

POWERS OF THE HEAD OF STATE

MICHAEL CROMMELIN AO*

The proposed law to alter the Constitution to establish the Commonwealth of Australia as a republic did not attempt to identify and define the powers of the head of state. Instead, it provided for the President to assume, essentially unchanged, the powers conferred by the existing Constitution on the Queen and the Governor-General. Those powers have never been clearly identified and defined. Their scope depends heavily on constitutional conventions. This article argues that reliance on constitutional conventions is misplaced and that any future proposal to establish a republic must specify the powers of the President as well as the method of appointment to that office.

CONTENTS

I	The Referendum on the Republic	1118
II	Source of the Problem	1121
III	Recognition of the Problem.....	1123
IV	The Challenge	1124
V	The <i>Constitution</i>	1125
VI	The Australian Constitutional Convention.....	1129
VII	The Constitutional Commission.....	1133
VIII	Conclusion	1138

I THE REFERENDUM ON THE REPUBLIC

On 6 November 1999, Australian electors were asked whether they approved of:

A proposed law: To alter the *Constitution* to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced

* BA, LLB (Hons) (UQ), LLM, PhD (UBC); Zelman Cowen Professor of Law, Melbourne Law School, The University of Melbourne.

by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.¹

The answer was a resounding ‘No’. Nationally, the proposal was rejected by 55 per cent of voters. It was defeated in all six states; Queensland topped the poll with 63 per cent of voters opposed to it. It was narrowly defeated in the Northern Territory with a ‘No’ vote of 51 per cent. Only the Australian Capital Territory said ‘Yes’, by a substantial margin of 63 per cent to 37 per cent.²

Opinion polls before the referendum had predominately indicated popular support, in principle, for change from a monarchy to a republic.³ Nevertheless, the particular proposal was firmly rejected.

What went wrong?

The proposed change from monarchy to republic involved two distinct but related issues: the method of appointment of the head of state, and the powers of the head of state. The question put to Australian electors at the referendum on the republic dealt explicitly with the former issue but not with the latter. Instead, the question implied that the President would assume, essentially unchanged, the powers previously conferred by the *Constitution* on both the Queen and her representative, the Governor-General.

This implication was confirmed by the Constitutional Alteration (Establishment of Republic) Bill 1999 (Cth), containing the proposed amendments to the Commonwealth *Constitution*. Schedule 2 provided simply for substitution of ‘the President’ for both ‘the Queen’ and ‘the Governor-General’ throughout the *Constitution* (in no fewer than 23 sections). Schedule 1 provided for two new sections relating to Commonwealth executive power.

A new s 59 of the *Constitution*, intended to replace the existing s 61, dealt with the scope of Commonwealth executive power and the manner of its exercise by the President:

59 Executive power

The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this *Constitution*, and of the

¹ Brenton Holmes, ‘Tracking the Push for an Australian Republic’ (Background Note, Parliamentary Library, Parliament of Australia, 2013) 3.

² Ibid, citing Australian Electoral Commission, *1999 Referendum Reports and Statistics* (19 January 2011) <http://www.aec.gov.au/Elections/referendums/1999_Referendum_Report_s_Statistics/results_preamble.htm>.

³ Ian McAllister, ‘Elections without Cues: The 1999 Australian Republic Referendum’ (2001) 36 *Australian Journal of Political Science* 247, 251.

laws of the Commonwealth. The President shall be the head of state of the Commonwealth.

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

The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.⁴

A new s 70A further declared that the scope of Commonwealth prerogative authority was unchanged and that its exercise was thereafter a matter for the President:

70A Continuation of prerogative

Until the Parliament otherwise provides, but subject to this *Constitution*, any prerogative enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any such prerogative enjoyed by the Governor-General shall be enjoyed by the President.⁵

The references in these sections to reserve power, constitutional conventions and the royal prerogative raised difficult questions to which no clear answers were provided. None of these significant features of the Australian system of government was mentioned explicitly in the *Constitution*. All were legacies of English constitutional practice.

Nevertheless, the broad intent of the proposed sections was clear. The President would assume all of the powers previously vested in the Queen and the Governor-General, and would exercise them in accordance with established constitutional conventions. The premise was that the move from monarchy to republic would not entail any break in the continuity of Australia's constitutional evolution, at least in relation to the powers of the head of state.

⁴ Constitutional Alteration (Establishment of Republic) Bill 1999 (Cth) sch 1 item 3.

⁵ *Ibid* sch 1 item 4.

II SOURCE OF THE PROBLEM

The attempt to skirt around the issue of the powers of the head of state in the referendum on the republic was hardly surprising. This issue had a long and troubled history. It was widely acknowledged as difficult, if not intractable. This was not the first occasion on which evasion was preferred to resolution.

The framers of the *Constitution* had encountered the issue in 1897 at the Adelaide meeting of the National Australasian Convention.⁶ The draft Bill debated at the Convention conferred certain powers on the Governor-General in Council and others simply upon the Governor-General. George Reid proposed an amendment to reflect ‘that which will in reality be the practice’, that the Governor-General will exercise all powers and functions under the *Constitution* ‘by and with the advice of the Executive Council’.⁷ Sir Edmund Barton demurred:

Executive Acts of the Crown are primarily divided into two classes: those exercised by the prerogative — and some of those are not even Executive Acts — and those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council. These are the offsprings of Statutes ... there is no necessity to add the words:

With the advice of the Governor in Council,

because in a constitution of this kind it is no more possible than it is under the English Constitution for the prerogative to be exercised as a personal act of the Crown.⁸

Furthermore, according to Barton, if Reid’s amendment were adopted ‘[t]here will be this little further result. We shall be told that we did not know how to draft an Act of Parliament because we did not have sufficient constitutional knowledge’.⁹

Finally, Barton noted that the draft Bill was premised upon the doctrine of responsible government, derived from English constitutional convention and already well-established in the Australian colonies:

We have provided ... that officers shall be members of the Federal Executive Council and shall be the Queen’s Ministers of State for the Commonwealth; that

⁶ Michael Crommelin, ‘The Executive’ in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 127, 143–4.

⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 908.

⁸ *Ibid* 910.

⁹ *Ibid* 913. The debates attribute this statement to George Reid but this appears to be an error.

after the first general election no Minister of State shall hold office for a longer period than three calendar months, unless he shall be or become a member of one of the Houses of Parliament; and that Ministers of State shall be in the Parliament, and that is the hold by which Parliament, if there were no other hold, would make them responsible to the people. The Act, as it was, would have made the Ministers responsible to the people, and have given us cabinet government responsible to the people. I do not think there is need for further discussion.¹⁰

Not all delegates were persuaded. William Carruthers made the point with devastating simplicity: 'Mr Barton first of all recites Dicey to show what occurs under the unwritten Constitution of England. But here we are framing a written Constitution. When once that Constitution is framed we cannot get behind it'.¹¹ He went on to provide a prophetic warning: 'We do not want the Federation to be plunged into a broil through the Governor taking responsibility on his own shoulders'.¹²

It was to no avail. Barton won. Sir John Forrest attempted to revive the issue later that year at the Sydney meeting of the Convention,¹³ but Barton remained intransigent.¹⁴ The matter was dropped.

And so the seed was sown. Barton's solution to this fundamental aspect of constitutional design was not only obscurantist and evasive; it was also seriously misguided.

In the first place, it was highly misleading to classify the powers of the head of state in only two categories: those conferred on the Governor-General in Council; and those conferred simply on the Queen or the Governor-General as her representative. Barton's lofty references to English constitutional practice did nothing to alleviate the misunderstanding arising inevitably from this approach.

In a written constitution, function should prevail over form, as Carruthers had urged. Function demanded that the powers of the head of state be classified, according to their manner of exercise, in four categories rather than two: formal powers exercisable by the Governor-General; powers exercisable by the Governor-General upon the advice of the Federal Executive Council;

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 915.

¹³ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 804.

¹⁴ Ibid 805-6.

powers exercisable by the Queen or the Governor-General only in accordance with Ministerial advice; and powers exercisable by the Queen or the Governor-General, in appropriate circumstances, without or contrary to Ministerial advice (reserve powers).

Secondly, the reliance that Barton placed upon constitutional conventions was also misplaced. Conventions offered the enticing prospect of flexibility but lacked the precision, clarity, durability and legal effect required to determine the scope of the authority of the head of state.

III RECOGNITION OF THE PROBLEM

In 1936 Justice H V Evatt drew attention to the inherent deficiencies of constitutional conventions in a pioneering study of the powers of the Crown and its representatives. In its opening paragraph he said:

It is desirable to re-examine some of the constitutional rules and practices whereby, both in Britain and in the self-governing Dominions, doctrines of overwhelming importance are treated as being too vague to be defined at all, or, if defined, defined in an unsatisfactory manner, and never regarded as enforceable by the Courts of the land. These rules and practices relate, in general, to what may be called, not for the first time, the 'Reserve Powers' of the Crown.¹⁵

Later, he concluded:

If the situation is allowed to continue without any alteration, the Sovereign, Governor-General, and the Governor will have to determine for themselves, on their own personal responsibility, not only what the true constitutional convention or practice is, but also whether certain facts exist, and whether they call for the application of the rule which is alleged to be derived from, and consistent with, all constitutional precedents. Even if, upon a given occasion, no extraordinary exercise of the Crown's prerogative results, the possibility of its exercise has always to be reckoned with, and this inevitably creates uncertainty and distrust.¹⁶

In his introduction to the first edition of this work, Professor Kenneth Bailey aptly summarised Evatt's principal findings:

¹⁵ Justice Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Oxford University Press, 1936) 1.

¹⁶ *Ibid* 286.

The most striking conclusion that emerges from a survey of past practice [regarding the reserve powers] is the immense amount of sheer uncertainty and confusion in which the whole subject is involved ...

The thesis maintained by Mr Justice Evatt is that the reserve powers of the Crown should be subjected to the normal and natural process of analysis and definition and reduction to rules of positive law ...¹⁷

Professor Zelman Cowen wrote the introduction to the second edition of Evatt's book, which was published without textual amendment in 1967. This introduction included an extensive review of constitutional practice regarding the reserve powers of the Crown in the thirty years that had elapsed since the publication of the first edition. Cowen concluded that

Evatt's general thesis remains persuasive. Uncertainty and vagueness in the definition of reserve powers may lead to inconsistent action and may embroil the Crown and its representatives in unhappy political controversy. But ... there may be difficulty in reducing the reserve powers to certainty by legislative definition. In any event, that definition may be and in some cases will necessarily be complex and discretions will not wholly be eradicated.¹⁸

IV THE CHALLENGE

In this paper, I argue that the success of any future proposal that Australia move from monarchy to republic will depend on prior identification and definition of the powers of the head of state.

I do not advocate, as Reid did in 1897, that all reserve powers of the head of state should be abolished. Instead, I take the view that all of the powers of the head of state must be explicitly identified and defined in the *Constitution*, and classified according to their manner of exercise. Reserve powers which confer discretionary authority on the head of state should remain as one of those categories, as such powers are both necessary and desirable to protect the institutional integrity of our system of government.

In my view, the ephemeral quality of constitutional conventions makes them incapable of meeting this challenge of identification and definition of

¹⁷ K H Bailey, 'Introduction' in Justice Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Oxford University Press, 1936) xiv, xv.

¹⁸ Zelman Cowen, 'Introduction to *The King and His Dominion Governors*' in Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (F W Cheshire, 2nd ed, 1967) xiii, xxxiii–xxxiv.

the powers of the head of state. It seems likely that many voters in the referendum on the republic were sceptical of the assurance that they could rely on constitutional conventions to determine the scope of the powers of the head of state. Their experience suggested otherwise.¹⁹ Furthermore, there was no reason at all to assume that the constitutional conventions that had evolved to curtail the authority of a monarch would remain unscathed by the transfer of that authority from the monarch to a president, however appointed.

V THE CONSTITUTION

The *Constitution* provides a convenient starting point for the exercise of identification and definition of the powers of the head of state. It confers a variety of powers upon the Queen and the Governor-General relating to all three branches of the Commonwealth government, legislative, executive and judicial. These powers fall naturally into four categories according to their manner of exercise: (a) formal powers; (b) powers conferred on the Governor-General in Council; (c) powers exercisable only on Ministerial advice; and (d) reserve powers.

The first category comprises a small number of formal powers vested simply in the Governor-General, requiring neither advice nor discretion in their exercise in any circumstances. Examples are notification of a Senate vacancy to the Governor of the relevant state²⁰ and administration of the oath or affirmation of allegiance to members of the Commonwealth Parliament.²¹

The second category comprises a number of powers specifically vested in the Governor-General in Council. It includes the powers to appoint and remove various Commonwealth officers: Justices of the High Court of Australia and of other courts created by the Commonwealth Parliament,²² civil servants,²³ and members of the Inter-State Commission;²⁴ and the power

¹⁹ The constitutional turmoil surrounding the Whitlam government was not forgotten: see P J Hanks, 'Parliamentarians and the Electorate' in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 166, 183–90; Colin Howard and Cheryl Saunders, 'The Blocking of the Budget and the Dismissal of the Government' in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 251, 270–86.

²⁰ *Constitution* s 21.

²¹ *Ibid* s 42.

²² *Ibid* s 72.

²³ *Ibid* s 67.

to establish Commonwealth government departments.²⁵ In addition, the Governor-General in Council is empowered to issue writs for elections of members of the House of Representatives.²⁶

The Governor-General has no discretionary authority in the exercise of any of these powers. Section 63 declares that provisions of the *Constitution* referring to the Governor-General in Council shall be construed as referring to the Governor-General acting *with* the advice of the Federal Executive Council. This provision is widely understood to mean acting *upon* such advice.

The third category consists of a larger number of more significant powers also vested simply in the Queen or the Governor-General, but exercisable in practice only in accordance with ministerial advice. As such, these powers involve no discretion on the part of the Queen or the Governor-General in their exercise. There are no fewer than nine of these powers: the transmission by the Governor-General of a message to the House of Representatives or Senate recommending the purpose of an appropriation bill;²⁷ the declaration of assent by the Governor-General or the Queen to a proposed law passed by the House of Representatives and the Senate;²⁸ the return of a proposed law to the Parliament with recommendations for amendment;²⁹ the exercise by the Governor-General of the executive power of the Commonwealth;³⁰ the selection, summoning and dismissal of members of the Federal Executive Council;³¹ the allocation by the Governor-General of portfolios to Commonwealth Ministers;³² the command in chief of the naval and military forces of the Commonwealth;³³ the placement by the Queen of any territory under the

²⁴ Ibid s 103.

²⁵ Ibid s 64.

²⁶ Ibid ss 32–3.

²⁷ Ibid s 56.

²⁸ Ibid ss 58–60. These sections contemplate various possibilities. The Governor-General may provide assent to a proposed law, withhold such assent, or reserve the proposed law for the Queen's assent: at s 58. The Queen may provide or withhold assent to a reserved law: at s 60. She may also disallow a law to which the Governor-General has provided assent: at s 59. However, reservation and disallowance are now barred by convention, as a corollary of Australia's achievement of independent statehood.

²⁹ Ibid s 58.

³⁰ Ibid s 61.

³¹ Ibid s 62.

³² Ibid s 64.

³³ Ibid s 68.

authority of the Commonwealth;³⁴ and the appointment by the Governor-General (with the authority of the Queen) of a deputy or deputies together with the assignment of powers and functions to such deputy or deputies.³⁵

The fourth category comprises eight powers. These are the reserve powers, distinguishable from the rest on the basis that, although they will usually be exercised upon ministerial advice, the Governor-General nevertheless has discretionary authority to exercise them without or contrary to such advice whenever a matter of institutional integrity of the system of government is at stake. These powers all involve, in one way or another, critical aspects of the operation of the Commonwealth Parliament.

In the first place, the Governor-General may appoint times for holding the sessions of the Parliament, prorogue the Parliament and dissolve the House of Representatives.³⁶ These three powers will usually be exercisable on the advice of the Prime Minister. However, there is a risk of abuse in the exercise of each of them in unusual circumstances, justifying the reserve powers of the Governor-General designed to protect the capacity of the Parliament to perform its constitutional functions.

The doctrine of responsible government, a foundation stone of the Australian constitutional edifice, requires that a government obtain and maintain the confidence of the House of Representatives.³⁷ The timing of parliamentary sessions is inextricably linked to this requirement. The *Constitution* stipulates that Parliament shall be summoned to meet not later than 30 days after the scheduled return of the writs for any general election,³⁸ and that the period between the end of one session of Parliament and the beginning of the next session shall be less than 12 months.³⁹ But these provisions are not sufficient to ensure that the House of Representatives can always perform its function of determining the fate of a government. The possibilities for manipulation are legion. A Prime Minister may seek to pre-empt a threatened motion of no confidence in the House of Representatives by advising the Governor-General to prorogue the Parliament. A Prime Minister who has lost the support of his or her political party while Parliament is prorogued may attempt to remain in

³⁴ *Ibid* s 122.

³⁵ *Ibid* s 126.

³⁶ *Ibid* ss 5, 28.

³⁷ *Egan v Willis* (1998) 195 CLR 424, 448–53 [35]–[45] (Gaudron, Gummow and Hayne JJ), 472–5 [94]–[99] (McHugh J), 496 [140], 501–3 [152]–[155] (Kirby J); Crommelin, above n 6, 136–45.

³⁸ *Constitution* s 5.

³⁹ *Ibid* s 6.

office by advising the Governor-General to defer the scheduled commencement of the next session. And a Prime Minister may try to exploit political instability in an opposition party by advising the Governor-General to dissolve the House of Representatives long before the expiry of its maximum term of three years.⁴⁰

Secondly, the *Constitution* confers significant powers on the Governor-General within its elaborate mechanism provided to resolve legislative deadlocks between the Senate and the House of Representatives. When the House of Representatives twice passes any proposed law and the Senate fails to do so, the Governor-General may (provided several procedural requirements are met) dissolve both Houses simultaneously. If the ensuing election does not resolve the impasse, and the Senate persists in its failure to pass the proposed law notwithstanding further passage by the House of Representatives, the Governor-General may convene a joint sitting of the members of both Houses to vote upon the proposed law.⁴¹

The fixed term of six years enjoyed by senators pursuant to s 7 of the *Constitution*, in contrast to the maximum term of three years provided by s 28 to members of the House of Representatives, is a notable feature in the design of the bicameral Parliament, intended to strengthen the autonomy of the Senate in the face of the authority of the more powerful House of Representatives.⁴² The power to dissolve both Houses simultaneously under s 57 poses a serious threat to this autonomy, especially if the Governor-General may exercise this power only in accordance with the advice of the Prime Minister. In contrast, the power to convene a joint sitting of the members of the Senate and the House of Representatives does not pose a similar threat to the institutional integrity of the bicameral Parliament as a joint sitting has none of the political consequences of a double dissolution and the High Court may determine the validity of any legislation enacted at the joint sitting.

Thirdly, the *Constitution* contains an intricate amendment process. The authority for initiation of an amendment rests with the Parliament, which may pass a proposed law for the alteration of the *Constitution* by absolute majorities of both the Senate and the House of Representatives. However, in the event of disagreement between the Houses, a proposed law may be passed twice by absolute majorities of either the Senate or the House of Representatives. The Governor-General may then submit the proposed law to referen-

⁴⁰ See *ibid* s 28. See also Zelman Cowen, 'A Historical Study of the Victorian Constitution, 1856 to 1956' (1957) 1 *Melbourne University Law Review* 9, 29.

⁴¹ *Ibid* s 57.

⁴² See *ibid* s 53.

dum.⁴³ The rationale is clear: either House may initiate an amendment proposal. A requirement that the Governor-General submit a proposed law to referendum only on the advice of the Prime Minister would be incompatible with this rationale.

Finally, two powers conferred on the Governor-General relate to the executive branch of the Commonwealth government, although they are also closely linked to the workings of Parliament. The Governor-General has authority to appoint and dismiss 'the Queen's Ministers of State for the Commonwealth'.⁴⁴ The doctrine of responsible government requires that the exercise of these powers take account of the functional necessity that the government obtain and maintain the support of the House of Representatives. Following a general election in which a political party (or coalition of parties) wins a majority of seats in the House of Representatives, the Governor-General has no practical choice: the invitation to form a government must go to the leader of the victorious party. However, when no party (or coalition) achieves such a majority, the Governor-General must judge who has the best prospects of forming a government that will obtain the support of the House of Representatives. Similarly, following a vote of no confidence in a government by the House of Representatives, the Governor-General must dismiss a Prime Minister who fails to resign or advise dissolution of the House of Representatives.

As Justice Evatt observed, the reserve powers are fraught with difficulty. The critical question in each case is whether the institutional integrity of our system of government is better served by conferral of discretionary authority upon the head of state rather than the Prime Minister. Unsurprisingly, this question has attracted considerable attention.

VI THE AUSTRALIAN CONSTITUTIONAL CONVENTION

At its meeting in Brisbane in 1985, the Australian Constitutional Convention attempted to overcome some of the uncertainty and vagueness in the definition of the discretionary authority of the head of state by identifying the constitutional conventions that governed the exercise of the reserve powers of the Governor-General in relation to: appointment and dismissal of the Prime Minister; summoning and proroguing Parliament; and resolving legislative deadlocks between the House of Representatives and the Senate. The Conven-

⁴³ *Ibid* s 128.

⁴⁴ *Ibid* s 64.

tion resolved to recognise and declare 18 'principles and practices [which] should be observed as Conventions in Australia' in the exercise of these powers.⁴⁵

The basic principle declared by the Convention was that the Ministry must have the confidence of the House of Representatives.⁴⁶ This principle was a corollary of the doctrine of responsible government recognised implicitly by s 64 of the *Constitution* in its requirement that all ministers be or become members of Parliament.

This principle led to the recognition by the Convention of the reserve power of the Governor-General in appointing the Prime Minister pursuant to s 64 of the *Constitution* in particular circumstances: when the government was defeated in a general election;⁴⁷ upon the resignation of the Prime Minister;⁴⁸ and upon the death of the Prime Minister while in office.⁴⁹ Surprisingly, perhaps, the Convention declared that this reserve power did not extend to the appointment of a new Prime Minister following the defeat of a Prime Minister in the House of Representatives. In that case, according to the Convention, the Governor-General was required to act on the advice of the outgoing Prime Minister, who in tendering that advice was in turn obliged to act 'in accordance with the basic principle that the Ministry should have the confidence of the House of Representatives'.⁵⁰ But what if the Prime Minister did not do so?

The Convention was unable to achieve any resolution of the highly contentious issue of the reserve power of the Governor-General to dismiss the Prime Minister; perhaps it was too soon after the dismissal of the Whitlam government on 11 November 1975. The Convention's Structure of Government Sub-Committee had suggested various circumstances in which the reserve power may be exercisable: when the Prime Minister failed to resign or seek a dissolution of the House of Representatives or the Parliament upon losing the confidence of the House of Representatives, or upon denial by the Senate of parliamentary appropriation of funds for the ordinary annual services of the government; and when the government was 'involved in a gross and patent

⁴⁵ *Proceedings of the Australian Constitutional Convention: Official Record of Debates and Biographical Notes*, Brisbane, 29 July – 1 August 1985, vol I, 415; see generally at vol I, 415–17.

⁴⁶ *Ibid* vol I, 415 (Principle A).

⁴⁷ *Ibid* vol I, 415 (Practice B).

⁴⁸ *Ibid* vol I, 415 (Practice C).

⁴⁹ *Ibid* vol I, 416 (Practice D).

⁵⁰ *Ibid* vol I, 416 (Practice F); see also at vol I, 416 (Practice E).

breach of the basic principles of the Constitutional System' that was not justiciable or could not be resolved by the courts for any other reason.⁵¹ However, the level of disagreement on this issue was such that neither the Sub-Committee nor the Convention proposed any principles or practices regarding the exercise of this power.

The Convention's declaration concerning the powers of the Governor-General with regard to summoning and proroguing Parliament was delightfully enigmatic. In general, the powers of the Governor-General to summon and prorogue Parliament were exercisable only on the advice of the Prime Minister. However, there was an important proviso: this general rule was subject to 'the requirements of the *Constitution* as to the sittings of Parliament'.⁵²

These requirements clearly imply reserve powers of the Governor-General, but the scope of these powers is uncertain. Section 5 of the *Constitution* demands a meeting of Parliament within a prescribed period after a general election, and s 6 demands a session of Parliament every year. But they are surely not enough to ensure adherence to the basic principle that the Ministry must have the confidence of the House of Representatives. Other requirements may flow from this principle and from the broader doctrine of responsible government.

The Convention acknowledged as much, albeit obliquely. It referred to the Standing Committee

the question whether provision should be made for the case of an improper prorogation or failure to summon Parliament, and, generally, other predictable issues requiring the exercise of the power of the Governor-General where ... a clearly acceptable rule can be stated in anticipation of the issue arising.⁵³

Nothing emerged from this referral.

The Convention took the view that the Governor-General had no discretionary authority in exercising the power to dissolve the House of Representatives. Rather, the Governor-General could dissolve the House only on the

⁵¹ Structure of Government Sub-Committee, Australian Constitutional Convention, 'Report to Standing Committee' in *Proceedings of the Australian Constitutional Convention: Standing Committee Reports*, Brisbane, 29 July – 1 August 1985, vol II, Appendix F, 68 (Practice 21: Alternative 1(c)).

⁵² *Proceedings of the Australian Constitutional Convention: Official Record of Debates and Biographical Notes*, Brisbane, 29 July – 1 August 1985, vol I, 417 (Practice N).

⁵³ *Ibid* vol I, 417.

advice of the Prime Minister.⁵⁴ Moreover, when a Prime Minister who retained the confidence of the House of Representatives advised its dissolution, the Governor-General must act on that advice.⁵⁵ Again, however, the Convention made a proviso: in tendering that advice, the Prime Minister must be in a position to assure the Governor-General that sufficient funds are or will be available for the continuation of government through the election period.⁵⁶ But what if the Prime Minister were unable to do so?

The Convention acknowledged that the mechanism established by s 57 of the *Constitution* for resolution of legislative deadlocks between the House of Representatives and the Senate conferred reserve powers on the Governor-General. Before dissolving both Houses simultaneously, the Governor-General must be personally satisfied 'on the advice of the Prime Minister that the conditions in section 57 of the *Constitution* have been met and that a double dissolution should be granted'.⁵⁷ Likewise, the Governor-General must be personally satisfied on similar advice that the conditions of s 57 of the *Constitution* have been met before convening a joint sitting of the members of both Houses.⁵⁸

However, the Convention denied that the deadlock mechanism contained in s 128 of the *Constitution* for passage of a proposed law for alteration of the *Constitution* by the Senate and the House of Representatives conferred any discretionary authority on the Governor-General. It declared that the Governor-General must act only on the advice of the Prime Minister in submitting a proposed law to the electors, whether the proposed law had been approved by both Houses or by only one of them.⁵⁹ This declaration appeared to disregard the fact that s 128 (unlike s 57 of the *Constitution*) allows a proposed law for alteration of the *Constitution* to originate in the Senate.

This statement of principles and practices achieved some clarification of the constitutional conventions applicable to the existence and exercise of the reserve powers of the Crown under the *Constitution*. However, it was not nearly enough. In its resolution, the Convention drew attention to the failure of the report of the Structure of Government Sub-Committee on Conventions

⁵⁴ Ibid vol I, 416 (Practice I).

⁵⁵ Ibid vol I, 416 (Practice J).

⁵⁶ Ibid vol I, 417 (Principle M).

⁵⁷ Ibid vol I, 416 (Practice K).

⁵⁸ Ibid vol I, 417 (Practice P).

⁵⁹ Ibid vol I, 417 (Practice Q).

of the Constitution 'to deal adequately with the reserve powers of the Crown exercisable through the Governor-General'.⁶⁰ It was a frank admission.

But lack of clarity was only part of the problem. The Convention's approach to the challenge of identification and definition of the reserve powers of the Governor-General assumed that constitutional conventions were appropriate means for doing so. That approach ignored their congenital infirmities of ephemeral quality and legal indeterminacy.

VII THE CONSTITUTIONAL COMMISSION

In December 1985, the Commonwealth government established a Constitutional Commission to carry out a fundamental review of the Commonwealth *Constitution*.⁶¹ The government also set up five Advisory Committees to examine particular areas of the *Constitution* and report to the Commission. One of these was the Advisory Committee on Executive Government, chaired by Sir Zelman Cowen.

The report of the Advisory Committee on Executive Government included the following pertinent observation:

Experience since federation, especially over the last decade or so, suggests that some people may read provisions of the *Constitution* literally, and it is, therefore, necessary to state explicitly that all powers vested in the Governor-General, except the 'reserve powers', are exercisable only in accordance with ministerial advice.⁶²

In effect, the Advisory Committee repudiated the argument advanced by Barton at the Adelaide meeting of the Constitutional Convention in 1897. It recommended that 'the *Constitution* be amended to provide explicitly that all powers vested in the Governor-General, except the "reserve powers", be exercisable only in accordance with ministerial advice'.⁶³

The Advisory Committee also recommended an amendment to the *Constitution* recognising the principle of a parliamentary executive, that is to say,

⁶⁰ Ibid vol I, 415.

⁶¹ Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 1, 33 ('*Constitutional Commission Report*').

⁶² Advisory Committee on Executive Government, *Report of the Advisory Committee on Executive Government* (1987) 37.

⁶³ Ibid.

that a government holds power by ‘maintaining the confidence’ of the House of Representatives.⁶⁴

The Advisory Committee identified four reserve powers of the Governor-General to act without, or contrary to, ministerial advice. These were the powers to appoint the Prime Minister, to dismiss the Prime Minister, to dissolve the House of Representatives, and to dissolve the House of Representatives and the Senate simultaneously pursuant to s 57 of the *Constitution*.⁶⁵ Surprisingly, the Committee agreed with the Australian Constitutional Convention that the Governor-General had no discretionary authority under s 128 to submit a proposed law for amendment of the *Constitution* to referendum.⁶⁶

Members of the Advisory Committee recognised the need for clarification of the reserve powers of the Governor-General but differed on how best to achieve it. A majority recommended that the Commonwealth Parliament enact a code of practice governing the reserve powers, while two dissenting members preferred only a statement of general guiding principles, without binding authority.⁶⁷

Like the Australian Constitutional Convention, the Advisory Committee proposed the formulation of detailed practices relating to the exercise of the reserve powers of the Governor-General, whether or not these practices were enacted in legislation. In framing its own recommendations regarding those practices, the Committee drew heavily upon the principles and practices recognised and declared by the Convention.⁶⁸ However, there were also some significant differences.

With regard to the appointment of the Prime Minister, the Advisory Committee agreed that the Governor-General had discretionary authority following the defeat of a government at a general election, or upon resignation or death of the incumbent, although members differed as to the scope of that authority.⁶⁹ However, the Advisory Committee disagreed with the Australian Constitutional Convention on whether the Governor-General had a reserve power of appointment of a Prime Minister following the defeat of a government in the House of Representatives. The Committee recommended that, if

⁶⁴ Ibid 16.

⁶⁵ Ibid 39.

⁶⁶ Ibid 43.

⁶⁷ Ibid 16, 38.

⁶⁸ Ibid 39–43, 65–9.

⁶⁹ Ibid 39–41, 65–6.

the House of Representatives passed a resolution of no confidence in the government, and named a person who would enjoy its confidence, the Governor-General must appoint that person as Prime Minister. Otherwise, the Governor-General had discretionary authority in making that appointment.⁷⁰

Unlike the Australian Constitutional Convention, the Advisory Committee dealt with the vexed issue of the reserve power of the Governor-General to dismiss a Prime Minister. The Committee identified two circumstances for its exercise. First, the Governor-General must dismiss the Prime Minister if the House of Representatives passed a resolution of no confidence in the Prime Minister, and the Prime Minister neither resigned nor advised dissolution of the House of Representatives or dissolution of both Houses, if appropriate.⁷¹ Secondly, the Governor-General may dismiss the Prime Minister for persisting in grossly unlawful or illegal conduct.⁷²

The Advisory Committee did not attempt to answer the question posed by the Australian Constitutional Convention whether the Governor-General had a reserve power in the event of an improper prorogation of or failure to summon Parliament. It merely suggested that an amendment to s 5 of the *Constitution* may be desirable to ensure not only that Parliament be summoned to meet no later than 30 days after the return of the writs for a general election, but also that Parliament meet within that period.⁷³

With regard to dissolution of the House of Representatives, the Advisory Committee endorsed the practices recognised and declared by the Australian Constitutional Convention, namely, that the Governor-General may dissolve the House of Representatives only on the advice of the Prime Minister, and must act on that advice when a Prime Minister who retains the confidence of the House advises its dissolution.⁷⁴ But it then proceeded to qualify those practices in several respects, all of which imply reserve powers of the Governor-General. First, like the Convention, the Committee stipulated that, so far as possible, the Prime Minister must be in a position to assure the Governor-General that the Government has been or will be granted sufficient funds by the Parliament to allow it to function throughout the election

⁷⁰ Ibid 41, 66–7.

⁷¹ Ibid 42, 68.

⁷² Ibid.

⁷³ Ibid 40, 65–6.

⁷⁴ Ibid 42, 68.

period.⁷⁵ Secondly, the Governor-General must not dissolve the House while a motion of no confidence is pending.⁷⁶ Thirdly, following a general election, the Governor-General must not dissolve the House until it has had an opportunity to consider who should be commissioned as Prime Minister.⁷⁷

The Advisory Committee followed the Australian Constitutional Convention in declaring that the Governor-General must not dissolve the Senate and the House of Representatives simultaneously pursuant to s 57 of the *Constitution* unless satisfied that the conditions specified in s 57 had been satisfied.⁷⁸ Again, however, as with dissolution of the House of Representatives, the Committee attached provisos concerning the funding of government throughout the election period⁷⁹ and precluding a double dissolution while a motion of no confidence against the government was pending in the House of Representatives.⁸⁰

Unlike the Australian Constitutional Convention, the Advisory Committee did not recognise that the Governor-General had a reserve power in convening a joint sitting of the Senate and House of Representatives to vote on a proposed law pursuant to s 57 of the *Constitution*.

Notwithstanding these differences, the approach adopted by the Advisory Committee to the issue of the reserve powers of the head of state was broadly similar to that of the Australian Constitutional Convention, involving identification of a limited number of reserve powers and declaration of the constitutional conventions governing their exercise. As previously noted, this approach had serious deficiencies.

The Constitutional Commission chose a very different path. It proposed specific amendments to the *Constitution* incorporating very limited reserve powers of the Governor-General by way of exception to the fundamental principle of responsible government that the Crown acts on the advice of ministers.⁸¹ While it noted the resolution of the Australian Constitutional Convention on recognising and declaring the principles and practices that should be observed as conventions of the *Constitution*, the Commission

⁷⁵ Ibid 43, 69.

⁷⁶ Ibid 42–3, 68.

⁷⁷ Ibid 43, 68.

⁷⁸ Ibid.

⁷⁹ Ibid 43, 69.

⁸⁰ Ibid 42–3, 69.

⁸¹ *Constitutional Commission Report*, above n 61, vol 1, 92 [2.215].

neither endorsed that resolution nor relied upon the principles and practices in framing its proposed constitutional amendments.⁸²

The Commission recommended that the Governor-General have discretionary authority in the appointment of the Prime Minister as head of the government of the Commonwealth.⁸³ It said that this authority must be exercised in accordance with the principles of responsible government,⁸⁴ discussed in ch 2 of its report. The Commission acknowledged that the legal status of those principles was uncertain but did not attempt to resolve that uncertainty.⁸⁵

The Commission recognised the reserve power of the Governor-General to dismiss the Prime Minister, but recommended that this power should be exercisable only following and on the ground of a resolution passed by the House of Representatives that the government does not have the confidence of the House.⁸⁶ Again, this discretionary authority was necessary to ensure the resignation of a government in these circumstances in accordance with the principles of responsible government.⁸⁷

The Commission recommended that the powers to appoint times for holding sessions of Parliament, to prorogue Parliament, and to dissolve the House of Representatives should all be conferred on the Governor-General in Council, thereby precluding any reserve power of the Governor-General.⁸⁸ It claimed that this recommendation reflected ‘the well established convention that the powers vested in the Governor-General by section 5 [of the *Constitution*] are exercised only on Ministerial advice’,⁸⁹ and apparently discounted any threat of abuse of these powers. However, the Commission did propose an amendment to s 5 requiring Parliament to be summoned to meet not later than 75 days after the day fixed for polling at the election, without specifying how this requirement may be enforced.⁹⁰

In a similar vein, the Commission recommended an amendment to s 57 of the *Constitution* conferring the powers on the Governor-General in Council (rather than the Governor-General) to dissolve simultaneously the Senate and

⁸² See *ibid* vol 1, 93–5 [2.224].

⁸³ *Ibid* vol 1, 316 [5.30]; see also at vol 2, 1004–5.

⁸⁴ *Ibid* vol 1, 325 [5.63] n 77.

⁸⁵ *Ibid* vol 1, 84–92 [2.187]–[2.213].

⁸⁶ *Ibid* vol 1, 316 [5.30]; see also at vol 2, 1005.

⁸⁷ *Ibid* vol 1, 89 [2.199].

⁸⁸ See *ibid* vol 1, 168 [4.214]; see also at vol 2, 997.

⁸⁹ *Ibid* vol 1, 174 [4.241].

⁹⁰ *Ibid* vol 1, 168 [4.214]; see also at vol 2, 997.

the House of Representatives, and to convene a joint sitting of the members of the two Houses.⁹¹ The Commission proposed that the authority to determine whether the requirements of s 57 had been satisfied in relation to a double dissolution or a joint sitting should be vested in the High Court, not the Governor-General.⁹² It also took the view that the Governor-General should not have discretionary authority to decide whether a double dissolution was otherwise justified, as that decision involved an exercise of political judgement liable to cause serious constitutional difficulties and public controversy.⁹³

Finally, the Commission recommended an amendment to s 128 of the *Constitution* requiring the Governor-General in Council to submit a proposed law for the alteration of the *Constitution* to referendum within a prescribed period following passage by both Houses of the Parliament or by one House twice.⁹⁴ This proposal removed any risk of abuse of the initiation process without any need for conferral of discretionary authority on the Governor-General.

VIII CONCLUSION

Meeting the challenge of identification and definition of the powers of the head of state in a republican constitution requires explicit classification of those powers according to their manner of exercise.

The formal powers of the Governor-General are uncontroversial. They should be conferred directly on the President.

The powers conferred on the Governor-General in Council are also relatively straightforward. There is no reason to suppose that, upon the change from monarchy to republic, the effective operation of the legislative, executive or judicial branches of the Commonwealth would be increased by providing discretionary authority to the President in the exercise of any of these powers. Accordingly, they should be conferred on the President in Council.

Some of the powers of the Governor-General that are exercisable only on Ministerial advice should also be conferred on the President in Council. The executive power of the Commonwealth should be vested in the President (if vesting is deemed necessary) and declared to be exercisable by the President in Council, together with the command in chief of the naval and military

⁹¹ Ibid vol 1, 247 [4.613]; see also at vol 2, 988.

⁹² Ibid vol 1, 258 [4.661], 414–21 [6.237]–[6.271].

⁹³ Ibid vol 1, 259 [4.664]–[4.667].

⁹⁴ Ibid vol 2, 883 [13.170], 1046.

forces of the Commonwealth, the transmission of a message to the House of Representatives or Senate recommending the purpose of an appropriation, and the assent to a proposed law passed by the House of Representatives and the Senate.

Other powers of the Governor-General that are exercisable only on ministerial advice should be conferred on the President and declared to be exercisable only in accordance with the advice of the Prime Minister. These include the selection, summoning and dismissal of members of the Federal Executive Council and the allocation of portfolios to Commonwealth Ministers.

Two further powers of the Governor-General which may currently confer discretionary authority would require special treatment. First, the President in Council rather than the President should exercise the power to convene a joint sitting of the members of the House of Representatives and the Senate after a double dissolution under s 57 of the *Constitution*. The jurisdiction of the High Court to determine whether the requirements of s 57 of the *Constitution* have been satisfied in relation to a proposed law enacted at a joint sitting is sufficient to protect the constitutional integrity of the deadlocks procedure without any need to confer discretionary authority on the President. Secondly, the President should be required to submit a proposed law for the alteration of the *Constitution* to referendum under s 128 of the *Constitution* after its passage by Parliament, whether by each House or by one House twice, as a corollary of the fact that s 128 allows such a proposed law to originate in either House. Then there would be no need to confer discretionary authority on the President.

In my opinion, only six reserve powers should be conferred on the President. They are the powers of appointment of the Prime Minister, dismissal of the Prime Minister, summoning Parliament, prorogation of Parliament, dissolution of the House of Representatives, and dissolution of the Senate and the House of Representatives simultaneously under s 57 of the *Constitution*. The exercise of each of these powers in particular circumstances poses a threat to our system of government sufficient to justify the exercise of discretionary authority of the President in fulfilment of a duty to uphold the *Constitution*.

Both principle and pragmatism demonstrate that reliance on constitutional conventions is more likely to hinder than help the identification and definition of the reserve powers of the head of state. Any inclination to perpetuate the Barton approach should be firmly resisted. Instead, the *Constitution* should simply state that the President has a duty to uphold the institutional integrity of the *Constitution*, including the principle that a government must have the confidence of the House of Representatives.