

SENATE INQUIRY INTO AN AUSTRALIAN REPUBLIC

SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

SUBMISSION IN RESPONSE TO THE TERMS OF REFERENCE
SET ON 26TH JUNE 2003

TERMS OF REFERENCE

- (A) THE MOST APPROPRIATE PROCESS FOR MOVING TOWARDS THE ESTABLISHMENT OF AN AUSTRALIAN REPUBLIC WITH AN AUSTRALIAN HEAD OF STATE ; AND
- (B) ALTERNATIVE MODELS FOR AN AUSTRALIAN REPUBLIC, WITH SPECIFIC REFERENCE TO :
- (i) THE FUNCTIONS AND POWERS OF THE HEAD OF STATE
 - (ii) THE METHOD OF SELECTION AND REMOVAL OF THE HEAD OF STATE, AND
 - (iii) THE RELATIONSHIP OF THE HEAD OF STATE WITH THE EXECUTIVE, THE PARLIAMENT AND THE JUDICIARY

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(A) PROLOGUE

My contention is that Australia has moved on from the 19th Century acceptance of a Constitutional Convention attended by wise persons and well intentioned political leaders producing a constitution which will create peace, order and good government !

Senators know that it is easy to criticise – much harder to provide a viable alternative. This submission, whilst addressing the ‘Terms of Reference’ essentially divides into three components: i.e.

1. constructive criticism and analysis of why the 1999 referendum failed and the lessons to be learnt
2. a process which will arrive at an acceptable model, concurrently avoiding the pitfalls of the 1999 referendum. My program will probably take 2-3 years, but will have a much higher prospect of success and
3. my preferred model

This submission outlines why a single Constitutional Conference will not meet the participation aspirations of the people; setting the scene for another failed republic referendum.

Australians have clearly indicated they want to be significantly involved in the Republic process. Failure to recognise this alone will doom any referendum to failure, let alone cope with the complexity of devising a suitable model in a single event.

The 1999 Referendum produced a number of lessons to be learnt – regrettably, most academics, political leaders and others have failed to recognise these lessons, let alone heed them. The Corowa Conference proposals are a prime example. I elaborate my claims later in my submission.

My program of devising a model will give voters ample opportunity for participation on all major issues. Details are provided in my submission following.

(A) (i) WHY THE 1999 REFERENDUM FAILED

(This paper assumes that Senators are aware of republican sentiments expressed over Australia's history and of the Constitutional changes that have affected the legal ties between Australia, the UK and the Monarchy since Federation. The majority of Australians would generally be unaware of these previous changes and of previous failed Referenda.)

These are now presented in detail.

MAJOR FACTORS LEADING TO THE REFERENDUM - FIRSTLY - A BRIEF RECENT HISTORY

I ask Senators to take on board that this paper is written from the perspective of how an ordinary voter would have seen the Republican Referendum eventuate

- The first meaningful step was the announcement by the then Prime Minister Paul Keating on 28th April, 1993, announcing the appointment of a Republic Advisory Committee. The terms of reference were issued in May 1993
- Subsequently, following the Committee's report on 7th June 1995, the Prime Minister issued a summary of the Government's proposals for an Australian Republic
- Following a change of Government it was decided to hold a Constitutional Convention and to put to voters the Convention's proposals.
- The composition of delegates to the Convention was set by the Prime Minister ; only half were elected by those wanting to vote, and the other half were 'appointed'.
- Few would have concerned themselves initially with fine legal details or implications. In the early stages of the campaign, most proponents and opponents probably ran on emotive and patriotic emotions rather than legally reasoned argument
- The Constitutional Convention was held from 2-13 February 1998 A model not approved by the majority of delegates was accepted by the Government and the referendum was held on 6th November 1999.
- Was the Convention a success ? – **Yes** if you either (i) opposed the republic or
(ii) opposed the model offered
No if you wanted this model to be accepted.

The inescapable conclusion is, that (accepting that a majority wanted a republic) the above procedure failed to produce a model that the people would accept . The referendum failed by a margin between 15 to say 25%, (allowing a large sampling error range.) .

To follow essentially the same procedure will produce the same result again !

(A) (i) POLITICAL/HISTORICAL REASONS

1. THE USUAL HISTORICAL FACTORS : These include :

- (i) not supported by the Prime Minister,
- (ii) not supported unconditionally by Government and Opposition. With the mix of support, those who voted according to party allegiance could have come confused and so voted no
- (iii) the existence of a shrill, influential and well financed group(s) strongly opposing a change and
- (iv) electoral resistance and inertia to any change anyway.

2. SPECIAL REPUBLICAN REFERENDUM FACTORS

- (i) model put forward not supported by a majority of delegates at the Constitutional Convention
- (ii) suspicion that with half of the delegates appointed, the Convention was not balanced
- (iii) voters not consulted on major issues to be decided, eg parliamentary appointment of head of state
- (iv) failure to identify major issues of concern to the public prior to the Convention
- (v) the determination of minority to get their way, even at the cost of defeating the Referendum and
- (vi) time pressures on the CC did not allow for consultation with the voters or a full debate; closures had to be applied and compromises were unwillingly entered into.

Even with the support of a Prime Minister, there will be significant opposition to a Republic. There is no guarantee that any political or community leader will support a model produced by a single Constitutional Convention. In fact the way is open for such leaders to 'sabotage' a model they do not like.

This precedent has already been set !

With my proposed 'progression' procedure (which follows), everyone from the Prime Minister down, will have to accept the progressive decisions made by the people. Details of my suggested procedure are set out in pages 12-14.

(A) (i) CONSTITUTIONAL CONVENTION SHORTCOMINGS

Listed below are aspects of a Constitutional Convention which will always bring controversy and will never be agreed upon :

1. the total number of delegates
2. weighting of delegates between the States and Territories
3. ex officio appointments
4. which quasi political organisations will have delegates e.g. ARM, ACM, RSL etc
5. split up between political parties
6. personal appointments by the Prime Minister (such as a QLD Archbishop)
7. time limits, imposing crunch and rushed decisions and
8. which of hundreds of submissions/models submitted will be critically examined and debated. Both republicans and monarchist supporters will swamp the Convention.

As each new topic is introduced for debate and decision, the number of different combinations and permutations will increase exponentially to uncontrollable dimensions.

Do the proponents of a Convention really believe a *majority consensus* can be achieved ? Listed below will be some problems that will arise (again) and which will be the subject of much discussion and dissent – even before the convention begins. This will put a cloud over the convention and create negative attitudes in the minds of the voters.

PROBLEMS:

1. monarchists will clamour for democratic representation in order to preserve current monarchy attributes. This will probably receive popular support, but with many and varied suggestions as to what these actually are!
2. other major interest groups cannot be denied delegates without risking the credibility of the Convention ? Pressure will be applied by these other major interest groups such as business, trade unions religious and who knows what other groups. All will claim to be underrepresented.
3. Arguments will then arise about the agenda items and the order of business – who decides
4. If an interest group has delegates, then it also has the right to put items on the agenda and then it will want their items debated in a certain order ! It will not be too difficult to put items forward which will bring wedge disagreement between other delegates. The intent being to cause delay and creating confusion. Any agenda item which has a fine legal point will be easily exploited and easily cause public confusion.

PROBABLE RESULTS :

1. A convention hopelessly deadlocked in trying to get a majority decision. Even if the Convention produces a model with majority agreement, there is no guarantee whatsoever that the voters will accept same.
2. After this, the public will be told by the monarchists that it is all too hard and with the republicans so divided and confused they will never be able to devise a model. So, after the second defeat will arise the argument that Australians have voted '*permanently*' against becoming a republic.

So best to leave the system as it is !

The weary public might just accept this proposition !

REMEMBER : THE MODEL PUT FORWARD AT THE 1999 REFERENDUM WAS APPROVED BY A MINORITY AT THE CONSTITUTIONAL CONVENTION.

IT LOST !!!!!

I CHALLENGE ANY SENATOR TO DECLARE THAT ANY FUTURE CONSTITUTIONAL CONVENTION WILL PRODUCE A MODEL WITH MAJORITY APPROVAL!

(A) (i) HOW TO SABOTAGE A CONSTITUTIONAL CONVENTION

I introduce just one example. There are probably many more.

A notable example presents itself in S. 58 on the basis that S. 59 and S.60 are automatically excluded. This states :

‘S. 58 When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen’s assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen’s name or that he withholds assent, or that he reserves the law for the Queen’s pleasure.

‘The Governor-General may return to the House in which it originated any proposed law so prevented to him, and may transmit therewith any amendments which he may recommend and the Houses may deal with the recommendation’.

There are well known academics who advocate that this section is virtually redundant, of no real force and would never be used. This argument will be used by monarchists and those who want to keep a certain status quo.

*I consider this viewpoint absolutely wrong and misleading.
The Section means exactly what it says !*

It is a reasonable to assume that inevitably a President with a history of political leaning will be elected and he/she will be in a position to disrupt in a number of ways the legislative program of a government. There will be no protection for a government against an omnipotent President who has no restraint on his/her powers or enforceable sanctions against him/her. Even probably more so if the president is elected. Conventions in the past have been broken with impunity.

With such fundamental differences of opinion, it will easy for conflict and division to arise. A classic example for the necessity for all powers to be much better codified.

*There are numerous other issues such as the powers of the Executive Council,
Statutory and Judicial appointments, dismissal of Ministers and
of Governments.*

(A) (ii) WHY THE COROWA CONFERENCE PROPOSALS WILL FAIL

These proposals are essentially a rerun, with variations, of the 1999 process.

Unfortunately, the three processes devised have the following negative attributes :
they -

1. propose what 'we' would like to instigate as the process instead of carefully considering what the ordinary voter wants to happen and be involved in. They also have the appearance of looking for an easy, patronising and paternalistic panacea solution with 'us' in control ! This creates the impression that their proposals are nothing more than an academic talk fest under the guise of a Constitutional Convention.
2. shut out voters from any meaningful input and consultation with the voters after the 'method of election of the President' is decided,
3. do not have a process or timetable for resolving deadlocks – the process could stall forever
4. have ignored the most important features of the voting pattern in the 1999 referendum, which were:
 - (i) electorates which had higher levels of education and income tended to vote 'yes'
 - (ii) electorates with lower education and income levels tended to vote 'no'.

By failing to address this glaring situation, will bring certain defeat again.

(A) (iii) WHAT ARE THE LESSONS TO BE LEARNT FROM (i) ABOVE

NEED TO DEVISE A MASTERPLAN :

Just a reminder of the attitudes and tactics of the opponents of the model put forward in 1999 :

1. There are those prepared to sabotage the whole main objective if a major aspect of their agenda is not accepted. In the main these were the 'direct election' proponents. Are there still many out there prepared to adopt the same attitude and tactics ? YES ! Cynics would argue this is the standard tactic of limited agenda pressure groups who once having won one battle, will forget that win or defeat, and concentrate on the next item as if it is the only item on the agenda. The more you give way, the more they want !
2. Monarchists will continue to confuse the public in whatever way possible in order to delay, hinder and ultimately destroy the process. They cannot hope for anything better than a Constitutional Convention to achieve these objectives, and
3. The ARM was out manoeuvred and out campaigned in the 1999 campaign by the tactics of their opponents. The ARM badly needed to take these into account. The Corowa proposals clearly shows that these tactical problems have been completely ignored.

HOW TO OVERCOME THESE PROBLEMS :

Create a masterplan process which should regard the process as a series of cumulative political election campaigns.

Full regard should be taken of the following:

- Not to rely on voters accepting a model put up on a patriotic basis
- Voters have shown they will abandon their usual political loyalty
- Voters will need to be satisfied that the model is theirs, not some elites wanting to get control for themselves.
- That there are adequate safeguards for their legal protection.
- That if things go 'wrong', something can be done promptly to rectify the situation; not to have it drag on and on interminably
- Research should be undertaken to find out qualitatively what voters regard as important; especially amongst those groups who voted strongly against the 1999 Referendum
- Just how complex, emotive and legalistic the issues are should not be underestimated.

CAMPAIGN TACTICS

Focussing on one major issue at a time will bring the following benefits :

- there will be fewer opportunities for opponents to bring in extraneous issues and confusing the issues and voters' understanding of the issues currently being considered. In summary –

There would not be the opportunity for various spokespersons to :

- i) put forward claims that are misleading or deceptive
- ii) give an incorrect interpretation of the law without challenge
- iii) have various spokespersons from the same organisation contradicting each other
- iv) continuously introducing new issues without losing credibility and
- (v) These spokespersons, or individuals, would not be able to make the claim that they did not get the same democratic opportunity to put their case the same as everybody else.

- once having decided an issue, voters can move on to the next constitutional model decision(s). Attempts to bring up issues already decided are unlikely to be successful
- the appeal to opponents will be to accept Australia's decisions and to now continue participating in contributing in obtaining the best constitution for Australia. Not to do so will more than likely damage themselves and their cause, and
- there will be a much better understanding of our Constitution through continuous discussion which can only be to Australia's benefit.

(A) (iv) THE MOST APPROPRIATE PROCESS

The purpose of this segment is to outline a process to achieve an acceptable model.

These are outlined below :

1. Prepare a transparent master plan
2. 1st referendum to approve and proceed
3. 2nd referendum to cover appointment, dismissal and title
4. 3rd referendum to consider the president's powers, and
5. 4th referendum for residual items
6. Declare Australia a Republic

1. PREPARE A TRANSPARENT MASTER PLAN

This should convince the voters that they will be not only be meaningfully consulted but will also have an effective say in the model. It should largely remove suspicions and distrust that elite proponents are trying to put one over and gain power for themselves. Hopefully, it will bring a confidence that all is above board. An analysis of the 1999 Referendum could confirm that this was a major probable factor for the voting pattern.

2. 1st REFERENDUM TO APPROVE AND PROCEED

The 1st plebiscite question should be 'Should Australia, (not we) become a republic with an Australian Head of State ?'.

Presumably 'yes' will win. But this will only express an opinion with an implied request to proceed. The intent must be expressed in stronger terms that no government can ignore. Put a 2nd question on the same ballot paper asking ' Should the Australian Government continue with the process until an Australian Republic is created ?'.

The first two referenda should be done under the normal process by the Parliament. There is no need for any other consultative body involvement. This should be the easiest and should settle in the minds two matters which will now be finalised

There will be several beneficial outcomes from this, presumably 'yes' vote. They are :

- (a) The voters will feel that they have had a say and will look forward to further consultations on their new republic constitution
- (b) Those opposing change will realise they have lost their cause and *may* turn their thoughts to constructively contributing to the new model and
- (c) voters can now concentrate on the next stage without distraction and cross arguments raising doubts in their mind. This has been a significant factor in the defeat of previous referendums

(3) 2nd REFERENDUM TO COVER APPOINTMENT, DISMISSAL AND TITLE

Again this should be a simple referendum. Parliament can invite submissions and could easily hold this referendum within 6 months after the first referendum.

The APPOINTMENT options are generally considered to be: by

- (i) the Prime Minister or by the Prime Minister and the Leader of the Opposition
- (ii) minimum 2/3 vote of Parliament
- (iii) elected by popular vote
- (iv) a select committee or elected Presidential Assembly

With preferential(not optional preference) voting a clear majority choice will emerge !

DISMISSAL options would be more contentious especially if the President is elected.

My recommendations are set out on pages 23-24.

TITLE

The Parliament should easily suggest a range of titles. The most obvious is

‘The President of the Commonwealth of Australia’

The Parliament should be capable of putting together an acceptable package

Again, as above, a clear majority choice will emerge

4. 3RD REFERENDUM TO CONSIDER THE PRESIDENT’S POWERS

By now, voters will be wanting to finalise the republic; having decided two of the major issues. The next move is to decide what style of constitutional powers should be embedded in the office. Voters should be reminded of the Governor-General’s present powers. Senators will recall past constitutional events and differing interpretations of the so called ‘reserve powers’.

Parliament should then proceed to the next referendum which will be asking the people to decide on the scope and limits of the President’s powers. In realistic terms, the choice will basically be one of three options:

1. basically be the same as now, with the President having unilateral powers of dismissal, rejecting legislation and participating in legal decisions etc, i.e. a minimalist change, and by convention, acting on the advice of the Prime Minister (*This convention was broken in 1975, and without change, can be broken again.*)
2. not have any legislative or legal powers with all political power with the Parliament, or
3. have some constitutional powers either separate or concurrent with the parliament.

VICE PRESIDENT : This is now the time to consider whether there should be a vice-president. So far, Australia has followed a pure monarchical system i.e. there is only one monarch, no acting monarch and no succession until the reigning monarch has gone either by death or abdication. Currently, the acting Governor-General is appointed by Convention.

My Vice-President proposals are set out on page 21-22

The Parliament will need to put up three models. There will be need for wide consultation. Perhaps the first two steps of Corowa proposal B would be appropriate for consultation. Voting in this Referendum should be on a full preferential basis so that one option is decided upon by a majority. (See answer to Question 28)

The three recommendations are then put to a referendum. With preferential voting a majority acceptance of one model will be clear.

(5) 4th REFERENDUM TO DECIDE RESIDUAL ITEMS

This Referendum would decide the remaining items to be resolved. These include

1. deciding the term of office/swearing in
2. how many times one person can be appointed
3. how/who to decide remuneration package
4. appointment of Federal Judges

Again another consultation body can be formed with the public being consulted at the very least by a combined All Party House and Senate Committee. The same process of a referendum be followed until referendum success.

My recommendations are set out on page 26

THEN AT LONG LAST THE FINAL MODEL IS PUT TO THE PEOPLE.

*If this is rejected, then an analysis will have to be made to determine what was the problem.
Parliament will have to resubmit another model.*

B. ANSWERS TO THE DISCUSSION PAPER QUESTIONS

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

NO, for the following reasons :

- I consider the Head of State has a different role to that of government, i.e. separate with no participation in the legislative or executive process
- The Head of State should not have any power to block legislation, appointments and expenditure etc
- The Head of State should have a ‘represent the Australian people’ role only

My proposals are set out on pages 20-22.

Question 2 : What powers (if any) should be conferred on the head of state ?

My proposals are set out on pages 20-22.

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

*Comments are set out on page 8
My proposals are set out on pages 20-22*

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

YES. But on the following basis :

- not be on a purely cash grant to each candidate, but on a ‘kind’ basis i.e. funding advertising (print and electronic media), travel, hire, pamphlets etc equally for each candidate,
- billing to be direct to the Electoral Commission
- the reasonable expenses of a total Senate campaign could be a guide, and set by an independent tribunal
- other campaign expenditure and funding to be accountable on the current system, i.e. under the Electoral Act.

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

NO. Any group/organisation should be allowed to participate in the best traditions of democracy. It would be tempting for political parties to set up ‘front’ organisations bringing unsavoury features into the campaign. Could be legally/morally difficult to deny campaign rights to a political party but allow them to other vested interest lobby groups.

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

THE AUSTRALIAN ELECTORAL COMMISSION. I am not aware of any public dissatisfaction with the Electoral Commission. In fact, I believe the EC stands in high public regard. It has all the necessary skills and resources to administer any funds made available.

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

My proposals are set out on page 23

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 centre 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 ?

The answer to the first question is NO, provided the model has the appropriate clauses. A rival centre of power is NOT acceptable and will cause immense and destructive damage. The answer to the third question is YES. My model which has a non-executive president, clearly prevents this situation from arising.

My proposals are set out on pages 20-22

Question 9 : Who should be eligible to put forward nominations for an appointed head of state ? For an elected head of state.

An appointed head of state is NOT considered acceptable.

My proposals for an elected head of state are set out on pages 23-24

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

YES. My proposals are set out in page 23

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

NO ! But, there should be eligibility requirements applied to all potential candidates. The public would expect to have to assess and vote for only serious candidates. To have otherwise will only anger the public against the republican election.

My proposals are set out on page 23.

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

YES ! My proposal is set out on page 23.

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 ?

My proposal is set out on page 26

Question 15 : Should a head of state be eligible for re-appointment/election ?

YES. My proposal is set out on page 26

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

YES. My proposal is set out on page 26

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

My proposals are set out on page 24.

Question 18 : On what grounds should the removal from office of the head of state be justified. Should these grounds be spelt out ?

Second question first – YES.

My proposals for these grounds are set out on page 24.

Question 19 : How should be a casual vacancy be filled ?

My proposals are set out on page 24

Question 20 : What should the eligibility requirements be for head of state ?

My proposals are set out on page 23

Question 21 : On what grounds should a person be disqualified from becoming head of state ?

My proposals are set out on page 23.

Question 22 : Should the head of state have power to appoint and remove federal judges ?

NO ! This must be carried out by approval of both Houses of Parliament.

My proposals are set out on page 25

Question 23 : Should the head of state have prerogative mercy ?

NO ! It is very likely that the head of state will have political connections and/or leanings. To have this provision will create a temptation to have 'mercy' as a reward etc, leading to corruption. This will create loss of confidence in the judicial and custodial system. It will undermine the willingness of those entrusted with all aspects of law and order to carry out their functions properly if there is a thought that all their work to protect society can be undone by the stroke of a pen of someone else not connected with the process.

This is a most unsavoury aspect of the United States system of Justice.

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

NO UNDER ANY CIRCUMSTANCES. The head of state currently is an integral component of one of the three pillars of democracy, i.e. part of the Legislature. The judiciary has to be kept totally independent even if the head of state does not form part of the Legislature or Executive. The judiciary is the last port of call for the interpretation of the Constitution and must not be involved in any proceedings or advice on any matter which may come before a Federal or State Court. If allowed, it will break one of the fundamental tenets of 'separation of powers' principle for a democracy.

My proposal for the head of state seeking legal advice is set out on page 21.

Question 25 : What is the best way to deal with the position of the states in a federal Australian republic ?

Presumably this question is directed to whether the States will dispense with their Governors. I am not familiar with the constitution of each State. This is a case where the Commonwealth should convene a Federal/State Government Constitutional Conference to convince the States to take a uniform approach in phasing out the current system of Governors. Otherwise, I cannot see any need to have a constitutional change in the relationship between the Commonwealth and States in order to become a Republic

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

YES - BUT. The roadmap of the proposed process should be clearly explained to the people first before asking the question.

My proposals are set out on pages 12-14.

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

YES is the answer to the first question; this is the central tenet to my proposal of how to reach an acceptable model. To have concurrent plebiscites is a stupid idea. Issues will be confused, contradictions will appear leading the people to vote no !

My proposal on separate plebiscites are set out on pages 12-14.

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

COMPULSORY. Otherwise, the amount of support or opposition can never be quantified. This would lead to assertions that any referendum was either won or lost without the support of the majority of the voters thereby eroding confidence in the result. This would create a lack of authority to either proceed to the next step or implementing the 'voluntary voting' result.

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

NONE OF THE ABOVE ! Part A of this submission makes it clear that all of these proposals will be rejected by the people.

My proposals, giving reasons, are set out on pages 12-14

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

This question represents a central tenet of my paper.

My proposals are set out as on pages 12-14.

B (i) THE FUNCTIONS AND POWERS OF THE HEAD OF STATE

The objective is to achieve a Presidential office having ceremonial functions only, without having any:

- Judicial,
- Legislative or
- Executive powers.

The purpose of this policy is to :

- Remove any potential conflict of power between the Parliament and President – especially if the President is elected
- Remove the prospect of the President exercising partisan action eg sacking ministers, sacking parliament, stalling or failing to assent to a bill, failure to make statutory appointments, including judges, etc
- Prevent a President from unilaterally declaring war, and
- Remove the President from the political process thereby creating a role for the President to represent the nation and its people on a non-political, non-partisan basis. (However note my suggestions on a Vice -President office at footnote (a) below).

How to Achieve This.

This will require both deletions and additions to the Constitution. These are the ones I suggest:

DELETIONS : (of powers of the president)

- (i) Sections 58 – Powers of the Governor-General. See footnote (b) below
- (ii) 59 & 60 - references to the Queen's powers deleted
- (iii) Sections 61, 62 and 63 – the Federal Executive Council with the president presiding, abolished. This is to keep the President out of the political process.
- (iv) Section 64 – appointment of ministers are to be on the nomination of the prime minister and the President is bound to accept
- (v) Sections 65 and 66 which are no longer needed – numbers and salaries of ministers.
- (vi) Section 67 – appointment of public servants to be the responsibility of the minister
- (vii) Section 68 – the commander in chief is to be the Prime Minister
- (viii) Sections 69 and 70 transfer of powers on federation no longer required
- (ix) Section 126 Power of Queen to delegate - no longer required, and
- (x) Section 72 appointment, dismissal and retirement of Federal Judges – all references to these aspects deleted and rewritten as set out on page 25.

ADDITIONS :

New Powers of the President:

- (i) Power to delegate duties to the Vice-President but not so that any power is concurrent
- (ii) Power to appoint and dismiss Ministers on the advice of the Prime Minister. If there is no person claiming to be the Prime Minister under the provisions of the Constitution, then the President has the power to ask the Electoral Commissioner to conduct elections for both Houses

New Duties of the President

- (i) The President is required to assent to a bill that has been passed by the Parliament on the advice of the Speaker and the President of the Senate. Refusal to assent is a breach of the Constitution
- (ii) If on the advice of the Prime Minister, the House of Representatives and the Senate have failed to agree on a bill after three months, then the President must ask the Electoral Commission to conduct an election for both houses
- (iii) If on the advice of the Prime Minister that the Parliament cannot function in accordance with the Constitution (i.e. sufficient Ministers have resigned), then the President must act in accordance with (ii) above
- (iv) The Parliament is to prescribe the duties of the President by statute approved by a minimum of 2/3 of the members in each house. These duties would include:
 - accepting ambassadorial credentials
 - opening Parliament
 - receiving and hosting other Heads of State and other Dignitaries
 - investing Honours and
 - patronage of worthy organisations.
- (v) But, if the president fails to carry out these duties, the Prime Minister is bound to request the Vice-President to do so. It will be considered a breach of the Constitution if the duties are not carried out as requested without reasonable excuse

New Provisions

- (i) The Prime Minister will need to be defined –being a person claiming to have a majority in the House of Representatives
- (ii) The President may obtain legal advice pertaining to his constitutional duties but not from the Judiciary or Executive. Reimbursement will be upon tabling of the advice and the account in both Houses.

FOOTNOTE (a)

A VICE-PRESIDENT

A single Head of State will bring in a range of difficulties especially if he/she is elected. These include :

1. Action requiring Head of State duties in Australia when representing Australia overseas
2. during a period of temporary ill health when it is inadvisable to carry out duties
3. immediately following dismissal from office under the Constitution

In each of these cases, it is clear that the Vice-President would automatically take over.

This proposal has to be read in conjunction with the method of selection and automatic succession proposals. The above are samples of how the President's powers can be much better codified

FOOTNOTE (b)

Australians have a propensity to vote one way for the House of Representatives and the other way for the Senate. This would probably be carried over to the Presidential election creating a dangerous power play if the President's legislative, appointment and reserve powers are not removed.

(B) (ii) METHOD OF SELECTION AND REMOVAL

Any Barriers to Nomination

NO ! Any eligible voter should be allowed to nominate. But with the following restrictions :

- Not eligible if serving any custodial sentence, being an undischarged bankrupt, legally certified as not being capable of running own affairs, has citizenship/passport of another country (no dual citizenship) or subject to a legal extradition order etc, but
- Holding an ‘office of profit’ (including the judiciary) is not to be a barrier to nomination. However, the nominee should cease all duties on nomination but should expect reappointment if unsuccessful (i.e. from date of declaration of any poll). But if successful, the nominee cannot hold any other public office, paid employment or remunerated contractual obligations.
- A Judge/MP to be given unpaid leave of absence from the closing date of nominations until the declaration of the poll.

Nomination

1. A nomination is to require at least 1000 electors’ signatures and a \$10 000 deposit which is lost if less than 5% of the valid vote is received as first preference.
2. A ‘nomination’ is to be of two candidates, the first named is deemed to be the group presidential candidate and the second listed candidate is the deemed vice-presidential candidate. A vote can only be cast in favour of the nominated group – splitting of individual candidates makes the vote informal
3. The purpose is to both eliminate fringe element and ensure that only serious candidates are to be considered. No more tablecloth ballot papers !

Method of Selection

3. ‘Above the line’ voting to be permitted with preferences lodged by a group to be permitted
4. The House of Representatives preferential system of counting votes is used until one grouping has at least 50% +1 of the valid votes counted on a national basis.

COMMENT: It is realized that not all the above need actually be incorporated into the Constitution. The voting methodology can be included in the Electoral Act although a safeguard can be in the Constitution for the method of counting of the presidential election shall be the same as the House of Representatives.

PROVISION FOR DISMISSAL :

Grounds for dismissal are:

Upon petition by at least 1/3 of MP's in each House to the High Court on the grounds of the President:

- (i) being declared bankrupt
- (ii) being convicted with a custodial sentence
- (iii) being the citizen of another country
- (iv) having sought judicial or executive advice
- (v) being incapable of running his/her own affairs
- (vi) being incapacitated to the extent that full duties cannot be undertaken within 3 months and
- (vii) otherwise in breach of the Constitution,

and the Full High Court upholding the petition – dismissal is automatic.

(Grounds for dismissal NOT to include religious, moral beliefs or acts or other issues which are freedoms existing by virtue of the Constitution.)

AUTOMATIC SUCCESSION BY THE VICE-PRESIDENT

- This is a difficult situation if there is not a vice-president, and even more difficult if the President is elected. In the proposed 'minimalist' model, this would fall to the senior State Governor. Now, with a Republic, the Head of a State situation cannot be foretold. If the office becomes a quasi political office, it could easily end up with a temporary President with opposing political views held by the former elected President and/or Vice-President. Would a new and urgent election be necessary ?
- There should be an automatic succession on a similar basis as a casual vacancy in the Senate i.e. if the President's office becomes vacant, the Vice-President is automatically eligible to be sworn in. The signatories on the nomination form of the former President then have the right to nominate the presidential replacement. If they fail to do so within 30 days, then the Vice-President has the right to nominate the successor.
- If for whatever reason, there is no Presidential officer, then an election must be held within 60 days and in the meantime, the Parliament can appoint temporary presidential officers by the same method as appointing a judge.

B (iii) RELATIONSHIP OF THE HEAD OF STATE WITH THE JUDICIARY

Current Situation :

This is covered by S 72. Effectively it is the Government who appoints judges.

There have been instances when voters have had grounds for considering judicial appointments have been made on political or other biases such as industrial relations or moral issues. The most notable is the appointment of prominent politicians directly onto the High Court. Prominent politicians have also openly stated their political/moral preference for appointment.

Both major sides have indulged. It is not my purpose to rake over these coals but to implement a system which should take out much of the bias and restore a greater depth of confidence by voters in the integrity of the High and other Courts.

Proposals :

DELETIONS :

- (i) and (ii) – judicial appointments by the President no longer applicable.

ADDITIONS – Judicial appointments:

- (i) Shall be nominated by the Prime Minister and
- (ii) shall be appointed or dismissed by resolution of a minimum of 2/3 majority of Members and Senators in each House respectively
- (iii) if he/she provides legal advice to any party likely to be an issue before a federal or state court, the judge shall be eligible for dismissal .

COMMENTS

1. *Advisable for a Prime Minister to seek acceptance of the Leader of the Opposition for nomination*
2. *Will ensure appointments and dismissals will have less bias and more on proven ability (and perhaps a better balance of the sexes !)*
3. *Will strengthen the impression of the independences of the Judiciary. It was alleged that the then Chief Justice in 1975, gave legal advice to the Governor-General, who is an essential part of the legislative process. This practice should not be tolerated as it undermines a fundamental aspect of democracy, i.e. the separation of powers.*

B (iv) RESIDUAL ITEMS

These include the following

5. deciding the term of office/swearing in
6. how many times one person can be appointed
7. how/who to decide remuneration package
8. appointment of Federal Judges

TERM OF OFFICE/SWEARING IN

- to be the same as the House of Representatives – until a new President (Vice-President) is sworn in
- The Chief Justice or designate to swear in the President(s)
- The same as the House of Representatives. In other words, if the House has an election, then there will also be an election for the head of state.
- The Constitution to provide that not one House of Representative or Senate seat can be declared until the High Court designate has sworn in the President(s). (*this will ensure that there is a sworn in president to swear in the new government*).

HOW MANY TIMES

Maximum of twice being elected as a full president i.e. the same as the US.

Allowing a person to have two terms elected as President. Serving as a part-term President by succession will not be counted as a term elected as President. Not prevented from renominating as a presidential candidate if unsuccessful in being elected as head of state in a previous presidential election.

REMUNERATION PACKAGE

President : same as the Prime Minister

Vice-President : same as a Minister

APPOINTMENT OF FEDERAL JUDGES

My proposals are set out on page 25.