Appendix

A consolidated council of state agenda listing

While each council of state will have to develop its own distinctive agenda, none will be able to avoid the following set of issues that are especially close to the cause of fiducial governance. It should be recognised, however, that much work would have to be done before this could begin to address any of these items. It is for this reason that it would be prudent to begin with an interim committee (as recommended in Note 1 on this page).

For example, the very functions of the council might well be shaped by its foundation membership (and vice versa) and some of these membership issues would most appropriately be considered after the heads of state and of government had convened initial exploratory meetings of interests likely to figure prominently in the work of the constituent chambers (which would number three if, as suggested above, the lead of the Indigenous community were to be followed).

Were any government to pursue seriously the strategy I have here recommended, the constitutional consequences would of course ultimately be considerable. No government, however, should be too quickly deterred from taking the first steps, for the full implementation of my reform program would take many years. All I am here trying to do is set forth a sense of long-term direction for the ways our governments might reform themselves. I have been encouraged in this enterprise by the acute observation of one well-placed observer, John Uhr (2009:132), who recently commented on the ‘remarkably adaptive Australian parliamentary system’.

Agenda item 1: functions of the council

Form and coordinate the activities of the council’s several specialist committees.

Provide a forum for determination of the scope of partisan political competition.

In the interests of simplicity, I have throughout this monograph referred to ‘councils of state’ as though they were already established. In practice, of course, agreement-in-principle to proceed, which had been reached between a governor and head of government, would be followed initially by the establishment of a working group or interim committee to work on such topics as those covered under the first two headings in the listing below. Any decisions taken by these interim bodies would, however, have to be ratified by the council of state at its first meeting, so I consider my simplification justified.
Comment

One reason why each interim committee would find the three-chambers structure attractive would be their suitability for engaging in wide-ranging consultations to identify those functions that were central to citizen perceptions of the nature of fiducial governance. Some of the more obvious functions—each to be developed by an appropriate committee—are listed below.

Agenda item 2: membership of the council

Comment

Those councils that had decided to follow the lead recently provided by Indigenous interests and adopted the three-chamber structure would have to move on to determine (at least on an interim basis) the composition of constituent chambers.

I have above indicated some of the interests that should be considered for inclusion in the three national chambers

- chamber 1: national peak bodies (representatives from the three established branches of government, from the National Congress of Australia’s First Peoples)
- chamber 2: sectoral peak bodies (representatives from the Council of Australian Governments)
- chamber 3: local community and individual representatives (representatives from the Australian Collaboration—see Section 1(i) above—and from organisations representing interests not specifically covered by the Collaboration (for example, women, the aged, the disabled).

In approaching the issues surrounding its own composition and structure, the interim committee for the council of state will have to discriminate between those institutions that are obvious inclusions (such as the representatives of the three established branches of governance) and those that would probably be included (which might need to be reviewed before a decision could be taken on the nature of its representation).

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2 Some of the interests formally represented under one of the ‘umbrellas’ of the Australian Collaboration might require separate consideration eg the Muslim community, from which a persuasive case for an Islamic constitutionalism rooted in the realm of the sacred has recently emerged (Aly 2007).

3 A good example of this latter ‘contingent’ category would be the Council of the Order of Australia. Although this council (and the awards it recommended) were restructured in modern times, so that knighthoods were no longer bestowed, it retained many characteristics that were more suitable to a monarchial than a republican regime. The structure of its awards closely reflect the class structure, with those of the highest status being reserved for ‘good chaps’; excessive secrecy surrounds its decision-making processes; and its lack of public accountability means that the severe biases its awards display are never publicly debated. The citizenry has never had much say in the affairs of the council; the awards descend on the population twice a year with
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It would be relatively straightforward for any interim committee operating at the state/territory level to modify these arrangements to suit their particular circumstances. For example, one or more of the established branches could bid to take over parts of the monitory function (for a bid of this kind emanating from a legislative branch, see Griffith 2005).

Agenda item 3: committee 1 of the council—
governance review committee

Comment

This of course is a body similar to that recommended by the NISA project. It is here presented, however, as a committee and not a council, for it would draw the needed political champions from the council of state, of which it would be one of the principal committees. It could well turn out in many jurisdictions to be the primus inter pares of the committees, for its concerns would lie at the heart of fiducial governance. To take a most important field, this Committee would have the responsibility of developing recommendations for its Council of State on the rules and standards, if any, that should constrain the exercise of prerogative powers by the Executive.

Agenda item 4: committee 2 of the council—human rights charter review committee

Comment

In this committee, on which representatives of all three of the established branches would be especially keen to be represented, the necessary inter-branch dialogue—called for but not made adequate provision for in all regimes that have to date established charter arrangements—would begin. Such dialogue would of course continue in the deliberations of each of the councils of state.

Agenda item 5: committee 3 of the council—judicial selection and protection committee

Comment

The 1997 Statement of Independence of the Australian Chief Justices—which impressed Patapan (2000:167) as ‘remarkable’ but unclear in its provenance—

precious little impact. It is time that the need for awards is reviewed and, if their continuation is deemed desirable, a major exercise of public consultation should precede the taking of decisions on the future structure of awards.
provides ample justification for the establishment of such a collegial body, which might in time morph into a judicial services commission: ‘To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence’ (Chief Justices of Australia 1997).

In some societies, the appointment of judges by, with the consent of or after consultation with, a judicial services commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a judicial services commission is adopted, it should include representatives from the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

In the absence of a judicial services commission, the procedures for the appointment of judges should be clearly defined and formalised and information about them should be available to the public.

Indeed, a Senate Committee has very recently argued along similar—indeed rather republican—lines:

The committee recommends that when the appointment of a federal judicial officer is announced the Attorney-General should make public the number of nominations and applications received for each vacancy.

If the government or department prepared a short-list of candidates for any appointment, the number of people on the list should also be made public.

The committee recommends that the process for appointments to the High Court should be principled and transparent. The committee recommends that the Attorney-General should adopt a process that includes advertising vacancies widely and should confirm that selection is based on merit and should detail the selection criteria that constitute merit for appointment to the High Court.

The committee recommends that the Commonwealth government establish a federal judicial commission modelled on the Judicial Commission of New South Wales. (Parliament of Australia 2009b)

Agenda item 6: committee 4 of the council—public service merit and equity committee

Comment

Establishment of this collegial body would give belated recognition to the two-decades-old recommendations of the report of the Review of Public Service
Personnel Management in Victoria. As the much more recent argument of Podger (2007) indicates, such a collegial presence is sorely needed at the apex of each of our regimes. Only through the effective functioning of such bodies could citizen trust in our public services be restored.

**Agenda item 7: committee 5 of the council—honours and awards committee**

**Comment**

Clearly, the new councils would share important interests with the existing Council for the Order of Australia. Whether the existing Council for the Order of Australia should be reconstituted as a committee of the national council of state will be a controversial issue best left without further comment in this monograph (see Note 3 of this Section). It should be noted, however, that honours are important to any conception of fiducial politics ‘for what they signal about the values and good works that matter’ (Braithwaite 2008:125). And sometimes those who should be honoured are those usually shunned by established honours councils, such as those non-partisans who have stimulated a measure of public controversy in their pursuit of public values.

**Agenda item 8: committee 6 of the council—deliberative chambers committee**

**Comment**

Some years ago, I persuaded the Commission on Constitutional Reform in Victoria that it was desirable for the members of the newly reconstituted upper house (the Legislative Council) to form regional committees on which they would deliberate with municipal representatives and other community figures. Unsurprisingly, the government of Steve Bracks ignored this recommendation. In this new context, however, such an arrangement could with benefit be modified for introduction at the national and state/territory levels. For example, senators and municipal councillors who were able to secure seats on their respective state/territory councils of state would be especially well placed to serve as linkages between the differing spheres of governance.

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4 See the 2002 report of the Constitution Commission Victoria: *A House for Our Future* (p. 51).
Agenda item 9: committee 7 of the council—interrelations between councils of state, and determining the role of the national head of state in activities of the council

Comment

While it would be up to each council of state to determine the role it would like the national head of state to play in its deliberations, this would be an issue of considerable interest to the national council and the head of state him/herself. It is not inconceivable that the councils in some jurisdictions would make provision for a new ‘vouching’ officer, such as the chairperson of an important parliamentary committee or the presiding officer of an upper house. If this were to occur, the relations of such an officer with the national-level ‘voucher’—the president—would need to be carefully negotiated between the councils concerned.

Another important responsibility that could be placed on this committee would be that of developing recommendations on the development of proper relations between Australian councils and international bodies. Once fiducially oriented councils of state came into existence (either through institutional innovation, as would have to be the case in Australia, or through the reorientation of existing councils, as in many existing semi-presidential regimes), they would naturally seek to establish linkages with other similarly oriented councils. Although such interactions would become evident first at regional levels, it would not be long before their relevance to global concerns would come under the attention of bodies such as the United Nations. While this is a topic that I shall take up in the companion essay, it is one that will increasingly demand the attention of governance practitioners long after I have departed the scene.

Agenda item 10: design of the reform program

Design the constitutional reform program, with particular attention to the sequencing of proposals to be submitted to the citizenry through serial referenda.

Comment

While much worthwhile work can be accomplished before constitutional reforms are attempted, ultimately popular referenda will be needed. The approach of governance leaders will, however, be far from minimalist orthodoxy, for they

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5 This important issue is treated at somewhat greater length in the epilogue to the companion essay.
will welcome public deliberation on a sequence of reform proposals. They will be fortified by the knowledge that their commitment to the fiducial cause will have become publicly known well before the first referendum tests are faced.