



# **AUSTRALIAN REPUBLICAN MOVEMENT**

**Submission to Australian Senate Legal and Constitutional References  
Committee Inquiry into an Australian Republic**

**APPENDICES**

## APPENDIX A: FIVE REPUBLICAN MODELS

Below are five workable republican models, which are taken from the ARM's *Six Models for an Australian Republic* document. We have not included the original Model Six, which briefly outlined the features of a US style system with an executive presidency, as the ARM has detected little support for such a radical break with our current parliamentary system.

The features of the five models are outlined below, with some of their perceived 'pluses and minuses'. Following that are the suggested constitutional amendments to give effect to the various models.

Again, we note that the ARM does not 'endorse' any one of these models and we recognise that there are other sound models proposed by other republican groups and individuals. We also recognise there are other ways to amend the constitution to give effect to the models below.

Although the term 'President' is employed throughout as a convenience, as indicated in the main body of the submission, the ARM supports a plebiscite vote on the Head of State's title.

# **Model One - Prime Minister appoints the President**

## **Comments**

This is the most minimal change and reflects the current political reality. Critics would argue that at present, while the Queen is obliged to follow the Prime Minister's advice on both the appointment and removal of a Governor General, she does have the ability to give the Prime Minister her advice as to the wisdom of this decision and to take a little time to implement the decision. A delay of a day or two could be crucial, they argue. The scenario is painted of a Prime Minister whose misconduct has reached such a point that he or she fears dismissal by the Governor General. If Prime Ministers are able to sack the Governor General instantly, they can put a stooge in his or her place. On the other hand, if there is likely to be a delay of a day or so, then events in Australia may overtake the Prime Minister and/or the Governor General could pull the trigger first.

Another appreciation of the situation might say that the Queen will act as promptly as the Prime Minister requests her to act. It is fundamental that she does not play a part in Australia's politics (as 1975 demonstrates) and an attempt to frustrate a Prime Minister's wish by delaying an appointment would make her a real player in the Australian political scene.

## **Eligibility**

Every Australian citizen qualified to be a member of the Commonwealth Parliament, provided that he or she is not a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

## **Nomination and Election**

The Head of State is selected and appointed by the Prime Minister.

## **Tenure**

The Head of State shall hold office for a five year term.

## **Removal**

By the Prime Minister.

## **Casual Vacancy**

A casual vacancy in the office of Head of State shall be filled by the most senior state governor who shall hold office until the appointment of a new Head of State.

## **Non-Reserve Powers**

Same as the Governor General - incorporated by reference.

## **Reserve Powers**

As currently stands for the Governor General.

### **Pluses**

- This change would require only minimal change to our existing constitution, which has provided for stable government since federation.

### **Minuses**

- The appointment of Head of State is confined to the discretion of one individual - the Prime Minister. The people have no say in who is appointed.
- The president would enjoy neither the benefit of a popular vote for the presidency, nor the advantages of bipartisan parliamentary appointment. He or she may risk being seen as the Prime Ministerial puppet.

# **Model Two - People nominate, Parliament appoints the President**

## **Comments**

In this model we have used the same provisions as were set out in the 1999 proposal except that the dismissal mechanism has been altered to provide that a President may only be removed by means of an ordinary resolution of the House of Representatives. The 1999 proposal envisaged the Prime Minister having the power to sack the President at any time.

In addition, the Prime Minister is obliged, in this revision, to nominate for President a person who is on the short list of the Nominations Committee established by Parliament. As was the case in the 1999 proposal, the Nominations Committee would be appointed by Parliament and would be required to reflect the cultural and geographic diversity of Australia.

## **Eligibility**

Every Australian citizen qualified to be a member of the Commonwealth Parliament, provided that he or she is not a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

## **Nomination**

Nominations for the Presidency would be accompanied by a required number of signatures of support and would be presented to a Nominations Committee, established by parliament. While the details of the Nominations Committee is not to be set out in the Constitution (as it will undoubtedly change with experience), we propose that the legislation establishing the Committee should provide that all nominations received should be made public. The shortlist should have not less than three and no more than seven names.

## **Election**

Prime Minister must choose a name from the shortlist and seek ratification by a two-thirds vote of a joint sitting. The nomination would need to be seconded by the Leader of the Opposition.

## **Tenure**

Five year term of office.

## **Removal**

By an ordinary resolution of the House of Representatives.

## **Casual Vacancy**

To be filled by the most senior state governor until a new president can be appointed.

### **Non-Reserve Powers**

Same as the Governor General - incorporated by reference.

### **Reserve Powers**

Same as the Governor General.

### **Pluses**

- Every citizen has the chance to nominate a candidate for president and every nomination is considered and made public.
- Best chance of obtaining an independent, impartial and non-political person as president because the Prime Minister and the Leader of the Opposition have to agree and neither would accept a candidate allied with the other side.
- Prime Ministers lose the power they have now to sack the Governor-General.
- No need for spending on a presidential election.
- Our current stable democracy is preserved, whereas an elected President may claim a mandate over the Prime Minister.

### **Minuses**

- Although this model is more consultative than the 1999 referendum model, there is no direct election of the President.
- While it has a few significant alterations, is essentially the same model that was defeated in 1999

## **Model Three - Presidential Assembly appoints the President**

### **Comments**

This model is similar to Model Two except that the president is appointed by a directly elected, special-purpose Presidential Assembly. The powers of the President are not codified, but instead dealt with in the same way employed in the 1999 proposal.

It is envisaged that the Presidential Assembly should conduct itself as a non party political body; a body that resembles the 1998 constitutional convention instead of a parliament. While this would be the ideal, there is no way to ensure this would happen, short of banning party participation, which would be both undemocratic and probably unconstitutional.

Candidates for the Presidential Assembly would ideally ask to be elected on the basis of their standing in the community, rather than their support for a party's nominee, as there would be no official nominees at the time of the election. The presence of the six state governors is intended to 'set the tone' for the body and provide the assembly with the benefit of their constitutional knowledge and experience.

Proponents of this model see it as a bridge between popular election and parliamentary appointment, giving the people a vote (if only an indirect one) while avoiding the risks of a President claiming a superior personal mandate to the Prime Minister of the day.

The presidential term of office is set at fixed five year terms, and not placed in 'synch' with the parliament, as this might present a president with a conflict of interest when given advice to dissolve parliament. Elections for the Presidential Assembly would be held simultaneously with every half-Senate election. This will reduce significantly the cost of the election.

### **Eligibility**

Every Australian citizen qualified to be a member of the Commonwealth Parliament, provided that he or she is not a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

### **Nomination**

A nominee must have no less than 1000 nominators, of which at least one hundred must be from each State.

## **Election**

The President to be appointed from the list of nominees by a specially convened electoral college to be known as the Presidential Assembly. The Presidential Assembly acts as a standing body and convenes solely for this purpose. Elections for the Presidential Assembly shall be held simultaneously with every half Senate election. Each elected member would hold office for six years, with elections for half the Assembly to be held every three years.

One year from the end of the incumbent president's term, the chair of the Assembly shall call for nominations. Some months later, nominations shall be closed and the full list of nominees published for public scrutiny before being presented to the Presidential Assembly.

The Presidential Assembly convenes after close of nominations to begin the process of appointing the new president (or re-appointing the incumbent, if they so choose) from the list of nominees. Appointment is to be carried by a simple majority of votes in the Presidential Assembly.

The Presidential Assembly to be composed of 48 members in total: 42 members being directly elected by the people with the addition of the 6 state governors. The elected seats may be apportioned to each state as follows: NSW and VIC: 8 seats each, QLD: 6 seats, SA and WA: 5 seats, TAS: 4 seats, NT and ACT: 3 seats.

## **Tenure**

Five year term of office. Limit of two terms.

## **Removal**

Same as for federal judges. The President may be removed from office by a resolution of both Houses of the Parliament in the same session on the ground of proved misbehaviour or incapacity.

## **Casual Vacancy**

To be filled by the most senior state governor until a new president can be appointed by the Presidential Assembly.

## **Non-Reserve Powers**

Same as the Governor General - incorporated by reference.

## **Reserve Powers**

Same as the Governor General.



## **Pluses**

- Offers public participation through the vote for the Presidential Assembly and through the open nominations process, yet does not require codification of the president's powers.
- While there is greater public participation than Models One and Two, the existence of the college curbs the presidential mandate. No president can claim a personal mandate superior to the Prime Minister of the day.
- As in Model Two, a wide range of people would agree to nominate for the presidency who would otherwise be reluctant to enter the fray of a general election campaign.
- The Presidential Assembly keeps the presidency at least one step removed from an issues based campaign and therefore from needing to take a stance on political issues of the day.
- The cost of elections for the Presidential Assembly are minimized by holding them at the same time as Senate elections.

## **Minuses**

- The model stops short of full direct election with all its attendant democratic appeal. While it is intended to bridge the gap between direct electionists and those who favour parliamentary appointment, it may please neither group.
- The members of the Presidential Assembly are to be elected by the people, but so are the members of the Federal Parliament. Will the Presidential Assembly have any less politicians than the Members of the House of Representatives?
- Political involvement of the major parties in and around the Presidential Assembly might transform it into a very political body. If that is so, why not simply use the federal parliament as proposed in Model Two?

## Model Four - People elect the President

### Comments

Model Four represents a significant departure from the status quo. In Model One we had a President appointed and removed by the Prime Minister with precisely the same powers as the Governor General. In Model Two we had a President with the same powers as the Governor General but who was appointed in a bi-partisan and consultative process that ensured the President would be, at the very least, somebody with the support of both sides of politics. The President's removal can be effected by the government of the day via a resolution of the House of Representatives, but it is a public process in the course of which the Prime Minister would be under a very heavy obligation to justify such action. Model Three provides for a President who is chosen by a specially elected Presidential Assembly.

In Model Four, we have a President who is directly elected by the people. The President cannot be removed by the Prime Minister (as in Model One) or by a simple vote of the House of Representatives (as in Model Two). The President will not only be the sole federal public official who is directly elected but because both Houses of Parliament will have to vote to remove them, on the ground of misbehaviour, it makes the President as secure in his or her office as a High Court justice.

Prime Ministers are elected as members of parliament by their local constituency, but their appointment to the office of Prime Minister is, in effect made, by the majority vote of the party which has a majority in the House of Representatives.

What difference will electing the President make to the office? It is possible to state some inevitable, and non-contentious, consequences.

The Presidential election will be a partisan process in which the political parties will participate. Accordingly there will be a presidential candidate endorsed by Labor and another endorsed by the Liberals. No doubt there will be other candidates.

By creating what is going to be a partisan, electoral process it is also inevitable that the candidates will be more likely to be political animals. This does not mean that they will be all current or former politicians: there are plenty of examples of generals and academics turned successful political candidate. Overseas experience, however, suggests that where non-executive presidents are elected, they will more likely be former members of parliament than not.

Elected Presidents, whatever their constitutional powers may be, will by reason of their election have a much more prominent stage from which to address the

nation... and its politicians. Some people would see this as a real plus. Others would say it confers power and authority without responsibility.

At present the convention is that the Governor General treads gently on controversial issues; a convention underpinned by the Prime Minister's right to hire and fire. An elected President would have no such inhibition. Good or bad? The Irish Constitution restricts the powers of their elected president very tightly indeed; so much so that every presidential speech must first be cleared through the Prime Minister's office. Would we choose to go that far?

### **Eligibility**

Every Australian citizen qualified to be a member of the Commonwealth Parliament.

### **Nomination**

A nominee must have no less than 3000 nominators, of which at least one hundred must be from each State.

### **Election**

The people of Australia voting directly by secret ballot with preferential voting by means of a single transferable vote.

### **Tenure**

Five year term of office.

### **Removal**

Same as for federal judges. The President may be removed from office by a resolution of both Houses of the Parliament in the same session on the ground of proved misbehaviour or incapacity.

### **Casual Vacancy**

A casual vacancy in the office of Head of State shall be filled by the most senior state governor who shall hold office until elections can be held for a new Head of State.

### **Non-Reserve Powers**

The existing practice that non-reserve powers should be exercised only in accordance with the advice of the Government shall be stated in the Constitution. A Presidential Oath shall emphasise the President's duty to act impartially and without favour to any political interest.

### **Reserve Powers**

Existing reserve powers shall be codified as generally provided in the Republic Advisory Committee's 1993 report where the Head of State retains appropriate discretion.

### **Pluses**

- This is the most openly democratic method of appointing the president, a symbol of the people's sovereignty.

### **Minuses**

- Many worthy people would not be prepared to stand against each other in the hurly-burly of a general election.
- Any popularly elected president would enjoy great prestige and be able to claim a powerful personal mandate. This would necessitate the substantial constitutional reform (and political debate) involved in codifying the President's powers.
- With such codification, critics might ask: why go to the trouble of electing someone to such a powerless office?
- Candidates for the office would inevitably be tempted to campaign on the issues of the day, impinging on the president's status as a politically disinterested figure.

## **Model Five - People Choose from Parliament's List**

### **Comments**

In this model it is proposed that nominations for President may be made by any Australian. They may also be made by either House of a State or Territory Parliament or by the Council of any unit of local government.

The full list of nominees would be published for public scrutiny for one month and then presented to the Federal Parliament. A joint sitting of both Houses shall by a two thirds majority choose no fewer than seven candidates from eligible nominees. The people will then choose their President from the seven nominees.

This model is somewhat reminiscent of the arrangements in Ireland where there is a directly elected President but a requirement that candidates be nominated either by a large number of members of the parliament or by several borough councils. The aim presumably was to ensure that only candidates with strong party political backing ran for office. This model would also require candidates to have strong political backing. But is that reconcilable with popular distrust of politicians?

Supporters of this Model see it as a means of building a bridge between the supporters of parliamentary appointment (Model Two) and those of open direct election (Model Four). On the other hand it could satisfy neither.

### **Eligibility**

Every Australian citizen qualified to be a member of the Commonwealth Parliament, provided that he or she is not a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

### **Nomination**

Nominations for the office of Australian Head of State may be made by:

- (a) Any Australian citizen qualified to be a member of the Commonwealth Parliament
- (b) Either House of a State or Territory Parliament
- (c) Any Local Government

The full list of nominees shall be published for public scrutiny for one month and then presented to Federal Parliament.

A joint sitting of the Senate and House of Representatives shall, by at least a two-thirds majority, choose no fewer than seven candidates from eligible nominees for an election of the Head of State by the people of Australia.

## **Election**

The people of Australia voting directly by secret ballot with preferential voting by means of a single transferable vote. The seven candidates shall be presented to the people for their consideration not more than 3 weeks before the date of the election.

## **Tenure**

Five year term of office. No President may serve more than two terms.

## **Removal**

Same as for federal judges. The President may be removed from office by a resolution of both Houses of the Parliament in the same session on the ground of proved misbehaviour or incapacity.

## **Casual Vacancy**

A casual vacancy in the office of Head of State shall be filled by the most senior state governor who shall hold office until elections can be held for a new Head of State.

## **Non-Reserve Powers**

The existing practice that non-reserve powers should be exercised only in accordance with the advice of the Government shall be stated in the Constitution and in the presidential oath of office.

## **Reserve Powers**

Existing reserve powers shall be codified as generally provided in the Republic Advisory Committee's 1993 report.

## **Pluses**

- Direct popular election of the president.
- Shortlisted nominees are more likely to be non party political, due to the necessity of bipartisan parliamentary approval of the shortlisted nominees - although this is by no means assured.

## **Minuses**

- Parliamentary shortlisting could be seen to be undemocratic- screening out of undesirables from the top job could be seen as contemptuous of the public's commonsense.
- The model stops short of open direct election yet still empowers a president with a greater personal mandate than the Prime Minister of the day.
- The political hurdles contained within the codification of the powers must still be faced.

- Politicians could simply collude to have a candidate from each of the Government and Opposition parties with five also-runs with no prospect of winning.
- There are many worthy candidates who would not be prepared to stand against each other in an election.

## Constitutional Amendments

As most of the other changes are consequential and common to all models, we have provided a fully marked up amendment of the Australian Constitution only in respect of Model Two (People nominate, Parliament appoints the President) and in respect of Model Four (People Elect the President). We have used as a starting point the 1999 Constitution Amendment Bill, which dealt comprehensively with the many obsolete provisions in the Constitution that would need to be changed regardless of the republican model finally proposed. What follows are the substantive changes each model would require.

### **Model One (Prime Minister appoints the President)**

The first amended clause is a new Section 59 which simply restates the status quo in a republican context. Note that in section 59(3) it is stated that the President acts on the advice of the government of the day, but maintains, for the President's benefit, the reserve powers of the Governor General. The constitutional conventions are expressed to continue and thus may evolve in the future as they have in the past.

#### **59 Executive power**

- 1. The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The President shall be the head of state of the Commonwealth.*
- 2. There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.*
- 3. The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but 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 that power.*

The next amended clause relates to the appointment of Presidents, their term of office and remuneration.

#### **60 The President**

- 1. The Prime Minister shall, subject to sub section 2 hereof, by an instrument in writing appoint a named Australian citizen as President, such appointment to take effect from the date stipulated in the notice.*
- 2. The person named in the Prime Minister's notice motion is qualified to be chosen as President if, at the date upon which the appointment is stated to take effect:*
  - (i) the person is qualified to be, and capable of being chosen as, a member of the House of Representatives; and*
  - (ii) the person is not a member of the Commonwealth Parliament or a State Parliament or Territory legislature or a member of a political party.*



3. *The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.*
4. *Each person chosen as President shall, before the term of office begins, make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

### **61 Term of office and remuneration of President**

1. *The term of office of a President begins at the end of the term of office of the previous President. But if the office of President falls vacant, or the term of office of the outgoing President ends, before the day on which the incoming President makes the oath or affirmation of office, the incoming President's term of office begins on the day after that day.*
2. *The President holds office for five years but if, at the end of the term, a new President does not take office, the office of President does not thereby fall vacant and the outgoing President continues as President until the term of office of the next President begins.*
3. *A person may serve more than one term as President.*
4. *The President may resign by signed notice delivered to the Prime Minister.*
5. *The President shall receive such remuneration as the Parliament fixes. The remuneration of a President payable during a term of office shall not be altered during that term of office.*

The next new section deals with the removal of the President. Again this is expressed as being entirely within the power of the Prime Minister, implemented in the same fashion as the appointment.

### **62 Removal of President**

1. *The Prime Minister may remove the President by an instrument in writing delivered to the President stating the date at which the removal shall take effect, provided that such date is not prior to the date of delivery of the instrument.*

Finally there is provision for an acting President and deputies. This provision simply reflects existing practice.

### **63 Acting President and deputies**

1. *Until the Parliament otherwise provides, the longest-serving State Governor available shall act as President if the office of President falls vacant. A State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.*
2. *Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.*
3. *The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.*

4. *Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign to such deputy or deputies.*
5. *The appointment of such deputy or deputies shall not affect the exercise by the President personally (including while the President is absent from Australia) of any power or function.*
6. *A person shall not exercise powers or functions as the acting President unless, in respect of that occasion of acting as President, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
7. *A person shall not exercise powers or functions as the President's deputy unless, since being appointed as the President's deputy, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
8. *An acting President, or a person exercising powers or functions as the President's deputy, shall receive such allowances as the Parliament fixes.*

## **Model Two (People nominate, Parliament appoints the President)**

These provisions are essentially the same as those for Model One except in relation to appointment and removal. Note that the powers are dealt with in the same way by incorporating the existing Governor General's powers and the conventions that govern their use.

Section 59 again essentially restates the status quo in a republican context.

### **59 Executive power**

- 1. The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The President shall be the head of state of the Commonwealth.*
- 2. There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.*
- 3. The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but 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 that power.*

Section 60 and 61 are again identical to the provisions proposed in 1999. A number of questions arise. Should the composition of the nominations committee be included in the Constitution? The Constitutional Convention took the view that the committee would evolve with experience and it was best to leave its composition to ordinary parliamentary legislation which could be amended from time to time.

### **60 The President**

- 1. After considering the report of a committee established and operating as the Parliament provides to invite and consider nominations for appointment as President, the Prime Minister may, in a joint sitting of the members of the Senate and the House of Representatives, move that an Australian citizen named by the committee in a short list of not less than three nor more than seven names be chosen as the President.*
- 2. If the Prime Minister's motion is seconded by the leader of the Opposition in the House of Representatives, and affirmed by a two-thirds majority of the total number of the members of the Senate and the House of Representatives, the named Australian citizen is chosen as the President.*
- 3. The person named in the Prime Minister's motion is qualified to be chosen as President if, when the motion is moved and affirmed:*
  - (i) the person is qualified to be, and capable of being chosen as, a member of the House of Representatives; and*
  - (ii) the person is not a member of the Commonwealth Parliament or a State Parliament or Territory legislature or a member of a political party.*

4. *The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.*
5. *Each person chosen as President shall, before the term of office begins, make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

#### **61 Term of office and remuneration of President**

1. *The term of office of a President begins at the end of the term of office of the previous President. But if the office of President falls vacant, or the term of office of the outgoing President ends, before the day on which the incoming President makes the oath or affirmation of office, the incoming President's term of office begins on the day after that day.*
2. *The President holds office for five years but if, at the end of the term, a new President does not take office, the office of President does not thereby fall vacant and the outgoing President continues as President until the term of office of the next President begins*
3. *A person may serve more than one term as President.*
4. *The President may resign by signed notice delivered to the Prime Minister.*
5. *The President shall receive such remuneration as the Parliament fixes. The remuneration of a President payable during a term of office shall not be altered during that term of office.*

As noted above in Section 62 we have made a substantive change to the mechanism proposed in 1999. The new provision retains the ability of the Prime Minister to remove a President but only if the House of Representatives approves of the removal. The President is suspended from office as soon as the Prime Minister gives notice of his or her motion to remove the President. An important change from the 1999 arrangements is that the President resumes office if the motion for removal is either not presented or not carried.

#### **62 Removal of President**

1. *The House of Representatives may, on the motion of Prime Minister, (of which not less than seven days and not more than twenty one days notice has been given) resolve to remove the President. Pending the determination of the Prime Minister's motion to remove the President, the President shall be deemed to be suspended from his office and the longest-serving State Governor available shall act as President.*
2. *In the event of the motion not being presented or withdrawn, the President shall immediately resume his office. In the event of the motion not being carried within twenty eight days of the Prime Minister's motion, the President shall immediately resume his office upon the earlier to occur of the defeat of the motion or the expiry of twenty eight days from the notice of the motion first being given.*
3. *The Prime Minister may not give notice of a motion for the removal of the President if the House has expired or been dissolved.*

The provisions for an acting President and deputies are as proposed in 1999.

### **63 Acting President and deputies**

1. *Until the Parliament otherwise provides, the longest-serving State Governor available shall act as President if the office of President falls vacant. A State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.*
2. *Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.*
3. *The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.*
4. *Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign to such deputy or deputies.*
5. *The appointment of such deputy or deputies shall not affect the exercise by the President personally (including while the President is absent from Australia) of any power or function.*
6. *A person shall not exercise powers or functions as the acting President unless, in respect of that occasion of acting as President, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
7. *A person shall not exercise powers or functions as the President's deputy unless, since being appointed as the President's deputy, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
8. *An acting President, or a person exercising powers or functions as the President's deputy, shall receive such allowances as the Parliament fixes.*

### **Model Three (Presidential Assembly appoints the President)**

The new Section 59 is the same as that in the two previous models.

#### **59 Executive power**

1. *The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The President shall be the head of state of the Commonwealth.*
2. *There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.*
3. *The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but 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 that power.*

We have included a new Section 60A to provide for the Presidential Assembly. Section 60 then follows closely the provision for the previous (Bi-Partisan Appointment) model.

#### **60A The Presidential Assembly**

1. *There shall be a Presidential Assembly consisting of not less than 48 members of which six shall be Governors of the several States for the time being and the remaining members shall be elected by the people at every second election for Senators. Members of the Presidential Assembly shall hold office from the date of the declaration of their election until the date of the declaration of the next Presidential Assembly election.*
2. *The Presidential Assembly shall be responsible for choosing the President. The President shall be chosen by a simple majority of members of the Presidential Assembly.*
3. *The Presidential Assembly shall determine its own rules and procedures for meeting not inconsistent with this Constitution or any legislation enacted pursuant to sub-section 4 hereof.*
4. *Parliament may make laws with respect to the Presidential Assembly and its election not inconsistent with this Constitution.*

#### **60 The President**

1. *At any time not more than four months before the expiry of a President's term of office or otherwise when a vacancy occurs the Presidential Assembly shall choose a named Australian citizen to be President of the Commonwealth of Australia.*
2. *A person is qualified to be chosen as President if, when the Presidential Assembly resolves to appoint that person:*
  - i. *the person is qualified to be, and capable of being chosen as, a member of the House of Representatives; and*

- ii. *the person is not a member of the Commonwealth Parliament or a State Parliament or Territory legislature or a member of a political party.*
- 3. *The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.*
- 4. *Each person chosen as President shall, before the term of office begins, make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

### **61 Term of office and remuneration of President**

- 1. *The term of office of a President begins at the end of the term of office of the previous President. But if the office of President falls vacant, or the term of office of the outgoing President ends, before the day on which the incoming President makes the oath or affirmation of office, the incoming President's term of office begins on the day after that day.*
- 2. *The President holds office for five years but if, at the end of the term, a new President does not take office, the office of President does not thereby fall vacant and the outgoing President continues as President until the term of office of the next President begins.*
- 3. *A person may serve more than one term as President.*
- 4. *The President may resign by signed notice delivered to the Prime Minister.*
- 5. *The President shall receive such remuneration as the Parliament fixes. The remuneration of a President payable during a term of office shall not be altered during that term of office.*

The method of removal differs from that in the first two models. The President would be removable only by a resolution of both Houses of the Federal Parliament on the grounds of proved misbehaviour or incapacity. This is the same impeachment formula which applies to the removal of federal judges.

### **62 Removal of President**

The President shall be removed from office if both Houses of the Parliament in the same session so resolve on the ground of proved misbehaviour or incapacity.

The provisions for an acting President and deputies are as proposed in 1999.

### **63 Acting President and deputies**

- 1. *Until the Parliament otherwise provides, the longest-serving State Governor available shall act as President if the office of President falls vacant. A State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.*
- 2. *Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.*

3. *The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.*
4. *Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign to such deputy or deputies.*
5. *The appointment of such deputy or deputies shall not affect the exercise by the President personally (including while the President is absent from Australia) of any power or function.*
6. *A person shall not exercise powers or functions as the acting President unless, in respect of that occasion of acting as President, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
7. *A person shall not exercise powers or functions as the President's deputy unless, since being appointed as the President's deputy, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
8. *An acting President, or a person exercising powers or functions as the President's deputy, shall receive such allowances as the Parliament fixes.*



## **Model Four (People elect the President)**

In this model we have used the approach suggested in the RAC Report to codify the reserve powers. In reality this means that they are almost entirely eliminated. The only circumstances in which the President can sack a Prime Minister who commands a parliamentary majority are where the Prime Minister has been found by a court to be persisting in a breach of the constitution and refuses to desist from that breach.

This would mean, in a case of the Senate blocking supply, that the Prime Minister could not be sacked unless the Prime Minister had been found by the High Court to be spending money which had not been lawfully appropriated and the Prime Minister refused to cease his or her constitutional breach. Such a scenario is almost beyond imagination; the political process would long before have dispatched the Prime Minister concerned; but the amendments below cater for it.

### **59A Executive power**

1. *The executive power of the Commonwealth is vested in the President, and is exercisable either directly or through Ministers of State (including the Prime Minister) or persons acting with their authority.*
2. *The executive power of the Commonwealth extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*
3. *The President shall be the head of state of the Commonwealth*
4. *The President shall exercise his powers and functions in accordance with the advice tendered to him by the Federal Executive Council, the Prime Minister, or such other Ministers of State as are authorized to do so by the Prime Minister.*
5. *Subsection (4) does not apply in relation to the exercise of the powers or functions of the President under Sections 59B, 59C(4), 59D, 59E and 59F.*
6. *There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.*

Section 59B simply restates the current convention that the Prime Minister is the person who has the confidence of the House of Representatives.

### **59B Appointment of the Prime Minister**

1. *The President shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.*
2. *Subject to subsection 59C(4), whenever it is necessary for the President to appoint a Prime Minister, the President shall appoint that person who commands the support of the House of Representatives expressed through a resolution of the House, and in the absence of such a resolution, the person who, in his judgement, is most likely to command the support of that House.*
3. *The Prime Minister shall not hold office for a longer period than 90 days unless he becomes a member of the House of Representatives.*

4. *The Prime Minister shall be a member of the Federal Executive Council and shall be one of the Ministers of State for the Commonwealth.*
5. *The Prime Minister shall hold office, subject to this Constitution, until he dies or resigns, or the President terminates his appointment.*
6. *The exercise of a power of the President under subsection (2) shall not be examined in any Court.*

Section 59C again restates current convention.

### **59C Appointment of Ministers**

1. *Ministers of State shall be appointed by the President acting in accordance with the advice of the Prime Minister.*
2. *One of the Ministers of State may be denominated Deputy Prime Minister.*
3. *Subject to this section, the President shall only remove a Minister from office in accordance with the advice of the Prime Minister.*
4. *Upon the death of the Prime Minister, the President shall appoint the Deputy Prime Minister, or if there is no Deputy Prime Minister, the Minister most senior in rank, to be the Prime Minister.*
5. *In this section "Minister" does not include the Prime Minister.*

Section 59D is a complex section, but is designed once again to mirror existing convention. In short, if a Prime Minister loses a vote of confidence in the House and the House then expresses confidence in another person, the Prime Minister must resign and if he or she does not he or she will be removed by the President. If the House simply passes a no confidence motion in the Prime Minister but fails to express confidence in another person, the Prime Minister will be removed unless within three days he or she resigns, secures a reversal of the no confidence resolution or calls an election.

A difficult issue arises with no confidence motions that are not carried by an absolute majority. This may be because a number of government members are sick, or away from the House. In this case the Prime Minister has seven days to secure a reversal; presumably long enough to summon wandering supporters back to Canberra.

### **59D Dismissal of the Prime Minister - No Confidence Motions**

1. *If the House of Representatives, by an absolute majority of its members, passes a resolution of confidence in a named person as Prime Minister (other than the person already holding office as Prime Minister), and the Prime Minister does not forthwith resign from office, the President shall remove him or her from office.*
2. *If the House of Representatives passes, other than by an absolute majority of its members, a resolution of confidence in a named person as Prime Minister (other than the person already holding office as Prime Minister) and the Prime Minister does not within three days resign from office or secure a reversal of that resolution, the President shall remove him from office.*

3. *If the House of Representatives passes a resolution of no confidence in the Prime Minister or the Government by an absolute majority of its members and does not name another person in whom it does have confidence, and the Prime Minister does not within three days of the passing of that resolution, either resign from office, secure a reversal of that resolution or advise the President to dissolve the Parliament, the President shall remove him from the office of Prime Minister.*
4. *If the House of Representatives passes a resolution of no confidence in the Prime Minister or the Government other than by an absolute majority of its members and does not name another person in whom it does have confidence, and the Prime Minister does not, within seven days of the passing of that resolution, either resign from office, secure a reversal of that resolution or advise the President to dissolve the Parliament, the President shall remove him from the office of Prime Minister.*

Section 59E is an innovation, designed to retain but limit the Governor General's current power to "defend the Constitution". There is, it should be noted, a very strong argument that a Governor General should not dismiss a Prime Minister for breaching the Constitution or the law unless and until that breach is both declared to be such by a Court and is continuing. When the NSW Governor, Sir Philip Game, dismissed Premier Jack Lang in 1932 he did so because Lang was defying recently enacted Commonwealth banking regulations. The Dominions Office in London had sent advice (too late as it turned out) instructing Game to stay his hand until the legality of Lang's conduct had been determined by a court.

### **59E Dismissal of the Prime Minister - Constitutional Contravention**

1. *If the President believes that the Government of the Commonwealth is contravening a fundamental provision of this Constitution or is not complying with an order of a court, the President may request the Prime Minister to demonstrate that no contravention is occurring or that the Government is complying with the order.*
2. *If, after giving the Prime Minister that opportunity, the President still believes that such a contravention or non-compliance is occurring, the President may apply to the High Court for relief.*
3. *If, on application by the President, the High Court is satisfied that the Government of the Commonwealth is contravening a provision of this Constitution or not complying with the order of a court, the High Court may grant such relief as it sees fit including a declaration to that effect. The High Court shall not decline to hear such application on the ground that it raises non-justiciable issues.*
4. *If, on an application of the President, the High Court declares that the Government of the Commonwealth is contravening this Constitution or not complying with the order of a court and the Prime Minister fails to take all reasonable steps to end the contravention or to ensure compliance with the order, the President may dissolve the House of Representatives.*

5. *If the President dissolves the House of Representatives under this section, he may also terminate the Prime Minister's commission and appoint as Prime Minister such other person who the President believes will take all reasonable steps to end the contravention and who will maintain the administration of the Commonwealth pending the outcome of the general election following the dissolution referred to in subsection (4) above.*
6. *The exercise of the powers of the President under this section shall not be examined by any court.*

Section 59F attempts to codify existing convention with respect to refusing a dissolution of Parliament.

### **59F Refusal of Dissolution**

*The President shall not dissolve the House of Representatives -*

- (a) *on the advice of a Prime Minister in whom, or in whose Government, the House of Representatives has passed a resolution of no confidence, if the House has by an absolute majority also expressed confidence in another named person as Prime Minister;*
- (b) *on the advice of a Prime Minister in whom, or in whose Government, the House of Representatives has passed a resolution of no confidence, if the House has, other than by an absolute majority of its members, also expressed confidence in another named person as Prime Minister, unless the House has reversed the resolution;*
- (c) *while a motion of no-confidence in the Prime Minister or the Government is pending; or*
- (d) *before the House of Representatives has met after a general election and considered whether it has confidence in the Prime Minister or the Government, unless the House of Representatives has met and is unable to elect a Speaker.*

*For the purpose of paragraph (c), a "motion of no confidence" is one which expresses confidence in another named person as Prime Minister and is to come before the House of Representatives within eight days.*

Section 60 deals with the election of the President. In an attempt to limit the number of candidates to those who have a reasonable level of national support, subsection 3 requires that a candidate must have three thousand nominators of which 100 must come from each State.

### **60 The Election of the President**

1. *The President shall be directly elected by the people of the Commonwealth in such manner as the Parliament may provide, subject to this Constitution.*

2. *Any person may be a candidate for President if at the time he is nominated that person is qualified to be, and capable of being chosen as, a member of the House of Representatives and is not a member of the Commonwealth Parliament or a State Parliament or Territory legislature.*
3. *A candidate for President shall be nominated by not less than three thousand Australian citizens qualified to vote in an election for members of the House of Representatives and such nominators shall include not less than three hundred such Australian citizens resident in each State.*
4. *The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.*
5. *Each person chosen as President shall, before the term of office begins, make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

Section 61 dealing with term of office and remuneration is in the same terms as for Models One and Two. Section 62 makes removal of the President extremely difficult and adopts the same formula as is applied to federal judges. Section 63 is in the same terms as for Models One and Two. Further work on a direct election model should consider whether a vice-president should be elected as well.

#### **61 Term of office and remuneration of President**

1. *The term of office of a President begins at the end of the term of office of the previous President. But if the office of President falls vacant, or the term of office of the outgoing President ends, before the day on which the incoming President makes the oath or affirmation of office, the incoming President's term of office begins on the day after that day.*
2. *The President holds office for five years but if, at the end of the term, a new President does not take office, the office of President does not thereby fall vacant and the outgoing President continues as President until the term of office of the next President begins.*
3. *A person may serve more than one term as President.*
4. *The President may resign by signed notice delivered to the Prime Minister.*
5. *The President shall receive such remuneration as the Parliament fixes. The remuneration of a President payable during a term of office shall not be altered during that term of office.*

#### **62 Removal of President**

The President shall be removed from office if both Houses of the Parliament in the same session so resolve on the ground of proved misbehaviour or incapacity.

### **63 Acting President and deputies**

1. *Until the Parliament otherwise provides, the longest-serving State Governor available shall act as President if the office of President falls vacant. Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.*
2. *The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.*
3. *Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign to such deputy or deputies.*
4. *The appointment of such deputy or deputies shall not affect the exercise by the President personally (including while the President is absent from Australia) of any power or function.*
5. *A person shall not exercise powers or functions as the acting President unless, in respect of that occasion of acting as President, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
6. *A person shall not exercise powers or functions as the President's deputy unless, since being appointed as the President's deputy, the person has made and subscribed, before a Justice of the High Court, the President's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*
7. *An acting President, or a person exercising powers or functions as the President's deputy, shall receive such allowances as the Parliament fixes.*

There will also be a new Oath (or Affirmation) for the President.

*Under God I swear that I will be loyal to the Commonwealth of Australia and the Australian people, whose rights and liberties I respect and whose laws I will uphold. I swear I will serve the Australian people impartially according to law without fear or favour and in particular without favour to any political party or interest.*

*I solemnly and sincerely affirm that I will be loyal to the Commonwealth of Australia and the Australian people, whose rights and liberties I respect and whose laws I will uphold, and that I will serve the Australian people impartially according to law without fear or favour and in particular without favour to any political party or interest.*

## **Model Five (People Choose from Parliament's List)**

Because the bulk of the operative provisions will be the same as those in Model Four, we have simply provided here a new Section 60 which deals with the election of the President.

### **60 The Election of the President**

1. *The President shall be directly elected by the people of the Commonwealth in such manner as the Parliament may provide, subject to this Constitution.*
2. *Any person may, subject to sub section 4 hereof, be a candidate for President if at the time he is nominated that person is qualified to be, and capable of being chosen as, a member of the House of Representatives and is not a member of the Commonwealth Parliament or a State Parliament or Territory legislature.*
3. *A candidate for President may be nominated by any Australian citizen qualified to be a member of the Commonwealth Parliament, by either House of a State or Territory Parliament or by the Council of any unit of Local Government.*
4. *All nominees for the office of President shall be published in the Government Gazette. Not less than 30 days after that publication a joint sitting of both Houses of the Commonwealth Parliament shall, by at least a two-thirds majority, choose not less than seven of the nominees to be candidates in the election for President. No person shall be a candidate for President unless he has been chosen as such by the joint sitting aforesaid.*
5. *The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.*

## APPENDIX B: THE ARM'S RECOMMENDED PROCESS

