7

Miscellaneous issues

Covering clauses

7.1 The Australian Constitution is contained in s.9 of the *Commonwealth of Australia Constitution Act (*UK) ('the UK Constitution Act'). That Act commences with a preamble which, in summary, refers to the agreement of the people in the various Australian colonies to 'unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland'. This preamble is followed by eight provisions of the UK Constitution Act, which are generally referred to as 'the covering clauses'.

7.2 The Constitutional Convention recommended that the Constitution should include a preamble, and noted that 'the existing Preamble before the Covering Clauses of the Imperial Act which enacted the Australian Constitution (and which is not itself part of our Constitution) would remain intact'.[1] The Convention also resolved that 'any provisions of the

1 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 30.

Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed.'[2]

7.3 The Republic Bill makes no amendment to the existing preamble or covering clauses of the Constitution.

7.4 The Government is of the view that:

> it is not necessary to alter or repeal the preamble or the covering clauses of the Constitution Act (UK) in order to establish Australia as a republic. The Government's view is that the preamble and covering clauses should at present be left unamended as statements of historical fact. In the event of a vote for change at the referendum, consideration could be given to their repeal as part of the wider range of consequential issues which will fall for consideration.[3]

7.5 A number of witnesses before the Committee raised concerns about the failure of the Republic Bill to amend the preamble.

Amendment of the enacting words

7.6 In the evidence before the Committee, the term 'enacting words' was used to refer to the paragraph which immediately precedes s.1 of the UK Constitution Act, and which reads:

> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

7.7 The view was expressed that, while it may not be legally necessary to amend the preamble for Australia to move to a republican form of government, it "would be bizarre if we had a republic, if the referendum is carried, and the Constitution in which it appears begins by saying that it is under the Crown of Great Britain and Ireland".[4] Professor George Winterton suggested that the Republic Bill should amend the preamble to include the following additional provisions:

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2 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 32.

3 Referendum Taskforce, *Submissions*, p. S101.

4 Professor George Winterton, *Transcript*, p. 93. See also Professor John Hirst, *Submissions*, p. S282.

> And whereas that Federal Commonwealth, the Commonwealth of Australia, evolved into an independent nation under the Crown of Australia:
>
> We, the people of Australia have decided to constitute the Commonwealth of Australia as an independent democratic republic.

7.8 Similarly, Ms Anne Winckel expressed the view that this part of the Constitution should be amended to clarify the source of authority for a republican constitution—that is, the people, as opposed to the monarch. She suggested the repeal of the enacting words and their substitution with perhaps:

> We the people of Australia affirm and declare that this [Constitution] continues to have force as the supreme law of Australia.[5]

7.9 The Committee recognises that there are good reasons to alter the existing enacting words. However, in light of the fact that there is no legal imperative to do so in the context of giving effect to the Constitutional Convention Model, the Committee notes that these matters can be addressed at a later time, should the referendum in November be successful.

Amendment of the covering clauses

7.10 The Constitutional Convention recommended that 'any provisions of the [UK] Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed'.[6]

7.11 The Republic Bill would substantially reproduce in the Constitution those covering clauses which have continuing force. Proposed s.126 reproduces covering clause 5, and proposed s.127 reproduces certain definitions which appear in covering clause 6. This is consistent with the recommendations of the Constitutional Convention. However, none of the covering clauses has been repealed.

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5 Ms Anne Winckel, *Submissions*, pp. S341–S342.

6 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 31.

7.12 This attracted some criticism in the evidence before the Committee. For example, Professor Leslie Zines noted:

> The Constitutional Convention recommended that any provisions of the Constitution Act which have continuing force should be moved into the Constitution and those which do not should be repealed. That has not been done. The result will be puzzlement or confusion for any Australian or foreigner who wants to understand our constitutional system. Such a person would begin with the agreement of the people of the colonies to unite under the British Crown, which is expressed in the present … 'have agreed'. There is then a definition of 'the Queen', thus leading to a reasonable belief that Australia is not a republic.
>
> The next two sections are spent, and, contrary to the Convention's resolution, have not been repealed. Sections 5 and 6 have been re-enacted in a modern and altered form and placed in proposed ss. 126 and 127 … Yet covering clauses 5 and 6 have not been deleted. A reader would not know until near the end that they had been superseded.[7]

7.13 Various other witnesses before the Committee agreed with these criticisms.[8]

7.14 Again, the Committee recognises that there are good presentational reasons for tidying up the covering clauses. However, in light of the fact that there is no legal imperative to do so in the context of giving effect to the Constitutional Convention model, and considering that there is a school of thought which suggests that it is not possible to alter the covering clauses by a referendum under s.128 [9], the Committee agrees that these matters should be addressed at a later time, should the referendum in November be successful.

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7 Professor Leslie Zines, *Submissions*, p. S700.

8 Professor Cheryl Saunders, *Transcript*, p. 731; Mr Dennis Rose QC AM, *Transcript*, p. 698.

9 These are summarised in Constitutional Commission, *Final Report*, 1988, paragraph 3.103.

Education campaign

7.15 As discussed above, in Chapter 1, the Commonwealth Government will conduct a public education campaign in the lead-up to the referendum. The Committee received compelling evidence of the importance of this campaign if Australians are to make an informed choice at the referendum in November.

7.16 Several witnesses pointed out that the provision of accessible information is particularly important for those Australians without good skills in English literacy or access to communication facilities.[10] Young Australians were also identified as a group with specific information requirements.[11]

7.17 The Committee agrees with the many witnesses who expressed the view that it is vital that Australians be adequately equipped to make an informed choice at the referendum.[12] Moreover, the Committee's concern goes beyond the republic referendum. Australians have the right, regardless of income, education, background or circumstances, to access meaningful information about their system of government.

Recommendation 14

7.18 **The Committee recommends that the information requirements of Australians in remote locations, those with limited English skills, and younger voters be specifically catered for by the education campaign associated with the proposed referendum in November 1999, and that sufficient resources be allocated for this purpose.**

10 Ms Maria Mann, *Transcript* p. 349; Ms Carol Martin, *Transcript*, p. 354; Brother Shane Wood, *Transcript*, p. 356.

11 Ms Jacqui Cochrane, *Transcript*, p. 354.

12 Mrs Carol Martin, *Transcript*, p. 354; Professor Jan Pakulski, *Transcript*, p. 413.

Membership of the Commonwealth of Nations

7.19 The Committee concurs with the Rt Hon Sir Zelman Cowen's argument that "Australia's becoming a republic is entirely consistent with our continuing membership of the Commonwealth."[13]

7.20 The Committee notes that after India became a republic, a general rule was adopted that the modern Commonwealth of Nations would include republics. The 1949 meeting of the Commonwealth Prime Minister's conference agreed to India's continued membership on the basis of acceptance of the British monarch as the symbol of the free association of the independent Member Nations and as such Head of the Commonwealth. This agreement established the precedent for republican membership of the Commonwealth of Nations and recognised the British monarch as its head, as distinct from head of state in those countries retaining allegiance to the Crown.[14] The Committee notes that 31 of the 53 members of the Commonwealth of Nations are currently republics.

7.21 The Committee also notes that as Australia will continue its membership of the Commonwealth, Australians will be able to continue competing in the Commonwealth Games.

Use of the prefix 'Royal' and associated matters

7.22 The question of the continued use of the prefix 'Royal' was raised in the evidence before the Committee.

7.23 The Committee understands that the use of the prefix 'Royal' is a matter that falls within the personal prerogative of the sovereign. Hence, it is a matter for the Queen to consider whether, should Australia move to a republican system of government, bodies presently authorised to use the term 'Royal' may continue to do so.

7.24 The Committee understands that 'public' bodies whose titles include 'Royal' (eg Royal Australian Navy) would cease using that title and associated symbols.

7.25 The Committee notes that a few companies exist which have been incorporated under 'Royal Charter' as opposed to under normal

13 The Rt Hon Sir Zelman Cowen, *Transcript*, p. 213.

14 See discussion in Republic Advisory Committee, *An Australian Republic: The Options*, 1993, p. 42ff.

corporations legislation (eg. the Scout Association of Australia, Institute of Chartered Accountants, Australian Red Cross Society, Standards Association of Australia, Australian Academy of Science). These may need to be legislatively transferred to the status of incorporated company. The Committee understands that this matter would be addressed in consequential legislation to be developed if the Republic Bill is approved in the referendum.

The Australian flag

7.26 Some witnesses expressed concern that any move by Australia to become a republic would result in a change to the Australian flag. This is not the case. Sub-section 3(2) of the *Flags Act 1953* requires a national plebiscite to be held before any change to the flag can be made. The referendum to be held in November 1999 will not seek to change the flag. As a result, no change to the flag could occur as a result of that referendum.

The position of Norfolk Island

7.27 The Committee received a submission from the Government of Norfolk Island which, in summary, argued that Norfolk Island is not part of the Commonwealth of Australia, and that therefore 'it is inappropriate for the Australian electorate to determine Norfolk Island's ultimate allegiance, and that the Norfolk Island community is entitled to decide whether the Island's links with the Crown should or should not be retained'.[15]

7.28 The Committee does not accept this assertion. In particular, the Committee notes the decision of the High Court in *Berwick Ltd v Gray*[16] in which the High Court unanimously concluded that the Territory of Norfolk Island is part of the legal and political entity, the Commonwealth of Australia, and that the power of the Commonwealth Parliament to legislate for the Territory is plenary.

15 Government of Norfolk Island, *Submissions,* pp. S664–S665.

16 (1976) 133 CLR 603.

7.29 Representatives of the Norfolk Island Government suggested to the Committee that Norfolk Island residents would not be eligible to vote in the referendum in which the Republic Bill will be put to the electorate.[17] It was claimed that, as Norfolk Island is not a Territory within the meaning of s.128 of the Constitution, Norfolk Island residents would have no opportunity to vote in the referendum.

7.30 Again, the Committee does not accept this assertion. Having received advice on this matter from the Australian Government Solicitor, it is the Committee's understanding that residents of Norfolk Island are entitled to enrol in a particular electorate, and that if they do, they are as entitled to vote in referendums as an elector resident in Australia.

7.31 In summary, the Committee's advice is that s.128 of the Constitution provides for a proposed law for the alteration of the Constitution to be submitted 'in each State and Territory' to the electors qualified to vote for the election of members of the House of Representatives. In s.128, 'Territory' means, a territory referred to in s.122 of the Constitution 'in respect of which there is in force a law allowing its representation in the House of Representatives'.

7.32 While Norfolk Island is a Territory of the type referred to in s.122, it is not a Territory 'in respect of which there is in force a law allowing its representation in the House of Representatives'. However, by virtue of ss.95AA-95AC of the *Commonwealth Electoral Act 1918,* the people of Norfolk Island are able to vote in referendums under s.128 if they are on the roll for a House of Representatives Subdivision in a State, or in a Territory of Australia that does fall within s.128. Under s.95AA(2), a 'qualified Norfolk Islander', who is otherwise qualified to vote, will be entitled to enrol in an electorate in a State, or in the Australian Capital Territory.[18]

7.33 Therefore, a resident of Norfolk Island who is otherwise qualified to vote will be entitled to vote in the referendum as an elector in a State, or in the ACT. If a Norfolk Island resident is enrolled in a State electorate, his or

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17 Government of Norfolk Island, Submissions, pp. S664–S665.

18 Under the *Commonwealth Electoral Act 1918*, a 'qualified Norfolk Islander' is a person who resides in Norfolk Island, and who would be qualified for enrolment if he or she lived in a House of Representatives subdivision. A qualified Norfolk Islander may be entitled to be enrolled in a House of Representatives subdivision in a State for which he or she last had an entitlement to be enrolled, for which any of his or her next of kin is enrolled, in which he or she was born or with which he or she has a close connection. In any other case, a qualified Norfolk Islander is entitled to be enrolled for a House of Representatives subdivision of a Territory division, such as the Division of Canberra.

her vote in the referendum will be counted in both the State and the national tally under s.128 of the Constitution.

7.34 The Committee notes that the electoral rolls are still open, and there is still time for Norfolk Island residents who are not enrolled in an Australian electorate to do so. The Committee encourages all Norfolk Island residents to place themselves on the electoral roll and to vote at the referendum. The Committee requests that, if necessary, the Government appoint a representative of the Australian Electoral Commission to provide relevant advice and assistance to the residents of Norfolk Island.

Drafting issues

7.35 The drafting of the Republic Bill and the Nominations Committee Bill attracted favourable comment in the evidence before the Committee. For example, the Hon Gough Whitlam AC QC noted the 'skill and clarity' with which the Bills had been drafted.[19] Similarly, Professor Greg Craven commented on the quality of the Republic Bill, noting that "if it becomes part of the Constitution, there will be no embarrassing jumps, inconsistencies or jarring changes of style or terminology."[20] Mr Dennis Rose QC remarked that 'the Bills are admirable'.[21]

7.36 However, some concerns about the drafting approach were expressed. These related broadly to either specific aspects of the drafting style adopted in the Bills, or to the fact that the opportunity to generally tidy-up the Constitution has not been taken.

7.37 The only recommendation of the Constitutional Convention relevant in respect of these matters is that 'spent or transitory provisions of the Constitution should be removed'.[22]

7.38 The issues concerning the drafting that were raised in the evidence before the Committee included:

- the use of the term 'named citizen' in proposed s.60 of the Republic Bill;[23]

19 The Hon Gough Whitlam AC QC, *Submissions*, p. S732.

20 Professor Greg Craven, *Transcript*, p. 300.

21 Mr Dennis Rose QC, *Transcript*, p. 36.

22 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 42, paragraph 52.

23 Professor John Hirst, *Transcript*, p. 144.

- insufficient attention to gender neutral language. Professor John Hirst noted that the remainder of the Constitution (ie everything that would not be altered by the Republic Bill) remained 'aggressively masculine' and suggested that this be rectified.[24]
- the numbering of sections. Professor John Hirst suggested an alternative arrangement, and advocated greater prominence for covering clause 5.[25]

7.39 A number of witnesses urged that greater attention be paid to modernising and tidying up the Constitution. Many suggested the removal of spent provisions in the Constitution.[26] It was suggested too that the approach taken in the Republic Bill to this matter was somewhat inconsistent.[27]

7.40 Some witnesses argued that s.25 of the Constitution should be removed because '… it is offensive in implicitly condoning the disqualification of persons from voting on racial grounds'.[28]

7.41 The Referendum Taskforce explained the approach taken to drafting the Republic Bill as follows:

> The preparation of the Republic Bill has not been used as an opportunity to 'tidy-up' the Constitution. Spent constitutional provisions would be removed or altered only where they refer specifically to the monarchical elements in the current system of government. The Government's judgment was that to make changes beyond those necessary for the implementation of the Convention model would give rise to a range of separate issues and distract from the central issue.
>
> The style adopted in the drafting of the new constitutional provisions reflects the style of existing provisions of the Constitution. The new provisions avoid unnecessary or inappropriate detail.[29]

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24 Professor John Hirst, *Submissions*, p. S284.

25 Professor John Hirst, *Submissions*, p. S284.

26 Professor John Hirst, *Transcript*, p. 145; Australian Council of Trade Unions, *Submissions*, pp. S367–S368.

27 Mr Stuart Hamilton, Submissions, pp. S307–S308.

28 Australian Council of Trade Unions, *Submissions*, p. S368. See also Mr Patrick Coleman, Transcript, p. 486.

29 Referendum Taskforce, *Submissions*, p. S73.

7.42 Further, the Taskforce informed the Committee that the provisions were numbered in such a way as to '… strike a balance between the maintenance of existing numbering and the use of spare places created by amendments.'[30]

7.43 The Committee agrees with the sentiments expressed by Mr Whitlam and Professor Craven, and with the approach taken in the drafting of the Republic Bill outlined by the Referendum Taskforce.

Bob Charles MP
Chairman

August 1999

30 Referendum Taskforce, *Submissions*, p. S74.