A Republic
For All Australians

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For Matthew and Jack

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Preface

Some Australians are surprised, confused, or simply dismayed that the republic issue is back on the national agenda. Didn't we deal with it in that referendum? Hasn't it run its course? Why now?

Unfortunately for this minority—but fortunately for the rest of us—the republic issue is not a disease. Having dealt with it once, we are not inoculated against it for the rest of our lives. We are bound to have recurrent bouts of Australian republicanism for as long as it takes to make it a reality, no matter how many times we fail.

But that doesn't mean that we have to re-live the attempt of the 1990s over and over, like the movie *Groundhog Day*. The consolation for republic-haters is that, as soon as we get it right, the issue will disappear forever. Once we succeed in becoming a republic, the debates and disagreements will be over. There will be no movement urging the abandonment of the republic, and our reattachment to the British monarchy. We will, simply, get on with our lives.

This book is my attempt to help get the republic issue "back on track", so that this time *will* be the last time. I am not interested in political point-scoring. I am not interested in how history will view the protagonists. I simply want to make sure that the Australian people are not put through another three, five, ten years of confusion and dismay, to have their hopes raised and then dashed again when their wishes are ignored.

I want us to succeed in creating a republic for *all* Australians.

The tone of this book may be surprising to some. My hope is that any Australian with an interest in the republic will be able to read the book without great difficulty. In reality, there *are* no "experts" on the task of converting Australia from a constitutional monarchy into a republic. It is something that will be done only once. Sure, there are experts on constitutional law, who can provide us with opinions as to what might work, what has worked in other democracies, and so on. There are politicians who can tell us how our form of democracy might work with various republican changes made to it. There are public relations experts who can tell us what the Australian people seem to want, based on their surveys.

And there are the leaders of groups such as the Australian Republican Movement, who can tell us first-hand about the logistics of mounting a referendum campaign to change the Constitution. But none of these people are, individually, experts on *creating a republic*.

There is only one group of people on the planet empowered to create an Australian republic. Section 128 of the Constitution describes them:

> This Constitution shall not be altered except in the following manner:
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
>
> … And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

In other words, *you're* the experts! It doesn't matter how many academic arguments are put forward for a republic model: if it doesn't smell right to the people of Australia, it's all for naught. That's what happened in the 1999 referendum, and that's what will happen all over again if we don't listen to all Australians, and create a suitable model that fulfils our dreams and desires.

That doesn't mean that ordinary Australians have to figure out the details of how such a republic would work. A "hands off" approach—"Just tell us what you want!"—will be just as doomed to failure as the "we'll tell *you* what's good for you" approach of the 1990s. Australians expect leadership; we expect that the details will be worked out for us, according to our broad desires.

In this book I am trying to bridge the gap between ordinary Australians and those who will bring into existence the republic they desire. I explain how it can be done. It is not an insurmountable task.

Before getting down to those details, however, it is worth taking a broad look at the development of republicanism in Australia—or, more accurately, the development of the independent spirit and identity that has led us to consider the establishment of a republic a natural stage in our growth as a nation. Chapter 1 provides a very brief overview of this evolution, from the times of our first convict colonies, through to the current day. It is not a history lesson—there are scores of books on the history of Australia, including some dedicated to republicanism in Australia, that fill that need (and, indeed, I will draw liberally from Mark McKenna's *The Captive Republic*, and numerous other sources, in my overview). Rather,

I try to weave together the common threads that led us to where we are today. Chapter 2 provides an overview of the successes and failures of the 1990s, not to praise or damn, but rather to extract the lessons that can be learnt—*must* be learnt—if we are to succeed this time around. Chapter 3 is the most crucial part of this book: listening to what Australians actually want of their republic, rather than foisting on them an undesirable compromise. Chapters 4 through 7 use these requirements to mould the details of a new, stable, desirable republic. Chapter 8 offers my opinions as to how (and how far) the Constitution should be amended to bring in the required changes. Finally, the Appendix contains my own republic model, with the full text of the Constitution and all amendments required to implement the model immediately, as but one example of how a workable republic—acceptable to the people of Australia—can be constructed.

Of course, I write this book at a time when much hard work lies before us. Australians are still confused and dismayed by our last failed attempt to become a republic. The leaders of that first push have, by and large, retired from the scene. Our new republican leaders—many of whom saw, first-hand, how the almost heroic efforts of the first generation counted for naught in the face of public disenfranchisement—have learnt to be much more cautious this time around, lest they, in turn, also back the wrong horse. It is a time when even the mechanisms and timetables by which we will make further progress are, themselves, being debated and reformulated. It is a time of uncertainty; but there is a real risk, if we do not take the bull by the horns now, and simply dare to be imaginative and creative, that we will see year after year trickle away, with a republic just as distant from us on the horizon as it is today.

We do need to be careful that we have the fundamentals right; but, sooner or later, we just have to get on with the job of creating a sound republic model and putting it to the people in a referendum.

So let's get to it.

John P. Costella
Narre Warren, Melbourne
March 2004

CHAPTER ONE

The Yearning

A slowly evolving independence

Australia has never had a War of Independence.

Given our history, that's a remarkable fact. We are the most anti-authoritarian, classless, cynical people in the world. Our culture is rooted in our convict origins. If aliens from another planet were to study all the peoples of the world, and choose just one of them as most likely to have rebelled violently against their colonial masters, they would undoubtedly choose Australians.

That we haven't is a key to the Australian soul. Despite our disdain for authority, we're one of the most law-abiding countries in the world. By and large, all Australians consider themselves equal in the eyes of the law. "One law for all" is about as egalitarian as it comes—and, barring some obvious shameful exceptions, we've pretty well achieved such a state of citizenly satisfaction.

How, then, do we get from a bunch of British convicts, to the Australian people of today? Where are the key events in our history marking the cataclysmic steps towards such independence?

Unfortunately for the historian of cataclysmic events, there are none. Instead, we have an almost unique *evolutionary* form of historical progress. Studying our history, decade by decade, we can recognise events that changed Australia, altered our outlook, made us reconsider who we were. But many of these changes were almost imperceptible to those who lived through them. Even today, older Australians are often mystified when they look at the society around them. They grew up in the British Empire, yet now there are young Australians telling them, straight-faced, that Britain is irrelevant! How did this happen? *When* did this happen?

It is this evolutionary path that I want to briefly chart in the rest of this chapter. In "joining the dots" I will select certain key events that, in my understanding at least, mark out the path. Learned historians would no doubt point to a multitude of other, equally important markers of our evo-

lution. What matters is not the identification of every single point on the path—that's almost impossible—but rather some understanding of how we could have possibly gone from "A" to "B" so imperceptibly.

In treading this evolutionary path, it is perhaps fitting to note that Australia has the only capital city in the world named after a scientist—Charles Darwin, father of the theory of Evolution.

From convicts to self-government

Although there was a strong sprinkling of republicans amongst the convicts transported to New South Wales—even as early as the late eighteenth century—the leap to a fully independent republic would have required revolutionary action that few were willing to contemplate, so many thousands of miles from the rest of the "civilised" world.

More pressing was the simple desire for self-government. The autocratic powers of the Governor were essentially complete. Things that we now take for granted—such as trial by jury, an independent press, or a local parliament—were absent. By the 1820s, less than a fifth of the population was "native born", namely, born in Australia, rather than shipped out from Britain—but the growing number of "natives", together with the growing emancipist (freed convict) and free-settler populations, were sufficient for the concept of Australia being "home" to develop.

What followed were three decades of unsuccessful attempts to achieve self-government. It was hoped that an arrangement similar to that granted in 1840 to Canada could be achieved, but the Constitution that arrived in New South Wales in 1842 established a single house of parliament—one-third of whom were to be appointed by the Governor, the remaining two-thirds restricted to large property owners—with no control over either the executive government nor the revenues of the colony. It was not satisfactory for the increasing number of British immigrants accustomed to parliamentary democracy. Land disputes arising from the provisions of the 1842 Constitution, and the failure to cease the transportation of convicts, brought Australians as close to revolution as they would ever come.

Finally, with John Dunmore Lang urging Australians to revolt and create a new republic in the 1850s—opposed by his former ally, Henry Parkes, who favoured a less revolutionary approach—and the Eureka rebellion inspiring similar republican sentiments further south, fully "responsible" (parliamentary) self-government was granted, in 1856, to the Australian colonies.

Colonies? More than one?

By 1856, there surely was (as we must often remind Sydneysiders to the current day). The establishment of these colonies around the continent sowed the seed for the next great idea in our evolving independence.

The rocky road towards Federation

No sooner had the Australian colonies been granted responsible government than some of the colonialists began to question what it meant to be "Australian". Following the lead of the United States, the idea of uniting the various colonies into a "federation of states" began to take root. But it was not clear whether such a federation would require a wholesale separation from Britain—as occurred with the U.S.—or not.

Most Australians, however, did not feel that the time was right for such a union. The colonies were progressing through a phase of rapid growth and general prosperity; it was a time for inter-colonial trade to develop and flourish—and the bickering over tariffs that arose from such trade—but still too early to seek a cooperative solution to these squabbles. Rapid though our early historical progress may have been, it generally still took two or three decades for fundamental changes to our system of government to "build up steam".

By 1870, however, the beginnings of widespread concern over the future of the continent were emerging. The British Government was questioning whether it would be able to continue to send troops to defend the far-flung corners of the Empire. Victorian Attorney-General George Higinbotham successfully passed parliamentary resolutions asserting that the Governor could only act on the advice of his colonial ministers with regard to domestic issues—rather than receiving instructions from Britain. And the desirability of an Australia-wide customs and tariff agreement was evident.

By the 1880s, over 60 per cent of the Australian population of two and a half million were "native born", and slogans such as "Australia for the Australians" began to be employed. In 1880 Ned Kelly's gang met to draft the Declaration of the Republic of North East Victoria. In 1883 the British refused to ratify Queensland's annexation of New Guinea—despite the support of every other colony of Queensland's actions—only to claim the south-east coast of it themselves eighteen months later, just days before Germany annexed the north-east and the Bismarck Archipelago. The delegates to the December 1883 Intercolonial Convention expressed concern that the activities of the French and the Germans in the

South Pacific might continue unchecked, and proposed the formation of a Federal Council to deal with our naval defence.

It was in this environment that the notion of Federation—republican or otherwise—began to take hold. Henry Lawson wrote of a republic, but the mainstream press began to portray republicanism as something for future generations to contemplate. In 1887, the year before the Centenary, the Premier of New South Wales, Henry Parkes, tried to change its name to "Australia"—a confusing and divisive idea, but not out of place in the Sydney-centricity that pervaded the centennial celebrations as deeply as it did the bicentennial celebrations a century later.

The colonies began to yearn for a national identity.

Republicanism again waned, but nationalism did not. In 1889 Parkes boasted that he could federate the Australian colonies within twelve months, and the Governor, Lord Carrington, dared him to do it. Parkes instigated the convening of a Federal Council in Melbourne in 1890, followed by a second Federal Convention in Sydney in 1891.

It was at the 1891 Federal Convention that Parkes proposed—and the Council passed, with a majority of just one vote—that the new Federation be given the remarkably republican name of "the Commonwealth of Australia" (the word "republic" simply coming from the Latin *res publica*, meaning "common wealth" or "common good").

The chairman of the Constitutional Committee of the Convention, Samuel Griffith, presented a draft bill to constitute the Commonwealth of Australia—under the Crown. This "compromise" bill did not go down well the republican side of the press, nor with the recently-formed and rapidly successful "Labor Party", namely, the Labor Electoral League of New South Wales.

Every colonial parliament rejected the draft bill.

The Commonwealth is saved by the people

It is worth pausing at this stage of our whirlwind tour of Australian history, to consider how things stood in 1893. With the benefit of hindsight, we know that we are but eight years away from the Federation of the Commonwealth of Australia. But the draft bill to constitute that Commonwealth, constructed at the 1891 Convention, had failed dismally.

How was failure converted into success in such a historically short period of time?

The answer is that *the people of Australia took over*. The Federal Conventions in Melbourne and Sydney were conducted by politicians. If it

were not for the determination of the townspeople of southern New South Wales, that may have been the end of the story. But those ordinary Australians brought together Federation leagues and branches of the Australian Natives Association at Corowa in 1893, where it was proposed that a Federal Convention *elected by the people* be held, and that the draft bill of the elected Convention *be put to the people of all the colonies at a referendum*.

This turning over of "ownership" of the process of Federation to the people proved to be crucial.

The Corowa Conference also marked the point of departure between Federation and republicanism. Vocal republicans were shouted down; future meetings carefully excluded them; and even *The Bulletin*—formerly highly republican—admitted in the years to follow that "Federation under the Crown" was no longer seen to be as objectionable as it had just a decade earlier.

By the time of the 1897 Convention, this view was widespread. The draft bill for constituting the Commonwealth emanating from this Convention was put to the people of each colony, as planned at Corowa, and, after some fine-tuning to satisfy doubts in New South Wales, was passed.

Was this draft bill so different from that constructed in 1891? There were many important changes, but its basic structure was not radically altered. The crucial difference was that *the people of Australia* had played their part in moulding its details. Compromises were made; unique circumstances called for provisions that, while not academically elegant, represented a recognition of the realities of the times.

What needed to be done was done.

May we learn this lesson of history.

Australia in the British Empire

At the same time that Sydneysiders were ushering in our new Federation with a wave of imperial splendour, Australians were fighting and dying for the Empire against the Boers in South Africa. Indeed, the first half-century of our nationhood would see the issues of war dominate our contemplation of our place in the British Empire, and in the world at large.

Barely a year after Federation, the British appeased the Germans—to avoid their entry into the Boer War, which may have brought forward World War I by a dozen years—by court-martialling and immediately executing Australian Lieutenants Harry "Breaker" Morant and Peter Handcock on trumped-up charges of murder. This "sacrificing of coloni-

alists" brought an outcry from the Australian press that still echoes to this day—Australian schoolchildren study both the play immortalising the event, and the 1970s film that followed much later, to try to understand an issue that continues to trouble our national psyche.

The Great War—delayed rather than prevented—provided one of the most pivotal episodes in our search for national identity. Foreigners have difficulty coming to grips with our reverence of the Gallipoli campaign—considering that we actually lost the battle. It is telling that our "coming of age" on those beaches is traced not just to the against-all-odds hopelessness of the task confronting our Diggers, but moreover to the incompetence of the British commanders that dropped them into the mess in the first place. Even three-quarters of a century later, it was the image of one of the last surviving Gallipoli Anzacs describing his incredulity at the blunder—"… a mile, a mile and a half *off our course*!"—that was used, year after year, to support the Legacy Appeal on television advertisements. Lest we forget …

Ironically, the more the British treated us with contempt, the greater our zeal to prove ourselves to be good Britons—not unlike a child continually seeking approval from an unloving parent, even into adulthood. We considered ourselves to be British—even if the British often considered us to be little more than convicts and bushmen. Through two World Wars we were "automatically" at war as soon as Britain was at war. Our patriotic fervour was almost boundless.

The way we went about our quest to become "independent Britons" varied, depending on which party was in power. Prime Minister Billy Hughes succeeded in fighting for an Australian seat at the 1919 Paris Peace Conference as a "separate dominion"; but when he pushed Australian interests too far, he received an urgent telegram from his Cabinet reminding him not to endanger our British connection. In 1931 Prime Minister Scullin fought through forty-five minutes of heated debate with King George to assure him that he would recommend no one other than Isaac Isaacs—an Australian!—for the post of Governor-General.

But we generally ignored the clear message from Britain that the Empire had grown to the point where the former dominions needed to stand on their own two feet. The Imperial Conference of 1926 declared that the Governor-General was no longer the diplomatic representative of the British Government, implying a need for each former dominion to establish its own department of foreign relations—a need only slowly met in Australia—and ensuring that the Governor-General could only act on the advice of his Australian ministers. The British Parliament enacted the Statute of Westminster in 1931, which ensured that Acts of the British and Australian Parliaments were, from that time, independent of each

other. But legislation ratifying the Statute of Westminster was not passed in Australia until 1942.

By that time, the Pacific theatre of World War II caused us to reconsider our place in the world. The inability of Britain to defend Australia's shores—which they had been warning us about for decades—suddenly became a reality. An alliance with the United States was formed that would shape our foreign policy for the foreseeable future.

After the War, in 1947, a nationwide Gallup poll asked Australians to declare their preference for British or Australian nationality. 65 per cent preferred to be British. Despite the result, the Chifley Government's 1949 Nationality and Citizenship Act endowed Australians with citizenship, and provided for new passports—Australian, rather than British.

But it was all too much, too soon for the Australian people. In 1949 Robert Menzies and his new Liberal Party swept into power, the beginning of a distinctive era that would last for twenty years. Menzies saw himself as staunchly British—an Australian Briton. His gushing sentiments of love for and devotion to the young Queen Elizabeth are embarrassing today—half a century later—but were not out of place in his own time. With two-thirds of the nation considering itself British rather than Australian, excitement about the fresh young Queen and her husband was widespread. Menzies revoked the provisions of the Nationality and Citizenship Act that provided for Australian passports. Australians happily travelled on British passports until 1963.

It was the golden era of the Australian British Empire.

Even though 1948 saw the University of Melbourne award the first Ph.D. in Australia, any Australian desiring a "proper" education would travel to Britain—indeed, to this day, our Parliaments are still graced by Rhodes Scholars, the ultimate academic manifestation of the cultural cringe of the era. Mail from government departments arrived in envelopes adorned with the initials "OHMS"—"On Her Majesty's Service". Post boxes were emblazoned with the "EIIR" insignia—the Latin acronym for Queen Elizabeth the Second. Imperial symbols were everywhere. The most prestigious institutions were invariably issued with a Royal Charter—an honour which allowed them to use the word "Royal" in their name. School students stood at assembly, and proudly sang the National Anthem—*God Save The Queen*.

The Menzies years coincided with a period of unparalleled growth and prosperity for most Australians, whilst at the same time we enjoyed an isolation from the rest of the world that protected us from many of its emerging problems. Children could play in the streets and wander their neighbourhoods in safety. Houses could be left unlocked. Parks were not littered with syringes or haunted by paedophiles. Whilst John Howard

was pilloried in the late 1980s for using a "white picket fence" imagery of an average Australian family—and "living in the 1950s" continues to be an insulting taunt to conservative politicians to this day—it is not difficult to understand why so many older Australians, who lived through that era, continue to warmly associate those glory days of the Australian British Empire with happiness, prosperity, safety, and contentedness.

Whether or not the connection was cause and effect, or a simple coincidence of historical timing, is beyond our concern here.

The awakening

By describing the 1960s and 1970s as Australia's "awakening", I am not implying that we came to any fundamental conclusions about the inferiority or undesirability of the British Empire. Rather, we suddenly realised that *it no longer existed*.

Formally, of course, we knew that the British Empire had been replaced by the British Commonwealth of Nations in 1931—but that wasn't the problem. Rather, it was "our" British Empire—the relationship between Britain and Australia—that was evaporating before our very eyes.

In 1961 Britain had applied to join the European Economic Community—causing Menzies to argue strongly against such a cataclysmic end to his Empire. Britain finally entered the EEC in 1973.

In 1965 the Labor Party formally dropped the "White Australia" plank from its party platform. In the 1950s and 1960s Menzies had increased dramatically the number of immigrants from eastern and southern Europe—to the point where they outstripped the number of immigrants from Britain itself. By the end of the 1960s the proportion of immigrants from Asia had risen above 10 per cent.

The coming of television to Australia in 1956, and its flourishing throughout the 1960s, turned our attention to the United States in a much more pervading manner than had previously occurred through films, radio and literature.

During the 1960s the United States and Japan overtook Britain as our major trading partners; by the late 1970s, trade with Britain was only nominal. In 1966 we swapped our pounds, shillings and pence for new, decimal currency—named "dollars" and "cents", not "pounds" and "pence" as occurred when decimal currency was introduced in Britain itself. In 1972 we likewise abandoned our treasured imperial units of measurement, and joined most of the world in moving to a metric system.

Republicanism was revived in the 1960s by writers such as Donald Horne and Geoffrey Dutton. Horne's *The Lucky Country* (1964) tapped into the issues that were to grip the nation in the years ahead, such as feminism, racism and (what was later to be called) multiculturalism—as well as republicanism; and his editorship of *The Bulletin* between 1967 and 1972 returned a republican voice to the magazine that had largely been absent for a century. In 1966 Dutton edited a thin *Sun* book, *Australia and the Monarchy*, many of the contributions in which remain relevant to this day.

In 1967 the British Government began the removal of forces from Malaysia and Singapore, completing the process that had begun in 1942 with the fall of Singapore. The Vietnam War forced Australians to contemplate our role in the world—and our alliance with the United States—without being able to follow the lead of Britain.

The broom of change was being well and truly swept through Australia as the 1970s dawned. But the election of the Whitlam Government in 1972 saw this "clean up" accelerate. *God Save The Queen* was given its marching orders, in favour of *Advance Australia Fair*. British knighthoods and imperial honours were scrapped, and replaced with a less pretentious set of Australian honours. Appeals from the High Court to the British Privy Council were abolished by legislation in 1975. The Queen disappeared from our post boxes and government envelopes. An unsuccessful attempt was even made to prevent new citizens having to swear allegiance to the Queen—who was herself re-titled "Queen of Australia" to more clearly delineate her role as *our* Sovereign, rather than our subservience to Britain and "their" Queen.

John Kerr's sacking of the Whitlam Government in 1975 highlighted how uniquely Australian our Federal politics had become—the blocking of supply by the Senate had no modern analogue in Britain: the House of Lords, unlike the fully elected Australian Senate, had had its power to block money bills curtailed over half a century earlier. Appeals to Buckingham Palace for a reversal of the Dismissal were rebuffed: the Queen had no constitutional right to interfere in Australian matters, even if she had wanted to do so. At the same time that serious flaws in our constitutional arrangements had been exposed, our true independence from Britain had never been clearer.

The Hawke–Keating years of the 1980s and 1990s continued our break with the past. The Australian dollar was "floated"—allowed to vary in value according to world currency market forces. Our banking system was deregulated. Our economic connections with the rest of the world multiplied; we no longer had the luxury of an insular outlook. The grow-

ing Internet connected us, primarily, to the United States, and through it to the rest of the world.

The Australia Acts of 1986 finally severed all formal ties between the British Parliament and the Australian Parliament (including the six State Parliaments), including the ability to appeal to the British Privy Council from the Supreme Court of any State. The only remaining constitutional links with Britain were the Queen's responsibility to commission or decommission the Governor-General and the six State Governors. She was Queen of Australia and of the six States, but now almost in name only.

As the 1990s dawned, the Queen became simply a nice old lady living in London, who, through some historical accident, happened to be our Sovereign. She didn't even mind terribly much when an Australian Prime Minister slipped his arm around her for guidance (although Fleet Street journalists were mortified).

Our citizenship oath was finally cleaned up to remove any reference to allegiance to her.

On the eve of the republic referendum in 1999, she expressed a greater understanding and maturity than most monarchists about the inevitability of Australia "growing up"—the metaphorical "moving out of home" that so aptly describes our independent-yet-not-fully-independent status as a constitutional monarchy.

Australians visiting Britain are treated no differently than any other foreigners; Europeans, on the other hand, can come and go as they please. Job advertisements throughout Europe—including Britain—routinely warn applicants: EC passport mandatory. That doesn't include one with a kangaroo and an emu on the front cover.

The High Court ruled that Britons with dual citizenship no longer satisfy the allegiance requirements of the Constitution for eligibility to sit in the Senate or the House of Representatives.

And in December 2003, the High Court ruled—in a 4 to 3 decision—that unnaturalised British subjects are foreign aliens, subject to deportation upon criminal conviction in the same manner as any other foreigner.

Transportation of convicts to Britain?

Bloody oath, mate.

The generation gap

Those of us born after 1960 have great trouble coming to grips with the fact that things were not *always* like this. It is difficult—almost impossible—to imagine a British Australia. Some of us have been able to connect

to it indirectly, through our parents (even my own parents—despite both of them being European immigrants!); others, through uncles and aunts, grandparents, family friends, or even teachers. But the most that we can ever achieve is a deep appreciation that things were, indeed, different.

As the number of years that have passed since 1960 tick by, the simple mathematics of "generational change" become more readily apparent. Despite the fact that "baby boomers" (those born before 1965) have a greater life expectancy than any of their forebears—and despite their having been born at a more prodigious rate than the generations that have followed—they are, slowly but surely, becoming a diminishing proportion of the population.

It would be the height of arrogance to assume that this change in the makeup of the population would automatically translate into a continually growing—and ultimately overwhelming—support for a change to a republic. But it does tell us that there will be a continually growing proportion of Australians who have no direct connection with the British Australia of old. Having a British monarch as our Sovereign will surely continue to be perplexing to these Australians, if nothing else.

One of the dilemmas faced by republicans since the 1960s is the fact that the symbols of Britain have been disappearing so regularly and so rapidly that there is little left to point to as being an undesirable intrusion into our inherent Australianness. It is quite possible that if we manage to botch our current push for a republic, Australians may end up so sick and tired of the whole affair that it gets put on the backburner for another ten or twenty years—by which time Britain itself may move towards abolishing the monarchy.

Let's just make sure that we don't botch it.

CHAPTER TWO

The Easy Option Fails

If history had been different

If he'd pulled it off, he'd almost be a national hero by now.

The doubters would be portrayed as the pessimistic naysayers of a bygone era. The difficulties which appeared to be insurmountable at the time would be viewed as minor "bugs" to be removed from the system in due course. Malcolm Turnbull would be the classic Australian underdog, battling against all odds, to snatch victory at the final turn.

But it didn't happen that way.

To comprehend the scope of the task facing Australian republicans in the twenty-first century, we must clearly understand the first full-scale attempt at bringing about a republic. But it would be a terrible mistake to sit in our armchairs and criticise the attempt in hindsight. As is often the case in history, just a few different turns of events, just a few different decisions made at crucial junctures, could have set us on a completely different track.

We might well have been sitting here in a republican Commonwealth of Australia, with a President appointed by a joint sitting of Parliament—or some variation or compromise of such a method of appointment—contemplating whether our new constitutional arrangements would be sufficient to deal with future crises. But such questions would probably only concern academics, scholars and historians in constitutional law. By and large, most Australians would feel a sense of pride in belonging to a fully independent country, even if we weren't exactly sure whether that changed very much in our day-to-day lives.

Further constitutional reform would be something that would probably be put off until a crisis actually occurred—which may well have been decades into the new century.

And you wouldn't be reading a book such as this one.

To move forward, we must resist the temptation to look upon the 1990s as a lost decade for republicanism. The course of events that oc-

curred probably *was* the best chance of making Australia a republic before the centenary of Federation.

It was a gamble worth taking. It was the best option for the times.

But everyone involved knew it was fraught with danger. I know, because I was one of the "pessimists" who warned them.

A sign of trouble ahead

On 1 August 1994, the Letters page of the Melbourne *Herald Sun* sported a large headline, "Vote to get ahead", a play on words introducing my letter to the editor:

> With Mr. Alexander Downer canvassing options for constitutional change, one glimpses the possibility of a convergence of Liberal and Labor views by the end of the decade. But even a bipartisan proposal for change would fail, if unsupported by the ultimate decision-makers: the people of Australia.
>
> Australians want to vote in their head of state; but politicians are understandably worried by the prospect of a popularity contest.
>
> Perhaps a suitable solution is for Parliament to put forward their favoured candidate, to be *approved* (or otherwise) by the people at a referendum.
>
> Such a "referendary" system might also be fruitfully applied to some of the thornier questions in constitutional reform, recognising that advances in technology could make twenty-first century referenda more streamlined than those of the twentieth. The head of state could be given wide-ranging powers—not to act directly, but rather to *initiate a referendum* on any issue of public concern.
>
> The reserve powers could thereby be wielded, but not without the assent of the populace; conversely, the Government of the day could seek the referendary removal of the head of state.
>
> In such a system, the head of state would effectively be an "ombudsman" or "advocate" for the people of Australia, without the granting of any direct discretionary power that would usurp the role of Parliament. The benefits would be visible to politicians and citizens alike.

Alexander Downer was, at the time, Leader of the Opposition. The Prime Minister, Paul Keating, had announced his goal of a republic by the centenary of Federation in his "One Nation" speech in 1992 (no relationship to the party later created by Pauline Hanson with the same name), and as a part of his platform for the 1993 election. But until July 1994, Keating's repeated return to the republic issue was widely seen as a purely political tactic—to distract voters from "the recession we had to have", and other

signs that the historic five-term Labor Government had begun to run out of steam.

Downer's announcement marked a turning point. Although a long way from embracing a full-blown republic (some of the constitutional reforms being considered even maintained the monarchy, while changing the method by which the Governor-General would be selected), it nevertheless signalled to both his Liberal colleagues and the press that the republic issue was being stripped of its political connotations.

Gradually, the debate matured. Keating's motives for raising the idea of a republic were questioned less often. Both sides of politics discussed the issue. Did we want to become a republic?

The early opinion polls played a great part in bringing about this thaw. Already, in late 1994, over 60 per cent of Australians favoured becoming a republic. That was the first time in history that a majority had been achieved on the question—and politics is all about numbers, namely, securing a majority of votes. (A "majority" means achieving more than any other option.) No party could afford to ignore an issue that had, with very little assistance, already gained wide favour.

However, another number arose in the opinion polls, that should have been a red flag: over 70 per cent of Australians wanted to have a say in choosing their head of state. In other words, voting for the head of state (whether for a monarchical Governor-General or for a republican President) had more support than actually becoming a republic!

As I tried to point out in my letter to the *Herald Sun*, this simple fact had enormous ramifications for the republic debate. Under our Constitution, the only way to bring in a republic would be to hold a referendum to change the Constitution itself. Such a referendum only passes if it achieves a majority of votes in a majority of states, and a majority of votes overall—a tough requirement, which has failed to be achieved far more often since Federation than it has succeeded. The decision-makers are *the people of Australia*, pure and simple. Without the support of the people, a republic is impossible.

And the people wanted to vote for their President.

Warning the decision-makers

Having a letter published in the newspaper is a start, but it ultimately doesn't achieve much. As the republic debate continued to mature during late 1994 and throughout 1995, I was concerned that the major players were concentrating their efforts on the "easy" question—should we be-

come a republic?—and sweeping under the rug the details of *what sort* of republic we should become.

I wrote to these major players, as they emerged, and warned them of the collision-course between the expectations of Australians, and the pronouncements of academics. I included a copy of my *Herald Sun* letter. I exhorted them to look for alternatives—such as the "ratification vote after parliamentary selection" model I had proposed—to ensure that the hard work being done would not ultimately be a lost cause.

The Prime Minister, Paul Keating, replied through a minister who had been allocated the task of handling the republic issue. The Leader of the Opposition, by this time John Howard, replied personally. The various State Premiers, Leaders of the Opposition, ministers and shadow ministers who had weighed into the debate were likewise gracious and courteous in their replies. I sensed a spirit of cooperation and hope spreading throughout the leaders of the land, transcending all political boundaries.

There was only one problem.

They weren't listening.

I don't mean that they fobbed me off, ignored me, or treated me like a crackpot. They didn't—even though I would have understood if they did. Rather, they read what I had to say, considered it, and then proceeded to explain to me that such compromises wouldn't be necessary. The only viable republic models were those in which the President was selected by Parliament—or the Prime Minister, who is a member of Parliament. This was accepted constitutional wisdom.

This point is crucial if one is to understand the republic debate of the 1990s: *by late 1994 or 1995, positions had already been "locked in"*. The remaining five years to the November 1999 referendum were important in shaping how the question was to be put to the people, but the fundamental decisions had already been made. If we were to have a republic, it would be by parliamentary selection.

Understanding how this crystallisation came about is key to understanding why the debate had passed the point of no return. In the next section I given an overview of the status of constitutional wisdom in the 1980s, which laid the groundwork for what was to follow. In the sections that follow I then give a brief overview of the events of the 1990s. (I draw liberally from the excellent Federal parliamentary Background Paper, *The Recent Republic Debate—A Chronology: 1989–1998* by Carolyne Hide, Karen Davis and Ian Ireland, as well as numerous other books and papers; but the opinions and interpretations provided are, of course, my own.)

Republic models before the 1990s

As the previous chapter reminded us, the yearning for independence—and a republic—in Australia did not begin with Paul Keating. However, before the 1990s a majority of Australians had not been convinced that we should become a republic. When the issue was debated, republicans had their hands full presenting their arguments for a move away from the monarchy. Discussion of the *details* of an Australian republic were, generally, premature.

But it would be a mistake to think that the details had not been pondered at all. Although mainly confined to constitutional lawyers and academics, the question of a possible republican alternative to our system of government had been explored, mainly in the 1980s. And, indeed, these explorations laid the basis for much of what would, in the 1990s, be taken as assumed, understood, and finally defended as the bedrock of constitutional opinion.

And what was the general consensus by the end of the 1980s?

It was generally assumed that Australia would wish to retain a "Westminster" form of government, namely, a parliamentary form of government, with ministers drawn from those parliamentarians whose party is in control of the dominant house. The most obvious alternative system of democratic government is that of the United States, whereby the President is effectively voted into office separately from Congress (Parliament), and is able to choose his or her own "ministry" of individuals—who are *not* themselves members of Congress. In other words, in the U.S. the legislative ("law-making") arm of the government, namely, Congress, is separated from the executive ("running the country") arm of the government, whereas in Westminster systems these two arms of government are merged into one.

So why would it be assumed that we wished to maintain our parliamentary form of government, rather than an alternative system such as that in force in the U.S.?

Basically, because it has served us well. Even in the crisis of 1975, when the powers and proprieties of the Governor-General, the Prime Minister and the Senate were surrounded by a cloud of confusion, it was never seriously contemplated that the entire system should be discarded, and replaced by a U.S.-style executive presidency. Prime Minister Gough Whitlam believed that the Senate had no right to refuse to pass the Government's money bills, and that the Governor-General ought only act on his advice; Governor-General John Kerr believed that the Senate had the right to block supply, and that he had the discretion to act contrary to the

Prime Minister's advice in a time of crisis. In question were aspects of our uniquely Australian form of Federal government that had not been tested to their limits—but parliamentary democracy was not itself overthrown.

This is not to say that a change to a U.S.-style form of government is unthinkable. In constitutional terms, anything is possible, provided that it is passed at a referendum. But there would be no motive for Australians to make such a wholesale change to a new system, unless the old were to be found to be utterly unworkable. It is possible that some future political or constitutional crisis will cause us to reassess the merits and demerits of our current system, but they have not yet materialised.

It was also generally assumed that we would wish to maintain an office equivalent to that of our current Governor-General (whether or not it be renamed "President") in the new system. The reasons for this, too, are easy to recognise, although they raise intriguing questions of principle.

Firstly, if we are to remove the Queen as our Sovereign, we surely need to replace her with something. If we also abolished the position of Governor-General completely, our head of state would then, presumably, be the Prime Minister, in the same way that the U.S. President has the dual roles of head of state and leader of the executive government. But it would not be clear that the Australian public would be comfortable endowing the Prime Minister with this additional honour—especially as the Prime Minister is liable to be replaced on the whim of their party, without any reference to the people at all.

Secondly, we would need to somehow replace the Governor-General's other functions, chief of which are to commission and decommission Ministers, to sign into law Bills that have passed both houses of Parliament, to oversee the executive government of the nation, and to be the holder of "reserve" (emergency) powers to resolve political and constitutional crises. Again, it would be quite possible to remove the need for these roles, by making Parliament essentially "self-regulating" or "automatic". Ministerial commissions could be determined by a vote of the House of Representatives. Bills that have passed both houses may automatically become law. New mechanisms may be introduced for the automatic resolution of legislative deadlocks—or the powers of the Senate may be simply curtailed.

The question was not whether such a complete removal of the office of Governor-General was possible, but, again, whether it was *desirable*. Was there any justification for such a substantial change to our system of government? Would Australians vote for any proposal that allowed politicians to regulate themselves, and which elevated one of them to essentially regal status?

This is the real test of any proposed constitutional change: would it succeed at a referendum? It is a curiosity of history that this principle moulded the form of republic thought to be achievable, yet was ignored when it was most important.

But let us continue. If there was little call, in the 1980s, for our fundamental system of government to be changed, nor to abolish the position of Governor-General outright, then how was such a position to be filled and vacated?

The system now in place is that the Prime Minister advises the Queen, who appoints or "recalls" a Governor-General. (The term "recall" harks back to the days when Governors-General were British: when losing their position they were "recalled to Britain".) If there is to be no Queen to formally commission or decommission a Governor-General or President, then who is to do it?

One option is to simply remove the Queen altogether, and have the Prime Minister appoint or dismiss the President at leisure. In terms of the everyday machinery of government, this seems to involve essentially no change. After all, the decision already *is* made by the Prime Minister. What's the difference?

In normal practice, not much. But one need only consider the singular events of 1975 to realise that the issue is deeper. For better or worse, the Governor-General is supposed to "oversee" the working of the Parliament, and of the executive government of the nation.

Strictly speaking, the Governor-General does so today on behalf of the Queen—to ensure that her Australian subjects are properly governed, as it were. Moving from a constitutional monarchy to a republic implies that the "sovereignty" of the Queen is to be transferred to the public—to the people of Australia. Therefore, the fundamental role of a Governor-General—or President—would seem to be to oversee the Parliament and executive government on behalf of the people.

Such a concept may seem to be splitting hairs: after all, aren't parliamentarians voted in by the public in the first place? How much "democracy" do we really need?

Differences can be drawn, however. Politicians are voted into office once every few years. Governors-General, on the other hand, are not voted into office at all, and their terms of tenure are generally longer than a single Parliament. They are supposed to be vice-regal, and not descend to the level of party politics. Their reputations hinge on upholding the Constitution and ensuring its smooth working. They keep an eye on the day-to-day affairs of the government, and ensure that the correct processes are followed.

I will have more to say on each of these points in the chapters that follow. But it should be clear that anyone having a deep understanding of the role of a Governor-General—as the scholars and academics of the 1980s most surely did—would realise that the office is not one that could be converted into a mere appointment of the Prime Minister, rubber-stamping any decisions that passed over their desk, without changing the true nature of the office drastically. The events of 1975 ensured that no one laboured under any such misapprehension. And so it was that the thought of simply allowing the Prime Minister to appoint and dismiss a Governor-General (or President) was entertained with the greatest of reservations. It really wasn't feasible.

So what was left?

One option is to fill the office of President by a vote of the public. Other parliamentary democracies have gone this route. However, the consequences are serious. Such a President will have received the electoral "mandate" (approval) of the entire country (or a majority of it, anyway), whereas the Prime Minster has, strictly speaking, only achieved that status in one electorate, and relies on party structure to assert that authority for the country as a whole. In other words, the President's mandate is equivalent to the entire governing *party's* mandate. Such a President may reasonably feel that the governance of the nation rightly belongs to them, not the Prime Minister. What, then, of parliamentary government?

This has, indeed, been the development in some comparable democracies. It would be a fundamental change to our system of government. Is it what the Australian people would want? Perhaps—although it would be difficult to argue for such an upheaval, without any evidence of significant flaws in our current system. But most important is the fact that any such change would be close to sacrilegious to the constitutional scholars and academics contemplating our constitutional future in the 1980s. Uncertainty and doubt do not make the bedrock of a democracy. Constitutional precedents and conventions have taken decades, and in some cases centuries, to develop. Leaving the question open to future Presidents and Prime Ministers to battle out is not an option in serious constitutional reform. Democracies can grow and develop, but they are not supposed to have flaws designed into them.

The alternative is to reduce the powers and responsibilities of the Governor-General's job so drastically that no directly elected President could possibly believe that they held more than a ceremonial role. This is essentially what was done in Ireland. However, this throws us back to having a President that is little more than a rubber-stamp for the Prime Minister—an option that was already rejected above.

The constitutional scholars of the 1980s therefore faced the realisation that the direct election of the President by the people would lead to a republican system of government that would probably not be desirable in Australia. *The easy option at this point is to reject "direct election" from any serious collection of republic models*. This decision will be the point of departure in the following chapters.

But what, then, was left to the scholars of the 1980s?

The goal was to retain an office of President roughly equivalent to that of our current Governor-General. The President would need to be appointed and dismissed by a method that provided more independence than simply being done on the whim of the Prime Minister, yet less independence than direct election by the public.

The solution was ingenious, if not obvious in retrospect: The President would be appointed or dismissed only by means of a suitable majority of a *joint sitting of Parliament*. A sufficiently large required majority would ensure that bipartisan support for the nominee would be necessary. Being appointed by the Parliament itself, the President could not possibly claim a popular mandate. On the other hand, the model could, by a stretch of the imagination, be sold as "indirect" election by the people—after all, the people vote in their parliamentarians, don't they?

It was an elegant, middle-ground solution to a vexing academic question. It trod the fine line between a perceived right wing (a Prime Minister with, potentially, almost dictatorial powers) and a left (a President potentially claiming a greater popular mandate than the Prime Minister and interfering in every unpopular decision of the Government). It became, effectively, the textbook solution to the question, "What form of republic should we become?" A very clever solution.

Too clever by half.

The ALP and the ARM

If asked, most Australians would probably recollect that it was Paul Keating who raised the republic debate in the 1990s, and Malcolm Turnbull who carried it through to the referendum. And as far as most Australians are concerned, this probably reflects quite accurately the public events that shaped their own awareness of the issue. But to understand where these two men fit into the history of the decade, it is necessary to step back and appreciate some other less public events that provided the environment that enabled them to leap into the unknown.

As highlighted in Chapter 1, the history of the issue of republicanism in the Australian Labor Party stretches right back to the its formation. Although the ALP's public enthusiasm for a republic waxed and waned over the decades—in recognition of the political danger of espousing a policy that would allow the conservative side of politics a "free kick"—nevertheless there seems to be little question that many ALP members and leaders continuously held the belief that full independence for Australia would inevitably come one day.

By 1981 this belief was made official: the ALP's Federal Conference declared the Party in favour of a republic. However, the issue was relegated to the backburner during the Prime Ministership of Bob Hawke. (Neville Wran, it must be noted, called on Australians in 1987 to work towards a republic by 1 January 2001, the centenary of Federation, but his call went largely unheard.) Even the 1988 Bicentenary didn't arouse any substantial republican feeling in the community. The main speech on Australia Day was given by none other than Prince Charles, future King of Australia. (Again, to be fair, merchant banker and lawyer Malcolm Turnbull wrote an article immediately after this event, calling for a republic—but again it went unheard.)

But it would be wrong to ascribe the "blame" for this lack of republicanism on Hawke himself. The 1980s was a decade of relative prosperity—and conservatism. Young Australians poured scorn on the "hippies" and burning-issue revolutionaries of the 1960s and 1970s; the "greed is good" attitude of Gordon Gekko (from the movie *Wall Street*) was widespread. As with many booms in the economic cycle, it seemed to the young and the enthusiastic that the rules of economics had fundamentally changed: growth and prosperity could continue, unchecked, indefinitely.

It was only with the stock market crash in 1987, the end of the property boom in 1989, and Paul Keating's "recession we had to have" in 1990 that Australians were forced to be more contemplative. Interest rates of 18 per cent were bringing down small businesses and forcing families out of their homes. The collapse of Pyramid, Tricontinental and the State Bank in Victoria brought our second most populous state close to despair. A million unemployed had more than enough time on their hands to sit and contemplate the world.

It was in this environment that the issue of republicanism woke from hibernation. Bill Hayden—widely reported in the press as "fiercely republican"—had been sworn in as Governor-General in February 1989 (although, enigmatically, in July 1991 Hayden wrote a scathing letter to Labor backbencher Barry Jones—who had referred to him as a "closet republican"—denying ever having professed republican beliefs). A Constitutional Centenary Conference at Sydney in April 1991 declared major-

ity support for an Australian republic by 2001; Prime Minister Hawke, speaking at the Convention, declared that a republic was inevitable—although he would not be held down to a timeline.

On 25 June 1991 the ALP National Conference unanimously passed a resolution calling on the Government to work towards an Australian republic by 2001. Leader of the Opposition, John Hewson, labelled it as "just a diversion". Western Australian Premier Carmen Lawrence supported Australia becoming a republic. Former Prime Minister Malcolm Fraser, and his former Treasurer and former Leader of the Opposition John Howard, opposed it. Victorian President of the RSL, Bruce Ruxton, labelled it "an obscenity".

Just twelve days later, on 7 July 1991, the Australian Republican Movement was launched. Reportedly the brainchild of New South Wales parliamentarian Franca Arena—with "brain-midwives" of business partners Neville Wran and Malcolm Turnbull—it brought together a diverse collection of public Sydney figures, chaired by author Thomas Keneally.

Keneally's 1994 book, *Our Republic*, featured a number of anecdotes that would provide opponents with ample ammunition for dubbing the ARM the "Sydney chardonnay republicans". The unwillingness for republicans to budge from their locked-in positions later in the decade would fuel this image of an elitist clique—surely the antithesis of a movement whose ownership, like that of the system it proposes, should be by the people. As a Melburnian opposed to the ARM's model, I myself resorted to this retort on more than one occasion.

But in reality this portrayal of the ARM's beginnings was unfair. Regardless of where—geographically or socially—the ARM had formally begun, the same attacks on its foundations could have been made by its opponents. If it weren't Sydneysiders sipping chardonnay, it would have been Broadmeadows Boys downing VB's, Western Australian secessionists upending Swans, or some other random association of location and beverage. At it happened, the ARM's foundation members sank a considerable amount of their own time, money and resources into ensuring that the republican message got into the press—which probably makes it a good thing that it was seeded in the more affluent corners of Sydney. Without those donated resources, chances are that the issue would not have seeped into the consciousness of decision-makers so effectively.

The ARM didn't get a "free kick", though. The same day as their launch, a special task force was set up to fight for the preservation of royal ties with Britain, headed by a former Liberal Party President.

Its membership included John Howard.

Paul Keating and Malcolm Turnbull

The day after the launch of the ARM, Malcolm Turnbull said that if the Westminster political system were retained, a simple change to the Constitution was all that would be needed to declare a republic:

> The reference to "the Queen and Her Majesty's heirs and successors in the sovereignty of the United Kingdom" could be replaced with "The Queen shall mean the President of Australia who shall be selected by [whatever means]".

Already we can see a belief in the "Tipp-Ex model", namely, the whiting out of "Queen" and "Governor-General" in the Constitution and the writing in of "President".

Just nine days later, former Treasurer (and by now backbencher) Paul Keating was asked by television interviewer Ray Martin where he stood on the republic:

> I've got a sneaking suspicion there's a certain inevitability about it all. But I think it's good there's a public debate about it, rather than a political debate. Because, you know, once you get a political debate, it all becomes polarised; it's like the referendums.

The irony of Keating's words would be clear by the end of the decade.

Another nine days later, Gough Whitlam said that 2001 would be a realistic date for achieving a republic, and that he believed that the President would be appointed by the Parliament, rather than being appointed by the Prime Minister or directly elected by the people.

Gough, of course, knew the status of thought on constitutional law.

State divisions of the Liberal Party were not as reticent to embrace a republican Australia as their Federal colleagues. Already in August 1991, President of the Victorian Division, Michael Kroger, announced that the Victorian Liberal Party would begin a campaign to win grass-roots support for a republic.

Meanwhile, in December 1991, Paul Keating was sworn in as Prime Minister after deposing Bob Hawke. By February he was calling for a new Australian flag.

On 15 February 1992, Thomas Keneally demonstrated that the ARM had not yet been locked into the "prevailing constitutional wisdom" of a President appointed by a joint sitting of Parliament. In an article in *The Australian*, the chairman of the ARM wrote:

> Australia should have a head of State who is an Australian citizen, who is appointed by and can be removed by the Australian people and who

> represents and owes sole allegiance to the people of Australia. This head of state or President would have powers approximating those of the Governor-General and would act solely on the advice of prime ministers and ministers. He or she would have none of the executive powers enjoyed by the presidents of the United States or France.

That such a concise and accurate understanding of the wishes of most Australians could have been lost in such a short period of time is one of the most heartbreaking tragedies of the 1990s, for those of who could foresee the coming train wreck.

On 26 February Prime Minister Keating outlined his "One Nation" manifesto, and referred to the republic issue. Four days later, the *Sunday Telegraph* reported him as saying:

> I think Australia will end up a republic at some point but certainly not while I'm Prime Minister.

Whether that represented pessimism on the timeline for change, or for the sustainability of his own Prime Ministership, is not clear.

By May 1992, Malcolm Turnbull, also in favour of changing our flag, gently admonished Keating for "pushing the new flag harder than the republic", arguing that there was an emerging consensus about what sort of republic we should become, but no consensus at all about what sort of flag we should adopt. Again we see the attitude that the question of *what type* of republic we should become had been settled; rather, the battle was to convince Australians that we *should* become a republic.

But the debate was slowly widening. Constitutional experts were considering the "nuts and bolts" of becoming a republic. Branches of the ARM were established in Victoria and Western Australia.

By August 1992, Keating was indicating that he would not push republicanism as an issue in the upcoming Federal election. By November he raised the issue of Australian sovereignty, but stated that his Government was not pushing the issue. He expressed support for changes to the oath of citizenship.

In mid-December, Prince Charles and Princess Diana separated. Eight days later, Keating announced that the oath of citizenship for new Australians would be amended to remove any reference to the Queen or "her heirs and successors".

In February 1993, Keating's policy launch address for the Federal election announced his intention to set up a committee of eminent Australians to consider options for a Federal Republic of Australia by 2001.

Keating interpreted his March 1993 election win as a mandate to continue to push for an Australian republic by 2001. The Liberal Party con-

tinued to thaw: former NSW Premier Nick Greiner called on the party to drop its blind allegiance to the monarchy; John Howard said that the Federal party had erred in the election campaign by ignoring republicanism; NSW Premier John Fahey declared a republic to be inevitable—as did Tasmanian Premier Ray Groom and former Victorian Premier Rupert Hamer—and called for a constitutional convention to be held that year; and South Australian Leader of the Opposition Dean Brown became the first Liberal leader to declare personal support for Australia becoming a republic. But Victorian Premier Jeff Kennett said that the republic was a "tenth-order issue", and Western Australian Premier Richard Court remained a monarchist.

In his April 1993 Evatt Lecture, Paul Keating announced the formation of a Republic Advisory Committee, chaired by Malcolm Turnbull. Two of the other members were academics, John Hirst (chair of the ARM in Victoria) and George Winterton, who had made the first comprehensive attempt to rewrite the Constitution into republican form.

The Turnbull Committee was to determine, amongst other things, what method should be used to select the President. But by May 1993 the new leader of the Australian Democrats, Cheryl Kernot, was already attacking as a "cop-out" the "minimalist" position that was being advocated by Keating.

An AGB McNair poll in May 1993 found that 83 per cent of Australians wanted to elect the President themselves. A poll for *The Australian* in July 1993 put the figure at 79 per cent.

The Turnbull Committee advised that they would visit 23 major Australian cities during their consultations, including public hearings where possible. But the turn-outs to these hearings were reportedly dismal; the Committee simply didn't capture the imagination of the people in the way that occurred in Corowa a century earlier.

In August 1993 the ARM made a submission to the Turnbull Committee, arguing that the President should be elected by a two-thirds majority of both houses of Parliament.

Another poll in *The Australian* in September 1993 found that 60 per cent of Australians supported a republic, including a majority in every State. Federal parliamentarians were also polled: 98 per cent of ALP and 26 per cent of Coalition parliamentarians favoured a republic.

On 5 October 1993 the Turnbull Committee made its report. Although it did not, formally, make any recommendations, the way it was worded left little to be read between the lines. It suggested that appointment of the President by the Prime Minister would probably be too partisan. It found little problem with appointment by Parliament. It didn't close the door on direct election, but merely highlighted the amount of work that would

need to be done to bring a directly elected President's powers into line with our form of parliamentary government.

The clear implication was that direct election was too hard, and too much work.

The easy option had the inside running.

Within weeks, Turnbull took over the chairmanship of the ARM from Keneally. It wasn't a difficult transition: the ARM had been run out of the offices of Turnbull and Partners, largely financed by Turnbull and Wran, from its inception. Malcolm's wife Lucy had drafted its articles of association in 1990.

The road to the Constitutional Convention

On 18 September 1993, after meeting with the Queen at Balmoral Castle, Prime Minister Keating issued a press release which summarised the relationship between the Australian Government and the Queen:

> The Australian Government's view was that, if approved by the Australian people at a referendum, it would be appropriate for Australia to become a republic by the centenary of Federation in 2001. I told Her Majesty that, in such a situation, Australia would remain a member of the Commonwealth of Nations, and that the Australian people would warmly welcome visits to Australia by Her Majesty as Head of the Commonwealth and as the Queen of the United Kingdom. Her Majesty authorised me to say that she would, of course, act on the advice of her Australian Ministers, as she always has, and on any decision made by the Australian people.

Five weeks later, addressing the leaders of the Commonwealth in Limassol, the Queen said:

> Nowadays, I have enough experience, not least in racing, to restrain me from laying any money down on how many countries will be in the Commonwealth in 40 years time, who they will be, and where the meeting will be held. I will certainly not be betting on how many of you will have the head of the Commonwealth as your head of State. I suppose that the only reasonably safe bet is that there will be three absentees—Prince Philip, Britannia and myself.

We can again see that the Monarch was less of a monarchist than the monarchists—for independent countries such as Australia, at any rate.

The idea that we were "offending" the Queen—who has been universally acclaimed to have been as good a monarch as any country could

possibly wish for—was dismissed as a red herring. The Queen saw Australia's move to a republic as a perfectly natural stage of our national development. Prince Charles later expressed the same opinion.

With that concern out of the way, and opinion polls stabilising on a clear if small majority support for the republic, attention turned to the question of *how* to bring in a republic by 2001.

In May 1994, ACT Opposition Leader, Kate Carnell, called for a two-part referendum on the republic: the first questioning whether we wanted a republic, the second to choose the model.

A week later, Alexander Downer deposed John Hewson as Leader of the Opposition. Within days Downer declared himself opposed to a republic, and moreover inclined to the belief that the constitutional changes would be too difficult to construct.

Throughout June and July 1994, the behaviour of members of the royal family would continue to foster debate. Downer's views became more accommodating. Malcolm Fraser declared the republic to be inevitable. On 28 July I wrote my letter to the *Herald Sun*, described earlier, warning of the real danger that the people of Australia would reject any parliamentary selection model.

By September Barry Jones, National President of the ALP, was telling the National Press Club that the "minimalist republic" had been "dead and buried" for eighteen months.

On 10 November 1994 Downer called for a "People's" Constitutional Convention, and nine days later provided further details of the Coalition's commitment. The Convention would be held in 1997, with half the delegates elected, and the other half appointed. He promised that any recommendations approved by a broad consensus of the Convention would be put to a referendum of the people, but reserved the right for the Coalition to campaign for or against any specific referendum proposal.

On Australia Day, 26 January 1995, an *Age* AGB McNair poll found that most people would not support a republic if they were unable to elect the head of state—despite overall support for a republic achieving an absolute majority, with 52 per cent in favour and 38 per cent opposed. (An "absolute" majority means more than 50 per cent, including those who did not vote on the question at hand for whatever reason—in this case, because they were "undecided".)

Four days later, after an embarrassing and offensive gaffe, Downer stood aside and John Howard became Leader of the Opposition.

In March 1995, Keating formally expressed his preference for a republic in which the head of state is elected by Parliament, rather than direct election by the people. National Party Leader Tim Fischer expressed a preference for the continuation of our constitutional monarchy—but, if

we were to have a republic, a directly elected President would be desirable. Democrats Leader Cheryl Kernot favoured parliamentary selection by a two-thirds majority of a joint sitting. Jeff Kennett remained a monarchist, but admitted that constitutional change was inevitable, and declared his support for parliamentary selection.

On 7 June 1995 Prime Minister Keating gave a speech to Parliament which was nationally televised, titled "An Australian Republic: The Way Forward". He put forward his Government's view that the President should be selected *or dismissed* by a two-thirds majority of a joint sitting of Parliament. This was the first time that the issue of *dismissing* the President had received national attention—but it would not be the last. According to the Keating model, either House of Parliament would have the right to initiate the joint sitting required to dismiss a President.

Cheryl Kernot expressed the Democrats' opinion that parliamentary selection was favoured, but only if preceded by a process by which the public could nominate the list of presidential candidates.

The next day, John Howard reaffirmed the Opposition's commitment to the plan outlined by Alexander Downer, for a "People's Convention" in 1997, followed by a referendum if a consensus was reached.

Jeff Kennett branded the proposed Convention "just another committee", and declared a preference to simply "get on with the deed and produce outcomes".

In October 1995 Governor-General Bill Hayden warned that a megalomaniacal President who "cobbled together" the support of just one-third of both Houses of Parliament could not be dismissed under the Keating model.

On 9 November 1995 an *Age* editorial reminded us that the problem of parliamentary deadlock had not been resolved since the 1975 crisis, and that any transition to a republic required a workable resolution. On the twentieth anniversary of the Dismissal, John Howard noted that the Keating model gave the President more power than John Kerr possessed in 1975.

On 17 December 1995, Deputy Opposition Leader Peter Costello said:

> I think that there is a real case, if people really want to elect the president, I don't see why they shouldn't be allowed to, myself.

In February 1996, Keating promised that, if re-elected, his Government would hold a plebiscite (a non-binding vote of the people) within twelve months on the single question: "Do you want an Australian to be Australia's head of State?" Cheryl Kernot agreed that the plebiscite was a good first step to settle the fundamental question—of whether we wanted a

republic—once and for all. John Howard immediately realised that this "ratchet method" would allow republicans to win the debate one small step at a time, submitting plebiscites to the electorate until a successful result on each point was achieved. He quickly painted it as "constitutional limbo".

An AGB McNair *Age* poll found 76 per cent support for an Australian head of state.

The Howard Government swept into power in March 1996. John Howard upheld his commitment to establishing a Constitutional Convention to be held in late 1997, but spent much of 1996 and 1997 trying to find a way to avoid doing so.

In August 1996, a survey of three hundred 16- and 17-year-olds by the Business Council of Australia found that 100 per cent believed Australia would be a republic by 2010.

The question of how the States would deal with a Federal republic had received increasing attention over the years. In November 1992 the University of Melbourne's Greg Craven had pointed out that Australia had not one but seven constitutional monarchies. The Turnbull Report had described as a "monstrosity" a Federal republic with States retaining their links to the monarchy. The South Australian Constitutional Advisory Commission, appointed by the Brown Government in 1995, completed its first report in October 1996 and recommended that the States relinquish their links with the monarchy.

A December 1996 AGB McNair poll found that 55 per cent of voters nationally supported a republic with the President having the same responsibilities as the current Governor-General.

On 25 January 1997 the Governor of Victoria, Richard McGarvie, retired from office. In an article published in the *Herald Sun*, the *Age* and the *Australian*, he pointed out that the question of whether one wanted to become a republic was one which most Australians could answer intuitively, depending on their background and beliefs; but that the real question was whether we wanted to change to a *specific* republic model.

McGarvie had felt that he should not speak out on the republic issue whilst in the office of Governor, but he had done extensive research and thinking on the subject. He spent the remainder of 1997 writing up his views on the subject and giving numerous speeches.

He repeated Bill Hayden's warning that the two-thirds majority required to dismiss a President would tip the balance of power away from a Prime Minister. But his major contribution to the debate was the formulation of "the McGarvie model", which sought to replace the Queen by a Constitutional Council of three "elders"—former Governors-General, Presidents, or State Governors—who would perform the only duties that

are now carried out by the Queen, namely, appointing or dismissing the Governor-General (President) on the advice of the Prime Minister. He referred to this change as simply "patriating" the powers of the Queen (namely, moving them to our own country—like the term "repatriating" but without the powers ever having been here in the first place).

McGarvie astutely observed that the delicate balance of powers and responsibilities inherent in our current constitutional system relied in large part on "convention", namely, an understanding on how the Constitution—which on a verbatim reading appears to give almost dictatorial powers to the Governor-General—is to actually be interpreted in our system of parliamentary government.

McGarvie argued—correctly, in my opinion—that *any* fundamental change to the method of appointment and dismissal of the Governor-General (President) would disturb this delicate balance, and, sooner or later, would set in train a "learning" or "testing" period in which a future Prime Minister or President would see how far the public would let them go within the new constitutional rules. The only viable alternatives are to "codify" (write into the Constitution) these heretofore unwritten conventions, or else to move to a system that was, in all respects, functionally equivalent to our current system—namely, the McGarvie model.

Meanwhile, in June 1997 the Constitutional Convention hit a snag, when the Senate refused to accept the Government's non-compulsory postal ballot for the elected half of the delegates. The deadlock was resolved by the end of August, with senators Bob Brown and Brian Harradine voting for the legislation enabling the Convention after being assured by John Howard that his Government had no intention of abolishing compulsory voting at general elections. The delay, however, pushed the date for the Convention back to February 1998.

On 31 August 1997, Princess Diana and her boyfriend were killed in Paris. The increasingly outrageous behaviour of the younger members of the royal family, which had changed the opinions of many in the preceding years about the long-term viability of the monarchy, was brought to a sad and untimely end.

The postal vote for the delegates to the Constitutional Convention occurred in November and December 1997. Many of the nominees were celebrities of one form or another.

Even though the ARM was a national movement, each State branch had relative autonomy in mounting their election campaign. In some States they campaigned directly on the two-thirds parliamentary model of appointment (which the national organisation had announced to be their recommended model), whereas in other States—in particular in Victoria—they appeared to be more flexible about accepting the decision of the

Convention in the choosing of a model. This would have serious consequences at the Convention and in its aftermath.

When the delegate election results were declared on 23 December 1997, the ARM's Malcolm Turnbull hinted at their *modus operandi* for the Constitutional Convention:

> I think the major focus must be to reach consensus … I think the Australian people will be very unsympathetic with delegates who go to the convention in a very doctrinaire, narrow-minded way … We would like to see the convention, before it talks about the mode of election, actually talk about what it wants its head of state to do. If your answer is you want someone impartial and above party politics, then it becomes harder to justify direct election.

In other words, delegates, don't be dogmatic—unless it's *my* dogma you're proselytising.

The "ConCon" con

The widespread portrayal of the 1998 Constitutional Convention—or "ConCon" to the enthusiasts—as simply a "con" is, like so much in the republic debate, a simplistic generalisation. The Convention represented different things to different people, and those who understood how it would function were not surprised by the way it panned out.

From the accounts written later by its delegates (particularly telling are Steve Vizard's *Two Weeks in Lilliput*, written before the afterglow of the Convention had worn off, and Malcolm Turnbull's *Fighting for the Republic*, written somewhat later but still before the referendum defeat), the ARM clearly understood that the Convention was a professional political forum. Representing by far the largest single bloc of elected delegates, they still commanded just 18 per cent of votes overall. They came to the Convention with their desired model—parliamentary appointment of the President—firmly established. In ten days of deliberations they would need to "get the numbers", namely, convince a sufficient number of other delegates to support their model—in the final vote, if not earlier. All ARM delegates had agreed, in writing, that they would meet in caucus and that all would vote according to the decision of the majority—there would be no "conscience" votes.

Purely and simply, they were on a mission. That the Convention was actually structured to debate a wide range of issues over its ten days was of little consequence. There was no doubt that the Convention would vote

for Australia to become a republic, that the new head of state should be called the President, and so on. While these things were being dutifully debated in the main chamber, the real work was going on behind the scenes. "Do we have the numbers?"

The "enemy" were not the monarchists. Indeed, Prime Minister John Howard, the biggest monarchist of them all, must have been ecstatic with the course of events. The monarchists realised that the ARM delegates were pushing a model that simply *was not supported by a majority of Australians*. Ironically, the monarchists' only realistic chance of fulfilling their goal of thwarting the republic would be for the ARM to emerge from the Convention triumphant.

The referendum put to the people of Australia would do the rest.

Only by taking out of the equation the monarchists and the ARM delegates do we get a picture of those delegates—and their followers in the public at large—who were bewildered, flummoxed, and finally angered by the entire Convention. Many naïvely believed that the Convention would genuinely debate the issues—that the unpopularity of parliamentary selection would be recognised; that some compromise allowing direct election would be fashioned. They envisaged a consultation process which, in reality, should have occurred in 1994 or 1995—one that would have been able to shape the course of the republic debate.

Instead, they were treated to a rapid-fire process intended to simply ratify the ARM's desired model, so that Parliament could work on the next stage of creating legislation for a referendum in time for the centenary of Federation.

Realistically, there was no time left for debate.

The ARM found an unlikely ally in John Howard during the Convention. His opening speech was completely scathing about the possibility of a directly elected President, warning that the political rivalry between such a President and the Prime Minister would essentially bring our form of parliamentary democracy to an end. On the other hand, he warned that, should the Convention fail to agree on a republic model, the question would definitely be put to the Australian people in an indicative plebiscite—including direct-election models—prior to a referendum on the favoured model.

The message was not lost on those delegates opposed to direct election—whether monarchists, McGarvyites, or ARM members. All knew that, if put to the vote of the people, direct election would easily win out—and civilisation would, seemingly, come to an end.

To avoid such an outcome, the Convention needed to agree on either the ARM model, the McGarvie model, or a compromise or modification of one of those two models.

Compared to the ARM, the McGarvyites and the monarchists, the "direct election" delegates could not be described as much more than a disorganised rabble—and I say that despite the fact that I was barracking for them every step of the way. They had no comprehensive, unified model to put before the Convention. They couldn't even agree as to what sort of powers the President should have—opinions varied from a U.S.-style executive presidency right through the French system to the Irish ceremonial President. They did not have a unified strategy during the voting. The only thing they had brought to the Convention was a firm knowledge that the people of Australia would not accept anything less than the direct election of the President. Details? … Unfortunately they had not yet been fully worked out … or worked out at all.

Yet this is all we could have possibly expected of them. As Malcolm Turnbull himself admitted, the essentials of the ARM model had been decided on before the ARM was even formed, and they had spent more than six years—aided by a Government-funded Committee headed by Turnbull himself—to ensure that their platform was rock-solid. The direct-electionists, on the other hand, represented little more than a protest vote against the edifice that Keating and Turnbull had erected. Had history been different—had the ARM begun its existence assuming that a directly elected President was fundamental—the situation would surely have been completely reversed. Malcolm Turnbull may have been one of the disorganised rabble, proposing some half-baked model involving parliamentary selection and dismissal.

But let us return to history as it actually occurred. On the second day of the Convention, the issue of the powers of the President was debated. A vote was taken on several options, ranging from full "codification" of the powers (describing explicitly in the Constitution what the President could do, under what explicit circumstances), to essentially complete removal of these powers.

Both of these extremes were avoided, and the delegates voted to maintain the current powers of the Governor-General.

The direct-electionists took this result to be an ambush. It was generally assumed—by all delegates—that any directly-elected President would have either much more or much less power than the Governor-General does under our current system (although, as the following chapters of this book demonstrate, that assumption is not inescapable—but this book did not, of course, exist in February 1998!). By voting to retain the Governor-General's current powers, the Convention had effectively eliminated direct election altogether—on only the second day.

Facing a hostile media reception to the dramatic turn of events (fuelled, quite understandably, by the direct-electionists themselves), the delegates

realised that they had quite possibly assigned the Convention to the scrap-heap of irrelevance. If the direct-electionists walked out after just two days, the Convention would have been widely seen as a failure. John Howard's promise just the day before came back to haunt them: he would hold a plebiscite to determine the favoured model—which would, ironically, most likely give the direct-electionists exactly what they wanted.

In utter desperation, a clever solution was hatched between the remaining blocs—including the monarchists. The "Resolutions Committee" (the committee that sifted through the results of the working groups to prepare resolutions for the Convention to discuss) would consider any resolution that achieved 25 per cent support of the Convention—effective retrospectively. That meant that the "codification" proposal of the direct-electionists would no longer be dead, but merely a "non-preferred option"—but it would still be on the table. By this ploy, the direct-election models would remain viable until the final votes were taken at the end of the Convention.

If the reader has the feeling that something is not right about all this, they are not alone. The ARM and the monarchists getting into bed with each other—to avoid at all costs the possibility of putting before the people the question of which model to adopt—is about as un-democratic and un-republican as it gets. If there had been any doubt that the Convention had descended to the depths of partisan politicking, this event served to dismiss it.

Turnbull has since sought to ascribe blame for the failure of the subsequent referendum to the four State Leaders of the Opposition—all Labor—who aligned themselves with the direct-electionists: Peter Beattie (Queensland), Geoff Gallop (Western Australia), Mike Rann (South Australia), and Jim Bacon (Tasmania):

> Having flirted with direct election before the convention, they now attached themselves to the direct-election group and wittingly or unwittingly quickly gave it a leadership and credibility it never deserved.

Whether this represents sour grapes or the legendary arrogance of Malcolm Turnbull is left to the reader to contemplate: "leadership and credibility" are undeserved—unless they are for the right team. Yet further:

> For whatever reason, Gallop, Rann, Bacon and Beattie took the populist road. In doing so, they seriously undermined the prospects of any model's emerging from the convention with the momentum needed to carry a referendum.

That Turnbull's position was illogical only seems to have become clear to many in hindsight. These Opposition Leaders undermined the prospects of any model winning a popular vote—by advocating the popular option! What Turnbull really meant was that they had undermined the prospects of *his* model, by showing that there were educated, politically savvy delegates who espoused the merits of direct election. This surely did put stress on the ARM's later "education" campaign—which I shall have more to say about shortly. But it is clear that Turnbull was frustrated by the inability of these Opposition Leaders to realise that He was right, and that His was the only path to Righteousness:

> My other great regret was that the Opposition Leaders made no attempt to engage the ARM before the convention. They flung down the direct-election gauntlet without any discussion with us, without any effort to build a constituency of support. They decided to take the ARM on rather than win it over. But it was a futile collision. Again and again we explained to them that direct election simply could not emerge from the convention and that we had to get all republicans behind one model that could win broad support.

Forgive anyone foolish enough to believe otherwise!

But to return to the substance of the Convention. The McGarvyites convinced Turnbull and others in the ARM that the two-thirds majority required to dismiss a President tipped the balance of power away from the Prime Minister in favour of the President, as Governor-General Bill Hayden had warned in 1995, and Richard McGarvie had shortly after his term as Governor of Victoria had ended in 1997. These two men clearly had the in-the-job experience in vice-regal office to remove any question that their warnings were completely valid.

As a compromise, the ARM agreed to replace the two-thirds dismissal mechanism by one in which the Prime Minister could instantly dismiss the President in writing, which would need to be ratified by the House of Representatives within a month (but a failure to ratify would have no essential consequence). McGarvyites were justifiably worried that this would tip the balance of power the other way. Moreover, who would fill the breach until a new President were selected by a joint sitting of Parliament? Surely not someone nominated by the Prime Minister—that would secure a mechanism by which the Prime Minister could assert almost dictatorial control, especially if the House were prevented from sitting by the newly appointed Interim President.

The solution to this problem, in turn, was both mind-numbingly simple, and ridiculous: the most senior State Governor would automatically become the Acting President. Some of the McGarvyites at the Convention

(but not McGarvie himself, of course—he has gone to his grave sticking steadfastly to his model) accepted this compromise, and indeed this mechanism was incorporated in the amendments later put to the voters of Australia in the republic referendum. But its foolishness was apparent to any serious thinker from the outset. There was nothing to prevent a Prime Minister from having seven letters of dismissal lined up, ready to dismiss the President and then, in turn, the six Acting Presidents. (Anyone who doubts whether such an apparently comical arrangement would ever be entertained would do well to read John Kerr's apologia, in which he describes how he effectively "ambushed" Gough Whitlam with letters prepared in just such a manner.) Whether it would be in any Prime Minister's best interests to govern without any President at all in office is an interesting question—but one can certainly imagine situations in which the ability to plunge our nation into such a constitutional crisis might be tempting.

In any case, this modified model, known forever afterwards as the Turnbull model, was the one that was finally adopted by the ARM at the Convention. (The opportunity to garner further votes—from Peter Costello and a number of others—by removing the consultative committee sifting through nominations, in favour of a community consultation process without a committee, was lost amidst the confusion of the Convention.)

The final votes of the Convention determined which model was to be favoured. It was resolved that only models having the support of ten delegates would be voted on. There were just four: the Turnbull model, the McGarvie model, and two direct-election models: one created by Geoff Gallop, and another by Bill Hayden. Delegates could also vote for no model, the status quo (except in one round), or could abstain.

The direct-election model constructed by Bill Hayden scarcely managed to qualify, and was eliminated in the first round with just 4 votes. It involved a nomination process requiring one per cent of all voters—about 120,000 people at present—by petition.

The Gallop model was reasonably well-constructed, given that it had not had the benefit of the years and resources of the Turnbull model. A joint sitting of Parliament would select three nominees, which would be put to a vote. The President would serve for two terms of the House of Representatives, and could be dismissed by a vote of the House—effectively, the Prime Minister could dismiss the President. The "reserve" (emergency) powers of the President would be fully codified, according to the procedures that Turnbull had himself laid down in the Report of his Republic Advisory Committee.

The Gallop model, however, still had a number of "rough edges". Parliamentary nomination would undoubtedly result in one nominee from each of the major parties, and one nominee with no hope of winning, resulting in an "our turn, your turn" method similar to that usually applying in Ireland. Without any way for the voters to express their disapproval of the nominees, such a political arrangement seemed inevitable. The dismissal arrangements tipped the balance of power in favour of a Prime Minister in a time of constitutional crisis—there would be no Queen or McGarvie Constitutional Council to delay the process of dismissal of the President.

But the Gallop model was still a feasible direct-election model. It garnered 30 votes in the second round, to be narrowly eliminated by a margin of one vote in favour of the McGarvie model.

The McGarvie model was then, in turn, eliminated in the third round.

The Turnbull model emerged triumphant—sort of. It failed to receive an absolute majority of votes in any of the rounds. With only 48 per cent of delegates voting for it in the final round, the ARM delegates were concerned that John Howard would not accept the result as a "clear indication" that could be put directly to a referendum without an indicative plebiscite.

But the ARM's fears were short-lived. Howard knew that the Turnbull model was doomed to electoral failure. He immediately stood up and announced that the Convention had expressed a clear preference for the Turnbull model, that he had no desire for a plebiscite, and that there would be no plebiscite. The Turnbull model would be put to the public at a referendum before the end of 1999.

The delegates to the convention were ecstatic. Tears flowed as they embraced each other, drinking the realisation that they were there at such a historic moment.

And the rest of us dry-retched.

The referendum we had to have

If Paul Keating's 1990 recession was "the recession we had to have", then surely the 1999 republic referendum was no less necessary or predictable.

The founding members of the ARM—and Paul Keating—had ushered in the new decade with a firm commitment to put a parliamentary selection republic before the people in time for the 2001 centenary of Federation. Keating's unexpected election win in 1993 kept the dream alive. His loss in 1996 could have caused the push for a republic to stall—but John

Howard astutely realised that the best chance to scuttle the issue was to stick to his predecessor's promises, and rush the issue through before the 2001 deadline. Such a tight timetable would only allow the entrenched parliamentary selection model to be put before the people—and the polling told Howard that, without direct election, the public would—with a little gentle prodding—almost certainly vote it down.

By the time of the Constitutional Convention the issue was well and truly sealed. This can be understood most clearly if one reads Turnbull's and Vizard's accounts. The ARM's position was by far the most popular on the republican side of the debate. On either side of them were the more "conservative" republicans (the McGarvyites) and the more "radical" republicans (the direct-electionists), each with significantly smaller numbers. In trying to pick up votes from one "wing", delegates of the other "wing" would drop off. Turnbull is completely right when he claims that, if the ARM had tried to shift one way or the other at this late stage, it would have emerged from the Convention with even less support.

But how did we find ourselves in this position in 1998?

The answer is that Turnbull and his colleagues had been "educating" republicans since the launch of the ARM in 1991. They had concluded, before the decade even began, that the only workable republic model was that of parliamentary selection. As interest and excitement in the republic debate grew, so too did the "educational" activities of the ARM. A growing number of converts spread the word farther and farther afield. They were, generally, eloquent, educated, charming—even charismatic. They were very persuasive, not just because they were convincing speakers, but moreover because *they wholeheartedly believed what they were saying*. They were convinced that theirs was the only path to success, and their mission was to ensure that a sufficient proportion of the population were on the straight and narrow to bring about a referendum success in time for the centenary of Federation.

If this description sounds hauntingly familiar, it is no coincidence. Many religious movements operate on the same principles. Whether one describes their activities as "spreading the word", "proselytising", "brainwashing" or "propaganda" depends on one's own background, attitudes and prejudices.

1998 came to an end with the Howard Government being returned for a second term. As 1999 progressed, and the referendum approached, Australians were subjected to what can only be described as a standard political election campaign—even Turnbull described it that way himself. But instead of Labor and the Coalition, there were two new teams: "Yes" and "No".

The ARM led the "Yes" case, and built up an impressive alliance. Many well-known republican politicians who had not supported the Keating model prior to the Convention were convinced to join the team. The general rationale seemed to be that *any* republic would be better than the monarchy. Some espoused the view that, if the referendum failed, it would be a long time (indeed, perhaps beyond the terms of some of their own lives) before the republic issue would again reach the point of being voted on at a referendum. Others had seen through John Howard's tactics, and didn't want to hand him and his fellow monarchists a victory by opposing the Turnbull model. Most espoused the further view that it would be far preferable to become a Turnbull republic in the first instance, and then, if a move to direct election of the President was thought to be desirable, those changes could be contemplated and formulated without any panicked rush, and put to the people at a later referendum.

The "No" case, on the other hand, was supported by a coalition of forces that was rather modest at the end of the Constitutional Convention, but continued to build in strength and number right through to referendum day itself.

Firstly, of course, there were the monarchists. The "No" case was never going to be fought on an allegiance to the British royal family—even the monarchists acknowledged that the polls indicated direct support for the monarchy to be 20 per cent or less. They had come to this realisation even at the start of the decade: the organisation formed to fight the ARM was dubbed the ACM—"Australians for *Constitutional* Monarchy"—almost as if a "constitutional" monarchy were not the same as a "normal" monarchy. The argument espoused was that, since Australia has (since the Australia Acts of 1986, and perhaps much earlier) been effectively a "crowned republic", the presence of the British royal family as the "independent umpire" at the top of the hierarchy is about as benign and harmless as one could possibly hope for.

This sort of argument would be pathetically weak if it were being offered in support of a change *to* a constitutional monarchy, but that is not the case here. It formed—and continues a form—a powerful fall-back position for anyone who wants to retain the "status quo" (what we have now). Australia's system of government is not in crisis; the Queen doesn't actually do anything that harms our nation; and so unless we are offered a system *which is demonstrably better* than what we have now, we should not make any changes. In brief, better the devil you know.

The second group immediately aligned with the monarchists after the Convention were the "radical" direct-election republicans, such as Ted Mack, Phil Cleary and Clem Jones, who refused to "deal" with the ARM

at the Convention, and stuck steadfastly to their belief that direct election was the only just and workable way of bringing in a republic.

That these "radicals" were in fact correct should have been evident to the ARM even as the campaign for the referendum was in full swing. The ARM's own private polling, of 4500 Australians (chosen equally from each State), showed that 65 per cent of those in favour of a republic still wanted direct election. Turnbull and his colleagues concluded that the problem lay with "educating" this 65 per cent of republicans as to why they were "wrong".

Next to publicly join the "No" case was Peter Reith, at that time a potential successor to John Howard (as an alternative to Peter Costello) and, hence, a potential Prime Minister. Reith very publicly courted the direct-electionists, and wrote a number of published newspaper articles. That his arguments varied wildly in strength, relevance and objectivity suggested that he was seeking to align himself with such a popular position simply to give himself the maximum chance to topple Costello for the leadership, at some future time. Costello's efforts for the "Yes" campaign, in contrast, were eloquent, and well-argued.

Bill Hayden also joined the "No" case. He agreed that the only way to bring in a direct-election republic was to vote down the Turnbull model. Hayden's concerns seem to have been much more heartfelt than Reith in advocating this path—having put his own direct-election model to the Constitutional Convention—but at the same time he seemed to have lost almost all connection with contemporary debate and ordinary Australians. The picture painted of him at the Constitutional Convention is of a loner, doing his best to make a mark on the future of the nation, but not having the vision or the political connections to allow his ideas to develop and flourish.

As the months of 1999 clocked over, and the referendum neared, the ARM were buoyed that their "education" campaign was succeeding in inching up the "Yes" vote ahead of the "No". Malcolm Turnbull's diary for 15 September provides an intriguing insight:

> If we can win Tasmania and Western Australia, we should be able to win the referendum. We have to assume that a strong Yes campaign from Kennett in Victoria will pick up a lot of votes there. Costello is also advocating a Yes vote and he is the darling of the Victorian Liberals, as he will be their next Prime Minister. The gap between us and the No vote in New South Wales is very, very troubling, though. We have always assumed that New South Wales will vote strongly Yes. […W]e should be able to get over the line here.
>
> Queensland is a write-off, but we cannot afford to write off South Australia and will have to increase our focus on that State.

That Jeff Kennett was on the nose in Victoria, and would lose the State election to Steve Bracks just three days later, was a blow that the ARM could not have possibly anticipated; it surprised many of us Victorians as well. But the tone of Turnbull's diary entry should be troubling for anyone viewing the republic as something that will unite Australians. "Writing off" a whole State as a lost cause (two States can be lost and the referendum will still pass, provided that there is a majority of overall votes), and being encouraged by a "victory" that would, at best, represent be a wafer-thin majority, is not a unifying experience. One would hope that a referendum on creating a republic—like that which federated us into a Commonwealth in the first place—would be passed in *every* State.

True, if the referendum *had* been narrowly passed, there would not have been anything preventing us changing to a more widely accepted model further down the track—but most likely not. Not on John Howard's "watch", that's for sure. And the intervening years could have hardly been less divisive than what actually transpired. At least we wiped the slate clean, retained the status quo, and prepared the way for a direct-election republic some time in the future—whenever Labor managed to get back into power federally.

But let us return to the actual referendum campaign. As soon as the "No" campaign's advertising was launched, it was all over, red rover. Turnbull's diary entry for 18 October—still three weeks out from the referendum—leaves no doubt on the question:

> Then, at 6.30 pm, I learn that we cannot win. […] Our vote has collapsed. In Tasmania our support has dropped from 50 per cent to 37 per cent, all in four weeks. In Queensland it is down from 39 per cent to 32 per cent. The trend will be the same throughout Australia. The reason is very simple: direct election. Support for an Australian head of state is unchanged, but Australians distrust politicians so much they will not allow them to choose their head of state.

The news had been phoned through to Turnbull from Rod Cameron of ANOP, the market-research consultancy that had been hired by the "Yes" campaign. The next day Cameron sent over what Turnbull describes as "some glum advice", but which is simply an insightful analysis which caused the penny to finally drop for Turnbull and his colleagues:

> As the less informed elements of the electorate become aware of the referendum, they are focusing largely on direct election, and the outbursts of indignation that we found earlier (how dare they stop us voting for the head of state) are re-emerging with the more recently engaged. The Yes vote among the part-secondary educated has plummeted.

> We must now concede that direct election is the major concern of the electorate in this referendum and that this position will not change.

Turnbull's publication of this concession is all the more important because the "outbursts of indignation that we found earlier" do not appear explicitly in his memoirs. Using it, we can reconstruct what their own research had been telling them all along, namely, that when Australians actually found out what was going on, *and when they found out that the ARM had stolen their chance of voting in their President*, they were absolutely indignant.

This emphasises the point that, during most of the republic debate, most Australians were not aware of the fine details at all. As one particularly telling example, even I had trouble determining whether the ARM would concede wide public support and accommodate some form of direct-election compromise as late as the vote for the delegates to the Constitutional Convention—and I had been following the debate as closely as is possible for an average citizen for five or six years. I voted for Eddie McGuire and the ARM! The main difference between me and most Australians, however, is that most Australians didn't sit at a computer screen during their lunch breaks at work, reading page after page of the Hansard transcripts of the previous day of the Convention, to find out what actually happened. Many voted in the postal ballot for delegates (half of Australia didn't), then heard a little about the republic in the news over the next eighteen months, and then the last month of the referendum campaign hit them. And *that* was the first time that the reality hit home: we definitely *would not* get to vote for the President. Definitely not.

And the indignation and anger was palpable.

The aftermath

Once the referendum was lost, the republic issue, naturally, dropped from public attention like a rock. Prime Minister John Howard held a victory party for his closest monarchist friends. Leader of the Opposition Kim Beazley announced that, if elected into power in the election due by 2001, his Government would expand on Keating's plan by holding, firstly, an indicative plebiscite on whether we wanted to become a republic, then a second on the desired model, and finally a referendum to change the Constitution itself.

On the personal front, as soon as the results started emerging on Referendum Night—and it was clear that it would be a resounding "No", except, perhaps, in my own state of Victoria—I decided that it was time for

me to "put my money where my mouth was" and do what the direct-electionists had not done: construct a fully workable direct-election model that would not change our fundamental system of Government.

The remainder of this book describes that journey. I do not apologise for throwing in a few of my personal experiences along the way—after all, this is only the beginning of the process, not the end, and a nice, tight, concise "historical" summary would be out of place. On the other hand, this book is not designed to be just light humour: I concentrate on the difficult questions that need to be answered by anyone seeking to construct a workable republic model that will be accepted by the people of Australia.

And so to my own journey.

In the days and weeks following the referendum, when all the postal and absentee votes were counted, it became clear that even Victoria had voted down the republic. In other words, it had failed in *every* State, and, of course, overall. It was clear that no parliamentary selection model would ever be put to the people again.

By the end of December 1999, I had constructed a workable direct-election model. I had a fully amended Constitution (almost identical to that presented in the Appendix of this book), together with a sixty-page discussion of the issues.

So what next?

I decided that I should first approach those who had campaigned against the Turnbull model in the referendum. I sent copies of my model to some of the more public figures. I also decided that I should approach those who, while supporting the "Yes" case for the referendum, had expressed doubts about the Turnbull model in the past. I had previously written to many of these people, urging the adoption of the compromise "ratification vote of parliamentary selection" model that I had proposed in my 1994 letter to the *Herald Sun*—some during the Constitutional Convention itself. (That appears to be how my model ended up being deposited with the papers of the Convention.) I also sent a copy to the ARM.

And what was the result?

Very disappointing—if predictably so. Some of the more vocal opponents of the Turnbull model didn't even give me the courtesy of a reply. Other, more moderate critics responded politely, but clearly expressed the opinion—either explicitly or more subtly—that the issue was no longer worth discussing.

On this count, Malcolm Turnbull and his colleagues were absolutely correct. Many of the direct-election proponents were not prepared to do the hard work of putting together a workable model that could be put before the people at a later date. They were happy to stand on the soap-

box of indignation against Turnbull and the ARM when they backed the wrong horse, but were not interested in putting in the same amount of hard work to come up with something better.

They will undoubtedly come back out of the woodwork when the next vote for a republic is nigh—and, disgruntled as we may now be, we will probably need as much support as we can get; and so I have decided not to name them here. But they will recognise themselves.

There was, however, one remarkable exception to this rule. I had sent a copy of my model to Richard McGarvie, former Governor of Victoria, Supreme Court Justice, and creator of the McGarvie model. I wrote to him after reading his book and the many papers he had published on the republic issue. Although his own ultra-minimalist approach was poles apart from my own feelings on how the republic should be constructed, nevertheless his clear understanding and explanation of the subtleties of the conventions governing the workings of our Constitution agreed completely with my own. I felt that he was one of the few republicans at the Constitutional Convention who truly understood what the ramifications would be of the constitutional amendments being traded in the backrooms of Old Parliament House like football cards.

Like many others, Richard McGarvie had been put into the category of "didn't even reply" in my own tally of responses. I figured that his own position was so far away from direct election that he probably considered my letter to him to be an insult. Suddenly, out of the blue—almost three months after writing to him—my wife Robyn answered a phone call while I was at work. "Some bloke called Dick rang today," she told me that evening. "I wrote down his name and number on that newspaper."

I looked at it in curiosity, and then explained to her who he was. "He used to be the *Governor*?" she cried out, aghast, "I told him, 'Yeah, no worries, Dick, I'll get him to call you back.' Am I allowed to call the former Governor 'Dick'? Isn't he 'Your Holiness' or something?"

"Well, I think it's 'Your Excellency'," I replied, "but I don't think you can call him 'Your Former Excellency'. If he called himself 'Dick', then that's what he wants to be called."

I don't think my explanation soothed her nerves, however. On the few occasions that he called again over the next few years, Robyn would always point to the phone and whisper gingerly to me: "It's Dick!"

(Despite being a winner at parties, this story has now been trumped. During the writing of this book—of this chapter, in fact—Robyn answered a call. "Could I speak to John Costella please?" The voice seemed vaguely familiar, but she couldn't place it. "Yeah, sure, could I ask who's calling please?" "It's Gough Whitlam here." Several minutes of silence later, I had to explain to the great man: "Sorry, Gough, my wife Robyn

has nearly fainted. You're her greatest hero." A few unforgettable chuckles, and he was into classic form. "Well, do make sure you resuscitate her first," he huffed in unmistakable, Whitlamesque baritone, chin undoubtedly held high. "I can wait a few more moments.")

Anyway, back to "Dick" McGarvie. (Steve Vizard refers to him as "Richard 'Call me Dick' McGarvie", so I gather his down-to-earth manner elicited chuckles of glee throughout the country.) I was intrigued to hear what he had to say on the phone.

"I've been looking over your model, and I've got a few comments to make," he began.

"Great," I replied. "What do you think?"

"Maybe we could meet for lunch in the City next week," he suggested. Lunch in the City? I was taken aback, but agreed. Why couldn't he just tell me? Lunch? I had to wrack my brain to remember if we had enough ready cash for the Zone 1, 2 and 3 ticket that would take me on a one-hour train trek to the City, let alone enough to pay my share of lunch.

But no sooner had we sat down at a table at his Club than I realised why a phone call just wasn't sufficient. Dick pulled out a sheaf of notes, including the documents I had sent him, plus extra notes of his own. My draft Constitution had annotations all over it. We spent hours discussing the model. Every amendment. Every provision. The ways in which they would interact. "Did you really intend that …" was a frequent start to his questions. Usually the answer was yes. Occasionally I'd made a slip. On a few contentious issues I simply agreed to think about it. (In fact, the model now in the Appendix essentially has these well-intentioned but constitutionally dubious provisions removed. He was generally right. Keep it simple, stupid!)

I realised why I had been drawn to write to McGarvie in the first place. Here was a man who was truly prepared to sit down and do the hard yakka to bring about a republic. Not just to *read* my documents—and most recipients of them probably didn't even bother to read the one-page summary, let alone the rest—but to digest them completely, understand their implications, and work the whole model through in his own mind, working through the various permutations and combinations that could possibly occur, playing Devil's Advocate to try to concoct a scenario—no matter how improbable or apparently outrageous—that could trigger a constitutional crisis.

It was the same exhaustive process that I had gone through myself, while pushing my baby son Matthew in his pram on long walks through the outskirts of Berwick where we were renting a house—up, ironically, a new housing estate that was first called Constitution Hill, and then renamed Federation Hill as 2001 approached, with the names of Barton and

Deakin and Playford and Reid glinting down on us from the street signs in the hot summer sun, at the same time that the Founding Fathers' debates were swirling around inside my own almost-sunstruck head.

But back to the lunch. After some hours of these discussions, Dick and I had finished working through his notes. We concluded that even Gough wouldn't be able to bring about a constitutional crisis with my model.

"So what do you think of it?" I asked him.

"Oh, it's a good model," he replied. "A very sound model."

I was ecstatic. Here was one of the foremost "ultra-minimalist" republicans, arguably as knowledgeable in constitutional law and vice-regal conventions as any Australian alive, telling me that my model was sound. But then a gleam twinkled in his otherwise rheumy eyes, and a corner of a smile appeared.

"But you'll never get it up," he remarked, playfully, clearly relishing the moment. "It's too complicated. The people would never vote for it."

I stared at him for a few seconds, an open-mouthed half-smile on my own face. "You might be right," I conceded, "but we have to try."

And with the sparkle undoubtedly back in my own eye: "Anyway, it's got more of a chance than your own Council of Old Codgers model."

He cackled heartily at my riposte, causing the other distinguished diners around us to look over disdainfully at the interruption to their peace and tranquillity—only to convert their sneers into meekly subservient nods and smiles when they saw the distinguished source of the cackling.

Dick relaxed a further notch after this. He now knew that I understood the many facets of the problem of building a suitable republic model. Absolutely crucial is that it be stable—legally, constitutionally, rock-solid—not just in the years to come, but for the decades and centuries to come. The Turnbull model failed this requirement—which was, ultimately, the main reason why I voted "No" in the referendum. The McGarvie model passes the requirement almost by definition. And Dick had determined, to his own satisfaction, that my direct-election model passed muster on this count as well. Quite separate from the question of stability, however, is the need to create a model that would be accepted by the people of Australia. My belief is that the overwhelming support for direct election should be used as a starting point, a foundation stone, of any model. Dick believed that the simplicity of his own model—and the fact that it clearly does not change our system of government in any way—would result in its eventual adoption.

Dick believed this right to the end. I was fortunate to have lunched with him again in early 2003, not long before his illness and death, and we discussed the progress of our respective models. It was largely a replay of our discussion three years earlier. Both of us agreed that either of

our models would provide for a good republic. But we maintained our good-natured difference of opinion over which model—or, rather, class of models, namely, ultra-minimalist or direct-election—would eventually be favoured by the people. (And, to my ever-lasting grief, he turned down my offer to pay on *both* occasions, and shouted me lunch. "The next one's on me," I assured him as we departed. How often last words come back to haunt us.)

Let me make it clear that my dismissal of the popular chances of the McGarvie model relate only to its viability post-1999. If history had been different, and the 1998 Constitutional Convention had for some reason turned to the McGarvie model as its preferred option, then I believe the 1999 referendum (if John Howard had allowed it to go forward, which is highly doubtful) would have been successful. We would now be living in a McGarvie republic. Many advocates of direct election would have been able to see that the McGarvie model changed so little that further constitutional reform was not just possible, but indeed would be crying out for attention. The ARM would have been happy to support any safe model that succeeded in moving us to a republic—and the McGarvie model is the ultimate in safety and conservatism. Even the "constitutional monarchists" would have a difficult time arguing against the replacement of a "crowned" republic by one in which the "crown" is replaced by a council of former Presidents and Governors.

For these same reasons, it is conceivable that the McGarvie model might succeed in the future, given the right circumstances. But *this time around* the circumstances are simply not right for it. We had an acrimonious referendum campaign on the Turnbull model, which proved that its greatest downfall was that it was perceived to be a "politicians' republic"—that the pollies had stolen our right to vote for our President. The only workable progression from that result is to give the people of Australia what they want. Moving back the other way, to the ultra-minimalist McGarvie solution, is no longer viable. If we rejected a republic in which the President would be chosen by Parliament, what chance would we have of getting one up in which the President would be chosen by the Prime Minister? Absolutely none. The fact that this is what occurs *now*, under our current system, is no longer persuasive. The debate has moved on; there is no longer the possibility of holding out the hope of a two-step process, namely, McGarvie republic by 2001, to be converted into a direct-election republic by 2010. The republic we are working on now *will* be the one put in place—if we don't botch it—by 2010.

To be fair, even Malcolm Turnbull, his colleagues, and most monarchists realised that this would be the case. Many conservatives argued for a "Yes" vote in the 1999 referendum, on the basis that the Turnbull model

was at least reasonably conservative, and wouldn't be replaced by anything more radical for some decades to come—possibly never. It was widely acknowledged that a failure at the referendum would sweep away any possibility that parliamentary selection—or anything more conservative than this, such as the McGarvie model—would even be considered the next time around.

As Mark Latham and Gough Whitlam have realised—and as more republican leaders will undoubtedly realise as time progresses—there *is* no way forward except direct election.

An interesting historical question is why the McGarvie model failed to build momentum in time to topple the Keating–Turnbull model before the end of the 1990s. I believe that Dick McGarvie's crucial mistake was to decide that he should not speak out on constitutional issues whilst still in the office of Governor of Victoria. It must have been a difficult decision; indeed, Governor-General Bill Hayden was mortified to hear criticism of his remarks on the republic issue while he was still in office. But McGarvie's position was hardly radical or anti-monarchy; it is difficult to see how he would have been criticised for offering it. Then again, Dick felt so strongly about the impartiality of the State Governors and Governor-General that he never failed to lecture me on it whenever the opportunity arose. (For instance, I never realised that the Governor is exempted from voting—but it is obvious once one thinks about it: does the Queen vote in Britain? Of course not.) It would probably have been completely against his philosophy and sense of ethics to be arguing for the maintenance of the impartiality of vice-regal office, while himself occupying one of these offices and speaking out on an issue that was—at the time—perceived to be highly partisan.

McGarvie had, in fact, begun formulating his model years before leaving office, when the Turnbull Committee had confidentially requested his opinions in 1993. If he had begun making it public back in 1994 or 1995—rather than leaving it until he left office in January 1997, just twelve months out from the Constitutional Convention (which should have been even *less* than twelve months, according to the widely agreed timetable of holding the Convention in 1997, if the Senate hadn't held up the legislation), then there would have been some chance of it building up a sufficient head of steam that it could have emerged as a suitable compromise in 1998.

In other words, if Governor McGarvie's five-year term of office had been from 1988 to 1993, rather than from 1992 to 1997, things might well have been different. Malcolm Turnbull might, as suggested at the start of this chapter, be close to a national hero by now.

But it wasn't, and he's not, so let's get on with the hard yakka.

CHAPTER THREE

Listening to Australians

Why do we need to listen?

Fundamental to my philosophy—and hence the philosophy of this book—is that the very first step that needs to be taken in constructing a republic is to *listen to the people of Australia*. Doesn't it make good sense, in moving to a system of government that is wholly by the people and for the people, as the Americans like to say, that the people should actually get what they want?

It might be common sense, but the prevailing wisdom in the 1990s suggested otherwise. Ordinary Australians don't really know and don't really care about how our system of government works. They're just interested in how it affects them. It's the task of *politicians* to determine what is good and bad for the people—both on issues on which the major parties disagree, as well as those which have bipartisan or even all-party support.

This attitude was accentuated in the case of the republic. How, the pollies argued, could ordinary Australians possibly understand the intricacies of constitutional law and the mechanics of modern government? That naïve, "populist" notions like directly electing the President were widely desired was not surprising: the vast bulk of Australians had not been "educated" as to what this would actually mean for our system of parliamentary democracy.

This arrogance failed to take into account a number of crucial points.

Firstly, Australians no longer trust politicians. They are not, in general, respected. They are rarely seen as statesmen. They are not generally not representatives of ordinary Australia, who have, after succeeding in other careers, felt the calling of public service, and have volunteered their talents to that end. They are, almost exclusively these days, party hacks whose résumés are full of advisory roles to other politicians or political organisations. In other words, politics is a career, in large part divorced from the rest of society, with its own set of vicious dog-eat-dog, survival-

at-all-costs rules. The people of Australia seem to be more a hindrance to politicians than being the whole reason for their existence. Indeed, politics would undoubtedly run much more smoothly if there weren't any constituents interfering in the business at all.

There's nothing essentially Australian in all this. The tide of "professional politics" has swept through the world in the past several decades, and these professional politicians have shown their predecessors to be rank amateurs. Pure survival has done the rest: success in politics is everything; if you don't win a seat, you're out. Indeed, it's not just politics that has felt this tidal wave. Compare the professional AFL footballers of today with their amateur VFL counterparts of just a few decades ago. Many of the old amateurs look almost comical through today's eyes. But the greatest legends of the game are precisely those "rank amateurs". They had lives, characters, experiences outside football. Maybe they weren't the premium athletes that we have today, but they were respected.

This is not to say that we could—or even should—wind things back to the "good old days". Far from it: the demands of modern government would simply overwhelm many "amateurs". But it would be nice for candidates other than party hacks to bag a few winnable seats in Parliament. Indeed, the party that manages to bring in a sufficient number of such new faces may well find the "magic balance"—between career politicians and those who can connect with the community—that will make the task of getting and staying in power that much easier.

That might be a challenge for the future. But our modern political landscape—now—ensures that fundamental changes will not be accepted by the people of Australia *because* politicians are advocating them, but rather *despite* the fact that politicians are advocating them. Changes forced on our parliamentarians through a groundswell of public opinion are the ones most likely to succeed. God forbid, we might actually become a democracy, not just a professional political bureaucracy whose membership is determined by periodically putting up equally abhorrent options to the people in a popularity contest.

If I have offended every politician in the country by now, good. Because this is the view of most Australians, and it needs to be understood—in one's bones, not just superficially—if we are going to get anywhere in the republic debate. Personally, I realise how much hard work is done by very many of our politicians, much of it unheralded and unseen by the general community. It is heartbreaking to see the most altruistic and selfless of them taken for granted—and eventually overlooked for promotion or even preselection—if they don't generate sufficiently supportive headlines. And I am not so pessimistic to believe that some degree

of respect and trust might not return to the holders of public office some time in the future. But not now; not for a decade or two at the least.

And we need to deal with the republic issue long before that.

The second mistake rooted in the arrogance of the 1990s is to assume that the public's ignorance of and disinterest in the *details* of the machinery of government necessarily translates into a disinterest in the "big picture". The truth is the complete opposite. When John Hewson tried to bring in a GST, the public were more than interested. They wanted to know if it was fair, if it was simple; they wanted to know if they would end up paying more—to subsidise income tax cuts for businesses or high-income earners, perhaps—or less, or the same. They weren't interested in how many thousands of pages of legislation it would take to implement it—as long as it was sound. When Hewson couldn't figure out the GST on a cake or a chicken, the public decided he hadn't worked out the details sufficiently well. They didn't need to read those thousands of pages.

The same is true of the republic. The vast majority of Australians did not read through the copy of the Constitution included in the referendum materials, studying the deletions and additions to determine how it would change our system of government. They could see that there was a sufficient number of experts opposing the changes that any loopholes would be found by them, and exploited in the campaign. But the "big picture" of the republic—a Politician's Republic that robbed them of their right to vote for their President—sealed it for them. The only question was whether a "Yes" or a "No" vote held out the greater prospect of fixing this enormous blunder in the future; the general consensus was that it was a "No" vote that offered this promise.

The third mistake of the 1990s is related to the second, namely, the idea that the public would vote down anything that is "too complicated". Such a patronising attitude has been shown to be wrong so many times that it is difficult to believe that it is still a part of conventional political wisdom. For all his faults, John Howard realised the error of this prejudice, and went to the 1998 election with the "never ever" GST incorporated into a new tax system. Implementing it would clearly be horrendously complex—as it was. But most of the general public didn't care less about how many headaches it would give accountants (excepting, obviously, small business owners who faced an explosion of paperwork); rather, they looked at such "big picture" issues as apparent fairness, equity, and overall simplicity (once it was implemented, at any rate).

Anyone offering the opinion that the public would vote down a republic model simply because it involved too many amendments to the Constitution would do well to compare the required legislation with that re-

quired for implementing the GST. Unless it weighs in at a greater number of kilograms, the argument fails miserably.

Lies, damn lies, and statistics

It's one thing to advocate a process of listening to Australians, but how do we do it? We can't sit down individually with all twenty million of us, and find out what we'd really want. We need to rely on surveys and opinion polls to have some idea of what the whole population wants.

Polling and market research organisations have come a long way since Mark Twain uttered his famous condemnation. But the phrase continues to contain a grain of truth. Any statistic is but a piece of information that summarises, in some way, a larger set of data. Even if the mathematical requirements of representative sampling and catering for uncertainties are fulfilled—and it is not easy to achieve even these goals when the subjects are real human beings, rather than guinea pigs, even for our best professional pollsters—the statistics that emerge will still only relate to a particular set of questions asked at a particular time, with a particular background of assumptions held in the minds of those who were surveyed. "Do you favour a republic?" Well, what the hell is a "republic"? Is it one of those things you get when the Communists take over a country? Is it what you get after you guillotine all the heads off those who insist that the peasants eat cake? Don't laugh: just how many republics did *you* learn about when you were at school?

The failed attempt to bring in a republic in the 1990s, of course, has helped us to pass this first hurdle to a large extent. Most Australians now have some idea of what a "republic" means in the context of Australia. But the general principle remains unchanged: even the most professionally constructed surveys only provide answers to questions *as they are understood by those being surveyed*. The same question can elicit completely different responses, if events occur that cause the respondents to think differently about the topics being considered.

A particularly dangerous and misleading form of public opinion polling is that of "push-polling", which has gained momentum in recent years. The idea is that, after selecting a suitable sample of the population, but before asking them any questions, one first "educates" them about the issue at hand. Although highly effective as a propaganda tool, the results of any such effort should be discarded out of hand in any serious debate about public opinion. As any psychologist or sociologist can tell you, plying a respondent with information immediately before asking them

questions on the subject will undoubtedly skew the results in favour of the opinion presented. By how much depends on the nature of the subject matter—how strongly the respondent already feels about the issues—as well the persuasiveness and apparent logical consistency—even inevitability—of the arguments presented.

Unbelievably, the ARM carried out push-polling of this nature in the lead-up to the referendum. That they placed any credibility in the results was probably owed more to optimism than any conscious intention to deceive—they really did seem to believe that such events were valid components of their education campaign. (To give credit where it is due, Malcolm Turnbull's diary confirms that Rod Cameron of ANOP warned Turnbull of this phenomenon, and cautioned him not to place any faith in the results.)

So what *are* the after-effects of push-polling? Essentially, the information injected into the respondents during the "education" phase will, over a matter or days or weeks, be moulded and incorporated into their own knowledge and understanding of the issue. They will discuss it with family and friends, and come to their own conclusions on the basis of all the information at hand. There may be aspects of the issue that they hadn't realised, or had forgotten about, at the time of the push-polling; once these aspects are pointed out to them, or remembered, their opinions may change back to what they were before the push-polling occurred, or some intermediate position in-between.

That a question answered in such an environment is misleading and unfair is the basis of the widespread existence of statutory "cooling off" periods. A salesperson is simply a push-pollster whose "question" is whether the respondent will make a purchase. In buying a house or a car, or signing up after a wealth creation seminar, or taking out a loan, or making *any* purchase from a door-to-door salesperson, the environment or the implications of the purchase—or both—are of sufficiently gravity that the state affords the psychologically susceptible some measure of protection.

The insidiousness of push-polling in political matters arises from the psychological effect of the polling stage itself. There is nothing unethical about providing highly focused, highly targeted information campaigns. It is only if the respondents are "polled" at the end of the process that it becomes dishonest. People are familiar with the idea of providing their opinion from time to time—they are forced to do it at general elections, at the very least. But if the answers have been affected by an immediately prior propaganda session, they do not represent the respondent's own genuine beliefs. Nevertheless, the psychological effect of ticking a box can reinforce in the respondent's mind that it *is* "their" opinion—and the

box cannot be "un-ticked" days or weeks later. In other words, push-polling is a subtle but effective—yet at this time still, apparently, socially acceptable—form of brainwashing.

Judging public opinion

Throughout this chapter, I will discuss a number of fundamental questions that need to be answered before we go about constructing a republic for all Australians. In offering my opinions—and that's all they are—I will be drawing on my knowledge of the many polls and surveys that have been taken of the Australian people since the republic debate began. I have seen most of the important results, both at the time and through my own reading, and I have a fair grasp of the mathematical and statistical processes that are used to generate them. I often won't quote individual results, but rather will aggregate them together, in a way that takes into account their relative relevance and the presence or absence of confounding factors. I won't try to "exaggerate for the cause"; my estimates will err on the side of conservatism. If all this sounds very airy-fairy and unscientific, then you'll have to decide for yourself. I could say, "Trust me, I'm a scientist," but in this day and age that would be probably no more useful than saying, "Trust me, I'm a politician."

But a large part of what I will be offering here will not be based on statistics at all. Rather, it is based on my own discussions with ordinary Australians over the years, and the reading of the opinions of others in the letters and opinion pages of the press, and on the Internet. Of course, I cannot pretend to have associated with a fully representative sample of Australians, like the pollsters can. I have only indirect knowledge of opinions of those who are not Melburnians or Victorians. But my experiences are not as cloistered as some—I have not been holed up in a den of radical republicans for the past decade. I was a Freemason, and for a short time a member of the Liberal Party, and know intricately the views of monarchists and conservatives whose views straddle the spectrum to the far right of Bruce Ruxton. I teach at Mentone Grammar, an Anglican school (although brought up a Catholic), and served under a headmaster whose allegiance to the Empire went as far as having the school assembly sing *God Save The Queen* as well as *Advance Australia Fair* at the Anzac Day service—and this was in 2002, not 1962! (I declined the invitation to sing a foreign Anthem.) I've voted both ways in Federal and State elections, depending on the merits or demerits of the parties. Some of our best friends are even Collingwood supporters, and (unfathomably) my step-

sons, Micka, Mark and Andy, continue to support the Brisbane Lions, despite the undeniable superiority of Tigerland. And, of course, I've had the good fortune to discuss the republic with hundreds of my students over the years—who, despite the outdated popular prejudice against independent schools, have well and truly spanned the full political spectrum.

But I won't be offering anything here that is counterintuitive or off the beaten track. I'm not holding myself up as a prophet who can tell you what Australians "really" want—"despite what they might think that they want". Rather, what I say should simply be obvious—common sense. If you read the following and your response is, "Well, *I* could have bloody well told you that!" then I will be overjoyed.

Because that's the idea of judging public opinion, isn't it? To state the bleeding obvious.

Do we want Australian sovereignty?

Despite squabbles over semantics, this is the easiest question to answer. Whenever Australians have been polled on this question, the response has arguably been an overwhelming "yes". Whether 70 per cent or 90-plus per cent are in favour of this proposition does not matter greatly—and the results have generally fallen in this range; it is unquestionable that most Australians want an Australian to hold our highest office, without ultimate sovereignty being held by the occupant of the British throne.

The wording of such a survey question has, however, come under attack by the monarchists. It has usually been asked in the form, "Do you want an Australian to be head of state?" The problem is that the term "head of state" has, itself, been the subject of furious debate, as will be discussed shortly. Nevertheless, in the context of the surveys that have asked the question, it is undeniable that most Australians have interpreted the question to mean "Do you want an Australian to be President, rather than the British King or Queen being our Sovereign?"

The best solution, of course, would be to conduct fresh surveys with an undisputed question, such as this one, being asked. The monarchists rightly argue that, until such a question is asked, we cannot place absolute faith in the results of those earlier surveys. However, I have no doubt that the same results would be obtained for the unambiguous question as for the "head of state" question.

Now, to the term "head of state" itself. The fundamental problem with it is that it is not defined anywhere in our existing Constitution, or in the various laws of the UK and Australian Parliaments that underpin our con-

stitutional arrangements. It is undeniable that, if we *were* to become a republic, then the President would become our head of state: that was, for example, written into the constitutional amendments proposed in the 1999 referendum, and is likewise written into the model described in Appendix A. The problem is that many republicans began the 1990s assuming that the Queen was, indeed, our "head of state", and so it became idiomatic to pose the republic question as, "Do you want an Australian to be head of state?"

The problem is that "head of state" is, in a constitutional sense, an artificial term. It is used by foreign governments to determine issues of protocol; it is not used in any way in our Constitution. It has been, essentially, defined in the eye of the beholder. Sometimes the Queen has been taken to be our "head of state", because she is the person who is toasted. But there is no fundamental law that says that the person toasted must be the "head of state". Despite being possibly our most famous republican of recent years, Paul Keating allowed his Government's *Commonwealth Government Directory* to list the Governor-General as our "head of state"—not just once, but through many successive editions.

But this was not a mere misprint. It is clear that many constitutional thinkers have considered the Governor-General to be our "head of state", even before the question was raised explicitly. After all, most republican models give the President powers that are more or less closely aligned with those currently exercised by the Governor-General. If the President is to be "head of state" of the republic, then surely the Governor-General must be the closest thing we have to a "head of state" today?

Indeed, I find that I made the same assumption when I wrote my letter to the *Herald Sun* in 1994. I described the issue of having a say in the selection of the "head of state"—covering both the case of a republican President *and* a monarchical Governor-General!

We reach the same conclusion when we look at the powers of the Queen. Today, the only powers she has are to appoint and dismiss the Governor-General. Republicans want those powers to be given to Australians—whether to the Prime Minister, Parliament, or all Australians. Regardless of the model, republicans want the Queen's powers—to *select and remove the head of state*—to be given to the people.

Looked at in this way, the monarchists' description actually fits reality much better. The Queen is our "Sovereign". In other words, Australia's sovereignty is held by the Sovereign of the UK. A republic seeks to transfer that sovereignty to the people of Australia, or in other words we want "popular sovereignty".

Many republicans have countered this argument in the past, saying that it would be absurd if Australia's current "head of state" were to be ap-

pointed by Britain's "head of state". But rather than looking at this as an argument against calling the Governor-General the "head of state", we should instead embrace this absurdity as the perfect illustration of why we should become a republic!

(I must point out that I, too, rejected the monarchists' claim that the Governor-General be considered our "head of state", right up to the first draft of this book. It was only after reviewing the comprehensive material submitted by David Smith to the Senate Inquiry, supplemented by opinion pieces written by the current head of the ACM, David Flint, that I have recognised my error, and publicly conceded the point.)

The Queen herself seems to have been as unconcerned about the semantics of the term "head of state" as most Australians. Her website in the mid-1990s apparently described her as "head of state" of Australia and her other overseas realms—the description apparently being changed to "Sovereign" in the lead-up to the 1999 referendum, undoubtedly on the basis of advice that would seem to be sound.

However, some commentators have argued that it would in some way be "insulting" to the Queen for us to seek to become a republic. The statement she issued on the failing of the 1999 referendum dispels any such qualms:

> I have followed the debate with close attention. I have always made it clear that the future of the Monarchy in Australia is an issue for the Australian people and them alone to decide, by democratic and constitutional means. … For some while, it has been clear that many Australians have wanted constitutional change. Much of the debate has been about what that change should be. In the light of the result and on the advice of the Prime Minister, John Howard, I shall continue faithfully to serve under the Constitution as Queen of Australia to the very best of my ability in the future as I have tried to do over the past 47 years.

How can we but love her?—one almost gets a touch of the Menzies when reading these words. The Queen's pride for Australia is manifest; and she clearly would harbour no ill feeling when we finally leave the nest. Her final statement makes it clear that she is *continuing to do her duty*—until the day that we determine that we have a suitable alternative.

It would be a tragedy if Australia were to deny the Queen the pleasure of seeing us stand on our own two feet before the end of her reign. It will undoubtedly be as emotional a day for her as it will for us. To see a land you have reigned for more than half of its nationhood evolve, by completely peaceful means, into full independence would be a wonderful tribute to any monarch. Could anyone deny her the right to stand with us, in the final minute of her reign as Queen of Australia, enjoying the deli-

cious irony of the words of what, for that last day of our monarchy, should surely not just be our Royal Anthem but should also revert to being our National Anthem?

> … Long to reign over us;
> God save the Queen!

Do we want to become a republic?

This is now a completely meaningless and confounding question.

Back in the mid-1990s, before the republic referendum, asking this question was reasonably sensible. "The republic" was something relatively new to Australians. They knew that becoming one meant that we would break our ties with the British royal family, that an Australian would hold our highest office. They weren't exactly sure how that would work. Keating and Turnbull were saying that Parliament would select the President, but others were adamant that the public should get a vote. What the President would actually do was anyone's guess. Asking whether we wanted to become a republic was a reasonably well-defined question—ironically, because the notion *was* so vague. It was an "in principle" decision—a preliminary hearing, as it were.

That is no longer the case today. The referendum ensured that every Australian of voting age on 6 November 1999 had to educate themselves—to whatever level they felt necessary—to vote on the republic being put to them on that day. Australians who were teenagers in 1999 generally followed the debate at school; soon, teenagers will, no doubt, be learning about it from their history books. The referendum was followed by a four-year republican drought; no one needed reminding what it was all about. But since Latham's ascension to the leadership of the ALP in December 2003 it has again been in the news. There is no section of the Australian community ignorant of the republic issue.

We have progressed past the vague, in-principle question. The only way to ask the question today is to be more specific. Do we want to become a Turnbull republic? With the passage of years, some republicans may have been dismayed that the direct-electionists never kept to their promise of another republic vote "soon", and may feel that they should have voted "Yes". But how soon is "soon"? In any case, it could hardly have been expected that Reith would retire from politics, that Howard would win yet another election, and that Costello would be thwarted from taking over the Prime Ministership. Beazley promised the same "threshold" plebiscite that Keating did in 1996, followed by one to determine the

desired model, only then followed by a referendum to change the Constitution; Latham promised the same schedule in 2003. (I can't remember whether Crean said anything about it; that's probably why he's no longer the Leader of the Opposition.) The people of Australia voted to keep John Howard in the Lodge, and everyone knew that Howard would never again allow the republic to be raised amongst his Coalition colleagues. So maybe now *is* soon enough. Likewise, on the other side of the coin, many who voted "Yes" in 1999 only did so because the Turnbull model *was* the only republic model on offer at the time. They know, now, beyond any doubt, that it will never be put before the people again. Would they now vote for it—"theoretically"? Hardly.

In other words, if respondents were to interpret the question as "Would you vote for the same republic that was offered to you last time?" then the response would most likely be much less than the roughly 45 per cent it achieved at the referendum.

That this "Do you want a republic?" question does, nevertheless, continue to be asked, and that the response rate is back over 50 per cent, suggests that respondents are *not* interpreting it to be asking for their support for the Turnbull republic. But what *does* it represent?

Your guess is as good as mine.

I strongly recommend that anyone considering conducting a poll with this vague question replace it with some of the others listed in this chapter. The results will then, perhaps, be of some use to decision-makers.

Do we want to vote for our President?

Is the Pope a Catholic?

My namesake aside, the only uncertainty in the answer to this question is one of degree.

Firstly, "pure" monarchists—namely, those who actually want to retain our connection with the British royal family—most definitely don't want to vote for our President. No one voted to make Elizabeth II the Queen, and no one will vote to make Charles III the King; that's the way a hereditary monarchy works. "Pure" monarchists believe in the concept of "royal blood", and anything which puts the decision in the grubby hands of the populace would offend their noble sensibilities.

What proportion of the population are "pure" monarchists? It's difficult to put a firm figure on it—most of us have an affection for the Queen herself, if not the office of Queen of Australia, so it's not a completely black-and-white question—but from the polling undertaken in the 1990s

it must surely be no more than 10 or 20 per cent of the population at best. Moreover, this is a figure that can reasonably be expected to diminish by the "generational change" argument; as reviewed in Chapter 1, those of us born after 1960 have had at best an indirect or incidental connection with the old British Australia.

Secondly, "constitutional" monarchists—namely, those who believe our current constitutional system to be better than any alternative proposed to date—will not want to vote for our President either, *in the first instance*. For them, the fact that the Queen of Australia happens to be shared with other countries is purely an accident of history—of symbolic chagrin perhaps, but not worth a revolution. More important is the fact that we would be throwing away one of the best democracies in the world, for something that is untried and—in the case of many models—intrinsically flawed in construction.

However, unlike the "pure" monarchists, the "constitutional" monarchists are not immune from persuasion. If they could be convinced that an alternative system could be put in place that maintains all the strengths of our current constitutional monarchy, they may be tempted to support it. For example, the McGarvie model would have great appeal to these people; a McGarvie republic is essentially no different than what we have today (indeed, McGarvie even proposed retaining the name "Governor-General" to emphasise the continuation, and as Gough emphasises there is nothing fundamentally objectionable in the terms "Governor" or "Governor-General" for republicans, other than historical connotations).

Could a significant proportion of constitutional monarchists be persuaded to support a direct-election model? It seems at first sight to be a bit of a stretch; but if one goes about constructing such a model *from the viewpoint of a constitutional monarchist*, then there is a fair chance that a reasonable proportion of them may be won over.

Fortunately, that is precisely my own viewpoint; I have always found abhorrent the "she'll be right, mate" school of constitutional reform. Whether I can put my case persuasively enough to effect any conversions in the remainder of this book, or in the years ahead, remains to be seen. A dismal failure would be to convert none of them; a raging success would probably be to convert half of them.

So what proportion of the population are constitutional monarchists? This is an even more difficult figure to estimate than the "pure" monarchists, precisely because it is the "fall-back" position of cautious republicans—namely, if you can't give me a good republic model, then I'm a constitutional monarchist until you can (indeed, many republicans—myself included—fell into this category for the 1999 referendum). Not including these "fall-back republicans", then, I would have to estimate

that, again, no more than 10 or 20 per cent of the population to "intrinsically" be constitutional monarchists. In this case, however, there is no good case for a "generational change" argument: our current system is just as strong today as it was decades ago, and if we don't change it there's no reason for it to be any weaker in the future.

Of course, there is a grey area between "pure" monarchists and "constitutional" monarchists; many of the latter will undoubtedly be affected by our emotional and historical ties with the monarchy. But in totality the polling of the 1990s seems to indicate that (again, excluding "fall-back republicans") no more than about 30 per cent of the population are intrinsically monarchists of one type or the other; 35 per cent would be pushing it, and 40 per cent could probably be ruled out.

That leaves something like 70 per cent of us—or at least more than 65 per cent of us, and almost definitely more than 60 per cent of us—as republicans. What proportion of us wants to vote for our President?

The polling done for the "Yes" team during the campaign for the republic referendum tells us that the absolute lower bound for this figure is something like 65 per cent. So even after eight years with almost every republican telling the public that direct election is dangerous, unworkable and unfeasible—and even after an "education" and advertising campaign relentlessly driving home that same message day after day—fully *two-thirds* of republicans stuck to their insistence on having their say on the selection of the President. This demonstrates how incredibly robust and unshakeable this desire is.

Take the negative propaganda away, and the figure is surely much higher than this. Earlier in the decade, when the republic was only just entering our consciousnesses, the proportion was 70, 80, or even 90 per cent. Indeed, it wouldn't be an exaggeration to conclude that the public's understanding of the republic idea was simply this: that the public would choose an Australian to sit at our constitutional apex. "Republicans" were simply those who agreed with this general concept.

Today, one must suspect that the figure is at least 75 per cent. There are still the McGarvyites and other conservative republicans, who would prefer to see minimal change, and who fear the damage that earlier direct-election models would do to our system of government. But even they must acknowledge that they represent a larger proportion of publicly outspoken republicans than they do of the wider community; most Australians simply don't view the issue with the degree of intellectual detachment required to deny the natural urge to extend and enhance our democracy with a popular vote for the President. Likewise, there are still parliamentary-selectionists who remain committed to the primacy of Parliament in our democratic processes, or remain convinced by the persuasive

arguments of the ARM and their supporters throughout the 1990s; but in the absence of the imperative to have their "only" chance at a "Yes" vote in their lifetimes, one would have to question their loyalty to the model favoured by academics. Indeed, as we have seen in the previous chapter, even Thomas Keneally, the first Chairman of the ARM, and Peter Costello, the most senior Government parliamentarian and one of the most eloquent and convincing proponents for the "Yes" case, expressed their own support for direct election in the early 1990s, before the parliamentary selection model was "locked in".

If these estimates are reasonable, namely, that at least 75 per cent of republicans support direct election, and that around 70 per cent of Australians are intrinsically republican, then as a purely mathematical proposition we are already starting off with an absolute majority (roughly 52 per cent) for a direct-election republic, even without lifting a finger.

This figure is almost certainly too pessimistic, because all of the polling done on the question of a direct-election republic has consistently showed much greater support than this. For example, on 9 August 1999 a poll for the *Age* and the *Sydney Morning Herald* found that a simply worded direct-election question gained a 67 per cent "Yes" vote, 24 per cent "No", with 9 per cent undecided; yet the parliamentary selection question in the same poll received only a 31 per cent "Yes" vote, 55 per cent "No", with 14 per cent undecided.

Quite possibly I am severely underestimating the level of intrinsic republicanism in Australia at 70 per cent, or the support for direct election amongst republicans at 75 per cent. If we split the difference on the "undecided" respondents for the direct-election poll above, and, say, assume 72 per cent support for the question overall, then one would need to assume that something like 80 per cent of the country is intrinsically republican—given a good enough model—and, say, 90 per cent of those republicans favour direct election.

Whatever the figures may be now, it is undoubtable that support for direct election would soar further if it were put in the context of a direct-election model that did not change our form of parliamentary government, nor threaten us with constitutional crisis at some time in the future.

Do we want a U.S.-style executive President?

Although this question is confounded somewhat because it is connected with direct election, there seems to be very little support for it in any of the polling. My estimate would be that the "intrinsic" support for this

style of presidency—namely, the proportion of people who would support this model of their own volition, without "education" or restrictive alternatives—would be less than 10 per cent, and quite possibly less than 5 per cent.

The question, of course, would become more difficult if there was no "middle of the road" direct election model (such as that presented in this book) available. For instance, imagine that a plebiscite were to be held on a preferred model (after a "threshold" plebiscite on becoming a republic), as seems to be the favoured option today. The current thinking is that the range of models offered would be something like the following: an ultra-minimalist model (such as the McGarvie); a parliamentary-selection model (such as the Turnbull); and at least two direct-election models, covering both the "ceremonial presidency" and the "executive presidency" options—it being widely understood and agreed that a directly elected President could not be simply transplanted into our current Constitution without grave danger. Most likely there would be but one executive presidency model offered, and perhaps two—or even three—ceremonial presidency models.

If such a plebiscite were to be held, the ultra-minimal and parliamentary-selection models would receive negligible support, in the presence of direct-election alternatives. The only question would be which direct-election model would achieve the most support.

Our political leaders would, without doubt, be pushing for one of the ceremonial presidency models. That there would most likely be two or three such models put forward—compared to a solitary "token" executive presidency model—would clearly give voters the message that it had already been concluded that a ceremonial presidency would, in fact, win out—the only choice would be in the fine details.

Such arrogance would be extremely dangerous. It would almost be a replay of the 1990s, just one step on. As will be discussed in the next section, ordinary Australians would take very little convincing that the politicians were trying to use the republic issue to boost their own power, by eliminating that of the Governor-General. In other words, the people will have been given the chance to vote for their President—but only if such a President were neutered so that they could no longer "keep the bastards honest", to use Don Chipp's famous line.

Nothing, of course, could be farther from the truth. Our political leaders would have been led to support direct election simply because of the public's overwhelming insistence of it. They would have liked nothing better than to maintain the current powers of the Governor-General—who stays out of the political side of public life, and oversees the executive government in an almost invisible way—but would have been forced to

reconcile this wish with the need for a direct-election alternative. They would have been advised that "full codification" and limitation of the President's powers was the only reasonable way that this could be achieved. They weren't trying to grab more power—they were simply trying to give the people what they said they wanted!

In such an environment, it is not difficult to envisage a large swing of support to an executive presidency. Who cares if it means a lot of rewriting of the Constitution? At least we would be voting into office the person we wanted to lead our country. We would never be faced with the situation that we can face today: that we vote for a Prime Minster at a general election, with the knowledge that they could retire or be deposed by their party mid-term, leaving us with a Prime Minister that we never voted for in the first place.

Why couldn't an executive presidency work? If it works in the United States, then why not here? Why do our politicians and academics cling so anally to the British model of parliamentary democracy? Aren't we supposed to be getting rid of the British influence?

Such a development would be disastrous. The executive presidency model could easily gain the greatest number of votes in such a plebiscite—especially since, ironically, the various ceremonial presidency models would be taking votes from each other. It is not difficult to envisage the executive presidency model getting 40 per cent of the vote, with the ceremonial models dividing up the remaining 60 per cent. It could even go higher than this, to a 50–50 situation.

Our leaders may try to avoid such an outcome by ensuring that there is only one ceremonial presidency model put up against the executive presidency model. But would this change the fundamental argument against the "pollies' grab for power"? Over the decades, Australians have proven themselves remarkably reticent to pass any referendum seeking to increase the power of our parliamentarians, such as the apparently innocuous suggestion that three-year terms be increased to four, or that minimum terms be guaranteed. Such changes have always been opposed on the grounds that they would give the public less of a say—or less often, at any rate. Even with just two direct-election republic options, a campaign along these lines could quite conceivably result in a majority for the executive presidency model. Indeed, the avoidance of vote-splitting may even allow it to gain an *absolute* majority—of all votes, not just those for the direct-election models.

Where could we possibly go from there? Our parliamentarians would be faced with the unenviable task of writing themselves out of executive power in a new Constitution. Can we really believe that they would do this? More likely, they would argue that something had gone terribly

wrong with the process. The republic would again be dropped from the national agenda. The public's cynicism for politicians and our political processes would plumb new depths of despair.

And the *next* time that the republic issue returned to the agenda—the third attempt—we *might* be faced with some truly radical options.

Of course, my thesis is that we need a direct-election model that sits squarely between the ceremonial and executive presidency extremes, that does not provide our parliamentarians any more nor less power than they now possess. I hope that the "thought experiment" of this section drives home the reason why such a model is absolutely imperative.

Do we want a ceremonial President?

As with the previous question, and as noted above, this question is inextricably intertwined with that of direct election itself.

At first glance, most Australians probably would probably support a ceremonial presidency. They will have been offered what they have always wanted: a directly elected President. It would represent essentially no change from what they have now with the Governor-General—who just goes around cutting ribbons and giving speeches on community issues, right?

This state of mutual bliss could be maintained for some years. To have a Prime Minister again advocating progress towards a republic would be refreshing. For them to favour direct election as almost inevitable would be close to exhilarating. Finally, someone is listening to us. Yes, yes, of course we understand that the powers of the President would have to be explicitly limited. You legislators can worry about those details. Just work it all out, and give it to us to vote on. Don't worry about your opponents. They're just opposing you for political point-scoring. We trust you.

Early polls could show support for a ceremonial directly-elected presidency almost as high as that for direct election altogether—in other words, overwhelming. This would, no doubt, encourage most reluctantly republican politicians to "come on board"—at the least to negate any political advantage gained by the Prime Minister, but (less cynically) in genuine bipartisan support for a model that seems both safe and popular.

This support would begin to be eroded, once the public were educated about our current constitutional arrangements. Coalition supporters old enough to remember 1975 will be warned: "Imagine if there had been no way to stop Gough!" ALP supporters of the same vintage will be no less worried: "No Prime Minister would ever again allow a Governor-General

to ambush them in the way that Kerr ambushed Gough. Imagine if the Senate had been in a position to stall indefinitely!" The general public will be reminded that the Governor-General possesses "reserve" (emergency) powers to resolve constitutional crises—even if Kerr's application of them was arguably not ideal. Can politicians be trusted to resolve these crises themselves, with no "independent umpire" overseeing them?

Keneally's 1992 statement will be highlighted:

> Australia should have a head of State who is an Australian citizen, who is appointed by and can be removed by the Australian people and who represents and owes sole allegiance to the people of Australia. This head of state or President would have powers approximating those of the Governor-General and would act solely on the advice of prime ministers and ministers.

Fair enough, we've won the argument that the President should be appointed by the Australian people. (We will return to the issue of the dismissal of the President below.) But why are we not giving them the very powers that they need to keep an eye on Parliament on our behalf? If Parliament is not doing the right thing, and the President is unhappy—on our behalf—with the course of events, what can be done? Nothing? *Nothing?* Then what the hell is the use of voting for a President in the first place—just so that they can walk around cutting ribbons?

George Winterton, an expert on constitutional law, who was a leading member of the Turnbull Committee, summed up his own views of the Australian people on this issue in the mid-1990s:

> [P]ublic opinion polls do suggest that the people don't want the powers of the president reduced. People probably aren't very familiar with exactly what the powers are, but they seem to favour either the present powers of the Governor-General, or perhaps even a little more. Certainly not less. They seem to want a popularly elected umpire, or ombudsman, or guardian who will act in the public interest. This person should have some power to check, as they see it, the possible abuse of power by the government. I don't think people want a reduction of the reserve powers.

The first stage of indignation of Australians was felt in 1999—that they would not get the chance to select their President—but the second stage is not difficult to foresee. Letting us vote for our President, but then turning them into a useless ornament, could very easily be portrayed as but the latest political con job. Remember, politicians are only lying when their mouths are moving.

Imagine a Singleton's advertisement featuring a digitally modified, mammary-endowed bull wearing a "President" badge. "A ceremonial

President's as useful as tits on a bull." (Cut to black screen with white text.) "Vote for a Real Republic, not a Politicians' Republic, on [insert date here]." (Cut back to the bull's face, just as a knife-wielding politician at the other end converts him into a steer. Wide-eyed squeal of pain.)

A bit over the top? Perhaps. I'm not sure the ABA would approve. But, however presented, the message would get through. 1999 all over again.

This time around, of course, there would be no possibility of countering such a campaign with the scare tactics attempted by the "Yes" campaign in 1999. There clearly *will* be an outcome—the threshold "Republic?" plebiscite will have already been passed. The alternative will be right there for choosing: the executive presidency model!

And that, my friends, would be the beginning of the end of parliamentary government in this country.

Who should be able to dismiss the President?

This is an absolutely crucial question in the construction of any republic model. To date, however, it has not received wide public attention. Its overriding importance was only conceded by the "experts" during the 1998 Constitutional Convention, when the ARM modified the Keating model (which required an almost impossible two-thirds majority of a joint sitting of Parliament to dismiss the President) into the Turnbull model (which allowed the Prime Minister to dismiss the President instantly, subject to a later ratification by the House of Representatives—which, if it failed, would have no substantial consequences). This aspect of the model received some attention during the early, pre-advertising lead-up to the referendum—as a fairly academic question—but was completely overshadowed by the direct-election issue once the campaign began in earnest.

I would hazard a guess that if a poll was taken asking Australians to tick the method of dismissal offered to them in the 1999 referendum, almost all would tick the box labelled "Not sure".

This, then, is a question which is both crucial to constructing a republic, and moreover is one which Australians have essentially no ingrained preconceptions or prejudice on. So what might we *expect* them to feel?

The train of thought is not difficult to imagine. The President will be selected by us—the people—to oversee the Parliament and the Government, on our behalf. Who should be able to remove them from that role?

It's bleeding obvious: *we* should! Remember Keneally's eminently sensible and intuitive words:

> Australia should have a head of State who is an Australian citizen, who is appointed by and can be removed by the Australian people and who represents and owes sole allegiance to the people of Australia.

But shouldn't it be the Prime Minister, or the Parliament, who dismisses the President? Of course not—why should it be? Does the captain of a cricket team dismiss the umpire and call for a new one to be appointed, just because an unfavourable decision is handed down? Or do both teams have a joint meeting to vote for a new umpire? How ridiculous. Our President is supposed to be "keeping the bastards honest"; why on earth should she be dismissible by the "Prime Bastard"? If she's not doing her job, *we'll* get rid of her. We put her there, and we're the only ones who have the right to take that privilege away.

The logic is impeccable. It's right. It's just. But how do we make it work? When we elect the President, we do so for an obvious reason, namely, that the previous President is, for whatever reason, no longer the President. We hold an election (to be discussed in Chapter 5). But how do we vote on *removing* the President? Who decides whether or when we have such a vote?

It's an interesting question. If the President is there to look out for the interests of the people, then how do the people assert their disapproval of the performance of the President themselves?

Obviously the President won't call for such a vote. An alternative might be to allow such a vote if a sufficient proportion of Australians petitioned the Parliament. However, perhaps we have gone a little too far in our cynicism of politicians. After all, we *do* vote them into Parliament, right? They *are*, ultimately, our representatives, no matter how uninspiring the choices put to us at election time. Moreover, if the President's performance is not acceptable, then surely it will be affecting the smooth working of Parliament or of the Government; either the House or the Senate—or both—would, undoubtedly, wish to have them removed as well, wouldn't they? (The Hollingworth affair reminds us that the President may need to be dismissed for reasons other than the impeding of the smooth working of the Parliament or the Government, but in such cases either the House or the Senate would surely take up the case on the urging of their constituents—and the very hint of dismissal should, as in the Hollingworth case, be sufficient to bring about a resignation.)

This suggests that a suitable mechanism may be for either House of Parliament to be enabled to call a vote of the people, asking that their President be removed from office.

Although it has not been tested in polling, I have absolutely no doubt that Australians would look upon such an arrangement extremely fa-

vourably. After all, if they are so vehemently opposed to losing the right to elect their President, why would they be any less vehemently opposed to any system that allowed their decision to be overruled by politicians?

Do we want a politician for President?

This is the question that Malcolm Turnbull and (hence) the ARM emphasised above all else in the lead-up to the 1999 referendum. Turnbull appreciated the public's cynicism for politicians (described earlier), and concluded that they would not want their President—their ultimate protector against politicians—to themselves be a politician.

Throughout his referendum campaign diary, Turnbull continually expressed his exasperation at the fact that his model was being portrayed as the one that would lead to a politician President. In his opinion, direct election would be much more likely to lead to this result—after all, who are the experts at winning elections, if not politicians?

Let us step back from this question for a moment, and return to the more fundamental question above: do the public really *care* whether their President is a politician or not?

Given our earlier discussions, I am sure that most Australians would prefer that their President not be a politician, in the same way that they would not want them to be a career criminal or an international terrorist. But the Governor-General today is intricately involved in the machinery of government, and the President (unless stripped of their power—which we have ruled out above) will be no less so. Like it or not, politicians are well-equipped to deal with this sort of responsibility—they have seen the process in operation, themselves, throughout their political careers.

Whether a politician can be trusted to shake off their partisan past and rise to the challenge of absolute neutrality and fairness of presidential office is a judgment that can only be made on a case by case basis. (I am assuming here that we are looking at a President with the same powers and responsibilities as the Governor-General has today.) Was Bill Hayden a good Governor-General? I don't think there can be any question of that. He fulfilled the requirements of the office admirably. But consider his political past: he was Treasurer at the time of the Dismissal, and, after Gough's retirement from politics, ascended to the position of Leader of the Opposition. These are the two highest and most overtly partisan positions in our Parliament, other than that of the Prime Minister itself—yet Hayden still made a good Governor-General. William McKell, Richard Casey and Paul Hasluck made similarly dignified transitions from politi-

cal to vice-regal life (although their terms of office are beyond the memories of many Australians alive today—Bill Hayden has been the only example in the past three decades).

It is not so important whether a person has been a non-politician before being appointed or elected to the office of Governor-General or President; what is important is whether they can be a non-politician *during their time in that office*. Indeed, the 1998 Constitutional Convention showed with crystal clarity that non-politicians can be converted into political animals within an extremely short period of time, if immersed in the right environment and being in possession of suitably amenable beliefs. It could almost be argued that the elected delegates became "de facto politicians" once they had succeeded in being elected—although that would be far too much of a generalisation: many elected delegates refused to act like politicians at all (recall those direct-electionists and McGarvyites who wouldn't "deal" with Turnbull and the ARM).

It would not take any great leap of imagination for one to conceive of the same process occurring with a President. Whether a leader of business, of the defence forces, of community service organisations, of sporting teams, or indeed any other occupation prior to becoming President, a suitable combination of personality defects could always lead to a delusion that interference in the political process is called for. Indeed, it could be argued that those who have not seen how it all works "from the inside" would probably be more likely to misunderstand or misjudge the proprieties of the office than those who have worked with the former President.

Of course, if we really did want to know the answer to the question of whether Australians wanted a politician for President, we would need to qualify it with an explanation of which republic model we had in mind. Not only that, but the exact wording of the question would have a large bearing on the results. "Would you mind if a politician was one of the candidates in a presidential election?" If it's an election—and if we're the ones voting—then most Australians would hardly object; if that person were deemed suitable for such a nomination, why not? But there are still unstated assumptions in this question. Consider: "Would you mind if all three candidates in a presidential election were politicians?" *Now* we've clearly got a problem! "… if all three had been chosen by a parliamentary committee?" Now we've got a *crisis*!

The real crux of the issue, of course, is whether the list of candidates we get to vote for provides us without enough real choice. The examples of "democratic" elections around the world in which there is effectively only one candidate—or only candidates from one party—are somewhat more extreme than what we would expect to see in Australia, but it's simply a matter of degree. Imagine you were facing a presidential ballot

paper with John Howard, Mark "Chopper" Read, and Peter Hollingworth the only three choices. There'd be a revolution! Fair enough, still too outrageous; then what about John Howard, Andrew Bartlett, and Simon Crean? Still rather extreme, but then again truth can be stranger than fiction from time to time. So how far do we have to "tone down" the list before it is plausible? What about in five years, twenty years, a hundred years from today, when our current constitutional monarchy is but an entry in our history textbook websites?

The answer is not to simply list on the ballot paper every single person nominated for President by an Australian citizen. There could be thousands of names on a ballot paper ten metres long! Rather, the key is to have some way of selecting a reasonable list of nominees, in such a way that the voters can express their disapproval with the entire set if it is poorly and cynically constructed.

I shall have more to say on this in Chapter 5.

Do we care how many amendments are needed?

Throughout the 1990s, those who wished to scuttle the republic debate would occasionally play the "complexity" card, namely, "Just *look* at how many amendments they want to make to the Constitution, for such a 'simple' model!" The final Turnbull model, for example, required something like 69 changes. The implication was that such a "huge" number of changes must necessarily represent such a radical and massive modification of the Constitution that we should think very, very carefully before committing to such an outcome.

I have dealt with the general "complexity" argument above. I doubt that, if questioned explicitly, Australians would care very much at all about how many amendments to the Constitution would be required, if the changes being brought in were good enough.

Nevertheless, it is worth pointing out that there are two ways in which one can contemplate the amendments to the Constitution required to bring about a change to a particular republic model. One way is to start with the entire text of the Constitution, and then cross out those words that are to be deleted and type in those words that are to be added (with some distinguishing typography, such as being in boldface of underlined). This is the way that Winterton produced his first republican modification of the Constitution, and likewise the way that the amendments required for the 1999 referendum were shown in the literature distributed before polling day. It is also the method that I have used in the Appendix.

The other way is to consider not the Constitution itself, but rather the actual legislation that *changes* the Constitution. This is, after some preliminaries, constructed in the general form, "In Section X, strike out the words 'blah blah blah' and replace them by the words 'blather blather'," and that sort of thing. Clearly, this form of description is much more complicated and indirect. It is really only required that those drafting and checking the legislation for the referendum describe the changes in this roundabout way; the rest of us can just view the edited document directly.

This method has, however, been used by those advocating "minimal" models, in an attempt to show how complicated *any* change to the Constitution is. In other words, "If these are the lengths we must go to in order to just make these *tiny little* changes, imagine all the work that would need to be done to make more wholesale changes!"

Again, I doubt that this form of academic argument would appeal to any significant portion of the community at all. In reality, all that we are doing is editing the Constitution. If the Constitution that results is legally sound and unambiguous, and fulfils our desires and requirements, then that is all that we fundamentally need to know. (I will, however, have more to say about the art of changing the Constitution in Chapter 8.)

Do we want to pay for all these elections?

During the republic debate of the 1990s, anti-republicans often tried to make an issue of the extra cost of holding elections for the republic issue. There was the election for the delegates to the Constitutional Convention (which was a little cheaper because it was a voluntary postal ballot); there was the 1999 referendum itself. Now we are facing another election for each of the Latham plebiscites, and a further one for the final referendum itself. And if direct election gets up—and there is no doubt that it will—then there will be another election every time we need a new President. What an outrageous waste of taxpayers' money!

In reality, the argument fell flat with Australians, on several grounds.

Firstly, the cost of an election sounds exorbitant when expressed as a dollar figure—but so too does any dollar figure for the nation as a whole. A health package of $800 million, or $1.3 billion, or tax cuts of $2.4 billion—these figures are simply beyond the comprehension of most Australians. It makes much more sense to break them down into "per capita" (per person) figures. Let's assume there are about 20 million Australians (as was true just before the writing of this book). We then have a health package of $40 per Australian, or $65 per Australian, or tax cuts of $120

per Australian. (All of these figures are per year.) *Now* we can get some handle on the magnitude of the costs or the benefits. A family of two adults and two children can multiply these figures by four. It's only rough, of course—not everyone pays or receives equally—but it at least gives us an approximate figure which we can relate to.

How much does an election cost, then? The current estimates are about $3.50 per Australian. Is it worth $3.50 to vote for a republic? Is it worth saving $3.50 so that we don't have to go to the "expense" of an election for our President? I don't know if this question has ever been put before Australians, but given the scorn and derision following Peter Costello's "sandwich and milk shake" tax cuts, I would suspect that most Australians would respond to such a question with laughter. (And those sandwiches and milk shakes were once a week—not once every few years!)

Secondly, Australians have already expressed their unwillingness to remove the "wastefulness" of too-frequent elections in the past. Referenda seeking to increasing Federal parliamentary terms to four years instead of three, or to guarantee a minimum term before which an election cannot be called, have failed dismally—despite being put to the people on more than one occasion, and despite having bipartisan support. Strangely enough, the people of Australia simply don't buy the argument that saving $1.20 per year is a worthwhile trade-off for giving our politicians an extra year before having to face us at the ballot box. Funny about that.

Thirdly, any argument about the cost of elections usually fails to take into account the trends in technology and voting around the world. As I already noted in my 1994 letter to the *Herald Sun*, the Internet will, sooner or later, provide us with the ability to vote online, rather than having to fill in pieces of paper in a local polling booth which are then counted by hand. Already many Australians do their banking online, and make credit card purchases online. The technological safeguards required for us to entrust our voting systems to the Internet are not, yet, sufficiently strong; that may change in the next decade. But if we are creating a new system of government that is supposed to last for centuries—not just a few years—then it would be foolish to imagine that the cost of performing an exhaustive, compulsory vote of the people will not drop dramatically in the future. (The main obstacle today, ironically, is that the safeguards would cost more than the $3.50 per Australian—or $5.60 per voter—that it costs to conduct our elections the "old-fashioned" way.)

In other words, provided that we do not put in place a system that would require a vote of the people every month, or even every year, then the cost of these elections will be a negligible influence on most Australians' views. Indeed, as George Winterton has argued, Australians would,

if anything, opt for *more* say in the political process, not less—and if this means a greater amount of voting, then so be it.

Do we want to curtail or abolish the Senate?

Following the 1975 crisis, there was an understandable backlash against not just Kerr's ambush of Whitlam, but also Fraser's tactic of "blocking supply" (refusing to allow the Government's legislation for funding the ordinary services of the Commonwealth Government from passing the Senate) to bring about the impasse in the first place.

The first problem—of the appropriate response of a Governor-General or President in the face of a looming constitutional crisis—is a rather intricate constitutional question, and it is something that I will discuss at length in the next chapter, and particularly in Chapter 7.

The question of whether the Senate should be allowed to "block supply", on the other hand, has been tied into the question of wider constitutional reform. After the Dismissal, Gough Whitlam called for the powers of the Senate to be curtailed—at the least to prevent them from blocking money bills, as has been the case for the House of Lords in Britain for almost a century. This, and the "maintained rage" over the Dismissal, led to the Labor advocates of constitutional reform pushing more for reform of the Senate than for any move to a republic, at least until the end of the 1980s. This goal was pushed somewhat onto the backburner once the republic debate took hold in the 1990s, but it remains a latent wish that has the potential to ignite as soon as any proposal to seriously rewrite our Constitution is put on the table.

This would be a dangerous development. As discussed above, Australians are remarkably reticent to give their parliamentarians even one iota more power than they already possess. Curtailing the powers of the Senate (or, worse, abolishing it completely) would obviously provide more power to the House of Representatives. Without doubt, it is in the House of Representatives that Governments are formed; the House drives the agenda of the Parliament. And, yes, the House is frequently frustrated by the Senate; Federal Governments today do not have untrammelled power to legislate as they wish. But does this mean that the powers of the Senate need to be curtailed?

For some politicians and former politicians, the answer is "yes". But it can be demonstrated quite simply that the people of Australia think otherwise. For decades, the public have seen Government legislation stalled, blocked, amended in the Senate. Governments have had to compromise

and deal with the Opposition and the minority parties and Independents to get controversial legislation through. If there was widespread disgust—or even concern—about this practice, the solution would be simple: at the next election, everyone would vote for the same party in the Senate as for the House, so that the party that won the election would be able to govern with a majority in both Houses of Parliament, and have their legislation passed without compromise.

True, the fact that only half of the Senate is usually replaced at each general election does mean that this process would not always work when there was a change of Government; but we have seen the Hawke–Keating Labor Governments win five elections in a row, and the Howard Government win three elections in a row, without the Senate ever "coming into line" with the House. We must conclude that the people of Australia are quite happy to have a Senate with "teeth", curbing the power of the House and of the Government.

In all this we must also remember that the Senate was constituted much differently than the House at Federation. Seats in the House are determined by population; although there are small variations, each seat represents roughly the same number of Australians. This is about as democratic as it comes, and is, of course, the reason that it is in the House that Governments are made or broken.

But in federating into a Commonwealth, such a method of election presented a formidable danger to the less populous States. (It is the height of arrogance that they are often referred to as the "smaller States", and I can empathise with the secessionist sentiments in Western Australia and Northern Queensland when such a patronising term is used.) Throughout our time as a Federation, the populations of New South Wales and Victoria together have represented significantly more than half of that of the entire continent, and so we have, together, dominated the House of Representatives. (In the first Parliament, New South Wales had 26 seats, Victoria 23, and the remaining four States only had 26 seats between them; today, New South Wales has 50 seats, Victoria 37, and the remaining States and Territories have only 63 seats between them.)

The solution was to create an Upper House, the Senate, in which each State would be represented equally, regardless of its population. If you like, this was an early form of "geographical equal opportunity", built into our very Federal structure. The Senate would have equal powers with the House, excepting only that money bills must originate in the House. This small asymmetry would then be enough to ensure that the primacy of the House in determining Governments would be maintained.

The rise of political parties (only embryonic at the time of Federation) swamped the role of the Senate as a "States' House", and it has been ar-

gued (by those wishing to curtail the powers of the Senate) that this, in itself, is reason enough to regard it as a historical curiosity and an anomaly. The Senate is controlled by one or more parties; senators do not (generally) vote on behalf of their States, but rather on party lines (excepting, of course, Independent senators). The argument is that such an "unrepresentative" House should not be able to thwart the will of the people—as determined by the House of Representatives.

I do not believe that Australians would agree with this line of argument in the least. For more than half a century the Senate has been elected by "proportional representation", which is a method of counting the votes that ensures that the number of seats held by any party is roughly proportional to the number of votes that they get in that State. (It's a bit more complicated than this, but that's the basic idea.) Without this system of voting, smaller parties such as the Democrats or the Greens would not be able to achieve any representation in our Parliament at all, because they do not have sufficient support to topple any of the major parties in any one single seat for the House—that's why they're all senators.

And Australians like this system. They vote for the party they wish to govern in the House (or vote for a minor party and choose their preferences to point for the party they wish to govern, knowing full well that the minor party will not usually have any chance of winning the seat). Many then put in a "keeping the bastards honest" vote for the Senate. This allows them to give a "flavour" to their vote. Even when none of the minor parties appeal to them, swinging voters will often vote one way for the House, and the other way for the Senate, just to make sure that there remains a balance.

If you like, it's simply our cynicism of party politics being transferred to the ballot box. Sure, we'll vote for one of these pathetic alternatives—but we'll make sure you can't go crazy and pass legislation that you never told us about, and that we never authorised you to introduce.

In this environment, if Australians were polled on the issue, in a neutral way, I cannot imagine anything more than negligible support for changing the powers of the Senate.

However, the outstanding question of what should occur when the Senate blocks supply is one that needs to be resolved. My belief is that Australians would not like the Senate's right to block supply to be curtailed either; anything which gives more power to the Government will, inevitably, be rejected. Rather, it is important to ensure that any such blockage will not lead to an unresolvable constitutional crisis, and in particular that Kerr's botched handling of it in 1975 is never repeated, or even possible to be repeated. I will address these issues, and offer a solution along these lines, in Chapter 4 and Chapter 7.

Do we want to abolish the States?

Whenever the opportunity of substantially modifying our Constitution is put on the table, politicians and other constitutional commentators often feel the natural urge to inject their own pet frustration into the issue.

Abolition of the States is one of these pet wishes that has popped up occasionally in the republic debate. It is not difficult to see why: Federal–State relations are tricky at the best of times, and increasingly over the past two decades we have found the State Governments largely in the control of one party, and the Federal Government under the control of the other; whether this is coincidence, or a conscious push by voters to provide yet another check and balance in our system of government, remains a point of contention; but I believe there is substance to the argument that it is deliberate. The subtle balance of funding responsibilities between the States and the Commonwealth for such crucial areas as health, education and transport, and the disbursement to the States of revenue from Income Tax and, now, the GST, provide politicians ample opportunities for dispute, one-upmanship and buck-passing. In this environment, it is not surprising that some of our Federal parliamentarians sometimes feel that the States are just there to impede real progress and make life difficult for them.

I do not, however, believe that the Australian public sees things this way. I cannot imagine anything but negligible support for the abolition of the States, no matter what form of alternative were to be proposed in its stead. It would clearly be perceived as a grab for power by our Federal parliamentarians, and such attempts do not have the public's support.

In this context, it is surprising that the idea has been seriously floated at all during the republic debate. Of course, it's a great "spoiling" line: in May 1993 the Leader of the Opposition, John Hewson, told Parliament that key members of the ALP wanted to abolish the States as well as the Senate; in August 1993 the Liberal Party Federal Council refused to allow party members a conscience vote on the republic, on grounds that included a Labor "hidden agenda" to "undermine the power of the States, to abolish the Senate", and so on. But then we have the serious proposals: earlier in August 1993 the Leader of the Australian Democrats, Cheryl Kernot, said there were valid arguments for abolishing the States and replacing them with regional governments, and committed the Democrats to a Task Force to examine the possibility. Some of the republic models created both before and after the failed 1999 referendum also envisage fundamental reform to the powers of the States.

In my opinion, any constitutional reform bringing in a republic should leave the States alone, completely. With any referendum on the issue requiring support in a majority of States, it is not worth touching their power in any way, even if well-meaning. (I will, however, make one proposal in Chapter 8 that *protects* the powers of the States; it is essentially a housekeeping exercise left over from the days of Federation, but it does represent a loophole that, in my opinion, needs to be closed.)

Do we hate the British?

Of course we hate the bloody Poms!

Seriously, the days of portraying republicanism as "Britain-bashing" are long behind us. With even the Queen and Prince Charles expressing their full understanding and support for Australia severing links with their family, this argument has now largely fallen by the wayside. The fact that a rapidly decreasing proportion of Australians actually consider themselves to be "British" is, of course, an important key to this progress. Indeed, one could argue that the widespread resistance to republicanism up to (at least) the end of the 1960s lay in this fundamental dichotomy: were we British or Australian? Some older Australians may continue to struggle with this issue.

Australia's relationship with Britain has matured remarkably over the past few decades. Britain will, of course, always be dear to us—a part of our history, a member of our immediate family in the international community—and we will, of course, remain a committed member of the Commonwealth of Nations. Even today, with American culture thrust upon us (and the rest of the world) so pervasively, many Australians maintain a greater affinity for British culture—and particularly British humour—than American. We will continue to enjoy beating the Poms in cricket, and those Australians not skilful enough to play real football will continue to battle against them in the substitute game of rugby.

Where does our relationship with Britain fit in with our relationships with other countries? A vague question, but, roughly speaking, I'd imagine we feel ourselves closer to New Zealand; Britain would come in about equal with the United States and Ireland. Most other countries would come in more or less equal; it depends one's own ethnic mix, and those of one's friends and colleagues. Those of us born after 1960 probably feel a closer affinity with the aboriginal peoples of our land than with Britain as such; our way of life and customs are seen as "European" rather than British. (The aboriginal peoples are not, of course, legally a separate na-

tion, but in some sense that's how many of us perceive them: we invaded and took over their land in an undeclared war, and are concerned that they are given a fair go and some form of recompense—but not to the extent of handing back the entire continent. [How about that as an expression of our ambiguous guilt?])

Of course, the most powerful weapon for republicans in any debate is a pompous Englishman expressing disdain in false upper-class tones that mere colonialists would dare insult the monarchy by attempting to cut their ties with Britain. I haven't visited the United Kingdom, but I would have trouble believing that such creatures still really exist. Certainly they are close to extinct in this country; if one were to appear in any serious debate on the republic, I would suspect it to be an attempt at comedy—or a plant by republicans to get our backs up. But the question of whether we actually want to cut our ties with Britain is now behind us, and there would be little point in debating a question that most Australians have already come to a decision on, one way or the other.

Must we change the flag too?

This is a troubling issue.

Having a Union Jack in the corner of our national flag is just as annoying to many republicans as having the British Queen as our Sovereign. It is no coincidence that widespread debate about the flag arose at the same time as debate about our constitutional arrangements.

The fundamental problem is that there is a much greater support for our current flag than there is for the monarchy. Despite the best efforts of Ausflag and others, I suspect that our current flag would probably receive more than 60 per cent support from Australians, if the question were put today in a referendum.

The general consensus of opinion has therefore been that we should ensure that the flag issue is dissociated from the republic issue. Malcolm Turnbull resigned as a director of Ausflag in the early 1990s in recognition of this reality.

But what about when we *do* become a republic? It's hard to deny that retaining a Union Jack on our flag would be rather strange. Inevitably there will be another push for the flag to be changed.

The big problem with all this is that no one has been able to come up with a flag that has captured the imagination of Australians. I've even had a try at it myself; the final iteration in the process is on my website, but

I'm still not happy with it. I've seen a number of better designs. Eventually we may even go for something very simple.

The problem is that we've become used to our current flag. It looks good. The Union Jack is quite photogenic, and it's hard to part with it. But, ultimately, it would be strange if we were to retain it.

The argument used to be made that there are so many flags with Union Jacks in the corner that our flag is not distinctive enough. Ironically, many of these other flags have since been changed, and there aren't many left that can be confused with ours. New Zealand's is probably the worst—it takes a while, when looking at it, to realise it's *not* an Australian flag.

An alternative argument is that our flag is a nice composite of the past (the Union Jack), the present (the Federation Star), and the future (the Southern Cross—if one day we travel to the stars, or to other planets at the least). It's not a completely convincing argument, but perhaps it will suffice for us to keep the flag issue on the backburner, until the republic issue has been dealt with.

A reasonable question for Australians might be, "Would you be happy to keep our current Australian flag, even if we became a republic?" I think there would be great support for such a concession.

How soon do we want a republic?

Now, of course!

Seriously, I must relate another anecdote. It was mid-2000, some six or so months after the failure of the republic referendum. Several local members of the ARM had read of my direct-election model, and invited me to an ARM function in Carlton (an inner-city suburb of Melbourne, adjacent to the University of Melbourne). It was, effectively, the first "regrouping and rebuilding" function after the referendum loss. I was reticent to attend—I wasn't very happy with the way that the ARM had run the republic debate during the 1990s—but I was assured that the organisation was being completely overhauled into a more "broad church".

It was, indeed, an enjoyable evening. But throughout many interesting discussions I was struck by what, to me, seemed to be un unbelievably naïve attitude to the possible timeline for further progress on the republic—not just by its followers, the rank-and-file members, but by those who were leaders in the organisation.

Many were expressing the belief that they hoped for another referendum by the end of the year, or at worst during 2001. I couldn't believe my

ears. A referendum within a year? It was preposterous. Didn't these people have any idea about what had happened? Surely they did—they had been the ones putting in the hard yakka for the referendum campaign. So how did they come to such a warped idea about the future?

Looking back on it, I think it was the unique development of the ARM itself that led to such unfounded optimism. Most of the branch structure of the organisation was not put in place until the lead-up to the vote for delegates to the Constitutional Convention, in late 1997—and in some cases not until 1998 or even 1999. But even the members that joined up as "early" as 1997 saw, within a historically short period of time, the campaign for the Constitutional Convention election, the Convention itself, the campaign for the 1999 referendum, and the referendum itself. They were used to seeing things happening on, roughly, an annual basis.

But they had not, as a rule, participated in the debate that preceded these final steps. They hadn't been there with Turnbull and his colleagues for the best part of a decade, preparing the decision-makers and the public of Australia for the republic issue. They didn't have a broad knowledge about the various models that had been proposed; the Turnbull model was, for most of them, *the* only model. They were the disciples of the ARM; they generally hadn't associated with the conservative republicans or the radical republicans at all—indeed, these groups were more dangerous than the lame monarchists.

With this kind of background, it is understandable that many of them believed that another opportunity would arise within a year or so.

The reality, of course, is much different. Looked at historically, the republic issue seems to have progressed quite nicely, but when one lives through those years—"real time"—one realises that it hasn't been a hurly-burly, exciting journey at all. It's the equivalent of watching a tree grow. For sure, you can return to the tree every year or so, and rejoice at its growth. Now and again there may even be a flurry of interest in it, when it begins to bear fruit. But, by and large, it remains a "backburner" issue. Certainly, don't give up your day job.

Republican leaders need to be a patient species. Timescales are measured in parliamentary terms, not months or years. If Beazley had won the 2001 election, then such-and-such would have been done by the 2004 election, and perhaps the rest in the next term. That's the only possible way of planning for the future; it depends on who is Prime Minister—and that's something that doesn't change very often.

One of the polls taken just before the 1999 referendum campaign asked Australians whether we believed we would want another vote within five or ten years. These were sensible questions. 77 per cent of Australians believed there should be another republic referendum within ten years.

Given the failure of the 1990s, Australians will be even more patient this time around. The "magic date" (the centenary of Federation) is no longer an artificial target. The republic will happen when it happens, as the saying goes. I would hope that it is in place by 2010, although the world will not end if it is not.

This is not to say, however, that things might not actually happen a lot faster. The tree analogy is not exact, in that the republic issue tends to be one of hibernation for years on end, punctuated by flurries of activity. Once the political environment is conducive to change, it could all—in principle—occur within a year or two. It is the enabling political environment that may take some years to eventuate.

Do we want a series of plebiscites?

As reviewed in the previous chapter, in February 1996 Paul Keating promised that, if his Government were re-elected, he would, within twelve months, hold a plebiscite on the single question of whether we wanted an Australian as our "head of state". After the failure of the 1999 referendum, Leader of the Opposition Kim Beazley promised that, if his Government were elected, he would hold two plebiscites—the first asking if we wished to become a republic, the second to determine the favoured model—followed by an actual referendum to change the Constitution. In December 2003, new Leader of the Opposition Mark Latham expressed his support for a direct-election republic, and promised the same timetable of plebiscites if his Government were elected in 2004.

On this count, ALP policy has been remarkably consistent and stable. An interesting question, however, is the following: do Australians actually *want* a series of plebiscites?

The plebiscite proposed by Keating in 1996 was eminently sensible. Australians were only just coming to grips with the republic issue. Asking whether they wanted an Australian at the apex of our constitutional structure would have "started the ball rolling". (Given the later disputes regarding the term "head of state", the question may have needed to be modified from Keating's original suggestion, lest the result be hijacked and neutralised as being defective by the monarchists. I assume that such a modification would have been accepted, had Keating won the election.)

Keating knew, from the polling, that a plebiscite of this form would achieve phenomenal support. It was one of the few questions, at the time, that had an overwhelmingly definite answer.

Kim Beazley's series of plebiscites seemed right for the times. A republican Australia had just voted down the only model that the "experts" said was feasible. What else could we do, but go back to square one? First a plebiscite to lock in the idea that we did, really and truly, want to become a republic. Then a second, perhaps another year down the track, to determine which model we should choose. This would then finally build up to a referendum that, one would hope, could not be lost.

As should be clear from the discussions above, however, there is a real chance that either or both of the Beazley plebiscites could have come off the rails. (Of course, he helped us avoid that fate, by not winning the 2001 election.)

The first question, "Do we want to become a republic?" is, by itself, meaningless, and this fact would no doubt have been exploited in the lead-up to the plebiscite. What *sort* of republic do you have in mind? This problem suggested to some commentators that the two plebiscites should, perhaps, be conducted at the same time, so that the ambiguity inherent in the first question could be answered in the second.

But as I have argued above, it is by no means certain that a "which model?" plebiscite would yield the "right" answer—namely, it could, with very little imagination, have yielded a triumph for a directly-elected executive presidency.

That Beazley did not move into the Lodge means that we cannot know whether the complexities of these issues would have been realised and acknowledged prior to such a dire course of action—but I suspect that they would not have. (This was, however, one of the reasons why I worked immediately on a middle-of-the-road direct-election model in December 1999, but I laboured under no misapprehension that I would have been listened to—as I do not now, indeed.)

Much the same dangers are present with the Latham programme, but with two crucial differences.

Firstly, Latham has already embraced the realisation that the only feasible republic models are those which incorporate direct election. This puts a definite "flavour" on the first plebiscite question. Namely, the question is, implicitly, now the following: "Do we want to become a republic, knowing that Prime Minister Latham will be giving us the direct-election republic we want?" This "flavoured" question will be supported extremely strongly.

The presumption of direct election also means that the lead-up to the second plebiscite will immediately address the question of *what sort* of direct-election model we should adopt, rather than the question of whether we want direct election at all—which we undoubtedly already know the answer to. (Of course, in the options put to voters, the usual

line-up of suspects will be provided for—the McGarvie and Turnbull models will be offered, not just direct-election options; to do otherwise would be to tread dangerously on the side of arrogance; but it is clear that they will receive negligible support.) By advancing the public debate by one step, there is a fair chance that the dangers of advocating a ceremonial presidency will be appreciated, and avoided.

Secondly, the public has had the opportunity to enjoy a four-year drought on the republic issue. The urgency of the late 1990s has been allowed to subside naturally. As the debate re-emerges, Australians will be able to address the issues with clear heads, and open hearts. It will not be a utopia, but there will at least be the feeling that the air has cleared since the acrimonious campaigns of the late 1990s. We can, hopefully, start afresh—or refreshed, at the least.

And, of course, you'll have had the chance to read this book.

CHAPTER FOUR

Expectations of the President

Maintaining the powers of the Governor-General

In the last chapter I argued that, before constructing a republic model to be put to the people, we should first listen to what Australians actually want. By considering a range of fundamental questions, I further argued that most Australians do not want any "radical" changes to our system of government—other than the right to elect our President—and that, in fact, most Australians are very conservative when it comes to the powers invested in the Parliament, the Government, and the Governor-General.

I shall therefore take it to be axiomatic—a "design rule", if you like—that the powers of the Governor-General will be maintained for the office of President, in any sensible republic model.

It serves no purpose to protest that this requirement is incompatible with direct election. It is not negotiable. Our job is to *make* it compatible.

One might ask at this point: do Australians really *know* what the powers of the Governor-General are today? And if they don't, then why are we bothering to maintain them?

The simple answer to the first question is that, as a rule, Australians probably have no idea at all what the Governor-General does, other than cut ribbons and give speeches. Those old enough to remember 1975 will realise that the Governor-General is able to bring about cataclysmic change, but they won't have any firm idea of how that comes about, or what limitations there may be.

But that doesn't mean that we could get away with "pulling the wool over their eyes", even if we wanted to. There are plenty of constitutional experts who would warn Australians, immediately, if there was any attempt to reduce the powers of the Governor-General in even the slightest way. The mere suggestion of such an attempt would cause a cascade of indignation from anyone with a public profile who opposes any increase of governmental power; and this would, in turn, cause a chain reaction of indignation from ordinary Australians, in the same way that occurred

when direct election was denied to the people in the 1999 referendum campaign. Indeed, this general ignorance—of what the Governor-General's powers actually are—would fuel, rather than suppress, the firestorm of indignation and anger; there would be no basis of prior knowledge on which the issues could be debated "rationally"; the public could not be "educated" (brainwashed) to believe that the proposed reductions of power were for their own good. It would, simply, be a disaster.

In the remainder of this chapter, then, I will outline the current powers of the Governor-General, as I understand them, and indicate how they can be retained, compatibly, with a directly-elected President. This will form the first, important part of the construction of the framework of this book, namely, the development of direct-election republic models that would be acceptable to the people of Australia. Chapter 5 will look at the issues involved in the actual direct election of the President, and will put in place further mechanisms by which the problems that arise may be resolved. Chapter 6 will look at the equally vexing question of the removal of the President, both with regard to their natural term of tenure, as well as the capability to remove them earlier should the need arise. Chapter 7 is dedicated to the formulation of a mechanism by which the emergency ("reserve") powers of the Governor-General can be invoked in a more satisfactory way than occurred in 1975, which simultaneously provides a solution to the problem of dismissing the President, should the need arise. These four chapters together constitute the "republic-building" part of this book. Chapter 8 looks at the art of modifying the Constitution itself, as well as suggesting a small number of minor "housekeeping" changes to keep the document fresh and relevant. Finally, the Appendix contains my own suggested draft Constitution, that fulfils all of these requirements.

Acting on the advice of Ministers

When one reads the Constitution for the first time, it can be surprising to find that the Governor-General seems to be given almost dictatorial powers. Almost nothing happens without the Governor-General making it so. This does not seem to gel with the fact that, in reality, it is the Prime Minister that runs the country. But where is the Prime Minister in the Constitution? You can look for him as long as you like—he's not there.

So what's going on here? The answer is that the Constitution has been written in the mould of the British system of government; the Governor-General takes the place of the Queen (and, indeed, is described as "Her Majesty's representative in the Commonwealth"). This is not the place to

delve into the history of the British monarchy but, suffice it say, over the centuries the *responsibility* for most of the powers of the Monarch were devolved upon the Parliament, even though the actions were carried out in the name of the Monarch. If you like, it's a very British way of looking at monarchical rule: the Monarch can do whatever they like—but only if the Parliament tells them that they can.

This form of "responsible government", as it is called, was implicitly assumed by the Founding Fathers when they drafted the Constitution. There was no need to state that the Queen (and her representative) exercised power only through the authority of Parliament—there existed centuries of British history that made perfectly clear what the relationship was, and how it should work.

Such remains the case today—and, moreover, our first century of Federation made the arrangements even more specific: apart from appointing and dismissing the Governor-General, the Queen has no powers at all. The Governor-General acts in the *name* of the Queen, on the authorisation of Parliament, but the Queen has no direct influence on those actions.

In converting our constitutional monarchy into a republic, however, we need to consider whether this implicit understanding needs to be made explicit. Should our Constitution stop "pretending" that the Governor-General (President) has almost dictatorial powers? Should the true relationship with the Prime Minister be spelled out?

The answer to this question depends on the sort of republic model we have in mind.

For the ultra-minimalist McGarvie model, there would be no point: the conventions and understandings in place today would continue, unbroken, into the future. However, we are not considering the adoption of the McGarvie model.

For the parliamentary-selection Keating or Turnbull model, the question was a little more subtle. Even though it seems to be far removed from direct election, the parliamentary selection of the President still represents a form of "election". Would such a President feel themselves to have a comparable mandate to the Prime Minister? The President is elected by a large majority of the entire Parliament; the Prime Minister "enjoys the confidence" of the House of Representatives. Of course, the President, in such a model, would never be directly elected by the people in the first place—and hence there could be no real argument that they would enjoy a greater "popular mandate" than the Prime Minister.

Nevertheless, it was felt prudent to insert provisions into the Turnbull Constitution, to the effect that the conventions in place prior to becoming a republic would continue to hold immediately after becoming a republic, and that they would continue to "evolve" as the years passed. These pro-

visions, although somewhat vague and rubbery from a legal point of view, clearly contained within them the implication that the President would continue to "reign" only with the authority of Parliament.

Direct-election models with a ceremonial or an executive President would not, of course, need to be concerned with this "pretending" at all. In the former, we would strip out the powers of the Governor-General completely; in the latter, we would need to rewrite the whole Constitution. Either way, the powers of the President would be explicit.

However, we wish to have a directly-elected President, with the same powers that the Governor-General has now, without tearing up the entire Constitution and rewriting it from scratch. Unless we specify otherwise, such a President—with the electoral mandate of the entire country (as will be discussed in more detail in the next chapter)—may validly feel that their power transcends that of the Prime Minister. How, then, are we to ensure that the President only acts on the advice of the Prime Minister, and not independently?

The solution, as I see it, is to simply write this requirement into the Constitution. It is not necessary to specify that the authorisation for any action comes from the *Prime* Minister; it is quite enough to insist that the President only act on the advice of Ministers in general—the Prime Minister is, in reality, simply the "lead" minister, first among equals, as the name suggests. (This will be discussed in greater detail below.)

In doing this, however, we have obviously overlooked something: wasn't the President supposed to maintain some discretionary powers? After all, we have rejected the idea of a ceremonial, rubber-stamp President, cipher of the Prime Minister. So where do these extra powers come into the equation, and on what authority does the Governor-General have them today?

The reserve powers

The "real" powers of the Governor-General today are, broadly speaking, the same as the "real" powers possessed by the Queen in Britain. As such, they represent the last vestiges of the comprehensive power formerly possessed by the British monarchy, after everything else was devolved onto Parliament. They have been retained by the Monarch in order that the Parliament and the Government continue to function as they should; in effect, it is the Queen who is "keeping the (British) bastards honest".

One might be overjoyed to hear that we continue to follow the British with regard to these powers. We can just look them up, and apply them

locally! Unfortunately, however, *they are not written down anywhere*. Indeed, the whole British "Constitution" isn't actually a piece of paper with everything specified on it, like ours, at all—it's just a set of rules that have evolved over the centuries. So how, then, does anyone know what the Queen's powers really are?

The answer is that no one really knows *absolutely* what these powers are. Experts on constitutional law have written treatises on the topic, and there is a fair consensus of opinion about what has been done in the past, why it was done, and what it means for the future. The problem is that it is similar to "case law", where the law is effectively created by means of a succession of ground-breaking court cases, but instead of new precedents being set every few years or decades, the precedents can generally be counted on both hands, and they span centuries! But even this analogy is incomplete, because discretionary powers are not subject to the usual legal rules of precedent—that's one reason why they are discretionary; they depend on the individual circumstances of each crisis, which will never be identical in any two cases.

Translating this corpus of opinion to the Australian scene is even more uncertain, not only because we *do* have a written Constitution, but also because the relationship between our House of Representatives and Senate is not exactly the same as that between the House of Commons and the House of Lords in Britain.

Indeed, one of John Kerr's major complaints—and it is a valid one—was that, despite being Chief Justice of New South Wales before being appointed Governor-General, and despite having studied the constitutional powers of the Monarch and the Governor-General as a law student, even he had trouble determining just what the rules actually were. If someone of his education and background found them vague and ambiguous, what hope would there be for a Governor-General or President from a different line of work?

This immediately suggests that we are facing problems if we wish to move to a republic with a directly elected President. If the rules are not fully clear even in Britain, and even less so when transported to Australia, then what could be confidently said about them if we changed our constitutional arrangements so "radically" as to have a popularly elected President? We could try to impose a "Turnbull solution", namely, simply write a provision into the Constitution that says that the conventions in place before becoming a republic would continue. But if these conventions are not agreed upon in the first place, this is asking for future trouble. Moreover, the second Turnbull provision—that the conventions would "continue to evolve"—would, if also included, provide the perfect excuse for a future President to claim that "things had changed" since the instigation

of the republic, and that their electoral mandate suggested—indeed, demanded—that the power balance between the President and the Prime Minister be altered to reflect this reality. This is not what we want.

So let us examine these powers in detail, and see if we can come up with some suitable way of "locking them into" our republic model, without damaging them in such a way that they fail to fulfil their very reason for existing in the first place.

Firstly, their name. The "real" powers of the Governor-General are referred to by different terms. In Britain they are sometimes referred to as the "royal prerogative", although this term is out of favour, and particularly so in countries such as Australia where their exercise is not undertaken by royalty at all, but rather by viceroyalty such as the Governor-General. Better descriptions are well summarised in Kenneth Bailey's introduction to the first edition of Evatt's 1936 book, *The King and his Dominion Governors*:

> The fate of the constitution itself will depend on the adequacy of the provision it makes for what may be called emergency or crisis or reserve powers.

I shall refer to all three of these terms throughout this book. The general tendency has been to refer to the discretionary powers of the Governor-General as the "reserve powers", and I shall maintain that usage for the powers of the Governor-General as they exist now. However, it is my opinion that describing the Dismissal as "an exercise of the reserve powers" is taking the British tendency to understatement a little too far, and a rather more dramatic name should be used if we are to describe them in the Constitution itself.

The term "crisis powers" probably would have seemed most appropriate in 1975, the events of which were widely described as a "constitutional crisis". However, having noticed that the "Casualty Wards" of old have all followed the American trend of being renamed "Emergency Departments", I have decided to accede to the trend and refer to these powers as "emergency powers" in the chapters that follow; after all, we followed the Americans completely when we named the Houses and officers of our Federal Parliament. (The word "emergency" also seems to work better than "crisis" as an adjective with some of the nouns that we will need to attach to it in Chapter 7, but again this is a personal opinion.)

The reserve powers of the Governor-General today represent a discretion to not act on the advice of Ministers, or even to act contrary to the advice of Ministers, to resolve a state of constitutional crisis. The circumstances for such an exercise of direct power occur fairly infrequently

(generally no more than once or twice a decade for similar parliamentary democracies throughout the entire world), but are real nonetheless.

In some cases the exercise of a reserve power may be in response to actions of the Government that are arguably breaches of the law. Such "justiciable" issues might in some cases be resolved in the courts, but it is possible (and it has occurred in the past, such as in the Game–Lang crisis in New South Wales in 1932) that the Government can continue to stall the process by means of a sequence of tactics—if you like, employing "legal loopholes". At the end of the day, of course, it is our parliamentarians who have created the laws of the land in the first place, and, moreover, no set of laws is ever watertight in all conceivable circumstances. If the crisis is dire enough, the Governor-General has the power to avoid allowing the legal process to continue to be "an ass", and to resolve the crisis by direct action. If you like, the Governor-General can act as a "circuit breaker" when the law by itself is struggling to bring about a solution to a political crisis.

Another possibility is that the Government may have secured the passage of a Bill through both Houses of Parliament, which, in the Governor-General's opinion, may seek to subvert the best interests of the people. Such a Bill cannot be "illegal"—it *is* the law, once assented to by the Governor-General on behalf of the Queen. In such a case, the Governor-General has the reserve power to not assent to the Bill.

But these do not exhaust the possibilities. There may be constitutional developments that do not involve any actual breach of the letter of the law, nor any attempted modification of it, but nevertheless represent a clear attempt to subvert the proper workings of the Parliament or the Government. The Governor-General retains reserve powers to deal with such crises.

Furthermore, there may simply be constitutional "stalemates", such as occurred in 1975 when the Senate blocked supply in order to try to force Whitlam to an election, and Whitlam refused to ask the Governor-General for such an election. The Government was about to run out of money, which would have brought real financial crisis to many Australians. Clearly, things weren't running the way they should. Whitlam blamed Fraser, and Fraser blamed Whitlam. Governor-General Kerr used his reserve powers to break the deadlock, and the financial crisis was averted. Kerr's solution was far from ideal, and it caused both great animosity in the Australian political sphere, as well as undeniable damage to the office of Governor-General, and indeed our entire constitutional monarchy, in the eyes of many Australians. However, there was little argument against the fact that Kerr, indeed, possessed these reserve powers; the main argument against him was that he had used them inappropriately.

One of the fundamental problems in the Kerr–Whitlam crisis was the conventional wisdom that the Governor-General needs to find a set of Ministers willing to accept responsibility for any action taken by the Governor-General. This convention harks back to the idea that "the Queen can do no wrong"; *anything* that is done must be done on the advice of Ministers. This has led to a situation whereby the exercise of the reserve powers has often been accompanied by a process of dismissal of Ministers and Governments that, to the average citizen, is simply bizarre and contrary to common sense. For example, after Kerr dismissed Whitlam, he commissioned Fraser as Prime Minister on the condition that Fraser would agree to advise a dissolution of the House of Representatives (and indeed a double dissolution, although that was not the crux of the issue). Fraser did not have the confidence of the House, so there was no way that he could do anything but advise dissolution. Further, Fraser had to guarantee that he would pass the supply Bills in the Senate—which was only possible because they had been deferred, not rejected. If they had been rejected at the time, the entire Kerr scheme would have been unworkable: Fraser had no way of initiating new supply Bills in the House, and, even though the country would have gone to an election, money would have begun to run out before a new Parliament could sit.

We therefore had the situation in which Whitlam was dismissed as Prime Minister, even though he retained the confidence of the House. Kerr ostensibly sacked him to obtain a new set of Ministers who would provide the advice he desired in order to avert the financial crisis. But many members of the general public thought that Kerr had sacked Whitlam because of the improprieties of his Government—that Kerr had somehow "passed judgment" on the Whitlam Government, and decided that it was time for it to come to an end. By forcing Whitlam to go to the consequent election as Leader of the Opposition, rather than as the Prime Minister, Kerr was condemning him to be almost a "convicted criminal" in the eyes of many Australians. Whether this contributed to the landslide win to Fraser is a point of opinion, but these constitutional gymnastics clearly confused the issue in the eyes of the public, and—validly, in my opinion—angered Whitlam and his supporters.

The basic question that needs to be answered, then, is the following: Is there a way in which the reserve powers of the Governor-General can be retained for a directly-elected President, but with mechanisms for invocation put in place that will not require a President to resort to such damaging and confusing constitutional contortions?

In my opinion, there is. Instead of requiring that new Ministers must be sought every time that the President wishes to invoke one of the Governor-General's reserve powers, we will instead write into the Constitution

that the exercise of the power is at the discretion of the President. All other actions of the President may only be taken on the advice of Ministers. Moreover, the President will be *required* to act on the advice of Ministers, or in some cases (to be discussed below) on the resolutions of Parliament, within a time period specified in the Constitution (appropriate to the matter at hand), unless the President invokes a discretionary power to *not* so act.

The exercise of any such discretionary power, in turn, in and of itself defines the existence of a *constitutional emergency*. In other words, if the President feels the need to act contrary to the advice of Ministers, or to not act on the advice on a constitutional request of Ministers or Parliament, then such a situation *automatically* places us in a state of dire constitutional crisis. It is not something to be done lightly. It should not occur frequently. Indeed, the mere warning of it should—as is the case today with the reserve powers—be sufficient to resolve most such crises.

It is well and good to make these stern pronouncements; but how do we ensure, constitutionally, that they are obeyed? And how are we to avoid such a directly elected President from usurping the role of the Prime Minister?

My suggestion is that *any* employment of a discretionary power must, constitutionally, lead to *a vote of the people* to resolve the crisis, to ask all Australians whether they wish to dissolve either House of Parliament, or both Houses. Note carefully: the President *does not* dissolve either House of Parliament in order to bring the question to the voters through an ordinary election; rather, a rapid vote of the people is taken to *decide* whether either or both Houses of Parliament should be dissolved; if so, the dissolution only takes place after that time, and a normal election campaign then begins. The Prime Minister remains the Prime Minister throughout the entire process. (The mechanisms for holding such an "emergency vote" will be discussed in detail in Chapter 7.) Conversely, at such an "emergency vote" the people may, alternatively (or additionally) choose to dismiss the President; after such a dismissal, a normal election for the office of President would be held.

Moreover, the President should be prevented from taking *any* action that is not on the advice of Ministers; in other words, the emergency powers are all powers to *not* act (save for the ability to call an emergency vote). In turn, the power to appoint and dismiss Ministers should also only be "on advice"—in this case on the advice of the House of Representatives, by means of a resolution to that effect. There is no need to leave the commissioning of Ministers to the discretion of the President, because the President would no longer be bound by the current Governor-General's requirement to secure Ministers to accept responsibility for any

actions that the Governor-General may take. This will be discussed in greater detail below.

Such a structure will allow the President to be a perfect "watchdog" over the Parliament and the Government, on behalf of the people. The President cannot initiate any independent action at all, other than to call for an emergency vote of the people, calling for the dissolution of either or both Houses of Parliament. There will be no way for such a President to aspire to active control of the Executive Government. On the other hand, the President will be given the clear, explicit discretion—in the Constitution—to *not* act on the request of the Government or of the Parliament, within a specified time period, if the President perceives an attempt to subvert the smooth working of the Constitution—provided that the President calls an emergency vote of the people.

What happens if the President does not act on a request of the Government or the Parliament, yet also refuses to call an emergency vote? The answer is simple: the President is automatically dismissed, and moreover is rendered ineligible to stand for the office of President at any future time. The mechanism by which a constitutional emergency may be resolved will be laid down in the Constitution; we will not tolerate any alternative, presidentially creative "solution". If there is a constitutional emergency, then it will be resolved by the people; the President only *initiates* this process. Although the President's powers of judgment and persuasion will undoubtedly be called on, to the utmost of their abilities, in the lead-up to such an emergency, the President will not make the final decision. Sovereignty, after all, lies with the people.

There is only one desirable exception to the prevention of independent action by the President, which is brought about by the fact that our Senate has the ability to block supply: once an emergency vote had been called, the President should be empowered to authorise "temporary supply" for a period that extends some short time (say, a week or two) after the first sitting of each House of the new Parliament. Such a suggestion for constitutional reform was made shortly after the 1975 crisis. In the context of an emergency vote of the people (which could dismiss an errant President if need be) it would not lead to any fundamental undermining of Section 83 of the Constitution (that provides that all withdrawals from the Treasury shall be appropriated by law, namely, by Bills passed by both Houses of Parliament and receiving assent).

In the remainder of this chapter, the emergency powers of the President will be discussed as they arise, in the context of the powers, duties and expectations of the President in general. The detailed construction of the mechanism by which an emergency vote of the people can be called and held will be described in Chapter 7.

Dissolving the House of Representatives

The Governor-General today plays an important role in the working of the Federal Parliament. The most obvious duty to perform, as far as the general public is concerned, is to open Parliament itself; but this ceremonial function is just the thin end of the wedge.

The Governor-General formally summons Parliament, namely, tells the members of the House of Representatives and senators to attend Parliament for its sessions; but this, also, is largely a formality.

More important is the Governor-General's responsibility to *dissolve the House of Representatives*. The general procedure is that the Prime Minister calls on the Governor-General and advises a dissolution of the House. The Governor-General then must decide whether such a dissolution is in the best interests of the nation.

In the normal course of events, a Governor-General will usually grant such a dissolution. The Prime Minister, after all, has risen to that office by virtue of their command of the confidence of the House of Representatives; and if the Prime Minister believes that a general election is called for, then that is usually a political decision with which the Governor-General will not interfere.

But there are a number of situations in which such a request may be refused. Most commonly, this occurs when the Prime Minister no longer has the confidence of the House. But how can this be? Isn't the Prime Minister the person who *does* have this confidence?

Usually this is true, but we are now not looking at the usual situation. The commissioning of Ministers under our current constitutional arrangements is (as will be discussed in greater detail below) formally independent of the workings of the House. After a general election, the Prime Minister will still be the Prime Minister, until they resign their office. In the case of a clear election loss—of, say, the Liberal–National Coalition to the ALP—a Prime Minister would look utterly foolish to refuse to resign as Prime Minister. But there are many other possibilities.

There could, for example, be three unaffiliated parties having seats in the new House, such that no single party has a majority of seats. The Prime Minister may belong to the party having the greatest number of seats, but unless they can form a coalition with one of the other two parties, they will not be able to govern. The Prime Minister may advise the Governor-General that they believe they will be able to govern with the support of one of the other parties, or individual members of those parties, or Independent members. The Governor-General would then, most likely, allow such a Prime Minister to try. However, if the Prime Minister

were to be immediately defeated in the House, their continuation in that office would obviously need to be reviewed.

One would think that such a Prime Minister would then, necessarily, resign their commission. However, this may not be the case. The Prime Minister may argue that the House is hopelessly fractured—that no workable Government can possibly be formed—and advise the Governor-General to dissolve the House again for another general election to resolve the crisis. This might seem to be a bit of a stretch—but it has occurred in our State Parliaments, which run by a very similar system.

The Governor-General may decide to follow such advice of the Prime Minister; but it is more likely that they will call for other members of the House—the leaders of the other parties—to investigate whether they believe they can form Government. If such is the case, they will probably be commissioned to do so.

This may provide a solution; the other parties may form a stable coalition Government. But it is also possible that these other parties might not be able to maintain solidarity in the House; the new Government may prove to be equally unworkable, and eventually have a vote of no confidence passed on it. In this situation—if all options have been exhausted—there will be no feasible option but to dissolve the House and issue writs for fresh elections. In such a circumstance, the Governor-General may dismiss the new Prime Minister, call for the previous Prime Minister, recommission them, and grant their original request for a dissolution. The logic here is that the previous Prime Minister was, in the end, "proved correct", and so they have the right to go to the fresh election retaining (or, rather, regaining) their office as Prime Minister. On the other hand, if there has been a sufficient amount of "water under the bridge" since the new Prime Minister had been commissioned (say, if the new Government had been in office for six months or a year), it is the new Prime Minister that would, most likely, be granted the dissolution.

There are many other scenarios in which a dissolution of the House may need to be granted, or not granted, to a Prime Minister. A Government having but a slim majority in the House—possibly with the aid of Independent members—may be defeated in the House if their members cross the floor, or if the support of Independents is withdrawn. The Government may be able to pass some pieces of legislation, but not others; this is more likely if Independents hold the balance of power. A Prime Minister may advise a dissolution and a general election to resolve such an impasse, or (in an extreme case) they may refuse to agree that their Government has become unworkable. Again, the Governor-General will usually investigate whether an alternative set of Ministers could form a workable Government, before dissolving the House.

Many Australians may be surprised that the Governor-General can wield such power in forming and dismissing Governments—even when there is no serious constitutional crisis unfolding. This owes itself largely to the fact that either the Liberal–National Coalition or the ALP generally wins an absolute majority of seats in the House of Representatives, and so it is usually clear-cut as to who can form Government. But there is no guarantee that this will still be the case five, ten, fifty years from today. There is no reason that the shifting alliances that hold sway in many of our State Parliaments will not make their way to the Federal level. And, indeed, the presence of Independents in the House of Representatives means that such a situation could arise after any general election—now—if the Coalition and the ALP were to win an almost-equal number of seats.

Clearly, these powers of the Governor-General present us with potential problems when we move towards a directly-elected President. Although, strictly speaking, any action of the Governor-General that is contrary to the advice of the Prime Minister is an exercise of a "reserve" power, most people would not consider it to be a constitutional "emergency" if the Governor-General were simply investigating which coalition of parties might be able to form a workable Government.

A directly-elected President, on the other hand, may (if we do not circumscribe the office carefully enough) feel that they have the right to "favour" one side or the other in such a situation, rather than proceed in a more impartial manner.

As a hypothetical example, imagine that there are two Independent members of the House who have threatened to withdraw support for the Government. It may be that most Australians are antagonistic towards these Independent members, for some reason. Imagine that the office of President falls vacant at that time. If we were to simply transfer the powers of the Governor-General across to the President holus-bolus, it may be possible for a President to be elected on a "platform" of opposing the said Independent members, should they actually withdraw their support for the Government. How could this be done? Quite easily: as soon as the Government lost the support of the House, such a President would then simply grant the Prime Minister's wish to dissolve the House and issue writs for a general election, rather than investigate the possibility of an alternative Government being formed by the Leader of the Opposition with the support of the said Independents.

Some might argue that, if the said Independents had such low support throughout the country, perhaps it *would* be a good thing that they could not hold the Government to ransom. But that would be missing the point. Firstly, we would have guaranteed that the office of President would have

become politicised—and our whole aim is to avoid such a change. Secondly, our form of parliamentary government works on the basis of seats. If Independents win seats in the House, then each of their votes counts for just as much as any other vote. The fact that most or all of the other seats in the House may be tied up in party structures is beside the point. If the said Independent members withdraw their support for the Government, and give it to the Opposition—and this is sufficient to give them a majority—then the Government changes. That is how the game works. The President is there to be the impartial umpire, to enforce the rules—not to show favouritism based on any personal political platform that they may have adopted to get elected.

The penny may now have dropped for some direct-election enthusiasts, who may not have realised, before now, how easily yet subtly the nature of the office of President can be changed from what we wish it to be—even if, ironically, we give the President *exactly the same* powers as our current Governor-General. Consider, again, the above hypothetical example: how did everything fall apart so quickly? The President didn't have any more power than the Governor-General does today; so what happened? The difference is that the President was *elected*—rather than appointed by the Prime Minister—and so it was possible for a political campaign to be mounted for such election. Of course, it is entirely possible that an appointed Governor-General, today, could go down the same path—but it would be immediately realised that such a Governor-General was being partisan, and, being an appointee of the Prime Minister, the backlash would (hopefully) be substantial in the general election granted by the said Governor-General.

This highlights the fact that, by changing the method of appointment and dismissal of the Governor-General (President) so drastically, we will sometimes need to *compensate* in other areas of the Constitution, simply to maintain the status quo in terms of political and constitutional power. This has been realised since day one by our political leaders, who understand intimately how the current system works—and this is, undoubtedly, the reason why most of these political leaders dismissed the prospect of a directly-elected President, almost out of hand, and put their support behind parliamentary selection; the alternative was, to them, simply too complicated. Well, like it or not, the time for a simplistic republic—the easy option—has passed, and we have to bite the bullet and make whatever compensating changes are necessary, in order to make it all work.

How, then, can we fix this serious problem?

My suggestion is that the decision to dissolve the House of Representatives be placed in the hands of the House itself. In other words, if the

House passes a resolution to dissolve itself, then it is dissolved (and writs are issued for a general election).

It takes a little thought to work through all the possibilities, but it can be verified that this apparently simplistic solution does, in fact, cover the various scenarios. It gives to the House the power to determine, itself, whether a dissolution is called for. If a Prime Minister loses the confidence of the House, and the Opposition—or, in the general case, some coalition of opposition parties and members—can form Government, then any resolution of the Prime Minister seeking to instead dissolve the House will fail.

Conversely, a Prime Minister enjoying the support of the House can clearly call a general election any time they wish. It might be argued that this is giving more power to the Prime Minister than they currently hold: today, a Governor-General could refuse such a request. But it has been widely accepted amongst constitutional scholars that there would be little point in a Governor-General making such a refusal. If, for some reason, the Prime Minister thinks that a new House is called for—and, recall, the Prime Minister cannot dissolve the Senate unless there is a legislative deadlock by the Houses, which we will discuss as a separate case below—then there is nothing useful that a Governor-General could do but to grant the dissolution. Commissioning other Ministers would not help, if the Prime Minister commands a majority on the floor of the House.

This does bring us to the touchy issue of minimum terms for the House of Representatives. It has been often argued that the ability to call an "early election" (say, only two years into a three-year term, or even sooner) allows a Prime Minister an unfair advantage: there could be bad news on the horizon—perhaps not widely known, or deniable at any rate—and the Government may wish to give themselves another three years before the reality hits home. Or a Government may wish to capitalise on an extended honeymoon period, before any of their decisions really begin to bite. Indeed, in many of our State Parliaments minimum (or even fixed) terms have been introduced.

This is, however, a question of constitutional reform that lies outside the transition to a republic. The question has failed when it has been put to the people at a referendum; anything which reduces the say of the people is generally voted down. There is hardly anything undemocratic in going to the people more often. True, the Government may do it cynically; but the average voter, today, is more than cynical enough to match wits with most politicians. Moreover, there is a good argument that it may be necessary, on occasion, to get a "fresh mandate" for a policy platform that has been modified from that presented in the campaign for the previous general election; and no Australian would argue with the ability to

pass judgment on a change in policy platform, rather than have it thrust upon them by surprise days or months after the election result. (One need only mention the phrase "non-core promise" to scuttle any proposed future referendum on this issue.)

Returning to the issue of the House resolving to dissolve itself, one might ask whether should this not, at least, be included as one of the actions that the President can refuse to perform (provided that they call an emergency vote of the people) in times of constitutional crisis. As a general principle, this idea is sound; but in this *particular* case there would be no point. If the President did not agree that the House should be dissolved, and if the President refused to dissolve the House but instead called an emergency vote of the people, then what would such a vote ask for? That the House be dissolved! Again, if the House expresses its wish that it go to the people, then it could hardly be argued that the people's watchdog (the President) should do anything to interfere.

However, since this is the only significant power of the Governor-General which the President will not have the discretion to consider, to question, and finally to act on—rather, it will be enacted as soon as the House passes a resolution to the effect—then we need to be cautious that it could not be used inappropriately. For example, it is normal practice for members of the House needing to be absent from a sitting to be "paired" with members of the opposite party. One would not want to allow even the temptation of breaking this practice in order to bring about an immediate dissolution of the House and a general election. Likewise, if some Government members of the House were missing—say, they are delayed after visiting a disaster zone, or have been kidnapped—then it would not be appropriate for the Opposition to be able to dissolve the House by using their temporary numbers. Now, any other example of an opportunistic use of a temporary House majority would, in the normal course of events, be blocked by the President, whose duty it is to uphold the smooth working of the Constitution. But in this case the President is not involved in the final decision at all. So how do we prevent such an abuse?

A workable solution is to specify in the Constitution that any resolution to dissolve the House must be passed by an *absolute* majority of the members of the House. This provision would then ensure that, no matter how many Government members are absent from a sitting, it would be impossible for the Opposition to dissolve the House.

Finally, it might be asked: we have dealt with the dissolution of the House of Representatives, but what about the complementary power of the Governor-General today, namely, the commissioning and decommissioning of Ministers? That will be discussed as a separate topic below.

Granting a double dissolution and a joint sitting

If it comes as a surprise to some Australians that the Governor-General today has such strong powers with regard to the dissolution of the House of Representatives, it may come as an equally sharp surprise that the Governor-General has almost no such power when it comes to the Senate.

The Australian Senate was constructed by the Founding Fathers to be an almost anomalously strong Upper House, compared to similar Westminster-style systems around the world. It represents the truly "Federal" part of our Federation, namely, the joining together of six disparate colonies as States in a single Federal Commonwealth.

As discussed above, each State has equal representation in the Senate, regardless of its population. But that is just the start of it: each State, in reality, controls their seats in the Senate. When you see a senator's letterhead describe them as "Senator for South Australia" or "Senator for Victoria", this is not simply a reflection of the fact that a senator's "seat" encompasses an entire State; each senator does, fundamentally, owe their seat to an election held—or an appointment made—in just that State.

Today, this "State-ness" of the Senate is essentially hidden from view, but in times of constitutional crisis it can become important.

If one looks at Section 12 of the Constitution, one finds that it is the Governor of a State that issues writs for elections of senators for that State, *not* the Governor-General:

> The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

It may be thought that the reference here to "dissolution of the Senate" would allow the Governor-General to, indirectly, "force" the State Governors to issue writs for a Senate election, in the same way that the Governor-General can dissolve the House of Representatives. However, with the exception of double dissolutions, which will be discussed below, the Governor-General has no power to dissolve the Senate at all. Rather, each senator has a term of six years; half of the senators' terms expire every three years. All of these terms begin on 1 July. Thus, every three years a "half-Senate" election is required, which must be held within the twelve months preceding the expiry of the terms of half the senators. (After a double dissolution, the entire Senate is elected, and half of the senators are selected by lot to have terms of only three years, to start the process.)

These arrangements are often hidden to most Australians; we usually vote for the Senate at the same time that we vote for the House of Repre-

sentatives. In reality, what has happened is that either the Prime Minister has asked for an early general election for the House during the twelve-month period that a half-Senate election is due, allowing them to be held on the same day; or else the House has run its full term of three years, which keeps it in step with the vacancy of half the Senate (provided that they were in step at the previous general election). There is, usually, real political incentive for a Prime Minister to keep the elections in step, so that they can be run on the same day: not only does this save money, but it also avoids the need for the Government to campaign twice as often as it needs to—and Governments will, usually, want to avoid going to the people too frequently, except in one-off circumstances which might provide an advantage that is not expected to last until the time of the next scheduled general election.

But in times of constitutional crisis, things can get quite complicated, as the 1975 crisis showed. Whitlam had looked at the option of asking the Governor-General for a half-Senate election, due before the middle of 1976, rather than any dissolution of the House. The unique situation at that time was that legislation had already been passed by Parliament and signed into law that provided for new senators for the Territories. This held out the prospect of a solution for Whitlam, because these new senators would take their seats as soon as they were elected, whereas the senators from each State would not "change over" until their normal "expiry date" of 30 June 1976; this changing of the numbers held out a possibility of a Senate majority for the ALP, for a few months at least—long enough to have the blocked supply Bills passed. In the event, Kerr decided that, since this half-Senate election would be held after the money had begun to run out, he would instead sack Whitlam and commission Fraser. Putting that decision to one side, however, it is noteworthy that it was being debated whether each State Parliament would advise their Governor to issue writs for a half-Senate election on the day requested—there is no constitutional obligation for a State to hold any Senate election on the same day as any other State (although in normal times it would be foolish to ignore such a request from the Governor-General).

Earlier in the Whitlam Government's tenure, the unique "State-ness" of the Senate became even more evident on a number of occasions.

A half-Senate election had been scheduled for 18 May 1974. There were five vacancies to be filled in Queensland. Whitlam succeeded in tempting DLP Senator Vince Gair to accept an appointment as Ambassador to Ireland. His resignation would cause a sixth vacancy to open up in Queensland, which would improve the ALP's chances of winning a third seat, because of the way that the "quota" is calculated for each State. (The DLP were opposed to the ALP, so the extra seat would be a net gain.)

However, the conservative Queensland Premier, Joh Bjelke-Petersen, who hated Whitlam, foiled the plan by advising the Governor of Queensland to issue writs for the return of five, rather than six, senators. But is this constitutional? Section 11 of the Constitution explicitly provides for any situation in which a State does not provide senators:

> The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

In other words, each State may provide their complement of senators, but they are not compelled to do so. In the Bjelke-Petersen case, there would be one less senator in the Senate, and Queensland would have less representation than any other State, but from the Opposition's point of view it was better than handing the seat to the Government.

As events transpired, the half-Senate election was converted into a full double dissolution election, and the machinations of Whitlam and Bjelke-Petersen over the "Gair affair" were largely superseded. However, the manifest "State-ness" of each Senate seat was brought to the fore.

In February 1975, the Whitlam Government's Senate Leader and Attorney-General, Lionel Murphy, was appointed to the High Court. Murphy was a Senator for New South Wales. The Liberal Premier of New South Wales, Tom Lewis, broke with the long-standing convention that a member of the same party be nominated to fill the casual vacancy, and instead advised his Governor to appoint the independent Mayor of Albury, Cleaver Bunton, who voted with the Opposition. Likewise, when ALP Senator for Queensland Bert Milliner died over the winter parliamentary break, Bjelke-Petersen refused to advise the appointment of the ALP's nominated replacement, Mal Colston, but instead advised his Governor to appoint Pat Field, who openly professed his willingness to oppose any Whitlam legislation, and was duly excommunicated by the ALP. These events prompted the 1977 referendum to amend the Constitution to ensure that the prior convention was converted into constitutional law, namely, that casual vacancies are filled by members of the same party, and that such endorsement by that party must be maintained until they take their seat. This eminently sensible referendum was passed.

Notwithstanding the 1977 amendment—which brought the Constitution into the twentieth century, giving recognition to political parties—it is still clear that the States maintain an "ownership" of the Senate that, although passive and benevolent in normal times, nevertheless provides for a measure of real protection and counterbalance in times of political and constitutional crisis.

Should this arrangement be maintained when we become a republic? Absolutely. There is no reason to antagonise or disenfranchise the States. We will need the support of as many Australians as possible to allow the required constitutional changes to be passed at a referendum.

What power, then, should the President have over the Senate?

I will discuss the question of whether the President should be able to call an emergency vote of the people, asking for the Senate to be dissolved, in Chapter 7. Apart from such a possibility, the President should have the same limited powers over the Senate that the Governor-General has today. As should be clear from the above discussion, this does *not* extend to the dissolution of the Senate under normal circumstances.

However, the Founding Fathers realised that the great strength of the Senate—which is almost, but not quite, as strong as the House of Representatives—would, sooner or later, lead to a deadlock between the Houses of Parliament over Bills that may be essential to the continued government of the nation. Waiting until the Senate is naturally replaced over time is not a feasible solution: it takes six years to replenish the entire Senate; and, even then, it may still be opposed to the House.

It was recognised that, if such a deadlock should occur, there should be a mechanism available by which it can be ultimately resolved. Section 57 of the Constitution provides for such a resolution.

The first requirement is that the House must pass a Bill, the Senate must fail to pass it, and after an interval of three months the House must pass it again (with or without amendments suggested by the Senate), and the Senate must again fail to pass it.

The second requirement is that the Prime Minister needs to ask the Governor-General for a double dissolution. The Governor-General may grant it. This is not automatic: the Governor-General needs to be satisfied that the deadlocked Bill or Bills is or are necessary for the continued government of the nation.

If a double dissolution is granted, then both Houses of Parliament are completely refreshed, by the people, at an election.

After such an election, the House may again pass the said Bill or Bills. The new Senate may now pass them. If the Senate does not, however, the Prime Minister may ask the Governor-General for a special joint sitting of Parliament, at which the Bills may be passed.

Because there are roughly twice as many members of the House of Representatives as there are senators, the House is effectively given "double weighting" in such a joint sitting. This will, usually, be sufficient for the Government to carry the vote.

The provisions of Section 57 recognise that, if all else has resulted in a stalemate, the House of Representatives shall be favoured over the Sen-

ate—like a "casting vote", one might say. In other words, most of our Constitution recognises "geographic democracy" (each State having an equal say) to be as important as "population democracy" (each Australian having an equal say); but in the case that these two forms of "democracy" are deadlocked, people must be favoured over geography. This is the Federal compact that the colonies agreed to at the time of Federation.

It is Section 57 that most clearly shows the very slight asymmetry in our Federal Parliament, in favour of the House of Representatives. Note that it only allows the House to override the Senate on a deadlocked Bill; there is no converse provision for the Senate to push through a Bill that is opposed by the House. Section 53 describes the remaining degree of asymmetry—that the Senate may not originate nor amend Money Bills—but explicitly stipulates that all remaining powers are equal:

> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

The asymmetry between the Houses is as important as their otherwise equality, and this fact will be used in the sections below.

Returning to the mechanisms for a Section 57 double dissolution, it is clear that the President should play the same role that the Governor-General does today. To ensure that there is no confusion, the Constitution should provide that, if a Bill satisfies the deadlock provisions of Section 57, the House of Representatives may pass a resolution requesting that the President perform a double dissolution. The President should have a reasonable amount of time to consider the request—say, a couple of months—and, unless the request has been withdrawn, should be compelled to either grant the double dissolution, or else call an emergency vote of the people seeking to dissolve the House of Representatives alone.

Likewise, after the elections for both Houses, if the blocked Bill is again passed by the House and blocked by the Senate, the House may pass a resolution requesting a joint sitting to deliberate on the blocked Bill. The President should again have some time to consider such a request—say, a month—and, unless the request has been withdrawn, should be compelled to either grant the joint sitting, or else call an emergency vote of the people.

One might wonder why there should be any discretionary power for a President to refuse either of these requests of the Government. In the case of the first request—for a double dissolution—it is clear that, if there were no prerogative to refuse, a constitutionally creative Prime Minister could use Section 57 to dissolve the Senate any time they wished, simply by having the House pass a Bill that will be obviously rejected by the

Senate, waiting three months, and then passing it again. For example, the House may pass a Bill seeking to change the Electoral Act so that voting for the Senate would be changed from that of proportional representation to some crazy scheme that would clearly give the Government a majority in the Senate. This would make a mockery of the intentions of the Founding Fathers, and would throw our constitutional arrangements into chaos.

In the case of the second request—for a joint sitting—one must remember that both Houses of Parliament will have been completely refreshed after the double dissolution election. The status of each House may not be comparable to that which produced the deadlock in the first place. Indeed, there may even be a different party in power! To make the granting of a joint sitting automatic would be to risk the possibility that this will provide an unwarranted opportunity in certain circumstances. It may be difficult to see how this could be true—how could a new Government profit by the Bills of the party that is now in Opposition?—but it is possible. For example, there may be quite a number of Bills deadlocked prior to the double dissolution. Any or all of these Bills may be deliberated on at the joint sitting. By picking and choosing a subset of these Bills, it may be possible to change their intended purpose completely.

Indeed, it could be argued that, if there is a change of Government, no joint sitting should be granted at all. This would be difficult to encapsulate constitutionally, and, indeed, it is a question that is best left—as it is today—to the judgment of the Governor-General or President.

Assenting to Bills

Most Australians know that the our laws are made by Parliament. However, most would probably not realise that the two Houses of Parliament cannot create any Acts of Parliament by themselves at all. The third, crucial component of our Federal Parliament is specified in Section 1 of the Constitution:

> The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament", or "The Parliament of the Commonwealth".

Section 58 describes how the Queen "passes" a proposed law (Bill):

> When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents

> in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

In other words, the Governor-General has the discretion to give royal assent to the Bill—whereupon it becomes law—or to withhold assent.

This power should be retained by the President. The Bills that may be passed by the Federal Parliament are only constrained by the provisions of the Constitution itself. Indeed, if one reads through the Constitution (a copy of which is contained within the Appendix), it is clear that even a portion of the ordinary workings of the Constitution itself are dictated by Acts of Parliament—for example, governing the holding of elections, the creation and jurisdiction of the High Court, and so on.

If there was no independent "watchdog" over the actions of the Parliament, then there would, at some future time, no doubt be a temptation for a constitutionally creative Prime Minister to "change the ground rules". True, to do so would require the control of both Houses of Parliament, which is very rare today. But it does happen—the landslide victory of Fraser following the Dismissal is but one example; indeed, the existence of a political or constitutional crisis may be more likely to cause the general public to swing their support to one party in both Houses, rather than maintaining the normal checks and balances by voting in different ways for the two Houses, or voting for minority parties in the Senate. And there is no guarantee that, at some time in the future, a party gaining control of both Houses might not exceed its mandate and attempt to pass legislation on a raft of issues—simply because it had the power to do so.

Thus, it should be written into the Constitution that the President has the discretion to *not* immediately give assent, on behalf of the people, to any Bill passed by both Houses. The President should have a reasonable time period—say, a month—in which to discuss the matter with the Prime Minister. In the case of a Bill of dubious intentions, it may be that the President's advice is heeded, and that the Bill is withdrawn. Failing that outcome, if the Prime Minister insists on the Bill receiving assent, and the President still feels obliged to refuse, on behalf of the people of Australia, then the President must call an emergency vote of the people to dissolve *both* Houses of Parliament—after all, the disputed Bill has been passed by both Houses, and so if the President feels that the rights of the people are being subverted by the entire Parliament, then the people should get to pass judgment on the future of both Houses. (There will, however, still be two separate questions put to the voters, each asking if they wish to dissolve one of the Houses.)

The Federal Executive Council

Most Australians have never heard of an Executive Council. Parliamentarians, however, deal with it everyday. What is it, and what relevance does it have to the republic?

If one takes a look at Sections 61–64 of the Constitution—the first sections in Chapter II, which describes the Executive Government—one can find a hint as to how the apparently dictatorial powers of the Governor-General are actually devolved upon our parliamentarians:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.
>
> The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

A more concise description of the executive powers conferred by the Constitution could hardly be imagined. The power is vested in the Queen, but is exercisable by her representative, the Governor-General. In turn, the Governor-General chooses and appoints the membership of an Executive Council, on whose advice the nation is governed.

But isn't it the Ministry who advises the Governor-General? Strictly speaking, this is not so. As a point of constitutional law, the Governor-General could, theoretically, appoint anyone at all as an Executive Councillor. We will return to this point shortly. However, the next two sections in the Constitution make it clear that no department of the Commonwealth Government can be administered by anyone but a Minister. So what is a Minister? Simply an Executive Councillor who has been appointed by the Governor-General to administer such a department! How-

ever, Section 64 clarifies how all of this provides us with parliamentary government: all Ministers must be, or must within three months become, a member of either House of the Federal Parliament.

All this might be a bit confusing for anyone not familiar with the intricacies of executive government. What does it mean?

In practice, it simply means that the Governor-General runs the country on the advice of Ministers. However, having an extra "layer"—this Executive Council—provides a nice way of honouring those who have served or are serving as Ministers. Namely, once a person is made an Executive Councillor, they are, generally, a member for life. Why does this convey any specific honour? Because it is conventional protocol that all Executive Councillors are entitled to use the title "Honourable". That's why some of our parliamentarians are "Honourable" and some are not—those that are "Honourable" are either Ministers now, or have served as Ministers in the past. The Governor-General is also a member of the Executive Council, and so they, too, are also "Honourable" for life. The same system works in our State Parliaments as well, so that State Ministers and State Governors are, likewise, generally entitled to use "Honourable" for the rest of their lives. (It is rare for an Executive Councillor to be dismissed from such a position, but clearly it is within the Governor-General's power to do so; for example, it would be anomalous if a convicted criminal were able to retain the term "Honourable".)

Such matters are, no doubt, of keen interest to Executive Councillors throughout the country, and those who aspire to such honour. But does this extra layer of membership have any implications when we move to being a republic?

That all depends on how we make that transition. If we were to have a directly elected President, and were to simply transfer the powers of the Governor-General to the President, Turnbull-style, then there is a latent potential for trouble. Initially, such a presidency would continue to obey the conventions now in place; that's the essence of the Turnbull provisions. However, in time, when such popularly elected Presidents began to aspire to executive power, a bright constitutional adviser will, sooner or later, realise that the Executive Council allows a way to avoid direct parliamentary control. Namely, there is nothing in the Constitution at the moment that would prevent a President from appointing someone from *outside Parliament* as an Executive Councillor. Read these sections carefully: all Ministers must be Executive Councillors, and all Ministers must sit in Parliament, but all Executive Councillors do not need to be Ministers, nor do all Executive Councillors need to sit in Parliament (indeed, that is why former Ministers can remain Executive Councillors, even when they lose their commissions as Ministers, and indeed after they

leave Parliament; and this is why Parliamentary Secretaries have been able to be made Executive Councillors, as they have since 1990.)

What would this mean? It would mean that, for example, there would be no constitutional barrier to a President appointing a person from outside Parliament to the post of, say, Secretary of State. Such a person could not administer any department of the Commonwealth Government—the Constitution constrains that honour to Ministers—but there would be nothing preventing a President from decreeing that all Ministers would report to these non-parliamentary Executive Councillors. For example, the Treasurer could be a civilian appointed by the President; the Minister for the Treasury—the person who actually administered the Treasury—would then be a member of Parliament, who reports to the Treasurer, who determines policy.

If naïve direct election enthusiasts are feeling a bit squeamish at this point, they should be: gluing a directly elected President onto our Constitution is not a safe option. Alternatively, if politicians intricately familiar with our current system of government are thinking that all of this is quite preposterous, then I ask that they provide support for such a view in terms of constitutional law. The 1975 crisis showed that—in Australia, at least—anything that is permitted by the Constitution is fair game. If, as a point of constitutional law, there is nothing preventing an Executive Government being formed from Executive Councillors who are not members of Parliament, then how can conventions formulated under a constitutional monarchy with a Governor-General appointed by the Prime Minister possibly forbid it? Moreover, if the second Turnbull provision was to be written into the Constitution—that the conventions would "continue to evolve"—then that, as a matter of law, implies that they will *change*, that they will *adapt*, to new circumstances; that, after all, is what the word "evolve" means, isn't it?

Is this what we want? Of course not. If we wanted a U.S.-style executive presidency, we should rewrite the Constitution to create one. We should not pretend that we are maintaining the status quo of parliamentary government, but then leave a loophole that would allow an almost effortless transition to an executive presidency further down the track.

We must clearly close the loophole. But do we want to go so far as abolishing the Executive Council altogether? I recommend not: as much of our current constitutional arrangements should be left intact as possible, consistent with our goal of maintaining the current power balance between the Prime Minister and the Governor-General. Rather, I recommend that the power to request the appointment of new Executive Councillors be given to the House of Representatives. Consistent with the current reserve powers of the Governor-General, the President would be

given some small amount of time to consider such a request—say, no more than forty-eight hours—at the end of which time the appointments must either be made, or an emergency vote of the people called.

Such a provision will ensure that it is the Prime Minister who determines appointments to the Executive Council; there is no possibility of a constitutionally creative President making their own appointments.

A further question might be asked: should it be stipulated in the Constitution that all Executive Councillors must sit in Parliament (apart from the President)? This is an amendment to our current constitutional arrangements that has been contemplated, independent of the question of whether we become a republic. Following the policy of not changing anything that doesn't need to be changed, I'm in favour of retaining the provisions as they are now, and leaving the question for further constitutional reformers to contemplate, if it is deemed desirable. (It would also require a change to entitlement to use the title "Honourable".)

This does, however, leave an opening, further down the track (if it is not closed by such future reformers), for a creative Prime Minister to request the appointment of Executive Councillors who are not members of Parliament. However, such a request would need to have the support of the House of Representatives; in other words, it would not be possible for a rogue Prime Minister to install an extra layer of Executive Government above their Ministry, against their will, because such a move would not, one would assume, be supported by the House—which will contain a good number of those very Ministers. On the other hand, such flexibility may allow our system of government to grow and evolve naturally, in the decades or centuries ahead, without jeopardising the primacy of Parliament; for example, it would be possible to appoint, say, a Secretary of Science and Technology, if it were believed that there were no members of Parliament with a sufficiently strong background in science or engineering to warrant a Ministry dedicated to such fields. Such a Secretary would report to the Prime Minister, and in turn would liaise with the Ministers of those Commonwealth departments on which the Secretary's authority and expertise impinged.

Whether or not such a development would actually occur is beyond our concern. All that is important is that we ensure that the power over such decisions be retained by the Prime Minister and by the Parliament, rather than being "accidentally" left in the hands of a directly elected President.

Finally, it might be asked whether the President should be compelled to actually preside over meetings of the Executive Council. There was some uncertainty over the arrangements for Executive Council meetings when Kerr was Governor-General, and the first authorisation that began the "loans affair" was made at an Executive Council meeting that was

held without his knowledge and without his presence. The arrangements have since been tightened up, and no meeting can be held today without the authorisation of the Governor-General. However, the question still needs to be asked: must the President preside?

The name of the office would seem to suggest that they should. Semantics aside, advances in technology over the last decade—let alone since Federation—mean that the barriers of distance no longer prohibit essentially instantaneous audiovisual communication with any location on the planet (for a President, anyway). Given this ability, it is reasonable to specify that the President actually chair all meetings of the Executive Council, by secure teleconferencing means if necessary. This will provide the people of Australia the peace of mind of knowing that every piece of business before the Executive Council, and every decision made by it, has been performed in the presence of the President.

Commissioning and decommissioning Ministers

Given the discussion of the previous section, it should hopefully be relatively clear that a similar solution will apply for the issue of the Governor-General's powers to commission or decommission Ministers.

As described further above, the construction of a framework in which the reserve powers of the Governor-General are converted into a discretionary right to call an emergency vote of the people removes the need for the current constitutional contortion of a Governor-General needing to commission and decommission different Ministries in order to resolve a constitutional crisis, or even to determine which coalition of parties may be capable of forming a workable Government.

In this environment, it is more sensible for the House of Representatives to request the commissioning or decommissioning of Ministers by means of a constitutionally required resolution to the effect.

The President should still, of course, be given the discretion to refuse the request, if there is some anomalous constitutional situation that would make the request a subversion of the interests of the people, in the view of the President. As an extreme example, imagine that a psychologically disturbed Leader of the Opposition were to have a dozen Government members of the House of Representatives kidnapped on the way to a parliamentary sitting. Any resolution passed by such a sitting would, obviously, be anomalous, and no President would be expected to agree to a resolution that, say, sacked the Prime Minister and installed the Leader of the Opposition as Prime Minister under such circumstances. This might

be a comical example, but it doesn't take much imagination to make it more realistic. What if a dozen Government members of the House were on a plane that crashed? What if the numbers were tight, and two Government members were injured in a car crash? Or stranded in a flash flood while surveying the damage of a natural disaster? Or caught out returning at the last moment from their holidays when a pilots' strike was suddenly called?

Of course, there are an unlimited number of scenarios that one could concoct, and by changing just a few of the parameters, one's opinion as to the legitimacy or otherwise of the actions of the protagonists can be altered drastically. This is a sure sign that there is a need for a discretionary power of the President to refuse to act on such requests—"just in case".

In practice, of course, the "advise and warn" strategy will usually be sufficient to resolve any real crises, without having the matter proceed to an emergency vote. Removing the discretionary power altogether, however, would provide a recipe for disaster, eventually, one day, when the conditions were opportune.

At this point, it is worth bringing up a question that has arisen frequently throughout the republic debate: should the Constitution recognise the existence of the Prime Minister, rather than simply Ministers in general? It seems to be incongruous that the person who actually runs the country is not even described in the Constitution at all.

This issue arose when the Turnbull model was written up in detail for the 1999 referendum. Although the method of selection was by a two-thirds majority of a joint sitting of Parliament, there was a further requirement of the model that the nomination be made by the Prime Minister, and seconded by the Leader of the Opposition. What is more, the Turnbull dismissal mechanism—as determined by compromise at the 1998 Constitutional Convention—was simply by signed instrument of the Prime Minister. Clearly, for each of these provisions to be written into the Constitution, the Prime Minister and the Leader of the Opposition needed to be referred to explicitly.

And so it was done. It does, however, beg the question: who, constitutionally, *is* the "Prime Minister". And who is the "Leader of the Opposition"? These offices were not defined in the Turnbull Constitution. One would assume that the catch-all provisions about conventions would have ensured that these offices would have sprung into constitutional existence if the referendum had been passed. Nevertheless, it did raise an intriguing question of principle: when everything else in the Constitution is defined so carefully and explicitly, should we really allow such vague and rubbery amendments to be introduced?

Indeed, numerous commentators noted that, in the future, it may not have been clear who the "Leader of the Opposition" was at all. What would happen if there were three parties having seats in the House, with one having an absolute majority, and the other two sharing the remaining seats equally? Who would be the "Leader of the Opposition" in such circumstances?

The normal business of Parliament could adjust to such an occurrence, simply by means of alterations to the Standing Orders. But to inscribe such a dubious office into the Constitution grates against the nerves. (Well, it grates against mine, at any rate.)

My firm opinion is that, unless there arose some unmistakable and unavoidable need to define the office of Prime Minister in the Constitution, then it should not be attempted. Indeed, consider all of the effort we are going to here, simply to define the office of President! If we were to introduce the Prime Minister to the Constitution, and do it properly rather than by fiat and implication, then we would be forced to put in place an equally intricate constitutional framework in order to ensure that the office was unambiguously defined, filled, and vacated.

The provisions of the Constitution (either the existing or the new) allowing for the establishment of departments, and of Ministers to administer those departments, is, to my mind, more than adequate to establish an office of Prime Minister, whose advice is to take precedence over those of all other Ministers. Moreover, if, perchance, in the decades or centuries ahead it should prove desirable for a more flexible structure to be put in place, then this could be achieved without any need for constitutional amendment. This might seem to be a bit of a stretch, but just think back to how ridiculous the idea of having "Co-Captains" of schools or football teams would have seemed to us just a couple of decades ago, and one can start to appreciate how attitudes to leadership can change. If, some time in the future, there were two parties of essentially equal strength in coalition forming Government, then it might make sense for the leader of each of the parties to be designated a "Co-Prime Minister". It might sound silly to us today, but why not? And, more to the point, why should we suppress such a development, should it be deemed necessary or desirous, simply to make our constitutional amendments a little easier to write? Are we to close off opportunities for future political evolution simply because of our own laziness?

For this reason, my draft Constitution in the Appendix does not introduce the terms "Prime Minister" or "Leader of the Opposition" at all. Of course, in the *discussion* of the model that we are now undertaking, I will often refer to the Prime Minister doing this or that, but when one examines the constitutional amendments themselves, one will find that it is

either Ministers in general (under the lead of the Prime Minister, literally, first among equals), or the House of Representatives (whose confidence the Prime Minister enjoys), that is actually the performing the actions.

There is one final issue that needs to be addressed as a consequence of changing the method by which Ministers are appointed: what happens if a Minister resigns, or dies, or goes missing, at a time when Parliament is not in session? If the President can only commission or decommission Ministers on the request of a resolution of the House of Representatives (rather than at any time, at their own discretion, as the Governor-General can today), then there would seem to be no way to deal with, for example, a Harold Holt-style disappearance. In such a circumstance, it would not be prudent to insist that there simply be no Minister in that role until Parliament again sits; this may cause undue difficulties and complications in some situations.

A reasonable solution is for the Constitution to allow the remaining Ministers to meet, and decide between themselves who amongst them will take up the Ministerial appointment that has been vacated, on a temporary basis. If it is the Prime Ministership that needs to be filled, then clearly it will be an interesting meeting—but it is no worse than the current situation (as a review of the events following the Holt disappearance will reveal). If it is any other portfolio that falls vacant, however, then it will clearly be a matter that will be determined by the Prime Minister. In any case, such a "doubling up" of portfolios will only be a temporary arrangement, until the House of Representatives can again meet and pass a new resolution asking the President to appoint a new Ministry.

Confidentiality of the Executive Government

Although it is not obvious to most Australians, the Governor-General is intimately involved in the government of the nation. Every piece of legislation passed by the Parliament must be assented to by the Governor-General, and almost every significant action carried out by the Government passes through the Executive Council for formal execution.

Obviously, this process would be impossible if the Governor-General did not understand implicitly that absolute confidentiality is imperative. The Governor-General is kept advised on all matters of government, including the most confidential matters, some of which may not have even gone to Cabinet. Any breach of this trust would destroy the working relationship between the Prime Minister and the Governor-General.

If we are to have a directly elected President, who retains the powers of the Governor-General, then clearly such a President will also need to be fully informed about all aspects of the Executive Government, but we must again guard against any possibility of their popular election being seen as a mandate for independent executive power. In particular, we must ensure that there is no incentive for the Opposition to campaign for a President to be elected who may be tempted to share the innermost confidences of the Government with members of the Opposition.

In my opinion, the best solution to both of these problems is to simply write these provisions into the Constitution, namely, that the President shall be kept informed about all aspects of the Executive Government, but that they shall maintain the confidentiality of any information provided to them. Obviously, there are so many aspects to modern government that an exhaustive description of every occurrence would not be appropriate, so it should be provided that, if the President requests further detailed information about any aspect of the government validly within their oversight, this information will be provided.

In case of a conflict between the Prime Minister and the President, these provisions would clearly be justiciable, but perhaps more important is the fact that, should the matter be put before the people in an emergency vote, it would be clear beyond any doubt what the responsibilities and requirements of both offices were. Any President seeking to convert the role into an executive presidency would be faced with the clear prohibition of such activities by the Constitution itself.

CHAPTER FIVE

Election of the President

Once one comes to grips with the idea that no republic will be acceptable to the people of Australia unless the President is directly elected by the people, the next questions to be asked are usually dedicated to the logistics of actually performing such an election. How? Who can nominate? How many candidates can there be? What method of voting should be employed? How is the winner determined? How, in a Federation such as ours, do we balance the wishes of the States against those of the population at large?

This chapter is dedicated to these issues, as well as those consequential issues that, in some cases, have escaped those who have been contemplating the direct election of the President.

Who is President when there is no President?

Before diving into the details of a presidential election, a fundamental question must first be answered: what do we do when there *is* no President in office?

The Turnbull model offered at the 1999 referendum suggested that the most senior State Governor should fill the role of Acting President. In the context of a President selected by parliament, such a substitute is probably reasonable, although (as will be discussed in Chapter 7) the method of dismissal of the President—and any Acting President—in the Turnbull model was far from satisfactory.

However, in the context of a directly elected President, choosing just one State Governor to be Acting President is hardly appropriate. For a start, there is no guarantee that each State will modify their own constitutional arrangements to provide for directly elected Governors; indeed, it may well be that *no* States follow the lead of the Commonwealth; a State may, for example, simply change its Constitution so that it is the President of the Commonwealth of Australia, rather than the Queen, who ap-

points and dismisses its Governor on the advice of its Premier. (This is but one model, offered as an example only, but it may have appeal in some States.)

Moreover, the selection of the Governor of just one State to be Acting President would fly in the face of the Federal nature of our Commonwealth: surely all States should have a say in the interim presidential powers, just as all States have a say in the election of each President? It is not difficult to conceive of constitutional crises in which the removal of a President may be sought by one side or the other, simply because the State Governor who would step into the role of Acting President might, for a multitude of reasons, be more likely to favour a specific alternative course of action than that being pursued by the incumbent President (even though it would, in an ideal world, be hoped that no such favouritism would be evident).

My suggestion, instead, is that, when there is no President, all of the State Governors shall, collectively, form a Presidential Council, which shall take over the powers and responsibilities of the President in a caretaker role. Such an arrangement will maintain an appropriate Federal balance between the States, and it will further ensure that no single individual is installed into the office that only the people of Australia have the power of bestowing.

What do I mean by "a caretaker role"? Simply that the Presidential Council will be empowered to perform the tasks and duties that the President would usually perform, but without having the constitutional right to demand details of any of the confidential matters of the Executive Government that a President may validly call for. The Presidential Council may, of course, make any such requests as may assist it in performing these caretaker tasks, but the Ministry may refuse to divulge such details.

Naturally, depending on the circumstances, a balance may need to be struck. For example, if the previous President had died suddenly and unexpectedly, it may be that there are Bills that have been passed by Parliament but which have not yet received presidential assent. It may be that it would not be wise or prudent to delay the enactment of these Bills until a new President is elected to office. In such circumstances, the Prime Minister may ask the Presidential Council to assent to the Bills. In such a case, there would usually be no problem with the Presidential Council assenting, unless the Bills were highly controversial. On the other hand, it may be that there are pressing Executive Council matters requiring the authorisation of the President. In asking the Presidential Council to make these authorisations, a Prime Minister would need to consider whether they were comfortable divulging the details of the matters before the entire Presidential Council. In turn, the Presidential Council would have the

same discretionary powers as the President to delay or refuse to act if a constitutional emergency were perceived to be developing.

Now, it is all well and good to constitute a Presidential Council in times when there is no President, but the next question invariably is: what happens if the State Governors refuse to attend, or if they cannot attend? For example, imagine that (some decades in the future) it was a time of war, or of great natural disaster, and the President is killed, and half of the State Governors are either killed, or incapacitated, or prevented from travelling to Canberra due to the exigencies of the crisis? The Presidential Council should surely be authorised to act only with the assent of an absolute majority of the State Governors; so if half of them are missing, must our constitutional system grind to a halt?

The British monarchy and the American presidency both have well-known chains of automatic succession, to cater for precisely such catastrophic and widespread attack on the senior rungs of the ladder of power. Although it is difficult for most Australians to contemplate being on a war footing on our own continent, it would surely be foolish to assume that such a development could not occur in the decades or centuries ahead of us; and, in any case, natural or man-made disasters can emulate the worst scenarios of war quite effortlessly. So what sort of "chain of succession" should be instituted for members of the Presidential Council?

My suggestion is that, rather than such a position being bestowed on a Governor or any other person simply by virtue of them being alive and not incapacitated, it should instead be bestowed on the basis of their presence at the location where the Presidential Council is designated to meet. For example, the Constitution could stipulate that this meeting place be the senate chamber of Old Parliament House, with Parliament being given the ability to enact laws to change the location in the future if need be. When the office of President falls vacant, the State Governors would make their way to Canberra to take up their places in the Presidential Council. Until they do so, however, their place may be held by the resident of their State who is present in Canberra at the time and has the highest precedence in the "ladder of succession" specified in the Constitution, which may, for instance, specify that former Governors of the State take highest precedence (with the most recently retired Governor having highest precedence), followed by former Ministers and then former members of the Parliament of that State (but not active members of Parliament), followed simply by residents of the State. In the case of two people having equal precedence, "tie-breaking" criteria can be included (such as the greatest term of service as a Minister, or as a member of Parliament, and so on).

A potentially valuable by-product of such a system would be the ability to substitute ordinary Australians into the Presidential Council on a temporary basis. For example, imagine that we are no longer considering a time of war or natural disaster, but rather the well-planned and orderly retirement of a President. As part of a civics education drive, a scheme may be instituted whereby, between the time of resignation of the old President and the swearing-in of the new, some or all of the State Governors could agree to forgo their place on the Presidential Council, and allow ordinary Australians, residents of their respective States, to take their places. There may be a competition or a lottery held to select the lucky Australians who would be given this temporary honour. Ordinary procedural business of the Executive Council may even be scheduled to take place during that time, so that all Australians would get an insight into how our form of government actually works. Imagine the thrill for the Honourable Mrs. Jane Citizen, Presidential Councillor for Tasmania, being able to co-sign a piece of Commonwealth legislation into law! What better showpiece of our democracy could there be than the explicit demonstration that—literally—any Australian can be President? Of course, membership of the Executive Council will automatically be temporary for Presidential Councillors (Mrs. Citizen will not be allowed to use the title "Honourable" for the rest of her life), and each State Governor will ensure that there is a "stand-by" person on hand, of higher precedence than any ordinary citizen (say, a former Governor or Minister or member of Parliament of their State), authorised to take over should any business of a more serious nature arise unexpectedly.

Perhaps I am too romantic in my view of our constitutional democracy, but in my view we are doomed if we do not foster the spark of imagination that could make the Australian republic come alive for ordinary Australians. To many in the general public, our Federal parliamentarians are foreign creatures, detached from mainstream Australia, buried away in the centre of an artificially-created city in which every road to the centre seems to instead go around and around in circles. I know from personal experience that this is not (completely) true: most of our parliamentarians are honest, caring, genuine people, friendly and easy to talk to in person. Having them interact with a Presidential Council of ordinary Australians is arguably a sure-fire way to show them to be more human than their usual public personas. Indeed, what could be more satisfying than having the Prime Minister enter the room and greet you as "Your Excellency"?

Returning to more serious constitutional matters, one might ask how the "replacement" process would work in times when the office of President falls vacant unexpectedly. Clearly, the resident of each State with highest precedence who is on hand at the time can take their place in the

Presidential Council immediately. But, equally clearly, there needs to be a mechanism in place whereby the Presidential Council can rescind any decisions made unwisely or precipitately before all Governors are able to travel to Canberra and take their places. For instance, it would be ridiculous if a Prime Minister who heard of the death of a President were able to rush to Old Parliament House with some other Ministers, grab half a dozen tourists from the various States, and have an Executive Council meeting, there and then, to get presidential assent to actions that no President would ever agree to. On the other hand, we need to balance this against the real potential uncertainty, in time of war or natural disaster, over whether the Governor *would* ever turn up to take their place.

A suitable solution is the following: if any vote is passed by the Presidential Council, and if it would have been numerically possible for that vote to have been defeated if Presidential Councillors had been replaced by other Presidential Councillors of higher precedence, then the vote does not become final and effective for twenty-four hours. Within that time, if Presidential Councillors *are*, in fact, replaced by other Presidential Councillors of higher precedence, and if the Presidential Council then passes a resolution to rescind the earlier vote, then the vote is rescinded.

Clearly, if there are at least four State Governors in place, and at least four of them vote in the affirmative on any matter, then the vote is effective immediately, because there *are* no persons of higher precedence than State Governors who could rescind such a decision. In all other cases, the vote may be rescinded if Presidential Councillors of higher precedence arrive and take their place. (So why not describe it in this more direct way? Because we must provide for the case that some States may change their own constitutional arrangements, and may provide for an office equivalent to that of Governor—but then again they may not, in which case the Constitution should provide that there be no office of Governor for these purposes, with highest precedence then going to former Governors, if any are still alive, then former Ministers, and so on.)

The next question that we must answer is *how* a Presidential Councillor is to be replaced when someone of higher precedence arrives. Unless (or until) it is the State Governor that arrives, who determines whether one person or another has higher precedence? My suggestion is that, in such a circumstance, if any former Justices of the High Court are present (or, failing that, any active or former Federal judges, or any active or former Justices of State Supreme Courts), that a majority of them be empowered to call a halt to proceedings if they feel a claim to precedence to be arguable; and that they make a determination on such a claim for precedence within, say, one hour. If none of these judges are present, then the Presidential Council itself can make such determinations, excepting,

obviously, that the Presidential Councillor whose precedence is being challenged must abstain. If fresh "evidence" over precedence later comes to light, the judges present (or the Presidential Councillors themselves) should have, say, fifteen minutes to make a determination on the available evidence. If insufficient evidence is available within these time periods to distinguish between two claimants of apparently equal precedence, then the position should be determined by lot.

The idea is that, if the Presidential Council is to be workable at all, it should not be bogged down with questions of determining who should be a member. The exclusion of serving Justices of the High Court recognises the fact that matters coming before the Presidential Council may be justiciable, and the High Court has original jurisdiction over constitutional matters. Conversely, *former* Justices of the High Court are ideally placed to make such determinations, due to their experience.

These provisions may seem complicated, but they do ensure that the Presidential Council functions in the way intended, yet remains flexible enough to survive in times of crisis or disaster.

Who should be eligible to become President?

The office of President has fallen vacant, and we now have a Presidential Council in place to ensure that the smooth working of the Commonwealth does not come to a grinding halt. We need to elect a new President. How do we do it?

The first question that needs to be addressed is just *who* should be allowed to be nominated for the office. Everyone agrees that the President must be an Australian citizen. But should there be other restrictions? Surely our President cannot have dual citizenship—how could a head of state swear allegiance to *another* head of state? (Then again, if the Governor-General *is* our current "head of state", perhaps we are already living with such an absurdity?) Should there be an age limit? Should politicians be allowed to be nominated and elected?

These issues are ones which can still be debated, and there would be no fundamental change to any republic model if the eligibility requirements were to be changed. My own personal opinions, however, are as follows.

Firstly, the restrictions on an Australian becoming a member of the House of Representatives, specified by the Constitution, provide a good starting point. Anyone having an allegiance to a foreign country (which now includes Britain) is ineligible from sitting in the House. A minimum

age of twenty-one is mandated. Prisoners and undischarged bankrupts are ineligible.

However, public servants, senators, and members of State Parliaments may not be candidates for election to the House. For such a person to run for a seat in the House, they must first resign from the public service or from their previous parliamentary seat. This is appropriate for someone aspiring to win a seat in the House of Representatives, but it would not be appropriate for presidential candidates. After all, the President is not "running for" a political office at all: the leading nominees will be admired and respected Australians, each of whom would make an excellent head of state and "watchdog" on behalf of the people. Often, they will be of such humility and modesty that they never considered themselves presidential material at all—they will have been nominated by others.

A solution to this problem is to simply specify in the Constitution that a person is eligible to be a presidential candidate if it is within their power to become eligible for election to the House of Representatives prior to the time that they are sworn in as President. In other words, public servants, senators and parliamentarians may be presidential candidates; it is only if they are actually elected President that they will need to resign from their former position. (I discussed the question of whether politicians or former politicians should be allowed to be presidential candidates in the previous chapter; in my opinion, they should not be barred.)

It has been recently suggested that a President should be Australian-born, in the same way that the President of the United States must have been born in the United States. To my mind, this is a poor provision of the U.S. Constitution. As far as I am concerned, any naturalised Australian citizen is just as much an Australian as I am; we do not have two classes of citizenship. However, I do not know what the majority of Australians think on this issue, and it no doubt needs to be discussed and debated in the community before a final decision is made. If I am, in fact, in the minority, then a provision should be added to the Constitution to reflect the wishes of the majority.

Filtering the nominations

Having now determined who is eligible to become President, let us consider the next question: how are nominations for the office to be made, collected, sorted, analysed, and put onto a ballot paper?

The most democratic solution of all would be to allow any Australian citizen to nominate any eligible Australian for the office of President, and for every such nomination to be placed on the ballot paper.

Obviously, this will not work. With such a system, there could be thousands, or even tens or hundreds of thousands of nominations. It would surely be fair, but how on earth could a ballot paper be constructed? Even if one envisages a computerised "virtual ballot paper", it would be almost impossible for anyone to cast a meaningful vote.

Most creators of direct-election models have tried to work back from this unrealistic democratic ideal, towards something more manageable. Bill Hayden's model, discussed at the 1998 Constitutional Convention, envisaged the need for one per cent of Australian voters to sign a petition to enable a nomination. This doesn't sound too bad until one realises that one per cent of voters translates to about 120,000 people. Who except for the major political parties has the manpower to collect and collate 120,000 signatures? All for a position that is supposed to be non-partisan? It doesn't fit at all.

Other models have sought to reduce these requirements substantially—say, 10,000 signatures, with at least 1,000 from each State. At least we are now in the realm of sensibility, but such a process would still beg the question: what types of organisation would be expected to provide the manpower and fund the expenses for coordinating the collection of these signatures across all six States? And with the hurdle for nomination being dropped so significantly, we would surely again find that there would be too many nominees to be able to put all of them onto a single, workable ballot paper.

At the other extreme, Geoff Gallop's direct election model, also considered at the 1998 Constitutional Convention, almost avoided any direct nomination process at all. According to this model, three candidates would be selected by a two-thirds majority of a joint sitting of Parliament. The public would then get to vote on just these three candidates.

Would the Gallop model have any chance of gaining acceptance by the people of Australia? At first, it would be tempting—it provides for direct election—but without any direct *nomination*, it would be as good as dead. If we don't trust our politicians to choose our President for us, then why on earth would we trust them to give us *three possible* choices? As noted in the previous chapter, we could well get Simon Crean, Andrew Bartlett, and John Howard to choose from. Need I say more—the second republic referendum would have just been defeated without further debate.

The third option that has been recently considered is an "electoral college", containing members from all over Australia, and all walks of life, who would select the presidential candidates. However, this simply

pushes the problem one step further back: how are the members of the electoral college selected? (Indeed, many Australians would be surprised to learn that, formally, the method of election of the United States President is not direct election at all, but is rather by means of an electoral college—but each candidate for the electoral college is aligned with a presidential candidate. This demonstrates how easily a "good idea at the time" can be manipulated into irrelevance if there is sufficient political motive.)

So far, the existing "solutions" to the nomination conundrum have created more problems than they have solved. However, there is a nugget of gold in each of them. Clearly, any nomination from a member of the public should be considered. The problem is how we can filter down a huge number of public nominations to something more manageable. A true electoral college which could discuss and analyse the nominations would be ideal, but then we face the problem of electing the electoral college. However, we *already* have a set of elected representatives, who are experts at judging public opinion and crunching the numbers for probable electoral success: our Federal parliamentarians. Rather than simply drawing them together for a single political joint sitting, at which they will attempt to neutralise their opponents by ensuring that both sides get up an equal number of candidates, why don't we force them to form a "de facto" electoral college, by constraining them in such a way that they are forced to filter the nominations of the public into a sensible shortlist, rather than put up their own political candidates?

This might sound vague at this stage, but let me persist.

Firstly, we must ensure that there are more than just three candidates put up for voters to vote on, as had been suggested by the Gallop model. In my opinion, a nice number of candidates to have on the ballot paper is nine. That's enough to ensure that there is real choice (provided that the choices are good ones, which we shall come back to in a moment), but not so many that voting for President would be as difficult as voting "below the line" on a Senate ballot paper. We will worry about how these votes are to be made, counted, analysed and summarised shortly; all that matters, at this point, is that the number of candidates is appropriate.

Secondly, it will help if we give this "electoral college" a distinctive name, to emphasise the fact that it *not* simply a joint sitting of Parliament (even though the personnel are the same as for a joint sitting). To this end, let us call it the Presidential Selection Council.

Thirdly, we need to ensure that the Presidential Selection Council can be formed, even if the House or the Senate or both are adjourned, prorogued or dissolved, or if the term of the House has expired. We can do so by simply stipulating in the Constitution that if any of these conditions

are true, the members of the House and the senators in place before the adjournment, prorogation, etc., will take their places in the Presidential Selection Council as if such adjournment, etc., had not taken place. There is nothing anti-constitutional in this: all we want are the parliamentarians, namely, the people: no parliamentary business will be carried out in the Presidential Selection Council at all.

We will give our parliamentarians a reasonable time to achieve a quorum of the Presidential Selection Council—say, two weeks—because we must recognise that the President may leave office suddenly, and some of the parliamentarians may be at the far ends of the earth at the time: there is no guarantee that Parliament will be in session. There is no need for *all* parliamentarians to be present for the first sittings of the Presidential Selection Council: the important votes will be taken at the end of one or two weeks of deliberations. However, it is important that a quorum of, say, half of all parliamentarians be achieved within the two-week period. If this is not stipulated, there may be a temptation for a Prime Minister not wishing to install another President in office at that particular time (for whatever reason) simply advising all Government members to stay away from the sitting of the Presidential Selection Council, allowing the process to be postponed indefinitely. We must ensure that there are no loopholes that would allow for such a subversion of the intention of the Constitution. (We will return to the question of what the penalty should be for breaching this requirement, or any other requirement to be discussed here, shortly.)

Fourthly, after achieving a quorum, the first business of the Presidential Selection Council will be to create a select committee to do the actual collection, processing and filtering of presidential nominations. For definiteness, let us refer to this committee as the Presidential Nomination Committee. The membership of this Committee shall be left completely to the discretion of the Presidential Selection Council. In practice, the power-brokers and number-crunchers from the major parties will be co-opted onto it. (As will be seen shortly, there will be real incentive to have the job done properly.) In addition, the Presidential Nomination Committee will be authorised, by the Constitution, to make use of the resources of the Commonwealth Government—in other words, Commonwealth public servants—to process and analyse these nominations.

The Presidential Nomination Committee may choose to perform any or all of its work in camera. Indeed, most of the detailed number-crunching, and analysis of the polling and opinions reported in the media, will be done behind closed doors.

Fifthly, the Presidential Nomination Committee will be required, by the Constitution, to come up with a shortlist of 36 presidential nominees.

The Committee must ensure that each of these nominees is qualified to be a presidential candidate, and must furthermore obtain written acceptance from each of the nominees. (If a nominee would need to perform some act or acts prior to being sworn in as President, such as resigning from a political party, then the nominee must also provide a written undertaking that, should they be elected President, they will perform the required act or acts.) However, the Constitution will provide that the whole process won't be invalidated simply because a nominee was included on the shortlist of 36 who was not, in fact, eligible, or who subsequently became ineligible, or died, etc.

Sixthly, the Presidential Nomination Committee will formally (and publicly) submit the names of these 36 presidential nominees to the Presidential Selection Council.

At this point, it would be expected that the shortlist of 36 would include a wide diversity of representation from the entire Australian community. One would expect nominees from every State and Territory, from many different walks of life, and from different cultural backgrounds. Some may be well-known, or even famous, in their own right; some may be less well known. All, however, should be well-respected, and clearly capable and worthy of our highest office.

If we design our constitutional system well, then being shortlisted as a presidential nominee will, in itself, be a great honour. Hopefully, this will encourage dignified and worthy Australians to agree to their name going forward.

To aid in this process, the Presidential Selection Council will be strongly encouraged to extol the virtues of the presidential nominees in their public debates. Of course, if information is forthcoming that puts a question mark against the suitability of any of the nominees, then such will need to be dealt with by the members of the Presidential Selection Council with as much tact and diplomacy as possible—but the public cannot be misled. In some cases, a nominee may be quietly advised to withdraw their consent to nomination; one can imagine a recent crisis that may have been avoided, had this process already been in place.

Finally, the Presidential Selection Council will need to decide on a final list of nine Presidential Candidates to be put to a vote of the people. It will be perfectly acceptable for the Presidential Selection Council to take heed of public opinion polls published in the press during this entire process in making their decisions—after all, the whole intention is that the Presidential Selection Council come up with precisely what the people *do* want. However, lest it be thought that this might simply be a one-way, watch-the-press exercise, it will be incumbent on the Presidential Selection Council to put each of the 36 nominees in the most favourable

light, to perhaps try to sway public opinion away from the obvious celebrity candidates, in favour of those nominees who may perhaps be less well known, but whose personal qualities may make them eminently suitable as our head of state; after all, our parliamentarians will need to work with the new President on a regular basis. On the other hand, it would not be prudent to push an unpopular candidate on the public, simply because parliamentarians personally believe that they would make the best President. A middle ground must be sought.

This returns us to the question of how we can possibly ensure that our parliamentarians will do any of this properly. What should be the penalty for breaching the requirement that a quorum be established within two weeks of the office of President falling vacant? That 36 presidential nominees be selected? That nine Presidential Candidates be selected within four weeks of the office of President falling vacant? That these nine Presidential Candidates actually have any bearing to what the people of Australia really want?

It's actually not too difficult to guarantee.

Keeping the bastards honest

I have overused Don Chipp's famous line throughout this book, but it is a good one—and he has at least ensured that it is not something that can now be censored. If I had to choose my own turn of phrase, it could not possibly be put into print.

The late Dick McGarvie continually reminded us that any constitutional convention is only as good as the effectiveness of the penalty that will apply in its breach. What I have described in the last section is a mixture of new constitutional law (namely, provisions that can be found in my draft Constitution in the Appendix), and new constitutional conventions. For instance, there is clearly no way to ensure, as a matter of constitutional law, that the Presidential Selection Council will extol the virtues of the presidential nominees. (Well, actually, I *did* try to write this into the Constitution on my first attempt, but Dick talked me out of it.) This will simply be a matter of convention. So what penalty could be applied if this new convention were breached? For that matter, what should occur if any of the constitutional requirements are not, in fact, met?

To my mind, there is one simple answer to this question. Namely, if the Presidential Selection Council fails to do its job, then there shall be an automatic and immediate double dissolution of Parliament.

I can feel the gasps of horror—and the reaching for the Panadol or the Ventolin or the Valium—of our Federal parliamentarians all the way from my home in Narre Warren in south-east suburban Melbourne. A double dissolution?! Surely you're pulling our legs?

Actually, I'm not. It might seem sacrilegious to our parliamentarians, but the only way to keep them honest (see, I didn't even call you "bastards" this time!) is to threaten to take away that which they treasure above all else: their parliamentary seats.

There *is* no more important duty, under our new Constitution, than to ensure the fair and prompt election of a new President into office, once that office becomes vacant. All actions of the Parliament and of the Executive Government proceed through the President, who assents to these actions on behalf of the people. The President is our head of state, the guardian of our Constitution.

Thus, the Constitution will simply specify that, should any constitutional requirement of the Presidential Selection Council fail to be carried out, a double dissolution will immediately take effect. Moreover, the Presidential Selection Council will itself be dismissed (recall, this entity is constitutionally separate from the Houses of Parliament, despite the fact that it is our parliamentarians who constitute it).

But if there is no Presidential Selection Council, then who will carry out the steps necessary to elect a new President? Simple—the Presidential Council will, itself, take on the role. Clearly, this would not be an ideal situation, but the six Governors would have the Commonwealth public service available to help them in their task. In the unlikely (but logically possible) case that the Presidential Council should likewise fail in this task, then the Presidential Council would itself be dismissed, and any person who has served as a Presidential Councillor since the office of President fell vacant would be barred from serving on it again for some specified time period (say, a year). The process would then begin again, with a fresh Presidential Council (typically of those people next on the list of precedence), until the process is completely successfully.

These provisions cater for the case of any breach of constitutional law, but how does this help us enforce the *conventions* described above?

Simple: the ballot paper for the presidential vote will not just contain boxes for the nine Presidential Candidates, but it will contain a further, tenth box at the bottom, labelled "A person other than the Candidates listed above". If this "none of the above" option achieves an absolute majority of votes in the Commonwealth, as well as an absolute majority of votes in a majority of States, then the Presidential Selection Council will be deemed to have failed in its task, and the double dissolution will take effect.

How does this provide an effective penalty for breach of the conventions? Clearly, if our parliamentarians foist upon us a list of Presidential Candidates that is obviously out of step with public opinion—and, recall, we live in an age in which public opinion can be gauged and broadcast within hours or days—then the public can express their disgust by throwing the lot of them out of their taxpayer-funded jobs.

Lest it be worried that a frivolous, politically-motivated campaign to vote for "none of the above" could be mounted, it should be noted that an absolute majority of votes would be extremely difficult to achieve unless there was genuine and widespread indignation over the failure of the selection process. The "none of the above" option (or the "Null Candidate", to give it a better name) would need to secure more than 50 per cent of the entire vote; in other words, the nine "real" Candidates would, *between them*, need to receive less than 50 per cent of the entire vote. Moreover, to achieve this absolute majority in a majority of States (namely, at present, in four States), as well as of the overall vote, would be a task as difficult as passing a Section 128 referendum.

However, if there was, perchance, a vacancy in the office of President at a time that the Parliament was "on the nose" with the Australian people, then even the remote possibility of carrying out such an overwhelming "protest vote" might serve as a useful check on the powers of an overly cunning Prime Minister or Leader of the Opposition. For example, if a political or constitutional crisis were looming, such a leader may try to intimidate an uncooperative President into retiring from office—say, by digging up some "dirt" on them, and threatening to make it public. If the only result of such a resignation would be to give such a leader even the slim prospect of installing a more compliant President in office, then it may be tempting. On the other hand, if there is also a chance that such a resignation could bring about a protest vote leading to a double dissolution, then the temptation would surely subside. (There would, of course, be no reason for a Prime Minister to ask a sympathetic President to resign simply to bring on such a vote: the President should have the power to call an emergency vote of the people to dissolve the Senate directly, as will be discussed in Chapter 7, if this were the intention.)

Apart from such singular (but useful) possibilities, then, it would be expected that the people would only vote to overwhelmingly turn down the list of Candidates if the list was, in fact, cynically and poorly constructed. One would expect that this effective penalty for breach would, indeed, ensure that the conventions described above were obeyed; namely, that for the purposes of selecting the Presidential Candidates, our parliamentarians will genuinely put their partisan politicking to one side, and give the people of Australia the best possible list of Candidates that

they can—and that they will respect the dignity of the office of President, and treat presidential nominees with the same respect. Once these conventions are "bedded down", after a decade or two, most Australians would hardly remember the penalty for their breach at all—but they will always be there, lurking in the background, at the fingertips of the constitutional experts, ready to advise the public, should any constitutionally creative Prime Minister contemplate subverting the process.

That's how effective conventions operate.

The Indicative Presidential Vote

We have come a long way. The office of President fell vacant. We have created a robust and reliable Presidential Council to take over the duties and responsibilities of the President in a caretaker role. We have given all Australians and all Australian organisations a chance to make nominations for the office of President. We have devised a method by which these nominations can be fairly and sensibly filtered down to a shortlist of 36 presidential nominees, and then further filtered down to nine Presidential Candidates—a method which simultaneously honours and celebrates the achievements of all of these distinguished Australians. And we have ensured that we have retained the right to express our displeasure at the list of Candidates, should such an occurrence ever arise.

We now get to vote on these nine Presidential Candidates. How should we do it?

Clearly, the logistical aspects of the election will be very similar to that of any general election. The Australian Electoral Commission will run the election in the normal way, which at the current time involves us trotting off to a local school hall on a Saturday morning to write some numbers on a piece of paper; in the future it may be possible for us to vote via the Internet, or by some hybrid mechanism.

But how should we express our preference for each Presidential Candidate?

There are a number of possible voting systems being discussed at the present time, corresponding to those used for different purposes around the world. However, I am going to suggest a system that is in some ways very traditional and familiar to us, but in other ways is completely novel. (This should not shock anyone: Australia is well-known throughout the world as being leaders in constitutional innovation. After all, there needs to be a new idea or two introduced every century or so, just to keep everything from getting too stale.)

The first stage of the process is the familiar and traditional: in filling out our ballot papers, we need simply number the boxes preferentially from 1 to 10, just like for a House of Representatives election with ten candidates.

So how do we put all these preference votes together, to determine the "winner"?

Selection of the President-Elect

One of the questions that creators of direct-election models have agonised over has been that of determining the winner of the presidential election.

For a normal election for a parliamentary seat, this question is simple enough: we employ some particular electoral algorithm, such as the single transferable vote (for the House of Representatives), or proportional representation (for the Senate), or "first past the post" (the system used in the early days of our Federation, for both Houses), or we could, in the future, use some other formula that seems to encapsulate a degree of fairness.

The election of a President, however, provides us with a fundamental dilemma. Our Federation is predicated on two distinct forms of "democracy", which I have previously referred to as "geographical democracy", namely, that each State is worth the same, which is encapsulated in the structure of our Senate; and "popular democracy", namely, that each Australian is worth the same, which is encapsulated in the structure of our House of Representatives. Which form of "democracy" should we abide by when deciding which Candidate wins the presidential election?

Surely, in a Federal system such as ours, we cannot simply choose one or the other. Somehow, we have to take into account *both* the support for the Candidates across the States *as well as* their support in the overall number of votes. Anything less will threaten to derail the entire process of becoming a republic. Could you imagine a system in which New South Wales and Victoria could, together, force President after President on the rest of the nation? Or a system in which the other four States could force President after President on New South Wales and Victoria? Hardly.

Mathematically, this leaves us with a fundamentally intractable problem. This is not to say that it is not possible to concoct any number of mathematical formulas, each of which is demonstrably "fair" to both concepts, in a certain mathematical way—there are many ways in which this could be done. But the simple fact is that any such formula is bound, sooner or later, to yield a result that is contrary to common sense.

The analogy I like to give is that of the AFL Finals. Over the years, the AFL have struggled with the question of how the Final Eight should play off against each other, in such a way that there is a clear progression from week to week of the Finals, so that teams higher on the ladder are given due credit for their better prior performance, but not at the expense of overlooking actual performances during the Finals themselves. It is the same sort of dichotomy as faces us now: how much should the Home and Away series be worth, and how much should the Finals be worth? Namely, how much should each State be worth, and how much should each person be worth?

Anyone who has observed the AFL struggle with this problem over the years cannot fail to have been surprised at some of the counterintuitive results that have emerged. No sooner has one anomalous Finals series been dealt with—by changing the formulas—than another soon comes along, and shows the new formulas to be just as hopeless. "How can Collingwood have to play Essendon when they beat them before and …" has been the sort of comment that has caused the AFL never-ending grief and soul-searching—especially in recent years, when additional formulas needed to be concocted to determine whether interstate teams would or would not be granted home Finals, again needing to be balanced against political and legal commitments to Victorian venues.

As any Victorian will tell you, the simple solution is to get rid of all of these new interstate teams, and go back to a Final Five from a competition of twelve teams. However, since this is the football equivalent of unfederating the Commonwealth and going back to six disparate and independent Colonies, it is unlikely that this solution is of much use to us in creating a workable direct-election republic.

Nevertheless, the general idea is sound: namely, if it is mathematically impossible to create a formula which will not provide a counterintuitive result in certain circumstances, then should we seek to construct such a formula at all? Could we instead throw out any idea of a universal formula, and instead deal with each case on its merits?

In the case of the AFL, this is not a realistic option: there needs to be in place some set of formulas, no matter how limited they may be, that can be applied scrupulously fairly, no matter if the results turn out to be counterintuitive. Such would also seem to be the case with a presidential election, but a little lateral thinking gives us an alternative path.

What if the Presidential Selection Council were to be reconstituted after the presidential election, and given the task of determining who the "winner" is? Put aside any questions, for the moment, about how we will force them to do this task fairly (remember, I don't trust 'em any more than you do), and simply consider the proposal itself. Just imagine that

you were given the task of determining who "won" the election. Do you think you could do it fairly?

If you were given enough statistical analyses of the election results, and it was stipulated to you that broad support across most or all of the States as well as of total vote should be taken into consideration, then I have no doubt that most Australians could arrive at a fair conclusion, and moreover would agree with each other on the conclusion. What is more, this result would, in some cases, be manifestly fairer than any naïve mathematical formula could possibly produce.

Our Federal parliamentarians, of course, are experts at crunching the numbers—State by State, seat by seat, male, female, Catholic, Protestant, blonde, brunette, you name it—they slice it and dice it in every way conceivable, to try to determine how they can get your vote. If they were given a few days to digest the election results, and (publicly) analyse them in as many ways as possible, it is undeniable that they would be able to come up with some way of selecting a "winner". Preferences could be allocated by any electoral formula you wish to consider; results could be analysed according to any criteria you wish to name. Moreover, the press would, at the same time, be digesting the same results and analyses, and seeking feedback from the public at large. Put all of this information together, and it is undeniable that some sort of fair conclusion could be arrived at. At worst, the Presidential Selection Council would be able to argue that their conclusion was the best that could be done, given the many competing factors that needed to be weighed up.

So let's assume that we have convinced ourselves that we may be able to extricate ourselves from the horns of our mathematical dilemma. How can we guarantee that this final work of the Presidential Selection Council is, in fact, performed fairly and equitably?

Ratification of the President-Elect

The solution is easy: we vote on the final result.

Before there are howls of protest against such a shameful waste of money—not just one presidential vote, but two!—let me a make a few telling points.

Firstly, some countries (such as France, Brazil and Chile) already have provision for a second vote of the people. In their cases, this second ballot has been designed to be a "run-off" election, between the top two candidates from the first ballot. However, these countries don't have the Federal dilemma that we have—our whole problem is that we don't *have* any

mathematical way of fairly determining the "top two" candidates from the first vote; that's why we gave the job of analysing the results to the Presidential Selection Council.

Secondly, it must again be kept in mind the amount of money we are talking about here. If it costs $7.00 for every Australian to choose their President, rather than $3.50, then I don't think there will be revolution in the streets. Indeed, consider how often this has to be done. Once every five years? Every seven years? Every ten years? We will discuss this question in detail in the next chapter, but let's be conservative and assume it's every five years. The cost of an extra vote in the presidential election process will then cost each Australian 70 cents per year. Big whoop.

So let's put that furphy firmly to one side. How will we, then, conduct this second vote of the people?

My suggestion is that the choice of President-Elect—the Candidate selected by the Presidential Selection Council as having best "won" the preferential vote—should be put to the people in a simple ratification vote. Namely, the ballot paper would say something like, "Jane Citizen has been deemed to be the winner of the Indicative Presidential Vote by the Presidential Selection Council. Do you agree with this decision?" Each Australian would then be required to respond with either "Yes" or "No", just as for a referendum.

If the processes have been carried out as I have described them above, then I have no doubt that most Australians will rally behind the President-Elect, and provide an overwhelming ratification of the decision. We like to play the game hard; but when all is said and done, we acknowledge and abide by the wishes of the majority. We have never seen rioting in the streets against an election result, arguing that the people of Australia "got it wrong". Governments get it wrong; Prime Ministers get it wrong; and, most certainly, Governors-General in the past have got it wrong. But the people do not get it wrong. How can they?—that's us!

Having such an overwhelming ratification for the President-Elect will allow all Australians to put the presidential selection process behind us—it will give us "closure", as the Americans like to say. It solves the problem of the apparent incongruity of having a President in office who only achieved, say, 20 per cent of first preferences out of the nine Candidates; such a President may, for example, receive 90 per cent approval at the ratification. Regardless of whether they favoured a different Candidate, Australians will surely unite behind our head of state—one of us, selected by us, by a process which was manifestly under our control.

We must, however, still decide when this vote is to be held, and what the criteria will be for the choice of President-Elect to be ratified. To my mind, the answer to the latter question is self-evident: the Ratification

Vote should pass according to the same criteria as a constitutional referendum. In other words, the President-Elect must be ratified in a majority of States, as well as by a majority of voters overall. Only in this way can we ensure that all previous stages of the selection process are carried out in a truly Federal spirit; namely, a feasible Presidential Candidate *must* have the support of the population *as well as* wide support across the States.

As to *when* the Ratification Vote should be held, my opinion is that there is no reason why it could not be held the Saturday after the Indicative Presidential Vote. If there is concern that this would not leave enough time to process postal votes, it must be remembered that the results of the first vote are not going to be inserted into an inflexible mathematical formula, but rather will be analysed in many different ways by the Presidential Selection Council. In reality, the small percentage of postal votes is unlikely to affect the discernible trends.

However, to maintain flexibility for calendaring (for an expected and planned resignation of a President, at any rate), it would be prudent to allow for the Indicative Vote to be held earlier, with, say, a two-week delay before the Ratification Vote, in the case that there is an event on the Saturday in between that we wish to avoid clashing with. To do this, we may simply stipulate that the Indicative Vote must be held within five weeks of the office of President falling vacant, and that the Ratification Vote should be held within six weeks of the office falling vacant. The entire process would then need to be completed within the six-week limit, but the first vote can be "pulled back" to be two or, in an extreme case, three weeks before the second vote.

Finally, we must consider what is to happen if the Ratification Vote should fail to ratify the President-Elect. In such a case, it would not be prudent to interpret such as result as indicating the failure of the Presidential Selection Council to properly do its job, for three reasons.

Firstly, it may be that there were two Candidates who were almost inseparable on the first vote, and that the Presidential Selection Council (and presumably also the media) simply misread public opinion about how the "dead heat" should be resolved.

Secondly, insisting on the "double majority" (of both States and electors) is crucial to ensuring that the previous stages of the selection process are carried out with the right Federal goals in mind; but it does, in turn, provide a formidable hurdle to be passed if there were to be any thought of stirring up controversy. It is certainly a far cry from the ability to dissolve Parliament on the first vote, which would require "none of the above" to outscore all nine Candidates put together; here, we only have two choices, which changes the equation significantly.

Thirdly, giving the Ratification Vote such power would, no doubt, provide a temptation at some future time for either a Government or an Opposition to seek to use it to obtain a quick double dissolution. (Having only one such opportunity—in the first vote—is arguably acceptable, because of the much greater difficulty of it being achieved frivolously.) Moreover, even the thought of such a hijacking of the process would overshadow the intention of the Ratification Vote completely, namely, to ensure unity of support for the new President. If such thoughts were to be entertained at all, let it be in relation to the first vote, when there are still nine Candidates in contention; obviously, if all nine were rejected—and if they were quite reasonable and feasible Candidates—then it would clearly be seen as a decision to throw out the Parliament, rather than any sleight on the Candidates themselves.

In the case, then, that the Ratification Vote fails, what should we do? My suggestion is that the Presidential Selection Council be given another week to put one of the other Candidates up as President-Elect, for a fresh Ratification Vote. Hopefully, this would resolve the issue.

As a point of logic, of course, it is conceivable that even this vote would fail. In such a case, the Presidential Selection Council would continue to put up Candidates as President-Elect, week after week (but not repeating any Candidate), until one of them is ratified. If all nine Candidates were rejected in this way (or the remainder of them withdrew, or died, or became ineligible, etc.), then the Constitution would simply provide that the entire presidential selection process start all over again.

The idea here is to remove any real temptation to scuttle the Ratification Vote on political grounds, by making the consequences of such a scuttling rather boring and tedious. If everything runs as it should, the ratification should almost be a formality—albeit a unifying one.

CHAPTER SIX

Removal of the President

In the previous chapter we considered the question of how we should fill the office of President once it fell vacant. In this chapter, we shall concentrate on the other end of a President's term in office, namely, what conditions should be put in place for their term to naturally expire, and how we should be able to remove a President should their continuance in that office be perceived to be against the best interests of all Australians.

Term of tenure of the office of President

After deciding on a method of selecting the President, the next question that is usually asked is how long a President's term of tenure should be, before they need to seek re-election. Or should a President be barred from seeking re-election at all? If not, how many terms should they be able to serve? Consecutively, or in total?

Commentators have looked at other presidencies around the world, and have generally tossed around a number of common suggestions for a presidential term of office: four years, five years, seven years. Since these numbers are somewhat close to two full terms of the House of Representatives, some have suggested that this connection be made definite, so that there is a presidential election at every second general election. Whether or not a President should be able to serve a second term, or subsequent terms after that, is generally a matter of personal opinion.

I recommend, however, that we go back one step from this. Is there any fundamental reason why a President's term of office should expire at all? The fact that other democracies have such a provision doesn't mean that it's right for us; after all, we are constructing our own form of presidency, directly elected, but neither ceremonial nor executive in its nature.

If we go back to the considerations of the previous chapter, it should be clear that politicians may be starting to realise that it might *not* be a good idea to have a presidential election too often—after all, there is a slim but

real possibility that the public could reject the list of Presidential Candidates altogether in order to bring about a double dissolution.

That's one immediate consideration—political in nature—but a little thought shows that there are a number of others, more closely related to the form of presidency that we are trying to create. Namely, if we are trying to construct a republic model in which the President (like the Governor-General today) plays an oversight role in the workings of the Parliament and the Government—but doesn't interfere with the political process—then why would our politicians want to foster the idea that the President is elected in the same manner as our parliamentarians? Once they accept that the President is going to be their independent umpire—that there is no political advantage to be gained by trying to install one of their own in the job—they will quickly understand that the best course of action is to minimise the frequency of these presidential elections as far as possible, and ensure that they are seen as part of a more stable mechanism that proceeds on a much longer timescale.

Indeed, there is much to be said for the idea that the presidency should be little different in concept from the monarchy—excepting, of course, that the President will be an Australian, and will ascend to that office by virtue of the support of the people of Australia, rather than by an accident of birth. And, indeed, since the Governor-General has been given all of the powers and responsibilities that the Queen has in Britain, and since we are transferring these same powers and responsibilities as closely as possible to the President, then it is hard to argue with the thesis that the President will, in effect, *become* the "Monarch"—for as long as they remain in office, at any rate.

Looked at in this way, the best result for all concerned would be for the President to enjoy a long, stable "reign", as it were. The longer they remained in office, the greater the incentive for them to maintain the dignity of their position. They would see Prime Ministers and Governments come and go, without needing to "look over their shoulders" for pretenders to their office—nor would they need to look nervously at the calendar, wondering if they would be able to withstand another presidential election.

The Queen, of course, would never consider abusing her position as Monarch—not just because it is not in her nature, but, even if it were, because such actions would undoubtedly hurt her family (being, as it is, a hereditary monarchy). There would be no such family constraints on an Australian President, of course—but there will be an even stronger, latent threat that, should they ever contemplate straying from a path of absolute impartiality in their dealings with the Government and the Parliament, they would be faced with the ignominy of being dismissed from office by the very Australians who elected them to it in the first place.

Of course, there would still be some very real differences between the presidency and the monarchy; for example, we would not expect a President to be elected to office so young that they would ever be able to celebrate a golden jubilee. But, in my opinion, there would be no harm at all to our constitutional institutions should an Australian President serve for ten, fifteen, or even twenty years in office.

It is therefore my recommendation that there should be no fixed term of office for the presidency at all, nor any need to "seek re-election". If a President cannot be trusted to make a sensible judgment as to an appropriate time for them to announce their own retirement, they why on Earth are we entrusting our entire democracy to their care? (Of course, if for some reason they go a little haywire as time passes, we can always remove them from office when circumstances degenerate far enough, as will be discussed below.)

On the other hand, having no fixed term for a President specified in the Constitution would not *automatically* mean that they must necessarily serve for an extended period of time. The Governor-General, for instance, has no fixed term of office, yet the Governor-Generalship has "turned over" fairly regularly, every five or so years, over the past century of our Federation. It would be quite acceptable for there to be an understanding that a new President would be expected to serve for, say, seven years, or ten years, or any other figure that may be generally considered to be appropriate at the time. A new President could even give such an informal undertaking, publicly, on the understanding that the precise timing for their retirement would be considered in more detail when the time arose. After all, there is no way to know what constitutional crises may or may not be facing the nation a decade from now: no one has a crystal ball into the future.

What is important is that we rid ourselves of the idea that the presidency is something that can be worked towards, or fought for, or planned for, in the same way that a political position like the Prime Ministership can be sought. That's not the sort of presidency we want.

Justiciable criteria for removal

We will shortly look at my recommended mechanism for removing a President from office who is clearly not suitable to remain in that position. However, before we look at that option, it is first worthwhile to consider those situations in which the High Court may, instead, be called on to remove the President from office on legal grounds.

Obviously, alleged ineligibility for office is likely to be a matter that the High Court could be called on to resolve. For example, if it turned out that the President retained an allegiance to a foreign country, then clearly they could not remain in office. Of course, there are situations in which the issues of dual citizenship are somewhat subtle—as has been shown to be the case with our parliamentarians; but that is the concern of the Court to determine.

Likewise, if a President were to take up any employment while in office (or, worse, to accept financial inducements from any source), the High Court could be called on to pass judgment, which, if adverse to the President, would remove them from office.

More subtle is the question of what should be done if a President simply disappears. By this I'm not just referring to a Harold Holt-style disappearance, but more generally to any inability of the Prime Minister to contact the President. What if he's not at home, not answering his mobile phone, and no one knows where he is?

This might sound somewhat comical, but it takes little imagination to make it more realistic. Imagine that there was a slightly eccentric President who decided that they wished to make a visit to, say, Belgium. Imagine, further, that, rather than arranging for a formal state visit, they simply jumped onto an international flight and went. What are we to do? If the President is our head of state, with both a ceremonial and a functional role, then surely we cannot argue that the President should just sit around in Canberra, doing their presidential duty whenever it arises. But how is this to be balanced against our need for them to actually oversee the workings of our Commonwealth Parliament and Government? What use is a President who doesn't preside?

One solution would be to follow the Irish model, namely, to write into the Constitution that the President may not leave the country (or, perhaps, may not leave Canberra) without the permission of the Prime Minister. However, as has been noted earlier, in this day and age our global communications technology is sufficiently advanced that it is not the physical separation of a President from Canberra that is a problem; we could arrange that presidential business could be done by means of secure teleconferencing equipment, if need be. Rather, it is the possibility that the President could simply be incommunicado that is more the concern. What if the President were to do a Saddam Hussein and bury themselves in a foxhole?

In such a circumstance, it might be difficult to argue that the President has failed to do their constitutional duty; after all, if no one can actually contact the President, then how can the President be expected to know that there are meetings to be held, or Bills to be signed into law? As a

point of constitutional law, it might be argued that a President could not be held in breach of these constitutional provisions if they were never told about them in the first place; if the contrary were true, then one could imagine a cunning Prime Minister contriving to have a President removed from office by means of requests that they never received.

My suggestion is that this problem be solved as follows. If the President cannot be contacted, then the Prime Minister (or, strictly speaking, any Minister) may have a notice published in the press, asking that the President receive them at Yarralumla. The President would have, say, forty-eight hours in which to either receive the Prime Minister at Yarralumla, or else to communicate with the Prime Minister (waiting at Yarralumla) by means of a secure teleconferencing system from wherever they happen to be on (or above) the planet. Alternatively, if the President were, for some reason, to feel that they should not hold such a meeting (it might be a stretch to envisage a gun-toting Prime Minister and a nail-biting President, but there may be other mitigating circumstances; for example, an intervention order restraining the President from approaching the Prime Minister), then the President should be authorised to receive, instead, a Justice of the High Court, to explain the situation. In a situation in which the President were restrained from doing any of these things (for instance, if they were stuck in some remote part of Africa, or if someone were to kidnap them), then arranging to have a notice published in the Canberra press explaining the situation—or even trying to have such a notice published—should be permitted to provide sufficient legal defence against the abuse of such provisions.

Finally, we need to deal with the tricky question of what should be done if the President is unconscious or incapacitated. My suggestion is that, if the President is in such a state for more than forty-eight hours, and if after that time the Senate and the House each pass a resolution seeking the removal of the President from office, then such should automatically occur. This would provide enough flexibility for the Parliament to allow an unconscious or incapacitated President to remain in office, should there be an expectation that they will recover sufficiently to continue in office; but conversely it would avoid the pain and indignity of an emergency vote to remove a President from office that had been struck down by an obviously incapacitating illness, condition, or injury.

One might ask, at this point, what the definition of "unconscious" or, more to the point, "incapacitated" should be. Should the Houses of Parliament be allowed to remove a President from office, simply because they barrack for Collingwood and, hence, clearly exhibit the manifestations of mental incapacity? Surely not; but you get the point. Is a stroke

necessarily "incapacitating"? Surely not, either—or, not necessarily, at any rate; but where on the continuum of incapacity do we draw the line?

I did try to provide a test of incapacity in the Constitution, at one stage, but I am now of the opinion that it would be best to leave a legal definition or test of this condition to the High Court, should it ever be challenged legally. One reason I am now more confident that this provision will not be misused is that, should our parliamentarians ever seek to remove a President from office prematurely by these means, the general public would have two immediate avenues by which they could right any apparent wrong. Firstly, if the breach of good faith by our parliamentarians was sufficiently flagrant, the people could simply cause a double dissolution by throwing out the list of Candidates for the presidential election that would ensue. Secondly, if it turned out that the President was removed from office prematurely, perhaps through no fault of the best wishes of out parliamentarians, then there would be nothing preventing the public from immediately voting them back into office.

Calling for the people to dismiss the President

The republic debate of the 1990s proceeded past the question of whether we wanted to become a republic (we do), but got snagged on the question of who would choose the President. Our leaders thought that Parliament should do it for us; we thought otherwise.

We have now progressed past that misjudgement, but one of the next tough questions looming on the horizon is who should be empowered to *remove* the President from office.

As should, by now, be clear, the framework that I have argued for in the previous chapters removes the need for most of the "conventions" that have dictated the power balance between the Prime Minister and the Governor-General in our current constitutional system. In particular, there will be no need for a Prime Minister to have the power to dismiss the President (even indirectly, as is the case today, namely, via the Queen) to ensure that the apparently dictatorial powers of the Governor-General conferred by the Constitution are only exercised on the Prime Minister's advice; the Constitution will now make it clear which powers are to remain discretionary, and which are to be exercised only on Ministerial advice.

Still, there is clearly a need for a mechanism by which a President can be removed from office. As I argued in Chapter 3, there is little prospect that Australians would accept any republic model which vested the power

to remove the President from office anywhere but in the people of Australia themselves. I further suggested that either House of Parliament should be empowered to call such an emergency vote of the people.

So why should *either* House have this power; why not, say, a suitable majority of a joint sitting of *both* Houses?

One of the few successes of the 1998 Constitutional Convention was the recognition of the fact that such a requirement may, in the most important of constitutional crises, be almost impossible to meet. Of course, if the Parliament were seeking to remove the President because of some clear impropriety, or mental instability, then a two-thirds majority of a joint sitting would, most likely, be achievable. This "Hollingworth" type of situation is, evidently, the type of situation envisaged by those who concocted the two-thirds dismissal mechanism in the first place. However, if a constitutional crisis were to emerge in which the President was opposing or, at the least, frustrating the will of the Prime Minister, then it could hardly be imagined that the Opposition would band together with the Government to oust the President. Rather, in the cut and thrust of Australian politics, it would be more likely that the Opposition would revel in the problems that the Prime Minister was facing, salivating at the chance of gaining the treasury benches in any election that may, possibly, ensue.

It could, of course, go the other way as well. It may be that the Opposition feels that the President is being far too compliant with a Prime Minister who is pushing the boundaries of their mandate, or indeed of constitutional legitimacy.

When one considers the many scenarios that may occur, it is clear that it is prudent to provide for *either* the House of Representatives *or* the Senate to have the power to call an emergency vote of the people to remove the President from office.

This power is not, of course, intended to be abused. It should not be used frivolously. Indeed, our hope is that the mere *existence* of this power should, like the existence of the reserve powers today, provide more than sufficient motivation to keep all the parts of our democracy functioning properly. In other words, it is the threat of their use that ensures that they are hardly ever used. Sort of like the vast nuclear weapon arsenal of the planet, when you think about it—although in that case we are hoping that their frequency of use is zero, not just very rarely.

How, then, are to we ensure that this power *is*, indeed, held wisely and used judiciously by each House of Parliament? Again, the answer to this is to make it a "convention" that such a power not be used except in the most dire of emergencies—and then, as Dick McGarvie would remind us,

to ensure that there is an extremely effective penalty put in place, should such a convention ever dare to be breached.

What's good for the goose is good for the gander

In my opinion, the best way to ensure that neither House seeks the dismissal of the President by an emergency vote of the people, except when it is clearly called for, is, again, to threaten that which our parliamentarians hold most dear: their seats.

To this end, we should formulate our procedures for emergency votes in such a way that, if a House calls for the dismissal of the President, then the President can add *another* question to the ballot paper, namely, asking the people whether they wish to dissolve the House that called for the dismissal. Of course, since we have given the President the discretionary power to, at any time, call for an emergency vote seeking the dissolution of *either* House, then in general we could have up to three questions being asked simultaneously: "Do you want to dismiss the President?", "Do you want to dissolve the Senate?", and "Do you want to dissolve the House of Representatives?"

Formulating the mechanisms by which such "simultaneous emergency votes" can be handled, constitutionally, will be something that is addressed in the next chapter. Mechanics aside, it is clear that such a capability would make our parliamentarians think twice about exercising their power to seek the removal of the President from office. If their request is simply frivolous, or politically opportunistic, then they will probably fail in their bid to remove the President, and will, most likely, be thrown out of their seats as well. The political fallout from such an action would be devastating. The ensuing election would almost certainly change the constitution of the chamber in question.

If you like, the formulation of a process of simultaneous emergency votes removes the "first strike" logic that has dogged constitutional scholars since the 1975 crisis. Namely, as our constitutional arrangements stand at the moment, in a time of constitutional crisis it could, quite literally, be a "race for the Palace"—in other words, it would depend on whether a Prime Minister could have a Governor-General recalled before the said Governor-General withdrew the commissions of the Prime Minister and their Government. Kerr only managed to avoid this fate because he kept his cards close to his chest, rather than following the "advise and warn" policy that constitutional convention dictates should have been his strategy—and then he ambushed Whitlam with an instantaneous dis-

missal. Of course, the circumstances were unique, and Kerr tried to justify his actions by arguing that, had he advised and warned Whitlam of his intentions, he would have been recalled, and possibly substituted with a more compliant replacement. Whether he decided that he must avoid such an outcome at all costs for the good of the country, or to ensure that he did not miss his place in history, is a point that can and will be debated by our historians well into our future. But it is clear that, once Kerr set the precedent, there was no longer any chance that a future Prime Minister would be lulled into a false sense of security that a dismissal would never, in fact, be contemplated. If a situation like 1975 ever arose again, it is certain that the Prime Minister would ensure that they achieved the "first strike"—which is, under our current arrangements, a prerogative that the Prime Minister undoubtedly enjoys.

Of course, this power is a purely colonial phenomenon: the British Prime Minister, obviously, has no constitutional power to dethrone the Queen (short of a revolution, anyway). As constitutional experts noted in the aftermath of 1975, if supply were to ever again be blocked, with a Prime Minister refusing to be held to ransom by the Senate, the consequences could easily be far more dire than they were in 1975. The Constitution still does not provide any mechanism whereby such a crisis can be resolved rapidly enough to necessarily avoid the catastrophic effects of a Government running out of money.

In this context, even constitutional monarchists may, in the end, acknowledge that it was a good thing that we moved to a new republican Constitution, along the lines of that argued for in this book, before the next supply crisis hit us.

Touch wood.

CHAPTER SEVEN

Emergency Powers

In the previous chapters I have argued that the best way to "lock in" our current form of parliamentary democracy is to formulate a definite mechanism by which any constitutional crisis can be referred to the people of Australia for rapid resolution. In this chapter I discuss the requirements of such a mechanism, and propose a structure that will be resistant to manipulation or confusion if it ever needs to be called on.

Discretionary decisions of the President

Throughout this book I have tried to convince the reader that a ceremonial presidency would not be suitable for Australia. Not only would it give the Prime Minister far too much power, and consequently warp the balance and indeed the very Federal structure of our Parliament, but moreover it would be *seen* to give too much power to the Prime Minister—by the people of Australia—and would, as a consequence, have no chance at all of being successful at a constitutional referendum.

I have argued that our goal must be to have a presidency that maintains the powers of the Governor-General. In the context of the direct election of the President, this transfer of power cannot simply be by fiat; we need to solidify and strengthen the structures and conventions that now apply under our constitutional monarchy, in order to actively enforce the power balance that we wish to maintain between the President and the Prime Minister.

My approach has been to crystallise the current powers of the Governor-General into three distinct categories. Firstly, there are the actions of the Governor-General that are only performed on Ministerial advice. Secondly, there is the opportunity—indeed, one might say the duty—for the Governor-General to digest and review the actions of the Executive Government (as has been the practice since, at the least, the Governor-Generalship of Paul Hasluck), consistent with Bagehot's three rights of

the Monarch, namely, "the right to be consulted, the right to encourage, and the right to warn". Thirdly, there are the reserve powers of the Governor-General, which usually do not have to be exercised simply because they *do* exist, but which, in time of constitutional crisis, can, if the need arises, be used to bring about a resolution.

These last powers of the Governor-General, namely, the reserve powers, are to be converted into the emergency power of the President to call for the people to dissolve either House of Parliament, and will be discussed in greater detail in this chapter. The first category of powers, namely, those exercised only on Ministerial advice, will be written into the Constitution as the default requirement of any action of the President, unless the Constitution expressly provides otherwise.

It is the second category of powers, namely, the right to review, to digest, to analyse, to delay, to encourage, to counsel, to advise, and to warn that we must examine in greater detail. These discretionary powers are, perhaps, the most invisible to the average Australian: they are exercised behind closed doors, in the company of only the Ministry or even just the Prime Minister, and generally do not lead to any externally visible consequences. But as any Governor-General or Governor, or Prime Minister or Premier or Minister will tell you, this discretion not only provides a check and balance on what could otherwise be a veritable unconstrained express train of Executive Government, but moreover plays an extremely useful role in helping the Government avoid procedural or legal blunders. Governors-General and Governors will often detect unintentional consequences and loopholes in legislation or executive orders, not only because the process of briefing the Governor-General causes a review and a re-evaluation of the matters being brought before the Executive Council, but moreover because the Governor-General is carrying out their duties from a somewhat different viewpoint, more relaxed in some ways, away from the hurly-burly of partisan politics. The Governor-General understands that their job is not to win elections or expound policy positions or defeat the Opposition in debate in the chamber; their fundamental responsibility is to ensure that any action of the Government or any legislation signed into law is compatible with the expectations and understandings of the people of Australia.

My approach to the existence of this second category of powers has been to identify those situations in which the Governor-General today has the right to delay, to consider, to question. I propose that, corresponding to each such situation, the Constitution should provide a definite time period before the President is forced, constitutionally, to make a decision. Before the expiry of the said time period, the President must either act on the advice of the Minister or (where appropriate) the request of the House

of Representatives or the Parliament, or else must call an emergency vote of the people. In some such cases, the Constitution will specify that the President must (at the least) call an emergency vote seeking the dissolution of the House of Representatives; this is sensible if the President does not wish to act on the request of the Prime Minister or of the House itself, because it is in the House that the Government is formed. In other cases, such as the passing of a Bill by both Houses of Parliament, the Constitution will specify that the President must seek an emergency vote with at least two questions put, namely, to dissolve the House, and to dissolve the Senate. The logic here is that if a Bill passed by both Houses of Parliament is, in the President's view, subverting the intentions of our Constitution so seriously that it calls for an emergency vote of the people, then clearly the President believes that both Houses of Parliament have not acted properly in passing the said Bill.

Of course, inserting such discretionary time delays into the Constitution does not mean that the President *will* or even *should* always delay until "the clock is running down". In the vast bulk of the normal business of the Executive Council, the President will often give immediate approval to most requests (provided that the normal procedures are followed for the scheduling and holding of Executive Council meetings). Any time limit which we write into the Constitution should be viewed as an absolute maximum, usually only to be considered in a time of crisis, rather than as a norm.

So which duties of the President should provide for a constitutional discretion to delay before action is mandated?

In numerical order of the sections of the Constitution, they are, in my opinion, as follows (amended sections are described as they appear in the draft Constitution contained in the Appendix):

Section 57 deals with legislative deadlocks between the Houses. If, after the deadlock requirements have been met, the House passes a resolution seeking a double dissolution, then the President should have, say, two months to grant it. This timescale is consistent with the relatively slow-moving provisions of Section 57, which include a mandatory three-month delay between the first and second rejections of the Bill by the Senate. (We will deal with the problem of supply being blocked below; this is something that Section 57 is clearly too sluggish for resolving satisfactorily, given the size and importance of the Commonwealth Government in this day and age.) If the President does not agree to the double dissolution, and if the House does not withdraw the resolution, then the President must call an emergency vote seeking the dissolution of the House alone.

Likewise, if, after such a double dissolution and election, the Senate still refuses to pass the Bill, and the House passes a resolution seeking a joint sitting, the President should have, say, one month to grant it. If the President does not grant such a joint sitting, then they must call an emergency vote of the people seeking to, at least, dissolve the House.

Section 58 (as amended) stipulates that a Bill passed by both Houses does not become law until the President assents to it on behalf of the people of Australia. The President should have, say, one month to assent to such a Bill. As noted above, if this time period expires, and the House that initiated the Bill has not withdrawn it, then the President must call an emergency vote seeking to dissolve both Houses.

Section 62 (as amended) provides that the House of Representatives may pass a resolution seeking the appointment of Executive Councillors. The President should have, say, forty-eight hours to make the requested appointments, or else call an emergency vote seeking the dissolution of the House. Likewise, in the much rarer case that an Executive Councillor needs to be dismissed from that honour, Section 62 (as amended) provides that the House may pass a resolution to the effect. The President should, likewise, have forty-eight hours to decide whether to grant the request.

Section 63 (as amended) provides that a Minister may request in writing that the President act on a written request of the Executive Council. The President should have, say, a week to comply with this request, or call for a dissolution of the House. This provision ensures that not only does the President only act on advice, but moreover can be *compelled* to act. Of course, we need to be careful to stipulate that this request is only valid if it requests an action of the President that is within their power to carry out. Moreover, if two or more pieces of advice from the Executive Council are in conflict, then the President must clearly be given the option to act on any or none, until the conflict is resolved by one or more of the requests being withdrawn.

Section 64 (as amended) provides that the House of Representatives may pass a resolution seeking the creation or abolition of departments of the Commonwealth Government. Since this is a structural change that may have wide-ranging implications, it would not be prudent to insist that the President be given too short a time period to consider it. In my opinion, a month, say, should be sufficient.

This section (as amended) also provides for the commissioning and decommissioning of Ministers. A Prime Minister should be able to expect that a reshuffle of their Ministry would be effected fairly promptly; likewise, a change of Government in the House should be ratified by the

President without too much delay. In such cases I believe forty-eight hours to be a sufficient time for consideration or delay.

It may seem somewhat remarkable, but these are (in my estimation) the only places in the Constitution where such discretionary time delays need to be inserted, in order to provide the same constitutional balance between the President and the Prime Minister that currently exists between the Governor-General and the Prime Minister. Of course, Section 63 provides an almost "catch-all" provision that covers most of the regular business of the Executive Council, that does not involve manifestly constitutional matters.

Forced dissolution of the House of Representatives

Several of the provisions described in the previous section require the President to act on the wishes of either the Ministry or of the House of Representatives within a specified time period. Before the end of that period, the President has the discretion to either act as requested, or to call an emergency vote of the people seeking, at the least, the dissolution of the House of Representatives. If the President does neither of these things, and the time period expires, then the Constitution will stipulate that the President shall be automatically and immediately dismissed from office.

Obviously, there are aspects of these provisions that may be justiciable. The President cannot be liable for failing to act if no reasonable attempt was made to inform the President of the pending request. Determining when "the clock starts ticking" is clearly something that will depend on the nature of the request and the event that triggered its enactment.

However, the discretion of the President to delay within the specified time period, as well as the power to call an emergency vote, shall be specified by the Constitution to be non-justiciable; in other words, they cannot be challenged in court. The President shall have an untrammelled right—should the need ever arise—to delay, to advise, to warn, and, should this fail to resolve the crisis, to call such an emergency vote.

Clearly, however, the President should not need to wait for one of these events to occur before having the power to call such an emergency vote of the people. One can imagine many scenarios in which the President may be concerned about the *inaction* of the Government or the Parliament, rather than its action. If the President were unable to seek a solution except as a response to a request for action, the imbalance would

create a constitutional environment that would be anomalous and, in some circumstances, dangerously unworkable.

For this reason, the President should be empowered to call an emergency vote seeking the dissolution of the House of Representatives at *any* time. Of course, the fact that the Constitution will specify other situations in which such a vote *must* be called (if the alternative is not acceptable to the President) does not detract from the President's discretionary power to so act at any other time.

Finally, it is clear that the power to call an emergency vote seeking the dissolution of the House of Representatives should be vested solely in the President. If, for any reason, the Senate believes that the House is subverting the intention of the Constitution, or exceeding its mandate, or otherwise interfering with the smooth working of our parliamentary democracy, then the Senate must rely on the President to intervene, if the President should deem it necessary to intervene. It would be ridiculous to give the Senate the power to call an emergency vote seeking to dissolve the House—we would have it being wielded every time the Opposition wanted an election.

Governments must be permitted to make unpopular decisions at times, in the knowledge that sufficient time remains in their term of office in which their popularity may be regained. Interfering with this process is something that should only occur in the very rarest of circumstances. As an indication of my own feelings on the matter, I would be happy if we were to see out the remainder of this century without it ever occurring at all—the threat of such action being, one would think, more than sufficient to resolve any constitutional crisis.

Forced dissolution of the Senate

As reviewed in Chapter 4, the power of the Governor-General today in respect to the House of Representatives can be as surprising to many Australians as the general *lack* of power of the Governor-General with respect to the Senate. Apart from the power to call a Section 57 double dissolution over a deadlocked Bill, the Governor-General cannot dissolve the Senate at all. Moreover, as a point of constitutional law, the Governor-General does not play any role at all in elections for the Senate, nor in the appointment of replacement senators in cases of casual vacancy (although, in the normal course of events, it is natural that such matters be handled at a national level by the Governor-General, who then liaises with each State Government).

Throughout this book, I have been scrupulously careful to ensure that the rights and powers of the States are fully preserved in any move to a republic. To my mind, any proposal that would weaken the standing of the States would not only fly in the face of the spirit of our Federation, but moreover would run the real risk of being defeated at a referendum. Indeed, that is why Section 128 of the Constitution requires the concurrence of the States in any modification of the Constitution itself.

Having said that, however, it must be acknowledged that it would clearly be anomalous if there were no mechanism by which the Senate could be dissolved in a constitutional crisis. That Kerr was able to secure a double dissolution in 1975, rather than just a dissolution of the House, was a consequence not of the crisis itself (namely, the blockage of supply), but rather was an almost accidental consequence of the blockage of other Bills earlier in the year. Putting aside the question of whether he should have acted as he did, once he made the decision to sack the Whitlam Government, his desire to ensure that both Houses of Parliament faced the people at an election—a desire for fairness, in that both Houses had brought about the supply crisis in the first place—was, I believe, a good one.

If we are to retain the right of the Senate to block supply—and I must confess that I seem to be in a minority of republican authors in that I believe that we should not interfere with this right at all—then it would surely be asking for trouble if we were to tell the Senate that they could do so without any risk of facing the people themselves.

If you like, it may be that the compromise for holding back the hordes of Labor supporters still enraged over 1975 may need to be the acknowledgment that the retention of this power must, inevitably, be coupled to a mechanism whereby the emergency powers of the President are evenly balanced between the two Houses that are in conflict.

My proposal, of course, isn't even to allow the President to dissolve the Senate at all, but rather to call for an emergency vote of the people *asking* whether the Senate should be dissolved. Moreover (as will be discussed below), such an emergency vote would need to have the support of a majority of States to be passed. In other words, if three of the less populous States were to believe that their rights were being overrun—by a President seeking to dissolve the entire Senate simply because it was in their power to ask for such a dissolution—then the answer would be to simply vote down the request.

Once one accepts the need for the Senate's power over supply to be balanced by a President having the power to ask the people for their dissolution, it does not take much thought to realise that this presidential power should be a general one. Namely, if we were to, say, restrict this

power to *only* cases in which the Senate blocked supply, then it would not take much effort to imagine other ways in which the Senate could frustrate the smooth and intended working of our Parliament.

For instance, the Senate could simply refuse to pass any Bill (other than a supply Bill) at all, regardless of any concessions made by the House. Obviously, there may be situations in which such actions might be justified; but if it were simply a strategy employed because it was available, then it would undermine the intended working of our parliamentary democracy. After all, any Government elected to power surely has a popular mandate to implement, at the least, the policies that it campaigned on to achieve or retain office; but there is no *constitutional* requirement for the Senate to allow legislation implementing these policies to pass. As a matter of convention, and good constitutional practice, it has a right to review such legislation, and perhaps to force the Government to blunt any unexpectedly sharp edges, but there should not be an untrammelled power for it to employ a "sour grapes" policy of not allowing any Bill at all to pass. For instance, imagine a Leader of the Opposition who misses out on forming Government by the narrowest of margins, and who might, for some reason, feel that the people of Australia "got it wrong" in the election, or feels aggrieved by some particular circumstances that may have occurred late in the election campaign that may have clearly cost them Government. Although the supporters of such a party may have a right to be disappointed, or even angry, this does not mean that the Government should be preventing from governing.

Once one starts to consider the possible scenarios—and remembers that we must here be thinking not just about today, but decades and even centuries into the future—then it is clear that the convention that the Senate allow the Government to reasonably govern must be one that has some penalty that may be applied in the case of its breach.

In my opinion, a sufficient threat of penalty is provided by giving the President the fully discretionary power to call an emergency vote of the people, seeking the dissolution of the Senate, at any time.

If a Senate of the future were to then contemplate not "playing the game by the rules", a President could ask the Prime Minister for permission to speak to the Leader of the Opposition, in order to warn them that such an emergency vote may need to be called. This should, one would hope, be sufficient to resolve the crisis; and, if not, the President could follow through on their threat, and put the matter before the people. It can hardly get more democratic than that.

Finally, just as it was clear that the Senate should not have the power to seek the dissolution of the House of Representatives, then equally clearly it would be inappropriate to give the House the power to seek the

dissolution of the Senate. These powers should be vested in the President alone.

Dismissal of the President

In the previous chapter I discussed in detail the issue of removing the President from office. I argued that *either* the House of Representatives *or* the Senate should be empowered to call an emergency vote of the people, asking for the President to be dismissed.

Coupled with the other emergency powers discussed above, there is a clear symmetry that emerges. The President can seek to dissolve the House; the House can seek to dismiss the President. Likewise, the President can seek to dissolve the Senate; the Senate can seek to dismiss the President. It is, if you like, the constitutional equivalent of Newton's Third Law of Motion: every action has (the possibility of) an equal and opposite reaction.

Dismissal of a Federal judge

Although not necessarily vital for the introduction of a republic, the issue of the appointment and dismissal of Federal judges has (rightly, in my opinion) begun to receive attention from our republican leaders. But why should we be concerned with this issue? Simply, because it is the Constitution itself that provides for the establishment of a High Court, and of all other Federal courts; and without an impartial and effective High Court, the very enforcement and interpretation of the Constitution would be impossible.

I shall have more to say on the jurisdiction of the High Court, of the compulsory retirement age for its Justices, and for the terms of remuneration of Federal judges in the next chapter; at this point I am only considering the issues of appointment and removal.

These are powers that, in my opinion, are *almost* right in our current constitutional framework. Having such judges appointed by the Governor-General in Council is appropriate. However, the method by which they may be removed does not inspire confidence—not in my mind, at any rate. Section 72 of the Constitution describes the method:

> The Justices of the High Court and of the other courts created by the Parliament shall not be removed except by the Governor-General in

> Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

Define "misbehaviour"! Would this allow a witch-hunt if a Justice of the High Court were to, say, be involved in a Monica Lewinsky type of scandal? Regardless, I find it somewhat anomalous that a simple majority of each House of Parliament should be sufficient to bring about a request for such a removal.

In my personal opinion, the High Court plays such an important role in our constitutional structure that its Justices should be afforded, at the very least, the same protection against dismissal from office as we have been considering here for our President. Now, since we are already constructing a mechanism whereby an emergency vote of the people may be called, why not make use of this same mechanism, if the need should ever arise, to dismiss a Federal judge?

In my opinion, either House of Parliament, or the President, should be empowered to call an emergency vote of the people, seeking to remove a Federal judge from office. My reason for suggesting that it should be *either* House that should be so empowered (rather than a requirement for them *both* to act, as is the case now) is that one can imagine a situation in which a Prime Minister might be tempted to slowly "stack" the High Court. If a constitutional crisis were to then arise, the High Court might, conceivably, be employed to give advantage to one side or the other. Of course, there is no guarantee that, by this stage, the Prime Minister who stacked the Court would still be in power; they may be in Opposition. Thus, it is conceivable that it could be either the House *or* the Senate who would seek to bring any flagrant anomalies of the behaviour of the High Court to the attention of the people.

Of course, it may also be that both Houses of Parliament are under the control of the Government. If, in such circumstances, the High Court, or a Justice of it, was acting in a way that the President felt was contrary to the best wishes of the people, and if such actions were to the benefit of the Government, then it would need to be the President that acted to bring the question before the people.

One would hope that such a provision would never need to be used. If it did, the House calling for the removal of the said judge (or the President, if the President called it) would need to be very certain of their actions. Australians are not, and will not, be used to the idea of removing a judge from office; the electoral retribution for any frivolous use of such a provision would be severe.

This, of course, brings up an important question: how *could* there be an electoral retribution for any such abuse of power?

In my opinion, the answer is that, *if* an emergency vote is called seeking to remove a Federal judge from office, then that judge should be empowered to seek the dismissal or dissolution of the person or House that called the vote. At all other times a Federal judge would have no power at all to call an emergency vote. For example, if the Senate were to call an emergency vote of the people seeking to remove Justice Bloggs from the High Court, then Justice Bloggs should be empowered to simultaneously seek the dissolution of the Senate.

Again, Newton's Third Law—or, what's good for the goose is good for the gander.

Calling an emergency vote of the people

We must now consider the structures and mechanisms that need to put in place to ensure that an emergency vote of the people, should one ever be needed, is robust, reliable, and immune from manipulation.

Firstly, we must allow for the possibility that an emergency vote may need to be called by the House or the Senate at a time when they are not in session. As was the case for constituting the Presidential Selection Council, the Constitution may simply stipulate that if the Senate or the House is dissolved, etc., then the senators or members in place before such dissolution, etc., would be empowered to take their places as if the dissolution, etc., had not taken place. However, unlike the case of the election of a new President, there is no external event, akin to the previous President leaving office, that would automatically "trigger" such an extra-parliamentary congregation of Federal parliamentarians. To solve this problem, the Constitution may simply specify that some suitable number of members of the respective chamber (say, seven senators, or fourteen members of the House) may proclaim an "emergency session" to consider the issue of an emergency vote, and only such an issue. However, such "emergency sessions" should not count towards any extra allowance, or benefit, or superannuation, etc., that would not otherwise accrue if such a session were not held; if it's a true emergency (and we would hope that such powers would never be even considered unless it were), then material gain should be the farthest thing from their minds.

Secondly, if the President, the Senate or the House do decide to call an emergency vote of the people, then there needs to be a public proclamation to that effect. We need to ensure that there is no doubt at all that such

a vote has been called; moreover, as will be seen shortly, we will need to be able to pin down the precise day and time that such a vote was called.

The most important requirement of such a proclamation is that it be made from an agreed place. The 1975 double dissolution was proclaimed from the steps of Old Parliament House, Canberra, which, of course, at that time, *was* Parliament House. Notwithstanding our memory of that event—and I am doing my best to help ensure that, constitutionally at least, nothing will save the Governor-General—it is clear that we should instead make use of the new Parliament House building. Now, anyone who has made the trip to Canberra (and figured out how to get through all those circular roads to actually get to Parliament House—even a Ph.D. in theoretical physics is insufficient training for that puzzle) will know that one of the most inspirational experiences is to walk *over the top* of the building itself. I am no expert on architecture, but to my mind the masterpiece of the design was this very concept, namely, that the people of Australia—the sovereignty of the nation—stands above our Parliament. What better place, then, for a President to proclaim the exercise of an emergency power, on behalf of the people, going (literally) over the heads of the Parliament, to resolve a constitutional crisis?

I have written such a specification into my draft Constitution in the Appendix, but have also provided for Parliament to pass laws changing the specified place of proclamation of emergency votes if my romanticism again proves to be impractical. Furthermore, there must clearly be provision for a proclamation to be held from the closest possible place to the specified location—in case, say, it had been destroyed by an explosion or a natural disaster, or in case all of Canberra were to be cloaked in radioactive fallout, or in case Osama bin Laden and his henchmen were holding the building hostage.

Ensuring that a crisis is resolved promptly

So far, we have looked at such issues as who should be empowered to call an emergency vote, whom they should be able to seek to remove from office, and how they should make a proclamation of such an event. Of equal if not greater importance are the provisions we make for the holding of such a vote. If they are cumbersome or protracted, such a vote will fail to fulfil the very reason for its existence, namely, to provide a speedy resolution of a constitutional crisis.

With this in mind, we must remember that an emergency vote is not like a normal election. No office or parliamentary seat will be filled on

the result of such a vote alone. Rather, the passing by the people of Australia of any such vote will simply cause offices or seats to be *vacated*, which will then be filled by a fresh election of the appropriate type.

In such a circumstance, it is clearly imperative that we balance our democratic wish to record the opinion of all Australians against the need for a speedy resolution to whatever crisis has precipitated such a grim course of action. It is my opinion that, for this reason, any form of voting that will delay the determination of a final result by more than, say, twenty-four hours should be disallowed for an emergency vote. I understand that, according to the voting procedures in force today, this may rule out some forms of postal or absentee voting. But it would be ludicrous, in the case of a close result, for the nation to be waiting days or weeks for the last postal votes to be counted, on an issue of such moment and urgency that it has brought our constitutional democracy to the point of collapse. Of course, as technological advances in this century allow us to vote digitally, rather than with pencil and paper, it is likely that this provision for disallowance will fall into effective disuse, in due course.

We must also ensure that an emergency vote is held speedily—say, within ten days of its proclamation. That provides at least one Saturday for the vote to be held; if the proclamation were made on a Wednesday, Thursday or Friday, the vote could be held on the Saturday week; if it were made on a Tuesday, Monday, Sunday or Saturday, it would have to be held on the upcoming Saturday. This, to my mind, provides a good balance between the need for speedy action, and the great logistical problems involved in setting up for such an unplanned event (at least, until we get digital voting up and running reliably).

Of equal importance is the need to ensure that the emergency vote is actually held. This may sound a little silly; but clearly it would not at all do if any segment of the Australian community were, through their actions, to be able to delay or prevent the holding of an emergency vote. Indeed, there is ample historical evidence to support the assumption that, in time of great political and constitutional crisis, both the public service and the private sector may choose to refuse to cooperate with one or the other side in the crisis. However, if an emergency vote is to be the ultimate safeguard against the dissolution of our very democracy, then we need to ensure that it, if nothing else, is carried out according to our intended design.

To this end, there clearly need to be some rather draconian penalties specified in the Constitution, should any Australian or any organisation or corporation doing business on Australian soil fail to cooperate with any request to do what is in their power to do in order to facilitate an emergency vote. Perhaps floggings or stonings are a little *too* draconian; but at

the least the threat of ineligibility to receive any moneys at all from the Commonwealth Government for some lengthy period of time (or, in the case of a corporation, to do any business at all on Australian soil) may be sufficient. Of course, when we move from paper-and-pencil voting to the digital age, the logistical requirements will be greatly eased; but, still, one can imagine that there may be resources in the digital world that would need to be co-opted in order to ensure that the provisions of the Constitution are fully met.

On the other hand, it would be rather un-Australian to expect any citizens or companies to shoulder any sort of financial loss, simply because our pollies have gotten their knickers into a constitutional knot. Hand in hand with any constitutional provisions to enforce cooperation in the staging of an emergency vote should be complementary provisions to ensure, as a matter of constitutional law, that any such losses will be compensated by the Commonwealth Government within a reasonable time of such a claim being made (say, a month). For example, should it be necessary to reschedule the AFL Grand Final because of such a constitutional crisis, there will be many companies and individuals (not just the AFL) who would bear a significant financial loss. (Of course, since Collingwood has shown that they have been unable to win on the last Saturday in September for almost half a century, we should really write into the Constitution that no Collingwood Grand Final can ever be rescheduled … but maybe that would be too cruel.)

Finally, we must consider the question of what should happen if, after the proclamation of an emergency vote, someone *else* wants to proclaim *another* emergency vote. For example, imagine that the President were to make a proclamation for an emergency vote, seeking the dissolution of the Senate. Undoubtedly, the Senate would be expected to turn around and call an emergency vote seeking the dismissal of the President. How do we deal with such a situation?

Clearly, we do not wish to replicate the fundamental weakness that is inherent in our current constitutional arrangements, namely, that the resolution to the crisis may depend on a simple "race for the Palace". It would be ludicrous if only one emergency vote or the other were to be held, depending on who managed to read out their proclamation first—possibly with the second vote having to be delayed until another Saturday.

My strong suggestion is that all emergency votes that are called should be voted on at the same time. In other words, there could be one, two or three questions that Australians would be asked to vote on (excluding the much rarer possibility that the seeking of the dismissal of a Federal judge were to be thrown into the crisis), namely, whether to dismiss the President, whether to dissolve the Senate, and whether to dissolve the House.

The mechanism for doing this requires some engineering, but it is a problem that computer and electronics engineers have solved long ago. The requirement is that we have a "synchronous system". (Indeed, all computers and digital circuits work on this very principle.) The idea is as follows. Once a proclamation of an emergency vote is made, a "window" of, say, forty-eight hours immediately starts counting down. Within this window of time, anyone else empowered to call an emergency vote may make a proclamation to that effect. After the window closes, no more emergency votes can be called until this first "batch" of emergency votes has been dealt with, and the results determined (which, recall, happens within twenty-four hours of the close of voting).

Once these results are known, the process may, if desired, be invoked again. Of course, it is almost inconceivable that another "batch" of emergency votes would be called immediately; but the point here is that there can be no "overlapping" of votes: the process can only start again, if necessary, after the first "batch" has been dealt with.

Emergency supply

I have mentioned several times in this book the problems inherent in the Senate's power to block supply. If we are to retain this power—as I have strongly suggested—then we must heed the essentially unanimous warnings of constitutional experts, of all persuasions, that Section 57 of the Constitution is simply too slow-acting to satisfactorily deal with a supply crisis in an era when the Commonwealth Government is as huge and all-pervasive in the lives of Australians as it is today.

My opinion is that we should insert into the Constitution the provision, suggested shortly after the 1975 crisis, that it be possible for "emergency supply" to be authorised by the Governor-General, i.e., by the President, until the crisis can be resolved. The mechanism of an emergency vote provides a perfect framework for such a provision: from the time that an emergency vote is proclaimed, until some reasonable time (say, two weeks) after both Houses of Parliament have first sat after the results of the vote or votes are known, the President should be empowered to authorise such emergency supply. This should only, of course, cover the ordinary annual services of the Commonwealth Government; it should not extend to any new schemes or policies that may be in contention.

Concomitant with this power, it should also be stipulated in the Constitution that supply should not be simply allowed to run out, without anyone calling an emergency vote. It is difficult to see how a "not my prob-

lem" attitude could possibly arise, amongst the whole of the Parliament *as well as* the President, but, as 1975 reminds us, truth can often be much stranger than fiction. Therefore, I recommend that it should be stipulated that, if money does run out in any Commonwealth department for any of the normal annual services of the Government due to a blockage of supply, and if no emergency vote is called within, say, twenty-four hours, then the Constitution will mandate one of two actions to occur, automatically and instantaneously. If supply ran out not because the Parliament failed to pass a necessary supply Bill, but rather because the President or the Presidential Council failed to assent to it and also failed to call an emergency vote, then the President or Presidential Council will be dismissed. If, on the other hand, supply ran out because a supply Bill for the purpose had not been passed by Parliament, and no one has called an emergency vote, then the lot of them will simply be turfed out of office: a triple dissolution, of the Senate, the House, and the President (or the Presidential Council if there is no President).

That should make them care.

CHAPTER EIGHT

Changing Our Constitution

The birth certificate of our nation

There are two ways in which authors of republic models can view our current Constitution. One is that it is simply a legal document which tells us how our Federation is constituted; a piece of paper that can be kept at the back of the file, for reference, in case any dispute should arise. The other view is that the Constitution is, literally, the birth certificate of the Commonwealth of Australia, and should be cherished and safeguarded as proudly as any birth certificate for one of our own children.

Proponents of the first view see the amendment of our Constitution to bring in a republic on strictly utilitarian grounds. All that is necessary is that anything that needs to be changed is changed, that anything that needs to be inserted is inserted, and that anything that needs to be deleted is deleted. To such people, it does not really matter how much we insert or delete or change in any particular section of the Constitution; all that matters is that the resulting document is, as a point of constitutional law, both self-consistent and faithful to our intentions.

I am not of this view. I am firmly in the second camp. I view our Constitution as a representation of the triumph of the people of the colonies of the Australian continent, in constructing a Federation against formidable odds, of such strength and innovation that it has stood for over a century without requiring anything but the most minor of alterations.

This attitude of mine must be borne in mind when considering the draft Constitution presented in the Appendix. The language of our Constitution is, in most aspects, remarkably plain, straightforward, and modern. Its structure is clear and logical. My belief is that, if we wish to modify it, we should aim, as far as is humanly possible, to maintain the character and feel of the document, in the same way that modern constructions must often be integrated harmoniously with buildings of heritage.

This is not to say that there are not additional changes to the Constitution, over and above the establishment of a republic, that may be desir-

able. For example, many constitutional authors have argued that we should have a Bill of Rights in our Constitution. I agree that such a development would, indeed, be desirable; but I strongly believe that such developments should not be allowed to confuse and complicate the process of becoming a republic. They are reforms that should be raised, debated, and formulated only after the republic is well and truly bedded down.

The republic, after all (as this book tries to demonstrate), provides us with more than enough to work on.

Maintaining the structure of the Constitution

Our Constitution has a clear and logical structure. The first three Chapters describe the three arms of government: the Parliament, the Executive Government, and the Judicature. Chapter IV describes the financial and trade powers of the Commonwealth. Chapter V describes the States of our Federation. The last three Chapters contain provisions for miscellaneous issues, such as the creation of new States and the alteration of the Constitution.

Because we have a parliamentary, "Westminster" form of government, Chapter I, describing the Parliament, is the most comprehensive. It is, itself, subdivided into five Parts. Part I deals with a few general, preliminary matters. Parts II and III deal with, respectively, the Senate and the House of Representatives. Part IV contains those provisions that are common to both Houses of Parliament, and Part V deals with the powers of the Parliament.

The first question that we need to resolve is how we can possibly insert an office of President into this tight logical structure. The discussions of the previous chapters of this book show that the Constitution will need to have quite a bit to say about the President. This contrasts starkly with the few words it has to say about our current Sovereign and her representative in Australia, namely, the Queen and the Governor-General. The only definition of "the Queen" in the Constitution itself (not including the covering clauses of the Act of the British Parliament that brought it into existence) is in a footnote to the Schedule to the Constitution that contains the oath or affirmation of office for members of Parliament:

> Note: The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.

Ignoring the Irish changes that have been made to the United Kingdom since the time of Queen Victoria, this is all the description that the Australian Constitution really needs. It is the problem of the British to determine who their King or Queen is; their Monarch is then, automatically, King or Queen of Australia as well.

The Governor-General rates scarcely more of a mention, in Sections 2, 3 and 4 of the Constitution:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.
>
> There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.
>
> The salary of a Governor-General shall not be altered during his continuance in office.
>
> The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

How, then, should we insert the President into the Constitution?

The Turnbull Constitution voted on at the 1999 referendum addressed this problem by inserting most of the provisions relating to the selection of the President into the start of Chapter II of the Constitution, which describes the Executive Government. However, to my mind, such a placement was inappropriate, and (subconsciously, perhaps) suggested that the President was subservient to, or, at the least, simply a part of the Executive Government; and, by implication, that the President has no greater place in the Constitution than the Prime Minister. But this is inconsistent with the very first Section of the Constitution, which I have adopted almost verbatim from the Turnbull Constitution:

> The People of Australia vest the legislative power of the Commonwealth in a Federal Parliament, which shall consist of a President, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament", or "The Parliament of the Commonwealth".

These three fundamental components of the Federal Parliament should undoubtedly be dealt with, by the Constitution, in precisely this order.

Now, within Chapter I, Part II deals with the Senate, and Part III with the House of Representatives. Clearly, Part I should deal with the President. But what do we do with the existing Part I (General)?

One suggestion has been that, if we wish to make substantial changes to the Constitution, then perhaps we should simply renumber the whole thing anew. However, I am strongly opposed to such a suggestion. Could you imagine the confusion that would ensue? "Section 47 of the Constitution. No, I meant Section 47 of the *new* Constitution. You were talking about the *old* Section 47?" Over a century of writings about our Constitution would be thrown into confusion; one would need to have a look-up table to figure out which provisions of the Constitution were being referred to.

This is the fundamental reason why Acts of Parliament are not renumbered when they are amended. New sections may be added; other sections may be repealed. Sometimes the numbering needs to be a little creative, to fit in all of the new provisions that may be needed. But, as a rule, any section or subsection that retains substantially the same content as the original Act will, usually, retain the numbering of the original.

In the context of ordinary legislation, this process of addition and deletion is largely utilitarian. However, as noted above, we should be a little more sensitive when it comes to altering our Constitution. We must do what needs to be done, but, if at all possible, it would be desirable if we could do so in a way that maintains the structure and cohesiveness of the Constitution, "without the joins being apparent", as it were. This includes filling in any "gaps" in the numbering of Sections, if possible, created by the repeal of any Section in a previous referendum (such as Section 127, which was repealed by the 1967 Aborigines referendum).

To this end, my draft Constitution in the Appendix makes the following changes. Within Chapter I, Part I (General) has been excised completely, and replaced by a new Part I (The President). All of the provisions relating to the election and powers of the President, and of the Presidential Council, are contained in this new Part I. However, the amended Section 1 (quoted above), which currently is within Part I, has been moved above the start of Part I and simply left as the first section of Chapter I (The Parliament).

If we are to maintain the numbering of the Sections in Part II (The Senate) and those that follow, as I am urging, then this means that we only have five Sections (namely, Sections 2, 3, 4, 5 and 6) to completely define the office of President. This necessarily means that these five Sections are fairly lengthy—and much larger than many of the Sections that follow—but that is the price that we must pay if we are to value the logi-

cal and structural integrity of the Constitution above purely pragmatic considerations. It's a reasonable compromise.

Now, of the five Sections of the current Part I (General) that we have excised, the first three relate to the Governor-General, and the last two to the sessions of the Parliament. The former have been replaced by our definition of the office of President, so all we need to do is figure out where to move the provisions of the current Sections 5 and 6.

My suggestion is that we make use of the fact that the current Sections 59 and 60, which deal with disallowance by the Queen of any Act of Parliament and the reservation of Bills for her personal assent respectively, are, of course, to be simply deleted completely. This, fortuitously, frees up two Sections right at the very end of Chapter I. My proposal is that a new Part VI (Sessions of the Parliament) be added to the end of Chapter I, following the (amended) Section 58 dealing with presidential assent to Bills passed by the Parliament. The new Sections 59 and 60 in this new Part VI can then deal with, respectively, the summoning and dissolution of the Parliament (although the latter is, essentially, simply a summary of those other Sections of the Constitution in which the processes are described—remember, the President will no longer have or require the discretionary power to summon the Parliament or dissolve the House of Representatives, except on the advice of the Parliament or the House respectively).

This solves the problem of devising an appropriate way of inserting the President into the Constitution, but we are still faced with the need to describe the substantial structures and mechanisms necessary for the holding of emergency votes, as outlined in the previous chapter.

My suggestion is that we should simply add an extra Chapter to the Constitution, namely, Chapter IX (Emergency Powers), and include as many Sections as seem warranted (starting with Section 129). In the draft Constitution contained in the Appendix, I have distributed these provisions among fifteen new Sections. It would undoubtedly be possible to reduce this number, if it was thought desirable, but since there are no direct constraints (we can add as many as we like) I simply proceeded on the basis of what felt natural, given the existing style and structure of the Constitution.

Removing unwanted blemishes

Constitutional conferences held over the decades have long suggested that the Constitution be "cleaned up" somewhat. There are a number of provi-

sions that were of a transitional nature, and are now "spent"; there are others whose relevance is now questionable; and there are some that are plainly undesirable.

My opinion is that we should *not* "gut" the Constitution of everything that is not absolutely necessary. One reason is legalistic: we might remove something that we think is no longer needed, but then may find, to our dismay or horror, that there are unintended legal consequences of the deletion. But the more overriding concern must be one of preservation of our heritage. Our Constitution tells us a story, the story of our Federation, and it tells it quite clearly and plainly. It might be logically tempting to remove everything not absolutely necessary to the maintenance of constitutional law, but we should resist the temptation insofar as it would destroy the spirit of the document itself.

But this is not to say that there are not things that should now be removed. One glaring example is the result of the 1977 referendum to provide that casual vacancies in the Senate shall be filled by a member of the same political party. The first extra paragraph in Section 15 added by this referendum is a good one: it describes, clearly and logically, in the language of the Constitution, how such a vacancy is to be filled. However, following that are four more solid paragraphs of transitional arrangements—provisions added merely so that the arrangements existing at the time would not be disrupted, should a casual vacancy arise in 1977. Indeed, the last paragraph of this extra verbiage is completely superfluous, pertaining as it does to the possibility that the Simultaneous Elections referendum had passed—which it did not.

In my opinion, these transitional provisions, however necessary they may have been from a legal standpoint in 1977, are ugly and no longer necessary. Consequently, I have struck them out in the draft Constitution contained in the Appendix. Of course, if it were widely believed that these provisions should be left in the Constitution, then so doing would not have any impact on the transition to a republic at all. I am simply indicating the sort of "cleaning up" that I believe would be agreed to by any Australian with an interest in the beauty of our Constitution.

Likewise, there are a number of provisions of the Constitution that have the proviso that they only apply if a given State is an "Original State" (in other words, a State at the time of Federation). This was a consequence of the fact that the Constitution needed to be drafted before it was known whether all the colonies would be a part of it. (It is difficult to imagine a Commonwealth of Australia which did not include Queensland or Western Australia, although secessionists may disagree with the degree of difficulty us residents of the south-eastern States may have in making such a leap of imagination.) In my opinion, the Constitution would be less

confusing and less cluttered if these provisos were simply deleted—but again it would be of no fundamental consequence if my opinion were to be overturned by the majority.

Likewise, there are two apparent *non sequiturs* in the description of how voting for the Commonwealth Parliament is to be undertaken. For example, Section 8 currently reads:

> The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall only vote once.

Huh? Since when did we vote more than once for any given House of Representatives election? (I'm ignoring the half-serious advice often given on election day to "vote early and vote often"—possible because of our antiquated pencil-and-paper voting mechanisms.)

The answer is that, at the time of Federation, even the idea of "one man, one vote" was novel, let alone "one person, one vote". (Indeed, in respect of the latter, Section 128 contains what is now an almost hilarious provision that, in any State in which women are allowed to vote, the number of votes cast in that State shall be divided in two, so that that State does not get an unfair numerical advantage!) Although it may seem absolutely repugnant to us today, in the early days of representative government it was commonplace for property owners to get more than one vote, depending on how much property they owned, or in which electorates it happened to be located!

Such *non sequiturs* can be repaired very simply, by removing the word "but", and repairing the punctuation to create two separate sentences.

Another question arises in the context of the President of the Senate. In copying the nomenclature of the United States Constitution, we adopted the titles of its officers (apart from the Governor-General) as well. The chair of the House of Representatives is called the Speaker; the chair of the Senate is called the President.

Obviously, this has the potential to be confusing. In the United States, the situation is even worse. The President of the United States is not the President of the Senate. Rather, it is the *Vice*-President of the United States who is, constitutionally, the President of the Senate. Confused yet? It gets worse. These days, the Senate usually chooses a "President *pro tempore*"—literally, in Latin, "President for a time", who is more like our President of the Senate. Of course, in America, every head of a large organisation likes to call themselves the "President". It's now pervasive in their culture that "the President" is the head honcho.

This might be the way things are done in the United States Senate, but I do not think that it is a good solution for our Senate. The Turnbull Constitution retained two ambiguous "Presidents", referring specifically to "the President of the Commonwealth" or "the President of the Senate" when the need for disambiguation arose. But since most Australians have never even heard of "the President of the Senate" in the first place, then why should we maintain this nomenclature, simply because it is what we had before we became a republic?

My suggestion is that we have just *one* President—the President of the Commonwealth of Australia. The chair of the Senate should renamed something else, such as the Principal of the Senate, which is the solution I have employed in the Appendix.

There are other minor changes that were suggested in the Turnbull Constitution that I have taken on board in my draft Constitution, such as replacing "naval and military forces" by simply "defence forces"; the deletion of the second paragraph of Section 83 (a provision that only applied to a one-month period in 1901, which as a result does not make sense if "Governor-General" is replaced by "President"); the rewriting of paragraph (i) of Section 85; the replacement of the word "Colony" by "territory" in Section 108; and the replacement of "a subject of the Queen" by "an Australian citizen". I have also taken the liberty of adding headings to Sections 86 and 87 (they are the only Sections of the Constitution which have no heading text). A new Section 126 on the operation of the Constitution and its laws (replacing a section that allows the Governor-General to appoint deputies) is also taken from the Turnbull Constitution, as is, to a large extent, a new Section 127 (taking the place of the "aborigines don't count" Section 127 that was repealed in 1967) of general definitions. Both of these sections were added to the Constitution to allow it to stand independently, without the need for the Act of the British Parliament that constituted the Commonwealth, the clauses of which (called the "covering clauses") contained these statements and definitions.

Racism, sexism and ageism in the Constitution

Although our Australian form of democracy has, historically, been remarkably enlightened—indeed, we were pioneers in some areas—our Constitution does, nevertheless, need a little work to bring it into the twenty-first century. Despite the 1967 Aborigines referendum, it is still explicitly racist; it appears to be (although, legally, is not) sexist; and it is most definitely and explicitly ageist.

Compared to the modern understanding of the word "racism"—an attitudinal problem that can sometimes be so subtle and implicit that it is difficult to prove—our Constitution is remarkably red-necked. Section 25 of the Constitution, titled "Provisions as to races disqualified from voting", reads as follows:

> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

It would be hard to argue with the fact that the Constitution is racist when it explicitly uses the word "race"! (The "last section" referred to here deals with the number of seats each State is to be allocated in the House of Representatives.) Of course, with the White Australia policy not having been abolished until the 1960s, it is not surprising that such words can still be found in our Constitution, no matter how repugnant they may be to any Australian born since 1960 (and most other Australians as well, one would assume).

One is tempted to simply delete this Section completely from the Constitution. However, it can be made eminently sensible—and, indeed, possibly useful—if the word "race" is simply replaced by the phrase "foreign citizenship or allegiance". This would not only allow some flexibility for counting or not counting people who are not Australian citizens, but moreover would allow flexibility for dealing with those who may have dual citizenship. (Those pesky British foreigners, in particular, always need to be dealt with—they seem to think they deserve special treatment!)

The same change can be applied to the explicitly racist provision of paragraph (xxvi) of Section 51, which currently reads:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race for whom it is deemed necessary to make special laws.

Yuk! It may be difficult to believe that such a provision still exists in our Constitution. There is, however, a good reason to actually retain it, believe it or not: namely, this provision allows for the Commonwealth to make laws that are for the benefit of aboriginal communities. (This has only been the case since the 1967 Aborigines referendum, which deleted the words "other than the aboriginal race in any State".)

Replacing "race" with "foreign citizenship or allegiance", in this context, would obviously not do: we could hardly ask the High Court to rule

that aborigines are "foreigners"! In my opinion, a suitable modification would be the following:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any foreign citizenship or allegiance, or those people who have at any time in the past been of any foreign citizenship or allegiance, or the aboriginal people of any part of the Commonwealth, for whom it is deemed necessary to make special laws.

Such an amendment would have four important consequences. Firstly, it would remove any suggestion that race could be used as a criterion for the passing of special laws. Secondly, it would provide for the special treatment of foreign nationals of a specific citizenship or allegiance—and in this age of both international terrorism and international refugeeism, such flexibility may, in the future, be needed. (Discrimination on the basis of citizenship or allegiance is acceptable—our immigration policy is but one obvious example; it is discrimination on the basis of race that is not.) Thirdly, it would recognise that a formal renouncement of such a foreign allegiance may, in some circumstances, not change the nature of a perceived threat or need for assistance, and that it may be prudent to allow the Commonwealth the flexibility to deal with such situations. Fourthly, it would explicitly reintroduce the right to legislate on behalf of aboriginal communities—not because of their race, but because of their very aboriginality, namely, that they were here long before we were.

Let us, now, turn to the apparent sexism of the Constitution.

Apart from the abovementioned humorous provisions in Section 128, there is nothing the Constitution that, as a matter of constitutional law, is actually sexist. However, anyone reading it today cannot fail to be struck by the references to members of Parliament or the Governor-General: "he" will resign "his" seat, and so on. As a point of law, of course, there is nothing actually sexist about this: the Constitution was, originally, embedded in an Act of the British Parliament, and as such is subject to the Interpretation Act (U.K.) of 1889, which provides that any reference to the masculine is to be interpreted to refer to males and females equally. Nevertheless, the Constitution really doesn't "sound right". It certainly isn't something you'd want schoolchildren to study in a course on civics.

An analogy may be drawn with the National Anthem. Although it would have been similarly possible to invoke the Interpretation Act (U.K.) of 1889 to claim that "Australia's sons let us rejoice" is not legally sexist, it was nevertheless felt necessary to change the words of *Advance Australia Fair* to "Australians all let us rejoice" (and similar changes in

the new second verse—the original third verse, after the offensive British middle verse was deleted).

There are numerous ways in which the English language can be made gender-neutral. Some of these have come and gone in fashion over the past few decades; some have a terribly patronising ring to them. In my opinion, however, the modern trend is best of all, and can be vaguely justified on linguistic grounds. Namely, just as the second personal singular of every verb and pronoun in the English language has been completely replaced by the second person plural (for example, we now say "you are good" rather than "thou art good", even if there is only one of "you"), then in like form the gender-neutral third person singular has been increasingly replaced by the third person plural. For example, one would now say, "If a senator's mobile phone rings when they are rising to give their speech, they should beg forgiveness," rather than the sexist alternative, "If a senator's mobile phone rings when he is rising to give his speech, he should beg forgiveness."

For most Australians born after 1960, this idiomatic convenience is completely natural and unnoticeable. Indeed, such readers may have instead noticed that, to this point in this book, I have strayed from this practice only twice: once when I referred to the President as "her", and once when I referred to the Prime Minister as "him". (The latter incident may have slipped past some readers, because we have not, as yet, had any female Prime Ministers in Australia, and so calling the Prime Minister "him" does not conjure up any incongruity of visualisation, such as occurs when the Constitution refers to a senator resigning "his" seat—which does not seem to fit Senator Stott Despoja very well at all.)

Some Australians born before 1960—probably well before 1960—may have found my use of this idiom grating, or annoying. So be it; we can't please everybody all of the time. In my opinion, this convention has become so widespread, and is so natural, that it would be inspirational, at the least, if we were to make such changes to our Constitution.

This is what I have done with my draft Constitution in the Appendix. There would be no fundamental concern if my suggestion were to be rejected by the majority (although, with the majority of Australians not being a "him", I'd be surprised if this were the case), and everything put back to the masculine.

Finally, ageism. One can empathise with the motivations of those who constructed the Retirement of Judges referendum of 1977: it was thought anomalous that a Federal judge should be able to remain on the bench indefinitely, regardless of age or senility. Thus, Section 72 of the Constitution was amended, to provide that all Justices of the High Court must retire at age 70, and all other Federal judges must retire at an age pre-

scribed by Parliament that must not exceed 70. The argument was not difficult to understand: most of the Australian community faced compulsory retirement at age 65; so why should Federal judges be any different?

Of course, this amendment happened at the worst possible time. Now, less then three decades on, compulsory retirement ages are illegal—except for Federal judges, of course, because the Constitution demands it. The Federal Government has, for more than a decade, been getting the Australian public used to the idea that they will probably have to work well past age 70, not least because there is an army of ageing yet healthy baby boomers expecting to collect an age pension that the less populous generations of taxpayers that have followed them will simply not tolerate. Ageism is recognised as a form of discrimination, no less repugnant than racism or sexism, and legislation seeking to stamp it out is slowly making its mark. Public education programmes on dementia and Alzheimer's have made Australians realise that these medical conditions can strike at any age, and are not a necessary consequence of passing an arbitrary age milestone. And, of course, Australians are living longer, and healthier, than ever before.

In such an environment, it would be encouraging if the provisions of the ageist 1977 referendum were to be reversed. They could, if desired, be simply repealed. However, in my opinion there is a nugget of truth contained within them: not that judges should be forced to retire at any specific age, but rather that it might not be a good idea to have the same judges on the bench for decade after decade after decade. In other words, the idea of judicial renewal and invigoration is a good one—it is only its association with a fixed chronological age that is so repugnant.

Looked at in this light, my suggestion is that the compulsory maximum retirement age of 70 should be replaced by a maximum *term* on the bench of, say, twenty years. If we still want to force our Federal judges to retire at age 70, then the solution would be simple: appoint them at age 50. However, one would hope that (in time, at least) a more enlightened approach would be taken.

Of course, the flip side of the coin is that, in reality, a Federal judge (like any of the rest of us) may lose their mental faculties at any age. In an ideal world, we would hope that such a judge would be able to assess their own situation, and, if necessary, retire before their twenty-year term has expired. However, this may not be possible in all situations. In such a case, we may always make use of the emergency power to ask for their removal from office (or, more usually, advise and warn them that such would need to be sought, if a retirement were not forthcoming).

Recognising inflation

One of the problems with the Constitution as it stands at the moment is that the remuneration of the office of Governor-General may not be increased during their term of office. The idea is a good one, of course: the Governor-Generalship should be an impartial office, and so they should not be able to be tempted to act in a fashion more favourable to the Government—or, indeed, for it to even be *imagined* that they were so tempted—by virtue of their remuneration being increased by Parliament.

Of course, at the time of Federation, inflation was essentially negligible, over the five or ten years that a Governor-General would be expected to remain in office. That has not been the case in recent decades; and, although it has been historically low in recent years, one should not assume that a higher rate of inflation could not return just as rapidly.

In my opinion, the Constitution should provide that the remuneration of the President should be increased in line with inflation every year. I have written such a provision into my draft Constitution in the Appendix. Of course, one might ask whether the CPI must, as a matter of constitutional law, always exist. I think that, in the context of the very many other vague or undefined concepts present in the Constitution, such an assumption is more than warranted. At worst, the High Court could deliberate on the question (although any differences in the method of calculation must surely be almost negligible in all but the worst cases of hyperinflation). At one stage I inserted a fall-back provision relating to the price of a litre of milk in Canberra, but I have now deleted it.

Further to this, I believe that the remuneration of Federal judges should, for exactly the same reasons, be fixed in real terms—in other words, that the increase from year to year should be strictly that of inflation. I have written this into my draft Constitution, but, again, it could be deleted if felt to be unwise.

Protecting the States

There is a small loophole in the Constitution that could, conceivably, allow the rights of the States to be diminished by a constitutionally creative Prime Minister in control of both Houses of Parliament, provided that they had a sympathetic Governor-General. (Since the Prime Minister advises the Queen on the appointment of the Governor-General, this is not difficult to arrange.)

Section 128 would seem to protect any State from such an attempt, by stipulating that any referendum seeking to diminish its representation in Parliament must be passed by the electors of that State. However, it is possible to bypass this protection by not seeking to alter the Constitution at all, but rather by using Section 121 of the Constitution.

Section 121? What the hell is that? Indeed, it has never been used. Section 121 allows the Commonwealth Parliament to *create new States*. Huh? Did you say that the *Parliament* can create new States? Shouldn't that be something that can only be decided by referendum? Are you telling me that Malcolm Fraser and John Kerr could, between them, have created as many new States as they desired?

Constitutionally, that appears to be the case. What's more, Section 121 not only empowers the Parliament to create new States, but moreover allows Parliament almost free reign over how many Senate seats can be allocated to each new State. (The provisions of Section 121 appear to also provide Parliament with the power to determine an arbitrary representation of each new State in the House of Representatives, but this would violate the provisions of Section 24, which stipulate that each State is entitled to seats in the House only in proportion to its population. I would hazard a guess that, if there were a conflict, the explicit provisions of Section 24 would prevail.)

It might seem far-fetched to imagine that any Prime Minister would ever seek to create new States, simply to engineer a constitutional coup. However, consider the following hypothetical scenario. Some time in the future (before we have the chance of bringing in the republic described in the Appendix), the Senate blocks supply. Moreover, supply runs out long before the sluggish provisions of Section 57 allow a joint sitting. There is financial and economic chaos throughout the nation. The double dissolution finally eventuates; the Government wins a majority in each House. The supply Bills are passed, but the country is an economic wasteland.

What happens next? Without doubt, the Senate's ability to block supply will be removed. How? Well, a referendum Bill to the effect needs to be passed by both Houses. That's easy—the Government controls both Houses. Then it goes to the people. But there's a catch. Three of the less populous States vote down the referendum. Why? Because the whole reason the Senate blocked supply in the first place was because the Government's Budget contained provisions that were detrimental to one of them. The other two States have gone out "in sympathy", realising that, if the Senate's powers were to be curtailed, they would forever more be at the mercy of the more populous States.

The Prime Minister is infuriated. The other three States are infuriated. After months of economic ruin, the less populous States are still refusing to fix the system.

So what does the Prime Minister do? Easy. She uses Section 121 of the Constitution to create half a dozen new States, each containing exactly one resident. She puts the referendum back through Parliament, and puts it to the people of Australia. Lo and behold, it is now passed by not just a majority of electors, but a majority of States too.

Fiction? Explain how it is much different from 1975. Indeed, if things had gone differently, this *could* have been 1975.

Fixing the supply conundrum is something that we have already addressed in the previous chapters. However, the principle remains. If we do not modify Section 121 of the Constitution, the loophole will continue to exist.

It is understandable that, at the time of Federation, it was not known if all six Colonies *would*, indeed, be Original States. There needed to be provisions written into the Constitution to deal with the possibility that one or even two of them would fail to pass the required referendum prior to Federation, but would then pass it shortly afterwards. If such had been the case, then one of the first matters to be considered by the Commonwealth Parliament would have been the admission of these "new" States. Such provisions made perfect sense in 1900, but, today, they represent a latent danger.

I am not against the creation of new States. Indeed, I was a little disappointed that the Northern Territory chose to not become one. Nevertheless, it is clear that any proposal to create a new State should pass the same hurdles as required for any change to the Constitution itself. If, some time in the future, the Northern Territory chooses Statehood, then I am sure that it would receive almost unanimous support from every Original State in the Commonwealth. It would, indeed, be a nice welcome for them.

Protecting the High Court

Before we finish considering possible constitutional creativity on the part of a future Prime Minister, it is worth taking a brief look at the High Court's position with respect to constitutional matters.

As with the case of new States, the loophole that exists with respect to the High Court is due entirely to the fact that, at the time of Federation, there *was* no High Court. It needed to be created.

The loophole resides in Section 76:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under this Constitution, or involving its interpretation.

The problem is that, if Parliament *may* make such laws, then surely they can repeal or amend such laws. Moreover, Section 71 allows Parliament to create other Federal courts, and Section 77 gives Parliament specific power to assign original jurisdiction over constitutional matters to any such other Federal court.

Again, it may seem to be a stretch of the imagination for any Government to create a new Federal court simply in order to take away the High Court's jurisdiction over constitutional matters, but if it's possible, then it's a loophole that should be closed.

One might think that a way to avoid such a ploy would be to simply bring a constitutional matter to the newly created court, and then appeal to the High Court. However, Section 73 stipulates that the Parliament may restrict the appellate jurisdiction of the High Court too.

The simple way to close this loophole is to write into the Constitution the original jurisdiction of the High Court on constitutional matters. I have used the spare Section 74 (formerly describing appeals to the Privy Council) to make this explicit. In excising this from Section 76, I have broken my general rule by renumbering the three remaining paragraphs (ii), (iii) and (iv) as (i), (ii) and (iii); in this case, aesthetics override any chance of confusion.

APPENDIX

A Ready Model

The Constitution

This Constitution is divided as follows:

Chapter I—The Parliament

~~Part I—General~~

1 Legislative power

The People of Australia vest the legislative power of the Commonwealth ~~shall be vested~~ in a Federal Parliament, which shall consist of ~~the Queen~~ a President, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament", or "The Parliament of the Commonwealth".

~~**2 Governor-General**~~

~~A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.~~

~~**3 Salary of Governor-General**~~

~~There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.~~

~~The salary of a Governor-General shall not be altered during his continuance in office.~~

~~**4 Provisions relating to Governor-General**~~

~~The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.~~

~~**5 Sessions of Parliament, prorogation and dissolution**~~

~~The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.~~

~~*Summoning Parliament*~~

~~After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.~~

~~*First session*~~

~~The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.~~

~~**6 Yearly session of Parliament**~~

~~There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.~~

Part I—The President

2 The President

The Parliament shall be overseen by the President, who shall ensure the maintenance and continuity of this Constitution, and of the laws of the Commonwealth.

3 Method of selection of the President

Within fourteen days of the office of President falling vacant, the members of both Houses of the Parliament shall assemble jointly at the seat of Government of the Commonwealth, and shall together constitute the members of the Presidential Selection Council.

If the Senate is prorogued or dissolved at the time of the office of President falling vacant, then the senators in place before the prorogation or dissolution of the Senate shall take their places in the Presidential Selection Council as if the Senate had not been prorogued or dissolved.

If the House of Representatives is expired or prorogued or dissolved at the time of the office of President falling vacant, then the members of the House of Representatives in place before the expiration or prorogation

or dissolution of the House shall take their places in the Presidential Selection Council as if the House had not expired or been prorogued or dissolved.

The presence of an absolute majority of the members of the Presidential Selection Council shall be necessary to constitute a quorum for the exercise of its powers.

If no quorum of the Presidential Selection Council is established within fourteen days of the office of President falling vacant, or within fourteen days of the dissolution of the previous Presidential Selection Council if a Presidential Selection Council has been dissolved under this section, or if any of the requirements or obligations of this section are not fulfilled by the Presidential Selection Council within the times prescribed by this section, then at the expiration of the said time the Presidential Selection Council shall be immediately and automatically dissolved, and both Houses of the Parliament, if they have not already been dissolved, shall be immediately and automatically dissolved, and the members of the Presidential Council defined in section five of this Constitution shall constitute the members of the Presidential Selection Council, subject to the provisions of dissolution and disallowance described in section five should they fail to fulfil any of the requirements of this section within the times prescribed.

The Presidential Selection Council shall, before proceeding to the despatch of any other business, choose a member to be the Chair, and as often as the office of Chair becomes vacant the Presidential Selection Council shall again choose a member to be the Chair. The Chair may be replaced at any time by a vote of the Presidential Selection Council.

Questions arising in the Presidential Selection Council shall be determined by an absolute majority of votes, and each member present, including the Chair, shall have one vote.

The Presidential Selection Council shall establish a Presidential Nomination Committee responsible for receiving nominations for the office of President from Australian citizens and any bodies or organisations representing Australian citizens. The Presidential Nomination Committee shall process and analyse such nominations, and shall select thirty-six such nominees for submission to the Presidential Selection Council. The Presidential Nomination Committee may make use of the resources of the Executive Government of the Commonwealth in carrying out its duties. All members of the Presidential Nomination Committee must be members of the Presidential Selection Council. Any or all of the deliberations of the Presidential Nomination Committee may be undertaken in camera, if so resolved by a majority of its members.

A person is qualified to be President if they are qualified to be, and capable of being chosen as, a member of the House of Representatives.

A nominee for the office of President is qualified to be a Presidential Candidate if they are qualified to be President or if it is within their power to become so qualified before taking the oath or affirmation of office.

Before the name of any nominee is presented to the Presidential Selection Council, the Presidential Nomination Committee shall establish that the nominee is qualified to be a Presidential Candidate, and must obtain the written acceptance of the nominee, consenting to their candidature if chosen and agreeing to undertake any steps that may be necessary to qualify them to be President prior to taking the oath or affirmation of office.

If the Presidential Nomination Committee submits the name of any member of the Presidential Selection Council as a nominee, then such member shall immediately resign from the Presidential Selection Council, and shall be ineligible to serve on it until the new President takes the oath or affirmation of office, or the dissolution of the Presidential Selection Council, whichever first occurs. If the Presidential Selection Council consists of the members of the Parliament of the Commonwealth, then for the purposes of the establishment of a quorum or for the determination of a question such a resigned member shall not from that time be counted as a member of the Presidential Selection Council; but if the Presidential Selection Council consists of the members of the Presidential Council, then for the purposes of the business of the Presidential Selection Council such a resigned member shall be replaced by the person that is qualified and is available and is highest in precedence according to the provisions of section five of this Constitution, but such replacement shall not prevent the resigned member from taking their place on the Presidential Council for all business other than that undertaken as the Presidential Selection Council.

Within twenty-eight days of the office of President falling vacant, the Presidential Selection Council shall choose, from the nominees submitted to it by the Presidential Nomination Committee, nine Presidential Candidates.

A List of Presidential Candidates shall be compiled, containing ten items. The first nine items shall be the names of the nine Presidential Candidates decided by the Presidential Selection Council, the order of the

names being determined by lot. The tenth item shall be labelled "A person other than the Candidates listed above", and shall be known as the Null Candidate.

Within thirty-five days of the office of President falling vacant, the List of Presidential Candidates shall be submitted to the electors in each State and Territory qualified to vote for the election of the House of Representatives for an Indicative Presidential Vote. The Indicative Presidential Vote shall be preferential, each item in the List of Candidates being numbered from one to ten, one indicating the most preferred Candidate. Subject to these provisions, Parliament may make laws prescribing the method and places of voting, and may permit the consideration of votes in which all ten preferences have not been assigned correctly.

The Indicative Presidential Vote shall not be invalidated by the death or incapacity or withdrawal of consent or lack or cessation of qualification of eligibility of any of the Presidential Candidates.

If in the Indicative Presidential Vote the Null Candidate receives an absolute majority of first-preference votes in a majority of States, and an absolute majority of first-preference votes of all of the electors of the Commonwealth voting, then the Presidential Selection Council shall be deemed to have not fulfilled its duties under this section, and the dissolutions prescribed in this section shall occur.

The Presidential Selection Council shall establish an Indicative Presidential Vote Analysis Committee responsible for the analysis of the results of the Indicative Presidential Vote. The Indicative Presidential Vote Analysis Committee may make use of the resources of the Executive Government of the Commonwealth, and need not wait for the completion of counting of the Indicative Presidential Vote before pursuing its deliberations. All members of the Indicative Presidential Vote Analysis Committee must be members of the Presidential Selection Council. Any or all of the deliberations of the Indicative Presidential Vote Analysis Committee may be undertaken in camera, if so resolved by a majority of its members.

The Presidential Selection Council shall, after considering the recommendations of the Indicative Presidential Vote Analysis Committee, choose one of the Presidential Candidates as President-Elect.

Within forty-two days of the office of President falling vacant, the name of the President-Elect shall be submitted to the electors in each State and Territory qualified to vote for the election of the House of Representatives for Presidential Ratification. The Presidential Ratification shall require a response either in the affirmative or the negative. Subject to these provisions, Parliament may make laws prescribing the method and places of voting.

And if in a majority of the States a majority of the electors voting ratify the choice of President-Elect, and if a majority of all the electors voting also ratify the choice of President-Elect, then the President-Elect becomes the President.

If the President-Elect does not become the President, then the Presidential Selection Council shall choose another of the Presidential Candidates as President-Elect, and within seven days of the previous Presidential Ratification the new President-Elect shall be submitted to the electors for Presidential Ratification. If the new President-Elect fails to be ratified, this process shall be repeated with other Presidential Candidates selected as the President-Elect until a President-Elect is ratified, or until there are no Presidential Candidates remaining who have not been submitted for Presidential Ratification and who remain eligible for office and who have not withdrawn their consent, in which case the provisions of this section are to be repeated, with the time of the office of President falling vacant being taken as the time that the last Presidential Ratification was held.

The President shall make and subscribe before a Justice of the High Court an oath or affirmation of office in the form set forth in Schedule I to this Constitution. The President may not exercise any Presidential power or receive any Presidential remuneration before this oath or affirmation is taken.

If the President is a member of the Commonwealth Parliament or a State Parliament or Territory legislature or any other form of government, then the President must resign their place in the said Parliament or legislature or other form of government before taking the oath or affirmation of office. The President may not be a member of any such Parliament or legislature or other form of government during their term of office.

If the President is a member of any political party or parties, then the President must resign or suspend their membership of the said political party or parties before taking the oath or affirmation of office. The President may not be an active member of any political party during their term of office.

If the President is a judge or magistrate of any court, then the President must resign their position as judge or magistrate before taking the oath or affirmation of office. The President may not be a judge or magistrate of any court during their term of office.

If the President is in any way employed or engaged or retained in any office of profit at the time of being ratified as President, then the President must, before taking the oath or affirmation of office, resign from the office if it is in the President's power to do so, or, if resignation is beyond the President's power, the President must submit to a Minister of the Commonwealth or a Justice of the High Court a written undertaking that all moneys or benefits received from such office will be donated to the Consolidated Revenue Fund of the Commonwealth. The President must not undertake any such office of profit while they continue to be the President, unless it is beyond their power to refuse the office, in which case the written undertaking described above must be submitted within twenty-eight days of the President being informed in writing of their compulsory appointment to that office.

If any of the provisions of section four of this Constitution determining the vacancy of the office of President apply to the President-Elect before the President makes the oath or affirmation of office, then the procedures of this section must be repeated, with the time of vacancy of the office of President taken to be the earliest time that any of the provisions of section four apply, and if the Presidential Ratification has already taken place or is taking place at the time of the vacancy, then it shall be null and void.

The actions of a person otherwise duly selected as President under this section are not invalidated only because the person was not qualified to be chosen as a Presidential Candidate, or ceased to be so qualified, unless such actions were undertaken after a ruling of the High Court of such disqualification.

The President may not delegate any Presidential power or responsibility specified in this Constitution to any other person or persons, except as explicitly provided for in section sixty-seven and section one hundred and thirty-two of this Constitution. Any other Presidential power or responsibility conferred on the President by an Act of the Parliament of the Commonwealth or of the Parliament of a State may only be delegated as explicitly specified by the Act conferring that power or by a subsequent Act of the same Parliament that conferred that power.

4 Vacancy of the office of President

The office of President shall immediately and automatically fall vacant if the President:

(i) dies; or

(ii) resigns by signed notice delivered to the Principal of the Senate, the Speaker of the House of Representatives, a Minister of the Commonwealth, or a Justice of the High Court; or

(iii) is unconscious or incapacitated for a continuous period of forty-eight hours, and after that time continues to remain unconscious or incapacitated while the Senate and the House of Representatives each pass by absolute majority a resolution seeking the removal of the President from office; or

(iv) fails to respond within forty-eight hours to a public notice issued by a Minister of the Commonwealth requesting to be received by the President; or

(v) ceases to be qualified to be President; or

(vi) fails to abide by the restrictions on remuneration, payment, rewards, or gifts specified in section six of this Constitution; or

(vii) is automatically dismissed by virtue of failing to act under section fifty-seven, fifty-eight, sixty-two, sixty-three, sixty-four, or one hundred and thirty-seven of this Constitution; or

(viii) is dismissed by an Emergency Vote according to Chapter IX of this Constitution.

If a person serving as President ceases to be President by virtue of reason (i), (vii) or (viii) above, then that person shall be disqualified from being a Presidential Candidate at any future time. In all other cases the former President shall not be disqualified from being a Presidential Candidate in the future only because they ceased to be the President, provided that they meet all of the requirements of section three of this Constitution for the qualifications of a Presidential Candidate in force at that future time that they are being considered as a Presidential Candidate.

For the purposes of subsection (iii) of this section, if the Senate is adjourned or prorogued or dissolved at any time that the President is unconscious or incapacitated, then the senators in place before the Senate was adjourned or prorogued or dissolved may be summoned by a Proclamation made from the location specified in section one hundred and thirty-two of this Constitution and signed by seven such senators, and the senators shall take their place as if the Senate had not been adjourned or prorogued or dissolved, for the sole purpose of considering a resolution of the form required in subsection (iii) of this section, and no other business shall be considered, other than the selection of a Principal if such a need may arise. Such a sitting shall not be counted

for the purposes of any remuneration, allowances, pensions, superannuation, or any other such benefit that would not accrue if the sitting had not taken place.

For the purposes of subsection (iii) of this section, if the House of Representatives is expired or adjourned or prorogued or dissolved at any time that the President is unconscious or incapacitated, then the members of the House of Representatives in place before the House of Representatives expired or was adjourned or prorogued or dissolved may be summoned by a Proclamation made from the location specified in section one hundred and thirty-two of this Constitution and signed by fourteen such members of the House of Representatives, and the members shall take their place as if the House of Representatives had not expired or been adjourned or prorogued or dissolved, for the sole purpose of considering a resolution of the form required in subsection (iii) of this section, and no other business shall be considered, other than the selection of a Speaker if such a need may arise. Such a sitting shall not be counted for the purposes of any remuneration, allowances, pensions, superannuation, or any other such benefit that would not accrue if the sitting had not taken place.

For the purposes of subsection (iv) of this section, the President shall be deemed to have failed to respond to a public notice by a Minister of the Commonwealth requesting to be received by the President if the said Minister causes the said public notice to be:

(1) printed in that newspaper that is published at least five times per week in the Australian Capital Territory that has the largest daily circulation in the Australian Capital Territory; or, if no such newspaper exists,

(2) published or broadcast in any public medium, that is readily accessible by all of the residents of the Australian Capital Territory, and that is capable of being updated at least daily;

and if the President does not either:

(a) receive in person the Minister that placed the notice; or

(b) receive in person a Justice of the High Court, indicating the reason for being unable or unwilling to abide by subsection (a) above;

at the official residence of the President in the Australian Capital Territory, within forty-eight hours of the said notice being freely accessible throughout the Australian Capital Territory. For the purposes of this section, the President may receive a Minister or Justice in person by means of any secure and reliable telecommunications system capable of communicating continuously and faithfully both audio and video in both directions with a maximum time delay in each direction of five seconds, between the President and the official residence of the President in the Australian Capital Territory. If the President is unable to receive in person any of the people listed in subsections (a) or (b) above, for reasons beyond the President's control, the President may fulfil the obligations of subsection (iv) of this section by causing a notice advising the fact to be published or broadcast, or seeking to have a notice advising the fact published or broadcast, in the same newspaper or public medium used to publish or broadcast the Minister's notice requesting to be received. For the purposes of this provision, the official residence of the President in the Australian Capital Territory shall be as prescribed by Parliament.

For the purposes of subsection (v) of this section, the qualifications of President shall be taken to be the qualifications as applicable at the time that the President was selected by the Presidential Selection Council to be a Presidential Candidate.

For the purposes of subsection (v) of this section, the time of cessation of qualification of the President shall be taken to be the time that the High Court rules this disqualification to be the case.

For the purposes of subsection (vi) of this section, the time of cessation of the President's compliance with the remuneration restrictions of section six shall be taken to be the time that the High Court rules this non-compliance to be the case.

From the time that the office of President falls vacant, until the time that the new President makes the oath or affirmation of office, all of the powers and duties of the President, whether conferred by this Constitution or by an Act of the Parliament of the Commonwealth or of a State or any other law or statute, shall be vested in the Presidential Council, except as otherwise provided by this Constitution.

If any matter is awaiting action by the President or Presidential Council at the time that the office of President falls vacant or the Presidential Council is dissolved, and if this Constitution provides a time period within which an action must be taken by the President or Presidential Council, then the time period shall be measured anew from the time that the office of President fell vacant, or the time that the Presidential Council was dissolved, as the case may be.

5 The Presidential Council

At any time that the office of President falls vacant, a Presidential Council shall be automatically and immediately constituted. The Presidential Council ceases to exist at the moment that the new President makes the oath or affirmation of office.

Each State of the Commonwealth shall have one Presidential Councillor, who shall be that person who:

(i) is physically present at the location specified in this section, at the time that the Presidential Council has need to meet; and

(ii) has not been disallowed from serving on the Presidential Council by the provisions of this section; and

(iii) is qualified to be, and capable of being chosen as, a member of the House of Representatives; and

(iv) is not at the time a senator, and has not been a senator for the preceding twelve months; and

(v) is not at the time a member of the House of Representatives, and has not been a member of the House of Representatives for the preceding twelve months; and

(vi) is not a member of any House of the Parliament of the said State; and

(vii) is available and willing to act as the representative of that State on the Presidential Council;

and who has highest precedence in the following list:

(a) the Governor of the State;

(b) a former Governor of the State, with precedence going to that Governor whose term of office expired most recently;

(c) a former Minister of the State, with precedence going to that former Minister who was Minister for the greatest number of days in that State in sum total, or, in the case of this total being equal, to the oldest former Minister who was a Minister for this greatest number of days;

(d) a former member of any House of the Parliament of that State, with precedence going to that former member of Parliament who was a member of any House of the Parliament of that State for the greatest number of days in sum total, or, in the case of this total being equal, to the oldest former member of Parliament who was a member for this greatest number of days;

(e) any Australian citizen who has been a resident of the State continuously during the preceding ten-year period, or, if the State has been a State of the Commonwealth for less than ten years, since the admission of the State to the Commonwealth, with precedence going to the person who has been a resident of the State for the greatest number of days in total during their lifetime, or, in the case of this total being equal, to the oldest such resident of the State having been resident in the State for the greatest number of days.

For the purposes of subsection (e) of this section, the required continuous period of residence shall be taken to span any absence or absences from the State if each absence was for a period of no longer than six months.

No decision of the Presidential Council shall be invalidated only because a Presidential Councillor was not qualified to be a Presidential Councillor or because a Presidential Councillor was not the person of highest precedence available from that State to fulfil that role at the time that the decision was made, provided that the requirements of this section have otherwise been met.

The Parliament shall make laws governing the method of summoning and the place of meeting of the Presidential Council, and may at any time amend or repeal such laws. In the absence of such provision, the Presidential Council shall first meet following the vacancy of the office of President or the dissolution of a Presidential Council, as the case may be, in the senate chamber of Old Parliament House, Canberra, and shall do so as soon as a quorum is established at that location.

An absolute majority of Presidential Councillors must be present to constitute a quorum for the exercise of any of its powers.

Any former Justice of the High Court who has not been removed from office by an Emergency Vote under Chapter IX of this Constitution who presents themselves in person to a meeting of the Presidential Council shall be admitted to the meeting and shall be permitted to be present at all deliberations of the meeting; but such a former Justice shall play no role in the proceedings except as specified in this section, unless explicitly requested to offer advice on legal or constitutional questions by a Presidential Councillor. No other person is

entitled to be present at any meeting of the Presidential Council; but the Presidential Council may pass a motion to admit any person or class of persons to any or all of its deliberations, as it sees fit.

Before proceeding to the despatch of any other business, the Presidential Council shall choose one of its members to be Chair, and as often as the office of Chair becomes vacant the Presidential Council shall again choose a member to be the Chair. The Chair may be replaced at any time by a vote of the Presidential Council.

Questions arising in the Presidential Council shall be determined by an absolute majority of votes, and each member, including the Chair, shall have one vote.

The deliberations of any meeting of the Presidential Council must be suspended at the moment that any person presents themselves to the Presidential Council with an arguable claim to have precedence over one of the members sitting on the Council. A claim shall be taken to be arguable if it is considered to be arguable by a majority of the former Justices of the High Court present at the meeting. The validity of an arguable claim shall be upheld if deemed so by a majority of the former Justices of the High Court that are present at the meeting, on the basis of all evidence available within one hour of the claim being made. If the claim is upheld, the claimant shall immediately replace the sitting representative of that State, and the deliberations of the Presidential Council may continue as if the replacement had not taken place, except that if the replaced member was the Chair of the Presidential Council at the time of replacement, then the Presidential Council shall choose a new Chair before resuming or proceeding to the despatch of any further business. Any of the former Justices of the High Court present at any meeting of the Presidential Council may at any time suspend the meeting if new evidence is forthcoming regarding a claim for precedence previously dealt with, and a new judgment on the claim may be issued by a majority of the former Justices of the High Court present at the meeting within fifteen minutes of the suspension being called. If in any determination of precedence the majority of former Justices of the High Court decide that there is insufficient information available to determine which of two or more people has precedence, then the question shall be determined by lot.

If no former Justices of the High Court are present at a meeting of the Presidential Council, then any reference in this section to a former Justice of the High Court shall instead be read as referring to any of the following people who are present at the meeting:

(1) a judge of any federal court other than the High Court;

(2) a former judge of any federal court;

(3) a Justice of the Supreme Court of any State;

(4) a former Justice of the Supreme Court of any State;

but if none of these people are present at a meeting of the Presidential Council, then any reference in this section to a former Justice of the High Court shall instead be read as referring to a Presidential Councillor, except that if the precedence of a Presidential Councillor is being voted on, then the said member shall not participate in the vote, and for the purpose of reckoning the number of members required for a question to pass the said member shall not be counted; and if the precedence of more than one Presidential Councillor has been challenged, then each such challenge shall be voted on separately, the order being determined by lot, with only the member being voted on being disqualified and discounted for the purposes of each particular vote.

If any former Justice of the High Court or any judge or former judge listed under provisions (1), (2), (3) or (4) of this section is claiming precedence to be a Presidential Councillor, then such person shall not participate in deliberations on their own claim.

If the Presidential Council fails to fulfil any responsibility or obligation specified by this Constitution within the time period specified by this Constitution, then the Presidential Council shall be immediately and automatically dissolved, and each and every person that has served on the Presidential Council since it has been most recently constituted shall be disallowed from being a Presidential Councillor for a period of twelve months from the said dissolution, and a new Presidential Council shall immediately and automatically be constituted, following the provisions specified in this section, and, except as otherwise provided in this Constitution, all time periods prescribed by this Constitution for action by the Presidential Council shall be taken from the time that the new Presidential Council is constituted.

Any vote passed by the Presidential Council may, within twenty-four hours of the vote being passed, be rescinded by resolution of the Presidential Council if any changes of membership of the Presidential Council have taken place in the interim in favour of Presidential Councillors of higher precedence and if such changes of membership would have been numerically sufficient to defeat the original vote if all replaced Presidential Councillors had voted in the negative. Any decision made by the Presidential Council capable of being rescinded by this provision shall not be final and effective until this twenty-four hour period has expired.

The Parliament shall make laws prescribing the remuneration of Presidential Councillors. In the absence of such provision, Presidential Councillors shall receive no remuneration for their service on the Presidential Council.

For the purposes of subsections (a) and (b) of this section, ***Governor of the State*** shall mean the office of Governor of the said State as existed at the enactment of *Constitutional Amendment (Establishment of Republic) 200?*, but shall not extend to any Lieutenant-Governor or other Administrator of the State who may be the acting Governor of the State. If the said State has subsequently amended its Constitution so as to eliminate the office of Governor, or to modify the powers of the office of Governor in any way, then such an amendment to the Constitution of the State shall specify whether any office shall be taken to take the place of that of Governor for the purposes of subsections (a) and (b) of this section, and if no such specification is made then no office of Governor of the State shall be deemed to exist for the purposes of subsections (a) and (b) of this section.

The provisions of this Constitution referring to ***the President or Presidential Council*** shall be construed as referring to the President if there is a President in office who has made the oath or affirmation of office, or the Presidential Council if there is no President in office or if there is a President in office who has not yet made the oath or affirmation of office.

6 Remuneration of the President

On taking office, the annual remuneration of the President shall be as fixed by the Parliament.

On the first day of July of each year, the annual remuneration of the President shall be proportionally adjusted in line with the consumer price index or other such index as best reflects the changes in the cost of living for the whole Australian community, as best determined or estimated by Commonwealth statistics for the twelve months to the preceding thirty-first day of December. If the length of the President's term of office up to the thirtieth day of June has been less than twelve months, then the adjustment shall be calculated pro rata, by geometric average, on the number of days the President has been in office to the thirtieth day of June.

No other alterations to the remuneration of the President shall be made while the President remains in office.

Apart from the remuneration described in this section, the President may not, after taking the oath or affirmation of office, receive any remuneration, payment, or reward of any sort, from any source whatsoever, while continuing in office, unless the receipt of such is beyond the power of the President to refuse, in which case it must be donated to the Consolidated Revenue Fund of the Commonwealth within twenty-eight days of being received by the President or of the President being notified in writing of its receipt. But this provision shall not apply to the receipt of gifts of nominal value from foreign heads of state or the chief executives of foreign countries. Until the Parliament provides otherwise, the maximum value of such permissible gifts shall be one thousand dollars per item, and the maximum total value of gifts received during any one calendar year shall be no more than five thousand dollars; and any gift or gifts in excess of these amounts shall be held in trust by the President and donated to a library or museum or other organisation of the Commonwealth within one month of the President ceasing to hold office.

Part II—The Senate

7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland~~, if that State be an Original State,~~ may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators and that no State shall have greater representation than any Original State and that the total number of senators for all the Territories of the Commonwealth shall not be greater than that for any Original State.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the ~~Governor-General~~ President or Presidential Council.

8 Qualification of electors

The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of ~~Representatives; but in~~ Representatives. In the choosing of senators each elector shall only vote once.

9 Method of election of senators

The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform ~~for all the States~~ throughout the Commonwealth. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

10 Application of State laws

Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

11 Failure to choose senators

The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

12 Issue of writs

The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

13 Rotation of senators

As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made within one year before the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of July following the day of ~~his~~ their election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of July preceding the day of ~~his~~ their election.

14 Further provision for rotation

Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

15 Casual vacancies

If the place of a senator becomes vacant before the expiration of ~~his~~ their term of service, the Houses of Parliament of the State for which ~~he~~ the said senator was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when ~~he was~~ they were so chosen, ~~he~~ the said senator was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented ~~himself~~ themselves to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where:

(a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

(b) before taking ~~his~~ their seat ~~he ceases~~ they cease to be a member of that party (otherwise than by reason of the party having ceased to exist);

~~he~~ they shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the ~~Governor-General~~ President or Presidential Council.

~~If the place of a senator chosen by the people of a State at the election of senators last held before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 became vacant before that commencement and, at that commencement, no person chosen by the House or Houses of Parliament of the State, or appointed by the Governor of the State, in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, held office, this section applies as if the place of the senator chosen by the people of the State had become vacant after that commencement.~~

~~A senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, being a senator appointed by the Governor of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State, shall be deemed to have been appointed to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State that commenced or commences after he was appointed and further action under this section shall be taken as if the vacancy in the place of the senator chosen by the people of the State had occurred after that commencement.~~

~~Subject to the next succeeding paragraph, a senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office until the expiration of the term of service of the senator elected by the people of the State.~~

~~If, at or before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, a law to alter the Constitution entitled "Constitution Alteration (Simultaneous Elections) 1977" came into operation, a senator holding office at the commencement of that law who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office:~~

~~(a) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and seventy-eight—until the expiration or dissolution of the first House of Representatives to expire or be dissolved after that law came into operation; or~~

~~(b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eighty-one—until the expiration or dissolution of the second House of Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution.~~

16 Qualifications of senator

The qualifications of a senator shall be the same as those of a member of the House of Representatives.

17 Election of ~~President~~ Principal

The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the ~~President~~ Principal; and as often as the office of ~~President~~ Principal becomes vacant the Senate shall again choose a senator to be the ~~President~~ Principal.

The ~~President~~ Principal shall cease to hold ~~his~~ their office if ~~he ceases~~ they cease to be a senator. ~~He~~ The Principal may be removed from office by a vote of the Senate, or ~~he~~ the Principal may resign ~~his~~ from office or ~~his~~ from their seat by writing addressed to the ~~Governor-General~~ President or Presidential Council.

18 Absence of ~~President~~ Principal

Before or during any absence of the ~~President~~ Principal, the Senate may choose a senator to perform ~~his~~ the Principal's duties in ~~his~~ the Principal's absence.

19 Resignation of senator

A senator may, by writing addressed to the ~~President~~ Principal, or to the ~~Governor-General~~ President or Presidential Council if there is no ~~President~~ Principal or if the ~~President~~ Principal is absent from the Commonwealth, resign ~~his~~ their place, which thereupon shall become vacant.

20 Vacancy by absence

The place of a senator shall become vacant if for two consecutive months of any session of the Parliament ~~he~~ they, without the permission of the Senate, ~~fails~~ fail to attend the Senate.

21 Vacancy to be notified

Whenever a vacancy happens in the Senate, the ~~President~~ Principal, or if there is no ~~President~~ Principal or if the ~~President~~ Principal is absent from the Commonwealth the ~~Governor-General~~ President or Presidential Council, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

22 Quorum

Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

23 Voting in Senate

Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The ~~President~~ Principal shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

Part III—The House of Representatives

24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

25 Provisions as to ~~races~~ persons of foreign citizenship or allegiance disqualified from voting

For the purposes of the last section, if by the law of any State all persons of any ~~race~~ foreign citizenship or allegiance are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that ~~race~~ foreign citizenship or allegiance resident in that State shall not be counted.

26 Representatives in first Parliament

Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:

~~New South Wales..... twenty-three;~~
~~Victoria..... twenty;~~
~~Queensland..... eight;~~
~~South Australia..... six;~~
~~Tasmania..... five;~~

~~Provided that if Western Australia is an Original State, the numbers shall be as follows:~~

New South Wales..... twenty-six;
Victoria..... twenty-three;
Queensland..... nine;
South Australia..... seven;
Western Australia..... five;
Tasmania..... five.

27 Alteration of number of members

Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

28 Duration of House of Representatives

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by ~~the Governor-General~~ means of the provisions of sections three, fifty-seven or one hundred and thirty-seven of this Constitution, or by means of the Emergency provisions of Chapter IX of this Constitution, or by a resolution passed by an absolute majority of the members of the House of Representatives.

29 Electoral divisions

Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

30 Qualification of electors

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of ~~the State; but in~~ the State. In the choosing of members each elector shall vote only once.

31 Application of State laws

Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

32 Writs for general election

~~The Governor General in Council may cause writs to be issued for general elections of members of the House of Representatives.~~

~~After the first general election, the writs~~ Writs shall be issued for general elections of members of the House of Representatives by the President or Presidential Council within ten days from the expiry of a House of Representatives or from ~~the proclamation of~~ a dissolution thereof.

33 Writs for vacancies

Whenever a vacancy happens in the House of Representatives, the Speaker shall issue ~~his~~ their writ for the election of a new member, or if there is no Speaker or if ~~he~~ the Speaker is absent from the Commonwealth the ~~Governor-General in Council may~~ President or Presidential Council shall issue the writ.

34 Qualifications of members

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

(i) ~~he~~ they must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when ~~he is~~ they are chosen;

~~(ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.~~

(ii) they must be an Australian citizen.

35 Election of Speaker

The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold ~~his~~ their office if ~~he ceases~~ they cease to be a member. ~~He~~ The Speaker may be removed from office by a vote of the House, or ~~he~~ the Speaker may resign ~~his~~ their office or ~~his~~ their seat by writing addressed to the ~~Governor-General~~ President or Presidential Council.

36 Absence of Speaker

Before or during any absence of the Speaker, the House of Representatives may choose a member to perform ~~his~~ the Speaker's duties in ~~his~~ the Speaker's absence.

37 Resignation of member

A member may by writing addressed to the Speaker, or to the ~~Governor-General~~ President or Presidential Council if there is no Speaker or if the Speaker is absent from the Commonwealth, resign ~~his~~ their place, which thereupon shall become vacant.

38 Vacancy by absence

The place of a member shall become vacant if for two consecutive months of any session of the Parliament ~~he~~ they, without the permission of the House, ~~fails~~ fail to attend the House.

39 Quorum

Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

40 Voting in House of Representatives

Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then ~~he~~ the Speaker shall have a casting vote.

Part IV—Both Houses of the Parliament

41 Right of electors of States

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

42 Oath or affirmation of allegiance

Every senator and every member of the House of Representatives shall before taking ~~his~~ their seat make and subscribe before the ~~Governor-General, or some person authorised by~~ ~~him, an~~ President or Presidential Council an oath or affirmation of allegiance in the form set forth in ~~the schedule to~~ Schedule I of this Constitution.

43 Member of one House ineligible for other

A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44 Disqualification

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) is an undischarged bankrupt or insolvent; or

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(iv) holds any office of profit under the Executive Government of the Commonwealth, a State or a Territory, or any pension payable, during the pleasure of the Executive Government of the Commonwealth, out of any of the revenues of the Commonwealth; or

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. But subsection (iv) does not apply to the office of any of the ~~Queen's~~ Ministers of State for the Commonwealth, or of any of the ~~Queen's~~ Ministers for a State, ~~or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army~~, or to the receipt of pay as an officer or member of the ~~naval or military~~ defence forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45 Vacancy on happening of disqualification

If a senator or member of the House of Representatives:

(i) becomes subject to any of the disabilities mentioned in the last preceding section; or

(ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or

(iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State;

~~his~~ their place shall thereupon become vacant.

46 Penalty for sitting when disqualified

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which ~~he so sits~~ they so sit, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

47 Disputed elections

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

48 Allowance to members

Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which ~~he takes his~~ they take their seat.

49 Privileges etc. of Houses

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50 Rules and orders

Each House of the Parliament may make rules and orders with respect to:

(i) the mode in which its powers, privileges, and immunities may be exercised and upheld;

(ii) the order and conduct of its business and proceedings either separately or jointly with the other House.

Part V—Powers of the Parliament

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) trade and commerce with other countries, and among the States;

(ii) taxation; but so as not to discriminate between States or parts of States;

(iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) borrowing money on the public credit of the Commonwealth;

(v) postal, telegraphic, telephonic, and other like services;

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) lighthouses, lightships, beacons and buoys;

(viii) astronomical and meteorological observations;

(ix) quarantine;

(x) fisheries in Australian waters beyond territorial limits;

(xi) census and statistics;

(xii) currency, coinage, and legal tender;

(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) weights and measures;

(xvi) bills of exchange and promissory notes;

(xvii) bankruptcy and insolvency;

(xviii) copyrights, patents of inventions and designs, and trade marks;

(xix) naturalization and aliens;

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) marriage;

(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) invalid and old-age pensions;

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

(xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) the people of any ~~race~~ foreign citizenship or allegiance, or those people who have at any time in the past been of any foreign citizenship or allegiance, or the aboriginal people of any part of the Commonwealth, for whom it is deemed necessary to make special laws;

(xxvii) immigration and emigration;

(xxviii) the influx of criminals;

(xxix) external affairs;

(xxx) the relations of the Commonwealth with the islands of the Pacific;

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) railway construction and extension in any State with the consent of that State;

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

52 Exclusive powers of the Parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

(ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) other matters declared by this Constitution to be within the exclusive power of the Parliament.

53 Powers of the Houses in respect of legislation

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55 Tax Bill

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

56 Recommendation of money votes

A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the ~~Governor-General~~ President in Council to the House in which the proposal originated.

57 Disagreement between the Houses

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, ~~the Governor-General may dissolve the Senate and the House of Representatives simultaneously~~ the House of Representatives may pass a resolution requesting that the President or Presidential Council dissolve the Senate and the House of Representatives simultaneously. But such a ~~dissolution~~ resolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

The President or Presidential Council shall, within fifty-six days of such a request, either dissolve the Senate and the House of Representatives simultaneously, or else call an Emergency Vote seeking the dissolution of the House of Representatives alone, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said fifty-six days the President or Presidential Council has not complied with this provision, and the House of Representatives has not since passed a further resolution withdrawing the resolution requesting that the President or Presidential Council dissolve the Senate and the House of Representatives simultaneously, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, ~~the Governor-General may~~ the House of Representatives may pass a resolution requesting that the President or Presidential Council convene a joint sitting of the members of the Senate and of the House of Representatives.

The President or Presidential Council shall, within twenty-eight days of such a request, either convene such a joint sitting, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said twenty-eight days the President or Presidential Council has not complied with this provision, and the House of Representatives has not since passed a further resolution withdrawing the resolution requesting that the President convene a joint sitting of the members of the Senate and of the House of Representatives, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the ~~Governor-General~~ President or Presidential Council ~~for the Queen's assent~~ for assent.

~~**58 Royal assent to Bills**~~

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

~~*Recommendations by Governor-General*~~

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

58 Assent to Bills

When a proposed law passed by both Houses of the Parliament is presented to the President or Presidential Council for assent, the President or Presidential Council shall, within twenty-eight days, either assent to the law on behalf of the People, or else both call an Emergency Vote seeking the dissolution of the House of Representatives and append an Emergency Vote seeking the dissolution of the Senate, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said twenty-eight days the President or Presidential Council has not complied with this provision, and the proposed law has not since been withdrawn by the House in which it originated, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

Recommendations by President or Presidential Council

The President or Presidential Council may return to the House in which it originated any proposed law presented for assent, and may transmit therewith any amendments which the President or Presidential Council may recommend. The House in which the proposed law originated may, if it sees fit, pass a resolution to withdraw the proposed law as presented for assent; but if no such resolution is passed, then the proposed law shall continue to be taken to be pending the assent of the President or Presidential Council, according to the provisions of this section.

~~**59 Disallowance by the Queen**~~

~~The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.~~

~~**60 Signification of Queen's pleasure on Bills reserved**~~

~~A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.~~

Part VI—Sessions of the Parliament

59 Sessions of the Parliament

The Parliament shall make laws governing the summoning, adjournment and prorogation of the sessions of the Parliament and may at any time repeal or amend such laws. If the Parliament has not made such laws, the Parliament may be summoned by Proclamation by any member of the Parliament from the location specified in section one hundred and thirty-two of this Constitution for the Proclamation of Emergency Votes; and in the case of two or more such Proclamations, the one specifying the earliest time and date shall take precedence.

After any general election the Parliament shall meet not later than thirty days after the day appointed for the return of the writs.

First session

The Parliament shall meet not later than six months after the establishment of the Commonwealth.

Quarterly session of Parliament

There shall be a session of the Parliament once at least in every quarter year, so that three months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

60 Dissolution of the Parliament

The Senate may only be dissolved by means of the provisions of sections three, fifty-seven or one hundred and thirty-seven of this Constitution, or by means of the Emergency provisions of Chapter IX of this Constitution.

The House of Representatives may only be dissolved by means of the provisions of section twenty-eight of this Constitution.

Chapter II—The Executive Government

~~**61 Executive power**~~

~~The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.~~

~~**62 Federal Executive Council**~~

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

~~**63 Provisions referring to Governor-General**~~

~~The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.~~

~~**64 Ministers of State**~~

~~The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.~~

~~Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.~~

~~*Ministers to sit in Parliament*~~

~~After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.~~

61 Executive power

The People of Australia vest the executive power of the Commonwealth in the President, which 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.

The President shall at all times be kept informed on all matters relating to all parts of the Executive Government of the Commonwealth, and shall be promptly provided with any further information the President requests.

If there is no President, or if there is a President who has not yet taken the oath or affirmation of office, then the executive power of the Commonwealth is vested in the Presidential Council in a caretaker role. The Presidential Council may request information from any Minister of State on any matter relating to any part of the

Executive Government of the Commonwealth, but it is at the discretion of the said Minister of State as to whether and how such requests shall be dealt with, and there is no obligation for the requested information to be provided. The Presidential Council may not seek independent counsel or advice except as provided for in section five of this Constitution.

The President, or each Presidential Councillor, as the case may be, shall take all available steps to maintain the confidentiality of all matters which have been transmitted to the President or Presidential Council, both while in office and after leaving office, excepting only such matters for which explicit written advice has been tendered to the President or Presidential Council, by the person or body originally transmitting the matter, advising that the matter need not or no longer needs to be kept confidential.

The President may, at any time and for any purpose, but subject to the confidentiality provisions of this section, independently seek the confidential counsel or advice of any person, provided that such person is not at the time a member of any political party or any member of the Parliament of the Commonwealth who is not a Minister or any member of any House of Parliament of a State or any member of a Territory legislature or any Justice of the High Court or judge of any other Court created by the Parliament of the Commonwealth. But the President may seek the confidential counsel or advice of any person forbidden by this provision if the President has been granted explicit written authorization to do so by a Minister of State, and only within the explicit bounds of such written authorization.

Where a time period has been specified in this Constitution within which the President or Presidential Council must act, the time at which the action is taken shall be at the complete discretion of the President or Presidential Council, and shall not be justiciable.

When, in accordance with this Constitution, the President or Presidential Council exercises any power or function according to the discretion of the President or Presidential Council, the exercise thereof shall not be justiciable.

62 Federal Executive Council

There shall be a Federal Executive Council to advise the President or Presidential Council in the government of the Commonwealth.

The President becomes a member of the Federal Executive Council when they take the oath or affirmation of office.

If there is no President, each Presidential Councillor who is not already a member of the Federal Executive Council becomes a temporary member of the Federal Executive Council for the duration of their membership of the Presidential Council.

If there is a President who has taken the oath or affirmation of office, then the President shall preside over each meeting of the Federal Executive Council, either in person, or by means of any secure and reliable telecommunications system capable of communicating continuously and faithfully both audio and video in both directions with a maximum time delay in each direction of five seconds. If there is no President, or if the President has not taken the oath or affirmation of office, then the Chair of the Presidential Council shall preside over each joint meeting of the Presidential Council and the Federal Executive Council.

The House of Representatives may pass a resolution calling for the President or Presidential Council to appoint named persons as Executive Councillors. The President or Presidential Council shall, within forty-eight hours, either appoint those persons named in the resolution as Executive Councillors, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said forty-eight hours the President or Presidential Council has not complied with this provision, and if the House of Representatives has not since passed a resolution withdrawing the original resolution, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

An Executive Councillor may resign their office by writing addressed to the President or Presidential Council.

The House of Representatives may pass a resolution calling for the President or Presidential Council to dismiss a named person as an Executive Councillor. The President or Presidential Council shall, within forty-eight hours, either dismiss the person named in the resolution as an Executive Councillor, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said forty-eight hours the President or Presidential

Council has not complied with this provision, and if the House of Representatives has not since passed a resolution withdrawing the original resolution, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

63 The President in Council

Except for those powers specified by this Constitution as being at the discretion of the President or Presidential Council, the President or Presidential Council may act only in accordance with the advice of the Federal Executive Council.

A Minister of State may request in writing that the President or Presidential Council act in accordance with specific written advice of the Federal Executive Council. If there exists no written advice of the Federal Executive Council that has not been subsequently withdrawn by the Federal Executive Council that is contrary to the said written advice, and if it is within the power of the President or Presidential Council to act in accordance with the said written advice, then the President or Presidential Council shall, within seven days, either act in accordance with the said written advice, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council; and if at the expiration of the said seven days the President or Presidential Council has not complied with this provision, and the Minister of State has not since withdrawn in writing the request that the President act in accordance with the said written advice of the Federal Executive Council, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be. But if contrary advice in writing by the Federal Executive Council that has not been subsequently withdrawn by the Federal Executive Council does exist, then the President or Presidential Council may act in accordance with either piece of advice, or may choose not to act at all, the choice being at the discretion of the President or Presidential Council.

Any advice tendered to the Federal Executive Council by a Minister shall be deemed to be automatically withdrawn if the Minister ceases to be a Minister or ceases to administer the department of the Commonwealth to which the advice pertains.

If there is a President who has taken the oath or affirmation of office, the provisions of this Constitution referring to ***the President in Council*** shall be construed as referring to the President acting in accordance with the advice of the Federal Executive Council. If there is no President, of if the President has not taken the oath or affirmation of office, then the provisions of this Constitution referring to ***the President in Council*** shall be construed as referring to the Presidential Council acting in accordance with the advice of the Federal Executive Council at a joint meeting of the Presidential Council and the Federal Executive Council.

64 Ministers of State

The House of Representatives may pass a resolution calling for the President or Presidential Council to establish certain departments of State of the Commonwealth, or to abolish certain existing departments of State of the Commonwealth, or a combination of both. The President or Presidential Council shall, within twenty-eight days, either comply with the resolution in full, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said twenty-eight days the President or Presidential Council has not complied with this provision, and the House of Representatives has not since passed a resolution withdrawing the resolution calling for the President or Presidential Council to establish or abolish certain departments, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

The House of Representatives may pass a resolution calling for the President or Presidential Council to appoint the named persons, each being either a member of the Federal Executive Council or a person listed on a resolution already passed under section sixty-two of this Constitution for appointment to the Federal Executive Council which is or is to be submitted to the President but which has not yet been acted on, to administer such departments of State of the Commonwealth as exist at the time that the resolution is passed, as Ministers of State of the Commonwealth. The President or Presidential Council shall, within forty-eight hours, either appoint and swear in those of the persons named in the resolution who are not already Ministers of State of the respective departments listed in the resolution and terminate the commissions of those existing Ministers of State which are not listed in the resolution, or else call an Emergency Vote seeking the dissolution of the House of Representatives, the choice being at the discretion of the President or Presidential Council. If at the expiration of the said forty-eight hours the President has not complied with this provision, and the House of Representatives has not since passed a resolution withdrawing the resolution calling for the President to

appoint the named persons as Ministers, then the President shall be immediately and automatically dismissed, or the Presidential Council shall be immediately and automatically dissolved according to section five of this Constitution, as the case may be.

A Minister of State shall cease to hold office if their commission as an Executive Councillor is terminated under the provisions of sixty-two of this Constitution, or if their department is abolished under the provisions of this section.

A Minister of State may resign their office by writing addressed to the President or Presidential Council.

Ministers to sit in Parliament

No Minister of State shall hold office for a longer period than three months unless the person is or becomes a senator or a member of the House of Representatives.

Number of Ministers

The number of Ministers of State shall not exceed the number prescribed by the Parliament.

~~**65 Number of Ministers**~~

~~Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.~~

~~**66 Salaries of Ministers**~~

~~There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.~~

65 Vacancy of the office of Minister

If a Minister of State dies or resigns or is unconscious or incapacitated at a time that the House of Representatives is not sitting, then the remaining Ministers of State shall meet and shall appoint one of the remaining Ministers of State as Acting Minister of State for the administration of such departments of State as were administered by the Minister that died or resigned or became unconscious or incapacitated.

Questions arising in any such meeting shall be decided by an absolute majority of the remaining Ministers of State. Any such appointment of an Acting Minister of State shall be notified in writing to the President or Presidential Council within twenty-four hours of the appointment.

A Minister appointed as an Acting Minister by the provisions of this section shall continue in this role until it is terminated by a resolution of a subsequent meeting of Ministers under the provisions of this section, or by a resolution of the House of Representatives under section sixty-four of this Constitution.

66 Salaries of Ministers

There shall be payable out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, such annual sum as is fixed by the Parliament.

67 Appointment of civil servants

Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the ~~Governor-General in Council~~ President in Council, unless the appointment is delegated by the ~~Governor-General in Council~~ President in Council or by a law of the Commonwealth to some other authority.

68 Command of ~~naval and military~~ defence forces

The command in chief of the ~~naval and military~~ defence forces of the Commonwealth is vested in ~~the Governor-General as the Queen's representative~~ the President in Council.

69 Transfer of certain departments

On a date or dates to be proclaimed ~~by the Governor-General~~ after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:

posts, telegraphs, and telephones;
naval and military defence;
lighthouses, lightships, beacons, and buoys;
quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

~~**70 Certain powers of Governors to vest in Governor-General**~~

70 Vesting of certain powers

In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of ~~his~~ the Governor's Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

All powers and functions that were vested under this section in the Governor-General, or in the Governor-General in Council, immediately before the office of Governor-General ceased to exist shall vest in the President in Council.

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the ~~Governor-General~~ President in Council;

(ii) shall not be removed except by ~~the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity~~ an Emergency Vote called under Chapter IX of this Constitution.

~~(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.~~

On appointment, the annual remuneration of a Justice of the High Court or of any other court created by the Parliament shall be as fixed by the Parliament.

On the first day of July of each year, the annual remuneration of a Justice of the High Court or of any other court created by the Parliament shall be proportionally adjusted in line with the consumer price index or other such index as best reflects the changes in the cost of living for the whole Australian community, as best determined or estimated by Commonwealth statistics for the twelve months to the preceding thirty-first day of December. If the length of the Justice's term of office up to the thirtieth day of June has been less than twelve months, then the adjustment shall be calculated pro rata, by geometric average, on the number of days the Justice has been in office to the thirtieth day of June.

No other alterations to the remuneration of a Justice of the High Court or of any other court created by the Parliament shall be made while the Justice remains in office.

The appointment of a Justice of the High Court shall be for a term ~~expiring upon his attaining the age of seventy years~~ of twenty years, ~~and a person shall not be appointed as a Justice of the High Court if he has attained that age,~~ and a person who has served a term as a Justice of the High Court shall not serve another term as a Justice of the High Court at any future time.

The appointment of a Justice of a court created by the Parliament shall be for a term ~~expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court~~ that is, at the time of the Justice's appointment, the term for Justices of that court ~~and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court,~~ and a person who has served a term as a Justice of a court created by the Parliament shall not serve another term as a Justice of that same court at any future time.

Subject to this section, the maximum ~~age~~ term for Justices of any court created by the Parliament is ~~seventy years~~ twenty years.

The Parliament may make a law fixing ~~an age~~ a term that is less than ~~seventy years~~ twenty years, but no less than ten years, as the ~~maximum age~~ term for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment. The Parliament may make a law disallowing any person who has served a term as a Justice of the High Court from serving a term as a Justice of any other specified court created by the Parliament, and may make a law disallowing any person who has served a term as a Justice of a specified court created by the Parliament from serving a term as a Justice of any other specified court created by the Parliament or of the High Court, and may at any time repeal or amend such laws, but any such law or any such repeal or amendment does not affect the term of office of a Justice under an appointment made before such a law was enacted or before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign ~~his~~ their office by writing under ~~his~~ their hand delivered to the ~~Governor-General~~ President or Presidential Council.

~~Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.~~

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation, except that in such case the maximum term of office shall be calculated from the time that the Justice was first appointed to that same court.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

~~But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.~~

~~Until the Parliament otherwise provides, the condition of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.~~

The conditions of and restrictions on appeals from the Supreme Courts of the several States to the High Court are as provided by the Parliament from time to time.

~~**74 Appeal to Queen in Council**~~

~~No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.~~

~~The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.~~

~~Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.~~

74 Original jurisdiction of High Court with respect to this Constitution

The High Court shall have original jurisdiction in all matters arising under this Constitution, or involving its interpretation, or involving its applicability or extension to situations or circumstances not covered by the provisions of this Constitution.

75 Further original ~~Original~~ jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

~~(i) arising under this Constitution, or involving its interpretation;~~

~~(ii)~~ (i) arising under any laws made by the Parliament;

~~(iii)~~ (ii) of Admiralty and maritime jurisdiction;

~~(iv)~~ (iii) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Chapter IV—Finance and Trade

81 Consolidated Revenue Fund

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

82 Expenditure charged thereon

The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

83 Money to be appropriated by law

Except as provided for in section one hundred and thirty-six of this Constitution, no ~~No~~ money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

~~But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.~~

84 Transfer of officers

When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless ~~he is~~ they be appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of ~~his~~ their office.

Any such officer who is retained in the service of the Commonwealth shall preserve all ~~his~~ their existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if ~~his~~ their service with the Commonwealth were a continuation of ~~his~~ their service with the State. Such pension or retiring allowance shall be paid to ~~him~~ the officer by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which ~~his~~ the officer's term of service with the State bears to ~~his~~ their whole term of service, and for the purpose of the calculation ~~his~~ the officer's salary shall be taken to be that paid to ~~him~~ them by the State at the time of the transfer. Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if ~~he~~ they had been an

officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85 Transfer of property of State

When any department of the public service of a State is transferred to the Commonwealth:

~~(i) all property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary;~~

(i) all property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth;

(ii) the Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth;

(iii) the Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament;

(iv) the Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86 Collection and control of duties of customs and of excise

On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87 Distribution of net revenue of duties of customs and of excise

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88 Uniform duties of customs

Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89 Payment to States before uniform duties

Until the imposition of uniform duties of customs:

(i) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii) The Commonwealth shall debit to each State:

  (a) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

  (b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth;

(iii) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90 Exclusive power over customs, excise, and bounties

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91 Exceptions as to bounties

Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93 Payment to States for five years after uniform tariffs

During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides:

(i) the duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State;

(ii) subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94 Distribution of surplus

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

95 Customs duties of Western Australia

Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia~~, if that State be an Original State,~~ may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

96 Financial assistance to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

97 Audit

Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

98 Trade and commerce includes navigation and State railways

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99 Commonwealth not to give preference

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100 Nor abridge right to use water

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101 Inter-State Commission

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102 Parliament may forbid preferences by State

The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

103 Commissioners' appointment, tenure, and remuneration

The members of the Inter-State Commission:

(i) shall be appointed by the ~~Governor-General in Council~~ President in Council;

(ii) shall hold office for seven years, but may be removed within that time by the ~~Governor-General in Council~~ President in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104 Saving of certain rates

Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

105 Taking over public debts of States

The Parliament may take over from the States their public debts or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

105A Agreements with respect to State debts

(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including:

(a) the taking over of such debts by the Commonwealth;

(b) the management of such debts;

(c) the payment of interest and the provision and management of sinking funds in respect of such debts;

(d) the consolidation, renewal, conversion, and redemption of such debts;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

Chapter V—The States

106 Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107 Saving of power of State Parliaments

Every power of the Parliament of a ~~Colony~~ territory which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108 Saving of State laws

Every law in force in a ~~Colony~~ territory which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the ~~Colony~~ territory had until the ~~Colony~~ territory became a State.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

110 Provisions referring to Governor

Except as otherwise provided for in section five of this Constitution, the ~~The~~ provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

111 States may surrender territory

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

112 States may levy charges for inspection laws

After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113 Intoxicating liquids

All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114 States may not raise forces. Taxation of property of Commonwealth or State

A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any ~~naval or military~~ defence force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115 States not to coin money

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

117 Rights of residents in States

~~A subject of the Queen~~ An Australian citizen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to ~~him if he~~ them if they were ~~a subject of the Queen~~ an Australian citizen resident in such other State.

118 Recognition of laws etc. of States

Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

119 Protection of States from invasion and violence

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

120 Custody of offenders against laws of the Commonwealth

Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Chapter VI—New States

121 New States may be admitted or established

The Parliament may seek to admit to the Commonwealth or establish new States, and may upon such seeking of admission or establishment simultaneously seek to make or impose such terms and conditions, including the extent of representation in either House of the Parliament, but subject to this Constitution, as it thinks fit.

The proposed law seeking to admit or establish a new State must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

When the proposed law is submitted to the electors the vote shall be taken in the same manner as for laws proposing to alter this Constitution by the provisions of section one hundred and twenty-eight of this Constitution.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the President for assent.

122 Government of territories

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed ~~by the Queen~~ under the authority of and accepted by the Commonwealth, or otherwise acquired by the ~~Commonwealth, and may~~ Commonwealth. The Parliament may seek to allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit, by means of a proposed law passed under the same provisions as apply under section one hundred and twenty-one of this Constitution for the admission or establishment of new States, except that any such allowances for representation enacted before the *Constitution Alteration (Establishment of Republic) 200?* shall remain in force until repealed or amended according to the provisions of this section.

123 Alteration of limits of States

The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, seek to increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, seek to make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected, by means of a proposed law passed under the same provisions as apply under section one hundred and twenty-one of this Constitution for the admission or establishment of new States.

124 Formation of new States

The Parliament of the Commonwealth may seek to form a ~~A~~ new State ~~may be formed~~ by separation of territory from a State, but only with the consent of the Parliament thereof, and it may seek to form a new State ~~may be formed~~ by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected, by means of a proposed law passed under the same provisions as apply under section one hundred and twenty-one of this Constitution for the admission or establishment of new States.

Chapter VII—Miscellaneous

125 Seat of Government

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

~~**126 Power to Her Majesty to authorise Governor-General to appoint deputies**~~

~~The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.~~

126 Operation of Constitution and laws

This Constitution, and all laws made under it by the Parliament, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.

~~**127 [Repealed in 1967]**~~

127 Definitions

In this Constitution:

(a) ***Australian citizen*** means a person who is an Australian citizen according to the laws made by the Parliament.

(b) ***The Commonwealth*** means the Commonwealth of Australia under this Constitution.

(c) ***The Original States*** means New South Wales, Queensland, Tasmania, Victoria, Western Australia, and South Australia.

(d) ***The States*** means the original States, and such territories as may be admitted into or established by the Commonwealth as States.

In sections three, one hundred and twenty-eight and one hundred and thirty-nine of this Constitution, ***Territory*** means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Chapter VIII—Alteration of the Constitution

128 Mode of altering the Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the ~~Governor-General~~ President in Council may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the ~~Governor-General~~ President or Presidential Council for ~~the Queen's~~ assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

~~In this section, ***Territory*** means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.~~

Chapter IX—Emergency Powers

129 Emergency Powers

The President or Presidential Council, the Senate, and the House of Representatives are each empowered to call an Emergency Vote of the People of Australia, at any time and for any reason they see fit, but subject to the provisions of this Constitution.

A Justice of the High Court or any other court created by the Parliament is empowered to append one Emergency Vote of the People of Australia to any Emergency Vote seeking to remove that Justice from office, subject to the provisions of section one hundred and forty-three of this Constitution.

130 Powers unaffected by suspension, prorogation, expiration or unrelated dissolution

If the Senate is suspended or prorogued, or is dissolved for any reason other than as a result of an Emergency Vote, it may be summoned by a Proclamation made from the location specified in section one hundred and thirty-two of this Constitution and signed by seven of the senators that were in place before the Senate was suspended, prorogued or dissolved, the sole business of such session or sessions being the exercise or otherwise of an Emergency Power of the Senate. For the purposes of the exercise of such a Power, the Senate in such a session shall be taken to be not suspended, prorogued or dissolved; but if any other business is considered in such a session, then any resolution or vote relating to such other business shall be invalid, except that a

Principal may be selected if the need arises. Such a session shall not be counted for the purposes of any remuneration, allowances, pensions, superannuation, or any other such benefit that would not accrue if the sitting had not taken place. Any resolution to call an Emergency Vote must be passed by an absolute majority of the senators that were in place before the Senate was suspended, prorogued or dissolved.

If the House of Representatives is suspended, prorogued or expired, or is dissolved for any reason other than as a result of an Emergency Vote, it may be summoned by a Proclamation made from the location specified in section one hundred and thirty-two of this Constitution and signed by fourteen of the members of the House of Representatives that were in place before the House was suspended, prorogued, expired or dissolved, the sole business of such session or sessions being the exercise or otherwise of an Emergency Power of the House of Representatives. For the purposes of the exercise of such a Power, the House of Representatives in such a session shall be taken to be not suspended, prorogued, expired or dissolved; but if any other business is considered in such a session, then any resolution or vote relating to such other business shall be invalid, except that a Speaker may be selected if the need arises. Such a sitting shall not be counted for the purposes of any remuneration, allowances, pensions, superannuation, or any other such benefit that would not accrue if the sitting had not taken place. Any resolution to call an Emergency Vote must be passed by an absolute majority of the members that were in place before the House of Representatives was suspended, prorogued, expired or dissolved.

131 Discretion to exercise an Emergency Power

The exercise of an Emergency Power is completely at the discretion of the person empowered to exercise that power, or members of the House of Parliament or Council empowered to exercise that power, as the case may be, and is not justiciable. The freedom of the person or House or Council to exercise such a power is not in any way restricted or diminished by any convention or precedent that may be argued to exist, nor by any agreement or Act of Parliament or international treaty which purports to make any such restriction or diminution, and any such agreement or Act of Parliament or treaty shall, to the extent to which it purports to make such a restriction or diminution, be invalid.

132 Proclamation of Emergency Vote

Until the Parliament otherwise provides, any Proclamation of an Emergency Vote shall be made from a position as close as attainable to the flagpole at the centre of the external roof of the New Parliament House building in Canberra.

If it is impossible or impractical or unsafe for access to be gained to the location specified for the Proclamation of an Emergency Vote, then the Proclamation shall be made from that location that the proclaimer may reasonably believe to be closest to the specified location that is possible or practical or safe, as the case may be, provided that the chosen location does not lie within any building or other enclosure on any side or from above from the open air.

If the Emergency Vote is called by the President, then the Proclamation shall be made by the President or by a person authorised in writing by the President to issue the Proclamation.

If the Emergency Vote is called by the Presidential Council, then the Proclamation shall be made by the Chair of the Presidential Council or by a member of the Presidential Council authorised in writing by the Chair of the Presidential Council to issue the Proclamation.

If the Emergency Vote is called by the Senate, then the Proclamation shall be made by the Principal of the Senate or by a senator authorised in writing by the Principal of the Senate to issue the Proclamation.

If the Emergency Vote is called by the House of Representatives, then the Proclamation shall be made by the Speaker of the House of Representatives or by a member of the House of Representatives authorised in writing by the Speaker of the House of Representatives to issue the Proclamation.

If an Emergency Vote is appended by a Justice of the High Court or of any other court created by the Parliament, then the Proclamation shall be made by that Justice or by a person authorised by that Justice in writing to issue the Proclamation.

133 Appending of Emergency Votes

The forty-eight hours following the time of Proclamation of an Emergency Vote shall be referred to as the Emergency Vote Window.

At any time during the Emergency Vote Window, any person or House or Council empowered to call an Emergency Vote may append such an Emergency Vote by Proclamation to the original Emergency Vote, provided that the purpose of the appended Emergency Vote does not coincide with the purpose of the original Emergency Vote or any other Emergency Vote that has already been appended to the original Emergency Vote by Proclamation.

No Emergency Vote Window exists for any Emergency Vote appended to another Emergency Vote.

134 Emergency Votes may not overlap

From the time that the Emergency Vote Window expires, to the end of the day that the Emergency Vote is held, no Proclamation of an Emergency Vote shall be made.

135 Subject of pending Emergency Vote may not call Emergency Vote

If a Proclamation of an Emergency Vote seeking the dismissal of the President has been made, and the Emergency Vote Window has expired, then the President may not issue a Proclamation for any Emergency Vote until the full and final result of the Emergency Vote seeking the dismissal of the President has been determined, and only then if the said Emergency Vote has failed to support the dismissal of the President.

If a Proclamation of an Emergency Vote seeking the dissolution of the Presidential Council has been made, and the Emergency Vote Window has expired, then the Presidential Council may not issue a Proclamation for any Emergency Vote until the full and final result of the Emergency Vote seeking the dissolution of the Presidential Council has been determined, and only then if the said Emergency Vote has failed to support the dissolution of the Presidential Council.

If a Proclamation of an Emergency Vote seeking the dissolution of a House of the Parliament has been made, and the Emergency Vote Window has expired, then the said House may not issue a Proclamation for any Emergency Vote until the full and final result of the Emergency Vote seeking the dissolution of the said House has been determined, and only then if the said Emergency Vote has failed to support the dissolution of the said House of the Parliament.

136 Emergency Presidential appropriations

The time period between the time of Proclamation of an Emergency Vote, and the time that is fourteen days after the time that both Houses of the Parliament have first sat following the final results being known of the said Emergency Vote and any appended Emergency Vote or Votes, shall be referred to as the Emergency Appropriation Period.

At any time during the Emergency Appropriation Period, the President or Presidential Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of the ordinary annual services of the Government, and for such compensation as may be required by the provisions of section one hundred and forty-two of this Constitution.

137 Failure of maintenance of the ordinary annual services of the Government

If at any time any ordinary annual service of the Government is forced to cease for a period of twenty-four hours or greater due to a lack of funds due to the necessary appropriation for its continuance failing to be introduced or passed by the Parliament, and if no Emergency Appropriation for the continuance of this service has been made under section one hundred and thirty-six of this Constitution, then the Senate shall be immediately and automatically dissolved, and the House of Representatives shall be immediately and automatically dissolved, and the President, if there is a President, shall be immediately and automatically dismissed, or the Presidential Council, if there is no President, shall be immediately and automatically dissolved according to the provisions of section five of this Constitution. But this provision shall not apply to the cessation of any ordinary annual service of the Government where that cessation is due to a law that has been passed by both Houses of the Parliament and has been assented to by the President or Presidential Council on behalf of the People.

For the purposes of section one hundred and thirty-six of this Constitution, the time from this complete dissolution to the time that is fourteen days after the date that both Houses of the new Parliament have first sat shall be taken to be the Emergency Appropriation Period.

If at any time any ordinary annual service of the Government is forced to cease for a period of twenty-four hours or greater due to a lack of funds due to the necessary appropriation for its continuance failing to be assented to by the President or Presidential Council, and if no Emergency Appropriation for the continuance of this service has been made under section one hundred and thirty-six of this Constitution, then the President, if there is a President, shall be immediately and automatically dismissed, or the Presidential Council, if there is no President, shall be immediately and automatically dissolved according to the provisions of section five of this Constitution.

After any dismissal or dissolution under the provisions of this section, the new Presidential Council must provide for the continuance of the ordinary annual services of the Government under the provisions of section one hundred and thirty-six of this Constitution within twenty-four hours of the dissolution of the previous Presidential Council, or else be itself subjected to dissolution and disallowance under this section.

138 Questions to be put at Emergency Votes

The question to be put to the electors of the Commonwealth at any Emergency Vote shall be as specified in Schedule II to this Constitution.

139 Method of Emergency Vote

Within ten days of the Proclamation of an Emergency Vote, the corresponding question shall be put to the electors in each State and Territory qualified to vote for the election of the House of Representatives, and if there be one or more Emergency Vote or Votes appended to the original Emergency Vote, the question or questions corresponding to the appended Emergency Vote or Votes shall be put the electors at the same time and in the same manner as the original Emergency Vote.

The vote shall be taken in as close a manner as is consistent with the provisions of this Constitution as that which is applicable for proposed amendments to this Constitution under section one hundred and twenty-eight of this Constitution, except that no method of voting which delays the counting of the vote relative to the method of voting undertaken by the majority of electors by more than twenty-four hours shall be permissible.

Each question to be put at an Emergency Vote shall require a response either in the affirmative or in the negative.

The results of an Emergency Vote, and any Emergency Vote or Votes appended to an original Emergency Vote, shall be determined within twenty-four hours of the close of voting.

And if in a majority of the States a majority of the electors voting respond in the affirmative, and if a majority of all the electors voting also respond in the affirmative, then the proposal of the Emergency Vote shall be immediately and automatically enacted.

If an Emergency Vote to dismiss the President is passed, then the President in office at the time of Proclamation of the Emergency Vote shall, if they are still the President, cease to be the President; but regardless of whether or not they are still the President at the determination of the Emergency Vote, such person shall be ineligible to serve as a Presidential Candidate at any time in the future according to the provisions of section four of this Constitution.

If an Emergency Vote to dissolve the Presidential Council is passed, then each person who was a Presidential Councillor at the time of Proclamation of the Emergency Vote shall, if they are still a Presidential Councillor, be dismissed from that position; but regardless of whether or not they are still a Presidential Councillor at the determination of the Emergency Vote, each such person shall be disallowed from serving on the Presidential Council for a period of twelve months according to the provisions of section five of this Constitution.

140 Authority to enforce Emergency Vote

The person or House or Council calling an Emergency Vote, or any Emergency Vote appended to an Emergency Vote, is authorised to command any Australian citizen, or any company or other organisation carrying out business within the bounds of the Commonwealth, to undertake or perform any task or duty required to ensure that the Emergency Vote or Votes take place in the manner specified and the times specified in this Constitution.

Such commands take precedence over any contrary directions or instructions or laws of the Parliament of the Commonwealth or of the Parliament of any State or of any legislature of any territory or of any other person or

body purporting to make such contrary directions or instructions or laws, and any such contrary directions or instructions or laws shall, to the extent that they are contrary to the provisions of this section, be invalid.

141 Penalty for impeding Emergency Vote

Any Australian citizen who fails to abide by the provisions of section one hundred and forty of this Constitution may be ruled by any court of competent jurisdiction to be ineligible to receive any moneys or benefits from the Commonwealth of Australia for a period of up to twenty-five years following their breach.

Any company or other organisation carrying out business within the bounds of the Commonwealth that fails to abide by the provisions of section one hundred and forty of this Constitution may be ruled by any court of competent jurisdiction to be ineligible to carry out any business within the bounds of the Commonwealth for a period of up to twenty-five years following its breach, and all of the directors, managers and employees of the said company or organisation may be ruled by any court of competent jurisdiction to be ineligible to receive any moneys or benefits from the Commonwealth of Australia for a period of up to twenty-five years following the breach.

The Parliament may make laws providing for additional maximum penalties for such breaches of section one hundred and forty of this Constitution as it sees fit.

142 Compensation for loss caused by Emergency Vote

Any person or company or organisation who suffers loss of any kind in complying with a command or commands under section one hundred and forty of this Constitution shall be fairly compensated by the Executive Government of the Commonwealth or by an Emergency Appropriation of the Presidential Council under section one hundred and thirty-six of this Constitution within twenty-eight days of submitting a written claim for such compensation to the President or Presidential Council.

If a person or company or organisation fails to be fully compensated within the time period specified by this section, such person or company or organisation may at any time within the following seven years sue the Government of the Commonwealth for the full amount of any loss or damage caused by the failure of such compensation having been made within the prescribed time.

143 List of Emergency Powers

The President or Presidential Council may call an Emergency Vote seeking:

(i) the dissolution of the Senate;

(ii) the dissolution of the House of Representatives;

(iii) the dismissal of a Justice of the High Court or of any other court created by the Parliament.

The Senate may call an Emergency Vote seeking:

(iv) the dismissal of the President;

(v) the dissolution of the Presidential Council;

(vi) the dismissal of a Justice of the High Court or of any other court created by the Parliament.

The House of Representatives may call an Emergency Vote seeking:

(vii) the dismissal of the President;

(viii) the dissolution of the Presidential Council;

(ix) the dismissal of a Justice of the High Court or of any other court created by the Parliament.

If an Emergency Vote has been called seeking the dismissal of a Justice of the High Court or of any court created by the Parliament, that Justice may, subject to section one hundred and thirty-three of this Constitution, append one Emergency Vote to the original Emergency Vote seeking:

(x) the dismissal of the President, if it was the President who called the Emergency Vote seeking to dismiss the said Justice; or

(xi) the dissolution of the Presidential Council, if it was the Presidential Council that called the Emergency Vote seeking to dismiss the said Justice; or

(xii) the dissolution of the Senate, if it was the Senate that called the Emergency Vote seeking to dismiss the said Justice; or

(xiii) the dissolution of the House of Representatives, if it was the House of Representatives that called the Emergency Vote seeking to dismiss the said Justice.

~~Schedule~~

~~**Oath**~~

~~I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!~~

~~**Affirmation**~~

~~I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.~~

~~Note: The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.~~

Schedule I—Oaths and affirmations

1 Oath or affirmation of allegiance: Members of Parliament

Under God I swear that I will be loyal to the Commonwealth of Australia and the Australian People, whose laws I will uphold.

I solemnly and sincerely affirm that I will be loyal to the Commonwealth of Australia and the Australian People, whose laws I will uphold.

2 Oath or affirmation of office: President

Under God I swear that I will be loyal to the Commonwealth of Australia and the Australian People, whose rights and liberties I respect and whose laws I will uphold, and that I will serve the Australian People according to law without fear or favour.

I solemnly and sincerely affirm that I will be loyal to the Commonwealth of Australia and the Australian People, whose rights and liberties I respect and whose laws I will uphold, and that I will serve the Australian People according to law without fear or favour.

Schedule II—Questions to be put at Emergency Votes

1 Emergency Vote seeking to dismiss the President

If an Emergency Vote is called under subsections (iv), (vii) or (x) of section one hundred and forty-three of this Constitution, the question to be put to the electors shall be:

> "It has been proposed that the President be immediately dismissed. Do you agree with this proposal?"

2 Emergency Vote seeking to dissolve the Presidential Council

If an Emergency Vote is called under subsections (v), (viii) or (xi) of section one hundred and forty-three of this Constitution, the question to be put to the electors shall be:

> "It has been proposed that the Presidential Council be immediately dissolved. Do you agree with this proposal?"

3 Emergency Vote seeking to dissolve the Senate

If an Emergency Vote is called under subsections (i) or (xii) of section one hundred and forty-three of this Constitution, the question to be put to the electors shall be:

> "It has been proposed that the Senate be immediately dissolved. Do you agree with this proposal?"

4 Emergency Vote seeking to dissolve the House of Representatives

If an Emergency Vote is called under subsection (ii) or (xiii) of section one hundred and forty-three of this Constitution, the question to be put to the electors shall be:

> "It has been proposed that the House of Representatives be immediately dissolved. Do you agree with this proposal?"

5 Emergency Vote seeking to dismiss a Justice of the High Court or of any other court created by the Parliament

If an Emergency Vote is called under subsections (iii), (vi) or (ix) of section one hundred and forty-three of this Constitution, the question to be put to the electors shall be:

> "It has been proposed that (insert full name here), a Federal judge, be immediately dismissed. Do you agree with this proposal?"

Schedule III—Transitional provisions for the establishment of the republic

1 The Governor-General

The office of Governor-General will cease to exist at a time and day determined by Parliament, at which time the alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 200?* take effect in a transitional role, subject to the provisions of this Schedule.

2 Establishment of the republic

The republic of the Commonwealth of Australia shall be established at a time and day determined by Parliament, at which time the alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 200?* are permanently enacted.

Notwithstanding anything in section three of this Constitution, the first President's term of office begins at the time of the establishment of the republic, and the first President shall make and subscribe the President's oath or affirmation of office under section three of this Constitution after that time.

From the time that the office of Governor-General ceased to exist under clause one of this schedule until the first President makes the oath or affirmation of office, the Presidential Council shall be constituted in accordance with section five of this Constitution. The first President shall be selected according to the provisions of section three of this Constitution, except as otherwise provided in this clause.

3 Savings

The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 200?* do not affect:

(i) the validity or continued effect, after the office of Governor-General ceases to exist, of anything done before that time under this Constitution or under the law in force in the Commonwealth; or

(ii) the continuity of the Parliament and its proceedings after the office of Governor-General ceases to exist; or

(iii) the qualifications of a senator or a member of the House of Representatives for the remainder of the term of a person who is a senator or member when the office of Governor-General ceases to exist; or

(iv) the continuity of the Executive Government of the Commonwealth, including in particular the membership and proceedings of the Federal Executive Council and the offices held by the Ministers of State of the Commonwealth, after the office of Governor-General ceases to exist; or

(v) the continuity of courts and their jurisdiction and proceedings after the office of Governor-General ceases to exist.

After the office of Governor-General ceases to exist, anything done before that time for the purposes of a provision of this Constitution by the Governor-General, or by the Governor-General in Council, has effect as if it had been done by the President in Council.

Despite the alteration of section one hundred and seventeen of this Constitution made by the *Constitution Alteration (Establishment of Republic) 200?*, that section continues to apply for the benefit of subjects of the Queen who were resident in a State immediately before the alteration took effect.

4 The States

A State that has not altered its laws to sever its links with the Crown by the time the office of Governor-General ceases to exist retains its links with the Crown until it has so altered its laws.

5 Unified federal system

The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 200?* do not affect the continuity of the federal system, including the unified system of law under this Constitution.

6 Judges' appointment, tenure and remuneration

Nothing in the provisions added to, repealed or amended in section seventy-two of this Constitution by the *Constitution Alteration (Establishment of Republic) 200?* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions, and such a person shall continue in office under those provisions of section seventy-two of this Constitution that were in effect before the said changes to that section were enacted.

7 Interpretation

The reference to the Crown in clause four of this Schedule shall extend to the Queen's heirs and successors in the sovereignty of the United Kingdom.

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