

Submission to the Inquiry into an Australian Republic

The U.S. Presidential Model as a Source of Inspiration for an Australian Republic

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Introduction

This submission is from the perspective that the Presidential model in existence in the United States of America should be considered as a model for an Australian Republic. This is not to say that the American model should be adopted as a whole or without change, but rather, that the concept of an Executive Presidency should at least be considered and the elements which achieve Australia's goals implemented.

As a preface to the submission it is necessary to briefly explain why the U.S. Presidential model could be a source of inspiration for Australia despite it being dismissed by many commentators as requiring too radical a change to the existing Australian form of government.

The American model has not been considered as a possible model for an Australian republic because the set goal was to replace the Queen and her representative by an Australian citizen without changing Australia's current constitutional arrangements. Many reasons have been advanced to justify such a choice, such as, the current system works, a minimalist change is more likely to succeed at a referendum and the American model is too far from the Australian system structurally and culturally. All of those are arguable.

The Australian form of government is not structurally that different from the American system. Upon closer examination Australian history demonstrates numerous ties to the United States. The Australian Founders studied the American political system closely and used it as inspiration for several elements. They decided to adopt a federal system to turn the colonies into states and a written Constitution (a necessary condition to the adoption of a federal system as powers need to be divided between the federal and state governments), both elements were borrowed from the United States. Further they created a Senate based on the American model. The influence remains today as Australia has been adopting electoral techniques from the U.S. such as media coverage, and televised debates. Many other aspects of the Australian culture – outside politics – reflect the considerable influence exerted by the United States. American art, literature, language, way of life, but most importantly cinema and television seem to have an impact on the Australian society. Some people might even argue that through the media in general and television in particular, Australians may know more from the United States political system than they do about their own. If this is true, there should be no cultural shock associated with the adoption of such a model in Australia.

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Additionally, the Australian system has some flaws that could be resolved through the adoption of an Executive Presidency. The Constitution does not reflect current political practice (e.g. there is no reference to a Prime Minister) and therefore cannot serve as a guide for Australians to understand how their system works. The powers of the Governor-General are subject to controversy and should be clearly specified to avoid a repeat of the 1975 situation. The principle of responsible government adopted from the English model does not work as initially intended and is in conflict with the federal principle. The House of Representatives is now subordinate to the government and does not exert any check on it due to party discipline. The Senate is the only part of Parliament which, since the introduction of proportional representation, can exercise some sort of check on the government. Equally the Senate was created to be the states' house but instead votes along party lines.

Moreover the republican debate should address the issues and ideals implied by a republic, which encompasses much more than replacing the Queen by an Australian head of state. Australian identity, civics and citizenship are also at stake.

This submission will address each question posed in the discussion paper from the perspective of an Executive Presidency. In summary, the following elements should be adopted:

- nomination of the president (a pre-selection process by each party based on the U.S. primary system)
- powers of the president (mainly combining the roles of head of state and head of government)
- a strict separation of powers between the executive and legislative
- removal of the president (by an impeachment procedure implemented by the parliament)
- creation of a vice-president office

Concerning the election of the president, the electoral college system, although workable, is not recommended in Australia as it is unnecessary due to the small number of states and its inability to allow the people to choose their head of state directly. A direct election is thus preferred.

Question 1: Should Australia consider moving towards having a head of state who is also the head of government?

Yes. In the United States the roles of head of government and head of state are combined in the position of President of the United States. Combining the head of state and the head of government resolves the problems attached to the allocation of powers between a split executive (Prime Minister and Governor-General) and the scope of unwritten conventions surrounding the use of the reserve powers. For example, the situations in which the Governor-General can dismiss the Prime Minister are currently uncertain. That uncertainty would cease to be an issue.

However, new issues then arise. How would Australia balance or limit the powers held by a position combining both head of state and head of government functions? When could a President be removed from office? The former has been dealt with through the separation powers in the United States and could be dealt with in a similar way in Australia. The latter is discussed in relation to Question 18.

Question 2: What powers should be conferred on the head of state?

As this submission advocates the consideration of the United States presidential model, Question 2 is interpreted to mean what powers should be conferred on an Australian President?

In the United States the President has the following powers:

- Ceremonial role of a head of state, including embodying the nation, receiving ambassadors and other countries' heads of state, the bestowing of honours and presiding at ceremonies;
- Head of government, which includes executing the laws that are passed by the legislature, the treaties that the country enters into, and the judgments rendered by the federal courts. It also includes the power of nomination, meaning the power to nominate ambassadors, civil servants, such as the Secretary of Defense, Secretary of Labor, Chair of the Federal Communications Commission, and the nomination of federal judges. The prerogative of mercy or the power to grant a pardon in relation to breaches of federal law.
- Chief of diplomacy, embodying the function of representing the country when dealing with other nations and non-government organizations. It also includes the power to enter into treaties, although those treaties must be approved by the Senate for them to take effect. However, the President also has the power to conclude executive agreements which, in substance, are similar to a treaty but do not require the approval of the Senate. The power to enter into executive agreements is not specifically stated and has therefore proved to be uncertain in its scope.
- Commander of the Armed Forces. In the United States the war power is divided between the President and the Congress. The Congress has the power to declare war and the President has the power to send troops. However, since the Gulf of Tonkin Resolution in 1964, the President can commit troops to defend the United States without requiring a declaration of war by Congress. In 1973, the Congress passed the War Powers Resolution which requires the President to obtain Congressional approval within 60 days of committing troops and, if such approval is not granted, the troops must be withdrawn.
- Chief Legislator. The President will send to the Congress his legislative program, which will be the various laws that need to be enacted for him to pursue his policies. For example, in 2003 President Bush wanted to restructure Medicare and therefore sought laws from the Congress that enabled that policy to be implemented. The United States Constitution does not give the President the power to initiate laws, but in practice the President suggests laws to the Congress to be able to achieve his/her policies. The President is able to communicate the laws which he would like enacted through his State of the Union Address and budget requests. Informally, the President is able to lobby Members of Congress, including members of his own political party who have an incentive to progress the party's policy agenda. The President does not have the power to dissolve the Congress. However, he can control the legislation through his power of veto,

although that power may be overcome by the Congress passing the bill again with a two-thirds majority of both houses.

Question 3: What powers (if any) should be codified beyond those currently specified in the Constitution?

All powers should be codified. The codification of powers will reduce but not eliminate controversies over what a President can and cannot do. Even when powers are codified, there will be disagreement over the interpretations of specific wording. Nonetheless, a Constitution with clearly specified powers provides greater guidance than unwritten conventions.

Question 4: Should some form of campaign assistance be available to nominees, and, if so, what assistance would be reasonable?

The U.S. system has three levels of campaigning: the primaries, the convention and the Presidential campaign proper. Campaign financing laws for each of these is complicated and could take up an entire submission. Rather than go into detail here, for information on the U.S. system of campaign assistance reference should be made to the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq., the amendments in the Bipartisan Campaign Reform Act of 2002 and the U.S. Supreme Court case *McConnell v. FEC*, 124 S. Ct. 619 (2003) that upheld the amendments.

Legislation and regulations for campaign assistance beyond the immediate issue of an Australian republic would need to be considered and may be better dealt with as a separate issue.

Question 5: Should/can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?

Political parties should be free to assist or campaign for nominees if they choose. To prevent a political party from participating in a presidential campaign may violate the fundamental human rights of freedom of speech and freedom of association.

Question 6: If assistance is to be given, should this be administered by the Australian Electoral Commission or some other public body?

In the United States election funding is administered by the Federal Election Commission. The Federal Election Commission performs similar roles to the Australian Electoral Commission so that the latter's role could be expanded to include administering campaign financing.

Question 7: If the Australian head of state is to be directly elected, what method of voting should be used?

In the United States the President is elected through an Electoral College. The Electoral College has a number of complexities, but in simple terms it works as follows: Each state chooses a number of Electors (equal to the number of representatives in the House of

Representatives that the State is entitled to, plus two Senators, U.S. Const. Art. II § 1) in a manner that the state's legislative assembly prescribes, which in most states is a popular vote with a first past the post system in which the winner takes all Electors for that state.

The advantages of the U.S. Electoral College system are:

- Promotes the two-party system and suppresses the influence of small groups or minor parties, making the choosing of a President simpler (this really follows from the use of the winner takes all approach to Electors)
- Small states and their particular concerns are taken care of through the equal state representation rule (2 electors per state regardless of their population).
- The system works, despite problems such as in the 2000 election, a result was reached and a candidate chosen.
- The Electoral College is easier to administer because the two step system ultimately requires only 538 Electors' votes to be counted because each state determines how it will choose its Electors and is responsible for administering that system.

The disadvantages of the Electoral College are:

- The President is not directly elected.
- The process can be undemocratic in that a candidate may win the popular vote but not be elected, as shown by the 2000 election where Al Gore received more votes than George Bush, but because George Bush had more Electors, he became President.
- The Electoral College can also be undemocratic in that it favours large states (heavily populated) and small states (scarcely populated) but not medium-sized states. This is because small states are more important than their specific population because of the two additional votes they get for their Senators and large states are important because of the sheer size of their population. The middle-sized states are not able to gain the same importance that would be granted to them if there were a direct election.
- Does not allow for third parties and independents to be able to win the vote.

The advantages and disadvantages Electoral College are closely tied to the voting system used within it. If a different system to the winner takes all method were used then the advantages and disadvantages would change substantially.

The Electoral College is not fundamental to an executive presidency and therefore does not need to be adopted by Australia. Indeed, the Electoral College was originally implemented because the architects of the American system did not trust the people to directly choose their President. Such a concern is not valid today. More importantly, the Electoral College does not give effect to the majority of Australians' preference to directly elect their President.

As the Australian system has multiple political parties, the method of voting should be either a preferential system or a run off method (See Question 11). Both of these methods insure that an Australian President would have the support of a majority of Australians, although that majority is achieved in slightly different manner under the two systems.

Question 8: If direct election is the preferred method for election of a non-executive President, will this lead to a situation where the President becomes a rival center of power to the Government? If so, is this acceptable or not? If not, can the office of Head of State be designed so that this situation does not arise?

An Australian President modelled on the United States of America presidential model does not encounter the problem of rival centres of power to the government, as the President is imbued with all of the powers of the Executive. Therefore, the concerns raised in Question 8 are removed through an executive-style President. However, this does mean that the President, as the Executive, must be separate from the Legislature. Accordingly, the President cannot be drawn from the Legislature in the way in which the Prime Minister currently is. Further, this stricter separation of powers does create two rival centres of power, but as the role of the Legislature and the Executive are different, any conflict should only arise from them performing their roles as checks and balances upon the other, not through attempting to do something which rightfully belongs to the other.

Question 9: Who should be eligible to put forward nominations for an appointed Head of State? For an elected Head of State?

In the United States the two major parties, the Republicans and the Democrats, are able to nominate a candidate through primaries or caucuses to contest the presidential election. The forms of primaries vary from State to State. The conditions for nomination of third parties or independents, such as Ralph Nader or Pat Buchanan, are also set by each State.

In Australia the major political parties should be able to put forward nominations. As a result, any federal parliamentary party, that is, a political party with at least one member in the House of Representatives or Senate, should be eligible to nominate a candidate. However, Australia should also make provision for independents or non-political parties to be able to contest the presidential election, provided they demonstrate sufficient support from a number of states.

Question 10: Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of Parliament?

No, there should be no barriers to nomination other than demonstrating a minimum level of support for non-Parliamentary parties as discussed in Question 12.

Question 11: Should there be a maximum and/or minimum number of candidates?

There should be no need to specify a minimum number of candidates nor a need to cap the number of candidates that may contest the elections. However, if there is an extremely large field of candidates, it will become unwieldy and detract from the status of the position if frivolous candidates are able to contest the elections. The means to prevent this is not to set a maximum number of candidates but to specify conditions for nomination, as discussed in

Question 12. Moreover, under an Executive Presidency the importance of the position and the weighty responsibilities will reduce the likelihood of frivolous candidates.

Question 12: Should there be a minimum number of nominators required for a nominee to become a candidate?

In the United States nominations for the Presidential election proceed on a state-by-state basis and therefore vary according to state. The presidential candidates for the Democratic and Republican parties do not need to meet a minimum nominator requirement. They are selected by delegates at the national convention of their party. Those delegates are themselves elected through caucuses or primaries in each state.

Independent or minor party candidates face different systems in each State. For example, in the State of Massachusetts an independent candidate is able to have their name placed on the ballot if they have ten thousand signatures from nominators, or through the use of “write-in” candidates where a voter on election day is able to write any person’s name into a space on the ballot paper. In the State of California, a person may have his or her name placed on the ballot as a presidential candidate in the Presidential Primary Election: (1) by the Secretary of State as a generally-recognised candidate, or (2) by circulating nomination petitions (gathering at least 1% of signatures by persons registered as members of that party). Generally-recognised includes being on ballots for President in primary elections in other states; receiving extensive coverage by the news media as viable candidates; and inclusion in national or statewide public opinion polls and surveys. Write-Ins are also possible after notification to the Californian Secretary of State.

A non-Parliamentary party should be required to demonstrate a minimum level of support from a number of states before being able to contest the Presidential elections. To achieve this, at least two conditions should need to be met: (1) A specified number of signatures from registered voters, such as ten thousand; and (2) those registered voters must come from a minimum of three different states with each of those states having a quota equal to a fraction of the total number of signatures required, i.e., a quarter of the signatures must come from state X.

Question 13: What should the Head of State be called, Governor-General, President of the Commonwealth of Australia, or some other title?

President of the Commonwealth of Australia.

Question 14: What should be the length of a term of office for Head of State?

In the United States the President serves a four-year term. The length of that term means that the Presidential elections take place at the same time at which the totality of the House of Representatives and a third of the Senate are also being elected.

Currently the Prime Minister is able to call elections early and there is no fixed election date. Australia should consider whether the legislature should adopt fixed terms so as to be synchronised with the presidential elections. Fixed terms avoid the use of political strategies in

deciding when to hold elections, and ensures that the people are called to vote at regular intervals allowing them to approve or sanction the actions of the government or parliament.

The term of office needs to balance the need for a President to have enough time to be able to achieve the electoral mandate but not so long that they are able to rule for an extended period without going back to the people. As a result, a term of 3, 4 or 5 years would be acceptable. However, it is also necessary to consider practicalities such as coordinating the Presidential election with the elections for the Legislature so as to minimize the cost of holding elections.

Question 15: Should a Head of State be eligible for re-appointment/re-election?

Yes. In the United States the President is allowed to serve two terms. However, even an incumbent President must be re-nominated by their political party. The United States Constitution Amendment XXII, Section 1, states: “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” As a result, a U. S. President may only serve two terms.

The reasoning behind term limits is that numerous terms create the possibility for the entrenchment of a particular person and therefore the possibility of corruption. In the United States the idea of term limits goes back to the first President, George Washington, who after serving two terms voluntarily chose not to contest a third election. The reason for this is thought to be that the idea of a President who serves multiple terms starts to look like the monarchy which the American Revolution had sought to remove. However, the United States did not adopt the Constitutional Amendment that introduced term limits until 1951 after President Roosevelt had served four terms as President.

In Australia and other democracies term limits have not been thought necessary, especially as any incumbent must still seek re-election. In addition, if a country has a particularly able and popular President, it may be detrimental to deny that person a third term.

Question 16: Should there be a limit on the number of terms an individual may serve as head of state?

See Question 15.

Question 17: Who or what body should have the authority to remove the Head of State from office?

In the United States, the House of Representatives has the sole power of impeachment according to the U.S. Constitution, Article I, Section 2, §5. The Senate then has the sole power to try all impeachments pursuant to U.S. Constitution Article I, Section 3, §6. When the President is tried, the Chief Justice of the Supreme Court of the United States presides, and a conviction may only be found with the concurrence of two-thirds of the members of the Senate.

In an Australian republic the Legislature could also be responsible for the conduct of impeachment proceedings.

Question 18: On what grounds should the removal from office of the Head of State be justified? Should those grounds be spelled out?

The U.S. Constitution, Article II, Section 4 provides: “The President, . . . shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” While treason and bribery are able to be accurately defined by recourse to the general law, “high crimes and misdemeanors” is a much vaguer concept. For example, during the impeachment proceedings for President Clinton there was debate as to whether his affair with Monica Lewinsky and/or his subsequent misleading testimony as to that affair fitted the definition of “high crimes and misdemeanors”.

Treason and corruption/bribery are accepted reasons for removing a public official from office. It may also make sense to have the grounds for removal mirror the grounds for disqualification, i.e. the President should be able to be removed if they meet any of the conditions for disqualification.

Question 19: How should a casual vacancy be filled?

In the United States the people elect a Vice President at the same time as they elect a President. The Vice President acts should the President be unable to act as provided in U.S. Constitution, Article II, Section 1, §6.

If Australia were to have a Vice President, consideration would need to be given to the role of that position. In the United States, the Vice President’s role is to be part of the Cabinet and therefore participate in the decision-making of the Executive and to advise the President. The Vice President is also able to act as the President’s deputy in terms of meeting with foreign dignitaries and representing the United States abroad. The Vice President also has the role of being the President of the Senate, but only being able to vote to resolve a deadlock. An Australian Vice President could perform the same functions as the American Vice President, although presiding at the Senate would be an issue that required further consideration, as it violates the separation of powers. In addition, an Australian Vice President may take on one of the portfolios that the members of the Executive hold such as Defense or Treasurer.

Question 20: What should the eligibility requirements be for the Head of State?

The eligibility requirements for the United States President is that they be a natural-born citizen, over 35 years of age and a resident within the United States for at least 14 years. U. S. Constitution Article II, Section 1, paragraph 5.

The advantage of requiring a Presidential candidate to have been born in Australia is that it is more likely that the person will have allegiances to Australia. However, in a multi-cultural country such as Australia, where there are numerous immigrants, it may prevent capable people

from contesting the office. As a result, it may be better to require that the person have been an Australian citizen for a specified number of years, such as twenty years.

While it is unlikely that somebody who is particularly young would receive the necessary votes to be elected, it is worthwhile to specify a minimum age, such as 35 years, to insure that the person has sufficient life experience and maturity to be able to perform the functions of President. Consideration should also be given to setting an upper age limit, as currently exists for Australian judges. The reason for such an age maximum would be to assist in insuring that the person holding office was in good health and of sound mind.

Question 21: On what grounds should a person be disqualified from becoming Head of State?

The United States Constitution is silent on matters that would disqualify a person from contesting the U. S. Presidential elections.

In Australia, it would make sense for the requirements disqualifying a person from election to the House of Representatives also to apply to the position of President.

There should be no disqualification of a person who is a Member of Parliament or a member of a political party. The only requirement would be that a person who is elected President cannot also hold a position in a Federal, State or Territory Parliament. The main reason for allowing politicians to contest the Presidential elections is that in an Executive Presidency the person is required to execute government functions. It follows that a person with experience in government or public service would be well qualified to perform the position of President. Indeed, in the United States every President had either served in some form of publicly elected office (the Congress or as governor of a state) or held a high-ranking position in the United States military. The Australian public may also change its view of wanting a non-politician if an Executive Presidency was adopted as they would want the important decisions of determining the Federal budget or declaring war to be conducted by someone with experience and ability.

Question 22: Should the Head of State have power to appoint and remove Federal Judges?

The U. S. Constitution, Article II, Section 2, §2, provides that the President shall have power to appoint Judges of the Supreme Court, provided two-thirds of the Senators concur. A U. S. Federal Judge holds office “during good behavior” and may be impeached by the Congress in the same method as for the President outlined above. U. S. Constitution Article III, Section 1 and Article I, Section 3, §6.

A similar system should be adopted by Australia whereby both the Executive and Legislature perform a role in choosing and removing judges.

Question 23: Should the Head of State have the prerogative of mercy?

The U. S. President has the power of pardon. Whether an Australian President has this power is not a particularly important issue. On one side it is a power that traditionally resides with an Executive President. However, its ancient roots are not as relevant in today's society where a person's conviction comes only after a trial and rights of appeal have been exhausted. In addition, as Australia does not have the death penalty, the punishment that may be brought to bear on a person is not as severe as in the United States.

Question 24: Should the Head of State be free to seek constitutional advice from the judiciary, and, if so, under what circumstances?

No. In the United States system, the President does not seek advice from the Chief Justice or any other member of the United States Supreme Court. Such a practice is contrary to the separation of powers.

Although this practice has occurred in Australia, it should be discouraged. Under an Executive Presidency, the President would have an Attorney General and the resources to seek legal advice from his own Cabinet. The High Court should remain independent, as it may be called upon to determine the legality of executive action.

Question 25: What is the best way to deal with the position of the States in a Federal Australian Republic?

No comment.

Question 26: Should there be an initial plebiscite to determine whether Australia should become a Republic, without deciding on a model for that Republic?

Yes. An initial plebiscite would be the best way to determine whether Australia should become a Republic.

Question 27: Should there be more than one plebiscite to seek views on broad models? If so, should the plebiscites be concurrent or separated?

A plebiscite could proceed in two manners. First, Australians could be asked to choose between models similar to those proposed at the 1998 Constitutional Convention, although a full Executive Presidency option should also be considered. Indeed, the six models for an Australian Republic put forward by the Australian Republic Movement on 19 October 2001 could each be put to a vote. A plebiscite such as this would need to decide whether to use a preferential system or a run-off system to determine which model had the support of a majority of Australians.

The second way in which a plebiscite could be conducted is to take the key elements of a republican model and have voters choose from a menu of items so as to advise an expert panel of the type of republic that they wanted. For example, the Australian public could be asked to state whether they wanted a directly elected or nominated President, whether they wanted the

President to have the full executive powers of an Executive Presidency, the same powers as the current Governor-General or the Governor-General's powers but in a codified form. It would seem unnecessary to conduct a plebiscite asking about matters such as eligibility and tenure, which are more mechanical. The problem with this approach is that voters may choose to combine elements that do not work well together. For example, they may want a directly elected President with full executive powers, but they may wish to exclude members of political parties. As discussed earlier in this submission, an Executive Presidency requires an office holder with experience in government. Nonetheless, this approach would give an expert panel guidance as to the type of republican model that should be put forward in a referendum.

Question 28: Should voting for a plebiscite be voluntary or compulsory?

A compulsory vote in accordance with Australia's existing electoral laws would give the most accurate guidance on the public's preferences for a republican system. However, if voting is compulsory, then there must be an option which allows those who oppose any type of republican model to say so. Equally, it may be desirable to allow a person to state that they are in favour of a republic, but they do not have a preference as to the model.

Question 29: What is the best way to formulate the details of an appropriate model for a republic? A convention? A Parliamentary inquiry? A Constitutional council of experts?

If a plebiscite has already given backing to a specific model, then all that would be left to be done would be to put that model into a form that could be used to amend the Australian Constitution and voted upon by the Australian people. In that case, a council of experts with backgrounds in Constitutional law and plain English drafting could be called upon to put the model into words.

However, if the second approach above was adopted and certain elements were given backing by the Australian people and, as a result, other elements were to be determined (such as the term of a President), then a convention could be called to give effect to the plebiscite and to resolve any ambiguities and determine those areas upon which the plebiscite had not spoken. After having done that, a council of experts should be called upon to draft the amendment to the Australian Constitution.

The most important component of formulating the details of an appropriate model is that the people involved understand that they are there to give effect to the wishes of the Australian people expressed through the plebiscite and not to put forward their own views, unless they are providing expert guidance on areas that have not been determined.

Question 30: What is the preferred way for a process to move towards an Australian Republic?

The preferred process to achieve an Australian Republic is to conduct two plebiscites and then a referendum. The first plebiscite should be to ask simply whether Australians want a Republic. The second plebiscite should be on the type of Republic that Australians want. Once the type of Republic has been determined, then a referendum can be held.

There is also a further process that needs to take place before and during the conduct of plebiscites and referendums: education. It is important that the Australian public receives straightforward and easily accessible explanations as to what a Republic would mean for Australia, the types of Republics available and the interaction of the various components within individual republican models. The requirement of education becomes problematic when monarchists and groups for and against different republican models attempt to discredit an Australian Republic or a particular type of republican model with misinformation.

The concept of a republic embodies the sovereignty of the people, justice and equality. An Australian republic must entrust the people with the power to select an appropriate model. Experts and politicians have a role to play but the Australian people must own their form of government.