

SUBMISSION

TO

**THE SENATE
INQUIRY INTO
AN AUSTRALIAN REPUBLIC**

March , 2004

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Preamble

In the 1999 referendum the majority of Australians were not convinced that Australia should become a republic. Anecdotal information at the time and the many surveys of public opinion since have indicated that the majority of Australians do in fact want to have an Australian republic. So what went wrong? Why couldn't the republicans make their case?

Aside from the political conservatism that appears to be inherent amongst Australian voters, there are indeed a number of lessons to be learnt on how we should go about the process in the future.

Much has been written about the 1999 referendum. For the purposes of brevity and in the view of the writer the lessons to be distilled are:

1. The perception was that the whole process was rushed- let's have a republic it doesn't matter which type. The Centenary of Federation was seen as a fitting deadline, which only added to the pressure of having to make a decision sooner rather than later.
2. There was a lack of understanding of the issues and their implications. Technical/legal issues in the end became too complex for most to follow and ultimately dogged the debate. Voters will always vote NO when there is 'fear of the unknown'.
3. The perception was that the model was undemocratic – there was to be no involvement or participation by the public in deciding who should be our head of state - even the constitutional convention representatives were only half elected,
4. The perception was that the proposed model gave too much power to the politicians. The argument that "Politicians can't be trusted" gained currency throughout the debate,
5. Republicans could not agree amongst themselves as to the best model for an Australian republic: direct vs. appointed, extensive change vs. minimalist, executive vs. ceremonial: How could the Australian public be expected to make sense of the referendum when the republicans couldn't even agree amongst themselves?
6. Engagement of the broader electorate came too late in the process and so many became disenfranchised by the idea of a republic.

The Monarchists fully exploited the division amongst republicans. Furthermore, they took full advantage of the uncertainty that came from not fully understanding the many and technical issues involved.

This submission concerns itself primarily with the first of the Inquiry's Terms of Reference: "The process of moving towards the establishment of an Australian republic with an Australian

Head of state". Consequently, this submission will cover and hopefully expand on the issues raised by the Discussion Paper's questions 26 to 30.

The second of its Terms of Reference - To identify alternative republican models - is somewhat more problematic. Each model will have its own implications and issues to address. The argument put forward in 'The process for moving towards a republic', is that the myriad of issues will need to be debated at length and advised upon by a coterie of experts before an appropriate model is put forward before to the Australian people.

Nonetheless, fundamental issues as raised by the Discussion Paper questions 1 to 25 can be addressed as necessary precursors to the process of becoming a republic. Not all can be comprehensively examined given the inherent legal implications when dealing with something as profound as a nation's constitution. However, whether we want an executive president or we continue with our current system of government can be easily addressed as a matter of principle. On the other hand, whether the president's powers should be codified and if so, which powers, are issues that not so easily addressed. Codification is contingent on other outcomes, which at this stage are unknown.

The most appropriate process of moving towards the establishment of an Australian Republic with an Australian Head of state

A process towards a republic could be as follows:

- 1. Initial Plebiscite** (*Consistent with our voting behaviour, voting at the Plebiscite should be compulsory*).

Holding an initial plebiscite is crucial. The threshold question could be:

Do you want Australia to become a republic with an Australian as its Head of state?

This first plebiscite will establish whether Australians agree with the idea of Australia becoming a republic with the head of state selected from amongst its own. The purpose here is to remove entirely the monarchist side of the debate and ultimately to focus on the central notion of a republic. In so doing, the Australian people will not be distracted from what will inevitably be a long and involved process for choosing the appropriate model.

This first plebiscite should be kept clear and simple. It is not appropriate at this stage of the process to present to the Australian people a list of alternative models. There is a diversity of legal opinion as to how the Constitution should be amended, what is to be included and what is to be removed. At this stage of the process, it is premature and counterproductive to place models in front of the Australian people without fully explaining them first.

Some have argued that by asking the Australian people to decide on whether to be a republic without prescribing which model is to be adopted is tantamount to giving the politicians a “blank cheque”. On the contrary, this submission contends that by specifying the process at the outset, wherein the people will have a number of opportunities to assess, provide feedback and vet the ultimate outcome, the blank cheque argument is rendered void. The ultimate decision of which republican model Australia should adopt will rest, as it should, with the people. There will be NO blank cheque.

Conversely, if the models are presented too early on in the process, without proper discussion and debate, voters will not be as fully informed as they should be, and more than likely as they increasingly engage in the process they will want the opportunity to change their minds. After having had time to review and weigh the pros and cons of each model, opinions will change. ‘Locking in’ a model early on in the process is unwise and will lead to a less than optimal outcome.

2. Constitutional Convention

A constitutional convention is to be convened soon after the initial Plebiscite with all of its members to be directly elected. The terms of reference, amongst other things¹, would include:

To explore and identify suitable alternative models for an Australian republic by canvassing any and all options.

The Australian people will be asked to provide their suggestions and views of republican models that should be considered by the convention. Once all of the views and opinions are collected, a filtering process would be needed to arrive at a credible short-list that will comprise the 'founding' list of model options for the convention to consider in detail.

Expert advisory committees would be available to the members and would sit on the periphery to be called upon as needed. The convention process will undoubtedly require the members to adjourn, sit and possibly adjourn and sit again until the recommended outcome is put to the Australian people to vote.

As part of the on-going process, and after the convention's own deliberations, the list of model options is further reduced to say three or possibly four models. The convention would then adjourn.

The short list of models is then made available to the Australian people for public consultation and feedback. A series of meetings could be held around the country for the public to attend and give their views. As well as asking for written submissions, the convention will consult and seek as widely as possible before reconvening.

The array of views and opinions received through the consultative process must then be collated and reviewed, and should be included and form part of the constitutional convention members' own deliberations.

The process will need to maintain a certain momentum to keep people motivated and involved. However, the process must be sufficient to give the most disenfranchised within the electorate enough time to engage in the debate. The first constitutional convention left most people disinterested at the start, but as it progressed, there was a growing and inspirational engagement by the broader public.

The convention will consider and arrive at a conclusion and recommend two models for further discussion and debate. Once the models have been appropriately refined, the convention will then decide either:

¹ Broader constitutional reform may also be included as part of the convention's terms of reference.

- a) to choose one as the preferred model, or
- b) to allow the Australian people to decide which of the two is to be chosen as the preferred republican model.

(Voting on the various models should be on preferential basis so that in the end, at most two models are considered. Alternatively, the convention members may decide because of its inherent standout characteristics, that only one model is to be recommended to the Australian people.)

In any event the convention must make known its deliberations and explain its reasons for the decision. These will then form the basis of an information kit to be presented to all voters.

Should there be more than one model recommended then a **second plebiscite** would be required prior to the referendum. If only one model is to be recommended then the second plebiscite would not be necessary and the process would go direct to a referendum.

3. Second Plebiscite:

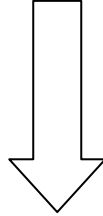
Two models are presented with information on each sent to all voters to consider. A final preferred model is voted on using preferential voting.

4. The Referendum:

The people will vote on the model recommended by the convention or as voted in the second plebiscite.

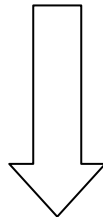
In summary the process is as follows:

INITIAL PLEBISCITE
Threshold Question

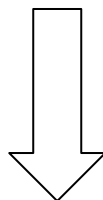


CONSTITUTIONAL CONVENTION

- All members fully elected
- Expert Advisory Committees
- All Models assessed and debated
- Adjourn & Seek Public Feedback
- Reconvene, adjourn, reconvene as required
- Recommend one or two models for voters to consider



Second Plebiscite
(If Required)
People decide on the Model to be put to Referendum



Referendum

Summary

The above process represents the outcome of an exhaustive and inclusive process. Totally transparent at all times and provides the opportunity for the broader public to participate. The convention will have distilled from the process the optimal model to be put up to the Australian people.

Appropriately, the people have controlled the entire process throughout and ultimately will decide on how Australia is to become a republic.

Arguments for:

- I. Inclusive and democratic process,
- II. People have time to sort through the technical issues,
- III. The Constitutional convention will not be a political (read divisive) process,
- IV. All models will be considered before the short listed options are assessed in detail,
- V. The current disparity of opinions amongst republicans will be resolved in an informed, unemotional and formal process,
- VI. People will be as well informed as they can be when making a decision,
- VII. Process is not rushed,
- VIII. Politicians are not perceived to be controlling the process,
- IX. Fear will have been removed from all camps - republicans, the uncommitted voter and possibly even monarchists.

Arguments against

- I. The 'blank cheque' argument exists in theory, however, as stated earlier, by specifying the process at the outset in which the people have the ultimate say, the blank cheque argument, in reality, is rendered void.

Further Considerations:

- a. Voting should be compulsory. This would be consistent with the way we vote both at general elections and on referenda
- b. The first plebiscite could be held at the time of a Federal Election. On the assumption that the vote is YES, then as soon as practicable after the plebiscite, the government/electoral commission will call for nominations for elections of members to sit in the constitutional convention. The convention would be convened as soon as the election results are known.

From this point on, the process would not necessarily follow any timetable; the time must be sufficient for the process to run its course. It would be hoped that the major part of the process, namely, model identification and selection, analysis and debate would occur within the intervening 3 years of a Federal Election (early elections notwithstanding).

If a second plebiscite was necessary, it could then be held at the next federal election. If a second plebiscite was not necessary, then the referendum could be held in its stead. Otherwise, the referendum would follow soon after the second plebiscite and would therefore be held as a stand-alone event.

Alternative models for an Australian republic, with specific reference to the:

- (i) Functions and powers of the Head of state**
- (ii) Method of selection and removal of the Head of state, and**
- (iii) Relationship of the head of state with the executive, the parliament and the judiciary.**

HEAD OF STATE FUNCTION & POWERS

Separate Head of state?

Before Australians are able to identify alternative republican models and to address the issues that pertain to each, a fundamental question needs to be answered first, namely,

Are we as a nation happy to continue with the Westminster system of government or do we wish some other form?

If the answer is to retain the current system, then the journey towards an Australian republic is clearly down a particular and reasonably recognizable road. However, if the answer is for another form of government, then we must embark on a different road and a very different journey.

The basis of this submission and all matters discussed herein relating to Australia becoming a republic, is for Australia to continue with its current system of government; one that has served us well for the past one hundred and three years.

Consequently, the writer would never wish to have a head of state that was also the head of government. An executive president would represent a very different system of government. A US-style executive president or say as in the French system, where the president shares power with a council of ministers and includes the Prime Minister, are examples of models that Australia should not consider nor adopt.

So of the generally known alternate model options, the executive president model is excluded from further consideration in this paper.

Powers of the head of state

Having established a preference for retaining the current Westminster system, it may not necessarily follow that the powers of the head of state will also be retained. It is with issues such as this that choosing alternate models becomes problematic. The powers, by-and-large, will depend on the eventual model that is to be adopted. The very issue of head of state powers and as they pertain to a particular model is a matter for the constitutional convention to determine. The issue should be discussed, analyzed and debated and be part of the process that ultimately recommends the model or models to be put to the Australian people.

Notwithstanding, and as a matter of principle for the writer, the powers of the president should be exercised only on the advice of the Prime Minister. As to the non-reserve powers these simply continue as under the current system. However, the reserve powers will need to be assessed in the context of the model under consideration. There is considerable support, even now, to undertake and codify the Governor General's reserve powers. It is problematic under the present system, and I foresee that will remain so under whichever model is to be presented in the future.

SELECTION & REMOVAL OF THE HEAD OF STATE

Selection

Of the many issues that Australians will face on the road to becoming a republic, none evokes more emotion and angst than the issue of how our republican head of state is to be selected. The one major issue dividing republicans is that of selection. More specifically whether the head of state is to be appointed or directly elected.

This writer's preference is for the head of state to be appointed by a joint sitting of parliament. Direct election raises concerns about the moral authority and power of the head of state relative to that of the Prime Minister. The argument against the 'direct election' model is that the role of the head of state could be perceived to have a mandate greater than that of the Prime Minister who is not directly elected. Such a situation could undermine the authority of the office and consequently that of the elected government.

Notwithstanding, the level of commitment and the ground swell of opinion that has grown since the 1999 referendum forces all republicans to review and reconsider the direct election model. 'Power to the people' is more than marketing hype. There is a fervent and well founded view that if we are to become a republic then our head of state must be directly elected by the Australian people. A sense of national identity has been awakened by the republican cause, and ably assisted by inspiring incumbents such as William Deane, who personified the kind of ideals that Australians would now like to see in their head of state.

Previously, it could have been argued that the role of the governor-general was seen as an anachronistic connection to Britain. Now, the view of many is that in a republican world the role of the head of state will have a more profound meaning - even if it is to remain as a purely ceremonial role.

Directly elected or appointed? How the two are to be reconciled will be a matter for the constitutional convention to explore and report. For the writer the corollary of directly electing the head of state will be the need to clearly define its powers so any moral authority that the role may attract is restrained by specifying what can and cannot be done.

Whichever mode of selection is to be adopted, and again as a matter of principle, the role of the head of state should be non-political. An interesting concept even under the present system where it could be argued that a Prime Ministerial appointment is in fact political. Alternatively, the vying for one's vote is by definition, engaging in a political process. So how can the process for selection in directly electing the head of state be non-political? Difficult and a further reason against the direct election model.

For the directly elected head of state, questions of campaigning and campaign assistance take on additional importance. Consistent with this paper's view of the head of state being a largely ceremonial role, the election campaign should be well regulated and campaign expenditure should be limited. No doubt campaigning would require some assistance (refer below), the details of which should be a matter for the constitutional convention to address and recommend when considering the direct election model.

To ensure that campaigning is free of any political bias, political parties should not be involved at all. They should not support, endorse nor assist informally or otherwise in the campaign.

Nomination

The nomination process should be formulated to achieve certain objectives, how these are to be accomplished is again a matter for the constitutional convention to determine for each of the models under consideration.

As a minimum requirement, one must assume that to be eligible, one must be an Australian citizen and satisfy the current requirements to be a member of the Australian, state and territory parliaments.

Ideally, the objectives of the nomination process should be:

- To seek out a list of eligible candidates from whom the Australian people can draw inspiration. (to counter the fear of having a popular singer or TV host nominate as the head of state)

- The number of candidates who are able to qualify should be limited to the extent that they are able to achieve a minimum number of nominators. Specifying a minimum number at this stage would be somewhat arbitrary and unnecessarily prescriptive. It will also depend on whether the individual is appointed or directly elected.
- In the case of appointment, it should not be up to the Prime Minister alone to nominate or some special council or committee but the Parliament as a whole. Names of individuals who wish to be nominated are put forward for the members of parliament to vote on. To be nominated, the candidate must achieve a minimum number of votes. The joint sitting of parliament then votes on the short list of candidates. Nomination is open to all who satisfy the eligibility requirements.
- In the case of being directly elected, individuals should rely on their own resources and finances in seeking the minimum number of nominators to qualify (different number to that for being appointed). Thereafter, some form of financial assistance should be given to campaign nationally. Perhaps a similar kind of assistance currently given to the minor political parties.
- Ultimately the objective is to select a candidate who is best able to represent a nation that has a rich and diverse cultural mix and with whom all of us can identify.
- If the head of state is to be appointed, it should be a transparent process, bipartisan and the Parliament the overriding authority,
- If the head of state is to be directly elected, the process should be regulated and overseen by the body that currently administers the electoral process, the Australian Electoral Commission.

Title of Head of state

To date, the title of President has been used almost by default by nearly all of those engaged in the republican debate. Recently however, some have questioned whether the title of President is appropriate for Australia.

With few exceptions, the title of President is universally used throughout the world. Its meaning is clear and well understood. Retaining the title of Governor General because it is familiar or that it is already part of our current system of government are not persuasive arguments. The title of Governor General seems wrong on a number of levels; it has ties to the monarchy and Australia's colonial past, and by having the same title it also suggests the same role.

The title of Governor General does not seem appropriate for a republican Australia. The role of the head of state will change, the way it is perceived by the Australian people will change and so must the title.

Term of Office

Again, this would be for the constitutional convention to determine.

The term of office should strike a balance between having sufficient time for the incumbent to settle in, make a presence and even possibly to make a difference, and that of staying too long and becoming ineffectual. Five years would seem to be an appropriate term. Seven years "feels" too long!

When the nation has managed to find an inspiring person as its head of state, one that the Australian people take to and even admire, then that individual should be eligible to stand for a second term.

The prudence that other nations have shown by imposing a limit of two terms for any one individual would appear to be an example that Australia should follow. By the end of say 10 years, it will be time for another to have a go.

Removal

The question of removal, as with the selection process, is a matter for the constitutional convention to consider at length with the assistance of constitutional advisers at the ready.

In any event removal presumably, will depend on the mode of selection that was used. In the case of being appointed and where the Parliament is the supreme authority, one would expect that Parliament would ultimately decide.

If the head of state was elected, then for practical reasons removal would be by a joint sitting of Parliament, but ultimately the people must decide. If the removed head of state wishes to stand and face the people then the removal can either be overturned or ratified by re-election or otherwise respectively.

The grounds for removal must be stated and form the basis for any action by the Parliament. The grounds for removal of the head of state however, must be specified at the outset and known by the nation. The grounds for removal would be for the constitutional convention to determine.

Casual Vacancy

The constitutional convention should devise a process for filling a casual vacancy consistent with its recommended mode of selection.

The pressing issue is what happens in the interim and who should fill the vacancy and whether it should be temporary or permanent?

Under the existing system, the most senior state governor is asked by the Prime Minister to step in until a replacement Governor General is appointed.

Although a matter for the constitutional convention to consider, state governors or what ever they are to be called under a republican model would seem logical caretakers until the selection process for a new head of state is completed.

When applied to a government term of office, the idea is to allow the government to complete its electoral mandate, the passing of its legislative programme. Unless the head of state is to be an executive president, there will be no electoral mandate to complete. Simply waiting for the term to finish without having a higher prerogative appears pointless.

It seems only sensible that if the process for selection is to be initiated then a new individual should be selected for full new term and this should be a matter of priority. The caretaker is there until the due process is completed and not to serve the previous holder's term.

Disqualification

Except in cases where the head of state is also the head of the executive, the role is usually non-political. The Australian head of state should be an Australian citizen that exclusively swears allegiance to Australia.

The following would disqualify a person from becoming the head of state:

- Has been a serving politician within the last 5 years prior to nomination,
- Has been a member of a political party within the last 5 years prior to nomination,
- Has dual citizenship or has sworn allegiance, obedience or adherence to a foreign power,
- Does not satisfy the existing eligibility requirements for being a member of the federal, state or territory parliament.

RELATIONSHIP OF THE HEAD OF STATE WITH EXECUTIVE, THE PARLIAMENT AND THE JUDICIARY

The powers of the head of state, whether they are to be enhanced, codified or removed are weighty issues that the constitutional convention will need to consider for each of the models.

As a matter of opinion, the issues raised under this section go to the very heart of where power is to reside in an Australian republic. In the view of the writer, power should reside with the Prime Minister and Cabinet and ultimately, of course with the Commonwealth Parliament.

Before making decisions about the future role of the head of state, some conscious decisions about the role of the Prime Minister would need to be revisited. For the writer, the PM is the head of the executive. Voting at a general election is all about which party is to be in government, and thereby which person is to the head of that government.

The head of state should be a largely ceremonial role that acts solely on the advice of the Prime Minister.

Appointing judges, opening and dissolving parliament should all be on the advice of the Prime Minister. Having the prerogative of mercy seems to be an anachronistic legacy at odds with the idea of an egalitarian society. However, the US President and US State Governors have the prerogative, and perhaps there is a place in a modern society for those exceptional circumstances. Again, if the prerogative is to be retained then it should be on the advice of the PM.

Whether the head of state should seek advice from the judiciary will depend on what powers the head of state is to have.

Position of the States

Leadership must come from the federal level. The states should, in an environment of change, act decisively and expeditiously to put in train the necessary actions to remove the monarchy at the state level.

The process, timing and actions that would need to be adopted should be considered by the constitutional convention as part of its overall deliberations.

Conclusion

The basis for this submission is that before the Australian people can be asked to vote on a model for an Australian republic, much discussion, analysis and contemplation will be required. To 'fast track' the process by presenting models at the outset without giving the voters time to understand the issues, will mean that we have learnt nothing from the failed 1999 referendum.

If we are to become a republic, Australia will need to commit itself to a process of political change not seen since Federation. Australians do not readily accept change. As with our founding fathers, the battle for the hearts and minds of the people will be as daunting now as it was then.

The process for becoming a republic and all that needs to be accomplished between now and the time of the referendum will be for the people, via the constitutional convention to determine.

The kind of republican model that Australia should have is not for one person, or many to prescribe. There are too many issues, too many implications that must be identified, understood and resolved. There are those who would like to take this opportunity and introduce significant constitutional change and there are others who simply want to change the title and nothing else. The process towards a republic needs to embrace and consider the full gamut of opinions and aspirations of Australians. It should consider and canvass any and all options.

Moreover, it is well accepted that constitutional reform has been long overdue. There are many outmoded sections within the constitution that have little relevance to a modern Australia. The constitutional convention, as part of its terms of reference, may incorporate such reform at the same time as it considers the most appropriate model for an Australian republic.

If we are to move towards a republic then let the process be worthy of the eventual outcome.

The convention's elected members with the assistance of the resident expert advisors will need to trawl through all of the submitted information, be cognizant of the legal and social issues, and after extensive public consultation, must recommend one or two models on which the people can vote.

Leaving the weighty issues to the constitutional convention to resolve, shouldn't stop any Australian from having an opinion and perhaps even changing that opinion as the process continues and issues are brought to light and discussed. The writer has a preferred model in mind and has expressed 'matters of principle' that are consistent with that model; but this too

may change. For example, republican attitudes towards a directly elected head of state have softened since the 1999 referendum. Why, because the issue has merit, and is of profound importance to too many people. The hurdles still remain but the issue of direct election is no longer dismissed out of hand and is now genuinely considered as possible; this was not the case amongst the diehard back in 1999.

However, overriding any personal preference is the central idea that the constitutional convention should canvass and ultimately recommend the right and proper model or models for us to consider.

I wait with anticipation to the time when we embark on the journey that reaffirms our democracy and resets the political framework of a nation that at a political level, has finally come of age.