

## **Senate Legal and Constitutional References Committee Inquiry into an Australian Republic 2004**

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### **Summary of the Head of State as the Guarantor of Democratic Government**

#### *The guarantor function for the head of state*

The head of state should be given a new function as the guarantor of democratic government. He or she would only intervene into parliamentary politics in very limited circumstances, namely where there has been a breakdown in the continuity of the democratic process. For present purposes, it is assumed that the head of state would possess this function in addition to the current powers of our Governor-General.

#### *The current powers of the head of state*

Broadly speaking, the Governor-General has three powers:

- *Ceremonial powers* which consist of opening parliament and public buildings, as well as granting awards.
- *A modest oversight role*, which involves ensuring that the workings of government are properly carried out and lawful. He or she can counsel, advise or warn the government against certain actions, but ultimately he or she must yield to the advice of government. This is therefore a very limited power.
- *The reserve powers*, which consist of the powers to dissolve the House of Representatives, to call a double dissolution of both Houses of Parliament and to appoint and dismiss the Prime Minister, and hence the government. These are considerable powers but are rarely exercised.

Day-to-day, the head of state will perform the oversight and ceremonial functions. The exercise of these powers is relatively uncontroversial.

#### *Problems with the reserve powers*

The use of the reserve powers is invariably controversial and often uncertain. In part, this is because their use is governed by conflicting rules or conventions. The dismissal of the Whitlam federal government illustrates both the controversial nature of these powers, and the uncertainty about their use.

One solution to these problems is to codify the reserve powers. Such a code would offer useful guidance. However, there will inevitably be ambiguities, omissions and discretionary space. A code may also be subject to the same kind of disputes as attend the operation of the current reserve powers.

#### *The operation of the guarantor function*

Given the problems with the reserve powers, the guarantor function provides a new way of thinking about these political problems. It moves beyond the debates about the current

operation of the powers, for example, whether one convention should trump another, or why a convention or legal principle does not apply to a particular case. Moreover, it avoids the problem that a code of the reserve powers would be subject to the technicalities of legal interpretation. Rather, it directly addresses the need to preserve the continuity of democratic government, which is, after all, the chief concern at a time of political crisis.

The guarantor function is concerned with the legitimate exercise of power by the head of state. It is assumed that the head of state would act as a guarantor only when exercising the reserve powers. This guarantor function requires that the head of state never take on a governing role, but rather ensures the continuity of democratic government. The guarantor function operates in the realm of political legitimacy. It justifies legitimate political action, but not illegitimate political conduct. Thus the guarantor function provides a new justification for, and constraint on, political action. Consider the following examples that are likely to arise where there is either a directly or parliamentary elected president:

- It is illegitimate for a popularly elected President to intervene in parliamentary politics just because they have a popular mandate. This is because the President's actions would only be legitimate if he or she acts as a constitutional guarantor. Therefore, it would be illegitimate for a popularly elected head of state to refuse to sign a bill where their role today would be purely formal. This would be taking on a governing role.
- It is legitimate for the head of state to call an election if the Prime Minister refused to do so after the expiration of the three-year term for the House of Representatives. This would facilitate the continuity of the democratic process. Thus, a parliamentary elected president would be empowered to act as a guarantor of democratic government because he or she is not simply a figurehead.
- It is legitimate for either a parliamentary or popularly elected president to dismiss a Prime Minister who does not have the confidence of the lower house of Parliament and refuses to resign from office. Further, the President would then appoint a person with majority support as Prime Minister. Such an exercise of power assists in the continuity of democratic government.

Thus, the guarantor function would strengthen our political system by providing both guidance to a new President, and a public standard by which to assess the conduct of the President and the Prime Minister in a time of political crisis.

### *Solving a political problem*

The guarantor function may also have the added benefit of resolving a tricky disagreement between republicans. It may serve as a rallying point for republicans, a point upon which they could unite. Many republicans believe that we should retain our current Westminster system of government, but they disagree over the mode of appointment — that is, whether the head of state should be appointed by direct election or by parliament. The popularly elected president may be seen to have too much power because he or she has a popular mandate. The parliamentary elected president may be seen to have too weak a mandate because they will be regarded as a puppet of Parliament. The guarantor function may be seen as appealing to republicans of either persuasion because it addresses weaknesses with each mode of appointment. As shown above, it constrains a popularly elected President, and empowers a parliamentary elected President.

Without a clear function set out for the head of state, the referendum debate becomes whether a popularly elected President is too powerful or whether a parliamentary elected President is a pawn of the politicians. The guarantor function might neutralise the rhetoric of the ‘politicians’ republic’ or the ‘popularly elected tyrant’ which distracts from a consideration of the proper functions and activities of our head of state. The guarantor function might provide for a more informed discussion of both the function and the powers of the head of state.

### *The guarantor function and other models for an Australian Republic*

The guarantor function is not a model per se, but rather a new job description for the head of state. It is not a ‘model’ which would sit alongside other alternatives, but a presidential function which other models could easily adopt. It is compatible with other proposals, such as a constitutional counsel to advise a President at a time of crisis, and either the direct or parliamentary election of a President, though some models may be more desirable than others.

### *Writing the guarantor function into the Constitution*

Perhaps the simplest way to write the guarantor function into the Constitution is the inclusion of a new provision describing the function of the head of state. This new provision could be in addition to a provision which either partially, or fully, codifies the reserve powers of the head of state.

### *The guarantor function can be understood by the general public*

The constitutional guarantor function would be readily understood by most people. This is because many are already aware of the role of a contractual guarantor, which is analogous to that of the constitutional guarantor. It is only when there is some breakdown in the democratic process that the guarantor is required to act to resolve the problem. At that very basic level, most people will understand the idea of a constitutional guarantor as a way of setting out broad parameters for what the head of state should do.

### *The guarantor function and overseas experience*

Although the constitutional guarantor function is not an exact replica of an overseas model, the term ‘guarantor’ is used, for example, in relation to various functions of the French President in the French Constitution. The proposed function also draws upon well-known principles of constitutionalism (such as legality and legitimacy).

### *The extent of the power*

While the head of state is given a new function, this does not amount to a *carte blanche* to intervene whenever the head of state thinks appropriate. This is because the function itself is limited. The rhetoric of action is constrained by the notion of the guarantor.