Submission to the Senate Legal and Constitutional References Committee

Australian Republic

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1. Target

This submission addresses Question 30 in a rather general way.

2. Rationale

Whatever process may be chosen as the way ahead, and whatever model may be adopted as a result of that process, it is a truism that we can "move towards an Australian republic" only when a set of proposed changes is accepted by the people in a referendum in accordance with s.128 of the Constitution.

Clearly the proposals must be made as attractive as possible so as to maximise the likelihood of that acceptance.

In summary:

- The people must be empowered to take ownership of the Constitution, and **actually do so.**
- The change to the Constitution must be structured so as to be readily understandable by **all** the voters.
- The content must be appropriate for a major constitutional change to be made **in Australia** in the 21st Century.

Additionally, although not a part of this rationale, some observations have been made about the Monarchy that might be worth including in any educational material that may be considered necessary.

3. Ownership of the Constitution

When the Constitution was being drafted, the people of the Australian Colonies, unlike those of the USA, had not fought a successful Revolutionary War. They were not ready to claim more than is implied in the preamble and in s.128. Further, at that time, it was not seriously contemplated by the majority that the new Commonwealth of Australia could, or even should, be independent of the Imperial Parliament.

Nevertheless, Quick and Garran had no doubts about the source of the Constitution. They say in their Commentary on the preamble:

> "The opening words of the preamble claim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern.

> Although it proceeds from the people, it is clothed with the form of law by an Act of the Imperial Parliament of Great Britain and Ireland, the Supreme Sovereign Legislature of the British Empire." [1]

It is otherwise now. Australia has, as evidenced by at least the Statute of Westminster and the Australia Acts, become completely independent of the United Kingdom and its Parliament.

Thus there is no reason why we, the people, should not, now, explicitly claim ownership of our Constitution in the manner suggested in Section 4 below.[2]

And there is every reason why we should.

4. Structure of the changes to be put to the Referendum

Not only has Australia become completely independent of the United Kingdom during the little more than a hundred year life of the Constitution, but the High Court of Australia has found in *Sue v Hill* [3] that the United Kingdom is now, at law, a foreign power.

It is submitted that it is quite absurd that we should continue to maintain our Constitution in the form of an Act of the Parliament of a foreign power.

Instead we should take this once in a century opportunity to establish a new set of rules about how we want to be governed in a Republican Australia.

This Constitution should be an Act of the Parliament of the Commonwealth of Australia, and the enacting clause would be on the lines of that in the 1999 Bill:

> "The Parliament of Australia, with the approval of the people of Australia, as required by the Constitution, enacts that the Constitution of the Commonwealth of Australia shall be ..."

Whether or not it is considered possible, or even prudent, to incorporate some of the more ambitious change outlined in Section 5 below, it is submitted that it is extremely important to avoid the piecemeal section by section approach adopted in the 1999 Bill. It took several hours of hard work cutting, pasting, and marking up a copy of the Constitution before a coherent picture of the proposals emerged.

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[1] Quick, J, and Garran, R, *Annotated Constitution of the Australian Commonwealth*, Angus and Robertson,1901, p285

[2] For a general discussion on this issue see the observations of Professor Cheryl Saunders in *The Australian Constitution (Annotated)*. 3rd Edition. 2000. Constitutional Centenary Foundation at page 17. See also the paper by Leslie Zines *The Sovereignty of the People* in *Power, Parliament and the People* ed. Michael Coper and George Williams, The Federation Press,1997

[3] *Sue v Hill* (1999) 199CLR 462

5. Content of a new Constitution

This is the most difficult part of this submission.

Clearly any new Constitution must cover the fundamentals of the Republican model chosen.

And, it is submitted that transitional provisions that were spent a century ago must be omitted, along with any others as recommended by the Joint Committee (1956-1959), the Australian Constitutional Convention (1973-1985, and the Constitutional Commission (1985-1988) whose findings have been summarised by the House of Representatives Standing Committee on Legal and Constitutional Affairs. [4]

Only in this way will the relevance and readability of the suggested new Constitution be assured. Unless both are achieved, it is unlikely to be accepted with any enthusiasm.

Obviously it ought to be more representative of what actually happens in the elective dictatorship that we have become (unless, of course, it is thought that there is any real prospect of reducing the power of the Prime Minister – whose role is not even mentioned in the current Constitution).

In the negative sense, it is submitted that we must be extremely careful not to allow the Constitution to become the vehicle for perpetuating the ideas of vocal minority groups, however respectable their intentions. Perhaps the test must be that if the mischief complained of is capable of cure by ordinary legislation, then it must be excluded.

So much is relatively straightforward. But (at least) three other open questions must be considered.

Changes unrelated to the establishment of a Republic

There may be such changes that it would be appropriate to include in a new Constitution, rather than taking their turn in a sort of referendum queue.

An example is the resolution of the current controversy on the membership, election, and powers of the Senate.

Changes in the nature of consolidation

The issue here is whether, and to what extent, we should attempt to change provisions that were originally obscure but which have, over the years, been elucidated by judicial decision. An obvious example is s.92 which could probably be improved in the light of *Cole v Whitfield.*[5] But it may well be safer to leave it unchanged. I am not qualified to make any submission on this general question, beyond fearing that to change such provisions may open another century of litigation about matters that may now be regarded as settled law. And, as a matter of public policy, this is clearly not desirable.

The States

The question of how the States might be dealt with in the move towards a Republic is a complex one, and the review of it took the whole of Chapter 8 of *The Report of the Republic Advisory Committee.* Nevertheless, it is submitted that it must be tackled; and some satisfactory agreement reached with States and reflected in the new Constitution if that Constitution is to be generally acceptable. And that is the aim.

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[4] *Constitutional Change,* AGPS. February 1997.
[5] *Cole v Whitfield* (1988) 165 CLR 365

6. The Monarchy

The Queen is Queen of Australia because she is the Queen of the United Kingdom. As Sir Robert Menzies made plain in his second reading speech on the *Royal Style and Titles Bill 1953*:

> "In the first place I think that juristically speaking, it would be fantastic to eliminate a reference to the United Kingdom, because the plain truth is that Her Majesty Queen Elizabeth sits on the throne not because of some law of Australia, but because of the law of the United Kingdom." [6]

And, of course, s.2 of the Constitution establishes this in a more formal way.

The Royal Style and Titles Act is, in a sense, purely cosmetic. It has no effect on the constitutional position of Her Majesty. Further, as implied in the last phrase of the quotation above, the succession to the throne is controlled by the law of the United Kingdom. [7] But, as explained in the first paragraph of Section 4 above, the United Kingdom is now a foreign power.

It appears to make no sense for Australians to continue to owe allegiance to the Monarch of a foreign power.

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[6] *Hansard,* 18 February 195, p.55. Quoted in the *Report of the Republic Advisory Committee* 1993, p.33

[7] Bogdanor believes though that "It remains, therefore, a convention that any alteration in these rules must be agreed between all the members of the Commonwealth which recognize the queen as their head of state." Bogdanor,V, *The Monarchy and the Constitution,* 1995, p269

An afterthought

We must avoid any accusations like this. It must be the **People's** Republic.