our constitution sought to update and improve upon this foundation by importing a number of additional innovations: the interaction of a written Constitution and Westminster conventions as already essayed by the Canadians; a federation of strong state governments and an elected "States' House" for the Parliament's Upper House, inspired by the United States (but with the innovation that the basic rights and privileges of the Australian Senate were to be primarily modelled on those of the British House of Commons, not the House of Lords or the US Senate); and a referendum process of constitutional change adopted from Switzerland.

Where these exotic mechanisms were to be incorporated into the Australian Constitution, the sensibilities of the Australian drafters remained strongly influenced by Westminster history, legal and constitutional convention and political philosophy, and it is through this prism that the High Court of Australia has constructed a self-consistent synergy from the various sections of the written Constitution since 1901.

So let me begin by describing what Senator Brown's proposed plebiscite is not. It is **not** a referendum as envisaged by either s.128 or any other section of the written Constitution that addresses appropriate ways in which the popular will can be used to re-write parts of our constitutional arrangements. Nowhere in the written Australian Constitution is a concept like Brown's plebiscite even contemplated—in its ambiguity of phrasing to be put to the people; in its envisaged aim, which clearly anticipates falling short of a referendum outcome; and in its proposed mechanism of future plebiscites and referenda to achieve its ultimate objective, it is alien to the written sections that define in part the exercise of lawful political authority in this country.

Of course, that may not itself be enough to exclude this notion of Brown's plebiscite. Traditionally, where the written Constitution is silent on whether something can be done, we turn to the Westminster notion of the sovereignty of the Crown in Parliament. The combination of majority assent of each of the Houses of Parliament and the assent of the Crown traditionally enables an elected government to do pretty much whatever it likes, subject to the constraints of the existing laws and Westminster

constitutional conventions. The process may not be especially tidy—the courts may keep knocking back sections of the enabling legislation where they conflict with existing law, until such time as Parliament has removed these obstacles—but provided this is achieved, any manner of strange and wonderful projects, propositions and political instruments may be constructed by the government of the day.

A key phrase here is "subject to the constraints of… Westminster constitutional conventions". Some political proposals are by their nature so obnoxious to those conventions that passage of that proposal is expected to be blocked by any conscientious party able to do so: for example, the corrupt extension of an existing Parliament's term, the declaration of a Prime Minister's or government's immunity to criminal law, the stripping of the franchise from a group in the community, etc. Although such obstruction is in the first instance the duty of the Upper House, that Upper House may be so emasculated in authority, or so complicit in the reprehensible behaviour, that alternative measures may be required.

Thus the ongoing relevance and importance of what are now known as the "reserve" powers of the Crown have been repeatedly acknowledged or advocated, in the 19th Century by people such as John Stuart Mill and the Canadian constitutional authority Alpheus Todd and in the 20th Century by British constitutional authorities such as Lord Anson, Professor A.V. Dicey and Lord Hailsham, Canadian authorities such as Senator Eugene Forsey, and Australian ones such as H.V. "Doc" Evatt and other leading legal authorities in the Commonwealth. This is because exercise of such reserve powers by a royal or vice-regal observer would inevitably force the issue back to the floor of the Lower House, or ultimately to the electorate to decide in a forced dissolution of Parliament and general election. This is due to the way the conventions of ministerial responsibility work when the reserve powers are exercised.[1] The current scope of the Crown in Australia to exercise its reserve powers is not an historical accident, but a democratic safeguard that augments other safeguards such as a powerful Senate, written Constitution and a vigilant High Court. Indeed this safeguard is arguably more democratic than the operation of the High Court, in that it ultimately refers the issue back to the Australian people—if necessary, in a forced general election, as in 1975—as a result of executive action by the unelected Governor-General, rather than having the finality of legislative action by an equally unelected High Court.

Returning to our main thread of argument, would a Brown plebiscite be one of those "strange and wonderful projects, propositions and political instruments" permissible under Westminster convention? Historically the Westminster system has regarded plebiscites as repugnant: for centuries, watching from across the Channel, British parliamentarians have seen them become a favoured tool of French despotic governments. From the French Revolution onwards to the "reign" of Charles de Gaulle in the 1960s, plebiscites in France have been a favourite way of creating an illusion of public involvement in government, while often in reality creating a

[1]Unfortunately this fact is not currently well understood by some modern Australian academics, due to their ignorance of the relevant conventions of ministerial responsibility during prerogative action by the Crown and the way they would force a general election: see Greenwood, N.J.C., *For the Sovereignty of the People*, Australian Academic Press, 1999. This work also includes a more comprehensive reading list in its bibliography.

"mandate" for outrageous political agendas neither advocated nor desired by the majority of the French people.

A loosely-worded proposal means all things to all people. The voter votes for what he or she deems to be the most reasonable interpretation of the question, as viewed through the prism of the voter's own beliefs. But once the votes are tallied and a "Yes" is obtained, the only interpretation that counts as to what the mandate actually means is the government's, however distorted and grotesque that might be. Remember, this question is being posed in a purely political context; there's no appeal to the High Court by enraged voters over the subsequent amoral re-definition of vague words. There's little or no scope for judicial remedy or redress, in the kind of plebiscite being proposed to the Australian Parliament by Senator Brown.

What is more, the senator's proposed question is itself a classic example of exploitable wording, vague enough to gladden the heart of any French politician: the voters are being asked their verdicts on Australia becoming "a republic", when neither the form of the republic nor the path to becoming it are specified. The simple description "republic" of course encompasses a swag of very different political structures, including an executive president, or a so-called "non-executive" president elected by Parliament, or directly by the people, or chosen by a non-electoral process (all three having very different implications for the relationship with the Prime Minister). Which of these is intended by the honourable senator? Each will create a very different Australia from the others.

For that matter, for students of political philosophy, the term "republic" (coming as it does from *res publica*, government "for the people") could accurately be applied to the current Australian constitution, which has frequently been described as a "crowned republic". Nor is this merely a recent label—the French political writer Alexis de Tocqueville, comparing Britain with Switzerland in the 19th Century, remarked that "Take it all in all, England seems to be much more republican than the Helvetic [i.e. Swiss] Republic".[2] Even our country's formal title makes a conscious nod in this direction: "Commonwealth of Australia" echoes the title of the 17th Century English republic, the Commonwealth of England.

Essentially, for the wording of Senator Brown's question to be publicly interpreted in the way he apparently desires, he is expecting—indeed, relying on—a certain level of political ignorance to prevail on the part of the Australian community, that they answer his simplistic question in a simple-minded manner.

Even assuming that the Senate is happy about this, and Brown's republic plebiscite Bill becomes law, and this plebiscite question is put to the Australian people, and is supported across the nation in the way the senator desires, what then? Even if the question were answered with an overwhelming "yes" by the electorate, this would not bring Australia closer to any single form of republic. Instead a succession of further plebiscites would be required; Senator Brown even seems to think this is an admirable and appropriate way of engaging in constitutional drafting.

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[2] Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, tenth edition, Macmillan, London 1959, pp.184-185, comment mine.

It's important to be clear about the difference between this and the form of popular consultation underpinning the acceptance of Australia's draft Constitution in the late 19th Century. There, the voters were presented with coherent and self-consistent political designs to support or reject. But here, it seems half-conceived and incomplete plans are to be put together, mixed and matched in a sort of "Big Brother" elimination game show: direct election or parliamentary election? Parliamentary impeachment? Judicial impeachment? Prime ministerial dismissal? Reserve powers? Codification versus political discretion?

Remember we are contemplating the constraints of extremely dangerous executive powers. As an object lesson in getting it wrong, consider France.

All of France's republics after Waterloo have attempted to adopt the Westminster system, moulded into a republican format—including the balance of power between the Prime Minister and the wielder of the reserve powers, and ways to keep the armed forces apolitical and yet obedient to elected politicians. All of France's republics, except the current one, have failed and collapsed disastrously. For example, the post-war Fourth Republic had a weak ceremonial presidency and a strong prime minister, based on a simplistic interpretation of Westminster conventions. The prime minister's policies on North Africa adversely politicised the police and armed forces, leading to the French military *coup* in 1958—the police and army had no politically-neutral figure to retain allegiance, or strong reserve powers to restore order, so they overthrew the civilian government in Corsica using armed force, and then the government in Paris by the threat of more.

The current republic, France's Fifth, was drafted in the aftermath of the *coup*, again with close attention to Westminster: "[Michel] Debré, an admirer of the British parliamentary system, genuinely desired to create a Republic in which a government could be strong while remaining democratic…".[3] And even this one has come close to collapsing into dictatorship under President de Gaulle, who in the 1960s subverted the constitution while ignoring the judiciary, emasculated the prime minister, repeatedly declared a "state of emergency" using the equivalent of reserve powers, and converted the ceremonial post of armed forces commander-in-chief into a position of actual military power. French democracy has subsequently become more stable, but a study of modern French history reveals how fragile it has been, and may easily become again.[4]

The Irish republic also carries grim lessons for Australian republicans. Malcolm Turnbull's Republic Advisory Committee commissioned a study of the Republic of Ireland from a leading Irish constitutional scholar in 1993, with a view to extolling its virtues to the Australian public in the lead-up to the 1999 referendum. Turnbull and his committee must have been seriously disappointed when the Irish constitutional scholar rejected the Irish office of President as "inherently unsatisfactory", "poorly defined", which "for most of its existence has existed in a form of limbo". It contrasted unfavourably when compared with either the role of Elizabeth II in the United Kingdom or that of her Governors-General in Australia. Consequently this scholar, writing from Dublin, suggested we retain our "Nominal Chief

[3] Crawley, A., *De Gaulle*, Collins, London 1969, p.360.
[4] See *ibid.*; also Hayward, J., *The One and Indivisible French Republic*, Weidenfeld & Nicolson, London 1973; Ledwidge, B., *De Gaulle*, Weidenfeld & Nicolson, London 1982.

Executive"system as currently embodied by the Governor-General, and strongly urged that, if Australia were to decide to become a republic, it avoid Irish precedents.[5]

These failures by other countries attempting to adopt and convert the Westminster system to a republican format should give us pause for thought. I would respectfully suggest that it's no accident the Westminster system doesn't translate successfully into a republic: ever since Westminster's 17th Century experiences with the English republic, the eventual Restoration of the monarchy to cope with a politicised parliamentary army, and the development of the legal theory underpinning the Revolution Settlement in 1689, the Westminster system has relied on the existence of a vested interest deep within the Executive, namely a constitutional monarch. You need not take my word for it: when the US Constitution was being drafted at Philadelphia in 1789, one of the American Revolution's most eminent lawyers, John Dickenson (known as the "Penman of the Revolution") argued that

> Such an Executive as some seemed to have in contemplation was not consistent with a republic:that a firm Executive could only exist in a limited monarchy. In the British Gov. itself the weight of the Executive arises from the attachments which the Crown draws to itself and not merely from the force of its prerogatives. In place of these attachments we must look out for something else… A limited Monarchy he considered as one of the best Governments in the world. It was not certain that the same blessings were derivable from any other form. It was certain that equal blessings had never yet been derived from any of the republican form. A limited Monarchy was, however, out of the question The spirit of the times—the state of our affairs, forbade the experiment, if it were desireable.[6]

As he saw it, Dickenson's only hope for the fledgeling United States was a bicameral Congress and a federation of strong States, with independent governments willing and able to challenge the Federal government. Others at Philadelphia agreed with him, and added further safeguards, including Congress' ability to—in effect—declare war on a rogue US President and a politicised army.[7] Some of these safeguards many Australians might deplore: for example, the so-called "Right to Bear Arms", which was intended to make such measures enforceable in hard reality. Australian republicans should take a long, hard look at Article I, section 8 of the US Constitution and all that it implies for civil society.

Of course, Dickenson didn't live to see the further balancing throughout the 19th Century between an elected parliamentary democracy and the guardianship of the Crown. Most of this additional evolution happened in the United Kingdom, but its modern implications were first realised by writers and lawyers in 19th and 20th Century Canada—and yes, by their Australian counterparts, and manifested in our constitutions. The result is our accountable parliamentary democracy in a peaceful

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[5] The report on the Irish republic is presented as Appendix 4 of Turnbull M. *et al.*, *Report of the Republic Advisory Committee*, Commonwealth Government, Australia 1993, vol.II. Oddly enough, Turnbull failed to mention this report in his subsequent campaigning for a republic.

[6] Madison, J. (ed.), *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America*, Oxford University Press, 1920, pp.47-48; Madison's italics removed.

[7] Article I section 8 of the US Constitution. See Colonel Mason's motion of 14th September 1787 and also the debate of 23rd August as examples; Madison *op. cit.* p.565, pp.454-455. Some good modern legal commentaries can be found, e.g. Bakel, C., *The Right to Bear Arms*, McGraw-Hill 1966, p. 296.

civil society, coexisting with a politically-neutral standing army, without the extreme measures of the US Constitution. To my mind the result is a society greatly preferable to any other in the world, built in part on the stability of the Crown.

But the deeper problem with Senator Brown's proposed plebiscites is in its pretence of democracy. Doubtless he would protest, aren't all appeals to the voting public "democratic"? Wouldn't his grand scheme of plebiscites and multiple-choice constitution-drafting be therefore highly democratic? Well, no. H.V. "Doc" Evatt, the Australian Labor Party's greatest intellectual (and, by the way, a constitutional monarchist) pointed out the problem with politicians staging repeated appeals to get the outcome they desire. In the context of repeated dissolutions of Parliament to achieve an outcome, he wrote:

> Of course, in one sense, every appeal to the people, whatever circumstances exist when it takes place, represents an attempt to get a decision from the political sovereign… In actual fact, however, by means of defamation and intimidation and the deliberate inculcation of disillusion and disgust, a series of repeated dissolutions would probably be the very means of first delaying and ultimately defeating the true popular will, and so represent a triumph over, and not a triumph of, the electorate.[8]

I respectfully put it to this Committee that Senator Brown's proposal of repeated plebiscites, if successful, would achieve just such a "triumph over, and not a triumph of, the electorate". Successful passage of his initial plebiscite would lead to an outcome—an outcome, I suggest, that is fully intended by Senator Brown—whereby any responsible observers, seeing a proposed republic inferior to our current Constitution and protesting accordingly, would be silenced. They would be told that the Australian people wanted a republic, and so critics preferring the Crown were not wanted by the Australian people; were not needed by the Australian people; and so should be silenced and ignored. Similarly, if the next plebiscite found in favour of a directly-elected president over one chosen by parliamentary appointment, and the resulting model proved to be inherently flawed and dangerous, those critics—monarchist and republican alike—who raised their voices in protest would be condemned to being silenced and ignored. And so Senator Brown's process would continue, until his final objective of a republic, however flawed, misbegotten or dangerous, was reached. And all its critics, silenced and ignored; and the Australian people, forced to suffer from its failures.

The referendum processes of the Australian Constitution are designed with a heavy burden of proof against the advocates of large-scale change. This is because tampering with constitutional mechanisms is inherently dangerous. Referenda have historically been detailed and precise. If they aren't sufficiently persuasive, then they fail, and should fail. (Indeed, this question of becoming a republic was regarded by the drafters of the Australian Constitution as being too fundamental to the root of

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[8]Evatt, H.V., "The King and His Dominion Governors", *Evatt and Forsey on the Reserve Power*, Legal Books, Sydney 1990, being a reprint of H.V.Evatt's *The King and His Dominion Governors* (2nd ed. Frank Cass, London 1967) and E.A. Forsey's *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford University Press, Toronto 1968); p. 109.

government and the Federal compact in Australia, to be achieved even by the usual referendum processes of s.128.[9])

Senator Brown's proposed process is not only unknown to our Constitution, it is contemptuous of our Constitution: contemptuous of its caution, of its burden of proof, of its heavily-engineered structures to shelter the Australian people from arbitrary and despotic government. He appears to find its design archaic, and so ventures a mechanism to dismantle the whole edifice because its aesthetics jar with his sensibilities. His proposal would leave the Australian people more exposed to the hostile elements, while he builds a new political edifice using methods better-suited to a game show.

The best reply to his scheme of plebiscites can be found in the words of Edmund Burke, Ireland's finest political thinker and one of Westminster's staunchest defenders, who wrote that society is

> …a partnership in all science; a partnership in all art; a partnership in every virtue... As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.[10]

Consequently,

> But one of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of a habitation– and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.[11]

Senator Brown's ill-conceived proposal risks leaving Australia's political system a ruin instead of a habitation. I therefore tender this protest against it.

Nigel Greenwood.

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[9] Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (reprint of 1901 edition), Legal Books, Sydney 1976, pp.294-295.
[10] Edmund Burke, *Reflections on the Revolution in France* (ed. L.G. Mitchell), Oxford University Press 1993, p.96.
[11] *Ibid.*, p.95.