

1999

**THE PARLIAMENT OF
THE COMMONWEALTH OF AUSTRALIA**

HOUSE OF REPRESENTATIVES

**CONSTITUTION ALTERATION
(ESTABLISHMENT OF REPUBLIC) 1999**

EXPLANATORY MEMORANDUM

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CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999 (THE BILL)

OUTLINE

This explanatory memorandum outlines the purposes and results of the 1998 Constitutional Convention, and the main elements of the Bill, before setting out notes on the provisions of the Bill.

The Constitutional Convention and the republic issue

1.1 The Constitutional Convention met in February 1998 to consider whether Australia should become a republic, which republic model should be put to voters to consider against the present system of government, and in what timeframe any change might take place. The Convention supported the adoption of a republican system of government based on a 'bipartisan appointment of the President model' and recommended that the model, and other related changes, be put to the people at a constitutional referendum.

1.2 It resolved that the referendum should be held in 1999 and, if the proposal for change was approved, that the republic should come into effect by 1 January 2001.

1.3 It further resolved that, while it would be desirable for republican arrangements to commence simultaneously in the Commonwealth and all the States, not all States may wish or be able to move to a republic within the timeframe established by the Commonwealth. On that basis, the Convention resolved that the government should consider whether specific provision would be required to enable States to retain their current constitutional arrangements.

1.4 The Prime Minister confirmed at the close of the Convention that, if re-elected, the government would put the Convention's preferred model to a referendum in 1999. This Bill generally implements recommendations of the Convention on the republic model.

The Constitutional Convention and the preamble issue

1.5 The Constitution of the Commonwealth of Australia is contained in s.9 of the Act of the United Kingdom known as the *Commonwealth of Australia Constitution Act* 1900 (in this explanatory memorandum that Act is called 'the Constitution Act (UK)'). The Constitution Act (UK) contains a preamble but there is no preamble to the Constitution proper. The Convention resolved that the existing preamble to the Constitution Act (UK) should remain intact.

1.6 The Convention also resolved that the Constitution should include its own preamble. It made this recommendation in the context of recommending that Australia adopt a republican system of government. However, the Constitution could be amended so as to include a preamble even if Australia were not to become a republic.

1.7 It is not necessary to alter or repeal the preamble or the covering clauses of the Constitution Act (UK) in order to include a new preamble in the Constitution, or to establish Australia as a republic.

1.8 If in the future it was considered desirable to alter or repeal the preamble or the covering clauses of the Constitution Act (UK), this could be done by the Commonwealth Parliament at the request of the States under the Australia Acts, or by a further constitutional referendum.

The Convention communique

1.9 The attachment to this explanatory memorandum sets out the Convention communique. Paragraph numbers have been added for ease of cross-referencing to the discussion below.

The main elements of the Constitution Alteration

1.10 The Bill would establish an Australian republic based on the bipartisan appointment of the President model and other related changes to the Constitution supported by the Convention.

1.11 The Bill would remove most of the existing references to the monarchy from the Constitution and establish an office of President. In so doing, it would convert Australia's system of national government from a constitutional monarchy to a republic. The President would be Australia's head of state.

Schedule 1 - Amendments of the Constitution relating to the President

1.12 Schedule 1 to the Bill relates specifically to the office of President and would cover the following matters.

Choosing the President

The Constitution would entrench elements of a mechanism for choosing the President. The mechanism has four main elements:

- a) a committee invites and considers nominations from the public and gives a report on the nominations to the Prime Minister;
- b) following consideration of the report of the committee, the Prime Minister moves in a joint sitting of the Commonwealth Parliament that a named Australian citizen be chosen as President;
- c) the Leader of the Opposition seconds the Prime Minister's motion; and
- d) a two-thirds majority of the members of the Commonwealth Parliament approves the Prime Minister's motion.

The Constitution would require the nominations committee to be established and operate as provided by the Parliament.

Qualifications of the President

Only a person who is an Australian citizen and qualified to be a member of the House of Representatives can be President. A person cannot be President if he or she is a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or is a member of a political party.

Oath or affirmation

Before taking office, a person chosen as President is required to make an oath or affirmation of office.

Powers of the President

The President is Australia's head of state and the executive power of the Commonwealth vests in the President. The President's powers are the same as the Governor-General's and the constitutional conventions that applied to the exercise of the Governor-General's powers apply to the exercise of the President's powers.

Term

The term of office of a President is 5 years.

Removal of the President

The President may be removed by the Prime Minister. However, the Prime Minister must seek the approval of the House of Representatives for the removal within 30 days unless an election is held. A President who has been removed is eligible for re-appointment, through the mechanism for choosing a President set out in the Constitution (and described briefly above).

Schedule 2 - Consequential amendments of the Constitution

1.13 Schedule 2 to the Bill contains consequential amendments of the Constitution that would be required to alter Australia's system of national government from a constitutional monarchy to a republic. They are primarily concerned with the removal of monarchical references from the Constitution.

1.14 As noted in the Outline above, the Constitutional Convention met to consider whether Australia should become a republic and, if so, which republic model should be put to voters to consider against the present system of government. While it recognised that consequential amendments of the Constitution would be required to establish a republic, it did not have the opportunity or resources to consider these in detail. It recommended simply that the Commonwealth Government and Parliament consider the consequential and transitional matters which would need to be addressed (and it mentioned several of these in particular).

1.15 Most consequential and transitional issues can be addressed by ordinary legislative or administrative action. For example, existing monarchical references in Commonwealth legislation can be amended by new Commonwealth legislation. The new legislation can also 'save' the effect of action under the earlier legislation.

1.16 The Constitution should not include provisions having only ephemeral relevance if those can be located elsewhere. The Constitution must endure. The Constitution should not include provisions which limit its relevance to future generations except where that is unavoidable.

1.17 Schedule 2 to the Bill removes most monarchical references from the Constitution. Those references comprise references to the Queen, the Governor-General and the Crown. Some provisions of the Constitution need to be repealed and replaced by other provisions, and those replacement provisions do not necessarily go in the same place. For example, existing provision for the payment of remuneration to the Governor-General made by s.3 of the Constitution would be replaced by provision for the payment of remuneration to the President, but the latter provision would be contained in proposed s.61 of the Constitution (see Schedule 1). Spent provisions of the Constitution would be removed only where they relate to the monarchical system of government.

1.18 The present Constitution contains several references to 'the President', meaning the President of the Senate. Schedule 2 would change those references to 'the President of the Senate' in order to avoid any confusion with references to the President of the Commonwealth.

Schedule 3 - Transitional provisions

1.19 Schedule 3 to the Bill would add a schedule to the Constitution (Schedule 2 to the Constitution) setting out provisions which would facilitate the transition from constitutional monarchy to republic with minimum disruption to existing institutions and arrangements. Schedule 2 to the Constitution would make provision for those transitional matters which must be addressed in the Constitution.

1.20 Schedule 2 would make provision in relation to the continuity of existing institutions; and the continuity of legislative, executive and judicial action undertaken before conversion to a republic.

1.21 It would make provision for choosing the first President before the commencement of the republic on 1 January 2001, and for enacting legislation in the 'transitional' period, so that the first President may take office on the commencement of the republic.

1.22 It would also make provision in relation to the continuity of State links with the Crown in any State that has not severed those links by 1 January 2001; and in relation to the continuity of Australia's federal system, including its system of law.

1.23 Finally, it would make provision in relation to the constitutional conventions governing the exercise by the President of the 'reserve' powers.

FINANCIAL IMPACT STATEMENT

2.1 The Government anticipates that \$19.5m will be expended on proposed public information activities: \$4.5m on a balanced public education programme and \$15m on Yes/No advertising campaigns conducted by committees drawn from the delegates to the Constitutional Convention.

2.2 It is estimated that the AEC's costs for conducting the referendum will be \$63m.

2.3 The cost of consequential changes (eg, changes to military insignia and coinage) would depend on the nature of those changes, the proposed timetable for transition and the extent to which the changes may be absorbed within existing funding arrangements. No estimate of these costs has been made.

2.4 The cost of running the office of President could be expected to equate broadly with the costs of running the office of the Governor-General. The cost of appointing a President under the proposed arrangements has not been estimated.

NOTES ON THE PROVISIONS OF THE BILL

3.1 The Bill comprises 3 technical clauses and 3 schedules. Clause 1 provides for the short title of the Bill. Clause 2 provides for the commencement of the Bill's provisions: clauses 1, 2 and 3, and Schedule 3, would commence on royal assent; Schedules 1 and 2 would commence at 3.00 pm in the Australian Capital Territory on 1 January 2001. Clause 3 provides that the Constitution is altered as set out in Schedules 1, 2 and 3.

3.2 Schedule 1 contains amendments of the Constitution relating to the office of President. Schedule 2 contains amendments of the Constitution that are consequential on the establishment of a republican form of government for the Commonwealth of Australia. Those amendments involve primarily the removal of monarchical references. Schedule 3 contains transitional provisions in relation to the establishment of the republic.

The provisions of Schedule 1 to the Bill

4.1 Items 1 and 2 of Schedule 1 to the Bill repeal ss. 59 and 60 of the Constitution. Sections 59 and 60 are discussed in more detail in the description below of Schedule 2 to the Bill, but essentially they are obsolete under Australia's existing system of government and would be redundant in a republic.

4.2 Item 3 of Schedule 1 repeals ss. 61, 62 and 63 of the Constitution and substitutes new provisions dealing with the executive power of the Commonwealth and the office of President. The new constitutional provisions are discussed below.

Proposed section 59 - Executive power

Purposes

5.1 The purposes of proposed s.59 are to:

- a) establish the President as Australia's head of state and repository of the executive power of the Commonwealth;
- b) preserve the Federal Executive Council established by s.62 of the Constitution; and
- c) apply the constitutional conventions relating to the exercise by the Governor-General of the 'reserve' powers to the exercise by the President of those powers.

Convention reference

5.2 Proposed s.59 establishes elements of the Convention model (in particular, the 'definition of powers' element). It gives effect, in whole or in part, to paragraphs 17, 26, 27 and 39 of the Convention communique.

Description

- the executive power of the Commonwealth

5.3 Under republican arrangements, the executive power of the Commonwealth currently vested in the Queen under s.61 of the Constitution would cease to be vested in her. The office of Governor-General would cease to exist (the Governor-General *exercises* the executive power under s.61). Under proposed s.59, the executive power of the Commonwealth would vest in, and be exercisable by, the President, who would be Australia's head of state.

- continue Federal Executive Council

5.4 Section 62 of the Constitution establishes the Federal Executive Council as a conduit for advice to the Governor-General on the exercise of his or her powers. Its principal functions are to receive advice and approve the signing of formal documents such as regulations and statutory appointments. Proposed s.59 preserves the Executive Council and allows for the continuation of its current role in relation to the President.

- apply constitutional conventions to President

5.5 Proposed s.59 provides expressly for the President to act on the advice of the Government of the day in accordance with the principle of responsible government which governs the exercise of nearly all of the Governor-General's powers. It provides that the President must exercise his or her ordinary powers in accordance with the advice of the Federal Executive Council, the Prime Minister or other Minister of State.

5.6 The only exception to this rule relates to the exercise of the 'reserve' powers (discussed below). Proposed s.59 provides that the constitutional conventions relating to the exercise of the reserve powers by the Governor-General will apply to the exercise of those powers by the President. This ensures that the conventions (including their capacity to evolve), which have developed in constitutional monarchies, do not cease to apply once links with the Crown are severed.

Issues

- the executive power of the Commonwealth

5.7 Upon the Commonwealth of Australia becoming a republic, the executive power of the Commonwealth would vest in the President; it would cease to vest in the Queen and would cease to be exercisable by the Governor-General. There would no longer be an office of Governor-General.

5.8 Proposed s.59 does not prevent the President exercising the executive power of the Commonwealth while absent from Australia. Traditionally, Governors-General do not exercise power when outside Australia. However, proposed s.63, which deals with arrangements for acting Presidents and Presidential deputies, would make it clear that the President is not so constrained.

- continue Federal Executive Council

5.9 At present, the Constitution confers some powers on 'the Governor-General' and others on 'the Governor-General in Council'. The latter expression means the Governor-General acting with the advice of the Federal Executive Council.

5.10 References to the 'President in Council' will be substituted for references to the 'Governor-General in Council'. This would preserve the present role of the

Federal Executive Council. (The expression 'President in Council' would be defined elsewhere in the Constitution.)

- apply constitutional conventions to President

5.11 The Queen is the head of state and the formal repository of executive power under the Constitution. The Queen does not, however, play a day-to-day role in the Commonwealth Government. Those few functions which the Queen does perform (for example, appointing the Governor-General) are performed in accordance with advice given by the Prime Minister.

5.12 The Governor-General, on the other hand, performs a range of functions. Apart from exceptional circumstances (discussed below), the Governor-General acts in accordance with the advice of Commonwealth Ministers. The reason for this is the principle of responsible government which is basic to the Westminster system of government and central to the Commonwealth Constitution. Under this principle, the Crown acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament. It is for this reason that s.64 of the Constitution requires Ministers to be, or become, members of Parliament.

5.13 There are a small number of matters in relation to which the Governor-General is not required to act in accordance with ministerial advice. The powers which the Governor-General has in relation to these matters are known as 'reserve' powers. There are probably only four reserve powers:

- to appoint the Prime Minister;
- to dismiss the Prime Minister;
- to refuse to dissolve the Parliament; and
- to force a dissolution of the Parliament.

5.14 In exercising a reserve power, the Governor-General ordinarily acts in accordance with established and generally accepted rules of practice known as 'conventions'. For example, when appointing a Prime Minister under s.64 of the Constitution, the Governor-General must, by convention, appoint the parliamentary leader of the party or coalition of parties which has a majority of seats in the House of Representatives.

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

5.16 Proposed s.59 would continue the reserve powers and apply the constitutional conventions to the exercise by the President of those powers. Proposed s.59 is intended to continue the existing potential for evolution of the conventions

governing the exercise of the reserve powers. Proposed item 8 in Schedule 3 to the Bill makes it clear that this potential for evolution is unaffected by conversion to a republic.

5.17 Proposed s.59 is intended to preserve the existing status of the constitutional conventions as rules of practice rather than rules of law. It is not intended to make justiciable decisions of the President in relation to the exercise of the reserve that would not have been justiciable if made by the Governor-General.

Proposed section 60 - The President

Purpose

6.1 The purposes of proposed s.60 are to:

- a) establish a mechanism for choosing a President;
- b) specify the qualifications of a person who may be chosen as President; and
- c) require any person chosen as President to make an oath or affirmation of office.

Convention reference

6.2 Proposed s.60 establishes elements of the Convention model (in particular, the 'appointment or election procedure' and 'qualifications for office' elements). It gives effect, in whole or in part, to paragraphs 17, 24, 28, 40, 43, 53, 54, 55 and 56 of the Convention communique.

Description

- mechanism for choosing President

6.3 Proposed s.60 would include the following elements of the mechanism for choosing a President supported by the Convention:

- a) motion by the Prime Minister, following consideration of the report of a committee established by the Parliament for the purpose of inviting and considering nominations, that a named Australian citizen be chosen as President;
- b) seconding of the Prime Minister's motion by the Leader of the Opposition;
- c) approval of the Prime Minister's motion (where seconded) by a two-thirds majority of the members of the Commonwealth Parliament.

6.4 Proposed s.60 would empower the Parliament to provide for the establishment and operation of a committee to invite and consider nominations.

- qualifications of office

6.5 Proposed s.60 provides that only an Australian citizen qualified to be, and capable of being chosen as, a member of the House of Representatives can be chosen as President. This imports the qualifications and disqualifications imposed by or under ss.34 and 44 of the Constitution (as amended by items 15, 18, 19 and 20 of Schedule 2 to the Bill). Under the rules presently in force, in order to be qualified to be a member of the House of Representatives, a person must have reached the age of 18 years and be eligible to vote in an election for the Senate or the House of Representatives.

6.6 A person cannot be chosen as President if he or she is a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party.

6.7 Proposed s.60 includes provision that the actions of a President who was otherwise duly chosen in accordance with the section are not invalidated merely because the President was not qualified to be chosen as President.

- oath or affirmation of office

6.8 Proposed s.60 requires a person chosen as President, before taking office, to make an oath or affirmation of office. The oath and affirmation of office are set out in a proposed new schedule to the Constitution and incorporate a promise of allegiance and service to Australia and its people.

Issues

- mechanism for choosing President

6.9 It is envisaged that Parliament will enact legislation dealing with the composition and functions of the nomination committee. Proposed s.60 (in combination with s.51 (xxxix)) enables all details of the committee's size, composition and functions to be dealt with in ordinary legislation. This complies with the Convention model and provides the necessary flexibility for the composition, functions and operations of the committee to develop over time. The constitutional reference to the leader of the Opposition is not intended to create any impediment to the appointment of a President in the unlikely event that the Parliament would not recognise a leader of the Opposition.

- qualifications of office

6.10 Proposed s.60 requires a person chosen as President to be qualified to be, and to be capable of being chosen as, a member of the House of Representatives. Any change to parliamentary qualification provisions (such as s.44 of the Constitution) would then have the effect of changing the qualifications for being chosen as President

(as anticipated by the Convention). However, unlike a member of Parliament, a person chosen as President cannot be a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party.

6.11 While the constitutional qualifications for members of parliament apply at all times they are members, the qualifications of a President would apply only at the time the President is chosen. It would be inappropriate to provide for the ‘automatic’ disqualification of the President, which might also require a judicial determination. Instead, the question whether grounds exist which render the President unsuitable to hold or continue in office is a matter for the Prime Minister to determine, in the light of the proposed removal provision (see below). The inclusion of certain specified grounds of disqualification might also implicitly fetter the Prime Minister’s otherwise unqualified power to remove.

6.12 While there is little risk that a person otherwise duly chosen as President was not in fact qualified to be chosen, it is prudent to make provision for this exceptional situation and ensure that the actions of an invalidly chosen President are not themselves invalid on that account. Proposed s.60 does not, however, purport to affect the discretionary power of a Prime Minister to decide that an invalidly chosen President should not continue to hold office.

- oath or affirmation of office

6.13 The presidential oath or affirmation that would be inserted in a new schedule (Schedule 1) to the Constitution combines an oath of office and an oath of allegiance. The Convention recommended that the President should swear or affirm an oath of allegiance and an oath of office and suggested forms of words on which each oath might appropriately be modelled. In the case of the oath of allegiance, the form of words that was recommended is the pledge required by the *Australian Citizenship Act 1948*. It seems doubtful whether a citizenship pledge provides an appropriate model for an oath of office and loyalty required to be taken by a person who is necessarily an Australian citizen and is about to become the head of state. The oath and affirmation in the Bill combine the important features of the various forms of words suggested by the Convention, in a simple, dignified oath or affirmation.

Proposed section 61 - Term of office and remuneration of President

Purpose

7.1 The purposes of proposed s.61 are to:

- a) specify that the term of office of a President is 5 years;
- b) permit a person to serve more than one term as President;
- c) specify that the term of an incoming President normally begins at the end of the term of office of the outgoing President;

- d) provide for the special cases when there is no outgoing President, eg because the President has resigned or died in office, or the outgoing President continues in office after his or her term has ended because no new President has been chosen;
- e) specify the method by which a President may resign; and
- f) provide for the remuneration of the President.

Convention reference

7.2 Proposed s.61 establishes elements of the Convention model (in particular, the ‘term of office’ element). It gives effect, in whole or in part, to paragraphs: 17, 29, 43 and 46 of the Convention communique.

Description

- term of office

7.3 Proposed s.61 provides for a term of 5 years, and that a person may serve more than one term as President. Normally a President’s term of office would commence at the end of the term of office of an outgoing President. However, the outgoing President may continue in office after his or her term expires to cover any hiatus (eg where the procedure for choosing a new President had not been completed before that term expires or an incoming President dies before taking office and a new President must be chosen).

7.4 In circumstances where for some reason the term of office of the new President does not commence at the end of the term of the previous President (eg, the previous President died or resigned), the new President takes office on the day after making the oath or affirmation of office.

- resignation

7.5 Proposed s.61 provides for the President to resign in writing delivered to the Prime Minister.

- remuneration

7.6 Proposed s.61 provides for the Parliament to fix the President’s remuneration, subject to the limitation that it may not be altered during a President’s term of office.

Issues

- term of office

7.7 The Governor-General is appointed by the Queen on the advice of the Prime Minister. The appointment is at the Queen’s pleasure but, by convention, the

usual term is 5 years, and a Governor-General may accept an extension of the term. The Convention may have had this practice in mind in recommending that a President serve a term of 5 years. The Convention also considered that a President who had been removed from office but whose removal had not been approved by the House of Representatives should be eligible for re-appointment. It did not otherwise deal with the issue of re-appointment.

7.8 The Bill provides for 5-year terms and permits a person (including a President who was removed from office, whether or not the removal was approved by the House of Representatives) to serve more than one term as President.

- resignation

7.9 The Constitution contains resignation provisions for members of Parliament and judges. Corresponding provision is made for the office of President. It avoids any doubt about how or when the resignation of a President is effected.

- remuneration

7.10 Under s.3 of the Constitution the Governor-General's salary cannot be altered (although other payments can be). The policy justification for s.3 is to avoid any possibility of financial pressure being placed on Governors-General which could affect their impartiality. There is no reason to depart from the existing rule in the case of the remuneration of a President. However, if a person serves another term as President, proposed s.61 would not prevent an alteration being made to the remuneration for the subsequent term. Also, if a President continues in office after the end of his or her term (eg, because a new President has not yet been chosen) s.61 would not prevent an alteration being made to the President's remuneration during that additional period of service as President.

Proposed section 62 - Removal of President

Purpose

8.1 The purposes of proposed s.62 are to:

- a) empower the Prime Minister to remove the President; and
- b) require the Prime Minister to seek the approval of the House of Representatives within 30 days of removing the President unless an election is held.

Convention reference

8.2 Proposed s.62 establishes elements of the Convention model (in particular, the 'dismissal procedure' element). It gives effect, in whole or in part, to paragraphs 17 and 25 of the Convention communique.

Description

- Prime Minister may remove the President

8.3 Proposed s.62 empowers the Prime Minister to remove the President by signed instrument with immediate effect. (An acting President then takes office automatically - see proposed s.63.)

- House of Representatives may approve the removal

8.4 Proposed s.62 requires the Prime Minister to seek the approval of the House of Representatives for the removal of the President within 30 days unless an election is held. The President would not be reinstated if the Prime Minister failed to obtain approval.

Issues

- Prime Minister may remove the President

8.5 Under s.2 of the Constitution the Governor-General is appointed by the Queen, acting on the advice of the Prime Minister, and holds office during the Queen's pleasure. A Governor-General is thus subject to removal by the Queen, acting on the advice of the Prime Minister, at any time. The Constitution does not specify any grounds for removal of the Governor-General. No Governor-General has been removed.

8.6 The situation under proposed s.62 would be similar to the existing situation. Proposed s.62 provides that the Prime Minister may remove the President, by signed instrument. The instrument would be effective as soon as it is signed.

- House of Representatives may approve the removal

8.7 The present Constitution does not make any express provision concerning the role of Parliament if the Queen were to remove a Governor-General on the advice of the Prime Minister. However, the Convention recommended that:

- Parliament be given 30 days in which to approve the removal by a Prime Minister of the President; and
- if Parliament fails to give its approval, this would constitute a vote of no confidence in the Prime Minister.

8.8 The Bill requires the Prime Minister to seek the approval of the House of Representatives for the removal of the President within 30 days. This ensures an opportunity for parliamentary scrutiny of the Prime Minister's action. The only exceptions to the requirement to seek approval are where a general election for the House of Representatives follows the removal, either because the Prime Minister calls an election with the 30 day period or because the processes leading to an election are

already in train at the time of removal. The latter is considered highly unlikely to arise in practice, and any decision to remove a President during an election period would need to be made with regard to caretaker conventions.

- failure to approve

8.9 The Convention said a failure by the House of Representatives to ratify the Prime Minister's decision to remove the President would constitute a vote of no confidence in the Prime Minister. It is highly unusual to have a vote of no confidence in a single Minister, particularly the Prime Minister. One consequence of a vote of no confidence in the Prime Minister might be loss of government. However, the Constitution is silent on the issue.

8.10 Proposed s.62 would require the Prime Minister to seek the approval of the House of Representatives for the removal of a President, but the President would not be reinstated if the Prime Minister failed to obtain that approval. The question of the sanction to apply for failure to obtain such approval is left for resolution in accordance with parliamentary processes, which must in turn develop within the broader constitutional framework.

Proposed section 63 - Acting President and deputies

Purpose

9.1 The purposes of proposed s.63 are to:

- a) provide for an acting President to take office automatically on the occurrence of a vacancy in the office of President;
- b) provide for the Prime Minister to appoint an acting President if the President is incapacitated;
- c) authorise the President to appoint a deputy or deputies (and in so doing confirm that the President may exercise the executive power while absent from Australia); and
- d) specify that the provisions of the Constitution applicable to the President (except for ss. 60 and 61) apply to the acting President.

Convention reference

9.2 Proposed s.63 gives effect to paragraph 44 of the Convention communique.

Description

- acting President automatically takes office

9.3 Proposed s.63 provides for the longest serving State Governor available to act as President if the office of President becomes vacant, unless and until Parliament

makes provision otherwise. However, if a State Governor has been removed from office as acting President by the current Prime Minister, the State Governor is not entitled to act as President.

- Prime Minister may appoint acting President

9.4 Proposed s.63 would allow the Prime Minister to appoint an acting President only where the President is incapacitated, unless and until Parliament makes provision otherwise. Neither the incapacity nor the appointment of an acting President would give rise to a vacancy in the office of President.

- provisions applicable to acting President

9.5 Proposed s.63 applies to an acting President the provisions of the Constitution which apply to the President, except for proposed ss.60 and 61. Proposed s.60 deals with the selection of a President. Proposed s.61 deals with the term of office of a President (which is not relevant to an acting President) and remuneration of the President. Remuneration of an acting President is dealt with separately by proposed s.63.

- President may appoint deputies

9.6 Proposed s.63 empowers the President to appoint deputies, unless and until Parliament makes provision otherwise. In so doing, proposed s.63 confirms that the President may perform and exercise his or her functions and powers while absent from Australia.

- Parliament may fix allowances

9.7 Proposed s.63 gives the Parliament power to fix allowances for an acting President or deputy.

- oath or affirmation of office

9.8 An acting President or deputy must take the oath or affirmation taken by the President, which is to be set out in a new schedule (Schedule 1) to the Constitution.

Issues

- acting President automatically takes office

9.9 Present arrangements for dealing with the situation when the Governor-General is unavailable are governed by ss. 4 and 126 of the Constitution. Section 4 enables the Queen to appoint a person as administrator and s.126 enables the Queen to authorise the Governor-General to appoint deputies. When the Governor-General is absent from Australia, or if he or she were to die in office or become incapacitated or be removed from office, by convention the most senior State Governor is appointed as administrator. All State Governors have dormant commissions to act as administrator.

If the Governor-General is in Australia but is temporarily unavailable, the practice is for the Governor-General to appoint a deputy to exercise specified powers or functions (although deputies are rarely called on to exercise powers or perform functions).

9.10 Proposed s.63 would reproduce most of the existing arrangements, which have proved satisfactory, and ensure that a replacement head of state has experience of similar duties at the State level. If some States retain links with the monarchy, there would be no necessary technical barrier to their governors acting as President. However, Parliament may make other provision for acting Presidents. This would enable Parliament to make interim arrangements for the period following adoption of a republican system of government, when one or more States may not have adopted republican forms of government. Alternatively, it would enable Parliament to make provision for a person other than a State Governor to act as President.

9.11 Implicitly, the circumstances in which the office of President may in fact become vacant (and the provision has an ‘automatic’ operation) are the death, resignation or removal of the President. Where the President is temporarily incapacitated the Prime Minister could appoint an acting President. In some cases, it may become necessary to remove a President who is incapacitated. The alternative approach, treating incapacity as giving rise to a vacancy in the office of President, would necessitate devising a mechanism for determining when a President had become so incapacitated as to be incapable of performing the duties of office and determining when the President was capable of resuming them. Instead of entrenching a complex mechanism in the Constitution, a decision on the incapacity of a President has in effect been left to the Prime Minister.

9.12 It is desirable that, to the extent possible, any provision for an acting President be self-executing, so that a suitable person takes office automatically. Particularly in the case where a President has been removed from office, where the constitutional provisions open up the possibility that the Prime Minister may also be deprived of office by the acting President if the Prime Minister fails to secure approval by the House of Representatives of the removal of the President, it is clearly essential that provision be made to ensure an acting President is in place.

9.13 It is intended, consistently with current practice, that a State Governor would not be ‘available’ to act as President unless the Governor, and the relevant State Government, agree that the Governor is available. Conversely, an acting President who was declared to be no longer ‘available’ (for whatever reason) would cease to act, whereupon the next most senior Governor available would be installed. It is, therefore, unnecessary to provide expressly for the ‘resignation’ of an acting President.

9.14 Where absence from Australia or other foreseeable absence prevents the President from performing any functions, it is expected that the President would appoint (or would have appointed) a deputy or deputies.

- provisions applicable to acting President

9.15 This provision corresponds to s.4 of the Constitution in relation to the Governor-General. It is desirable to make clear that the provisions of the Constitution applicable to the President apply also to an acting President. However, those provisions which are clearly unsuitable to apply to the office of acting President are specifically identified.

- President may appoint deputies

9.16 This provision corresponds to s.126 of the Constitution in relation to the Governor-General. It is desirable to enable the President to have the same power to appoint deputies (on the advice of the government of the day) as the Governor-General does. As noted above, whereas at present an administrator is usually appointed when the Governor-General is absent from Australia, it is expected that a deputy or deputies would be appointed when a President is absent from Australia. Proposed s.63 would empower Parliament to make provision otherwise in relation to deputies.

- Parliament may fix allowances

9.17 Proposed s.63 would give the Parliament power to fix allowances payable to an acting President or deputy where appropriate. Where an acting President was a State Governor who would normally perform the full range of the President's powers and functions, it could be expected that Parliament would take those factors into account in deciding whether to fix any allowances and their amount. If arrangements were made for persons other than a State Governor to be able to serve as deputies, Parliament would need to consider what remuneration was appropriate. In the case of deputies, Parliament might fix different allowances for different deputies depending on the nature of the powers and functions conferred and whether or not a deputy was entitled to remuneration in respect of any other Commonwealth office.

- oath or affirmation of office

9.18 In view of the important function performed by an acting President or deputy of the President, it is appropriate that, whenever a person acts as President or a presidential deputy, the person take the same oath or affirmation of office that is taken by the President.

- aides-de-camp

9.19 Proposed s.63 would not prevent the President making arrangements, similar to those currently made by the Governor-General, to be represented by an honorary aide-de-camp on ceremonial occasions when the President is unavailable.

Proposed section 70A – Continuation of prerogative

10.1 Item 4 of Schedule 1 to the Bill would insert a new s.70A in the Constitution. Proposed s.70A would put beyond doubt that the executive prerogatives,

prerogative immunities and proprietary prerogatives deriving from the royal prerogative, and currently enjoyed by the Crown in right of the Commonwealth and its agents, continue to be enjoyed by the Commonwealth following the severing of links with the Crown. However, the President will not enjoy the personal prerogatives of the Queen.

10.2 Item 4 gives effect to paragraph 45 of the Convention communique.

Oaths and affirmations

11.1 Item 5 of Schedule 1 to the Bill repeals the existing Schedule to the Constitution setting out the oath and affirmation of allegiance for members of Parliament required by s.42 of the Constitution. It substitutes a replacement schedule setting out:

- (a) an oath or affirmation of allegiance for members of Parliament; and
- (b) an oath or affirmation of office for the President.

11.2 The Convention made no specific recommendation in relation to the consequential amendment of the members' oath or affirmation. However, the oath and affirmation both need to be altered so that a member of Parliament swears allegiance to Australia. The oath or affirmation in the Bill combines the elements of loyalty to Australia and its people, and a commitment to upholding Australia's laws, while retaining the simplicity and brevity of the existing oath or affirmation.

11.3 The President's oath or affirmation is discussed at paragraph 6.13 above.

The provisions of Schedule 2 to the Bill

Item 1 – Table of contents

12.1 Item 1 removes the current reference to ‘the Schedule’ in the table of contents which appears at the beginning of the Constitution. It replaces the reference with references to ‘Schedule 1 – Oaths and affirmations’ and ‘Schedule 2 – Transitional provisions for the establishment of the republic’ to reflect the amendments discussed above.

Item 2 – Section 1 of the Constitution

12.2 Section 1 of the Constitution vests the legislative power of the Commonwealth in the Commonwealth Parliament, consisting of the Queen, the Senate and the House of Representatives. Under a republican system of government, the President would become the head of state in whom the executive power of the Commonwealth would vest, and the Parliament would comprise the President, the Senate and the House of Representatives.

12.3 Item 2 therefore omits the reference to ‘Queen’ and substitutes ‘President’.

Item 3 – Sections 2, 3 and 4 of the Constitution

12.4 Section 2 provides for the appointment of the Governor-General by the Queen, the Governor-General’s exercise of power, and functions assigned to the Governor-General by the Queen. Under a republican system of government the office of Governor-General would cease to exist and s.2 would no longer be required. New provision vesting the executive power of the Commonwealth in the President and dealing with the appointment and powers of the President, and the removal from office of the President, would be placed in Chapter II of the Constitution.

12.5 Item 3 therefore repeals s.2.

12.6 Section 3 deals with the Governor-General’s salary. Section 3 would no longer be required under a republican system of government. Provision for the remuneration of the President would be made in s.61 of the Constitution.

12.7 Item 3 therefore repeals s.3.

12.8 Section 4 applies the provisions of the Constitution relating to the Governor-General to the Governor-General for the time being or to whomever the Queen appoints to administer the Commonwealth Government. With the abolition of the office of Governor-General, s.4 would no longer be required. New provision dealing with the acting President and presidential deputies would be made in s.63 of the Constitution.

12.9 Item 3 therefore repeals s.4.

Item 4 – Sections 5, 7 and 15 of the Constitution

12.10 Section 5 authorises the Governor-General to appoint the times for holding sessions of Parliament, to prorogue Parliament and to dissolve the House of Representatives.

12.11 Item 4 omits ‘Governor-General’ from s.5 and substitutes ‘President’.

12.12 Section 7 requires the names of senators chosen by each State to be certified by the State Governor to the Governor-General.

12.13 Item 4 omits ‘Governor-General’ from s.7 and substitutes ‘President’.

12.14 Section 15 requires the name of any senator appointed to fill a casual Senate vacancy to be certified by the State Governor to the Governor-General.

12.15 Item 4 omits ‘Governor-General’ from s.15 and substitutes ‘President’.

Items 5, 6 and 7 – Section 17 of the Constitution

12.16 Section 17 requires the Senate to choose a senator to be the President of the Senate. It also allows ‘the President’, meaning the President of the Senate, to resign his or her office or seat by writing addressed to the Governor-General.

12.17 Under a republican system, references in the Constitution to ‘the President’ would be references to the President of the Commonwealth of Australia. In order to avoid any confusion, existing references to ‘the President’, meaning the President of the Senate, would be altered to ‘President of the Senate’.

12.18 Items 5, 6 and 7 therefore change the references in s.17 from ‘President’ to ‘President of the Senate’, and the reference from ‘Governor-General’ to ‘President of the Commonwealth’.

Items 8, 9 and 10 – Sections 18 and 19 of the Constitution

12.19 Section 18 enables the Senate to choose a senator to perform the duties of the President of the Senate if the President of the Senate is absent.

12.20 Section 19 makes provision for a senator to resign by writing to the President of the Senate or, if there is no President of the Senate or the President of the Senate is absent, to the Governor-General.

12.21 Items 8, 9 and 10 amend ss.18 and 19 of the Constitution in order to change the references in the sections from ‘President’ to ‘President of the Senate’ and, in the case of s.19, from ‘Governor-General’ to ‘President of the Commonwealth’.

Item 11 – Section 21 of the Constitution

12.22 Section 21 makes provision for the Governor of a State to be notified by the President of the Senate of a vacancy in the Senate for a senator for the State. If there is no President of the Senate or he or she is absent, s.21 requires the Governor-General to notify the Governor.

12.23 Item 11 amends s.21 in order to change the references from ‘President’ to ‘President of the Senate’ and the reference from ‘Governor-General’ to ‘President of the Commonwealth’.

Item 12 – Section 23 of the Constitution

12.24 Section 23 of the Constitution provides that questions arising in the Senate are to be decided by a majority of votes and each senator, including the President, has a vote.

12.25 Item 12 amends s.23 to insert ‘of the Senate’ after ‘President’. This amendment makes clear that the reference in s.23 to the ‘President’ is a reference to the ‘President of the Senate’ (and not a reference to the President of the Commonwealth of Australia).

Item 13 – Section 28 of the Constitution

12.26 Section 28 provides for a maximum term of 3 years for the House of Representatives and gives the Governor-General power to dissolve the House early.

12.27 Item 13 omits ‘Governor-General’ from s.28 and substitutes ‘President’.

Item 14 – Sections 32 and 33 of the Constitution

12.28 Section 32 gives the Governor-General in Council power to issue writs for general elections of members of the House of Representatives.

12.29 Item 14 omits ‘Governor-General in Council’ from s.32 and substitutes ‘President in Council’.

12.30 Section 33 gives the Governor-General in Council power to issue a writ for the election of a new member of the House of Representatives if there is no Speaker or the Speaker is absent from the Commonwealth.

12.31 Item 14 omits ‘Governor-General in Council’ from s.33 and substitutes ‘President in Council’.

Item 15 – Subsection 34(ii) of the Constitution

12.32 Section 34 sets out the qualifications required for a person to be a member of the House of Representatives, until the Parliament otherwise provides. (Section 16

provides that the qualifications for a senator are the same as those for a member of the House.) Subsection 34(ii) states that a member of the House of Representatives:

- ‘(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’.

12.33 The qualifications set out in s.34 apply only until and unless Parliament provides otherwise, and Parliament has done so. Under the *Commonwealth Electoral Act 1918* a member of either House must be an Australian citizen. However, if Parliament were to repeal the requirements set out in ordinary legislation, the qualifications in s.34 would probably revive. In view of this possibility, it would be undesirable to retain in the Constitution a qualification that a person must be a subject of the Queen.

12.34 Item 15 therefore omits subsection (ii) and substitutes a requirement that a member of the House of Representatives must be an Australian citizen. As s.16 of the Constitution imposes on senators the same qualifications as those of members of the House of Representatives, item 15 would have the effect of also requiring senators to be Australian citizens.

Item 16 – Sections 35, 37 and 42 of the Constitution

12.35 Section 35 allows the Speaker to resign his or her office or seat by writing addressed to the Governor-General.

12.36 Section 37 enables a member of the House of Representatives to resign his or her place by writing addressed to the Governor-General.

12.37 Sections 42 requires senators and members of the House of Representatives, before taking their seats, to make before the Governor-General an oath or affirmation of allegiance in the form set out in the Schedule to the Constitution.

12.38 Item 16 omits ‘Governor-General’ from ss.35, 37 and 42 and substitutes ‘President’.

Item 17 – Section 42 of the Constitution

12.39 Item 17 would further amend s.42 to replace the existing reference to ‘the schedule’ with a reference to ‘Schedule 1’ to reflect the fact that the amended Constitution would contain 2 schedules.

Item 18 – Subsection 44(iv) of the Constitution

12.40 Section 44 provides that any person who comes within subsection (i), (ii), (iii), (iv) or (v) of the section is incapable of being chosen or of sitting as a senator or a member of the House of Representatives. Subsection (iv) thus disqualifies a person from being a member of either House if the person:

‘(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’.

12.41 The ‘Crown’ referred to in subsection (iv) includes the Crown in right of the Commonwealth and the Crown in right of a State or Territory.

12.42 The proviso to s.44 states that 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 a person receiving pay, half-pay or a pension as an officer or member of the Queen’s navy or army, or to a person receiving pay as an officer or member of the naval or military forces of the Commonwealth if the person’s services are not wholly employed by the Commonwealth.

12.43 Item 18 repeals subsection 44(iv) and substitutes a new subsection. New subsection (iv) refers to holding any office of profit under the Executive Government of the Commonwealth or a State or Territory, or any pension payable, during the pleasure of the Executive Government of the Commonwealth, out of any revenues of the Commonwealth. New subsection (iv) thus substitutes the concept of ‘the Executive Government’ of the Commonwealth, or a State or Territory, for the concept of ‘the Crown’ and makes it clear that only pensions payable from Commonwealth revenues at the pleasure of the Executive Government come within the ambit of the subsection.

Item 19 – Section 44 of the Constitution

12.44 Item 19 omits from s.44 the first two occurrences of ‘Queen’s’, which are found in the proviso to s.44 which is described in paragraph 12.42 above. Section 44 currently describes Commonwealth and State Ministers as ‘the Queen’s’ Ministers.

12.45 The meaning of s.44 is not altered by the omissions. The proviso will remain applicable to Commonwealth and State Ministers.

Item 20 – Section 44 of the Constitution

12.46 Item 20 makes a further omission from the proviso to s.44. The proviso sets out exceptions to the rules disqualifying a person from being entitled to be chosen as, or to hold office as, a senator or member of the House of Representatives. One of the exceptions is a person receiving pay, half-pay, or a pension as an officer or member of the Queen’s (ie the British) navy or army.

12.47 The proviso is only necessary to exempt such persons because the reference in subsection 44(iv) to holding an office of profit under ‘the Crown’ was originally intended to cover such persons. The change to that subsection made by item 20 would make it clear that such persons are no longer within the ambit of the provision.

Item 21 – Sections 56 and 57 of the Constitution

12.48 Section 56 prohibits the passing of a vote, resolution or proposed law appropriating money unless the appropriation has been recommended by a message from the Governor-General to the House in which the proposal originated.

12.49 Section 57 sets out the procedure for dealing with disagreements between the Houses on proposed laws. It gives the Governor-General power to dissolve the Houses in circumstances which demonstrate an ongoing disagreement and to convene joint sittings. It requires proposed laws passed at a joint sitting to ‘be presented to the Governor-General for the Queen’s assent’.

12.50 Item 21 omits ‘Governor-General’ from ss.56 and 57 and substitutes ‘President’.

Item 22 – Section 57 of the Constitution

12.51 Item 22 omits the reference in s.57 to ‘for the Queen’s assent’ and substitutes a reference to ‘for assent’. This, together with item 21, has the effect that proposed laws passed at a joint sitting would be presented to the President for the President’s assent.

Item 23 – Section 58 of the Constitution

12.52 Section 58 provides that when a proposed law passed by both Houses is presented to the Governor-General for the Queen’s assent, he must assent in the Queen’s name, or withhold assent, or reserve the law for the Queen’s pleasure. It also allows the Governor-General to return a proposed law to the relevant House with recommended amendments.

12.53 Item 23 repeals s.58 and substitutes a new section providing that when a proposed law passed by both Houses is presented to the President for assent, the President must declare that he or she assents to the law, or withholds assent. Therefore item 23 removes the reference to withholding a law for the Queen’s assent. The President may also return a proposed law to the House in which it originated and may recommend amendments to a proposed law.

12.54 The Governor-General’s power to reserve a law for the Queen’s assent is obsolete under Australia’s present system of government and would have no place under a republican system. Item 23 therefore removes this power from s.58. Otherwise the President’s powers under the new s.58 are the same as the Governor-General’s powers under existing s.58.

Item 24 – Section 64 of the Constitution

12.55 Section 64 empowers the Governor-General to appoint officers to administer departments of State established by the Governor-General in Council. It says that such officers hold office during the pleasure of the Governor-General, they shall be members of the Federal Executive Council and they shall be the Queen's Ministers of State for the Commonwealth. Section 64 also provides that after the first general election no Minister of State shall hold office for more than 3 months unless he or she is or becomes a senator or member of the House of Representatives.

12.56 Item 24 repeals s.64 and substitutes a new section to exactly the same effect as the existing s.64, except that references to the 'Governor-General' and 'Governor-General in Council' are replaced by references to the 'President' and 'President in Council' and the reference to 'the first general election' is omitted. The reference to the 'Queen's Ministers of State for the Commonwealth' is replaced by a reference to 'Ministers of State for the Commonwealth'. (Item 19 makes a similar change to s.44.)

Item 25 – Section 65 of the Constitution

12.57 Section 65 empowers Parliament to determine the number of Ministers of State and empowers the Governor-General, in the absence of provision by Parliament, to direct which office Ministers hold.

12.58 Item 25 amends s.65 by omitting 'Governor-General' and substituting 'President'.

Item 26 – Section 66 of the Constitution

12.59 Section 66 requires an annual sum to be paid to the Queen out of Consolidated Revenue for Ministers' salaries. The sum is set at £12,000 until Parliament otherwise provides. Parliament has made other provision in the *Ministers of State Act 1952* and in the *Remuneration Tribunal Act 1973*.

12.60 Item 26 repeals s.66 and replaces it by a provision that permits Parliament to fix an annual sum payable to Ministers out of the Consolidated Revenue Fund.

Item 27 – Section 67 of the Constitution

12.61 Section 67 empowers the Governor-General in Council, until the Parliament otherwise provides, to appoint all officers of the Executive Government of the Commonwealth (except Ministers, who are dealt with in s. 64).

12.62 Item 27 omits references to 'Governor-General in Council' from s.67 and substitutes references to 'President in Council'.

Item 28 – Section 68 of the Constitution

12.63 Section 68 vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen's representative.

12.64 Item 28 amends s.68 by omitting 'Governor-General as the Queen's representative' and substituting 'President'.

Item 29 – Section 69 of the Constitution

12.65 Section 69 compulsorily transferred the departments of customs and excise in each State to the Commonwealth on its establishment in 1901 and provided that on a date or dates proclaimed by the Governor-General certain other State departments were transferred to the Commonwealth.

12.66 The effect of s.69 is now spent and item 29 deletes the reference to the Governor-General.

Items 30 and 31 – Section 70 of the Constitution

12.67 Section 70 vests in the Governor-General and Governor-General in Council certain powers and functions which were vested in Governors of the six colonies at the Commonwealth's establishment.

12.68 Items 30 and 31 amend s.70 by adding that the powers and functions that remain vested under that section in the Governor-General, or the Governor-General in Council, immediately before the office of Governor-General ceased to exist, thereafter vest in the President, or the President in Council, as the case may be.

Item 32 – Section 72 of the Constitution

12.69 Section 72 provides that judges of the High Court and other federal courts are appointed by the Governor-General in Council and may resign by writing addressed to the Governor-General.

12.70 Item 32 omits 'Governor-General' from s.72 and substitutes 'President'. This has the effect that references to references in s.72 to 'Governor-General in Council' are replaced by references to 'President in Council'.

Item 33 – Section 73 of the Constitution

12.71 Section 73 describes the appellate jurisdiction of the High Court. The last paragraph provides that, until the Parliament otherwise provides, 'the conditions 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 Queen in Council means the Privy Council. No appeals are possible from any State Supreme Court to the Privy Council. Therefore the conditions of and restrictions on appeals to the Privy Council from State Supreme Courts do not govern appeals from those Courts

to the High Court. The conditions of and restrictions on appeals from State Supreme Courts to the High Court are determined by the Commonwealth Parliament.

12.72 Item 33 therefore repeals the last sentence of s.73 and restates the existing situation, that the conditions of and restrictions on appeals from State Supreme Courts to the High Court are as Parliament provides from time to time.

Item 34 – Section 74 of the Constitution

12.73 Section 74 regulates appeals to the Privy Council and provides that laws limiting the matters in which special leave to appeal to the Privy Council could be sought are to be reserved by the Governor-General for the Queen's pleasure.

12.74 Section 74 is wholly expended. No appeals now lie from any Australian court to the Privy Council. Item 34 therefore repeals s.74.

Item 35 – Section 83 of the Constitution

12.75 Section 83 prohibits the drawing of money from the Treasury 'except under appropriation made by law'. The second sentence of s.83 made special provision for the situation following the creation of the Commonwealth. It allowed the Governor-General in Council to draw money from Treasury until one month after the first meeting of the Parliament.

12.76 The second sentence, which refers to the Governor-General, has had no operation since 1901. Item 35 therefore repeals it.

Item 36 – Subsection 85(i) of the Constitution

12.77 Section 85 empowers the Governor-General in Council to make certain declarations in connection with the transfer of State property to the Commonwealth as a consequence of the transfer of a State public service department to the Commonwealth in the early years of federation. Subsection 85(i) provides that, when a department of the public service of a State is transferred to the Commonwealth, all State property used exclusively in connection with the department vests in the Commonwealth. However, it contains a qualification that, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council declares to be necessary.

12.78 The qualification to subsection 85(i) is now spent. The effect of item 36 is to repeal the qualification.

Item 37 – Section 103 of the Constitution

12.79 Section 103 deals with the appointment and conditions of service of members of the Inter-State Commission. It provides for them to be appointed and removed by the Governor-General in Council.

12.80 The Commission does not exist at present, but it could be re-established. Item 37 therefore omits references to ‘Governor-General in Council’ and substitutes reference to ‘President in Council’.

Item 38 – Section 117 of the Constitution

12.81 Section 117 precludes a subject of the Queen, resident in a State, from subjection in another State to any disability or discrimination not equally applicable to the person if he or she were a subject of the Queen resident in that other State.

12.82 Item 38 omits ‘A subject of the Queen’ from s.117 and substitutes ‘An Australian citizen’.

Item 39 – Section 117 of the Constitution

12.83 Item 39 omits ‘a subject of the Queen’ from s.117 and substitutes ‘an Australian citizen’.

Item 40 – Section 122 of the Constitution

12.84 Section 122 gives the Parliament power to 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’.

12.85 Item 40 simply omits ‘by the Queen’ from s.122.

Item 41 – Section 126 of the Constitution

12.86 Section 126 allows the Queen to authorise the Governor-General to appoint a deputy or deputies and makes provision for their exercise of the Governor-General’s powers and functions.

12.87 Item 41 repeals s.126. The Bill makes provision for an acting President and presidential deputies in proposed s.63 of the Constitution.

12.88 Item 41 uses the spare section available to enact in the Constitution a provision stating that the Constitution of the Commonwealth of Australia, and all laws made under it by the Commonwealth Parliament, are binding on the courts, judges and peoples of every State and of every part of the Commonwealth. New s.126 is in essentially the same terms as covering clause 5 of the Constitution Act (UK).

12.89 Item 41 enacts a new s.127 in the Constitution. (The original s.127 was repealed in 1967.) New s.127 contains several important constitutional definitions, some of which are contained in the covering clauses to the Constitution.

12.90 The definitions are as follows:

‘Australian citizen’ is defined to mean a person who is an Australian citizen according to the laws made by the Commonwealth Parliament.

‘The Commonwealth’ is defined as the Commonwealth of Australia under the Constitution. The definition of ‘The Commonwealth’ in covering clause 6 is ‘the Commonwealth of Australia as established under this Act’, meaning the Commonwealth of Australia as established under the Constitution Act (UK).

‘The original States’ means New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia. (This is the order in which ‘the States’ is defined in covering clause 6.)

‘The President in Council’ means the President acting with the advice of the Federal Executive Council. This definition is currently set out in s.63 of the Constitution.

‘The States’ means the original States, and territories admitted into or established by the Commonwealth as States. This is the effect of the definition of ‘the States’ in clause 6 of the covering clauses.

Item 42 – Section 128 of the Constitution

12.91 Section 128 specifies the procedure whereby the Constitution may be altered. The process includes the submission by the Governor-General of a proposed alteration to the electors at a referendum and the presentation of a proposed alteration which has been approved at the referendum to the Governor-General for the Queen’s assent.

12.92 Item 42 omits references to the ‘Governor-General’ in s.128 and substitutes references to ‘President’.

Item 43 – Section 128 of the Constitution

12.93 Item 43 omits ‘the Queen’s’ from s.128. The assent required under s.128 as amended is the President’s assent, not the Queen’s assent.

The provisions of Schedule 3 to the Bill

Transitional provisions for the establishment of the republic

13.1 Schedule 3 to the Bill contains one item. The item would add a schedule - Schedule 2 - at the end of the Constitution setting out transitional provisions necessary or desirable for the establishment of the republic. The proposed clauses of Schedule 2 to the Constitution are discussed below.

Proposed clause 1 – The Governor-General

13.2 Clause 1 provides that the office of the Governor-General would cease to exist when the provisions establishing the republic commence (ie, 3.00 pm in Canberra on 1 January 2001). Clause 1 makes it clear that the office of Governor-General does not continue under clause 4 ('Savings' - see below) beyond the time of the establishment of the republic.

Proposed clause 2 – The first President

13.3 Clause 2 would allow the process of choosing the first President, in accordance with the new constitutional provisions (and the Presidential Nominations Committee Bill 1999), to be completed after the Bill is approved at referendum but before the commencement of a republic on 1 January 2001. The first President could then take office on the day on which the office formally comes into existence (ie, 1 January 2001).

13.4 This approach could involve the passage of the Presidential Nominations Committee Bill 1999 in 2000 (as to which, see below), and completion of the nomination and selection processes before the end of that year.

13.5 Clause 2 would also provide for the acting arrangements under the new constitutional provisions to apply in the event that no person is chosen as the first President before 1 January 2001.

Proposed clause 3 – Parliament may make laws during transitional period

13.6 In order to choose the first President as permitted under clause 2, it would be open to enact the Presidential Nominations Committee Bill 1999 prior to the commencement of the provisions establishing the office of President. It may also be convenient to enact legislation providing for the President's salary and terms and conditions of office, determining the President's liability in relation to taxation, and making arrangements for an office equivalent to that of the Official Secretary to the Governor-General (established under the *Governor-General Act 1974*), so that the office of President may function from the moment of its commencement.

13.7 In order to remove any doubt as to whether the Commonwealth Parliament has constitutional power to enact legislation under the new constitutional provisions prior to their commencement, clause 3 would authorise such legislation. Clause 3 would in effect authorise the enactment and operation of any legislation that may be required under the new constitutional arrangements. Clause 3 would not, however, alter the fact that the amendments of the Constitution proper would not commence until 1 January 2001; and therefore would not authorise legislative arrangements effective to *establish* a republic until that date.

Proposed clause 4 – Savings

13.8 In order to put beyond doubt that conversion to a republic would not affect the continuity of the legislative, executive or judicial arms of the Commonwealth government, or the validity of any exercise of legislative, executive or judicial power, clause 4 provides that these are not affected by the alterations of the Constitution made by the Bill.

13.9 In particular:

- (a) subparagraph (i) of clause 4 covers the exercise of federal legislative or executive power;
- (b) subparagraph (ii) covers the institution of the Commonwealth Parliament and its proceedings;
- (c) subparagraph (iii) covers current membership of the Parliament (including the qualifications of members following consequential amendments of ss.34 and 44 of the Constitution);
- (d) subparagraph (iv) covers the institution of the Executive Government of the Commonwealth (including the Federal Executive Council); and
- (e) subparagraph (v) covers federal, State and Territory courts and their jurisdiction and proceedings.

13.10 The second paragraph of clause 4 is intended to ensure that things done by the Governor-General under a constitutional provision (but not under an ordinary statutory provision) have effect as if they had been done by the President. The provision would, for example, ‘translate’ any action of the Governor-General under s.56 of the Constitution that was not complete at the time of the establishment of the republic.

Proposed clause 5 – The States

13.11 The Convention resolved:

That any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of state should continue to be determined by each State.

While it is desirable that the advent of the republican government occur simultaneously in the Commonwealth and all the States, not all States may wish, or be able, to move to a republic within the time-frame established by the [Commonwealth] ... the Commonwealth Government and Parliament should accordingly consider whether specific provision needs to be made to enable States to retain their current constitutional arrangements.

13.12 Amendments of State constitutions would be necessary to sever State links with the Crown. The States would be left to make these amendments. In the event that the Australian people support change to a republic at the referendum, the Commonwealth would strongly support simultaneous change at Commonwealth and State levels.

13.13 However, as the States would be left to sever their own Crown links, the Constitution must cover the possibility that those links will remain in one or more States beyond the point at which any republic is established at the Commonwealth level. Clause 5 would put the status of these links beyond doubt, and rule out any argument that the Commonwealth constitutional amendments are intended to affect the links at State level, by stating that a State that has not altered its laws to sever its links with the Crown by 1 January 2001 retains its links with the Crown until it so alters its laws. Proposed clause 9 (see below) would make it clear that the monarch of the State would be the person who is the monarch of the UK.

Proposed clause 6 – Unified federal system

13.14 Clause 6 puts beyond doubt that the alterations of the Constitution made by the Constitution Alteration (Establishment of Republic) 1999 do not affect the continuity of the federal system, including the unified system of law, under the Constitution.

13.15 Australia's unified legal system derives from the Constitution, which provides in s.73 that the High Court is Australia's ultimate court of appeal (and, since the enactment of the Australia Acts, *the* ultimate court of appeal) for federal, State and Territory courts on all matters. The Constitution, binding on the Commonwealth and all the States under the Constitution (see ss.106 and 109 and proposed s.126), maintains this unified system.

Proposed clause 7 – Amendment of Australia Acts

13.16 Subsection 7(1) of the Australia Acts (Commonwealth and UK) provides that 'Her Majesty's representative in each State shall be the Governor'. It would be desirable, in the event of change to a republic, to amend s.7 in each Act to avoid any argument that they entrench Crown links at the State level which are inconsistent with republican arrangements.

13.17 The Australia Acts can be amended by a law of the Commonwealth passed at the request or with the concurrence of all the States. They can also be amended by the Commonwealth Parliament if it is given power to do so by amendment of the Commonwealth Constitution.

13.18 Clause 7 would give such a power to the Commonwealth Parliament.

13.19 The grant of power is framed very narrowly. Where requested by a State to do so, the Parliament may make a law that provides that the provisions in question do not apply to that State.

Proposed clause 8 – Constitutional conventions

13.20 Clause 8 would put beyond doubt that the potential for evolution of the constitutional conventions applying to the exercise of the reserve powers by the President is not affected by conversion to a republic.

Proposed clause 9 – Interpretation

13.21 Clause 9 adopts the terms of covering clause 2 of the Constitution Act (UK). It would put beyond doubt that references in proposed clause 5 to ‘the Crown’ extend to the Queen’s heirs and successors in the sovereignty of the United Kingdom.

ATTACHMENT

CONSTITUTIONAL CONVENTION 1998

COMMUNIQUE

1. The Convention met at Canberra from Monday 2 February 1998 until Friday 6 February 1998 and from Monday 9 February 1998 until Friday 13 February 1998.
2. The Convention considered three questions:
 - whether or not Australia should become a republic;
 - which republic model should be put to the voters to consider against the current system of government; and
 - in what timeframe and under what circumstances might any change be considered.
3. The Rt Hon Ian Sinclair MP presided as Chairman, with the Hon Barry Jones AO MP as Deputy Chairman.
4. The Convention was constituted by 152 delegates. Seventy-six delegates were elected under the *Constitutional Convention (Election) Act 1997*. The other seventy-six were appointed by the Commonwealth Government and included forty representatives of the Commonwealth, State and Territory Parliaments.
5. Debate on the Convention floor was positive, with wide participation by delegates. While the debate was robust, a strong spirit of civility and compromise was demonstrated.
6. Three categories of model for a possible Australian republic were before the Convention. They were: direct election, parliamentary election by a special majority and appointment by a special council following Prime Ministerial nomination. While there was significant support for models in each of these categories, following an exhaustive balloting process the Bipartisan Appointment of the President set out below was endorsed by a majority of delegates who voted for or against the motion.
7. The Convention also agreed to a range of resolutions relating to the Preamble and to miscellaneous transitional and consequential issues relating to a change to a republic.
8. The following specific matters were resolved by the Convention:

Whether Australia should become a republic

9. That this Convention supports, in principle, Australia becoming a republic.
10. That this Convention supports the adoption of a republican system of government on the “Bipartisan Appointment of the President Model” as set out below in preference to there being no change to the Constitution.
11. That this Convention recommends to the Prime Minister and Parliament that the Bipartisan Appointment of the President Model, and other related changes to the Constitution, supported by this Convention, be put to the people in a constitutional referendum.

Timing and circumstances of any change

12. That a referendum for change to a republic or for the maintenance of the status quo be held in 1999. If the referendum is in favour of a republic, that the new republic come into effect by 1 January 2001.
13. That prior to the referendum being put to the people, the Government undertake a public education programme directed to the constitutional and other issues relevant to the referendum.

Implications for the States

14. That the Commonwealth Government and Parliament extend an invitation to State Governments and Parliaments to consider:

The implications for their respective Constitutions of any proposal that Australia become a republic; and

The consequences to the Federation if one or more States should decline to accept republican status.

15. That any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of state should continue to be determined by each State.
16. While it is desirable that the advent of the republican government occur simultaneously in the Commonwealth and all States, not all States may wish, or be able, to move to a republic within the timeframe established by the Commonwealth. That the Government and Parliament should accordingly consider whether specific provision needs to be made to enable States to retain their current constitutional arrangements.

The Bipartisan Appointment of the President Model.

17. In the event that Australia becomes a republic, the model adopted be the Bipartisan Appointment of the President Model.

Nomination Procedure

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

State and Territory Parliaments;
local government;
community organisations, and
individual members of the public

all of whom should be invited to provide nominations.

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

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

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

22. This process for community consultation and evaluation of nominations is likely to evolve with experience and is best dealt with by ordinary legislation or parliamentary resolution; and

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

Appointment or Election Procedure

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

Dismissal Procedure

25. The President may be removed at any time by a notice in writing signed by the Prime Minister. The President is removed immediately the Prime Minister's written notice is issued. The Prime Minister's action must be presented to a meeting of the House of Representatives for the purpose of its ratification within 30 days of the date of removal of the President. In the event the House of Representatives does not ratify the Prime Minister's action, the President would not be restored to office, but would be eligible for re-appointment. The vote of the House would constitute a vote of no confidence in the Prime Minister.

Definition of Powers

26. The powers of the President shall be the same as those currently exercised by the Governor-General.
27. To that end, the Convention recommends that the Parliament consider:

the non-reserve powers (those exercised in accordance with ministerial advice) being spelled out so far as practicable; and

a statement that the reserve powers and the conventions relating to their exercise continue to exist.

Qualifications for Office

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

Term of Office

29. Five years.

A Preamble

30. The Convention also resolved that the Constitution include a Preamble, noting that the existing Preamble before the Covering Clauses of the Imperial Act which enacted the Australian Constitution (and which is not itself part of our Constitution) would remain intact.

31. Any provisions of the Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed.

32. The Preamble to the Constitution should contain the following elements:

Introductory language in the form "We the people of Australia";

Reference to “Almighty God”;

Reference to the origins of the Constitution, and acknowledgment that the Commonwealth has evolved into an independent, democratic and sovereign nation under the Crown;

Recognition of our federal system of representative democracy and responsible government;

Affirmation of the rule of law;

Acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders;

Recognition of Australia’s cultural diversity;

Affirmation of respect for our unique land and the environment;

Reference to the people of Australia having agreed to re-constitute our system of government as a republic; and

Concluding language to the effect that “[We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution”.

33. The following matters be considered for inclusion in the Preamble:

Affirmation of the equality of all people before the law;

Recognition of gender equality; and

Recognition that Aboriginal people and Torres Strait islanders have continuing rights by virtue of their status as Australia’s indigenous peoples.

34. Care should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution.

35. Chapter 3 of the Constitution should state that the Preamble not be used to interpret the other provisions of the Constitution.

Other issues

36. As to other issues, the Convention resolved that, in the event Australia becomes a republic:

37. the name “Commonwealth of Australia” be retained
38. Australia remain a member of the Commonwealth of Nations in accordance with the rules of the Commonwealth.
39. the title of the head of state should be “President”.
40. the head of state should swear or affirm an oath of allegiance and an oath of office,

The oath or allegiance might appropriately be modelled on that provided by the *Australian Citizenship Act 1948* as follows:

[Under God] I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey.

The oath [or affirmation] of office might appropriately be modelled on the following words:

I swear, humbly relying on the blessing of Almighty God, [or, I do solemnly and sincerely affirm and declare] that I will give my undivided loyalty to and will well and truly serve the Commonwealth of Australia and all its people according to law in the office of the President of the Commonwealth of Australia, and I will do right to all manner of people after the laws and usages of the Commonwealth of Australia without fear or favour, affection or ill will

or

I swear [or affirm] that I will be loyal to and serve Australia and all its people according to law without fear or favour.

41. The Commonwealth Government and Commonwealth Parliament give consideration to the transitional and consequential matters which will need to be addressed, by way of constitutional amendment or other legislative or executive action, including:
 42. The date of commencement of the new provisions;
 43. The commencement in office of the head of state upon oath or affirmation;
 44. Provision for an acting head of state in certain circumstances;

45. Provision for continuation of prerogative powers, privileges and immunities until otherwise provided;
46. Provision for salary and pension;
47. Provision for voluntary resignation;
48. Provision for the continued use, if and where appropriate, of the term Royal, Crown or other related terms, and use of the royal insignia, by the Defence Forces or any other government body;
49. Provision for the continued use of the term Royal, Crown or other related term, and use of royal insignia, by non-government organisations;
50. Provision for notes and coins bearing The Queen's image to be progressively withdrawn from circulation; and
51. Provision to ensure that any change to the term Crown land, Crown lease or other related term does not affect existing rights and entitlements to land;
52. Spent or transitory provisions of the Constitution should be removed.
53. The head of state should be an Australian citizen;
54. The head of state should be eligible to vote in an election for the Senate or House of Representatives at the time of nomination;
55. The head of state should not be a member of any political party;
56. The head of state should be subject to the same disqualifications as set out in section 44 of the Constitution in relation to members of Parliament; and
57. Any future amendments to section 44 of the Constitution should also apply to the head of state.

Ongoing constitutional review process

58. The Convention also resolved that, if a republican system of government should be introduced by referendum, at a date being not less than three years or more than five years thereafter the Commonwealth Government should convene a further Constitutional Convention.
59. Two-thirds of such Convention should be directly elected by the people.
60. The agenda of such Convention would be to :

61. Review the operation and effectiveness of any republican system of government introduced by a constitutional referendum;
62. Address any other matter related to the operation of our system of government under republican arrangements, including: the role of the three tiers of government; the rights and responsibilities of citizenship; whether the Commonwealth should have an environment power; the system of governance and proportional representation; whether the mechanism for constitutional change should be altered; constitutional aspects of indigenous reconciliation; equal representation of women and men in parliament; and ways to better involve people in the political process.
63. The Convention be preceded by an extensive and properly resourced community consultation process, to commence within twelve months of the passage of a referendum to establish a republic, in which ideas and responses on the above matters would be actively sought by the Government and Parliament.

Australian Flag and Coat of Arms

64. In addition to the matters on which resolutions were adopted, the Australian Flag and Coat of Arms were also raised in debate before the Convention. While it was beyond the terms of reference for this Convention to make formal resolutions on the issue, the Chairman undertook to draw the discussion to the attention of the Government.
65. A number of delegates sought entrenchment of the design of the Australian Flag and Coat of Arms in the Constitution so that they could not be changed without the necessary majority at a referendum. Other delegates did not support incorporation in the Constitution but agreed that the Flag should not be altered without a vote of all electors.
66. Full details of the proceedings and details of the voting on final resolutions will be presented to the Commonwealth Parliament and published in a report of the Convention.

Signed on behalf of delegates, this thirteenth day of February 1998

Ian Sinclair
Chairman

Barry Jones
Deputy Chairman