AUSTRALIAN SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

INQUIRY INTO AN AUSTRALIAN REPUBLIC

SUBMISSION

Process:

I support Corowa Proposal A, set out on p 17 of the Committee's discussion paper and advanced by the Corowa Committee. The members of that Committee are –

Mr DW Rogers, A.O. (Chair);
Mr Bill Peach (Convenor);
Sir Daryl Dawson, A.C., K.B.E., C.B.;
Hon Tim Fischer;
Hon Barry Jones, A.O.;
Ms Sarah Henderson;
Professor George Winterton;
Dr Bede Harris;
Professor Walter Phillips
and myself.

Proposal A is designed to elicit the majority opinion of the Australian electorate without bias towards, or commitment to, any particular outcome. It is designed not as an instrument of constitutional change but as a means of ascertaining democratic opinion. Thus, if there were a negative vote on the question whether Australia should become a republic, it would not be necessary to convene a Constitutional

Convention to draft a constitutional amendment. If there were a positive vote on that question, however, Proposal A permits the electorate to choose the broad characteristics of the Constitutional amendment favoured by the greatest proportion of those voting. The only part of the process in which the general electorate would not be involved would be in the drafting of an amendment to give effect to the most favoured model.

A referendum on a Republic of the most favoured model would settle the question whether Australia would be a Republic or would continue for the foreseeable future as a constitutional Monarchy. Constitutional settlement would be effected. Corowa Proposal A gives the electorate an efficient means of determining the issue which has actively concerned the nation for nearly a decade.[1]

The following parts of this submission are personal[2]; they lie outside the scope of the Corowa Committee's submission.

The Westminster System

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1 In passing, a curious Constitutional anomaly may be noted. Section 2 of the *Commonwealth of Australia Constitution Act* 1900 (U.K.) has the effect of making the Monarch of the United Kingdom the Queen (or King) of Australia. Succession to the Monarchy in the United Kingdom may be altered by the Parliament at Westminster but no Act of that Parliament passed after the *Australia Act* 1986 came into force extends to this country. If there be no alteration, succession will be determined in accordance with the *Act of Settlement of 1701* which requires the successor to be an heir of the body of Electress Sophie of Hanover provided he or she is not a Catholic and has not married a Catholic – a provision that is hard to reconcile with s 116 of our Constitution.

2 These submissions have developed some views I expressed in *"100 Years on: Strengths and Strains in the Constitution"* which I delivered as the Fourth Geoffrey Sawer Lecture (ANU, 18 July 2001).

To determine an appropriate model for an Australian Republic, it would assist electors to appreciate the mechanics of the Westminster system, the powers which a Head of State possesses and the manner in which the exercise of those powers is controlled. By the "mechanics of the Westminster system" I mean the powers and restraints which operate to create and preserve the system of responsible government under our Constitution – the system with which Australians are familiar. That system leaves political responsibility with the Government of the day although executive power is reposed by Section 61 of the Constitution in the Queen to be exercised by the Governor General.

If Australia wishes to become a republic but retain the Westminster system of responsible government, it will not be necessary to amend the Constitution to effect a different distribution of powers. But it will be necessary to consider the conventions which affect the exercise of those powers. That is because responsible government depends not only on the terms of the Constitution, but also on convention. Regrettably, in the debate preceding the 1999 referendum on a Republic, there was little analysis of these elements. Attention was focussed on the procedure for the appointment of a President and the power of dismissal: should the Prime Minister have control of the appointment procedure or should there be a popular election? Popular election had a natural attraction for the electorate ("no politicians' President"); the argument against the popular election model was simply that the President would try to overrule the Prime Minister. There was little analysis of the conventions which underpin and protect the system of responsible government – the conventions which govern the exercise of the powers of the Governor General. In fact, the proposal put forward in the 1999 referendum would

have preserved the conventions. The relationship between the President (I use that term to denote the Head of State under a republican constitution) and the Executive Government would have remained substantially unaltered, as the power of appointment and dismissal of a President would have remained with the Prime Minister. In the event of a dismissal, the Prime Minister would have had to obtain a vote of confidence in the House of Representatives or go to a general election. Although that model could have effected a transition to a Republic without destroying the system of responsible government, the debate has shown the desirability of expressing constitutionally the limits of the powers of a President vis a vis the Prime Minister and the Ministry if Australia were to become a republic.

Responsible government is not expressly provided for in the Constitution; it was not thought necessary to do so when the Federation was being formed "under the Crown of the United Kingdom"[3]. The conventions which secured responsible government under the Imperial Crown were assumed to be applicable under the Constitution. At the Constitutional Convention of 1898 Mr Josiah Symon said[4]:

> "A written Constitution is not exhaustive. We have implanted responsible government in this Constitution, but we have not said so in so many words. We must have some regard to the instrument we are framing, and we ought to look upon it as a Constitution with plenty of elasticity, under which all the constitutional usages will apply and be interpreted."

The Constitutional requirement that Ministers be, or become, members of the Parliament[5] clearly indicates an expectation that responsible

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3 Preamble to the *Constitution of Australia Act* 1900.

4 10 March 1898, Official Record, 3rd Session, Melbourne 1898 Vol 2 p 2262 reproduced 55 ALJ 166.

5 Constitution, s 64; and see *New South Wales v The Commonwealth (Seas and Submerged Lands)* (1975) 135 CLR 337 at 364-365.

government in the Westminster model would be the form of government. In the *Engineers Case*[6] in 1920, the majority judgment recalled the speech of Lord Haldane, when a member of the House of Commons, in speaking to the Bill for the enactment of the Commonwealth Constitution. He said:

> "The difference between the Constitution which this bill proposes to set up and the Constitution of the United States is enormous and fundamental. This bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, … – I mean the institution of responsible government, a government under which the Executive is directly responsible to – nay, is almost the creature of – the Legislature."

In *Lange v Australian Broadcasting Commission*[7], the High Court said:

> "The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government. In his *Notes on Australian Federation: Its Nature and Probable Effects*[8], Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government[9]."

The Underpinning of Responsible Government

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6 (1920) 28 CLR 129 at 147.
7 (1997) 189 CLR 520 at 559.
8 (1896) at 17.
9 Reid and Forrest, *Australia's Commonwealth Parliament*, (1989) at 319, 337-339.

The executive power of the Commonwealth is not vested in the Ministry by s 61 of the Constitution; it is vested in the Queen and is exercised by the Governor-General. Generally speaking, however, the Ministry is responsible for the way in which the Governor-General exercises his power. The Constitution provides that certain of the Governor-General's powers can be exercised only on the advice of the Federal Executive Council[10] but, *by convention,* the Governor-General exercises any and all of his powers only on the "advice" of his Ministers except, on rare occasions, when the Governor-General exercises the so-called "reserve powers". In *FAI Insurances Ltd v Winneke*[11], Mason J explained the role of convention in the system of responsible government:

> "The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility. It is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government. 'The principal convention of the British constitution', says de Smith in his *Constitutional and Administrative Law*, 3rd ed. (1977), p.99, 'is that the Queen shall exercise her formal legal powers only upon and in accordance with the advice of her Ministers, save in a few exceptional situations'. Comformably with this principle there is a convention that in general the Governor-General or the Governor of a State acts in accordance with the advice tendered to him by his Ministers and not otherwise (Sawer, *Federation under Strain* (1977), p.

[10] Section 63. The powers so conferred are the power to issue writs for a general election of the House of Representatives(s 32), or for an election when a casual vacancy occurs (s 33), the power to establish Departments of State (s 64), certain powers that are now obsolete (ss 67, 70, 83, 85), the power to appoint and, on an address of the Parliament, to remove a Justice of the High Court (s 72) or a member of the Inter-State Commission (s 103).

> 142; see also Keith, *Responsible Government in the Dominions*, 2nd ed. (1928), pp.107-108)."

Informed by practical experience, former Governor McGarvie observed[12]:

> "The basic constitutional convention that binds the Governor-General to exercise powers as advised by Ministers of the elected Government is the essential link between the exercise of those powers and the sovereignty of the people".

The significance of this convention in the republican debate is obvious. Indeed, McGarvie[13] observed that –

> "The basic constitutional convention of acting on ministerial advice is so vital to our democracy and responsible government, that it would be reasonable to assume that the first priority of anyone designing a model for head of state in a republic would have been to maintain the convention and its binding effect. Yet for a long time that was generally overlooked."

If the Constitution were to vest executive power in a President, would the President be bound by a convention which is the cornerstone of constitutional monarchy[14]? In the United Kingdom, the Monarch has been constrained to act only on ministerial advice since the Hanoverian succession. When George III attempted to exercise power without ministerial advice, he was met by the Commons resolution in 1780 moved by Mr Dunning "that the influence of the Crown has increased, is increasing, and ought to be diminished"[15]. In the United Kingdom, constitutional monarchy and responsible government are the reciprocal results of history. In Australia, no Governor-General would decline to observe the convention, for it is basic to the accepted system of

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11 (1982) 151 CLR 342 at 364.

12 Richard E McGarvie, *"Democracy – choosing Australia's republic"*(MUP, 1999) p 61.

13 *Op Cit* p 89.

14 The question was raised by Professor Winterton *"Reserve Powers in an Australian Republic"* (1993) 12 U Tas LR 249 at 254.

government. Long established practice would be enforced, if a Governor-General were to breach the convention, by the "practical penalty" of dismissal on the insistence of the Prime Minister.

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15 Taswell-Langmead "English Constitutional History" (4th ed. 1890) p 730.

Responsible Government in a Republic

If Australia were to become a Republic, a President, especially an elected President, with a fixed term of office would be less constrained than a Governor-General to act only on ministerial advice.

The principal objection that has been raised against an elected Presidency is the risk – perhaps the likelihood – that the President, armed with the authority of a popular mandate, might exercise executive and, possibly, reserve power to frustrate the policies or impair the powers of the Prime Minister and Government. There would be two hands on the tiller of national interest. The rationale of the present convention is that the Parliament represents the people and the Governor-General must act on advice of his Ministers so that Ministers can be held responsible to the people's representatives in the Parliament for the exercise of executive power. But a popularly elected President *is* a representative of the people, with a broader constituency than a Prime Minister or even a Government party. If a presidential election were conducted on a platform of policy, would not the President have a mandate to implement the policy even if it were opposed by the Prime Minister? To preserve Ministerial responsibility to the Parliament, it would be essential that the Constitution impose on the President the general duty to act, and to act only, on the advice of the Ministry.

The discretionary powers which the Constitution confers on the Governor-General and which are **not** expressed to be exercisable only with the advice of the Federal Executive Council include[16] power to

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[16] In addition to the powers expressly conferred by the Constitution, the Governor-General possesses the prerogative powers – that is, the common law powers possessed exclusively by

appoint and dismiss Ministers[17], to appoint members of the Executive Council[18], to submit a Bill for the amendment of the Constitution to referendum[19], to summon and prorogue the Parliament[20], to dissolve the House of Representatives[21], to dissolve both Houses of the Parliament[22]; to assent to Bills passed by the Houses of the Parliament[23], to recommend by message to the Parliament the purpose of an appropriation[24]. The Governor-General ordinarily exercises these powers on ministerial advice[25] and the Constitutional Commission recommended that that practice should be incorporated in the Constitution with respect to most of these powers[26]. Indeed, the Commission so recommended without proposing any change to the Monarchical system[27]. If responsible government is to be retained under a republican form of government, a new legal duty should be imposed on the President, corresponding with the duty which convention now imposes on a Governor-General, to act and to act only on the advice of his or her Ministers, subject to certain

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the Sovereign. For example, the Governor-General possesses the power to execute treaties (*R v Burgess; ex parte Henry* (1936) 55 CLR 608, 643-644), to declare war (*Farey v Burvett* (1916) 21 CLR 433, 452; *Welsbach Light Co of Australasia Ltd v Commonwealth of Australia* (1916) 22 CLR 268, 278) or to seek extradition from a country with which Australia has no formal extradition arrangements (*Barton v The Commonwealth* (1974) 131 CLR 477, 498). The provisions of s 2 of the Constitution which empowers the Queen to assign powers and functions to the Governor-General is now obsolete. The Queen's Secretary's letter following the 1975 dismissal of the Prime Minister noted that the Constitution "firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia." (However, the dismissal was not effected by exercise of the prerogative power; the power of dismissal is conferred on the Governor-General by s 64.)

17 Constitution, s 64.

18 Constitution, s 62.

19 Constitution, s 128.

20 Constitution, s 5.

21 Constitution, s 5.

22 Constitution, s 57.

23 Constitution, s 58.

24 Constitution, s 56.

25 Report of Standing Committee D of the Australian Constitutional Convention (Adelaide 1983) and Report of Structure of Government Sub-Committee Report to Standing Committee D, 1984. However, the Saunders-Smith Paper prepared for Standing Committee D suggests (p 18) that assent may be withheld from a Bill that is "flagrantly unconstitutional"; and see the intervention of Mr Higgins in the Convention Debates of 31 January 1898 p 339.

26 The recommendation did not cover the power to submit a Bill to referendum under s 128 as the Commission recommended the elimination of the discretion to submit: see Constitutional Commission Summary, pp 19-20, 75.

27 See the Constitutional Commission Summary p 19.

exceptions. The duty should be entrenched in the Constitution. Entrenching the duty would be desirable to avoid any misunderstanding even if the President, like the Governor-General, were appointed and could be removed by the Prime Minister.

The Reserve Powers

If the conventional duty were entrenched in the Constitution, the main objection to an elected Presidency would be reduced substantially. Of course, that would not give protection against a President's unwarranted exercise of the "reserve" powers. That problem needs to be addressed separately. The reserve powers exist to protect the people and the Constitution against the possibility that a Government may pursue an unlawful course of conduct or that the elements of our parliamentary democracy are unwilling or unable to discharge their intended function. They enable the Governor-General to act to ensure compliance with the general law and the effective working of parliamentary democracy in accordance with the law and custom of the Constitution. The chief occasions for their exercise arise when it is necessary to act without, or to refuse to accept, ministerial advice in order to give effect to the authority of a majority in the lower House of a parliament or, if the parliament is unworkable and appropriate ministerial advice cannot otherwise be obtained, to give the electorate an opportunity to exercise its democratic authority. But an exercise of reserve powers is extraordinary, since responsibility for the action taken rests solely with the Governor-General. Former Governor McGarvie, writing of the November 1975 double dissolution, said that "once absolute necessity justifies use of the reserve

authority, the Governor-General is free of the inhibition of the basic constitutional convention and has an independent discretion to exercise the reserve power of dissolution given by the Constitution independently of ministerial advice"[28]. (In truth, the double dissolution followed the advice of the incoming Prime Minister, Mr Fraser. It was the dismissal of Mr Whitlam that was an exercise of reserve power.) If Professor Winterton's stringent test were adopted, a Governor-General's exercise of power without ministerial advice could be justified only when the exercise is "*absolutely necessary* to preserve the rule of law and protect the operation of responsible government from abuse by the executive"[29].

The Constitutional Commission suggested that "the reserve powers… that is the powers the Governor-General may exercise without or contrary to Ministerial advice, should be kept to a minimum". The reserve powers were identified[30] as –

> "the power to appoint and to dismiss the Prime Minister (section 64), dissolution of the House of Representatives (section 5), and a double dissolution pursuant to section 57 of the Constitution. How the reserve powers should be exercised is, however, regulated to a large extent by constitutional convention".

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28 See also G Winterton *"The Resurrection of the Republic"* p 16.

29 G. Winterton (1993) 12 U Tas LR 249 at 256; *The Resurrection of the Republic*, Law and Policy Paper No 125 Centre for International and Public Law, Australian National University, 2001 p17. Both the majority and the minority of the Executive Government Advisory Committee to the Constitutional Commission endorsed a test similar to that of "absolute necessity" – their formula was "that there is no other method available to prevent": Final Report, vol 1 p 326.

30 Final Report, vol 1 p 342, par 5.151.

There are no "reserve powers" which are additional to the panoply of powers possessed by a Governor-General and ordinarily exercised with ministerial advice. Thus the only powers of prorogation and dissolution available to a Governor-General are those conferred by ss 5 and 57. The only source of the powers to commission and to dismiss a Ministry is s 64. As the Constitutional Commission perceived, ss 5, 57 and 64 confer the powers which directly affect the constitution and functioning of the executive and legislative branches of government. Those are the powers which, in extraordinary circumstances, a Head of State might contemplate using to ensure compliance with the general law and the effective working of parliamentary democracy in accordance with the law and custom of the Constitution.

A distinction must be drawn between the powers of a Head of State and the conventions which might govern their exercise without ministerial advice. Should the conventions which might govern their exercise be codified and inserted in the Constitution? In 1998, the Constitutional Convention Communique, which supported in principle that Australia become a Republic, proposed that the non-reserve powers be "spelled out so far as possible" and that a statement be made "that the reserve powers and the conventions relating to their exercise continue to exist"[31]. It is difficult to spell out conventions prescribing the occasions for exercise of reserve powers, as Sir Ninian Stephen observed in an address to mark the 75th Anniversary of the Constitution –

> "The truly difficult and important part, having once identified the area governed, if at all, only by conventions, is that of determining the content of the constitutional rules that should then apply, and accordingly be reflected in the new constitutional text."[32]

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31 Report of Proceedings, vol 1 p 45.

32 Reproduced in D Marr's *Barwick*, pp 303-304.

It is not possible to foresee the precise circumstances which might warrant an exercise of power without ministerial advice – a question of timing as much as substance – if it became *absolutely necessary* to ensure compliance with the general law and the effective working of parliamentary democracy in accordance with the law and custom of the Constitution.[33]

If the Constitution were amended to spell out rules specifying when the powers of a President can be exercised without ministerial advice, a difficult practical problem would arise if the President should ever need to exercise a reserve power. A constitutional challenge could be made to the validity of an exercise of the power, questioning whether the circumstances existed which justified that exercise of the power. The validity of the exercise of the power would be justiciable. The federal judiciary would become seized of the issue, even though a situation of emergency had evoked an exercise of the reserve power. In all probability, proceedings would be brought in the High Court with consequent delay and uncertainty and issues that are more political than legal might have to be litigated. Occasions when speedy action is required might pass by while the litigation proceeded. The effectiveness of the Presidential action might be frustrated, placing at risk the constitutional stability of the nation. It has been suggested that a Constitutional statement of conventions governing the exercise of reserve powers need not be justiciable – but that would surely have the doubly unfortunate effect of petrifying the conventions while denying them legal

[33] As Professor E A Forsey notes, the circumstances in which the reserve powers need to be exercised "are not easy to set out in detail, comprehensively and with precision. They have a

efficacy. Whenever a rule is made non-justiciable and no other check and balance is provided to enforce it, it ceases to be a legal rule and a party bound thereby is free to disregard it. Some check and balance is always needed when a limited power is conferred.

The preferable check and balance would be a non-judicial control mechanism to ensure that Presidential power can be exercised without ministerial advice only when there are reasonable grounds for the opinion that such an exercise of power is absolutely necessary to ensure compliance with the general law or the effective working of parliamentary democracy in accordance with the law and custom of the Constitution. A Council of State (perhaps entitled “the Constitutional Council”), properly constituted and with a clearly defined function, could provide such a mechanism. It would act only if the President consulted it about the absolute necessity to exercise or to refuse to exercise power without ministerial advice to ensure compliance with the general law or the effective working of parliamentary democracy in accordance with the law and custom of the Constitution. If the Council certified that there are reasonable grounds for the President’s opinion that the President’s proposed exercise or refusal to exercise power is absolutely necessary, the certificate would be final and conclusive of the existence of those grounds. In practice, the existence of a Council’s certificate would preclude judicial review of the President’s action. If the Council denied a certificate, the President’s action would be subject to judicial scrutiny and disallowance. That consequence would provide a significant disincentive to an exercise of power without ministerial advice. In practice, the President could exercise power without ministerial advice only if a

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disconcerting way of popping up in utterly unforeseen, even unforeseeable, guise.” (Reprint in “Evatt and Forsey on the Reserve Powers”(Legal Books, Sydney, 1990) p.lxxxiii).

majority of the Constitutional Council agreed that there were reasonable grounds for the President's opinion that it was absolutely necessary to do so in order to ensure compliance with the general law or the effective working of parliamentary democracy in accordance with the law and custom of the Constitution.

The consultation by the President and the proceedings of the Council would have to be insulated against judicial scrutiny and control in order to preclude the uncertainty and delay of litigation. It would therefore be necessary to constitute the Council with persons whose judgment and integrity are respected by Government and by the electorate. The respect of Government is important as an affirmative certificate by the Council would authorize the exercise of a discretionary power without ministerial advice. The Council should be few in number to provide ease and speed of consultation. It should be constituted by persons who have held the office of Governor-General or President, State Governor, Chief Justice or Justice of the High Court or Chief Justice of another superior court – all subject to an age limit. The power of appointment to the Council should be reposed in the Prime Minister to be exercised once only within, say, three months of a general election for the House of Representatives or in order to fill a casual vacancy. That would ensure the respect of Government, at least at the commencement of Government's term after a general election. It would be desirable for the Prime Minister to consult with the President about the appointments, but that should not be a constitutional or statutory requirement.

By entrenching the Presidential duty generally to exercise power only on ministerial advice and by virtually ensuring that Presidential

power is not otherwise exercised unless the non-justiciable certificate of a Constitutional Council is first obtained, the essential characteristics of responsible and representative government under the Constitution can be preserved if Australia should become a Republic. Whatever the mode of election of the President might be, those essential characteristics can be preserved by governing the powers of the President and the manner of their exercise. It would not be necessary to insert wide-ranging amendments to the Constitution. I attach a draft clause which might serve as a draft for Parliamentary counsel if a republican form of government were desired by a majority of the Australian electorate. It could take the place of the obsolete provisions of s 2 of the Constitution (which empowers the Queen to assign powers and functions to the Governor-General) and, with an amended s 61[34], would confer powers and functions on the President and regulate their exercise.

Amendments of this kind would not – indeed, cannot – entirely avoid the problem which led to the November 1975 dismissal. That is because the Senate has power to deny supply. That power removes the ability of a Government enjoying the confidence of the House of Representatives to guarantee supply in the face of a Senate resolved on denying supply. The Constitutional commission recognized the difficulty. Nevertheless, a majority of the Commission opted to restrict the Governor-General's power to dismiss –

> "to cases in which the House of Representatives had passed a vote of no confidence in the Government. There would be no reserve power in the

[34] Section 61 would simply vest in the President the executive powers vested in the Governor-General, thus:
"The executive power of the Commonwealth is vested in the President and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth."

> Governor-General to terminate Ministerial appointments, and it would thus not be open to the Governor-General to terminate the appointment of a Prime Minister on grounds such as the failure by the Senate to pass essential appropriation or supply Bills, or serious misconduct in an official capacity."[35]

Sir Rupert Hamer in dissent would have allowed a more liberal exercise of the reserve power of dismissal[36]. If the Senate should be resolved that it will deny supply to a Government which enjoys the confidence of the House of Representatives and the Government cannot or will not take any step to break the deadlock, should the Governor-General have some "reserve" power which might be useful to terminate the crisis? The running out of supply might well entail either illegal expenditure or the collapse of government and its services. So much is obvious, but the powers of the Governor-General are limited in two respects: first, only the powers conferred by ss 5, 57 and 64 are available[37]; secondly, an exercise of reserve power to dismiss the Prime Minister, especially if the power be exercised precipitately, is politically dangerous – not least to the office of Governor-General. In November 1975, it was only because the conditions for a double dissolution were satisfied that it was possible for Mr Fraser to undertake to advise, and to advise, a double dissolution. And it was only because he was able to secure the Senate's passing of the Supply Bill in the meantime that the supply crisis was terminated. If a similar stalemate should occur in the future, there may be no trigger for a double dissolution and no alternative Prime Minister might be able to guarantee supply. But that position would be neither the result of, nor curable by, the existence of reserve

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35 Final Report, vol 1 p326 para 5.66

36 Final Report, vol 1 p327 paras 5.70-5.72

37 The prerogative powers of dissolution have been subsumed and restricted by the constitutional powers conferred by ss 5 and 57.

powers: it is a consequence of the Senate's authority and constitution which distinguish it from the House of Lords in the Westminster model.

Given these provisions of our Constitution, would the existence of a Constitutional Council assist if a future President were faced with a similar crisis? The Council would be not only a brake on the precipitate use of power without ministerial advice; it would facilitate the exercise of the most appropriate power (if any) to resolve the impasse. Thus, if the President and the Constitutional Council were satisfied that there were reasonable grounds to believe that [38] "the Senate was determined to refuse to grant supply to the Government" and "that there was no likelihood of compromise", they would have to consider whether those facts constituted reasonable grounds for an opinion that it was *absolutely necessary* to dismiss the Prime Minister and commission another and whether that other could and would secure supply and advise a double dissolution; alternatively, they might consider whether those facts constituted reasonable grounds for an opinion that it was *absolutely necessary* for the President, assuming the conditions for a double dissolution under s 57 had been fulfilled, to dissolve both Houses and send the Parliament to a general election with the existing Prime Minister in office. The controversy that attended the dismissal of the Whitlam Government shows how important an independent consideration of the circumstances justifying *absolute necessity* would be. A Constitutional Council would be a protection of the President against any suspicion of political partisanship. The Council itself would be protected against such a charge since its membership would have been determined by the Government of the day in the three months after the most recent general election.

Even with these provisions in place, however, the model of direct election could be adopted only at a price, namely, the virtual elimination of eminent, non-political citizens as candidates for the Presidency. The Australian Governors General who have held office in recent times have fallen into two categories: those who have held political office and have been appointed on the nomination of their political party, and those who have achieved eminence in a non-political field and would have declined any invitation to engage in an electoral campaign for the office. It is unlikely that citizens who fall into the latter category would agree to be nominated to contest an election for the office of President. A choice must be made between that loss and any desire to vote to elect the Head of State. But that is not the principal choice which the Australian people will have to make if they wish Australia to become a Republic. The critical choice to be made is whether it is desired to preserve the Westminster system of responsible government. If that be the desired system of government, a further choice must be made: should the President have any powers which might be exercised without ministerial advice and, if so, what is the mechanism for regulating their exercise?

A draft clause giving effect to these proposals is attached for consideration. It could take the place of s 2 of the Constitution which has become obsolete. Of course, if Australia were to move to a Republic, there would be a number of sections of the Constitution which would require consequential amendment. The attached clause would itself require the attention of Parliamentary counsel. It is attached in order to express the framework in which our system of representative and responsible government can be preserved if Australia should move to a

[38] The quoted phrases are taken from Sir John Kerr's "Statement of Reasons"

republic, irrespective of the manner in which a President is appointed or elected.

Answers to the Committee's Questions

These submissions are directed chiefly to answering Questions 1 and 8 in the Discussion Paper issued by the Reference Committee in December 2003.

The answers I would submit to the questions posed in the Discussion Paper are as follows:

Q 1: No

Q 2 The powers and functions presently vested in or exercisable by the Governor General.

Q 3 None

Q 4 No submission

Q 5 No submission

Q 6 No submission

Q 7 The method of election or appointment of the Head of State should await the preferred option of the electorate ascertained in accordance with Corowa Committee's proposal A. If the favoured model is "popular vote", I should think preferential voting is desirable. Personally, I would favour appointment by the Prime Minister or, as a second choice, 2/3 majority of the Parliament. The latter model raises the possibility that circumstances might arise when a 2/3 majority may not be obtainable.

Q 8 The office of Head of State can be designed so that the President is not a rival centre of power to the Government. The above submission proposes a mechanism to effect that result.

Q 9 No submission

Q 10 No submission

Q 11 No submission

Q12 No submission

Q 13 President of Australia or President of the Commonwealth of Australia

Q 14 No submission

Q 15 No submission

Q 16 No submission

Q17 The Parliament, voting as prescribed by s 72 in the case of the removal of a Justice of the High Court. The formal instrument of removal should be signed by the Presiding Officers of the Senate and the House of Representatives.

Q 18 The same grounds as those prescribed by s 72 for the removal of a Justice of the High Court.

Q 19 By the same method as the method for the original appointment of a President.

Q 20 The same eligibility requirements as for a member of the Parliament

Q 21 Disqualifications as for a member of the Parliament, that is, the disqualifications listed in s 44 and s 45

Q 22 Only in accordance with s 72

Q 23 Yes – on ministerial advice only.

Q 24 No. The Judiciary should be kept apart from any issue relating to the propriety of the exercise of executive power. There are two reasons: one, in order to ensure that the Judiciary may, without embarrassment, determine judicially any issue relating to the lawfulness of the exercise of executive power that might arise directly or incidentally in a justiciable controversy; two, in order to ensure that the Judiciary is not seen to be

involved in the making of decisions which turn or may be thought to turn on political considerations.

Q 25 The States must choose their own form of government but should be invited to invest in the President the same powers as their respective Constitutions vest or recognize in the Queen.

Respectfully submitted,

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