

THE EASY GUIDE TO THE REPUBLIC PROPOSAL

BY KERRY CORKE

On 6 November 1999, the Australian people will be asked whether to amend the Constitution of the Commonwealth of Australia so as to replace our current constitutional monarchy with a republic with a President chosen by Federal Parliament.

To date, most of the debate has focused on the broad issues of monarchy versus republic and directly versus indirectly elected President. But what the Australian people are actually voting on is a series of specific amendments to the Constitution. Are those amendments well-considered and well-drafted?

In this IPA Backgrounder, experienced legislative lawyer Kerry Corke casts a critical eye over the extensive changes to the Australian Constitution involved in the republic proposal. In straightforward, non-technical language, he sets out the proposed changes and identifies difficulties involved in the proposals.

Some of the problems he identifies include: the President being **required** to follow the advice of different, and potentially competing persons; the importing into the Constitution terms of highly uncertain content creating great uncertainty about the role of the High Court in situations of potential crisis; and the pervasive, yet dubious, assumption that the bi-polar, highly disciplined party politics of the current day will continue indefinitely.

These problems lead Mr Corke to conclude that the proposed changes are, to use the modern fable of a camel being a horse designed by a committee, a 'constitutional camel'.

INTRODUCTION

According to the modern fable, a camel is a horse designed by a committee. The proposed republican amendments to the Commonwealth Constitution—based by and large on the **Bipartisan Appointment of the President** model passed by the Constitutional Convention on 12 February 1998, and to be put to the Australian people in the 6 November Referendum—very much creates a constitutional camel.

The amendment proposal introduces concepts such as ‘reserve powers’ and ‘conventions’. They are *labels* quite well known to students of government. Unfortunately, they are also terms with no fixed *ambit*.

They may be familiar concepts to the political scientist. They are also a clear invitation for constitutional gridlock.

The indirect-election republic proposal also places the Prime Minister, an office not recognised in the current Constitution, in a position of unparalleled strength.

In a recent article, Senator Lees, Leader of the Australian Democrats, said:

When Coalition MPs talk about government, they mean the Prime Minister, his Ministers and themselves having all power and making all decisions, irrespective of the Parliament. Very big G.¹

The proposal entrenches that big ‘G’ in the Constitution.

The model is described as the ‘Bipartisan Appointment of the President’ model.² As the name *bi*partisan implies, the design clearly presupposes the continuation of:

- the two-party system;
- contemporary party discipline;
- the current system of single-seat constituencies;
- the current preferential system of voting; and
- Australians structuring their vote so that, at the end of the day, a Coalition or Labor candidate will be returned.

I. THE HIRE POWER: THE APPOINTMENT OF THE PRESIDENT

The proposed new Section 60 reads:

60. The President

After considering the report of a committee established as the Parliament provides to invite and consider nominations for appoint-

ment as President, the Prime Minister may, in a joint sitting of the members of the Senate and the House of Representatives, move that a named Australian citizen be chosen as the President.

If the Prime Minister’s motion is seconded by the leader of the Opposition in the House of Representatives, and affirmed by a two-thirds majority of the total number of the members of the Senate and the House of Representatives, the named Australian citizen is chosen as the President.

The person named in the Prime Minister’s motion is qualified to be President if, when the motion is moved and affirmed:

- (i) the person is qualified to be, and capable of being chosen as, a member of the House of Representatives; and
- (ii) the person must not be a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party.

The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.

Each person chosen as President shall, before the term of office begins, make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.

It is left to the Parliament to *set up* the Committee advising the Prime Minister, and to *set out* how it operates.

The *Presidential Nominations Committee Bill*³ establishes a committee to recommend names of suitable candidates to the Prime Minister. It will comprise eight federal parliamentarians, one member from each State and Federal Parliament, and 16 ordinary people.⁴

A short list of suitable candidates derived from community nominations is to be given to the Prime Minister, so that, one assumes, he can choose one as the presidential nominee.⁵ In preparing the report, the Committee has to consider:

- the ‘diversity’ of the Australian community; and
- the ability of the nominees to command the respect and support of the Australian community.⁶

Taking the last point first, it is a relief to know that the Committee has a duty to pick someone we can all wear.

What is meant by the ‘diversity’ of the Australian community is more problematic. There are a number of ways in which the ‘diversity’ of the com-

munity can be recognised. It can be by:

- geography;
- age;
- culture;
- gender

and the list goes on.

Under the current proposal, the Prime Minister will be able to appoint half the Committee. Given that the Prime Minister *is* Prime Minister because of his majority in Parliament, his party will also have people, in the form of MPs, on the Committee.⁷ One doesn't have to be a genius to anticipate that, at some time in the future, there will be political complaints of the PM 'stacking' the Committee to provide 'his' sort of candidate.

Even if the Committee is not perceived to be doing the bidding of the PM, there will undoubtedly be debate about whether the shortlisted candidates satisfy the 'diversity' test. (Assuming we're allowed to see the names. More about this below.)

One imagines that the Committee's report will become a public document. The *Presidential Nominations Committee Bill* is somewhat awkward on this point. This is because the Constitutional Convention's model required a person's nomination to be a secret unless the person consents to it becoming public. An official or Committee member cannot reveal the contents of the report given to the Prime Minister.⁸ This is because the Constitutional Convention thought that revealing nominations may stop people from nominating.⁹

This gag is not extended to the Prime Minister. Nor should it be. After all, if the Constitution ordains the Prime Minister to consider a report, it should be available to all. Particularly one dealing with the appointment of an Australian President. Indeed, one would have thought that the proposed Constitutional amendment would have required the report to be tabled in the Parliament. However, such is not the case.

Let us assume that the confidentiality provision was honoured in any publicly released version of the document. What would be your reaction to reading that the Committee had on its presidential shortlist:

1. Smith;
2. Jones;
3. Mmth;
4. Mmth; and
5. Mmth

with modesty preventing the release of the names of 3, 4 and 5?

What the existing proposal delivers is a 'sort of' transparency of process, and 'sort of' public participation, which, alas, is half-baked. Unlike the re-

mainder of the mechanism, however, at least this can be subsequently changed by the Parliament.

What will be constitutionally entrenched is a filter between the people and the appointment of a President. It will be up to the voters to decide on 6 November whether they are happy with an institutionalised 'President by Committee'.

The Nomination

The Prime Minister *may* put a name forward for consideration. One assumes that it will be one of the names suggested by the Committee. Or *some* name. Just so long as the nominee is not a parliamentarian or a member of a 'political party'.¹⁰ On the face of the document, the matter appears to be left to prime ministerial discretion.

When 'may' is ordinarily used in legislation, it means that a person has a discretion to do something.¹¹ One would have thought that if we were to have a constitutionally ordained committee (undoubtedly of 'eminent people') to provide names for the Presidency, then the Prime Minister would be obliged to put one of those names forward. No doubt it can be argued that the term 'After considering the report of a committee ...' will lead to the implication being drawn that the PM is bound to put one of the names forward. But if this is what was meant, it should have been made clear in the proposed section 60. Why leave it to implication?

On the other hand, where the legislative draftsman wishes something to happen, a term like 'must' or 'shall' is used. One example is the first arm of the third paragraph of the proposed section 59. Another is the proposed section 62, which says that a PM who sacks a President *must* seek the approval of the House of Representatives for its approval.

If, however, the proposed amendment is read as giving the PM the right to reject a committee report outright, it raises the question: is it desirable to give the PM *this much* power in a republican system of government?

The Leader of the Opposition is to second the Prime Minister's proposal.¹² Thus we have the Prime Minister and the Opposition Leader forming a unity ticket. The irresistible inference is that the Government and official Opposition will vote *en bloc*. Two-thirds will be obtained. Stability delivered.

Life, however, is continually changing. Nothing stays the same forever. The *bipolar* political system which the proposed *bipartisan* model anticipates may not be present in the future.

The Australian Democrats have again floated the concept of proportional representation as a method

of electing people to the lower chamber, with a recent recommendation made to the UK House of Commons suggested as a realistic 'good and practical compromise'.¹³ Who's to say that some Parliament in the future won't adopt some concept of proportional representation for membership of the House of Representatives?

Minor parties are increasing their overall percentage of the primary vote. In the most recent election in NSW, non-major parties received over 25 per cent of the primary vote.¹⁴ If Australians perceive that parties other than the two majors may gain representation in the lower House to the extent they may influence how a government may be composed, even if they do not participate in it, they might vote for them. Parliamentary representation may fragment. As might this model.

Supporters say that this model will ensure the selection of a President who is above party politics, unsullied from participating in an election campaign and acceptable to those on both sides of the political fence. The person will be someone who can unify the nation.¹⁵ What happens, though:

- if the Opposition Leader refuses to second the Prime Minister's recommendation, either because he thought the appointed committee was 'stacked', or because he genuinely thought the candidate a dud?; or
- there is fragmentation of parliamentary representation, so that there are more than two sides to the political fence and the two-thirds vote isn't achieved. What happens?

This is answered by the proposed new section 61. The old President just keeps on going and going. Until a compromise candidate is found. Or the politicians stop playing politics.

One imagines that the argument will be that a 'political' imperative will exist to get a President appointed. Imagine the embarrassment if there is political gridlock. People will get cross, they'll punish at the ballot box. It won't be worth it. And so on. But what happens? Does the Prime Minister keep drawing from the shortlist? Can the Opposition Leader play politics and simply decline to second the nominee? And for how long?

In one sense, the *status quo* is replicated. The Queen, acting on the advice of her Australian advisers, appoints the Governor-General. The first most of us hear of the appointment is to read about it in the newspapers. It could be anybody. Including, of course, a non-Australian citizen.

It differs from the *status quo* because, unlike now, where once an appointment is made, unless there is an enormous community outcry, the decision is

made. Under the proposed constitutional amendments, the Parliament has a role in endorsing the prime ministerial choice. And the person must be an Australian citizen. However, the people only have an indirect say. They don't get a vote on it.

Electors will have to decide that in moving from the current system to a republican system, they want a republic where:

- a committee of the 'worthy' filters the views of the community;
- the Prime Minister gets to choose the nominee;
- only *federal* politicians get a direct say in affirming the prime ministerial nominee; and
- if the Leader of the Opposition fails to second a prime ministerial nomination, or the two-thirds majority of Parliament is not achieved, there is built-in delay, and thus a period of political instability, while a compromise candidate is found.

II. THE FIRE POWER: DISMISSING THE PRESIDENT

The proposed new Section 62 reads:

62. Removal of President

The Prime Minister may, by signed notice, remove the President with effect immediately.

A Prime Minister who removes a President must seek the approval of the House of Representatives for the removal of the President within thirty days of the removal, unless:

- (i) within that period, the House expires or is dissolved; or
- (ii) before the removal, the House had expired or been dissolved, but a general election of members of the House had not taken place.

The failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who was removed.

The Prime Minister has an 'unqualified' power to

dismiss the President.¹⁶ It appears that giving the PM the power to sack the head of state has no precedent among republican constitutions.¹⁷

For all intents and purposes, it reflects the *status quo*. The Governor-General holds office at the pleasure of the Queen.¹⁸ If it ever came to sacking a Governor-General, the way the current Constitution is assumed to work would be for the Queen, acting on the advice of her Australian Ministers, to terminate the Governor-General's commission.

The proposed model has the additional feature that if the Prime Minister removes the President, he must seek the 'approval' of the House of Representatives within 30 days¹⁹ for the removal of the President.²⁰ In this sense, the Parliament is given a role it currently doesn't possess.

What if the Prime Minister Is Knocked Back?

The model proposed by the Constitutional Convention suggests that the failure of a Prime Minister to have a presidential dismissal by the House of Representatives upheld would be the equivalent of a no confidence motion in the Prime Minister.

The proposed section 62 is, however, designed so that this is not the outcome.²¹ What happens is to be left 'for resolution in accordance with parliamentary processes, which must in turn develop within the broader constitutional framework'.²²

One would have thought that if Parliament is asked the question 'do you approve of my removal of the President', and answers 'no', the President would be returned. Wouldn't you expect that to be the outcome?

This would give some direct meaning to the House being involved in the sacking process, and give full meaning to the term 'approval' used in the first paragraph of section 62. The last paragraph of section 62, however, makes clear that once the President is sacked, he's sacked. Without having to achieve a special majority of Parliament. Or without having to prove any sort of misbehaviour.

And, where you have the current system, where the parliamentary 'numbers' are as sure as they are today with the system of single-seat constituencies, party discipline and secure majorities—that is the end of the story.

It is curious that the head of state has less security of tenure than a High Court judge. A High Court judge can't be constitutionally removed unless *both* houses of Parliament 'pray' for a sacking on the grounds of proved misbehaviour or incapacity.²³

Electors will have to decide whether they wish to entrench a republican system where:

- The Prime Minister has an unqualified power to dismiss the head of state;
- A simple majority of the House of Representatives, sitting alone, is enough to confirm the dismissal; and
- The head of state of the Commonwealth of Australia has less security of tenure than a High Court judge.

III. WHAT THE PRESIDENT CAN DO

The proposed Section 59 reads:

59. Executive power

The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The President shall be the head of state of the Commonwealth.

There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.

The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions that related to the exercise of that power by the Governor-General.

The *first paragraph* effectively reconstitutes the existing section 61. The one addition is the declaration that the President is the 'head of state' of the Commonwealth.

The *second* paragraph re-establishes the Executive Council.

The *third* paragraph is the interesting one.

On its face, the section appears to say that:

- ordinarily the President has to act on the advice of the Executive Council *or* the Prime Minister *or* a Minister; but

- if it's a 'reserve power', the President can exercise the power if he wants, but must do so according to constitutional 'convention'.

Conventions

In a book dedicated to discussing constitutional conventions, entitled *Conventions, the Australian Constitution and the Future*, L.J.M. Cooray observed that conventions are based on usage. Quoting Sir Ivor Jennings, he suggests that two fundamental requirements are required for the creation of a convention:

- (i) a reason or purpose referable to the existing requirements of constitutional government; and
- (ii) acceptance of it by those who are most immediately concerned with its application.²⁴

As 1975 shows, however, when politicians become involved, the question of 'acceptance' of rules becomes quite problematic.

And they can change. In his work *Cabinet Government*, Sir Ivor Jennings records that in the United Kingdom in 1932, the convention that Cabinet takes collective responsibility for decisions made by it in Parliament was not followed because of 'exceptional political conditions'. In that case, the Government was a coalition formed of three parties with distinct organisations, set up for specific purposes. As the relevant issue (tariff reform) was not one of those purposes, members of the Cabinet could speak and vote against it.²⁵

This is recognised in the amendments being presented to the people. There is a Schedule 2 proposed to be added to the Constitution. It deals with 'transitional provisions for the establishment of the republic'. Section 7 of Schedule 2 reads:

7. Constitutional Conventions

The enactment of the *Constitution Alteration (Establishment of Republic) Act 1999* does not prevent the evolution of the constitutional conventions, including those relating to the exercise of the reserve powers referred to in section 59 of this Constitution.

So, what is a 'convention' is a settled thing. Unless the circumstances are such that it either makes sense not to follow 'convention' or to make a new rule.

Professor Winterton observes that there is uncertainty about the actual contents of the conventions relating to responsible government.²⁶ Equally, Cooray accepts that in any analysis of the operation of conventions in Australian law there is a degree of uncertainty.²⁷

It needs to be said that 'conventions' are nothing more than the application of common sense in the operation of government. They are not the sort of

thing that can really be set down in writing. Because they *are* applications of common sense, they can change with circumstances.

Using conventions has been tried before in a constitution of a former 'British dominion'. In his book *The King and His Dominion Governors*, Dr Evatt referred to the *Status of the Union Act 1934*, which made various amendments to the South African Constitution following the Imperial conferences of 1926 and 1930.

The way in which the powers of the Governor-General were otherwise set out in that Constitution were not to be taken to affect the 'constitutional conventions relating to the exercise of the functions of choosing of Ministers and the summoning and prorogation of Parliament'.

Evatt said:

The great difficulty about incorporating in a Statute references to constitutional conventions, usages, maxims and practices, is that there is greatest uncertainty not only as to what rules are to be applied, but how as to any particular case they are to be applied.

He continued:

It is obvious, therefore, that it is never safe to rely upon the application of mere constitutional usages, no matter how authoritative the documents by which they are evidenced. In the case of South Africa the difficulty is raised by the reference to the Conventions is much greater because it is impossible to say what the 'conventions' are and where they are to be found. Is recourse to be had to Hallam or May? To Hearn or Bagehot? To Bryce or Anson? To Asquith or Dicey? To Todd or Keith?²⁸

For reasons discussed later on, rather than providing certainty, or even the *status quo*, the insertion of 'convention' may only give rise to litigation and great uncertainty.

The First Arm of the proposed section 59: 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; ...'

The Explanatory memorandum accompanying the proposed amendments says:

Proposed s.59 provides expressly for the President to act on the advice of the Government of the day in accordance with the principle of responsible government which governs the exercise of nearly all of the Governor-General's powers.

The proposed section does no such thing.

By the time of Federation, the concept of ‘responsible government’ was well and truly established. It really means *Cabinet* government. In the British Dominions (of which Australia was one), the discretionary power of the Crown, other than the ‘reserve powers’ (discussed later on) were not exercised by the representative of the Crown itself, but on advice from popularly-elected legislators.

So it is in the Australian Constitution. Quick and Garran analysed the existing section 63 of the *Constitution* thus:

(the object of s.63) is to make clear that whenever in the Constitution there is a provision that the Governor-General in Council may do certain Acts, such provision refers to the Governor-General acting with the advice of the Executive Council. This, as we have already seen, means the advice of the select committee of the Federal Executive Council known as the Ministry.²⁹

The operating presumption is that when the head of state hears advice from a representative of Cabinet, the advice given will be fully supported in both parliamentary and public forums.

Sir Paul Hasluck, a previous Governor-General, thought that it was *not* appropriate for Ministers to have an argument in Executive Council about the merits of a particular proposal. They should go away and come back when the *Cabinet* can express a united view.

He thought that it was appropriate for a Governor-General to hesitate to follow the advice of a Prime Minister where there was reason to believe that the Prime Minister was at odds with his own Cabinet or his own party.

In that case, the Governor-General in Council might seek confirmation that he is acting on clear advice and not taking sides in an unresolved argument. In the case of a coalition government, if there was any substantial doubt about the unity of the coalition partners, he might find it advisable to seek assurances from the leader of any coalition party as well as from the Prime Minister.³⁰

The proposed amendments not only require the President to exercise powers on the advice of the Executive Council, but also on that of the Prime Minister or a Minister of State.

It is odd legislative drafting. If you have, for example, a fractious government of the sort hinted at by Sir Paul: when does the President act with the advice of his Executive Council? Or the Prime Minister? Or a mere Minister of State?

Even in the exercise of an ‘ordinary’ power, such as the commencement of a piece of legislation, or

the appointment of someone to a board or committee (leaving aside issues such as ministerial reshuffles or dismissals), or the appropriation of money, there is a chance that a fractious multi-party government may exist, possessing different views.

Giving three separate people (or groups of people) a statutory right to advise a President in the fashion proposed can raise the spectre of an unseemly race to Government House so that the Prime Minister may beat a Minister with relevant administrative responsibility for an Act, or an ‘Executive Council’, to tender advice, on which the President ‘must’ act.

Let us look at an example of the problems this could create. Section 56 of the Constitution bars a parliamentary vote on the appropriation of revenue unless the purpose of the appropriation has been recommended by (now) the President. It is assumed that the President will make the relevant recommendation to Parliament on advice.

Assume now a fractious coalition, and the relevant purpose to be funded is one that stimulates the political tension. Does section 59 create a contextual implication that the PM, as the principal adviser to the President, may give advice *notwithstanding* a decision of Cabinet? Or, does it allow a Minister acting as an emissary of Cabinet to advise the President of the view of the majority of his Cabinet, and that the President *must* act on that advice? That would be a valid implication to draw, as it would accord with the standard concept of ‘responsible (Cabinet) government’.

Yet can the PM then go back to Government House, and advise a reversal of the decision, again something the President might *have* to do. After all he *is* the boss. And the President *must* act on advice tendered by (*inter alia*) the PM. What ‘convention’ would apply in that circumstance?

In a submission to the Joint Select Committee on the Republic Referendum, Mr Griffith QC observed that the establishment of disjunctive (and apparently equal) sources of advice may place the President in a position of constitutional uncertainty as to whose advice he should act on.³¹

The Committee considered the issue. They concluded that it was desirable to amend the constitutional amendments proposed by the Government so as to save and perpetuate the relevant conventions which presently assist the Governor-General in determining the appropriate source of advice. It also said that the *Acts Interpretation Act 1901*—which tells how legislative provisions should be interpreted—could be amended ‘so that provisions dealing with giving advice to the Governor-General

apply to the President.’³²

As we have discussed, however, conventions are pliable things. One must query whether in a particular case a ‘convention’ will assist in breaking this impasse.

This is a timebomb waiting to happen—inserted on the premise that today’s political scene of tight party discipline and (effectively) one-party government will never change.

The Second Arm of the proposed section 59: ‘... but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to that power’.

Constitutional literature abounds discussing the concept of ‘reserve powers’. The trick is identifying what they actually are. The *Explanatory Memorandum* says that there are **probably** four:

- appointing a Prime Minister;
- dismissing a Prime Minister;
- refusing to dissolve a Parliament; and
- forcing a dissolution of Parliament.³³

It is quite something to put something into a constitution with an uncertain ambit. Yet that is what is being submitted to the people. And it is proposed that when exercising a reserve power, the President must act ‘in accordance with’ constitutional convention. As the *Explanatory Memorandum to the Republic Bill* said, the conventions *will* apply to the exercise of those powers by the President.³⁴

However, as we have discussed, conventions are uncertain things. And, as the *Explanatory Memorandum to the Republic Bill* says:

There can be circumstances, however, where there is no generally agreed convention to control the exercise of the Governor-General’s reserve powers. Such a situation arose in 1975 when the Governor-General, Sir John Kerr, dismissed the Prime Minister, Mr Whitlam, after the Senate failed to pass the Supply Bill for Mr Whitlam’s (sic) government.³⁵

So, there may have been a convention to deal with the 1975 scenario. Or maybe not.

The change to the Constitution must surely drag the High Court into any exercise of a ‘reserve power’. As Australia’s constitutional court, it has a duty to ensure that the Constitution is not infringed.³⁶ There is a legal debate as to whether the exercise of a ‘reserve power’ by the Governor-General is currently ‘justiciable’,³⁷ that is, capable of being reviewed and reversed by the High Court. The traditional view,

however, is that the reserve powers and the conventions which govern their exercise are ‘high political matters’ and are not justiciable.³⁸

An attempt has been made to ensure that an exercise of the reserve power is not capable of court review. The Parliament added a section 8 of Schedule 2 to the constitutional amendments to be put to the people, which reads:

8. Justiciability

The enactment of the *Constitution Alteration (Establishment of Republic) Act 1999* does not make justiciable the exercise by the President of a reserve power referred to in section 59 of the Constitution if the exercise by the Governor-General of that power was not justiciable.

To read section 8 as blocking the High Court from reviewing *any* exercise of a reserve power would be to frustrate the clear terms of section 59.

It is obviously a fetter on a President to (for instance) prevent him from capriciously sacking a Prime Minister **in complete distinction to the unfettered right of the Prime Minister to sack a President.**

When section 59 and (the somewhat circular and non-committal) section 8 are read together, the effect must be that if there was a convention and the President generally acted within its terms, the High Court could not intervene. But if he didn’t, they can.

‘High political matters’ also means ‘high political drama’, and uncertainty. At least under the traditional view, once the reserve power was exercised, it was exercised. As there are fetters imposed on the exercise of the power, the High Court has an appropriate role to ensure that the rules are followed.

Let’s look at 1975, and how these amendments could have affected the outcome.

In Australia, the House of Representatives and the Senate have equal and co-ordinate authority. One commentator, Professor Lane, thought that, as it couldn’t gain supply, it was open for Sir John Kerr to remove the Whitlam Government, using the reserve powers. This was because the circumstance was one where the exercise of the reserve power was the only possible method of giving to the electorate an opportunity to say what was to be done in a political crisis.³⁹

Winterton, to the contrary, thinks that a Governor-General *arguably* has reserve powers with respect to the dissolution of the House of Representatives, a double dissolution, to appoint a Prime Minister, and ‘even more dubiously’ to dismiss the government.⁴⁰

The Supreme Court of New South Wales observed in *Greiner v. Independent Commission Against Corrup-*

tion that the rules relating to the dismissal of the government are vague and uncertain. The only certainty being that it was a power exercisable only in 'most extreme circumstances'.⁴¹

So, even assuming that there are 'reserve powers' (an open question), and that there are settled conventions to guide their exercise (an equally open question), the better view is that they may only be exercised in 'extreme circumstances'.

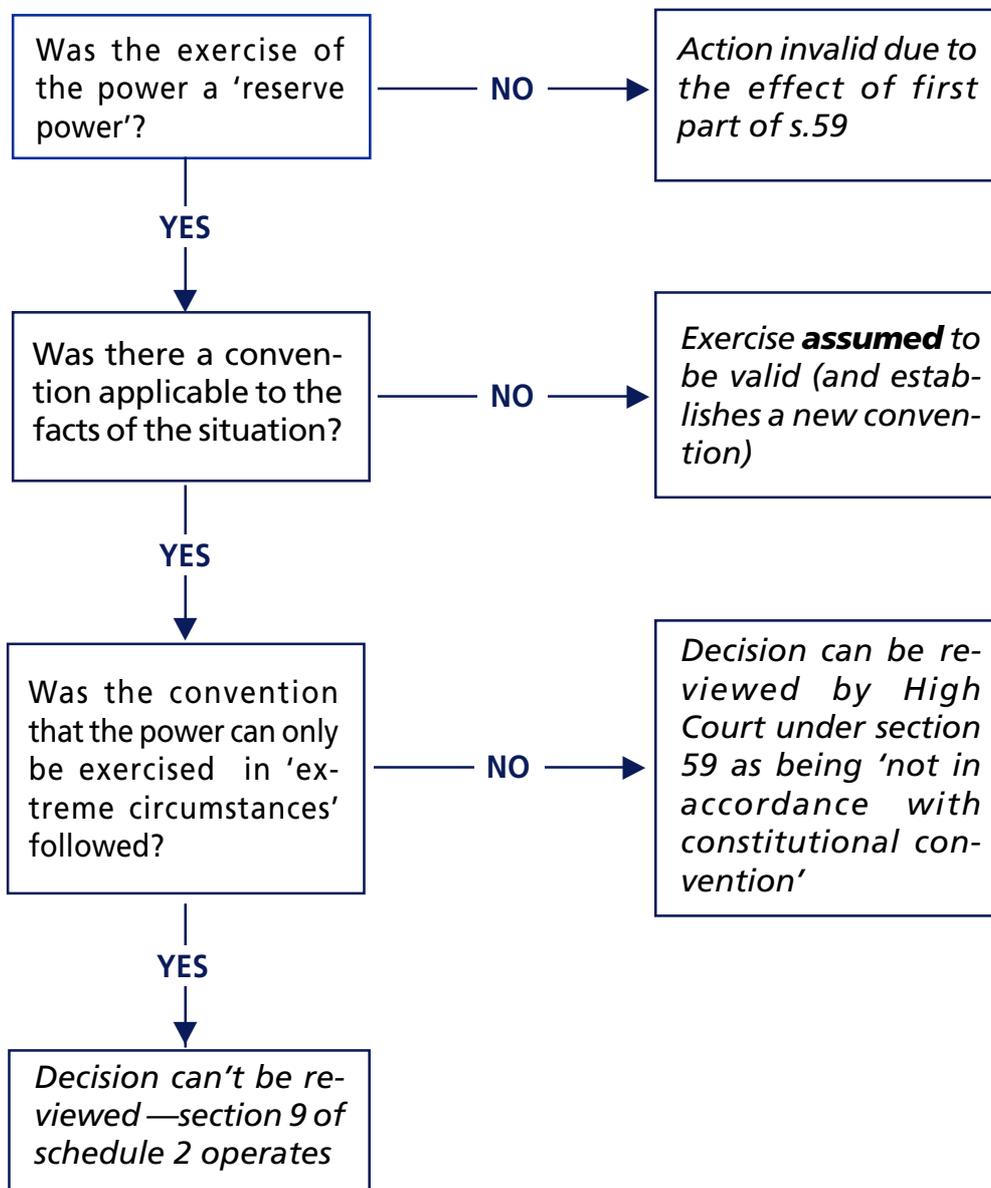
What is 'extreme' to one person may not be to another. This can be proved by asking one question: were the events leading up to 11 November 1975 'extreme' enough to justify the dismissal of the Whitlam Government? Ask that one at a party.

Courts are experienced in making decisions as to

whether, in public law, a person has acted in a 'reasonable' way. Conduct that no reasonable person would adopt, or outcomes so oppressive or capricious that no reasonable mind could justify them can, and are, overturned by the courts.⁴²

It may be one thing for courts to correct decisions made by junior public servants that are stand-out shockers. In the atmosphere of an emotionally charged political situation, it is entirely unfair to put a constitutional court into a position to determine (for example) whether a set of facts fits the very value-laden term of whether a circumstance is 'extreme'. Which is what these provisions appear to do.

In the case of 1975, section 59 probably would have operated this way:



The dismissal of a government is something of great political moment and drama. Leaving aside whether it is appropriate to leave the government of the country rudderless for the High Court makes its decision, one wonders whether it is an appropriate sort of controversy for it to arbitrate in the first place.

Electors will have to decide whether they wish to insert into the Constitution:

- the indefinite and inherently political concept of ‘convention’;
- in all likelihood an increased role for the High Court in time of political turmoil; and
- in cases other than an exercise of the reserve powers, that the President *must* take advice from three separate sources identified in the Constitution, rather than the Cabinet.

Why the Proposed Amendments Create a Constitutional Camel

Reserve powers, and constitutional conventions, aren’t conveniently listed anywhere. They are merely derived from usage and practice.

As a matter of statutory design, it is very bad practice for terms of art such as ‘convention’ or ‘reserve power’ to be contained in legislation when the ambit of the terms is uncertain.

The very best terms of art should be well known, such as the Ten Commandments: ‘Thou shall not kill; thou shall not steal; ...’. Or be a term like a baker’s dozen—most of us know that that *means* 13 of something. When terms of art are used in a statute, their ambit should be well known, so that those well-known concepts can be applied to the facts of the case at hand.

Under no circumstances should a term of art be inserted into anything, *particularly* a constitution, where the ambit of a term can only be defined as *probably* constituting something.

One is left with the thought that the ‘Bipartisan Appointment of the President Model’ has in mind the political landscape of today. Party discipline is all. The Prime Minister is king (if not President). This is done without anticipating that as the years turn into decades, things may change. The political certainty of today may not exist tomorrow.

Attempts to express the concept of responsible government in the Constitution in a way better than that of the founding fathers have been unsuccessful, largely because of the use of technical terms of art which, when it comes to the crunch, are of indefinite meaning.

These are all reasons why the proposed amendments to the Constitution should be regarded as a constitutional camel.

APPENDIX

CONSTITUTIONAL CONVENTION RESOLUTIONS PASSED ON 12 FEBRUARY 1998

That if Australia is to become a republic, this Convention recommends that the model adopted be the ‘Bipartisan Appointment of the President Model’.

Bipartisan Appointment of the President Model A. Nomination Procedure

The objective of the nomination process is to ensure that the Australian people are consulted as thoroughly as possible. This process of consultation shall involve the whole community, including:

- State and Territory parliaments
- local government
- community organisations, and
- individual members of the public

all of whom should be invited to provide nominations.

Parliament shall establish a Committee which will have responsibility for considering the nominations for the position of President. The Committee shall report to the Prime Minister.

While recognising the need for the Committee to be of a workable size, its composition should have a balance between parliamentary (including representatives of all parties with party status in the Commonwealth Parliament) and community membership and take into account so far as practicable considerations of federalism, gender and cultural diversity.

The Committee should be mindful of community diversity in the compilation of a short-list of candidates for consideration by the Prime Minister.

This process for community consultation and

evaluation of nominations is likely to evolve with experience and is best dealt with by ordinary legislation or parliamentary resolution.

The Committee should not disclose any nomination without the consent of the nominee.

B. Appointment or Election Procedure

Having taken into account the report of the Committee, the Prime Minister shall present a single nomination for the office of President, seconded by the Leader of the Opposition, for approval by a Joint Sitting of both Houses of the Federal Parliament. A two thirds majority will be required to approve the nomination.

C. Dismissal Procedure

The President may be removed at any time by a notice in writing signed by the Prime Minister. The President is removed immediately the Prime Minister's written notice is issued. The Prime Minister's action must be presented to a meeting of the House of Representatives for the purpose of its ratification within 30 days of the date of removal of the President. In the event the House of Representa-

tives does not ratify the Prime Minister's action, the President would not be restored to office, but would be eligible for re-appointment. The vote of the House would constitute a vote of no confidence in the Prime Minister.

D. Definition of Powers

The powers of the President shall be the same as those currently exercised by the Governor General.

To that end, the Convention recommends that the Parliament consider:

- the non-reserve powers (those exercised in accordance with ministerial advice) being spelled out so far as practicable.
- a statement that the reserve powers and the conventions relating to their exercise continue to exist.

E. Qualifications for Office

Australian citizen, qualified to be a member of the House of Representatives (see s. 44 Constitution).

F. Term of Office

Five years.

ABOUT THE AUTHOR

Kerry Corke has 14 years of public law experience. He has been involved in the development of over 40 pieces of legislation, and in the conduct of over 150 administrative law matters in courts and the federal Administrative Appeals Tribunal. He is the principal of K.M. Corke and Associates, a Canberra-based company involved in the analysis and design of legislation, and advice on amendments to proposed and existing laws.

WEBSITE RESOURCES

In addition to the references listed in the Endnotes (below), the following Websites are valuable resources for a wide range of views on the forthcoming Referendum.

Australian Republic Movement - www.republic.org.au

Australians for Constitutional Monarchy - www.norepublic.com.au

The Joint Committee Report on the Republic Referendum - www.aph.gov.au/house/committee/Republic/report.htm

Official "Yes" Committee site - www.yes.org.au

Official "No" Committee site - www.voteno.com.au

Young Australians Against this Republic - www.yaar.org.au

The ABC site - www.abc.net/au/news/referendum99/default/htm

ENDNOTES

¹ 'House of Ill-Repute Must Be Reformed', *The Australian*, 24 February 1999, page 10.

² Attached as an Appendix to this Backgrounder.

³ The Bill will move forward in Parliament if the referendum approves the amendments to the Constitution.

⁴ Clauses 8-12 of the *Presidential Nominations Committee Bill* ('the Committee Bill').

⁵ Part 4 of the *Committee Bill*.

⁶ Clause 22 of the *Committee Bill*.

⁷ Clause 9 of the *Committee Bill*.

⁸ Clause 25 of the *Committee Bill*.

⁹ See paragraph 23 of the *Communique* for the 1998 Constitutional Convention.

¹⁰ What is a 'political party'? The proposed constitutional amendments and supporting documentation are silent on the point.

The term 'party' has been used in the Constitution since 1977. Section 15 provides for Senate casual vacancies to be filled by someone 'publicly recognised by a particular political party as being an endorsed member of that party and publicly represented himself to be such a candidate.....'. Nowadays, Australia's electoral law has the concept of registered parties. It is relatively easy to determine if the departed politician stood for a party registered with the Australian Electoral Commission for the purposes of standing at a federal election.

Otherwise, when is a group a 'political party'? Sometimes, people (including presidential candidates) will keep membership of some organisations to keep their 'local roots'. Sometimes, community groups club together to form a 'party' to influence political affairs. For example, the recent 'No-Aircraft Noise' Party, formed by a number of Sydney community groups to influence decisions relating to the operations of Sydney Airport. The group stood people for Parliament in elections.

The third edition of the *Macquarie Dictionary* defines a 'party' as:

4. a number or body of persons ranged on one side, or united in purpose or opinion, in opposition to others, as in politics, etc.: *the Australian Labor Party*.

The relevant definition of 'political' in the *Macquarie* is:

3. exercising or seeking power in the governmental or public affairs of a state, municipality or the like; *a political party*.

Taking these definitions together, and looking at the context surrounding the term in section 60, a 'political party' appears to be one which stands people for a

Parliament (as well as, to be safe, even a local council) somewhere in Australia. This is because we are talking about the President of a *Commonwealth*. It would have to include candidacy for some sort of political organ within the Federation. However, this could be read down to mean participation at national level only. The point is that the issue is open to debate. One can only hope that we don't need a High Court case to work it out.

We must also assume that the relevant election had to be fought 'recently' and not, say, 30 years ago. Again, it is almost certain that the High Court will have to tell us one day.

This provision could be a 'sleeper' provision, like section 44 of the current Constitution. Section 44 prevents people from standing for Parliament who are 'under the allegiance of a foreign power'. From time to time it leaps out to invalidate the parliamentary victory of someone who considered themselves 'Australian' enough to stand for the Australian Parliament, such as Senator Wood, or Miss Kelly in Lindsay.

¹¹ Subsection 33(2A) of the *Acts Interpretation Act 1901*(C'wth).

¹² It is of interest that the exposure draft of the *Republic Bill* provided that the motion to second the presidential nomination was to be by the 'Leader of the Opposition (if any)'. The original draft certainly anticipated that there may be a breakdown in the current bipolar political paradigm. The '(if any)' reference was removed by the time the proposed Bill was introduced into the Parliament.

¹³ 'House of Ill-Repute Must Be Reformed', *The Australian*, 24 February 1999, page 10.

¹⁴ NSW Electoral Commission figures posted on the Internet as at 14 April 1999.

¹⁵ See speech of Mr McClelland, Member for Barton, on the consideration of Senate amendments to the *Constitutional Alteration (Establishment of Republic) Bill*, House of Representatives, *Hansard*, 12 August 1999 at page 6648.

¹⁶ A description given by paragraph 6.11 of the Explanatory Memorandum accompanying the *Constitutional Alteration (Establishment of Republic) Bill* ('the *Republic Bill*') through Parliament.

¹⁷ Winterton, G., 'The 1998 Convention: A Reprise of 1898', in *The 1998 Constitutional Convention: An Experiment in Popular Reform*, University of NSW Law Journal Forum, Volume 2, No. 2, at page 5.

¹⁸ Section 2 of the Constitution.

¹⁹ However, there do appear to be gaps. The first is what happens if, for instance, the Parliament has, by its own

- resolution, adjourned for a period greater than 30 days, as can happen. Or the Parliament has been prorogued, under section 5 of the Constitution. So long as the House has not been dissolved, one would have thought that there would have been a mandatory provision requiring the Speaker of the House, a constitutionally recognised position, to convene the chamber on the occasion of the President's dismissal, just as the Speaker issues writs for by-elections under section 33 of the Constitution. This would remedy any procedural awkwardness.
- ²⁰ One assumes that the 'approval' would constitute a simple majority of those present and voting on the motion. No special majority is required. This is a little unusual given the other votes contained in the Constitution, for example, the existing section 57 regarding the determination of legislation following a double dissolution, and the proposed section 60 regarding the appointment of the President.
- ²¹ Although, of course, it may be the political outcome.
- ²² Paragraph 8.10 of the Explanatory Memorandum accompanying the Republic Bill.
- ²³ See section 72 of the *Constitution*.
- ²⁴ Cooray, L.J.M., *Conventions, the Australian Constitution and the Future*, Legal Books, Sydney 1979, pages 78-9.
- ²⁵ Jennings, Sir Ivor, *Cabinet Government*, Cambridge University Press, Cambridge, 1969.
- ²⁶ Winterton, G., *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, University of Melbourne Press, Melbourne, 1983, page 2.
- ²⁷ Cooray, *op.cit.*, page 90. The author does say, however, that the degree of uncertainty is not as great as it is often portrayed to be.
- ²⁸ Evatt, H.V., *The King and His Dominion Governors*, second edition, Cheshire Australia, Melbourne, 1967, pages 303-5. At the relevant time, the Irish Free State had similar provisions.
- ²⁹ Quick, J. and Garran, R., *The Annotated Constitution of the Commonwealth*, 1976 reprint, Legal Books, Sydney, page 707. See also Crisp, L.F., *Australian National Government*, Longman Australia, Melbourne, 1977, pages 350-7. Also generally Jennings, Sir Ivor, *Cabinet Government*, Cambridge University Press, Cambridge, 1969, pages 13ff; Moore, W. Harrison, *The Constitution of the Commonwealth of Australia*, 1997 Reprint, Legal Books, Sydney, page 168; Cooray, *op.cit.*, pages 66-8.
- ³⁰ Hasluck, P., *The Office of the Governor-General*, Queale Memorial Lecture, Adelaide, 1972, pages 18-19.
- ³¹ Paragraph 8 of the submission to the Joint Select Committee on the Republic Referendum.
- ³² See generally the discussion at paragraphs 4.35-4.39 of the Advisory Report of the Joint Select Committee on the Republic Referendum. The Government accepted the Committee's recommendations by way of adding the words 'including those' into the proposed section 8 to Schedule 2 to the Constitution—see the speech of Senator Ellison, moving the amendments, Senate, *Parliamentary Debates*, 11 August 1999 at page 7222.
- ³³ Paragraph 5.13 of the Explanatory Memorandum accompanying the Republic Bill.
- ³⁴ See Paragraphs 5.6 and 5.16 of the Explanatory Memorandum accompanying the Republic Bill.
- ³⁵ Paragraph 5.15 of the Explanatory Memorandum accompanying the Republic Bill.
- ³⁶ See for instance the decision of the High Court in the decision of *Cormack v. Cope*, volume 3, Australian Law Reports, 419 generally, and in particular page 427.
- ³⁷ See Paragraph 4.23, and 4.26-4.31 of the Report of the Joint Select Committee on the Republic Referendum, Canberra, 1999.
- ³⁸ See the speech of Senator Ellison, moving to introduce section 9 of Schedule 2 into the Constitution, Senate, *Parliamentary Debates*, 11 August 1999 at page 7222.
- ³⁹ Lane, P.H., *Lane's Commentary on the Australian Constitution*, second edition, LBC Information Services, Sydney, 1997, pages 411-9, especially 419.
- ⁴⁰ Winterton, G., *Parliament, the Executive and the Governor-General: A Constitutional Analysis* University of Melbourne Press, Melbourne, 1983, page 17. In a lengthy footnote (F/N158, page 214), he thought it doubtful that the reserve power to dismiss a government had 'survived'. He also questioned whether the 'reserve power' to dismiss should be conceded at all to the head of state with the 'responsible government' model of government.
- ⁴¹ Volume 28 of the *New South Wales Law Reports* 125 at page 144.
- ⁴² Lawyers know this as 'Wednesbury' unreasonableness, after the case which spelt out the concept in its modern form: *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, volume 1 of the 1948 King's Bench Reports, page 223.