

POWERS OF THE NEW HEAD OF STATE:

FULL CODIFICATION AND LIMITATION

Address by Hon Gareth Evans QC MP, Deputy Leader of the Opposition and Shadow Treasurer, to the 1998 Constitutional Convention, Old Parliament House, Canberra, Tuesday 3 February, 1998.

As they say in show business, never follow children, animal acts or Phil Cleary; and certainly never, ever get an endorsement from him. My view of the role of the head of state is and has been so long as I can remember that it should be essentially ceremonial and symbolic: representing the nation at home and abroad, embodying the spirit of the nation about which Janet Holmes a Court spoke so eloquently yesterday, and being available as a source of consultation, advice and warning to the government of the day by all means but having no capacity to do any damage to any properly democratically elected government.

For so long as I have been coming to official constitutional conventions - and, having a masochistic streak, I have been in one capacity or another to every one of these things since 1973 - I have supported efforts to codify and limit so far as possible the powers of the head of state, and I do so again today. Those efforts have been spectacularly unsuccessful in the past and may well be so again today. If someone like Ron Boswell has not already quoted me from the early 1980s I am sure they will, so I will get in first. I have said in the past, yes, that trying to come up with a codification and power limitation model that attracts across-the-board support is a labour of Hercules. Yes, I have said in the past that achieving complete consensus on this is a task likely to elude us even if we worked at it for 30 years or more. Nonetheless, despite that obvious feasibility problem, I do believe the effort is worth making again and that the issue should at least be seriously explored by this Convention.

With this in mind and to test the issue, I will be moving later in the day that which Bob Carr called the very bold resolution emerging from Working Group 7 that argues, as Mary Kelly laid it out earlier this morning, for three things: first, full codification of the powers of the head of state in order to eliminate to the maximum practicable extent uncertainty and ambiguity about their meaning; second, the limitation in that context of the powers of the head of state in order to eliminate, again to the maximum practicable extent, the possibility of any conflict with the principles of responsible parliamentary government; and, third, limitation of the powers of the Senate to the extent necessary to eliminate the possibility arising of the head of state exercising discretionary power to resolve a conflict between the two houses.

The resolution itself does not try to set out the actual text of the constitutional changes necessary to achieve this, rather it points the way to how that text might be constructed. So we say, going through each category of powers, that, for example, in the case of the powers expressly already given to the Governor-General and made subject to the advice of the Federal Executive Council, that those powers should be retained as they are, obviously, but with some clarification about the position of the Federal Executive Council, making it clear that that is actually the government of the day. In the case of those powers expressly given to the Governor-General at the moment but about which

no guidance at all is given us to their exercise and where conventions simply prevail, we say, 'Yes, the rules governing exercise of those powers should be spelt out in detail.' We do have a model for that in earlier resolutions of previous constitutional conventions and more particularly in the report of the Republic Advisory Committee in 1993.

In the case of the reserve powers, unspecified and certainly undefined in the Constitution in relation to appointment and dismissal of Prime Ministers and dissolution of parliament, we say in this resolution that detailed rules should be spelt out to cover in an appropriate way each situation in such a way as to make it clear that the head of state retains no independent personal discretion in dealing with these matters. Here again one would take into account the report of the 1993 Republic Advisory Committee in that respect.

Fourthly, in the case of the Senate's power to block supply, which is not expressly limited by the present Constitution, we argue that the Constitution should be amended by a provision removing the Senate's right to reject or to significantly delay bills which appropriate moneys for the ordinary annual services of the government.

Attached to the resolution as circulated is the relevant draft from the Republic Advisory Committee in 1993, which does as well as any other draft I have seen to date the basic job of codifying and limiting the head of state's powers. To round off the whole story, that would need to be supplemented by a further provision directly addressing the Senate power question.

What I suggest is that, if there is sufficient support today which emerges from this model, it would certainly be possible for that working group to reconvene and bring back to the Convention next week a fully developed draft constitutional text.

The question of the Senate's powers is, of course, a particularly sensitive and delicate one and it is likely, I acknowledge, to be the subject of some disagreement; although hopefully not as much as in earlier years when tempers were still very hot and nerves were still very frayed by the events of 1975. But you simply cannot take a position on the head of state's powers without also taking a position on the Senate's power. The two issues, as the Prime Minister said yesterday, are inextricably connected. Given what the Prime Minister described yesterday as the almost unique power enjoyed by the Australian Senate to block supply and the problems that arise if there is a protracted deadlock between the two houses, you can deal with a situation in either of two ways.

You can address the problem in the first place after the event, by giving the head of state the power to dissolve the parliament against the will of the government of the day, albeit perhaps with a few more hurdles to jump over along the way, for example having to wait for an actual illegal payment to occur - something which did not trouble Sir John Kerr in 1975. So you could do it that way: actually give the power in a tightly defined way to the head of state. Or you could avoid the problem arising in the first place by removing the Senate's power to block supply - a power which is effectively unique to the Australian upper house, one that does cut across the whole concept of Westminster style parliamentary government and certainly is not available in Westminster itself, and which is also a power which before 1975 no-one ever would have thought would

actually be exercised. It will come as no surprise to delegates that, faced with this kind of choice, I, like Bob Carr, opt for choking off the problem at source by denying rather than confirming the Senate's power, and that is the proposition which is tested in Working Group 7's resolution before you.

The whole question of codification and limitation of the head of state's powers is logically separate and distinct from the issue of how the head of state should be elected or appointed. Whether you opt for direct popular election or parliamentary election or prime ministerial appointment or some combination of these, you can have accompanying that model any model you like on the codification of powers question. That has become clear from the contributions made by the working group convenors this morning.

That said, there is a very important practical and political connection between the two topics. If you go down the path of direct popular election, with all the risk of creating a rival democratic power centre that that implies, then, if you do not want to turn our existing parliamentary system upside down, you simply have to limit or eliminate from the system all those powers which are capable of misuse in the sense of coming into conflict with the principles of responsible government. If, on the other hand, you opt for parliamentary election or prime ministerial appointment as at present, you do not have to anything like to the same extent the problem of rival democratic legitimacy, and to that extent it is less necessary - although in my judgment it is still highly desirable - to go down the path of codification and elimination that is mapped in Working Group 7's resolution.

My own position on all of this is that if we can agree on the elimination of all powers of both the head of state and the Senate which are incompatible with the properly functioning system of responsible parliamentary government, then there is absolutely no reason why we should not opt for direct popular election. If we could have a constitutional system like Ireland's, capable, as Phil Cleary said, of producing a President like Mary Robinson we would be very well served in this country. It would be workable in both law and in practice and it would be a model which would be responsive to that public enthusiasm, which undoubtedly presently exists, for a direct popular vote.

But let us remember that two essential characteristics, which must never be forgotten, make the Irish system workable and effective. First, the Irish President has effectively no independent discretionary power whatever when it comes to the appointment and dismissal of prime ministers and governments and the dissolution of parliament. Secondly, there is effectively no capacity whatever in the Irish upper house to block supply in a way that could create deadlocks that ultimately force the President to play an umpire role.

My very short concluding point is this: the full codification and limitation of powers model in the Working Group 7 resolution is worth pursuing for its own sake. But the issue has this further consequence: if we can agree on a full-scale codification or elimination of all relevant powers that are capable of misuse, then we do keep alive the option of direct election of the head of state. If we cannot agree, if there is no substantial majority for that position on the elimination of powers along the lines proposed in the Working Group 7 resolution or something like it, then the only viable election or

appointment model is a less ambitious one - either prime ministerial appointment as at present or, as I would prefer in that situation, parliamentary election.