

**1999**

**THE PARLIAMENT OF  
THE COMMONWEALTH OF AUSTRALIA**

**SENATE**

**CONSTITUTION ALTERATION  
(ESTABLISHMENT OF REPUBLIC) 1999**

**SUPPLEMENTARY EXPLANATORY MEMORANDUM**

Amendments and New Clauses to be Moved on Behalf of the Government

**(Circulated with the authority of the  
Attorney-General, the Hon Daryl Williams AM QC MP)**

# **CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999 (THE BILL)**

## **OUTLINE**

1. The purpose of the amendments of the Bill is to:
  - rule out arguments about:
    - the time at which the qualifications for President apply;
    - the continuity of the office of President and appointments by the President;
    - the justiciability of the reserve powers;
  - remove a provision dealing with amendment of s.7 of the Australia Acts; and
  - ensure that no accrued right is lost by the removal of the term ‘subject of the Queen’ in s.117 of the Constitution.

## **FINANCIAL IMPACT STATEMENT**

2. See the explanatory memorandum for the Bill as introduced in the Senate.

## **NOTES ON THE PROVISIONS OF THE BILL**

### **Amendment 1 – Schedule 1, item 3, proposed s.60 (The President)**

3. Proposed s.60 currently provides that the qualifications for the office of President apply at the time the President is ‘chosen’. Under that provision, a person will not be chosen before the person’s name is moved by the Prime Minister in a joint sitting of the Commonwealth Parliament. The third paragraph of proposed s.60 has been slightly revised. It now makes completely clear that a candidate for the office of President must be qualified to be chosen when the Prime Minister moves his or her motion, and the joint sitting votes on that motion, but need not be qualified at the earlier public nomination stage.

### **Amendment 2 – Schedule 2, item 41, proposed s.127 (Definitions)**

4. The term ‘President’ would be defined in proposed s.127 to mean the President from time to time. Proposed s.63 would provide that provisions relating to the President ‘extend and apply to any person acting as the President’. Together, these sections would mirror the current operation of the first part of s.4 of the Constitution and put beyond doubt that persons holding office ‘during the pleasure of the President’ under the Constitution do not cease to hold office on the expiration of a President’s or an acting President’s term.

### **Amendment 3 – Schedule 3, item 1, proposed cl.4 (Savings)**

5. Section 117 of the Constitution currently prevents a ‘subject of the Queen’ resident in a State being subjected in another State to any ‘disability or discrimination’ that does not apply to a ‘subject of the Queen’ resident in that other State. Items 38 and 39 of Schedule 2 to the Bill would substitute ‘Australian citizen’ for ‘subject of the Queen’ in s.117. Items 38 and 39 are consistent with the change to s.34 of the Constitution (see item 15 of the Schedule 2 to the Bill). ‘Australian citizen’, although the appropriate replacement expression, arguably has a slightly narrower meaning than ‘subject of the Queen’.

6. The new paragraph in cl.4 of Schedule 3 would ensure that the alterations of s.117 of the Constitution do not remove any right accrued under that section when items 38 and 39 commence.

### **Amendment 4 – Schedule 3, item 1, proposed cl.7 (Amendment of Australia Acts)**

7. Clause 7 of Schedule 3 to the Bill was included to deal with s.7 of the Australia Acts. Section 7 of the Australia Acts provides, among other things, that ‘Her Majesty’s representative in each State shall be the Governor’. It is generally agreed

that, in the event of change to a republic, s.7 should be amended to avoid any argument that it entrenches Crown links at the State level that would prevent any State that wished to do so severing those links as part any move to a republic. There are two potential procedures for the Commonwealth Parliament to amend s.7:

- under s.15(1) of the Australia Acts, following a request from all the States;
- under s.15(3) of the Australia Acts, following an amendment of the Commonwealth Constitution.

8. Clause 7 of Schedule 3 to the Bill was included to support the s.15(3) procedure.

9. During consultation on the exposure draft of the Bill, all States indicated a strong preference for the s.15(1) procedure, and the Government indicated that it would rely on that procedure, and remove cl.7 from the Bill, if all States were able to pass request legislation before the Bill had passed by the Commonwealth Parliament.

10. As request legislation has been passed in all States, this amendment will remove cl.7 of Schedule 3 to the Bill.

### **Amendment 5 – Schedule 3, item 1, new cl.8A (Justiciability)**

11. The traditional view is that the reserve powers, and the conventions which govern their exercise, are high political matters which are not justiciable. However, that view has been questioned. Proposed s.59 of the Constitution, in continuing the reserve powers and conventions, is not intended to resolve the existing uncertainty. It has been designed to leave things as much as possible as they are. It is designed to give effect to the Convention model, and rule out any argument that any of the reserve powers or conventions are lost with the removal of the Crown. It is not intended to determine in any respect the nature or content of the reserve powers or the existing conventions.

12. Together, proposed s.59 of the Constitution and cl.8 of proposed Schedule 2 to the Constitution are intended to provide for the integration of the new arrangements within the existing system of constitutional conventions. These provisions are intended to continue all of the constitutional conventions, whether or not they relate to the exercise of the reserve powers. In particular, they are intended to continue the conventions and practices as to which Ministers give advice on particular matters, and the convention that the head of state has a right to be consulted, to advise and to warn. The provisions are not intended to remove the power of the Parliament to determine which Minister should advise on a particular matter.

13. Clause 8A has been added to rule out any argument that the enactment of proposed s.59 of the Constitution would, in articulating a requirement that the reserve powers are to be exercised in accordance with the constitutional conventions, make the exercise of a reserve power by the President justiciable. Clause 8A is intended to ensure that the changes made by the Bill do not of themselves make justiciable the

exercise of a reserve power that was not justiciable when exercised by the Governor-General. The clause is intended to put beyond doubt that the enactment of the Bill does not affect the question whether a reserve power may be justiciable.