

THE BEST REPUBLIC FOR AUSTRALIA—WHY THE BIPARTISAN MODEL WORKS

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In February this year the Constitutional Convention finally concluded with a recommendation, overwhelmingly carried, that the Bipartisan Appointment of the President Model be put to the people in a referendum pursuant to section 128 of the Constitution.¹

Both the Prime Minister John Howard and the Opposition Leader Kim Beazley undertook that they would support such a procedure, and so, notwithstanding the seismic shifts currently underway in Australian politics, we can expect that this will occur.²

Is the Bipartisan Model a good one for Australia? Would a variant have been preferable? Most relevant of all, can it carry the day? Let me quickly summarise what the Model involves:

- A President would be Australia's Head of State, replacing the Queen and her representative the Governor General.
- The President would have the same powers as the Governor-General does today.
- The President would be an Australian adult citizen and his or her appointment would be approved by a two-thirds majority of a joint sitting of both houses of the Australian Parliament. The motion of appointment would be moved by the Prime Minister and seconded by the Leader of the Opposition.

A degree of public consultation would precede the nomination of the President. This would involve consultation with State, Territory and Local governments. A bipartisan committee comprising representatives of all parties having 'party status' in the Parliament would consider nominations, suggestions and so forth. Such a committee would, consistent with maintaining a workable size, be representative of the diversity of

* Chairman, Australian Republican Movement (ARM). This address is a revised version of the 4th annual Deakin Law School Oration delivered 6 August 1998. It has also been published in slightly altered form on the ARM website at <http://www.republic.org.au/spch/turnbull8.html>.

¹ Final resolution was 75 in favour to 71 against with 4 abstentions, *Report of the Constitutional Convention 2-13 February 1998*, Volume 1, Commonwealth of Australia, Canberra, 1998, 38-9.

² See Michael Millet, 'The New Republic', *Sunday Morning Herald*, 14 Feb 1998, 36; The Australian Labor Party, 'Policy Statement', Sept 1998, available at www.republic.org.au/party/labor98.html; and The Liberal Party of Australia, 'Policy Statement', Sept 1998, available at www.republic.org.au/party/liberal98.html.

Australia in terms of ethnicity, age, gender and geography. In short, it will not be comprised solely of middle aged gentlemen from Sydney and Melbourne.

Nonetheless, the final choice will be very much in the hands of the leaders of the two major political groups in the Parliament, which today would mean John Howard and Kim Beazley.

The powers of the President would be handled in the following way: in circumstances where the Governor-General has acted on advice (which conventionally is in all cases except use of the reserve powers), the Constitution will state that the President will act on advice. However, this will not be so in areas where the reserve powers are relevant—the appointment and dismissal of the Prime Minister, the dissolution of Parliament and the issuing of writs for an election. In this area, the Convention decided not to codify the constitutional conventions, for reasons I will return to, and instead resolved that the Constitution should state that the existing conventions which govern the office of Governor General should continue to apply.³

The Convention resolved that the Prime Minister should have the power to dismiss the Prime Minister. The President would be required to bring his action before the House of Representatives for ratification within 30 days of the dismissal. If the decision were not ratified it would constitute a vote of no confidence and, consistent with custom, he or she would be obliged to resign.⁴

It should be noted in this context that following the removal (or indeed the resignation, death or disability) of the President the office would be temporarily filled, pending a formal new appointment by the Joint Sitting, by the Senior State Governor. This process is consistent with current practice.⁵

It can be seen that the bipartisan model is essentially a republican facsimile of the status quo with three significant innovations. First, the President is appointed by a bipartisan, parliamentary process, in contrast to our current hereditary, sectarian procedure governed by British law in the case of the Queen or by the decision of the Prime Minister in the case of the Governor-General. Second, while the reserve powers remain the same (with all of the attendant merits and vices of the current dispensation), the non-reserve powers are expressly stated to be exercised on advice thereby making the constitution a more accurate reflection of how the system actually works. Third, while the President can be dismissed by the Prime Minister; thereby preserving the current arrangement between the Prime Minister and the Governor General, the Prime Minister cannot, in a republic, terminate the President and appoint a new one in his or her place. The casual vacancy created will be filled by the senior State Governor and within a specified interval of 90 days, the Parliament will convene in a joint sitting to appoint a new President.⁶ The Prime Minister will have no influence over the office of the senior State Governor

³ Ibid 39, 45.

⁴ Ibid 39.

⁵ Ibid 45. See also, Republic Advisory Committee, *An Australian Republic: The Options* (AGPS, The Report of the Republic Advisory Committee, vols 1-2, 1993).

⁶ Ibid.

and, as we have seen, appointment of the President will require the concurrence of the Opposition Leader.

At the Convention the debate as to the type of republic model focused largely on the mode of appointment, to some extent on the way in which the powers were to be expressed and to a very limited extent, on the mode of dismissal. On the issue of appointment, there were essentially three models presented: (i) Prime Ministerial appointment, best exemplified by Richard McGarvie's eponymous model; (ii) direct election by the people; and (iii) the bipartisan model favoured by the ARM and, ultimately, the Convention as a whole.

A *The McGarvie Model*

The McGarvie Model was favoured by many conservatives as, I suppose, the least of all evils. It was a curious specimen involving the creating of a Constitutional Council of old people with, as I recall, a minimum age of 65 and a maximum age of 79. These former Governors-General, Governors and Chief Justices would take the place of the Queen in the current system. They would appoint and remove Presidents on Prime Ministerial advice. Although retaining the ability to counsel the Prime Minister on his or her recommendation, regardless of their views, they would have the obligation to act on it.

We tried in vain to persuade Mr McGarvie to present a Prime Ministerial appointment model in a more palatable form, with the President being appointed, for example, by a simple majority of the House of Representatives. His council of elders struck most delegates as being likely to confuse the issue and create the impression that this distinguished committee actually made the appointment.

Mr McGarvie would not change a letter of his model, and his commitment to it was quite unrelated to its eponymous nature. We humorously suggested, by way of an inducement, that the new Head of State could be called the Greater McGarvie (at the federal level) with State Governors becoming Lesser McGarvies. A Territory Administrator logically would be a Minor McGarvie. The Real McGarvie, or should I say the McGarvie Incarnate, was unmoved by this and stuck to his guns.

The real flaw in Prime Ministerial appointment is that it permits the Prime Minister to put a political crony in the job. It is one thing to appoint Bill Hayden, it would be another to remove Sir William Deane and replace him with a political sympathiser.

B *Direct Election*

Direct election was a much more compelling alternative and it attracted passionate support from its adherents. They made many arguments in their favour although they tended to rely on the fact that many opinion polls have shown most Australians want to elect their Head of State.

All of the debates about modes of appointment at the Convention tended to overlook the fundamental question: what is the nature of the office being discussed? Almost every

delegate at the Convention envisaged a President with pretty much the same powers and duties as the Governor-General. A largely ceremonial figure, seen to be politically impartial and able to act as a constitutional umpire on those hopefully rare occasions when called upon. If not a quasi-judicial figure at least one whose powers should be exercised judiciously.

Of course, once you define the office in the above way, it is readily apparent that direct election is an inappropriate mode of appointment. Direct election will give you a partisan, of that there can be no doubt. The successful candidate may pledge to act impartially and indeed may do so; but in our highly charged political culture does anyone imagine that Liberal partisans would believe a directly elected Labor President would always act without the faintest tinge of political bias.? Of course not.⁷

The direct electionists, as they came to be known, when faced with this observation met it in three ways. First, they noted that the 'people wanted it'. This led to endless arguments about the reliability of quantitative polling. Second, they pointed to the experience of other countries (in particular Ireland) where there is a directly elected President with powers and duties similar to that of our Governor General. Third, they proposed a direct election model which elegantly combined the worst features of almost all modes of appointment contemplated by the Convention.

The first argument, based on popular sentiment, would logically lead to supporting a US style system. It is a little odd to invoke passionately the right of the people to elect a largely powerless figurehead but at the same time deny them the right directly to elect the Prime Minister who actually runs the country. Yet, curiously only two delegates at the Convention supported a US system. As an alternative, it had no support.

The second argument, based on the Irish model, was more persuasive. However, it overlooked a fundamental difference between our Constitution and that of Ireland. The Irish President has, for all practical purposes, no significant independent discretion. Most important, Ireland is a unitary state with a Senate with no power to frustrate the Lower House. We on the other hand have a federal system with a Senate that has equal power to the House of Representatives. It is most improbable any Government will also control the Senate so the potential for constitutional impasse is always there. Such an impasse can have an unpredictable course and the potential need for an umpire is obvious. Can a partisan discharge that duty to the satisfaction of the electorate?

One answer to that, of course, is to codify the procedures to be followed. We could abolish the right of the Senate to refuse money bills. That would be politically unachievable, however, as everyone at the Convention acknowledged. Another alternative, which I had proposed in times past, was to provide that the President could not dismiss a Government for breach of the law (such as spending money which had not been lawfully appropriated) without the approval of the High Court. The Labor Party too regarded this as potential legitimisation of the Senate's power.

⁷ An interesting parallel could be drawn with the intervention of Barwick CJ in the 1975 constitutional crisis. Despite his office as chief justice, his prior background as a minister in the previous Liberal – Country Party government was used to attack his credibility. See Peter Hanks, *Constitutional Law in Australia*, 2nd ed. (1996) 202; also see G Sawyer, *Federation Under Strain* (1977).

The upshot of all this was that those who did not favour the Senate having the right to turn out the Government believed that the current, rather messy and uncertain state of affairs, served a purpose. The less clear-cut the consequences of blocking supply, the more contentious the action. The more unpredictable the outcome, the less likely the Senate was to exercise it. But equally, the more necessary was the impartial umpire. And that in a nutshell is why the Irish model was not persuasive.

The final direct election model was the worst of all. It involved the Parliament by a bipartisan super majority choosing three candidates who would then be put to the people. Every Australian would have the right to vote for a Presidential candidate, but only if he or she was on the list approved by the politicians.

C The Bipartisan ARM Model

As is now known, a variant of this model was the one ultimately favoured by the Convention. There were two significant changes made to the ARM model prior to and in the course of the Convention. The first was to provide for a mechanism of public consultation as described above. The second was to allow for the Prime Minister to be able to remove the President.

Many conservatives, especially Mr McGarvie, were critical of the ARM's original model in that it provided that the President could not be removed other than by a resolution supported by a two thirds majority. They pointed out that, especially if the reserve powers were not codified, a President who was breaking the Conventions in a manner agreeable to the Opposition would never be able to be removed. Again and again, they pointed out the only sanction against a Governor General breaking the Conventions was Prime Ministerial dismissal. Recognising the force of this argument, and unable to secure support for codification of the powers, the ARM agreed to Prime Ministerial dismissal of the President. Needless to say many of these conservatives, including Mr McGarvie, then used this as a means of attacking the referendum proposal.

Afterword

The text above is essentially a transcript of a speech I gave at Deakin in 1998. It is in the nature of things that Law Journals are compiled sedately and as I write these concluding lines, in September 1999, we are less than six weeks from the referendum. The people will shortly have their say. I can only hope that they choose well and cast a vote of confidence in their country and its people, by voting Yes for the republic.

