IMAGINING CONSTITUTIONAL CRISES: POWER AND (MIS)BEHAVIOUR IN REPUBLICAN AUSTRALIA

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> The change we propose [to the Australian Constitution] has very limited implications for the design of Australia's democracy. It is the so-called "minimalist" option. All the essential constitutional principles and practices which have worked well and evolved constructively over the last hundred years will remain in place.[1]

INTRODUCTION

The previous Australian government's aim was to remove the hereditary office of the monarch with only minor changes to the Australian system of government. Former Prime Minister Paul Keating stated that the proposed "republican" changes would have limited implications for the design and operation of Australian democracy. But his quest, and the quest of those who support the republican movement, may represent a more momentous shift in Australian political values and political sensibility than is widely admitted. This shift might lead to the enhancement of democratic participation. Indeed, the debate surrounding the republican initiative has already caused both a revised understanding of Australian political philosophy and a renewed appreciation of certain strong democratic threads in the history of Australia as a nation.

In Australia, the debate over republicanism reflects an apparent tension between two opposing points of view. On the one hand, there are those who prefer to preserve

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1 P Keating, "An Australian Republic: The Way Forward", 7 June 1995 at 7. The new Howard government (elected 2 March 1996) proposes to put the issue of whether or not Australia should become a Republic on the agenda at a constitutional convention to be held in 1997. If no consensus is reached by the convention, the coalition intends to put a range of options for a Republic to a referendum in 1998 or 1999. See John Howard, "Republic Debate: Response by the Leader of the Opposition", 8 June 1995.

symbolically-laden elements of Australia's British heritage (especially since these elements no longer seem to carry an imperialist agenda and have simply become a manifestation of a domestically formed identity). On the other hand, there are those who want Australia's constitutional form to reflect its strong spirit of independence and its separation from its colonial beginnings.

There are good reasons to retain the monarchical form. As a symbolic expression of national identity, the monarchy could be said to have evolved into an Australian institution; describing something truthful about the nation's origins, while at the same time accurately expressing a cultural aspect of the Australian polity. There are also good reasons to wish to end the Australian monarchy: its expression of national identity is partial and, as such, it privileges a memory of Australian history that no longer deserves special regard. It reflects a concept of cultural identity about which many Australians have long been sceptical and to which they often paid little respect.

This controversy is certainly not trivial, since it involves a heady dispute over selecting a mode for expressing cultural memory and identity. However, beneath this debate is another, equally momentous, debate. This is the debate over what "republicanism" implies for political life in Australia. By this, we do not only mean how tensions between presidential power and governing power would be mediated (although this, too, is important). We also contend that there is the underlying question of whether adopting republicanism will alter the political soul of Australia.

The history of constitutional theory reveals that the debate about republicanism is concerned with more than with whether the Head of State is identified by election or birth. Nor is the debate limited to the question of whether the Head of State is selected by a governing elite or by a more broadly based democratic process. Republicanism's richer meaning describes a polity marked by an engaged self-governing citizenry, that is, a citizenry which is motivated not so much by self-interest and the pursuit of personal happiness as by a concern for the public good. The deep debate within Australian republicanism focuses on whether this concern in any way underlies the shift to a republican form of governance. Thus, there are two aspects of constitutional change to a republic in Australia. First, does republicanism present an uncertain and possibly destabilising change in political relationships which undermines the continuity of the political system? Secondly, does republicanism represent a change in the basis of popular participation in political life?

As we noted earlier, some Australian republicans have preferred to present minimalist accounts of their reform project. But, as we will illustrate, there is much at stake for Australia in adopting a republican form. The minimalist republican proposal has the potential to effect a more substantial political change than that which is expressly anticipated. However, whether this should be a cause for concern and anxiety is an open question. Rather than assuming this political change would be unwanted, it is worth considering whether it might, in fact, occasion a political awakening in the Australian people.

Our examination of the previous federal government's "minimalist" reforms will be developed as follows. First, we describe the proposals put forward by the Keating Government to establish a republican Head of State in Australia. We then explore the historical and philosophical principles that underlie republicanism and speculate on their relevance to Australia. Next, we draw out the potential for political destabilisation as a result of making the structure of democratic legitimacy more complex and examine the Keating Government's attempts to control any such destabilisation. This is

followed by our own proposal of how to construct a role for a republican Head of State in order to promote political stability. Finally, by considering problems associated with selection of the Head of State, we consider how republicanism might provide a means for enhancing participation in the Australian political community.

Before turning to these parts of our argument, we want to state our position on the underlying question of whether there is any necessary connection between the so-called "minimalist" constitutional reform and questions of political stability and consciousness. We believe that the change from a monarchic to a republican Constitution could serve to emphasise social solidarity, as well as those enduring and non-private pursuits of the common good that mark the broader republican character. This consequence is, of course, not a necessary result of a minimal alteration to the Australian Constitution. Our view is that such a result may eventuate by involving the citizenry not only in the choice of governors, but also in the choice of the Head of State as the guarantor of governing legitimacy. This electoral task requires that popular attention be paid not only to the question of distribution and restraint but also to the question of position and function. In other words, popular attention directed to the question of conditions for governance would divert citizens from considerations of immediate wants towards questions about the needs of the entire polity. Further, the procedural role of determinations by the Head of State would shift the focus from the private to the communal. In a republic, the discourse of politics would change to one in which the people identify a role for themselves in the maintenance of good government. For instance, in a context similar to the dismissal in 1975 of Prime Minister Gough Whitlam by Governor-General Sir John Kerr, the debate would not revolve around an unaccountable vice-regal authority trumping the power of the democratically elected Prime Minister.[2] Rather, the debate would concern which mandate conferred by democracy has a greater claim to vindication — the mandate to govern or the mandate to guarantee the continuity of the political system. This kind of discussion involves the people in authentic questions about the political community's long-term interests. Such a debate draws out the question which is always in the background in complex democratic states: when is it appropriate to interrupt the ordinary course of politics in order to maintain political stability and public confidence in government?

In terms of the constitutional significance of republicanism, we see further serious consequences. Even at its most "minimalist", the republican proposal alters the principles for the continuance of constitutional government. The critical relationship between the Prime Minister and Head of State would change fundamentally. The election of a President would not be a mere substitution for the Queen and therefore would not leave all the essential constitutional principles and practices intact. The election of a President would open up new possibilities for the abuse of power in office and for the kind of misbehaviour that can lead to constitutional crises. There is a danger, for instance, that the President or Prime Minister would take as his or her chief political objective the perpetuation of his or her own position. The engagement of the two highest political officer-holders in machiavellian activities would be not only mischievous, but potentially harmful to the stability of the whole political system. In the shift to republicanism, we may be courting the development of strategies that could corrupt our political system. We risk experiencing shadowy moments of political life in

2 Assuming that, under a republican system, the Head of State would continue to have the option of dismissing the Prime Minister.

which we become strangers to our sense of political propriety; moments from which we may never recover. However, it is only by acknowledging these risks that we can determine how to avoid them. The true value of the Keating Government's proposal will be found in its capacity to forestall competition and collusion for power between the Prime Minister and President. After carefully weighing the Keating Government's proposal, we find it wanting in this regard.

THE FORMER KEATING GOVERNMENT'S PROPOSAL

Former Prime Minister Keating maintained that his government's proposal would create a change which would significantly enhance Australian culture. He invested much in the new office; the President as Head of State would embody Australian values and traditions, experience and aspirations, making clear Australia's independence and its responsibility for its own affairs.

> An Australian Head of State can embody our *modern* aspirations — our cultural diversity, our evolving partnerships with Asia and the Pacific, our quest for reconciliation with Aboriginal Australians, our ambition to create a society in which women have equal opportunity, equal representation and equal rights.[3]

Thus the Head of State would remind us of the things we stand for at home and abroad. The creation of an Australian Head of State could deliver a heightened sense of unity and it could enliven our national spirit. Yet all of this is apparently based merely on the hope that an Australian as President would provide a symbol, or at most, an example of such aspirations. Almost anti-climatically, Paul Keating concluded that "[i]f only by a small degree an Australian republic fulfilled these ideals it would be worth it".[4]

Perhaps we should not be surprised by this admission. The proposal was, after all, for a "minimal" alteration. According to the Keating Government, the replacement of the monarch with an Australian Head of State would be a small step forward, and the last step in the project of independence begun nearly 100 years ago.[5] Possibly to underline the modest character of this constitutional change, the Keating Government proposal[6] was cast in the sober language of a serious proposition and supported by dispassionate policy justifications. A comparison was made between present and proposed provisions of the Constitution to reveal the minimal character of the change. This presentation was packaged in a way that allowed the proposal to be succinctly summarised and to be relatively straight forward. The Keating Government's intentions can be outlined in five propositions.

(1) An office of Head of State would be created and given the title of President.[7] The candidate would need to be an Australian citizen of voting age to qualify for the office. Under the current system, the Constitution does not contain qualifications for the Governor-General. The creation of formal procedures would ensure that the new office will be open to all citizens.[8]

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3 P Keating, above n 1 at 4.
4 Ibid at 5.
5 Ibid at 6.
6 See Office of the Prime Minister, "An Australian Republic: The Way Forward: Questions and Answers", 7 June 1995.
7 Ibid at 13.
8 P Keating, above n 1 at 5; ibid at 12.

(2) A procedure for the appointment and removal of the Head of State would be prescribed.[9] The President would be elected by a two-thirds majority vote in a joint sitting of both Houses of the Commonwealth Parliament, with the Prime Minister submitting a single nomination.[10] The President would be removed by the same majority procedure if he or she were incapable or guilty of proven misbehaviour.[11] Under the current arrangements, the Governor-General is appointed and removed by the Queen acting on the advice of the Prime Minister. The aim of the Keating Government's proposal is to make it "impossible for any government to dictate the outcome of this process".[12] This special majority would require bipartisan support and thus ensure that the Head of State would be blessed by all major parties. Such a vote would also encourage cooperation.[13]

(3) The powers or functions of the President would remain the same as those of the Governor-General so as to enable the Head of State to resolve a constitutional crisis.[14] To provide a check against a President who might be tempted to abuse his or her position of power, there would be enacted new constitutional provisions recognising continuity of the constitutional conventions, although the Constitution would not specify their content. The Keating Government rejected a comprehensive code of the Head of State's powers because it could not be written "in a way that would both find general community acceptance *and* cover every possible contingency".[15]

(4) The implications of a republic for the role of the Queen with regard to the States would require consideration.[16] The States are constitutional monarchies with the Queen as Head of State. Her representative in each State is the Governor. Each State would be free to choose for itself whether it remains a monarchy. The Keating Government contends that the good sense of the people will ensure an appropriate outcome for Australia.[17] Under the constitutional amending procedure, a majority of people in four States would be required to introduce a Commonwealth republic. Consequently, two States may realistically remain monarchies after a successful referendum.[18]

(5) Re-writing of the Constitution would be necessary to introduce a republic.[19] Apart from the above amendments, other changes will be largely incidental, often simply replacing references to the Crown, Queen, or Governor-General with the appropriate republican term, without altering the practical effect of the provisions.[20]

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9 Office of the Prime Minister, above n 6 at 3-6.
10 Ibid at 3.
11 Ibid at 6.
12 P Keating, above n 1 at 13.
13 Ibid at 13; Office of the Prime Minister, above n 6 at 4.
14 Office of the Prime Minister, above n 6 at 7.
15 P Keating, above n 1 at 10.
16 Office of the Prime Minister, above n 6 at 14.
17 Ibid.
18 Ibid.
19 Ibid at 17.
20 Ibid.

THE CHANGE BEHIND STRUCTURAL CHANGE: A NEW CONSTITUTIONAL PRINCIPLE

The apparent simplicity of the former government's proposals disguises the potential significance of these structural alterations. The Keating Government has provided little or no discussion of the possible philosophical implications of its proposal. The following explores the philosophical ramifications of the removal of the Crown and the incorporation of a republican Head of State. In other words, we explore the change behind the structural change: the emergence of a new constitutional principle in Australia.

The first implication of this structural change is the invocation of a republican philosophy of thought as a value system or paradigm[21] on which to base our system of government.[22] Republicanism is a rich political philosophy which does not merely entail the replacement of the monarch with a popularly chosen President. This philosophy rests on the idea that the highest collective human endeavour is the joining of citizens, who are approximately equal, in the ongoing political project of self-government. Republicanism is less about the condition of individual freedom than it is about establishing conditions for political freedom or independence. These conditions necessarily include an educated population committed to the well-being of the state and to a habit of open political discourse. Republicanism *per se* represents a different conception of ruling from that of a monarchy. Republicanism is, of course, profoundly anti-monarchical because it is about the rule by all citizens.[23] Selection for political office should not be based on birth or patronage; rather it should be open to all and all should be engaged, in some way, in the conferral of office. Importantly, republicanism also expresses a different role for the citizen. The citizen is no longer the subject (or beneficiary) of the Queen's peace, or army or court, but becomes a joint bearer of

21 G Williams, "A Republican Tradition for Australia?" (1995) 23 *FL Rev* 133.

22 There is much scholarly debate over the range of republican conceptions which are apparent in Australian history. Some believe that the republican philosophy is barely evident: see G Winterton, "Presidential Power in Republican Australia" (1993) 28 *Australian Journal of Political Science* 40 ("Presidential Power"); cf G Winterton, "A Republican Constitution" in G Winterton (ed), *We, The People: Australian Republican Government* (1994) 38 ("We, The People"); C Condren, "The Australian Commonwealth: A Republic and Republican Virtue" (1992) 6 *Legislative Studies* 31. Others believe that a fertile republican philosophy is apparent in Australian history: J Warden, "The Fettered Republic: The Anglo-American Commonwealth and the Traditions of Australian Political Thought" (1993) 28 *Australian Journal of Political Science* 83 at 93-6; see generally, D Headon, J Warden and B Gammage (eds), *Crown or Country: the Traditions of Australian Republicanism* (1994). For a discussion of republican themes see: P Pettit, "Republican Themes" (1992) 6 *Legislative Studies* 29; K Boehringer, "Against Clayton's Republicanism" (1991) 16 *Legal Service Bulletin* 276; A Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990); A Fraser, "The Corporation as a Body Politic", (1993) 57 *Telos* 5; M Lake, "A Republic For Women?" *Arena* (1994, No 9) 32; H Irving, "Boy's Own Republic" *Arena* (1993, No 8) 24. See also M A Stevenson and C Turner, *Republic or Monarchy: Legal and Constitutional Issues* (1994); J Hoorn and D Goodman (eds), *Feminism and the Republic* (1996); B Galligan, "Regularising the Australian Republic" (1993) 28 *Australian J Political Science* 56. See also the debate between George Williams and Andrew Fraser: A Fraser, "In Defence of Republicanism: A Reply to George Williams" (1995) *FL Rev* 362; G Williams, "What Role for Republicanism? A Reply to Andrew Fraser" (1995) *FL Rev* 376.

23 A monarch is literally, a sole ruler.

responsibility for the safety, sanity and efficiency of state power. Republicanism presents a substantive version of popular government. It is a constitutive principle requiring that both citizens and political figures act in the public interest as opposed to, say, the mere satisfaction of wants or vindication of interests.[24]

At heart, republicanism has always been about the moral claims on citizens in political communities aspiring to self-determination. As Professor Cass Sunstein has observed:

> [T]he animating principle of [republicanism] was civic virtue. To the republicans, the prerequisite of sound government was the willingness of citizens to subordinate their private interests to the general good. Politics consisted of self-rule by the people; but it was not a scheme in which people impressed their private preferences on the government.[25]

This principle has been promoted both in modern and early times. Under classical republicanism, civic virtue could not be the abiding concern of politics, nor public spiritedness the abiding condition, except in small political communities marked by homogeneity and a close proximity between governmental action and the well-being of all citizens. However, at the time of American independence, it was argued by some that large and diverse communities could be created on republican lines through the use of a system of political representation. According to James Madison, the engagement of citizens in government through a system of elected representation would, in fact, be superior because "it may well happen that the public vote, pronounced by the representatives of the people, will be more consonant with the public good than if pronounced by the people themselves convened for the purpose".[26]

Today, representatives rarely seem to act in aid of the general public good. A critical reason for the decline of civic virtue is the prevalence of factionalism and political conflict. These modern facts of life arise from that almost ubiquitous characteristic of civil society: "The People" today is a heterogeneous body with a diversity of identities, interests and political allegiances.[27] Conflict rather than consensus is a normal or even desirable part of our politics. Representatives adhere to particular rather than common interests. Political parties dominate our parliaments. But a republican conception of politics still offers important insights and guidance for political actors. What is central to a revised republicanism, and to an attendant conception of its legitimacy, is that state power rests on the active engagement of citizens in the choice of governmental policies, in the conduct of government and in the selection of governors. Public discussion or the giving of reasons, the expression of

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24 See R Dahl, *Democracy and its Critics* (1989), ch 2.

25 C Sunstein, "The Enduring Legacy of Republicanism", in S Elkin and K Soltan (eds), *A New Constitutionalism* (1993) 174 at 175. See J Warden, above n 22 at 88; see also C Sunstein, "Interest Groups in American Public Law" (1985) 38 *Stanford L R* 29 at 45. It is noteworthy that the wishes of some of the American Founders were that those who own the land should run the country. Hence the experience in the United States has been that private interests did affect the government: see G Williams, above n 21 at 136.

26 J Madison, *The Federalist*, No 10, 23 November 1787. This understanding is surprisingly close to the Burkean conception of representation. See, eg, Speech to the Electors, 3 November 1774, reprinted in R J S Hoffman (ed), *Burke's Politics: Selected Writings and Speeches on Reform, Revolution and War* (1949) 116. See also S Miller, *Special Interest Groups in American Politics* (1983) at 52-53.

27 R Dahl, above n 24 at 25.

needs, feelings and aspirations, and a willingness to talk and listen, in order to reach an understanding, determine the content of government.

Of course, in mature democracies, especially ones that mediate social diversity through a sophisticated system of political parties, traces of the republican conception of the common good can be ascertained. In Australian politics, a common interest in the continuity of the democratic process and in relation to certain substantive issues exists. For instance, many of us have recently shared the conviction that nuclear tests in the Pacific should end. Likewise, in 1967, an overwhelming majority of Australians supported the constitutional recognition of the status of Aboriginal people. More broadly speaking, there is an almost universal commitment to the continuity of the political system and its democratic institutions, a commitment which is directed to the common good rather than narrow self-interest.

Republicanism's deepest purposes go beyond anti-monarchism to a spirited opposition to privilege and the promotion of narrow interests by government. This opposition, we would argue, is present in Australian political memory. Our argument is that republicanism confirms and enhances a general political vision which already exists in mature political societies including Australia. Changing the arrangement for selecting the Head of State to some form of general participation will foster tendencies to seek out common political interests. After all, the Head of State is a single power-holder and must find a political base in deeper, more general notions of the political good.

REPUBLICANISM AND CHANGE IN POLITICAL LEGITIMACY

It is important to consider republicanism not only as a possible change in political philosophy (or political vision) but also as a change in political legitimacy (or the justification for political action). Consequently, a second possible change to basic constitutionalism brought about by the shift from a monarchy to a republic relates to the very nature of the political legitimacy of Australian public authorities. While there may not be a large difference in the legitimacy of the state under a republic compared to that under a constitutional monarchy such as Australia, there is an important rhetorical difference in the role of government. In a monarchy, the elected governors — the Ministers of the Crown — are invited to govern by the regnal head, and governing is done in his or her name and with his or her consent. The regnal head has, of course, little choice in the exercise of power: whom to invite to govern is mostly determined by the electorate, the advice given to the monarch is usually binding and, in reality, there is no discretion in giving royal assent to Bills. By contrast, in a republic, Ministers are selected and govern with the consent and on the authority of a mandate secured solely from the people.

The different bases for exercising ultimate personal responsibility for government are significant. In a republic the electorate retains ultimate personal responsibility for determining which governors (and which governance) it is wise to select, while in a monarchical tradition, even in the highly attenuated form found in Australia, ultimate personal responsibility for "virtuous" government — government that is legitimate and conducive to political stability — rests with the monarch. Constitutional monarchy relies on the idea of ultimate personal responsibility; that there is a single person — hopefully a person of wisdom and judgment — on whose shoulders government legitimacy rests.

This residual responsibility is, on occasion, exercised through genuinely independent judgment. The Head of State would be called upon to decide whom to invite to form a government, or whether to dissolve Parliament and allow an election or, on the other hand, to invite another political leader to attempt to govern. Furthermore, the instances in which these independent judgments are called for are likely to become more frequent as "interest-based" politics grows, party loyalties weaken, and multi-party elections and parliaments become more common. In fact, the close results in the recent Queensland and New South Wales elections may be precursors of minority governments. The relative stability of Westminster-model democracies may not continue under intensifying regional and ethnic sentiment, as is evident in the experience of Scottish separatism and the coup d'etat in Fiji. In these circumstances, power over the selection of who should govern or over whether those in power should continue to govern cannot be minimised.

In all political systems there is a reasonable apprehension that those in power will take as their chief political objective the perpetuation of their own position. There is, unfortunately, an ever-present possibility that those who currently control the instruments of government — the Prime Minister and cabinet, or the de facto powers within the political party that they represent — will seize authority either to determine the authentic will of the people, or, worse, to act under an imagined mandate from the people. Democracies are hardly immune from this concern even where there is an established pattern of (or constitutional requirement for) periodic elections.

The critical question is how the proposed transformation from monarchy to republic would change the dynamic of the relationship between the political leader — the Prime Minister — and the Head of State. The following is an exploration of how the proposed change to our form of government may well open up new possibilities for the abuse of power in office and for the kind of misbehaviour that can lead to constitutional crises.

Selection by election

Under the current arrangements, the Head of State and the Prime Minister enjoy different bases of public responsibility. The Prime Minister has a popular constituency (based on election) while the Head of State carries an ancient and, in a sense, patriarchal responsibility for public peace and orderly public authority. When the legitimating basis for the power of the Head of State changes to appointment by democratic and popular means, through an election of some form or other, he or she becomes an embodiment of the people's self-governing duties.

Thus, the Head of State and the Prime Minister could become entangled in a competition with each claiming to be the superior manifestation of the citizens' will and the superior interpreter of the citizens' wishes. The Prime Minister and Cabinet might seek to continue to govern or to prevent any other leader being given a chance to govern. They might claim an indefinite term in office and resist the intervention of the Head of State to call a general election, engaging in a campaign of disparagement of the President's legitimacy, or of his or her political even-handedness, or of his or her right to intrude into the continued working of a "popularly elected" government. The basis of this disparagement could be that the President's election represents a hollow or purely formal mandate because the role for which the person is elected may be known by the electorate to be limited to figurehead or ceremonial functions. The people's choice to conduct government, it would be said, is the Prime Minister — the leader of the dominant political party. Concerns over such disparagement and over the

possibility that the President's orders would be ignored by political leaders are, admittedly, concerns about extreme political situations: they contemplate a Prime Minister who refuses to submit to the direction of the Head of State and this would amount to a revolutionary moment.

A further dramatic alteration to the relationship between the President and Prime Minister could be brought about if the President were tempted to become the actual governor. The President might take seriously his or her role as the current expression of republican virtue — as the embodiment of the citizens' will to exercise political autonomy — and could feel bound to preserve the electorate's "true" interests. To that end, he or she may resist the "mistaken" advice of the Prime Minister or the legislators. Thus, the President could abandon any deference to the advice of the elected ministry in relation to say, the dissolution of parliament, or else attempt to exercise independent judgment where his or her role as Governor-General today would simply be formal. He or she may, for example, refuse to sign executive orders in relation to legislation. "[The] potential would exist for the representative and democratically elected parliamentary chambers ... to be gradually diminished, while the embodiment of the nation *and* great powers would be vested in one person."[28] In other words, a President may be tempted to aggrandise his or her power.

Another possibility is that the Prime Minister and the President would join together to perpetuate the government's term of office with the President either acquiescing or, worse, colluding, with a request for support from the Prime Minister. The Prime Minister might claim it is in the national interest that he or she continue to govern beyond the set term within which an election must be held. The President as a figure of national unity and identity could respond by calling on the people of Australia to unite behind the government in a time of crisis.

It is precisely to such potential crises that constitutional safeguards should be directed. It must be acknowledged that under both the current arrangements and the republican proposal the same constitutional principles would be infringed. The perpetuation of the term in office of the government would be an illegal act[29] and the extension of the term of the Head of State contrary to the advice of the Prime Minister would be a breach of a constitutional convention.[30] However, the creation of a figure of national unity deriving power from an election would change the principle of self-government in Australia. The bases upon which political actors might rely to justify contravention of current constitutional limitations would be popular and republican rather than monarchical. This change in constitutional principle and practice ought not to be ignored when considering the development of measures to forestall constitutional crises.

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28 P Keating, above n 1 at 12.

29 The Constitution, s 28, provides for a maximum term of three years for the House of Representatives.

30 The Governor-General is required by convention to act on the advice of his or her Ministers. One question is whether the Head of State should be able to dismiss a government if it acts illegally. While the Republic Advisory Committee endorsed the retention of this reserve power (*An Australian Republic: The Options: Vol 1 The Report* (1993) at 93), controversy surrounds when it should be excercised. This was seen, for example, at the time of Lang's dismissal on 13 May 1932. For a discussion of when the Head of State should intervene in such circumstances, see the proposed presidential powers discussed below. See also G Winterton, "Presidential Power", above n 22.

Removal of selection of the Head of State by a monarchical procedure

The removal of selection of the Head of State by monarchical appointment changes constitutional principle and practice. The removal of the hereditary office of the monarchy from the Australian Constitution would end the current relationship between the Queen and the Prime Minister, a connection which is relevant to the maintenance of the current Constitution and proposed republican amendment. Perhaps this change was not mentioned in the Keating Government's literature because the power vested in the Queen is perceived to be purely formal: to appoint and to remove the Governor-General.[31] Both functions, by convention, are performed only on the advice of the Australian Prime Minister. Nonetheless, this power is a constitutional restraint. It may never be exercised but its threatened use is a plausible check on an abuse of power by the Vice-Regal representative.

The Governor-General as the Queen's representative is tied to a monarchical tradition. Whether this tradition is founded on the representative relationship, the self-preservation of the Crown or on the advancement of the greater public good, once the monarchical structure is removed the tradition will almost certainly be lost or fade away.[32] In a time of crisis this would mean that there would be no monarchical legitimating basis for political action by the Head of State, no historically-based responsibility for guaranteeing the propriety of political power. Nor would there be any historically-based constraint on the power of the Head of State to intervene in the parliamentary domain.

THE KEATING GOVERNMENT'S DESIGN FOR A NEW HEAD OF STATE REGIME

We have just drawn attention to the potential for political destabilisation as a result of making the structure of democratic government more complex. We will now examine the former government's attempts to control any such destabilisation. The Keating Government's proposal recognises that new constitutional powers and constraints would have to be created. We shall evaluate the Keating Government's measures in terms of how they constrain potential acts of collusion, competition and aggrandisement by the two highest political office holders.

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31 The Constitution, s 2. It should be noted that the Queen also possesses a number of other constitutional powers: ss 58 and 60 vest the Governor-General with the power to reserve a law for the Queen's pleasure and s 59 permits the Queen to disallow a law within one year from the Governor-General's assent. The orthodox view of these powers is that they are obsolete or outmoded instruments of imperial authority. They are controlled by convention and no longer exercised. In fact, they are potentially capable of being activated in a legal sense. The Queen also possesses powers to appoint a deputy or administrator which could be exercised in an emergency or national crisis. Section 126 allows the Queen to authorise the Governor-General to appoint a deputy or deputies. Section 4 allows the Queen to appoint an administrator who acts with full powers of an acting Governor-General. See P H Lane, *Lane's Commentary on the Australian Constitution* (1986) at 20 and 640. Finally, the award of honours is still in the Queen's discretion. However, an independent council makes recommendations to the Governor-General who then advises the Queen. See the schedule to the Letters Patent given by the Queen at St James' Court on 14 February 1975.

32 See G Winterton, "The States and the Republic: A Constitutional Accord?" (1995) 6 *Public Law Review* 107.

Collusion

The possibility of collusion could be prevented by the proposed measures to create a politically impartial Head of State. These strategies insulate the President from political allegiance and financial inducement,[33] thereby having the unexpressed but crucial effect of limiting the possibility of collusion. The opportunities for those outside government to influence the Head of State by financial inducement are diminished by the provision of an adequate salary (although this policy was not expressly recognised in the Keating proposals) and by an express prohibition on the President holding any other remunerative position while in office.[34]

Other measures suggested should insulate the President from financial pressures exerted by the government: his or her salary would not be subject to income tax and would be fixed for the entire term. The President would be prohibited at the expiry of the term from receiving remuneration from the Commonwealth in addition to his or her retirement allowance for a period of five years.

The Head of State would only serve for five years, ensuring he or she cannot be influenced by offers to renew the appointment.[35] Further, the opportunity for the government to extend the President's term where there is a disagreement about the selection of the new Head of State has been limited. This limitation is similar to current arrangements. If the outgoing Head of State's term expires, it was proposed that an acting Head of State be appointed until a nomination can be agreed on.[36] A State Governor, or if no State Governor is available, the President of the Senate, would be appointed in the interim. It is argued that a State Governor should be sufficiently independent as he or she will have been commissioned by a different government. The appointment of the President of the Senate is less satisfactory as he or she may be a member of the dominant party. Although this interim appointee would be an appointment of last resort, the possibility remains that a partisan appointment could be made.

Another set of rules is aimed at removing partisan allegiances. Serving and former politicians (Commonwealth, State and Territory) would not be eligible for appointment to the office for five years after their departure from politics.[37] The justification for this policy is that the Head of State should be politically neutral and impartial, notwithstanding the number of past politicians who have discharged the duties of the office of Head of State with distinction.[38] While the Head of State obviously ought not be a Member of Parliament,[39] the effect of the proposed restriction may be to remove suitable candidates. Selection of the President by a vote of the Parliament is more likely to be an effective method of ensuring that someone known, or expected to be politically partial, would not be appointed.[40]

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33 Office of the Prime Minister, above n 6 at 6.
34 Ibid at 6.
35 Ibid at 13.
36 Ibid at 5.
37 Ibid at 6.
38 Ibid at 6. Former politicians who have recently departed politics have acted in aid of the public good; eg, the former Govenor-General, Bill Hayden.
39 Republic Advisory Committee Report, above n 30 at 54-6.
40 Ibid at 56.

Competition

The former government aimed to limit potential competition for leadership between the Head of State and the Prime Minister by regulating the mode of election of the President. The Keating Government maintained that the President should not be the only directly elected executive officer in the system, because this might create a potential challenge to a Prime Minister who, in contrast, is indirectly elected under the system of representative and responsible government.[41] It has also been observed that a popular election would suggest that the President should have large powers — at least in reserve.[42] Such an election could also result in constituent and party pressure to renew his or her term. So it was proposed that the President be elected by parliamentarians, under a system requiring a two-thirds vote in a joint sitting of both Houses, ensuring that his or her mandate flows from the Parliament.[43]

The proposed removal of the President by the same parliamentary method would require strong bipartisan support, except where one party achieves an overwhelming majority in Parliament. Before a President could be dismissed, he or she would have to be found guilty of proven misbehaviour or incapacity.[44] However, it is not proposed that dismissal would be contingent on a specified set of facts, circumstances or conditions in a constitutional provision. A further brake on misbehaviour by a President would be that either House may, by simple majority, initiate a joint sitting to censure or remove the Head of State.[45] Nonetheless, the vote required to attain a special majority should result in significant security of tenure which would probably not be unduly diminished by the mechanisms for removal or dismissal.

A single-term presidency is likely to limit competition between the Head of State and the Prime Minister by reinforcing the importance of rotation in office. An appointment for five years is likely to be of sufficient duration to attract qualified candidates and to ensure that the President has a measure of independence from the House of Representatives, which must itself go to the people before the expiration of three years. By these means, the Keating Government sought to regulate the basis upon which the Head of State could act independently. It was believed that the President would be endowed with sufficient legitimacy and hence would have the political stature to intervene when necessary. On the other hand, the President would never be tempted to take over a broader governing function because he or she might be seen as an agent of Parliament and not the direct representative of the people. Although this plan would certainly lessen the risk of a President taking on a political role that would undermine the government, the question remains whether the electorate would view such a President as a mere puppet of Parliament and, more importantly, of the dominant party. The concern is that the fully independent political judgement sometimes required by a Head of State would not be exercised to restrain an abuse of power by the Prime Minister.

Perhaps it is simply impossible to achieve a balance between political legitimacy and independence, on the one hand, and a limited legitimacy and appropriate restraint on power, on the other. However, this dilemma may not be as intractable as it first

41 P Keating, above n 1 at 11-12; Office of the Prime Minister, above n 6 at 4.
42 Sir Zelman Cowen, "Williamson Community Leadership Lecture", 1 June 1995, cited in Office of the Prime Minister, above n 6 at 4.
43 Office of the Prime Minister, above n 6 at 3-4.
44 Ibid at 5-6.
45 P Keating, above n 1 at 13.

appears. The political legitimacy and independence of the Head of State may be derived from the powers vested in the office, and when these are balanced against the preferred method of appointment, a more appropriate allocation of power might be achieved. According to the Keating Government's proposals, restraints on the Head of State's power would result from the election of the President by the Parliament and not the people and a capacity (conferred on the Parliament) to censure the Head of State. The basis upon which a Head of State could act to resolve a constitutional crisis was to be secured from the substantial "authority" derived through the current powers of the Governor General's office. These measures must have been seen as sufficient to resolve a constitutional crisis.[46]

Not surprisingly, it was intended that the future President would possess the constitutional powers presently held by the Governor-General. These fall into three categories.[47] First, there are those powers which are expressly required to be exercised by the Governor-General acting with the advice of the Federal Executive Council: the power to cause writs to be issued for a House of Representatives election (ss 32, 33)[48]; to establish departments of state (s 64); to appoint members of the Interstate Commission (s 103); and to appoint, and remove upon an address from both Houses, judges of the High Court and of other federal courts (s 72).

Second, there are those powers which are exercised by the Governor-General on ministerial advice according to constitutional convention. These include the power to summon Parliament and dissolve the House of Representatives (ss 5, 28); to fix session times and prorogue Parliament (s 5); to dissolve both Houses where there is a deadlock between them and convene a joint sitting (s 57); to recommend money Bills (s 56) and to exercise the executive power of the Commonwealth. [49] The Governor-General is also vested with command of the defence forces (s 68). He or she may appoint and dismiss Ministers of State (s 64) and, in the absence of parliamentary provision, direct what offices Ministers shall hold (s 65). Finally, the Governor-General may submit a referendum proposal to the people where there is a deadlock between the two Houses (s 128). The Keating Government proposed that an Australian Head of State be constitutionally required to exercise such powers on ministerial advice according to constitutional convention as there is at present no express constitutional provision requiring this. These first two kinds of constitutional powers just described will be referred to as the non-discretionary powers of the Governor-General.

Third, there are the so-called "reserve" powers, which may be exercised at the Governor-General's discretion, that is, without, or contrary to, ministerial advice. These consist of the powers to dissolve the House of Representatives (s 5), to call a double dissolution of both Houses of Parliament (s 57) and to appoint and dismiss the Prime Minister and hence the government. Clearly, some non-discretionary powers are capable of being exercised as reserve powers. The Governor-General also possesses statutory powers including the power to make regulations and appoint public officials under Commonwealth legislation exercised on the advice of the Federal Executive Council.

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46 Ibid at 9.

47 Office of the Prime Minister, above n 6 at 7-9.

48 All sections mentioned in the text referring to the powers of the Governor-General are to be found in the Constitution.

49 Some of these powers are capable of being exercised as reserve powers and are mentioned below.

The former government proposed that the Constitution should require the Head of State to exercise the reserve powers in accordance with existing constitutional conventions. In short, under this proposal it was intended that constitutional conventions be retained by way of new provisions referring to the continuity of such conventions. The Constitution would not, however, spell these out. The decision not to include a positive statement of the reserve powers in the Constitution has important implications for the aggrandisement of the office of the Head of State.

Aggrandisement

The potential for self-aggrandisement by the Head of State is inherent in the considerable powers vested in him or her, combined with a failure to describe the content of the constitutional conventions, and the inadequacy of constitutional conventions as effective restraints. The text of the Constitution gives the Head of State significant powers and so provides a basis upon which he or she may act independently.[50] Unspecified conventions are not effective counter-weights because existing conventions confer on the Head of State a broad discretion or may even be ignored. As the Keating government admitted, a Head of State may occasionally exercise political judgment without regard to the conventions.[51] As the Head of State also possesses a broad discretion under the reserve powers,[52] he or she may change the ministry to ensure support for his or her point of view. [53]

One strategy to confine this discretion is to set out in a special constitutional section all the instances in which the President could exercise independent judgement. In this way there would be no bases on which the President could intervene other than those spelled out in the Constitution. However, for numerous reasons, this option was rejected. It was thought that such a code could not be written, because specifying the reserve powers would lead to unpredictable problems of interpretation and

50 See description of the "reserve" powers, above.

51 Office of the Prime Minister, above n 6 at 9.

52 The traditional constraint on a potential enlargement of the office has been the unwritten constitutional conventions. A literal argument could be made to circumvent these devices in a future republic. This was not considered by the Keating Government, but it is consistent with the Keating proposal. If the conventions were thought to apply in their unwritten form, being conventions of Australian rather than monarchical government and therefore applicable in the republic, they may still be subject to a textual argument that they are not mandated by the Constitution. At the time of the 1975 Constitutional crisis, there was an assertion that the Governor-General was responsible, under s 61 of the Constitution, for maintaining the Constitution, and possessed the power under s 64, to summon and dismiss Parliament. This was said to lead to the conclusion that no unwritten convention of responsible government could change or diminish those legal provisions. The Keating Government's proposal should forestall this argument. See P Hanks, *Australian Constitutional Law: Materials and Commentary* (5th ed, 1994) at 342 (para 5.083) (For a view contrary to that put forward by the Governor-General in his letter to Prime Minister Whitlam, dated 11 November 1975, and attached "reasons" (ibid at 335-338, paras [5.073]-[5.074]), see *Victoria v the Commonwealth and Connor* (the *PMA* case) (1975) 134 CLR 81 at 155 where Gibbs CJ said that, "The Constitution makes no other provision for the dissolution of the Senate other than that contained in s 57". His Honour also said that the "Governor-General is given power by ss 5 and 28 to dissolve the House of Representatives" (ibid).

53 G Winterton, "The Evolution of a Separate Australian Crown" (1993) 19 *Monash University L R* 1 at 10.

application.[54] On the other hand, if a code were written it would not necessarily provide a solution to current dilemmas because of the form of the reserve powers. While this issue was not explicitly explored in the proposal, it is nevertheless significant as it has been frequently proposed that gubernatorial conventions should be codified. This is a troublesome solution, however, because the reserve powers institutionalise disagreement. The Head of State is vested with a discretion to reject the advice of the Prime Minister, frequently creating two points of view in a political imbroglio,[55] with no possibility of an agreement to settle the dispute. Such a code would be necessarily subject to constant debates about interpretation and contextual amplification, a situation therefore not markedly different from the one that presently exists.

The former government also claimed that any attempt to codify the powers of the Head of State would raise the divisive debate concerning the Governor-General's actions in 1975.[56] It was thought that the revival of this debate would no more produce a consensus over the propriety of what was done than the original debate did. Consequently, it was believed that a proposed code which incorporated a judgment concerning the 1975 issue would give rise to a debate which would be simply incapable of resolution. For this reason, once again, the approach of the Keating Government to codification was simply to confirm the *status quo*. The Keating Government further contended that if the conventions were codified they would come to be regarded as rigid rules of law. However, the Keating proposal may already have this effect if explicit reference to the continuance of the conventions is included in the Constitution.[57] Reliance on an absence of specific rules may not be sufficient to forestall an interpretation of the constitutional conventions as rules of law. Of course, the government could argue that the incorporation of these conventions was not to make disputes relating to them justiciable, but was merely a response to the other arguments

54 Opinion is divided as to whether this broad discretion is a critical problem. Evatt argued that it was both possible and necessary to define the reserve powers in order to increase their certainty and to confine the scope of the discretion: H V Evatt, *The King and his Dominion Governors* (1967) at 7-11 and 286-291. See also G Winterton, "Presidential Power", above n 22 at 46. By contrast, Eugene Forsey argued that the reserve powers should continue to be flexible and adaptable. He contended that a satisfactory code could not be written because it would ossify or petrify them: E A Forsey, "The Present Position of the Reserve Powers of the Crown" in *Evatt and Forsey on the Reserve Powers* (1990) at xxxiii.

55 This is borne out by the way most authors present these two points of view in their description of various constitutional crises. We have not, however, found any authors who explain this point of view in terms of the disputatious nature of the rule itself. See, eg, E A Forsey, above n 54; H V Evatt, above n 54; P Hanks, above n 52.

56 P Keating, above n 1 at 9. The role of the Head of State if the Senate exercises its power to block supply is another important issue raised by proposed changes to the power of the Head of State. The Keating Government's proposal leaves this vexed question in abeyance and this paper will do likewise. Again, this topic moves beyond the scope of the potential crises discussed in this commentary.

57 See *Marbury v Madison* 1 Cranch 137 (1803), where the Supreme Court of the United States relied on a textual justification as a key rationale to establish its power of judicial review of the American Constitution.

mentioned above. Alternatively, a provision could be included in the Constitution declaring that the conventions governing the Head of State are not justiciable.[58]

Another consideration was that judicial review of a code would alter the status of the High Court in relation to the executive and parliament. The Keating Government was concerned that the High Court would be drawn into political debates in the context of public pressure to resolve a bipartisan impasse. The standing and impartiality of the Court could be called into question.[59] It must be acknowledged that constitutional conventions are, in fact, recognised but not enforced by the courts.[60] Once again the Keating Government's approach simply supports the *status quo*.

In our view, objections to the codification of the powers of the Head of State, as mentioned above, are not criticisms of codification *per se*, or of an explicit statement, in some form, of such powers being incorporated into the text of the Australian Constitution. Rather, all the above arguments have in common an objection to the codification of the reserve powers. It follows that if we address the problems associated with this specific issue, we may find a way around the difficulties arising from a failure to articulate a comprehensive set of rules.

RECONCEIVING POLITICAL RELATIONSHIPS WITH THE HEAD OF STATE: A NEW MODEL OF REPUBLICAN GOVERNMENT

The following proposal entails reconceiving the political relationship between the Head of State and Prime Minister. It should be remembered that in writing and interpreting a Constitution, what is central is not always the precise constitutional rules but the political ideas and values embedded in the structures and relationships that are created by the text. These ideas and values may be relied upon to inform our understanding of the essential conditions of and necessary constraints upon an office recognised in the Constitution.

Function of the Head of State

From this conception of constitutionalism it follows that the Constitution could specify the exclusive function of the Head of State to ensure the continuance of the democratic legitimacy of government. The President's role is that of guarantor of constitutional government, never that of provider of good government.[61] The appointment of the Head of State by Parliament for this express purpose would certainly strengthen the constitutional basis for action when necessary. The specification of the President's residual capacity would also restrict his or her opportunity to take on a governing role, thus acting as a constitutional check. To clarify these new roles, we will attempt a reallocation of the powers of each actor.

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58 Professor George Winterton has contended that such a provision could be included in the Constitution: see G Winterton, "A Constitution for an Australian Republic", *Independent Monthly* (Sydney), March 1992, 1 at 9.

59 Office of the Prime Minister, above n 6 at 12; P Keating, above n 1 at 10.

60 For a scholarly discussion of the justiciability of conventions, see G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1984) at 12-18, and P Hanks, above n 52 at 342ff.

61 We believe that the role of the President is best described metaphorically and functionally as a guarantor rather than as an umpire.

The Power of the Prime Minister, Cabinet and Parliament

The governing role of the Prime Minister, Cabinet and Parliament should be clearly expressed in the Constitution.[62] Representative responsible government could be explicitly recognised, perhaps by creating a new office of Prime Minister and Cabinet. Neither of these offices is expressly acknowledged in the present Constitution. The Head of State's current non-discretionary powers, described above, could be vested in the Parliament, Cabinet or the Prime Minister by altering current constitutional provisions. This alteration would not formally enlarge the powers of the state's political leaders, as these have been regarded as executive powers since Federation.[63] It would only be where an executive act was inconsistent with the exercise of one of the President's remaining powers that a conflict might arise, as discussed below. However, this proposal would remove the Head of State's supervisory and figurehead roles, each of which acts as a constraint on the exercise of executive power. These functions could be replaced by new measures designed to preserve the continuity of Parliament. Two suggestions should suffice to illustrate this proposition. Minimum terms, to operate in conjunction with the current maximum term and meeting arrangements of Parliament, such as exist in three States, could be created.[64] The Prime Minister could be recognised as the commander and chief of the armed forces but only given the power to declare a state of emergency subject to Parliamentary approval. This limitation would act as a check against the improper deployment of the military in a time of political crisis.

Powers of the President

The Head of State's current governing powers should be removed. These non-discretionary and reserve powers are expressed as a proprietary and supervisory function, vesting him or her with a voice in the parliamentary process, the right to have

62 Many scholars agree that "the basic rules of responsible government should be more clearly stated in the Constitution": J McMillan, G Evans, H Storey, *Australia's Constitution: Time for Change?* (1983) at 213; S Encel, D Horne and E Thompson (eds), *Change The Rules! Towards a Democratic Constitution* (1977); Howard, *Australia's Constitution* (1978). See also the *Report of the 1987 Constitutional Commission* (1987); E Thompson, "A Washminster Republic" and C Sharman, "Reforming Executive Power" in G Winterton, *We, The People*, above n 22 at 97 and 113 respectively.

63 At Federation, the terms "Governor-General in Council" and "Governor-General" had no real constitutional significance. The Crown could not perform an executive act except on ministerial advice. Furthermore, the allocation of some powers to the Governor-General in Council and some to the Governor-General alone is the result of an oversight. According to Quick and Garran, these two categories are "historical and technical, rather than practical or substantial": *The Annotated Constitution of the Australian Commonwealth* (1901, reprinted 1976, at 707 and 406). See also *The Final Report of the Constitutional Commission* (1988) at 316, 341 and 344; P Hanks, above n 52 at 329 ff. The Keating Government's proposal clarifies the position as at Federation. To this extent, it is a minimal proposal. However, this clarification also has implications for how the Head of State might act in a constitutional crisis. These are discussed above.

64 See, eg, Australian Constitutional Commission, *Background Paper no 13: Fixed Term Parliaments* (1987); Australasian Study of Parliament Workshop, *Fixed Term Parliaments* (1982) and C Howard, *Fixed Term Parliaments* (1981). For example, s 4 of the Constitution (Fixed Term Parliaments) Act 1991 (NSW) fixed 25 March 1995 as the date for the next general election unless the Parliament was previously dissolved in accordance with the Act.

a say in the operation of government and a power to rule. If the Head of State is not directly elected by the people, any governing role is significantly anti-democratic.

Nonetheless, such a change would not significantly alter the current non-discretionary power of the Head of State. The Governor-General's day-to-day function in ensuring that the government complies with the Constitution and Laws[65] of the Commonwealth is extremely limited, extending only to the questioning of ministerial advice, which must be complied with (eventually).[66] The reserve powers are of greater importance. The Governor-General may reject the advice of a Prime Minister who holds the confidence of the House of Representatives. Consequently, removing the power to reject advice would eliminate the propensity of the reserve powers to give rise to disputes and disagreement. The Head of State should still retain important powers to preserve Parliamentary government. But the current powers ought to be refined and confined. They should be truly residual, with the Head of State possessing a minimal voice in determining popular decisions, intervening only where there is no other means to resolve a constitutional crisis. In other words, these powers should be the bare minimum. If called upon, the President should have the power to initiate a procedure to settle a political impasse by democratic means, such as referring the issue to Parliament or a general election.

The precise powers which ought to be vested in the office of President can be succinctly stated. The power to appoint the Prime Minister would be removed from the Head of State; rather the Prime Minister would be elected by the House of Representatives, with the outgoing Prime Minister continuing in office as a "caretaker" until a successor was chosen. A positive vote of confidence would be required to transfer power to the new leader.[67] A constructive no-confidence resolution which expresses both a lack of confidence in the incumbent Prime Minister and confidence in a successor should be required.[68] The House's failure to nominate a new Prime Minister would indicate an inability to do so leading to the House's dissolution.[69] The power of the Head of State to dismiss a Prime Minister or dissolve the Parliament and call a general election should operate only where a Prime Minister insists on ignoring a vote of no-confidence, contravenes a fundamental constitutional provision (notwithstanding a High Court decision confirming such infringement) or does not heed requests to desist by the Head of State ("if the matter has been held non-justiciable by the High Court").[70] Such breaches of the Constitution might include a refusal to summon Parliament or to call a general election when the parliamentary term has

65 Note also that the Governor-General may return a Bill to the originating House while recommending amendments (Commonwealth Constitution, s 58).

66 See G Winterton, "Presidential Power", above n 22 at 42.

67 Much of our discussion of potential presidential powers draws on the insight of Professor G Winterton: G Winterton, "Presidential Power", above n 22 at 49-53.

68 Ibid at 47.

69 Ibid at 44.

70 Ibid. It is likely that the Head of State's failure to follow constitutional procedures would be subject to judicial review. See *Cormack v Cope* (1974) 131 CLR 432, where the High Court recognised that it has jurisdiction to intervene in the legislative process to ensure compliance with the procedures in s 57, but declined to do so. In the *PMA* case (1975) 134 CLR 81 at 155, Gibbs CJ dealt with circumstances where the Court may intervene in the legislative process. Nonetheless, these procedures could be made non-justiciable by recourse to Professor Winterton's proposal. See also G Winterton, *Monarchy to Republic: Australian Republican Government* (1986) at 46.

expired.[71] The power of the Head of State to refuse a dissolution would be abolished.[72] This right should rest with the Prime Minister only after the expiration of a minimum fixed term.[73]

In short, the Head of State's power to choose the Prime Minister and power to refuse a dissolution would be dispensed with as these are governing powers. The power to dismiss a Prime Minister or call an election should operate only if the proper parliamentary procedure is ignored or cannot resolve a political impasse. In this way, the last word would rest with popular decision-makers — the Parliament or electorate. It must be acknowledged that the effect of this proposal is to remove the Head of State further from the parliamentary process, a recommendation for a stricter separation of powers which might appeal to democratic republicans.[74] Nevertheless, the principal rationale is to create a clear basis for action by the Head of State and the Prime Minister, in addition to a clarification of the terms of political discourse to prevent a potentially disastrous debate. Thus, this scheme would enhance the Head of State's power to act, although that power would be much more confined than under the present proposal of the Keating Government.

FINDING REPUBLICANISM THROUGH A REPUBLICAN HEAD OF STATE

We have just considered the President's function in terms of guaranteeing stable government. We now propose a new rule designed to provide more diversity in the selection of candidates for the office of Head of State not only to reinforce this function but also to enhance popular participation. We address the precise problem of selecting a republican Head of State as a means of promoting a new vision of participation in the Australian political community. The Keating Government's proposal is partly consistent with such a republican philosophy. The proposed role of the Head of State is as representative and representation, a figure of national unity and identity. Regrettably, this function would clearly be weakened under the proposed mode of appointment because of the extremely limited choice of candidates. Under the proposal, the Head of State would probably be selected by the two dominant political parties as a result of the parliamentary rule of selection, the prescribed qualifications for the office and the historical organisation of Australian politics. The two-thirds majority vote rule would effectively require support of both Government and Opposition but not of independent members or minor parties. However, the proposal has the virtue of ensuring that a wide measure of support for the candidate is required in the Parliament.

The qualification that the candidate be of a high calibre, while desirable in terms of encouraging national aspirations, is likely to justify selection of the President from one of the major parties. An historical assessment of the proposal indicates that it would advantage the major parties. The National, Liberal and Labor parties have controlled Parliament and the executive, and have shared the role of Government and Opposition in the second half of the twentieth century. In other words, political representation has

71 G Winterton, "Presidential Power", above n 22 at 44.
72 Ibid.
73 Ibid.
74 See R Dahl, above n 24, ch 2; J Warden, above n 22 at 84.

been cast in terms of a binary division between capital and labour.[75] The two-party system has significantly excluded other social relations in which identity is contained, such as race, ethnicity, nationality, gender, age, disability and sexuality.[76] It is for this reason that an alternative approach to the selection of the Head of State is required.

It is possible to create an alternative mode of selection and to find a more genuine republicanism through a republican Head of State. If former Prime Minister Keating's hope for a revitalised national culture is to be more than hollow rhetoric, how will identity and participation be enhanced through creating a republican Head of State? One of the approaches to this task adopted by Mr Keating is not satisfactory. He said that the Head of State should be "truly one of us".[77] This carries the implication that he or she should not be one of them, which could be read as excluding whole categories of unsuitable persons — those who are committed to Australia's British heritage, those who are monarchists and traditionalists and, perhaps, those who are supporters of the Opposition, not the Government.

Is a more inclusionary understanding of Australian state leadership possible? A fruitful alternative to the "us" and "them" suggested by the former Prime Minister is to conceive of Australians as a "we" — a people of diverse origins and identities joining together to form a society which is the Australian nation. But we should go further and, while confirming the category "Australian", simultaneously work to unravel it — to subject it to social and historical review. In this context, the role of the President as an Australian would be to reflect the national identify. However, the national identity created should be buttressed by, rather than forged in opposition to, these other political identities. People have multiple political identities, which are ascendant at different times. Thus, it is necessary to recognise the diversity of the Australian political community

If the Australian republican movement is, at some point, to achieve its objective of creating a figure representing all Australians, selection should take place from the broadest range of people in Australia's diverse society. This could be accomplished by the adoption of the "fair reflection principle" as a rule for selection of candidates to hold the office.[78] This principle imposes a duty on the Parliament, as the selecting authority, to ensure that over time the office of President is held by people with diverse ideological, cultural and social backgrounds. Two points can be made in favour of this principle. First, the office of President is a branch of government and thus appointments ought not to be made in total disregard of the composition of society.[79] Second, if appointments are seen to come routinely from one or two groups within society, then those outside these groups may believe that their perspectives are neglected in the political process. This will diminish community understanding and respect for the political decision.[80] Thus, the fair reflection principle can be seen to flow from an unquestioned requirement that the office of President be, and be seen to be,

75 See M Lake, above n 22 at 33.
76 Ibid.
77 P Keating, above n 1 at 4.
78 This proposed mode of appointment draws on suggested methods of enhancing the impartiality of judicial selection: S Shetreet, "Who Will Judge: Reflections on the Process and Standards of Judicial Selection" (1987) 61 *ALJ* 766 at 776; S Cooney, "Women and Judicial Selection: Should There Be More Women on the Courts?" (1993) 19 *MULR* 20 at 21.
79 S Shetreet, n 78 at 777; D Pannick, *Judges* (1987) at 59; S Cooney, above n 78 at 21.
80 S Shetreet, above n 78 at 776.

open to all. All Governors-General have been men. This result has not fairly reflected gender differences in Australian society. Failing to appoint women to the office of Australia's Head of State may considerably undermine the role of the President. As noted above, however, the fair reflection principle would also involve questions of social background, occupation, political persuasion and so forth.

Adoption of this proposal does not involve a system of proportional representation — that is, the selection of candidates representing particular groups or interests.[81] Rather, it requires that in addition to the other criteria for selection, consideration be given to past appointments to determine whether the inclusion of a particular candidate would increase the diversity of appointees.[82] This diversity may be relied upon to kindle awareness in society of the limited role of the President. Presentations and lectures by the President in our various communities will enhance this understanding. Further, there is no reason why a person whose background differs from that of most appointees may be less likely to uphold the interests of all in the community.[83] The principle reinforces the view that persons of diverse backgrounds can meet the government criterion that candidates be of a high calibre.

The Keating Government's proposal that the Prime Minister submit a single nomination for Head of State to the Parliament could be made consonant with the fair reflection principle. However, unless the Prime Minister is required by the Parliament to take the fair reflection principle into account, through requiring fully articulated acceptance of the principle in presenting his or her nomination, there is a real risk that the nomination of the President will soon become dominated by the stringencies of the two-party system. It would also be possible to make the fair reflection principle justiciable.[84] The courts could enforce this standard through insistence that the nomination process must include explicit recognition of the principle. Of course, the question of whether the fair reflection principle has been satisfied or applied in any particular appointment could not realistically be justiciable. The High Court would be required to enforce a procedural provision that the Prime Minister mention the fair reflection principle in his or her nomination for President. Accordingly, the Prime Minister would have to give consideration to the principle but would be free to apply it as he or she saw fit, his or her decision being subject to public scrutiny or debate. Nevertheless, the mere fact of such recognition would be valuable as an expression of the deepest possible political commitment to developing a fully inclusive polity. It should, however, be acknowledged that even reliance on the fair reflection principle may not satisfy republicanist demands for political participation. It might be felt by many Australians that a nominated President would be, and would appear to be, removed from the populace and this arrangement would be inconsistent with the underlying spirit of the republican proposal. The Keating Government's proposal may be insufficient to dampen the desire either for a more republican mode of appointment (scrutiny of a candidate in the Parliament) or a more democratic one (a popular

81 S Cooney, above n 78 at 22.

82 Ibid

83 Ibid.

84 One question is whether the High Court could review this mode of appointment. If it was incorporated as a procedure it would probably be open to judicial review. See also *Cormack v Cope* (1974) 131 CLR 432 and the *PMA* case (1975) 134 CLR 81 at 155per Gibbs CJ.

election).[85] Of course, such processes could also fail to produce candidates of diversity, in which case our attempts at constitutional design will be caught between the demand for full inclusiveness and the demand for full participation. Both are political virtues, but both may not be fully realisable.

In conclusion, there are no firm constraints upon those who are empowered through constitutional recognition or creation of an official office. There are, however, ideas of legitimate power which, when expressed in the constitutional text, will control the excesses of office-holders. Beyond that, the only thing that can be claimed with great confidence is that constitutional adjustment requires great care, as changes in the structure of the constitutional order will invariably pave the way for changes in power, in the behaviour of those in public office and, ultimately, in the sense of political responsibility within the whole population.

85 Even if a President is to be popularly elected it should be possible to create a non-executive President provided there is an appropriate distribution and restraint of power. We are grateful to Dean Michael Crommelin for drawing this point to our attention. Perhaps the model suggested above might provide a useful allocation and restraint of Presidential power. A contrary view has been expressed by G Maddox, "The Possible Impact of Republicanism on Australian Government" in G Winterton, *We, The People*, above n 22 at 136.