Reserve Powers in an Australian Republic

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The essential contours of an Australian republic are already reasonably foreseeable, even at this early stage of the debate. Although, of course, a theoretical possibility, there is no real prospect of our present parliamentary executive - "Washminster"[1] - system of government being abandoned in favour of one based upon a constitutional separation of the legislative and executive branches of government along American lines. This is for reasons both of principle and pragmatism.

The principled reason is that, whatever the virtues in abstract of the American system, and however attractive it might appear if we were starting from scratch, the critical point is that we are not starting from scratch. Australia has had almost a century and a half of experience in operating a "Westminster" system and adapting it to changing needs. Our political culture, shaped by that system, is very different from America's, especially in its strong party system. Transplanting a different system of government into an alien political and cultural environment could not only prove extremely disruptive, but experience elsewhere suggests that if we imported the American system into Australia, the result would not be the American system, but instead some hybrid mutant which might well combine the worst features of both systems.2

Moreover, one feature of the American system, often overlooked by those advocating its transplantation elsewhere, is that the legal separation of legislative and executive powers and functions means that there is a sphere of executive action immune from legislative control.[3] Do we really want such executive independence in Australia, especially since we lack a Bill of Rights,

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1 Thompson, E, "The 'Washminster' Mutation", in Weller, P, and Jaensch, D (eds), *Responsible Government in Australia*, Melbourne, Drummond, 1980, at 32.

2 Winterton, G, *Monarchy to Republic: Australian Republican Government*, Melbourne, Oxford University Press, 1986, at 101-102.

3 See, eg, *Myers v United States* 272 US 52 (1926); *Buckley vValeo* 424 US 1 (1976); *Bowsher v Synar* 478 US 714 (1986).

which is at least able to control the exercise of executive power in the United States?[4]

In this respect it is interesting to note that Sir Owen Dixon, whose logical mind made him a somewhat extreme proponent of the separation of powers,[5] believed that the structure of the Commonwealth Constitution, modelled as it was on the American, logically supported a similarly strict separation of powers doctrine. In a speech delivered in New York in December 1942, while he was Australian Minister to the United States, he remarked:[6]

> I can ... discover no reason in the form or text of the Australian constitution why the legal implications of the separation of powers should not have been as full as they have been in [the United States]. That is to say, on the face of the constitution there is nothing to displace the inference to which its form gives rise, I mean the inference that the judicature shall receive nothing but judicial power, the executive nothing but executive power, and the parliament nothing but legislative power, and the further inference that no organ other than the judiciary might exercise judicial power, none but the parliament, legislative power and none but the executive, executive power.

Dixon was, of course, well aware that responsible government operated in Australia, but thought that system "not incompatible with a strict legal separation of powers between the three organs of government".[7] The reason, as he aptly put it, was that: "Power ... is one thing. The political means of controlling its exercise is another."[8]

That may theoretically be so, but what Dixon apparently overlooked was the pervasive influence in our system of the British doctrine of parliamentary supremacy over the executive, of which responsible government is an application and means for enforcement. As Jacobs J of the High Court noted in 1975:[9]

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4 See, eg, *United States v United States District Court* 407 US 297 (1972).

5 See, especially, the *Boilermakers* case: *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

6 Sir Owen Dixon, "The Separation of Powers in the Australian Constitution", *American Foreign Law Association, Proceedings*, No 24, December 1942, 5. *Cf* Dixon's evidence to the 1927 Royal Commission on the Constitution, quoted in Winterton, G, *Parliament, the Executive and the Governor-General*, Melbourne, Melbourne University Press, 1983, at 11.

7 Dixon, work cited at footnote 6, at 5.

8 See footnote 7.

9 *Victoria v Commonwealth* (the *AAP* case) (1975) 134 CLR 338, at 406. His Honour noted that, subject to the Constitution, "[t]he same is true of any executive power expressly conferred by the Constitution" (at 406).

> The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s 61 [of the Constitution] ... may be the subject of legislation of the Australian Parliament.

This vital principle is an essential attribute of the rule of law in Australia and should not lightly be abandoned. Indeed, a republican Constitution ought to entrench it more firmly by expressly subjecting the exercise of executive power to the overriding control of Parliament, not only politically through ministerial accountability to Parliament, but *legally* as well, through subjection to legislation.[10]

The pragmatic reason for retaining our present system of government is that public opinion polls show general satisfaction with it,[11] and preference in the order of about 75% to 25% for retaining it, as compared with moving to a presidential executive.[12] Even if one may be sceptical regarding public understanding of the American system, let alone our own, these figures suggest that a fundamental change to our system of government would encounter stiff resistance.

Hence, it is virtually certain that the present system of government will be retained. Though, of course, far from perfect, little of the necessary reform requires constitutional alteration. Mostly it requires political will-power.

Reserve Powers

It is sometimes thought that a system of responsible government could not operate without "reserve powers", powers in the exercise of which the head of state retains an independent discretion to act without, or contrary to, ministerial advice. Thus, Professor Peter Hogg, a leading Canadian authority, has asserted that "[a] system of responsible government cannot work without a formal head of

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10 See, eg, Winterton, G, "A Constitution for an Australian Republic", *Independent Monthly*, March 1992, ss 51(xi) and 61(3).

11 See Bean, C, "Politics and the Public: Mass Attitudes Towards the Australian Political System", in Kelley, J, and Bean, C (eds), *Australian Attitudes: Social and Political Analyses from the National Social Science Survey*, Sydney, Allen & Unwin, 1988, at 49: 73% of respondents were "satisfied ... with the way democracy works in Australia"; 23% were not satisfied.

12 See "Majority Favor a Republic", *Time* (Australia), 26 April, 1993, at 8: the figures were 73% to 22%. For earlier surveys, see Winterton, G, "Presidential Power in Republican Australia" (1993) 28 *Australian Journal of Political Science* 40, at 41-42.

state who is possessed of certain reserve powers".[13] Similar remarks have been made by Sir Harry Gibbs on several occasions.[14]

However, with respect, this is not strictly correct, because a study of the governmental system of other nations demonstrates that responsible government can operate successfully without reserve powers vested in the head of state, either by dispensing with the need for such powers by laying down detailed rules to cover virtually all contingencies now governed by the reserve powers, or by vesting such powers in some other person or institution. Selection of the Prime Minister could, for example, be left to the lower House of Parliament, as is effectively the case in Ireland, Germany and Japan, and the parliamentary term could be fixed, as it is in four Australian States, with dissolution otherwise being left to the decision of Parliament, with the lower House either voting directly to dissolve itself,[15] or effectively so resolving by passing a simple (not a "constructive") resolution of no-confidence in the government.[16]

But while the risk of abuse of presidential power may be diminished, elimination of presidential reserve powers reduces the flexibility of the governmental machinery, making it difficult to adapt to unforeseen crises. Moreover, the British system of responsible government, inherited by Australia, views the Monarch and her vice-regal representatives as constitutional "guardians", or at least "umpires", ensuring compliance with fundamental constitutional principles, such as the rule of law and responsible parliamentary government.[17] The reserve powers, the last vestiges of the Monarch's formerly extensive governmental powers, are the means by which this constitutional guardianship is enforced.

Hence many commentators insist that the reserve powers of the Crown are an indispensable feature of British notions of responsible government. The leading Canadian reserve power scholar, Dr Eugene Forsey, for example, maintained that:[18]

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13 Hogg, PW, *Constitutional Law of Canada*, 3rd ed, Toronto, Carswell, 1992, at 253.

14 See the comments of Gibbs, quoted in Winterton, work cited at footnote 12, at 43-44; Sir Harry Gibbs, "Republic: Difficult and Dangerous", *Canberra Times*, 28 June, 1993, 11.

15 See, eg, the Austrian Constitution, art 29(2).

16 *Cf* the German Basic Law, art 68.

17 See, eg, Mount, F, *The British Constitution Now*, London, Heinemann, 1992, at 96-100.

18 Forsey, E, *Freedom and Order*, Toronto, McClelland and Stewart, 1974, at 48. (Emphasis added.)

> [t]he reserve power is indeed, under our Constitution, an *absolutely essential safeguard of democracy*. It takes the place of the legal and judicial safeguards provided in the United States by written Constitutions, enforceable in the courts.

Moreover, one of Dr Evatt's reasons for advocating codification of the reserve powers was to ensure that they would be exercised on appropriate occasions:[19]

> Perhaps the greatest advantage to be derived from defining the extent of the discretion as to the exercise of reserve powers is that the absence of definition may prevent an over-careful Governor-General from acting when he should, just as it may enable an imprudent or over-zealous Governor-General to act where no reasonable ground for intervention exists. In each case an error may be fatal to the best interests of the people which are committed in the last resort to the care of the Governor-General or Governor.

The advent of a republic, which necessitates a re-examination of the role of the head of state in our constitutional system, is obviously an opportune occasion for reconsidering what, if any, reserve powers the head of state ought to have, and how such powers should be defined.[20]

Australia's present *de facto* head of state, the Governor-General, possesses three reserve powers: to appoint and dismiss the Prime Minister, and to refuse to dissolve Parliament (or both Houses of Parliament pursuant to s 57 of the Constitution). The present Constitution simply vests these powers in the Governor-General in general terms and relies upon conventions to regulate their exercise. However, the latter were not mentioned in the Constitution, partly because the principal draftsman, Edmund Barton, feared ridicule in London if the instrument did not confine itself to the "law" (as contrasted with the conventions) of the Constitution.[21] It was able to omit reference to the conventions because it operated in the context of the British monarchical system, in which powers legally vested in the Monarch are governed by well-recognised conventions which have developed at least since the advent of responsible government 150 years ago.

Subject to specific constitutional provisions, the same conventions govern the exercise of the reserve powers throughout the Queen's dominions. Although largely unwritten and nowhere authoritatively codified, there is broad consensus regarding the core

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19 Evatt, HV, *The King and His Dominion Governors*, 2nd ed, London, Frank Cass, 1967, at 306.

20 Accord Constitutional Centenary Foundation Inc, *Representing the People: The Role of Parliament in Australian Democracy. A Discussion Paper*, Melbourne, 1993, at 46.

21 See Winterton, work cited at footnote 6, at 3.

of such conventions, although the boundaries are often indistinct. Thus, for example, no-one doubts that a government in which the lower House of Parliament has expressed lack of confidence cannot simply ignore such resolution and carry on regardless. It must either resign or seek a dissolution of Parliament, but opinion is divided upon whether, and in what circumstances, a dissolution requested on such occasions could be refused.

If the Governor-General's powers were inherited by a republican head of state, since the link with the monarchy would be severed, the present conventions governing the exercise of the reserve powers might not subsist. They might if they were regarded more generally as conventions of Australian government (although they are not uniquely Australian, but are, of course, shared with Britain, Canada, New Zealand and others), but if they were seen as conventions of the *monarchy*, abolition of the monarchy might well extinguish them as well.[22] So a republican Constitution cannot simply continue the present constitutional position of conferring powers on the head of state in general terms, relying on the constitutional conventions to govern their exercise.

If a republican head of state were to have reserve powers, several courses of action would be open:

- First, the Constitution could leave intact the present provisions conferring reserve powers on the Governor-General (ss 5, 57 and 64) and expressly provide that the conventions formerly governing the exercise of these powers should continue, notwithstanding abolition of the monarchy,[23] preferably stating that their status as non-justiciable conventions should remain unchanged, thereby allowing their continued evolution.[24]
- In addition, Parliament might be authorised to regulate these powers. Parliament may already have the power to do so by a simple majority in each House.[25] But because of the quasi-constitutional nature of such rules, it would be appropriate to provide that legislation governing the exercise of these

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22 As Sir Harry Gibbs has stressed (Gibbs, work cited at footnote 14; Sir Harry Gibbs, "Remove the Queen, and the Whole Structure Could Fall", *Australian*, 7 June, 1993, 11).

23 *Cf* the South African Constitution of 1961, s 7(5): "The constitutional conventions which existed immediately prior to the commencement of this Act shall not be affected by the provisions of this Act."

24 See, eg, Winterton, work cited at footnote 10, at s 60A.

25 Winterton, work cited at footnote 6, at 98-101. But see Lindell, GJ, Book Review [of work cited at footnote 6] (1983) 6 *University of New South Wales Law Journal* 261, at 267-268.

powers should be passed by a super-majority, say a two-thirds majority in each House, in order to ensure bi-partisan support.

- The Constitution could partially codify the reserve powers and convert them into law: for example, by prescribing detailed rules on matters on which there is general consensus (such as the appointment as Prime Minister of the person most likely to command the support of the House of Representatives), while leaving more controversial matters to be governed by the general provision continuing the present conventions and, perhaps, Parliament's power to regulate them (if that be considered appropriate).

  Converting the conventions into law need not render them justiciable, since the Constitution could expressly provide that some or all of such rules should not be justiciable.[26] It would, for example, be appropriate for provisions conferring a discretion upon the head of state to remain non-justiciable, while mandatory provisions might well be enforced by the courts.[27]

- Finally, the current constitutional provisions could be replaced by detailed rules seeking to govern all contingencies, although one must question the wisdom of seeking to provide for unforeseeable crises in a Constitution as difficult to amend as ours.

In considering what, if any, reserve powers to vest in a republican head of state, it is noteworthy that the present reserve powers of the Governor-General are quite extensive compared with those of other successful constitutional monarchies and republics with a parliamentary executive form of government. The monarchs of Sweden and Japan, for instance, exercise no reserve powers whatever, and the Presidents of Ireland, Germany, Austria, Italy and Israel all possess fewer reserve powers than the Australian Governor-General. Their Constitutions essentially adopt a more democratic, less deferential, perspective, entrusting critical political decisions to Parliament, and demonstrate greater

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26 See, eg, the Constitution of India, art 74(2); the Constitution of Papua New Guinea, s 86(4); Ryan, KW, *Opinion for Standing Committee "D"*, Australian Constitutional Convention, 1978, at paras 26-33.

27 See Republic Advisory Committee, *An Australian Republic: The Options - The Report*, Canberra, AGPS, 1993, at 90 and 103-105; Constitutional Commission, *Report of the Advisory Committee on Executive Government*, Canberra, AGPS, 1987, at 39-43.

confidence than ours in Parliament's capacity to resolve political crises.[28]

If, as is likely, an Australian republican head of state will be expected to inherit the Governor-General's constitutional guardianship role, it will be necessary to enable powers to be exercised against ministerial advice in extreme cases; in other words, to confer reserve powers. But since all power is open to abuse - in Juvenal's classic query, "Who guards the guardians?"[29] - no greater discretion should be conferred on the head of state than is *absolutely necessary* to secure the rule of law and protect the operation of responsible government from abuse by the executive. If other means of protection exist, such as action by Parliament or the judiciary, then the exercise of a reserve power is not necessary to deal with that exigency, and the power should not exist.[30]

In regulating the reserve powers, the principles of representative and responsible government suggest that matters capable of being resolved by politicians should be left in their hands. Accordingly, "constructive" (rather than "simple") no-confidence resolutions - resolutions which express not only lack of confidence in the incumbent Prime Minister but also confidence in someone else - should be employed whenever possible, and should bind the head of state, at least if passed by an absolute majority of the members of the House. However, there is some reluctance at present to accept this principle, perhaps because the constitutional role of the Crown is seen as so fundamental that the lower House's opinion as to who should form a government should not *bind* the head of state, but only be highly persuasive.[31] But, since the principle of responsible government requires the Prime Minister to be the person enjoying the House's confidence, it would be somewhat bizarre if the House's statement as to who actually *does* enjoy that confidence were ignored. Moreover, there is no reason why views

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28 For a comparison of presidential powers in various republics, see Republic Advisory Committee, *An Australian Republic: The Options - The Appendices*, Canberra, AGPS, 1993, Appendices 3 and 4; Constitutional Centenary Foundation Inc, *Heads of State: A Comparative Perspective. A Discussion Paper*, 1993; Winterton, work cited at footnote 2, at 110-113.

29 Juvenal, *Satires*, in *The Oxford Dictionary of Quotations*, 2nd ed, London, Oxford University Press, 1953, at 283.

30 See further, Winterton, work cited at footnote 12, at 46-47.

31 See the *Constitution (Fixed Term Parliaments) Special Provisions Act* 1991 (NSW), s 7; Winterton, G, "The Constitutional Position of Australian State Governors", in Lee, HP, and Winterton G (eds), *Australian Constitutional Perspectives*, Sydney, Law Book Company, 1992, at 324-328 (discussing the views of Tasmanian Governor Sir Phillip Bennett and others).

based on the supposed "rights" of the Crown should subsist under a republic.

The reserve powers appropriate to a republican head of state cannot be determined in abstract, since much will depend upon other features of the office, above all the method of selection.[32] But if political crises are to be resolved by Parliament, it is important to ensure that Parliament is sitting and able to act at the relevant time. The Governor-General's powers to summon and prorogue Parliament are not at present reserve powers, but are exercisable only in accordance with the advice of the Prime Minister.[33] If Parliament is to have principal responsibility for resolving political crises, there is a strong case for authorising the head of state to exercise independent discretion to summon Parliament and to refuse to prorogue it, thereby effectively creating two new reserve powers.[34]

President and Governor-General Compared

At present the Governor-General is effectively appointed and removable by the Prime Minister, although the Monarch formally exercises the power, which presumably acts as a restraint upon prime ministerial whim. Although, of course, theoretically possible, it is unlikely that a republican head of state would be appointed and removable by the Prime Minister alone. Some form of election - whether directly by the people or by Parliament, perhaps by a super-majority - together with relatively secure tenure - perhaps analogous to that enjoyed by judges - is more likely.

This has led to concern that even if a republican head of state inherited exactly the same powers as the Governor-General, the greater democratic legitimacy and more secure tenure of the office would upset the present delicate balance of power and influence between the Governor-General and the government. This argument was put recently in rather extreme terms by Lloyd Waddy, the Convenor of Australians for Constitutional Monarchy: "Any change means giving *more or less* power to the executive (and Prime Minister) and *either* change is wholly undesirable."[35] In other words, the present system represents perfection incarnate!

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32 For general comments on republican reserve powers, see Winterton, work cited at footnote 12, at 47-49.

33 See *Proceedings of the Australian Constitutional Convention*, Brisbane, 1985, vol 1, at 417 (Practice N).

34 See Winterton, work cited at footnote 31, at 297.

35 Waddy, L, "Inevitable? Not at All" (1993) 28(5) *Australian Lawyer* 16, at 18. (Emphasis added.)

However, even under the present system, the balance of power and influence between the government and the effective head of state is not static and fluctuates depending upon the political situation (for example, whether Parliament is "hung" or the government enjoys a secure majority) and the personalities involved. But is the present balance so perfect that *improvement* is impossible?

The exact political balance between the government and a republican head of state will obviously depend upon the President's powers and method of selection and removal, making it impossible to predict before any of these issues have been settled. However, some tentative observations can be offered.

Several factors are likely to enhance the President's independence and status as compared with the Governor-General's, which may tend to increase the probability of exercises of the reserve powers. But their effect is uncertain, and some have countervailing implications.

First, the President will be the actual head of state, perhaps elected by a representative body by a "super-majority", which is likely to exceed the support enjoyed by the government. These factors are bound to give the President greater status and self-assurance than that enjoyed by the Governor-General, who is merely a surrogate, not actual head of state.[36] This will be even more likely if the head of state is popularly elected, making it the only nationally elected public office.

A second factor is that, unlike the Governor-General, the President would feel no constraint derived from concern not to injure the monarchy. Yet Sir John Kerr demonstrated in 1975 that this factor could actually *encourage* the exercise of a reserve power, for he failed to warn Mr Whitlam of his possible dismissal partly out of concern not to involve the Queen, which would have occurred had Mr Whitlam advised her to remove the Governor-General.[37]

Finally, would a President's greater security of tenure encourage the exercise of reserve powers? The present removability of the Governor-General on the "advice" of the Prime Minister[38]

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36 See, eg, Kirby, M, "A Defence of the Constitutional Monarchy" (1993) 37(9) *Quadrant* 30, at 34.

37 Sir John Kerr, *Matters for Judgment*, Melbourne, Macmillan, 1978, at 332.

38 Although some commentators, especially Geoffrey Marshall and Andrew Heard, have queried whether the Monarch would be obliged ultimately to comply with prime ministerial advice to remove a

might be thought to constrain the exercise of reserve powers in two respects. First, a Prime Minister warned of possible dismissal, or faced with a refusal of dissolution, could secure the removal of the Governor-General, although political realities would surely make such removal during a crisis extremely hazardous politically, and therefore highly unlikely. A greater threat, perhaps, is that a Prime Minister against whom a reserve power has been exercised might punish the Governor-General by removal if successful at a subsequent general election.[39] Indeed, when Dominion governments first acquired the power to remove Governors-General (in effect at the Imperial Conference of 1930), some feared that the reserve powers had thereby effectively been abolished. The Canadian scholar, WPM Kennedy, for example, asserted in 1938 that:[40]

> it is not too much to say that in practice no "reserve powers" can exist in a Dominion, for the simple reason that a Governor General who persisted in refusing ministerial advice would be at once recalled on the advice of his ministry given direct to the King.

Subsequent events have proved that to be an over-statement, but fear of removal can certainly influence vice-regal action, as Sir John Kerr demonstrated in 1975.[41] Yet such considerations may not be wholly absent under a republic for, if the President is eligible for re-election, presidential independence might well be constrained by concern not to alienate the government party and thereby impair re-election prospects. For this reason, some commentators have argued that a President should not be eligible for re-election.

The Senate and Supply

Recent public opinion polls reveal strong public support (about 80%) for popular election of a republican head of state, as compared with election by Parliament or appointment by the government.[42] This presumably reflects a widespread popular desire to take the choice of head of state out of the hands of politicians and exercise it

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Governor-General, the better view, with respect, is that she would be. See Winterton, work cited at footnote 31, at 278-281.

39 Evatt, work cited at footnote 19, at 200, 248 and 288.

40 Kennedy, WPM, Book Review [of work cited at footnote 19] (1938) 2 *University of Toronto Law Journal* 408, at 409. See also, Heard, A, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto, Oxford University Press, 1991, at 43.

41 See Sir John Kerr, "Kerr Rejects Ambush Myth: 'PM Knew I Could Sack Him'", *Bulletin*, 10 September, 1985, 72, at 78-79.

42 *Bulletin*, 19 October, 1993, 13 (popular election 80%); *Australian*, 19 July, 1993, 2 (popular election 79%); *Bulletin*, 11 May, 1993, 14 (popular election 83%); *Time* (Australia), 26 April, 1993, 8 (popular election 71%).

themselves, making it one of the features of a republic for which people express considerable enthusiasm. This is understandable, but the practicalities of popular election suggest that the public has not really thought the matter through, for there are also strong indications that many people would prefer a non-politician as head of state. Yet, unless strong counter-measures were adopted, popular election would almost guarantee the election of a politician. Nevertheless, if public opinion remains steadfast, popular election may have to be conceded, perhaps with careful provision being made to minimise the role of political parties in presidential election campaigns and for the public funding of campaigns by nominees selected by an independent and impartial presidential nominating commission.

Political neutrality is one of the concerns expressed regarding a popularly-elected head of state. Another is the likelihood that almost half the country will have voted against the successful candidate, making it difficult for him or her to act as a focus of national unity. Most important, perhaps, is the fear that such a head of state will feel empowered by a "popular mandate" to exercise reserve powers, unconstrained by the conventions hitherto governing the Monarch and her appointed representatives.[43] The experience of the popularly-elected presidencies of Ireland and Austria belies such notions, but they are nevertheless likely to be influential in the republican debate, and to lead to demands that the reserve powers be codified, and thereby narrowly confined.[44]

Although the boundaries of the reserve powers are contentious, bi-partisan agreement on most issues should not prove impossible. The exception, however, is resolution of the appropriate consequence of Senate blockage of Supply, on which the political parties seem as divided today as they were in 1975. Those fearful of the prospect of a popularly-elected head of state invested with the present legally undefined powers of the Governor-General[45] presumably wish to remove the Senate's power to block

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43 See, eg, Governor-General Bill Hayden, *Record of Interview Between the Governor-General and Mr Bob Hawke: Canberra, July 27, 1993* (unpublished), at 6-7; Devine, F, "Never Mind the Olympics, the Republic Can't Be Rushed", *Australian*, 11 October, 1993, 11.

44 On the other hand, some see virtue in a popularly-elected head of state "with sufficient independence ... to provide a balance to an otherwise autocratic Prime Minister" (see Evans, H, "The Agenda of the True Republicans", in Walker, G de Q, Ratnapala, S, and Kasper, W, *Restoring the True Republic*, Sydney, Centre for Independent Studies, 1993, at 6).

45 The present writer does not believe that the Governor-General's powers are legally undefined (see Winterton, work cited at footnote 6, at 124-127, 128-129 and 151), but that is a minority view.

Supply, or the head of state's power to force a dissolution of Parliament (whether or not the Prime Minister is also dismissed), or both. But the Conservative parties are extremely unlikely to agree to such a constitutional amendment, and without their support passage of a referendum to establish a republic would be difficult, to put it mildly.

So, to state the position bluntly, those wishing to see the advent of an Australian republic may have to accept the prospect of a popularly-elected President invested with the present power of the Governor-General to dismiss the Prime Minister (or force a dissolution of Parliament), presumably limited by a constitutional provision expressly continuing the present constitutional conventions, as conventions, not rules of law.

Two questions arise. First, even if it be conceded, for the sake of argument, that a popularly-elected President would be less reluctant than the Governor-General to exercise reserve powers, is that prospect so horrendous that the advent of a republic should be deferred, possibly indefinitely, to avoid it? And secondly, can nothing be done to minimise the prospect of such an exercise of the reserve power?

Regarding the first issue, it needs to be remembered that the consequence of an exercise of the reserve power exercised in 1975 is simply a general election. Now it is, of course, true that a House in which the least populous State has equal representation with the most populous is somewhat lacking in democratic credentials; that an Upper House's ability to force the government to the polls effectively makes that government ultimately responsible to both Houses, which before Federation Richard O'Connor rightly declared "utterly impossible";[46] and that, as Eugene Forsey aptly put it, "an 'appeal to the people' is not necessarily democratic. It might be merely demagogic, pseudo-democratic, even anti-democratic".[47] Moreover, the Senate's ability to force the government and the House of Representatives to the polls without itself facing the electors highlights the constitutional incongruity of its actions.

Yet, all this must be seen in proper perspective. The exercise of this reserve power leads not to emergency powers, or martial law, but merely refers a constitutional impasse between two legislative Houses - or, realistically, two political parties - to the people, the ultimate sovereigns.

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46 *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, at 499.

47 Forsey, work cited at footnote 18, at 44.

Secondly, can anything be done to persuade a popularly-elected head of state to exercise caution in the exercise of reserve powers? Since much of our Constitution, especially the executive, is the product of evolution, we are less familiar than the Americans with deliberate engineering of constitutional checks and balances to constrain the exercise of power, but their Constitution is a testament to the success of such devices.

If fear of removal constrains the vice-regal exercise of reserve powers, why not introduce that element into a republican Constitution? Professor SA de Smith aptly characterised the Monarch's power to dismiss the government as "an ultimate weapon which is liable to destroy its user"[48] - analogous, in other words, to a bee-sting. Why not apply that principle here, and provide that a President who forces a dissolution of Parliament, or dismisses the government consequent upon Senate blockage of supply, shall thereupon forfeit office and thereafter become ineligible for the presidency?

Such a provision need not, of course, be confined to a popularly-elected President, and could apply more generally to dismissal of the government on any ground. Moreover, it is suggested here merely as an illustration of the type of provision that might be contemplated. It surely is not beyond our ingenuity to find imaginative solutions to these and other difficulties on the path to becoming a republic.

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48 de Smith, SA, and Brazier, R, *Constitutional and Administrative Law*, 6th ed (by Brazier, R), London, Penguin, 1989, at 116.