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Joint Select Committee on the Republic Referendum,
Parliament of Australia
Canberra
(by email)

Supplementary Submission on the Constitution Alteration (Establishment of Republic) Bill

Honourable Members and Senators,

As I promised (threatened?) at the end of my evidence last week, here is a supplementary submission. I have somewhat modified my thoughts on one of the issues already mentioned (dismissal of the President), and also wish to briefly mention a few other issues.

Dismissal of the President

Since I gave evidence, I have thought more about this issue, particularly in light of Mr Scott's and Senator Stott Despoja's questions and comments (isn't the dialectic process great?), and have come to a conclusion that is even further removed from the ConCon's recommendation than my original submission was.

The arguments in favour of the Prime Minister's right to instantly dismiss the President seem to be as follows:
1. The ConCon recommended it, therefore it must be implemented;
2. What if the President goes mad?
3. It only reproduces the existing state of affairs.

I will deal with them in turn.

The ConCon Recommended It

As I have already remarked in writing and in my evidence, the ConCon's recommendations are not Holy Writ. This one in particular, as I remember (though I have not ploughed through the Hansards to confirm it) was added so as to make the Prime Minister, and other monarchists and supporters of the McGarvie model, less ***un***comfortable with the bipartisan model. As I intimated in my evidence, I do not think that we ought to be unduly influenced by the views of those who have held office as Prime Minister – such people *do* tend to develop the view that the Prime Minister ought to have as much power as possible! [We should certainly not be unduly influenced by the views of a Prime Minister who does not want a republic anyway.] We ordinary mortals (including members of Parliament other than Prime Ministers) ought to be concerned:

- that too much power is not concentrated in one person, and
- that we have a republican Constitution that will work sensibly.

If the ConCon has recommended something that makes little sense, then Parliament ought not include it in the Alteration Bill.

What if the President Goes Mad?

In the first place, how likely is this? No other republic seems to think it is such a pressing problem that a process for instant dismissal is necessary. The real reason for the power of instant dismissal is clearly a desire to give the Prime Minister a way of forestalling his/her own dismissal. Unfortunately it leads to the absurdity of the possibility of the President and Prime Minister stalking each other ready to play "Dismissal-Notice Quick Draw". Now if the President's role is to mean anything at all, s/he really must have power to dismiss the Prime Minister. Unless we want to codify the reserve powers totally, *some* discretionary element has to be left in the power, and we will just have to put up with the possibility that the President may occasionally use it too precipitately or perhaps even in a fit of pique. If the President does exercise the power of dismissal or dissolution too hastily, in the end the will of the people expressed through the ballot box will settle any question of who is to be the government. [I say this as someone who thinks that J R Kerr was quite wrong in dismissing Prime Minister Whitlam – the dismissal may have been wrong (*and* unfair, in that no Liberal Prime Minister had ever been forced to the polls at a time not of his choosing by the actions of a Governor-General), but within a month the people had the opportunity to choose who they wanted to govern the country for the next three years - and life went on, though some of us maintained a degree of rage for a while.]

And perhaps more tellingly, even if some defence against madness or fits of pique is required, to put the power of dismissal in the hands of one other person is hardly the answer - what if the Prime Minister is the one who has the fit of pique or goes mad? This theme is picked up below.

Does It Only Reproduce the Existing State of Affairs?

First, What is the Existing State of Affairs?

It has been suggested by apologists for the ConCon model that at present the Prime Minister can dismiss the Governor-General instantly, or virtually instantly. Of course, they concede, there would be some delay while a message asking for dismissal went to the Queen and a response came back from her Majesty, but as Michael Lavarch insisted to me once "How long would that be? About half an hour!" The point is, even half an hour would be enough. Even *if* there is now a convention that the Governor-General should warn the Prime Minister before dismissing him/her (which in my opinion is a dubious proposition), if the PM made an immediate phone call or fax to the Queen on receipt of a warning, the Governor-General could then quite justifiably dismiss the Prime Minister. I do not believe there is any doctrine, as was apparently suggested to you by Mr Fraser, that a Governor-General under notice of dismissal is in some way a 'lame duck' or caretaker Governor-General - until the moment when he is dismissed by the Queen, he has the power to dismiss the Prime Minister.

In any case, I strongly suspect that a dismissal of the Governor-General would take substantially more than half and hour. There are no exact precedents or agreed conventions for the dismissal of a Governor-General, so all I can rely on is a guess, and an attempt to

intuit how Her Majesty would feel if a fax or phone call (or email?) suddenly turned up from the Prime Minister of Australia asking for the dismissal of the Governor-General. I suspect that her first couple of questions might be "Has the Prime Minister gone mad? Does he have the support of his Cabinet and party in this?" She might well follow the example set by Sir Walter Campbell when Sir Joh Bjelke-Petersen had *his* fit of pique and wanted to dismiss some members of his Cabinet. Sir Walter waited a day or two until there had been a Cabinet meeting to see whether this really was a recommendation from a first minister who had the confidence of the rest of the Ministry and his party. Of course, in that case he did not – and a future Prime Minister who takes extreme measures like trying to dismiss the President might well have alienated his/her party as well. That is why I suspect the Queen might well regard Sir Walter's action as defining the convention, and why a Prime Minister acting alone should not have power to dismiss a President. [I know this will be disputed by some "expert advisers" on constitutional conventions – but count how many of them are former Prime Ministers or have been close enough to Prime Ministers to see the world through Prime Ministerial eyes.]

So, How Would We Reproduce That?

If minimal change is the desired aim, it seems to me that the person or body who does the appointing, on the recommendation of the Prime Minister, would also have the power to *dismiss* on the recommendation of the Prime Minister, but only after waiting a day or two to make sure that the PM still has the support of Cabinet and party. But as I said in evidence, minimalism is not a religion, it's simply a tactic to avoid frightening too many people. The body that is to do the appointing – the combined Houses of Parliament - is one that may not be able to make a decision in two days, because the House may not be sitting. So the process will have to have at least some differences from the existing one.

A Sensible Outcome

As I said in evidence, though I am attracted to the idea that our Constitution, like that of most other republics, should provide for dismissal of the President only for good cause, I can see *some* logic in the proposition that if the President must have bipartisan support to be elected, it should be possible to dismiss him/her if s/he has lost bipartisan support. But, contrary to what I said in evidence, on further thought I now think that symmetry should be preserved - the dismissal authority should be the same as the appointing authority. Thus it could reasonably enough be provided that the President can be dismissed by a joint sitting of the Houses, simply on the ground that s/he no longer has the confidence of the majority of members of Parliament. But the more I think of it the less reasonable it seems that dismissal or even suspension should be done by the Prime Minister alone (it may well be the PM who is having a fit of pique). If "what if the President goes mad?" is a real consideration, and a power to suspend is felt necessary, it could be provided that the President may be suspended by a vote of the majority of the Ministers, who in this circumstance would have the power to summon a joint sitting and must exercise it immediately.

I submit that, given the substitution for the Queen of a body of 220-plus people as the appointing authority and the necessity of converting unwritten understandings into a Constitutional code, this mechanism is as close as one can go to a minimal change *while still making sense*. While significantly different from what the ConCon recommended, it follows the resolutions in so far as it does not require dismissal for cause, and so far as it involves

Parliament in the final step. (And, hopefully, it will frighten *less* people than the ConCon proposal with its potential for the Dismissal-Notice Quick Draw scenario.)

Other Issues

Express Reference to Conventions, and Justiciability

I reiterate what I said in my first submission and in evidence that the Constitution would be a document that better *explained* the reality of our system of government if, instead of simply referring to "conventions", it spells out that the *point* of the conventions is the maintenance of responsible government.

A question that has been raised in several of the submissions, and towards which I think Ms Bishop was leading when we ran out of time, is whether the reference to the obligation to act on advice and the mention of the word "conventions" would make the decisions of the President justiciable. First , it should be pointed out that there is a tendency in that direction anyway; where a power is given by statute to a or Governor-in-Council, the High Court has held that they are reviewable because everyone knows that the real decision is made a Minister or a group of them, and the Governor merely rubber-stamps them – see *FAI Insurances v Winneke* (1982) 151 CLR 342 among other cases. What about powers given *directly by the Constitution* to a President? In my opinion the most likely outcome would be:

- in a matter where the Constitution says that the President must act on advice, a decision made by the President without advice or contrary to advice would be reviewable – and rightly so! Unless we decide one day to install an executive president, the Constitution must spell out that we are instituting a *non*-executive President, and it would be entirely proper for the Courts as guardians of the Constitution to remind the President of that fact, *if* ever necessary.
- In a matter involving the reserve powers or conventions, I expect that in most cases the Court would take one look at the word "convention" and say "these are vague and evolving things, and part of the evolution is that Governors and Presidents make decisions as to the correct course of action when new situations arise." If ever a situation arose where a President's action was a *clear* breach of convention and of the underlying rationale of the conventions, I expect the Court would review for that reason (as a few others have suggested in their submissions). Again I have no fear of this – government under a Constitution is government by rules, and when the players misapply the rules there has to be an enforcement authority.

Acting President, Deputy Presidents, etc

I agree with the several submissions that have maintained that any acting President should satisfy the same eligibility criteria as a regular President. I also agree with Professor Howell that the copying of the largely-moribund section 126 into section 63 is pointless. Perhaps, however, it *would* be useful to provide for the appointment and swearing-in of the most senior "available" State Governor from time to time as Deputy President, *not* to exercise any powers while the President is in office but so that in the case of incapacity or dismissal/suspension the Deputy could automatically and instantly become the Acting President. If incapacity/dismissal/suspension should occur, such a provision could avoid much scratching of heads as the relevant officials asked "who is the most senior Governor? Is s/he available?" and on, finding that one unwilling, asking "Who's next in line?" And then

within a day or two of the Deputy becoming Acting President, the next in line should be sworn in as Acting Deputy *pro tem* – just in case!

I also share Professor Howell's doubt about section 63's provisions being subject to provision otherwise by the Parliament. This sort of provision seems all very well in times like the present when we are used to semi-permanent control of the Senate by minor parties or independents – but if we ever again have one party (or coalition) controlling both Houses, that party could be tempted to introduce "convenient" provisions as to the acting Presidency. At the least, section 63 ought to require large majorities of both Houses for any Bill affecting the Acting Presidency. It may be better if it has no provision for contrary legislation at all, and its provisions can only be altered by the section 128 process. We the People are not totally unreasonable. Governments seem at the moment to have no confidence in their ability to persuade Us; it would not be a bad thing to make them *practice* the art of presenting rational arguments in favour of Constitutional amendments.

New Schedule 2, Transitional Provisions

The reference to "the unified system of law" in clause 6 of the proposed new schedule certainly looks very odd, as a couple of submissions have pointed out. We do indeed have a unified *common law*, but our statute laws are far from uniform. Perhaps the intention of the drafters was simply to refer to the conceptual unity of the court system, with the High Court at the common apex of all court systems, but if so this is not made at all clear. The clause is quite unnecessary in any case, as the alterations clearly do not affect the continuity of the federal system. The words up to the first comma look as if they were put in to counteract the scare story (spread by some who ought to know better) that a republic would necessarily lead to the elimination of the States – and then the *next* words seem designed to confirm the scare story! If the section is thought necessary at all, the phrase between the commas ought to be deleted.

I do not understand why clause 8 is among the "Transitional provisions". If it is thought necessary to spell out the fact that constitutional conventions will continue to evolve (which is part of the essence of conventions, I would have thought!), it should be done in section 59.

And I enthusiastically endorse Mr Hamilton's suggestion that a provision for repeal of the other, truly transitional, provisions, once they have expired, should be included. The Constitution should be readable, and one of the factors promoting readability is that all of the words have current relevance. The history of the Constitution can be an interesting study in itself, but people who want to study *that* can find earlier versions of the text in libraries. People who go to AusInfo to buy the Constitution should get something that simply relates the *current* Rules of the Game.

Oaths of Allegiance and Office

One of the peculiar things about our life as a constitutional monarchy is that when people have been sworn in to various offices (eg, member of Parliament, barrister or solicitor, public servant) they have made no pledge that relates to the conscientious carrying out of their duties, but have simply sworn or affirmed "to be faithful and bear true allegiance to Her Majesty" (see the Schedule to the existing Constitution). Quite apart from the fact that this gives ammunition to those who want to accuse all republicans of sedition (to which the simple reply is that for the last 50 years or more her Majesty, like "the Crown", has been a

metaphor or metonym for the government), this has always seemed to me to be rather off the point. When sworn in as a barrister, it seemed to me that it would have been more to the point to swear to do my duty to the Courts, my clients and the public (which, any lecturer in professional ethics will tell you, are the three general duties of a lawyer) than to promise for the third or fourth time in my life to be a loyal little subject.

The ConCon made a very sensible recommendation in this area, that the head of state should swear or affirm an oath of allegiance and an oath of office, giving suggested forms for each. The oath of office included, as anyone might expect, some words actually referring to serving the people *in the office of the President of the Commonwealth of Australia.* Yet the PM's Task Force, pursuing minimalism even beyond the ConCon's recommendations, has fused the two oaths back into one, which, though *called* an oath of office, could be an oath to be sworn by any servant of the people. It really would make more sense, *and*, I suggest, add more of a sense of occasion to the swearing-in, if an MP swore to carry out the duties of an MP (with a reference to compliance with the code of ethics, perhaps?) and a President swore to carry out the duties of a President. A pledge of loyalty to Australia and its people, modelled on the oath of citizenship, seems in fact *less* necessary than a promise to attend faithfully to the duties of the office, because all MP's and the President must be Australian citizens already. We should be able to assume their loyalty. Let us have a ceremony where the oaths have relevance to the offices that the people are being admitted to!

The States and Proposed Schedule 2, Clause 7

My final comment is not a suggestion for change, but a remark in (partial) defence of an aspect of the drafting. This in relation to the worry about section 7 of the Australia Acts, which, ***if*** you read it presupposing that it preserves the position of the Queen in the States, preserves the position of the Queen in the States. In the first draft from the Task Force, We the People were going to give the Commonwealth Parliament a specific power to amend section 7 in respect of the States that wanted to "go republic". The possibility of doing this is adverted to in section 15(3) of the Australia Acts – quite unnecessarily, as I will show below. The States, as you will be aware, all protested about this and insisted that they should be given a role in amending section 7, using the cooperative mechanism provided for in sub-section 15(1) of the Australia Acts. The draft now refers to both of those methods, as alternatives, in the proposed clause 7 of the new Schedule 2.

Some submissions (eg that from Mr Buxton) are protesting against the fact that the grant of power to the Commonwealth is still included, and are arguing that the section 15(1) method is the only proper one. Mr Buxton refers to the belief that "as the Commonwealth did not create the States, State Constitutions are independent of the Commonwealth Constitution". He refers to this belief as "orthodox". Indeed it seems to float around the corridors of every State Crown Law Office as *their* orthodoxy, but that does not make it orthodox. The premiss of the argument as quoted – that Commonwealth did not create the States – is correct, but the conclusion is an utter *non sequitur*, as well as being contrary to historical fact and the text of the Commonwealth Constitution. The Commonwealth *Constitution*, not the Commonwealth, created both the Commonwealth and the States. Previously the States were separate colonies, and the Commonwealth Constitution turned them into States. Section 106 preserved their formerly colonial Constitutions as State Constitutions, so *as State Constitutions* they are indeed dependent on the Commonwealth Constitution. Section 106 also makes them expressly *subject to* the Commonwealth Constitution. We the People of the Commonwealth, by the majority required under s 128, could do anything we liked to the State Parliaments and

Constitutions – if we could be persuaded to. We could insert a section modelled on Art 4, sec 4 of the United States Constitution, providing that the Commonwealth shall guarantee to every State a republican form of government – if we could be persuaded to. We can certainly insert the much more moderate provision empowering the Commonwealth Parliament to amend the Australia Acts, so that States will have a choice as to their form off government, if we can be persuaded to.

As to the two methods provided in the Australia Act for amending itself, I submit that the sub-s 15(3) one is the *preferable* one. If the complaint on behalf of the States is that the actual enactment which amends the Australia Acts will be an Act of the Commonwealth Parliament, then *either* method of amendment culminates in that. Compare the two methods: under one, the people expressly, after public debate, grant the Commonwealth the power to pass the enactment. Under the other, a deal by the executive governments sees Acts whizzed through State Parliaments with minimal debate, and then the Commonwealth Parliament, with perhaps as little debate, will pass exactly the same final enactment. People who believe in democracy and the sovereignty of the people will favour the first one, those who are frightened to consult the people and do not believe that State Parliaments should be subject to *any* binding law favour the second one. If it will keep the premiers and their advisers happy, I suppose it will do no harm to leave the second paragraph of the proposed clause 7 in, but the first paragraph is in fact the better one. Do not let the strange ideas that waft around State Law offices persuade you to take it out!

Finally, I do hope you have time to digest all of this, and that you will be able to prepare a brilliant set of recommendations to the two Houses by your deadline.

Sincerely,

Citizen John R Pyke