A CENTENARY REFLECTION ON THE AUSTRALIAN CONSTITUTION: THE REPUBLIC REFERENDUM, 1999

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REMEMBERING MENZIES

For Robert Gordon Menzies, long-time Prime Minister of Australia, republicanism was unthinkable in the Australian context. He was not alone. Another hero of the 1950s and 60s, the Labor Party leader, Dr H V Evatt was as insistent that Australia was a "British nation" involved in a special family relationship with the United Kingdom[1]. Like Menzies, Evatt regarded the monarchy as a source of beneficence and an instrument for the good governance of a free society[2]. Evatt recognised that, even with the change from Empire to Commonwealth, the King's prerogative powers[3]:

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* Justice of the High Court of Australia. Adapted from the text of the R G Menzies Memorial Lecture delivered at King's College, London, 4 July 2000 on the eve of the centenary of the passage of the *Commonwealth of Australia Constitution Act* 1900 (Imp).

1 F Bongiorno, "Commonwealthmen and Republicans: Dr H V Evatt, the Monarchy and India" (2000) 47 *Australian Journal of Politics and History* 33 at 36.

2 Bongiorno, above n 1, 37.

3 H V Evatt, *The Royal Prerogative*" (1987 ed), 197-198.

> "lent powerful aid to the general principle of self-government, his name is the symbol of unity, not a unity resting on legal supremacy, but rather resting in the hearts and minds of British citizens throughout the world".

Similarly, J B Chifley, the Australian Labor Party Prime Minister in the post-War years in which Menzies languished in the political wilderness, regarded the monarchy in Australia as "a handy constitutional fiction"[4]. It was to be a natural foundation for the acceptance of a new fiction in 1949 as the monarch assumed a role in the Commonwealth of Nations.

Menzies was returned to Government in Canberra in December 1949. Soon after he attempted to have the constitution amended after the High Court of Australia struck down the *Communist Party Dissolution Act* 1951 (Cth)[5]. Fortunately, the wisdom of the electors and the requirements of the Constitution, defeated that proposal[6]. It was Evatt's greatest triumph and Menzies' greatest rebuff in his long

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4 Letter by Kiernan to Boland, 25 October 1948, Department of External Affairs, Ireland (National Archives of Ireland) noted in Bongiorno, above n 1, 42.

5 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

6 The proposal to enshrine the *Communist Party Dissolution Act* 1950 (Cth) in the Constitution and to give the Commonwealth power over communism was carried in three States (Queensland, Western Australia and Tasmania). It was not carried nationally. (48.75% yes; 49.85% No; 1.40% informal).

second period as Prime Minister. It demonstrated the occasional wisdom of the restrictive Australian referendum provision[7].

Even at the time of Menzies' death in 1978, I think he would have been astonished if he had been told that within twenty-five years, a momentum to convert Australia to a republic would grow up and a proposal for that purpose would be put to the Australian electors. How did this change, so inconceivable in Menzies' time, come about? How was it addressed? Why, in the event, did the attempt to change the Australian Constitution fail? What are the lessons of the referendum for Australia? Are there any lessons for the United Kingdom?

THE 1999 AUSTRALIAN REFERENDUM

The republic referendum took place throughout Australia on Saturday 6 November 1999. More than 12.3 million electors participated. Two questions were asked. One of them concerned the introduction into the Constitution of an additional Preamble, although one which would have no binding legal force[8]. The other question asked whether the electors approved a proposed amendment:

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7. M D Kirby, "H V Evatt and the anti communism referendum and liberty in Australia" (1991) 7 *Australian Bar Review* 93.

8. *Constitution Alteration (Preamble)* 1999. See P H Lane "Referendum of 1999" (1999) 73 Australian Law Journal 749 at 749-750.

> "To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament"[9].

Both proposals were defeated. The national vote of the electors in favour of Australia's becoming a republic was 45.13%, with 54.87% against. The proposed Preamble was lost even more decisively. It could muster only 39.34% in favour with 60.66% against[10]. The republic proposal was rejected in every State[11]. It secured a majority only in the Australian Capital Territory[12]. Yet whilst the votes of the electors in that Territory counted towards the national aggregate, they were not relevant to the other requirement of the Constitution concerning amendment. Under s 128 of the Australian Constitution, to secure the passage of an amendment it is necessary to obtain not only a majority of the electors nationally but also an affirmative vote in a

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9 The Long Title of the Act is cited as *Constitution Alteration (Establishment of Republic)* 1999 (Cth). For criticism of the form of question, see B O Jones, "Framing a New Australian Republic", unpublished address to the Australian Academy of the Humanities, 3 November 1999, 11.

10 Final National Results issued by the Australian Electoral Commission, National Table.

11 New South Wales: Yes 46.43%; No 53.57%; Victoria: Yes 49.48%; No 50.16%; Queensland: Yes 37.44%; No 62.56%; South Australia: Yes 43.57%; No 56.43%; Western Australia: Yes 41.48%; No 58.52%. See [1999] *Public Law Review* 305.

12 63.27% in favour; 36.73% against. See Comment (1999) 24 *Alternative Law Journal* 307.

majority of the States. Far from obtaining a majority of the States, every State rejected the proposed republic. The margins varied. The only other self-governing mainland Territory of the Commonwealth, the Northern Territory of Australia, also voted against the republic[13]

The founders of the Australian Commonwealth had a number of models from which to choose the requirement for amendment of the Constitution. That of the United States required a two-thirds vote of both Houses of the Congress together with affirmative votes in three quarters of the States[14]. That of the then German Empire required an exceptional majority in the Federal Council and, where certain rights of the constituent States were concerned, the consent of the States affected[15]. But it was to Switzerland that the founders ultimately looked for the model which was adopted . In the case of most amendments to

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13 The final Northern Territory vote was: Yes 48.77%; No 51.23%.

14 United States Constitution, Art V. See K E Palmer (ed) *Constitutional Amendments - 1789 to the Present* (1999), 591 where M H Scarborough points out that the odds against constitutional change are "monumentally long". Thirty-nine times the United States Congress has approved a constitutional amendment and sent it to the States for ratification. On 27 occasions, three quarters of the States have then ratified the proposal, thereby effecting an alteration of the Constitution. In six instances the States have refused. Nearly 11,000 proposals for amendment to the United States Constitution have been introduced in Congress but have failed to gain the two-thirds majority required. According to the author, change requires "a sustained consensus" about a problem for which the amendment is "the best (and probably the only) solution".

15 Basic Law of the German Empire 1870, Art 78(2).

the Swiss Constitution, it was necessary to secure the approval of the two chambers of the federal legislature and the submission of the proposal to, and acceptance of it by, a majority of the electors and by a majority of the Cantons[16]. This was the source of the idea that became the Australian constitutional provision.

The justification for this amendment provision, which is undoubtedly conservative (but not as formidable as that of the United States), was expressed by Dr John Quick and Mr Robert Garran in their *Annotated Constitution of the Australian Commonwealth,* published in 1901. The authors explained how the federalists wished to have a method of amendment which did not require supplication to the Imperial Parliament, as was necessary in the case of Canada under the *British North America Act* 1867 (Imp). Coming to London on bended knee, as they had done to obtain passage of the Constitution, was once enough. The seriousness of any alteration of the Constitution, so hard won and considered over more than fifteen years[17], led to the adoption of the

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16 Swiss Constitution, Arts 118, 119. See J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901; 1976 reprint) 995; B Ackerman, "The New Separation of Powers", 113 *Harvard Law Rev* 634 at 671 (2000).

17 Since at least the *Federal Council of Australasia Act* 1885 (Imp) 48 and 49 Vic c 60.

restrictive amendment procedure in s 128. But according to Quick and Garran there was more[18]:

> "In the Constitution of the Commonwealth ... there is no absolute sovereignty, but a *quasi*-sovereignty which resides in the people of the Commonwealth, who may express their will on constitutional questions through a majority of the electors voting and a majority of the States. No amendment of the Constitution can be made without the concurrence of that double majority - a majority within a majority. These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable".

In the history of the Australian Commonwealth before 1999, there had been 42 proposals for change to the federal Constitution. One of these[19] altered s 128 itself, to enable electors in the Northern Territory and the Australian Capital Territory to participate in amendment referenda. Since the first referendum was held in 1906, only 8 have been approved[20]. Although it has sometimes been

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18 J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth,* 1901, 988.

19 *Constitution Alteration (Referendums)* 1977.

20 J McMillan, "Constitutional Reform in Australia" in Australian Parliament, The Senate, Papers of the Parliament, November 1991, 63.

suggested that the requirement of a double majority frustrates the national majority, if the provisions of s 128 were altered to provide that an amendment would pass if three (instead of four) of the six favoured it, only three further proposals would have been adopted[21]. Constitutionally speaking, Australia is, and has always been, a most cautious and conservative country. Its Constitution is one of the oldest continuously operating written constitutions in the world.

In the events that occurred there is one legal debate, which does not have to be addressed. It concerns the ambit of s 128 as an amending device. It was widely assumed throughout the consideration of the republican amendment proposal, that the alteration of the Constitution to establish a republic could be achieved by the majorities provided in s 128. This assumption may be correct. However, there was a contrary argument[22]. According to the contrary view, s 128 is a

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21 Two on 28 September 1946 (to exclude cooperative marketing schemes from s 92 of the Constitution and to provide additional federal power over industrial employment) and one on 21 May 1977 (to require simultaneous elections for both Houses of the Federal Parliament). cf C Merritt "Why republicans must win twice over" in *Australian Financial Review*, 5 November 1999, 27.

22 S Gageler and M Leeming, "An Australian Republic: Is a Referendum Enough?" (1996) 7 *Public Law Review* 143. cf G Lindell and D Rose, "A Response" (1996) 7 *Public Law Review* 155. Under some national constitutions (eg Germany, Cyprus) some provisions are purportedly placed beyond formal amendment, requiring a form of extra legal revolution to secure change: O Hood Phillips and P Jackson, *O Hood Phillips' Constitutional and Administrative Law* (7th ed, 1987), at 7.

provision for altering the *detail* of the Constitution, not for altering its fundamental *character* or a fundamental provision. In India, such a distinction has been drawn between the ordinary methods of constitutional amendment and those that would be necessary to alter a "basic feature" of the Constitution: such as the superintendence of the rule of law by the courts[23] or perhaps the secular and republican character of the nation[24].

Obviously, a means would have to be found to effect an alteration even of a fundamental feature of a written constitution. Since the time of the Medes and Persians, nothing in a country like Australia is wholly resistant to a change that has democratic support. This is especially so where (whatever may be accepted in legal theory) ultimate constitutional sovereignty lies in the will of the people[25].

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23 Derived from the concept of "directive principles" in the Constitution said to lie at its heart. This notion appears to have originated from the Irish Republic but has had its main exposition in India. See eg *Golakanath v State of Punjab* AIR 1967 SC 1643; *Kesavanamda Bharatt v State of Kerala* AIR 1973 SC 1461; D G Morgan, "The Indian Essential Features" Case (1981) 30 *Intl CLQ* 307. cf R Garran, *Prosper the Commonwealth* (1958), 200. The question of the indissolubility of the Commonwealth of Australia was raised when the Parliament of Western Australia petitioned the United Kingdom Parliament in 1934 that Western Australia be allowed to secede. The United Kingdom Parliament decided that the petition could not be granted without the request of the Australian Federal Parliament.

24 Set out in the Preamble to the Constitution of India.

25 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484, 486; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

The opening words of the *Commonwealth of Australia Constitution Act*[26] recites that the people of the several colonies "humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established". Does this provision mean that, to be valid, the people of each of the constituent parts of the federation would, by a majority, have to agree to dissolve the "indissoluble federal Commonwealth under the Crown?" Does it mean that to achieve the alteration of this fundamental feature of the Commonwealth (despite the *Statute of Westminster* of 1931 and the *Australia Acts* 1986) it would be necessary for Australians to return to the Parliament of the United Kingdom to present the evidence of the will of the people in each of the States and to secure an amendment to the document which the United Kingdom Parliament first enacted? It seems unlikely that this last proposition could be the law given the acceptance by the Australian High Court that constitutionally speaking, in relation to Australia, the United Kingdom is now a "foreign power"[27]. What business would it be of a "foreign power", even at the request of Australia, to enact a law (and especially a constitutional law) for

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26 1900 (Imp) 63 and 64 Vic c 12.

27 *Sue v Hill* (1999) 73 ALJR 1016.

Australia and its people over which the United Kingdom has long since lost, and indeed renounced, any legislative authority?

In light of the outcome of the 1999 referendum this question need not be addressed. Perhaps it will arise at some time in the future. I mention it merely to indicate the legal difficulties which may lie in the path of the constitutional reformer in Australia seeking to effect a fundamental change. They could not be insurmountable. But they may be substantial. They were meant to be.

AUSTRALIAN REPUBLICANISM

Despite the popularity which constitutional monarchy reached in Australia during the time that Menzies was Prime Minister, there has always been a measure of support for a republican form of government[28]. In the 1850s the Rev John Dunmore Lang, founder of the Presbyterian Church in Australia, was an avowed republican. At the Australian Convention in Sydney in 1891, which produced the first draft that was to become the Constitution, a former Premier of New South Wales, Mr George Dibbs, described as the "inevitable destiny of the people of this great country" the establishment of "the Republic of

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28 M McKenna, *The Captive Republic - A History of Republicanism in Australia 1788-1996.* See review (1997) 71 ALJ 568.

Australia"[29]. In the 1890s, national journals such as *The Bulletin* were avowedly republican. They were vigorously critical of the British monarchy. At the time of federation, after the Constitution had been adopted which accepted Queen Victoria and her successors as the nation's monarch, popular support for monarchy waxed and waned. Yet it was the Queen Victoria's Royal Assent and Proclamation that brought the Australian Constitution into effect. It was a representative of the monarchy, the Duke of Cornwall and York (later King George V) who participated at the Exhibition buildings in the temporary national capital Melbourne, at the opening of the first Federal Parliament on 9 May 1901.

By s 61 of the Constitution, the executive power of the Commonwealth of Australia is "vested in the Queen and is exercisable by the Governor-General as the Queen's representative". By s 68 the Command in Chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative. If one were to read the Australian Constitution, without knowledge of the conventions by which it operates, one could be forgiven for concluding that Australia was a kind of personal fifedom of the British monarch. She is part of the Parliament of the

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29. *Official Record of the Debates of the Australasian Federal Convention* 1891, Vol 1, 186.

Commonwealth[30]. She appoints the Governor-General[31]. She is paid out of Consolidated Revenue for the Governor-General's salary[32]. No proposed law may be passed without her assent[33]. Assent is given in her name by the Governor-General. Even then, within one year, she can annul such a law[34]. Certain proposed laws may be reserved for two years for that assent[35]. The Executive Government of the Commonwealth is vested in her[36]. She even appears in the Judicature, provision being made for appeals from Australian courts to the Queen in Council (Privy Council)[37]. She can authorise deputies to the Governor-General[38]. It is her assent again, given by the Governor-General, which is necessary for an alteration of the Constitution[39].

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30 Constitution, s 1.

31 Constitution, s 2.

32 Constitution, s 3.

33 Constitution, s 58.

34 Constitution, s 59.

35 Constitution, s 60.

36 Constitution, s 61.

37 Constitution, ss 73, 74. cf *The Commonwealth v Mewett* (1997) 191 CLR 471 at 546 citing *Johntone v The Commonwealth* (1979) 143 CLR 398 at 406.

38 Constitution, s 126.

39 Constitution, s 128.

The reality is quite different. So it was, indeed, from the start, and intended to be so. Save for the possibility of infrequent visits, it was simply not feasible for the monarch to be physically present in Australia. It was even less so in 1900 when the Constitution was adopted. Hence, from 1901, the monarchical appearances of the Australian Constitution were belied by the substantial republican realities. At all times unless the Queen is personally present, the Governor-General performs virtually all the functions of an Australian Head of State. Legislation reserved for the personal assent of the Queen is extremely rare and generally confined now to symbolic matters. The appeals to the Privy Council from the High Court, federal courts and State courts have been successively terminated[40].

Any pretence of British intervention in Australia's internal affairs in legislation, administration or the judiciary has long since ceased. Australia is, and for decades has been, a wholly independent nation. There is no link in the Australian Constitution with the Royal Family, except with the reigning monarch of the United Kingdom and implicitly (contingently on her demise) with her heirs and successors[41]. Save for the expenses of occasional Royal visits and infrequent gifts, Australia

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40 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Australia Acts* 1986 (Cth and UK), s 11. See *Kirmani v Captain Cook Cruises Pty Ltd [No 2]; Ex parte Attorney-General (Qld)* (1985) 159 CLR 451.

41 *Constitution of the Commonwealth of Australia Act* 1900 (Imp), s 2.

contributes nothing to the upkeep of the Queen or her family. In 1956, with the Queen's personal assent, she was designated Queen of Australia. Her Royal style and title for Australia was later changed by the Parliament of Australia to exclude in the case of Australia the papal title given to King Henry VIII, "Defender of the Faith"[42].

Queen Elizabeth II has fulfilled her duties under the Australian Constitution since 6 February 1952, ie forty-eight years. Menzies was her first Australian Prime Minister. She has seen out ten of them. In a message to the people of Australia following the result of the 1999 referendum, the Queen acknowledged her respect for, and acceptance of, the outcome. She said[43]:

> "I have always made it clear that the future of the monarchy in Australia is an issue for the Australian people and them alone to decide, by democratic and constitutional means".

This was a position which she reiterated in Australia during her thirteenth Royal visit in March 2000.

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42 *Royal Style and Titles Act* 1953 (Cth) and *Royal Style and Titles Act* 1973 (Cth). By s 2(1) of the latter the assent of the Parliament was given to the adoption by the Queen of the Royal Style and Title of Queen of Australia.

43 Statement by the Queen, published *Sydney Morning Herald,* 8 November 1999, 12.

A Commission established to review the Australian Constitution in time for the Bicentenary of British settlement, which fell in 1988, concluded that there was no significant movement in Australia to change to a republican form of government[44]. Indeed, no real steps were taken in that direction until Mr Paul Keating became Australia's Prime Minister in 1992. But then Mr Keating announced his decision to propose the constitutional changes necessary to establish a republic. In a speech to the Evatt Foundation on 28 April 1993, he announced the establishment of a Republic Advisory Committee comprising seven persons. The Committee was not established to advise *whether* a republic should be substituted for the constitutional monarchy in Australia. Instead, it was asked to report on the minimum constitutional changes that would be required to bring about a republic.

A lawyer, Mr Malcolm Turnbull, was appointed to chair the Committee[45]. The Committee produced its report within the year[46]. The report canvassed the options for the selection of a Head of State to replace the Queen. These included: (1) Appointment by the Prime

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44 Australia, Constitutional Commission, *Final Report* (1988) vol 1, p 12 (par 5.9). "We recommend no change to Australia's status as a constitutional monarchy or to the position of the Queen as Head of State".

45 M Turnbull, *Fighting for the Republic* (1999), 9.

46 Australia, Republic Advisory Committee, *An Australian Republic - The Options*, 1993.

Minister; (2) appointment by the Federal Parliament; (3) direct election by the people; and (4) election by an electoral college. The Committee concluded that it was "both legally and practically possible to amend the Constitution to achieve a republic without making changes which would in any way detract from the fundamental constitutional principles on which our system of government is based"[47].

On 7 June 1995, Mr Keating responded to the report by indicating that the Government had adopted as its preferred model the "minimalist" position by which the new Head of State would be "above politics" and "an eminent Australian, a widely respected figure who can represent the nation as a whole. This, in fact, has been the character of the role of the Governor-General and it should be protected and retained in the role of Head of State"[48]. On 19 September 1993 Mr Keating had an audience with the Queen at Balmoral to inform her of his Government's plans[49]. He indicated an intention to put his proposals for a republic to the Australian people in a referendum

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47 Report p 7.

48 J P Keating, "An Australian Republic, The Way Forward", 7 June 1995 reproduced in T Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998) 1211-1212.

49 The Queen authorised Mr Keating to say that "she would of course act on the advice of her Australian ministers as she always has and on any decision made by the Australian people" See L D S Waddy, Introduction to G Grainger and K Jones (eds), *The Australian Constitutional Monarchy* (1994) 1 at 5.

"sometime in 1998 or 1999 with a view to acceptance of the referendum entailing a change to a republic in the centenary year of Australian federation, 2001"[50].

As required by the Australian Constitution, Mr Keating went to the electors as Prime Minister for the second time, on 2 March 1996. At that election, responding to perceived popular interest in the republic proposal, including in its own ranks, the opposition Coalition parties promised that, if returned, they would establish a People's Convention to debate the proposed change of the Constitution. This would be followed by a referendum on the issue of a republic before the end of the year 2000. Mr Keating lost government. The Coalition parties under Prime Minister John Howard were returned. A year later, in March 1997, Mr Howard announced the details of a Constitutional Convention to consider a change to a republic[51].

To facilitate the establishment and functions of the Convention, federal legislation was enacted on 27 August 1997[52]. The Convention, partly elected and partly appointed, met in the Old Parliament House in Canberra over ten days in February 1998. It soon became apparent

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50 *Ibid,* 13.

51 J W Howard, in *Commonwealth Parliamentary Debates (House of Representatives)*, 26 March 1997, 3061.

52 *Constitutional Convention (Election) Act* 1997 (Cth).

that a majority of delegates to the Convention favoured some form of republic. However, they were divided about the detail. Some preferred the "minimalist" republic proposed by the Australian Republican Movement (ARM). Others favoured a President directly elected by the electors. In the end, by negotiation and compromise, a model emerged which attracted the support of a majority of the Convention[53].

In accordance with his undertaking, Mr Howard announced that this proposal would be put to the people. Legislation to permit this to be done was enacted in the form of a Constitutional Alteration proposal[54]. Significant public funds were provided to the "Yes" Committee and to the "No" Coalition. The latter was made up substantially of members of Australians for Constitutional Monarchy (ACM) whose executive director was Mrs Kerry Jones. But the "No" Coalition also included direct election supporters who considered that the "minimalist" model adopted by the Convention was undemocratic and non-republican in character. To them, it amounted to a continuation of monarchical "elitist" government dressed in republican raiments. Thus began an unusual marriage of convenience between

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53 Australia, Report of the Constitutional Convention, 4 vols, 1988. See G Williams "The People's Convention?" (1998) *Alternative Law Journal* 2. On the motion that the Convention recommend the model favoured by ARM there were finally 75 votes in favour, 71 against and 4 abstentions. See Turnbull, above n 45, 73.

54 *Constitutional Alteration (Establishment of a Republic)* 1999.

the true monarchists and the most radical republicans. It was an alliance which would defeat the Australian referendum on the republic.

REASONS FOR THE DEFEAT

There are many reasons why the 1999 referendum failed. The "rout" of the country's "intellectual elite" by "a Coalition of battlers, supported by a Dad's Army and a monarch living 17,000 km away[55] astonished the media and many others. In my view there were ten main reasons for the result:

1. *The partisan error:* The lesson of formal constitutional alteration in Australia is that, without affirmative support by all the major players in the political debates, there is little or no chance of securing the majorities required to amend the Constitution. Even with such support, there is no guarantee that the electors will agree to the proposal. On the evidence of past referenda, any attempt to change the Constitution for party political advantage would be bound to attract the scepticism of the people. It would fail to build the coalition necessary to achieve the dual majorities required by s 128.

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55 *Sun Herald,* 7 November 1999, 74.

Prime Minister Keating felt passionately about the republic. He felt the same way about the political party which he led. He effectively claimed the republic for himself and for his party. Although the personal opposition of Prime Minister Howard to the proposed constitutional change was undoubtedly a very important factor in the defeat of the referendum[56], there will always be, in both sides of politics, opponents of such a change. That is the nature of a democracy and a free society. Attempting to stamp out such opposition and to gain partisan advantage from the republican cause was a formula which the history of referenda in Australia, suggested was likely to spell defeat for the proposal.

2 *The haste error:* To change the Australian Constitution in such a significant respect, within the space, effectively, of five years, imposed requirements of comprehension and adaptation to change which proved unacceptable to the majority of the Australian electors. To many republicans, including Mr Keating, the centenary of federation in 2001 seemed the appropriately symbolic time to effect the change to the character of the Commonwealth.

However, to many Australians, there was no urgency for such a change which was bound to upset a significant number of citizens. To

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56 Turnbull, above n 45, 245, 251.

some republicans, it appeared sufficient that the barest constitutional majority for change should be collected. This was hard enough to attain, but it was considered enough. This is precisely the attitude to constitutional reform which the double majorities in s 128 are designed to restrain. Until such a change is regarded as "desirable, irresistible and inevitable"[57], there are powerful reasons to hasten slowly in such matters.

Impatience for change which is seen as based on ethical and political principles, is sometimes understandable. However, in the business of constitutional alteration in Australia, such impatience must be tempered by a respect for the process and by the need to allow time for that process to become tolerated, even if not welcomed, by those who will lose out in it[58].

3. *The elitist error:* The post-referendum analysis of the voting patterns throughout Australia indicated the way in which the republican proposal divided the electors. The country against the cities. The small States against the big States. The high income earners against

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57 Quick and Garran, above n 18, 988.

58 B O Jones, "Framing a New Australian Republic", unpublished address to the Australian Academy of the Humanities, 3 November 1999, 9. The importance of process as a feature of republicanism is emphasised in P Pettit, *Republicanism - A Theory of Freedom and Government* (1997), 286ff.

the "battlers". The educated elite against those who had lost their economic advantages in the structural adjustments which had occurred in recent times in Australia and under successive governments. The projection of the referendum vote throughout Australia on a map of the country demonstrates vividly the substantial lack of majority support for the idea of a republic outside city centres.

Clearly enough the alteration was seen by many as an unnecessary distraction from really important issues and one that was being pressed on the nation by an urban elite out of touch with the values and concerns of other citizens. All referenda are "elite driven"[59]. However, to secure the requisite support amongst the electors of Australia proponents of change must somehow secure the understanding and support of a wide range of ordinary citizens. On big issues this imposes a heavy burden.

4. *The patriotism error:* Some republican advocates, before and after the vote, denigrated those who did not agree to the proposed

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59 R Evans Case, *The Republic Referendum: A Democratic Elite Perspective*, paper noted by R McClelland, "Amending our Constitution - The Climate for Constitutional Reform", 13 November 1999, 4. The opposition was also elite driven, a point made by Barry Jones, above n 58, 12. But it seemed to attract more ordinary citizens to its cause. Mark McKenna in *The Captive Republic* (1996), 235 described the push for a republic as "a minority of intellectuals fighting a minority of rabid loyalists - with the great majority of Australians showing little interest in the debate".

change as somehow less patriotic and even un-Australian. Some of the supporters of the republic could not accept that others disagreed with the perception of the needs for Australia's good governance of the change proposed (or of the specific model of republic on offer). A mark of this nationalism was taken to be the commitment to a specifically Australian Head of State who was "one of us" and who lived in Australia, "postcode 2600" (Canberra) as it was sometimes put.

To upbraid half the people of a nation, or at least a good proportion of them, as "unpatriotic" because they do not happen to agree with a proposal, is a sure way in a country such as Australia to alienate them. Yet this was a theme of the advertisements and some of the arguments urging an affirmative vote. Australians are fiercely loyal to their country in war and in sport; but for the most part they are quiet about their allegiance. They are usually embarrassed about breast beating patriotism.

5. *The Convention error:* The Constitutional Convention which finally, but narrowly, settled the republican model that was put to the Australian people obviously operated within significant constraints. The republicans had to endeavour to secure a consensus in order to call up the fulfilment of the Prime Minister's promise to have a referendum in those circumstances. Yet this imposed upon them the haste and unwillingness to explore and forge links with republicans of differing persuasions, which produced the proposal ultimately put to the people. Once that proposal was adopted by the Constitutional Convention, it

became anointed, not only by ARM but by the media and various celebrities and notables.

The vision of a compromise proposal, hastily worked out in the committee rooms of the Constitutional Convention, was precisely the kind of image likely to engender popular suspicion. In this respect, the republicans were probably outflanked by the strategy of the Prime Minister, Mr Howard whose unwavering support for the present constitutional arrangements was never in doubt. His offer locked republican supporters into a time frame, and then a model, which it was difficult or impossible to change in any material respect.

Mr Keating was committed to his time frame by sincere republican passion, a sense of urgency and a desire to divide his political opponents. Mr Howard was committed to his by the need for a response to the Keating proposal, an electoral promise and the imperative to preserve unity within the Coalition parties despite republican dissent amongst their numbers. Both sides were constrained by millennial deadlines.

6. *The model error:* This is not the occasion to canvass all of the criticisms of the republican model which was put to the electors in 1999. Critics certainly raised many false issues. However, if such

matters are put to one side, there remained genuine concerns about the proposed alterations. They worried informed critics[60].

Probably the chief concern was the fear about the ease with which, under the proposed alterations, the Prime Minister would be able to dismiss the proposed President[61]. The Prime Minister would be obliged to seek endorsement of such action by an affirmative vote in the House of Representatives within a short time. An affirmative vote was required of the House of Representatives. However, in practice, that chamber would ordinarily be in the control of the Government party from which the Prime Minister was elected. No effective constitutional sanction was imposed if, astonishingly, the House of Representatives voted against the Prime Minister[62]. In particular, an adverse vote would not have meant the restoration of the ousted President to office. In Australia, these were not theoretical points, given events which had occurred in the dismissal of Prime Minister Whitlam by Governor-General Sir John Kerr in November 1975.

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60 K R Handley, "'She'll be right' model is wrong way to go", *Australian Financial Review,* 2 November 1999, 19; H T Gibbs, "Beware a president with a lust for power", *The Age,* 13 October 1999, A17.

61 *Constitution Alteration (Establishment of Republic)*, proposed ss 62-63 of the Constitution. See generally P H Lane "Referendum of 1999" (1999) 73 *Australian Law Journal* 749 at 752.

62 This was pointed out in a letter published in *The Australian,* 3 November 1999: "The model on offer is not safe, simple or minimalist" signed by R J Ellicott and others.

For those who urged acceptance of the model, even if defective, on the promise of later amendment and improvement - to codify the powers of the Governor-General; to provide ultimately for direct election; to control further the dismissal of the President - the spectre of the difficulty of securing later change loomed large. Even electors generally sympathetic to the idea of a republic could therefore rationally reject the proposed model.

7. *The pundit error:* The ARM strategy, linked with that of the Conservatives for an Australian Head of State, involved calling upon a number of "names" well known to the Australian people to support their cause. The advertisements, and public affairs coverage during the campaign for the referendum concentrated heavily upon past Prime Ministers supporting the change (Messrs Whitlam, Fraser and Hawke), past Chief Justices who declared it safe (Sir Anthony Mason and Sir Gerard Brennan), and a past Governor-General who was converted to the cause (Sir Zelman Cowen). ACM found it difficult to match these names, although one past Governor-General (Mr W G Hayden) and one past Chief Justice (Sir Harry Gibbs) joined the other side.

The ARM campaign tune adopted the "It's Time" musical and verbal theme which had accompanied the election of the first Whitlam administration in 1972 after twenty-three years of Coalition government. However, it seems clear from the general irrelevance of party allegiance in the pattern of voting in those city areas which favoured the republican proposal that the advocacy of the heroes of earlier times did

not reach down to the grassroots, certainly not to outer suburban and rural Australia. A constant theme of explanations for the negative response to the change was the feeling that the electors were being taken for granted, talked down to, condescended with jingles but not provided with basic and detailed information of what precisely was involved in the change.

Occasional points were scored critical of the monarchy by reference to the hereditary principle, the precedence of male heirs and the requirement in the British *Act of Settlement* of adherence to Protestantism by the monarch and heirs to the throne[63]. It is virtually impossible to have a modern constitutional monarchy without the hereditary principle. However, other monarchies have removed the primacy of male heirs. And it is not difficult to understand the objection of non-Protestants; indeed non-Christians, to a requirement that the Head of State of their country and sovereign must adhere to one religious conviction only[64].

8. *The small State error:* The post-referendum scrutiny of the voting for the republic largely concentrated upon the national vote. However, the truly serious figures for those who hoped for change

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63 Act of Settlement 1700 (Imp), 12 and 13 Will III.

64 T Abbott, *The Minimal Monarchy* (1995), 141; V Bagdanor, *Monarchy and the Constitution* (1995), 59.

appear to lie in the high negative votes in the States of Australia with smaller populations. Whilst the referendum proposal almost passed in Victoria (49.84%), and received a 46.43% affirmative vote in New South Wales, in most of the smaller states the affirmative vote was little more than 40%. This leaves a very large gap to be made up if the electors' votes are to be changed in the near future. Until now the experience of referenda in Australia has generally been that second attempts to secure a proposed constitutional change actually witness a diminution in the support of the electors[65]. It is as if, having been educated in part on the issue and having passed upon it, the electors do not want to be troubled again.

9. *The media error:* There were no real exceptions to the affirmative editorial line on the republic followed by the Australian media. Even the national broadcaster, the Australian Broadcasting

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65 In 1913 a proposal for an expanded federal power of trade and commerce gained a 47.19% affirmative vote but was not carried nationally. In 1919, a proposal for a temporary extension of federal power of trade and commerce gathered only 44.87% affirmative votes and was not carried. A 1913 proposal for nationalisation of monopolies gained 45.16% affirmative votes but was not carried. A further attempt to secure that power in 1919 also failed with an affirmative vote of only 40.07%. Sometimes there is a movement in the opposite direction. Thus a proposal for simultaneous elections for both Houses of the Federal Parliament in May 1974 was not carried and gathered only 47.50% of the national vote. A similar proposal in May 1977 gathered 61.12% of the national vote but was still not carried because it achieved a majority in only three States (New South Wales, Victoria and South Australia). A further attempt in December 1984 was also lost, the affirmative vote dropping to 48.21% and a majority being achieved in only two States.

Corporation, in the opinion of many ACM observers, exhibited substantial bias in favour of the republic proposal and against the constitutional *status quo*. The print media, with virtual unanimity (a few isolated columnists apart) advocated change to a republic and support for the "minimalist" model proposed.

So uneven and biased was the media coverage of the referendum issues that it almost certainly became part of the problem for support for the republic in Australia . It tended to reinforce opinions, especially amongst lower income and rural electors, that this was a push by intellectual, well-off east coasters, not necessarily to be trusted by the rest of the nation[66].

10. *The republican problem:* The electors of Australia are now better informed about the issue of republicanism than they were when Mr Keating first raised it. A non-binding plebiscite on the general question of whether Australia should become a republic might have been a useful strategy in 1995. Now it might seem to some to be unduly naive or even manipulative. If such a plebiscite were now put and carried, the proponents of change would still have to advance a new specific

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66 Mr B O Jones considered the one-sided media campaign "strengthened the view that rich, powerful elites were trying to dominate". "The support of Messrs Rupert and Lachlan Murdoch, both United States citizens, was quite damaging to the 'Yes' case". See B O Jones, above n 58, 15. cf G Henderson, "Limited Influence", *Sydney Morning Herald*, 30 November 1999, 19.

model. A plebiscite cannot alter the Constitution, although it could wound its institutions. If, in the short term, republicans were to put forward another version of a republic, with a President elected in some way by the Parliament (or any other group including politicians), it seems likely that such a proposal, at least in the immediate future, would face the same fate as the 1999 proposal.

To advance a proposal for a directly elected President, would amount to the most radical surgery upon the Australian Constitution. It would create an office-holder potentially able to challenge the Prime Minister for national legitimacy and authority[67]. It would involve a conception of the Head of State which Australians have never held. Because such a change would seem likely to diminish the prestige and power of the Prime Minister who is elected from the members of the Federal Parliament (and on one view the power of the Federal Parliament itself) it seems unlikely that it will be adopted in the near future by that Parliament. Under s 128, any proposal for the amendment of the Constitution must first have the approval of the Federal Parliament.

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67 B Ackerman, "The New Separation of Powers", 113 *Harvard Law Rev* 634 at 657ff (2000) deals with the dangers of a presidential "cult of personality". ["Quite simply an elected presidency predisposes the system to a politics of personality and especially the politics of a single personality."]

These are the reasons why republicans in Australia are, and for a time must remain, in a kind of electoral gridlock[68]. The reasons illustrate the fundamental dilemma which the republican cause faces in Australia at this time. Addressing these issues, the perils of divisiveness, not to say the costs and distractions of repeated proposals, as well as the constitutional difficulties of achieving change, will probably persuade all but the most intrepid that it is best to leave things alone for the time being. However, the future may bring a new momentum with different players and different urgency

DENOUMENT

Does a referendum on the other side of the world about constitutional monarchy have any implications for the United Kingdom? British commentators who have expressed an opinion seem to think not[69]. After all, if one adds to the negative vote in Australia those electors who supported the current system but simply wanted a locally resident incumbent at the top of it, one derives a vote strongly favourable to the present constitutional arrangements. The presence of the Queen for the most part in the United Kingdom deprives many local

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68 cf G Williams, "Major reforms needed before another vote, Australian National University, *News*, November 1999, 11.

69 C Munro, "More Daylight, Less Magic: The Australian Referendum on the Monarchy [2000] *Public Law*, 3.

nationalists in Britain of the argument about a head of state who is "one of us".

On the other hand, it is impossible to see precisely where devolution within the United Kingdom may finally lead or, for that matter, where the building of the European federation may ultimately take the members of the European Union in constitutional terms. The removal of many of the holders of hereditary peerages from the House of Lords in 1999[70] may reflect the same impatience in the United Kingdom as exists generally in Australia, with the very notion of heredity. But in the Australian Commonwealth, the idea of heredity has only one lingering role to play, namely in the monarch. A hundred years later the United Kingdom has taken a distinct step in the same direction. In the United Kingdom, in a sense, a larger adjustment of thinking is required to narrow the heredity concept to the monarch and close members of her family but to stop the narrowing there. Australians have enjoyed that situation for a century. Much still obviously depends on the personalities involved. No longer can a modern Royal Family be cloistered from the gaze of the people. Satellite television and the Internet are everywhere.

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[70] Under the *House of Lords Act* 1999 (UK).

One of the arguments which recurred in the Australian debate, concerned the exclusion from the Crown of persons who profess or marry a Roman Catholic. The same issue has already surfaced in Scotland[71]. A motion calling for the removal of this provision from British constitutional law attracted all Party support in the Scottish Parliament, although an amendment recognising it as a complex issue was also carried. Given that members of the Royal Family become Presbyterians when they are in Scotland, it may not be unreasonable, in modern conditions, to release their consciences so that they can enjoy (as the rest of us do) the fundamental right of freedom of religion (and, if they choose, as Justice Murphy of the High Court of Australia used to insist, of freedom from religion).

Seventeen weeks after the referendum the Queen made her most recent Royal visit to Australia. She will return in 2001 to mark the centenary of federation and to attend a meeting of the Commonwealth Heads of Government in Brisbane. The visit in March 2000 was by everyone's estimation a happy and successful one[72].

In a major speech in Sydney on 20 March 2000, the Queen renewed her commitment "to serve as Queen of Australia under the

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[71] *Scotland's Parliament,* Cm 3658, para 2.5.

[72] See eg *Sydney Morning Herald* 1 April 2000, at 16.

Constitution to the very best of my ability, as I have tried to do for these past forty-eight years". Correctly, once again, she acknowledged that the constitutional future of Australia is for Australians alone to decide. She said: "Australia has always been a country on the move and will go on being so". In a telling comment, spoken as much as Head of the Commonwealth as in her capacity as Queen of Australia, the Queen referred to the need to bring the Australian sense of fairness to play in resolving the issues affecting the indigenous peoples of Australia. This was the strongest moral and political point made during the Royal visit. It carried the unique clout of a royal appeal.

The same editorialists who had urged the Queen's removal from the Constitution continued to do so[73]. Their opinion columns repeated the institutional obituaries[74]. The ARM regrouped. Reportedly it invited a number of prominent direct electionists to stand for election in its new National Executive Committee[75]. Some republicans complained energetically about the visit of Australians to London in July 2000. Invoking the ghost of Alfred Deakin, they suggested that Australian

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73 "Farewell to the Queen", *Sydney Morning Herald,* 1 April 2000, at 16.

74 P Botsman, "Time to Wish our Lilac Queen Well - And Wave her goodbye", *Australian Financial Review,* 31 March 2000, at 36.

75 *Sydney Morning Herald,* 24 April 2000, at 6.

centenaries should be celebrated "anywhere in Australia, just not bloody London![76]"

The warmth of the Australian response to the Queen personally in March 2000, so soon after the referendum, appeared to surprise some Australian journalists for she had not visited the country as it debated, and ultimately voted on, its constitutional future. Observers were reportedly "struck by how relaxed and confident the [Q]ueen looks in the wake of the republican ballot". One is quoted as saying:

> "It's like a huge weight has been lifted off her shoulders. You can tell she's really enjoying herself. A lot of the old formality is gone but it's something more than that. A new type of confidence. And don't forget she's been doing this type of thing for an awfully long time. It's a class act"[77].

Even the gay community in Sydney was reported as "coming out". An announcer on Radio Free FM chortled: "Of course we love the [Q]ueen. ... Frocks, jewellery and Prince William. She's got the lot, darlings!"[78]. Puzzled, a young journalist wrote:

> "Less than six months after Australia talked its way out of the 'inevitable' republic, the country has reattached the apron strings to Buckingham Palace with alarming

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76 P Botsman, "Our history should be celebrated at home", *Australian Financial Review,* 5 May 2000, at 39.

77 Quoting G L Martin, *The Eye,* 6 April 2000, at 25.

78 *The Eye,* 6 April 2000, at 26.

> speed. Like a grand old ocean liner, the [Q]ueen remains firmly moored to the emotional and political life of Australia - even though 45% of the population have already celebrated her constitutional demise"[79].

An unnamed republican, at a loss to explain the monarch's resurgent popularity with a phalanx of suburban mums and dads waving Australian flags reportedly said: "They're just loopy"[80]. Although he probably would not have used such a vulgar word, that would almost certainly have been Robert Menzies' assessment of the Australian people when they voted down his referendum proposal of 1951 to amend the Australian Constitution to ban communists. Loopy or not, the instinctive feeling of the Australian people towards a certain caution in large constitutional changes is very deeply ingrained. It has been repeatedly displayed. It is probably wise. And whether it is wise or is not, it is a political and constitutional reality.

This is probably the greatest tribute to the Australian Constitution which was adopted at Westminster on 5 July 1900 It has shown a rare capacity over a hundred years to adapt and change despite the failure of so many referenda. Every institution referred to in the Constitution has changed, including the Crown itself. One day Australians may bring the monarchical form of the Constitution into line with the

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[79] Chipperfield, *The Eye,* 6 April 2000, at 26.

[80] Quoted Chipperfield, *The Eye,* 6 April 2000, at 26.

republican realities. But it will not happen until proponents of a republic resolve their fundamental dilemma. It will not happen unless they learn the lessons of the referendum of 1999. It will probably not happen in the reign of the present Queen. Meanwhile Australians will continue to get by with Prime Minister Chifley's "handy constitutional fiction"[81]. It is a fiction that reminds us, if ever revisionists would have it otherwise, of Australia's indelible, special, legal, cultural and emotional links to the United Kingdom, its people and the Crown.

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[81] Chifley, quoted in Bongiorno, above n 1, at 42.