

MENZIES CENTRE FOR AUSTRALIAN STUDIES

KING'S COLLEGE, LONDON

2000 MENZIES MEMORIAL LECTURE

GREAT HALL, KING'S COLLEGE, LONDON

TUESDAY 4 JULY 2000

THE AUSTRALIAN REFERENDUM ON A REPUBLIC -

TEN LESSONS

The Hon Justice Michael Kirby AC CMG

2000 MENZIES MEMORIAL LECTURE, LONDON, 4 JULY 2000

Justice Michael Kirby

Two proposals to amend the Australian Constitution were submitted to the electors of Australia in a referendum in November 1999. Both were defeated. The more important sought to convert Australia from a constitutional monarchy to a republic. It failed to secure the "double majorities" required by s 128 of the Australian Constitution. It did not obtain a majority of the aggregate national vote nor an affirmative vote in a majority of the States. In fact, no State recorded a majority for the proposal.

The author outlines the history of, and reasons for, the double majority required. He traces the history of republicanism in Australia and the evolution of the monarchy whose popularity was probably at its zenith during the Governments of R G Menzies from 1949 to 1966. After recording the way in which the 1999 republican proposal emerged, was formulated and fought out before the electors, he suggests ten lessons that may be drawn from the outcome of the referendum.

The lessons include the need for constitutional reformers to avoid as far as possible partisan division about any proposed change; the need to take time to explain the change; the requirement to avoid the appearance that supporters are an unrepresentative elite and denunciation or dismissal of opponents as unpatriotic or ignorant. The perceived defects of the compromise hammered out at the Constitutional Convention are reviewed. It is suggested that republicans erred in their strategy in relying excessively upon past political and other leaders, in failing to pay sufficient attention to the views of electors in the smaller States and in assuming that the unanimity of support for their cause in the Australian media would be translated into the vote of the electors.

The problem of furthering the republican idea in Australia is explored. Opinion polls suggest that the Australian electors will only accept a republic in which they could vote for the President. But such a proposal would be unacceptable to many who were willing to vote for the 1999 proposal, would be a more radical constitutional change and would be unlikely to be enacted by the Federal Parliament whose affirmative vote is required for a future referendum to take place.

Whilst accepting that Australia may well one day bring the monarchical forms of its Constitution into line with its republican reality, the author suggests that this will not occur unless attention is paid to the lessons of the 1999 referendum and unless the dilemma of republicans is satisfactorily resolved. Otherwise, the "handy constitutional fiction", as Prime Minister Chifley called the monarchy in Australia, will remain in place.

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REMEMBERING R G MENZIES

Menzies would have enjoyed this moment. Constitutional lawyer, long-time Prime Minister, Anglophile. He would have relished all the activities of this week which marks the centenary of the passage through the Imperial Parliament tomorrow, 5 July, a hundred years ago, of the Constitution Bill to create the Australian Commonwealth. A country with such a great sense of humour had thought it proper to avoid enactment on the 4th of July. That might have been tempting fate. The day on which the American colonists declared their

* Justice of the High Court of Australia.

independence, threw off allegiance to the Crown and established a republic would have carried an ill omen. So traumatic was the accomplishment of that severance that British colonial policy was never to be the same. The right of distant settlers - even those in the far-off penal settlements of Australia - to govern themselves as they saw fit was not, in principle, ever again challenged. The change led quite quickly to elected parliaments in the settlers' colonies and to dominion government, even ultimately for Ireland. The natural progression to independence within the Empire of the other colonies was inevitable after the Empire of India, the jewel in the crown, gained its independence. Its example was copied elsewhere. Most of the non-settler colonies elected, like India, for a republican constitution.

For Menzies, republicanism was unthinkable in an Australian context. But he was not alone. That other hero of my boyhood, the Labor Party leader, H V Evatt was almost as insistent that Australia was a "British nation" involved in a special family relationship with the United Kingdom¹. For those who today suggest that Menzies was an aberration on the Australian political scene, it is as well that they be reminded that his great rival, Evatt, like him, regarded the monarchy as a source of beneficence and an instrument for the good governance of

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.

a free society². Evatt recognised that, even with the change from Empire to Commonwealth, the King's prerogative powers³:

"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, Prime Minister during the post-War years when Menzies languished in the political wilderness, regarded the monarchy in an Australian context as "a handy constitutional fiction"⁴. This was a natural foundation for the acceptance of a new fiction in 1949 as the Crown assumed its new role in the Commonwealth of Nations. In the childhood and youth, and for most of the lives of Australians of my age, the monarchy was not only an unquestioned feature of the Constitution. It was supported on both sides of politics. It was a matter of heart as well as mind. On this point, history should not be rewritten by those who may now find it inconvenient.

I remember the day in December 1949 when Menzies was returned to Government in Canberra. I was 10. I also remember the

² Bongiorno, above n 1, 37.

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

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.

struggle that Menzies waged, after the High Court of Australia struck down the *Communist Party Dissolution Act*⁵ to have the Constitution amended. This is the first referendum that I can remember. Fortunately, the wisdom of the electors and the requirements of the Constitution, defeated that proposal⁶. It was Evatt's greatest triumph and Menzies' greatest rebuff in his long second period as Prime Minister. It demonstrated to many the wisdom of the Australian referendum provision⁷.

I was to be one of the countless thousands of beneficiaries of the Menzies Government's Commonwealth Scholarship Scheme. It gave me free university education at Australia's oldest university, the University of Sydney. I lived through the long unbroken interval of the Menzies governments. Years merged into each other and above all challengers, Menzies was dominant. His allegiance to the Crown was based on an historical sense, intellectual conviction and personal affection. Even at the time of his death in 1978, I think he would have

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).

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

been astonished if he had been told that in such a short time as 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 people. Undoubtedly, his spirit rests more easily because the proposal was, on this attempt, defeated.

But how did this change, so inconceivable in Menzies' own day, come about? How was it addressed in the Constitution (a centenary of which we celebrate tomorrow)? Why, in the event, did the endeavour fail? What are the lessons of this for Australia? Are there any lessons for the United Kingdom? These are the topics I have chosen to consider. At this centenary moment, and on this occasion and in this place, the memory of Menzies demands nothing less.

THE 1999 REFERENDUM

The republic referendum took place on Saturday 6 November 1999, 12.3 million electors of the Commonwealth of Australia 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 force⁸. The other question asked whether the electors approved a proposed amendment:

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% against¹⁰. The republic proposal was rejected in every State¹¹. It secured a majority only in the Australian Capital Territory¹². However, 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

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 republic¹³

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 States¹⁴. 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 affected¹⁵. But it was to Switzerland that the founders ultimately looked for the model which was adopted. In the case of most amendments to

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, 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 Cantons¹⁶. 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 under the *British North America Act* 1867 (Imp) in the case of Canada. Coming to London on bended knee, as they were a century ago this week, was once enough. The seriousness of the alteration of the Constitution, so hard won and considered over more than fifteen years¹⁷, led to the adoption of the restrictive amendment procedure in s 128. But according to Quick and Garran there was more¹⁸:

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.

¹⁸ Quick and Garran, above n 16, 988.

"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 these¹⁹ altered s 128 itself, to enable voters 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 approved²⁰. Although it has sometimes been 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

19 *Constitution Alteration (Referendums)* 1977.

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

it, only three further proposals would have been adopted²¹. 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 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 argument²². According to the contrary view, s 128 is a 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

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.

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 courts²³ or perhaps the secular and republican character of the nation²⁴.

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 secular law is immutable in a country like Australia and wholly resistant to change having democratic support. This is especially so where (whatever may be accepted in legal theory) ultimate constitutional sovereignty lies in the will of the people²⁵.

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 *Golaknath v State of Punjab* AIR 1967 SC 1643; *Kesavananda Bharati 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 Australia and its people over which the United Kingdom has long since lost, and indeed renounced, any legislative authority?

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

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

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 apogee 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 government²⁸. 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 Australia"²⁹. In the 1890s, national journals such as *The Bulletin* were

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

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

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. The famous portrait of that event by Tom Roberts belongs to the British Royal Collection. It is on permanent loan to the Parliament of Australia.

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 fiefdom of the British monarch. She is part of the Parliament of the Commonwealth³⁰. She appoints the Governor-General³¹. She is paid

³⁰ Constitution, s 1.

out of Consolidated Revenue for the Governor-General's salary³². No proposed law may be passed without her assent³³. Assent is given in her name by the Governor-General. Even then, within one year, she can annul such a law³⁴. Certain proposed laws may be reserved for two years for that assent³⁵. The Executive Government of the Commonwealth is vested in her³⁶. 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-General³⁸. It is her assent again, given by the Governor-General, which is necessary for an alteration of the Constitution³⁹.

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

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, s 73.

38 Constitution, s 126.

39 Constitution, s 128.

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 terminated⁴⁰. 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. Its mode of governance, in reality, is effectively republican. It has no House of Commons (as Canada does) and certainly no House of Lords. It has no hereditary aristocracy. On the intervention of the Queen herself, the recommendation of knighthoods by Australian Governments, federal and State, ceased in the 1980s. Civil honours are awarded on the recommendation of the Council of the Order of Australia, constituted wholly by Australians. The Queen is the Sovereign Head of that Order which she founded in 1975 on the advice of the Australian Government. The last knight or dame in the Order of Australia was appointed in 1983 after which that degree was deleted

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.

from the warrant. The insignia of the Order of Australia contain Australian motifs. But above them all is superimposed the Crown of St Edward.

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 successors⁴¹. Save for the expenses of occasional Royal visits and infrequent gifts, Australia 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.

I remember the Queen's arrival in Australia in February 1954. I was an onlooker - with countless others - as Menzies welcomed her at

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

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. See also *Royal Powers Act 1953* (Cth) which provides that at any time when the Queen is personally in Australia, any power under any Act exercisable by the Governor-General may be exercised by the Queen, being "the Queen, acting with the advice of the Federal Executive Council". See *ibid*, s 2(4). Any power given by the Constitution to the Governor-General could not be altered by an ordinary Act of the Federal Parliament. Such power could not be exercised by the Queen personally.

Farm Cove on Sydney Harbour in midsummer sunshine. This was the first visit to Australia by a reigning monarch. In the ensuing decades the euphoria of those days was replaced by friendly, respectful and business-like welcomes. There have been twelve further Royal visits since 1954. The most recent was completed in March 2000. Such visits have usually coincided with the opening of the Federal, and sometimes State, Parliaments, or the inauguration of important national buildings such as the new Parliament House and High Court buildings in Canberra. 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 said⁴³:

"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 visit in March 2000.

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

During the Menzies years there was little public sentiment in Australia for changing the foregoing constitutional arrangements. However, in 1966 a symposium on Australia and the monarchy was organised by a group of noted writers including Donald Horne, Max Harris and Geoffrey Dutton⁴⁴. It passed with comparatively little attention. History will probably judge the first real catalyst for the republican movement in Australia as the dismissal of Prime Minister Gough Whitlam by the Governor-General, Sir John Kerr, on 11 November 1975. That was certainly a traumatic constitutional moment. In the succeeding election, Mr Whitlam's government was defeated. But many Australians resented what the Governor-General had done, the way he had done it and the fact that an unelected and appointed person had the constitutional power to remove from office the Prime Minister and government elected by the majority of the Australian people. It did not seem democratic. Monarchical reform had intended, in the minds of many, upon democratic substance.

A poll taken by *The Age* and *Sydney Morning Herald* newspapers in December 1976 revealed that 39% of Australians wanted Australia to become a republic. This was a dramatic increase on past polls. Three months later another poll conducted by the *National Times* and the Australian Broadcasting Commission's *Four*

⁴⁴ G Dutton (ed) *Republican Australia?* (1977). See *ibid* D Horne, "The Case for a Republic", 7.

Corners programme revealed that 58% of Australians felt they "didn't need a Queen"⁴⁵. A striking feature of these votes was the large proportion of supporters of the generally conservative Liberal Party who shared the stated opinions. Yet, even commentators, such as Professor Manning Clark, who were generally sympathetic to a shift to a republic, pointed to the fact that, in relation to Australia, the monarch had always behaved with dignity and impartiality "singularly lacking at times in the Antipodes"⁴⁶. Clark expressed the opinion that it was men holding the office of Governor or Governor-General who had used their influence to serve "the interests of conservative forces"⁴⁷. Nonetheless, he suggested that Australia would "need to look straight away for the institutions which will give every man [sic] a voice in deciding the conditions under which he lives"⁴⁸. Devising an acceptable alternative to the present constitutional system was always seen as presenting a significant dilemma.

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

45 G Dutton (ed) *Republican Australia?* (1977), v.

46 M Clark, "The Monarchy and Australia" in Dutton, above n 44, 1 at 6.

47 *Ibid.*

48 *Ibid.*

change to a republican form of government⁴⁹. Indeed, no real steps were taken in that direction until Mr Paul Keating became Australia's Prime Minister in 1992. Mr Keating's forebears were Irish Roman Catholics. Opinion polls after the dismissal of Mr Whitlam showed that Catholic supporters of the Australian Labor Party in 1976 were the most likely to favour a change to a republic, particularly if they were young, as Mr Keating was⁵⁰. A member of the Keating government once stated none of the Cabinet ministers were monarchists but that Mr Keating was the only avowed republican. In the manner of these things, accidental events propelled the new Prime Minister into political action.

The Queen had been invited to Australia to make the twelfth visit of her reign⁵¹. In Canberra she opened the new building of the National Gallery of Australia. Invited to a reception were numerous guests. They included some elderly Australians who would have been known to the Queen, including Dame Pattie Menzies, widow of Prime Minister

49 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". Mr E G Whitlam was a member of the Commission and a signatory to its report.

50 Dutton, above n 44, 212-213.

51 M Goot, "The Queen in the Polls" In J Arnold, P Spearritt and D Walker, *Out of Empire - The British Dominion in Australia* (1994) 295 at 306.

Menzies who had greeted the Queen at Sydney on her first visit in February 1954. Gently ushering the Queen in the direction of these guests, Mr Keating was photographed with his hand momentarily on the Queen's back. The photograph was reproduced in the British tabloid media as an illustration of lese-majesty. One of the newspapers of the News Limited Group ran a banner headline "Hands off Cobber!" and "the Lizard of Oz". This, in turn, was picked up by newspapers of the same media group in Australia defending Mr Keating's action. The result was a minor outcry, harmless enough as an instance of global media entertainment fanning national rivalries. But the outcome was a clear resolve on the part of Mr Keating to usher in the changes that would bring about what he described as a "Federal Republic of Australia".

Mr Keating announced his decision to propose the constitutional changes necessary to establish a republic. Commentators expressed their admiration for his move. It had significant emotional appeal within the Australian Labor Party which, at the time, was in a difficult electoral position. It promised to divide the Liberal Party of Australia, the major element in the Coalition opposition. When the Keating Government was returned to power in an "unwinnable" federal election held on 13 March 1993, the Prime Minister promptly set in train the steps to secure change to the Australian Constitution. 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 young and successful Sydney merchant banker and lawyer, Mr Malcolm Turnbull, was appointed to chair the Committee⁵². The Committee produced its report within the year⁵³. The report canvassed the options for the selection of a Head of State to replace the Queen. These included: (1) Appointment by the Prime 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"⁵⁴.

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

⁵² M Turnbull, *Fighting for the Republic* (1999), 9.

⁵³ Australia, Republic Advisory Committee, *An Australian Republic - The Options*, 1993.

⁵⁴ Report p 7.

of the role of the Governor-General and it should be protected and retained in the role of Head of State"⁵⁵. Mr Keating made a visit to Europe. On 19 September 1993 Mr Keating had an audience with the Queen at Balmoral to inform her of his Government's plans⁵⁶. He also paid a visit to the Irish Republic where he was most warmly greeted. He indicated an intention to put his proposals for a republic to the Australian people in a referendum "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"⁵⁷.

As required by the Australian Constitution, Mr Keating went to the people 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

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ *Ibid*, 13.

the year 2000. Mr Keating lost government. The Coalition parties under Prime Minister John Howard swept into office. A year later, in March 1997, Mr Howard announced the details of a Constitutional Convention to consider a change to a republic⁵⁸.

The Convention which was announced was to include 40 parliamentary delegates from the Federal, State and Territory Parliaments and 36 non-parliamentary delegates, appointed by the Federal Government, together with an equal number of delegates elected by a non-compulsory, secret, postal ballot conducted amongst the electors of Australia by the Australian Electoral Commission. Mr Howard undertook that, if the Convention agreed on a proposal for a republic, such proposal would be put to the electors in a constitutional referendum held in accordance with s 128 of the Constitution.

To facilitate the establishment and functions of the Convention, federal legislation was enacted on 27 August 1997⁵⁹. The Convention duly met in the Old Parliament House in Canberra over ten days in February 1998. It soon became apparent 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

⁵⁸ J W Howard, in *Commonwealth Parliamentary Debates (House of Representatives)*, 26 March 1997, 3061.

⁵⁹ *Constitutional Convention (Election) Act 1997 (Cth)*.

proposed by the Australian Republican Movement (ARM). Others favoured a President directly elected by the electors. Still others preferred an option proposed by the former Governor of Victoria and State judge, Richard McGarvie⁶⁰. In the end, by negotiation and compromise, a model emerged which attracted the support of a majority of the Convention⁶¹.

In accordance with his undertaking, Mr Howard stated that this proposal would be put to the people. Legislation to permit this to be done was duly enacted in the form of a Constitutional Alteration proposal⁶². 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

⁶⁰ R E McGarvie, "Democracy: Choosing Australia's Republic", Melbourne University Press, 1999.

⁶¹ 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 52, 73.

⁶² *Constitutional Alteration (Establishment of a Republic)* 1999.

raiments. Thus began an unusual marriage of convenience between the true monarchists and the most radical republicans. It was an alliance which would defeat the referendum on the republic.

THE TWO ORGANISATIONS: ARM AND ACM

The Australian Republican Movement was established in July 1991⁶³. It gathered around it a distinguished collection of intellectuals, politicians and former politicians, business people, students and other Australian citizens. The leadership of the organisation was concentrated in Sydney and Melbourne. It included, but was not confined to, a large number of members, supporters and sympathisers of the Australian Labor Party (ALP). As the campaign for a republic developed, a number of prominent members and former members of the Liberal Party of Australia, the Australian Democrats and a few members of the National Party came to espouse the republic. They included the leaders of the Government in the Australian Senate and the Deputy Leader in the House of Representatives (Mr Peter Costello). Another leading Federal Minister, Mr Peter Reith, advocated direct election of the President. He aligned himself with the "No" case. The Coalition politicians did not, for the most part, join ARM. However,

⁶³ M Turnbull, in W Hudson and D Carter *The Republicanism Debate* (1993), xi. See *ibid* 2-5; M Turnbull, "The Best Republic for Australia - Why the Bipartisan Model Works" (1998) 4 *Deakin Law Review* 21.

another organisation, with strong links to the Coalition parties, Conservatives for an Australian Head of State, was established to urge that differences and hesitations over the republic be buried in support of the proposal accepted by the Convention.

Whereas members of the Coalition parties were permitted a free vote on the Republic issue, according to their conscience, the ALP adopted the republic as a matter of party policy. Only one parliamentary member of the ALP, Mr Jack Snelling, the youngest member of the Parliament of South Australia, did not publicly adhere to this policy. If there were dissentients within the ALP, they kept silent or reflected their hesitations by muted involvement rather than outright dissent. Within the Coalition parties a majority of the members of the Federal Parliament indicated their opposition or refrained from identifying themselves with the republic. But about a third did so. A number of leading advocates of the "No" case were government ministers, including Mr Alexander Downer (Minister for Foreign Affairs), Mrs Bronwyn Bishop (Minister for Aged Care) Senator Nick Minchin (Parliamentary Secretary to the Prime Minister) and Mr Tony Abbott (Minister for Employment Services). Mr Abbott had been executive director for ACM before his entering Federal Parliament at a by-election in 1994 and subsequent appointment to the Australian federal ministry.

ACM was established in 1992, soon after Mr Keating announced his republican proposals. It happened in this way. Much publicity in Australia had attended Mr Keating's announcements. The media began what substantially continued until the referendum: a coverage of

the issue heavily weighted in favour of a change to republic. In the weeks after Mr Keating's announcement, very little, if anything, appeared in the media to contest the wisdom of the change, to explain the merits of constitutional monarchy as a system of government, to explain the complexities of change and the deep hurt that would be done to a sizeable number of Australians by forcing the pace of change against their wishes, in effect, as a *fait accompli*.

Concerned by the lack of a contrary voice to put the arguments for Chifley's "handy constitutional fiction", I decided to take an initiative. I invited a Sydney barrister, Mr Lloyd Waddy QC, to join me in a discussion about gathering a group of Australian citizens to respond to the supporters of the republic. With Mr Waddy, I called together a group who came to comprise the first Council of ACM. They included: the late Mr Neville Bonner (the first Aboriginal Australian elected to the Senate), Sir Harry Gibbs (past Chief Justice of Australia), Mr Gareth Grainger (broadcasting executive), Mr Richard Cobden (a Sydney barrister and gay activist), Mr Stephen Hall (musical entrepreneur), Mr Angelo Hatsatouris (Sydney solicitor), Dame Leonie Kramer (Chancellor of the University of Sydney), Ms Vahoi Naufahu (an Australian of Tongan decent) Mr Barry O'Keefe QC (noted in local government), Ms Margaret Olley (Australian painter), Mrs Helen Sham Ho MLC (the first Chinese-born member of an Australian Parliament) Mr Doug Sutherland (former Labor Lord Mayor of Sydney) and Ms Margaret Valadian (noted Australian Aboriginal). Subsequently, Richard Cobden withdrew from the ACM. Following my appointment to the High Court of Australia I too resigned. But otherwise the National

Council of ACM. He remained to the end of the referendum campaign much as it had been at its establishment. Lloyd Waddy became the National Convenor and later Chairman of ACM. He led ACM with vigour and good humour until he was appointed a federal judge on 1 July 1998⁶⁴.

In my conversations with Lloyd Waddy I insisted on observance by ACM of a number of principles. These included that ACM should maintain a distance from too close an association with the parties or opinions of the political right. Every endeavour should be made to create a national movement that would represent ordinary Australians of every ethnic origin, religion, political viewpoint and otherwise. Great care was paid in constituting the National Council and later the State leadership of ACM, to include people of different sex, religion, ethnicity, sexuality and political viewpoint. Although it was difficult to attract prominent ALP supporters, because of that Party's official commitment to the republic, in all major events, the bipartisan commitment of ACM was stressed. Doug Sutherland accepted heavy responsibilities to ensure that this should be done. Later Mr W G Hayden, former Governor-General and one-time Parliamentary Leader of the Labor Party, would contribute to this endeavour. I believe that these decisions, with which Lloyd Waddy fully agreed, made at the outset of

⁶⁴ Noted (1999) 73 ALJ 870.

ACM were to contribute to the ultimate success of its strategy. Inclusiveness was its rule.

ACM quickly established a grass roots organisation with branches in every State and Territory of Australia. It was formally launched at a public meeting held at the Sydney Town Hall on 4 June 1992. It ultimately numbered about 30,000 supporters nationwide – larger than most of the national political parties in Australia. A rally at the Sydney Town Hall on 26 November 1993 saw that large Hall filled to capacity – the first time a constitutional issue had attracted such an audience since the federation debates of the 1890s. Although the National Council included distinguished professional Australians, as in due course did State branches, formed between May 1992 and May 1993, the ethos of ACM was somewhat different from ARM. It was substantially an organisation of ordinary citizens. It had no governmental, corporate or wealthy sponsors. It relied on individual donations, mostly of \$5 to \$10.

Invariably the members of ACM were denigrated by the media as "elderly", "blue rinse" and lacking the glamour of the ARM. As it transpired, this would prove a strength, and not a weakness. In its infancy ACM's small office in Sydney was run by volunteers led by an honorary administrator and retired Royal Australian Air Force officer, Mr Nick Hobson. But ACM soon recruited as its first full time executive director a former Rhodes Scholar, Mr Tony Abbott, who had served in the parliamentary office of Dr John Hewson when he was leader of the Liberal Party and of the Federal Opposition. Mr Abbott proved a

resilient, combative, articulate advocate for ACM. He remained a supporter of its cause after his employment by ACM ceased following his entering the Federal Parliament in 1994. He took an active part in the Constitutional Convention, public meetings and media debates to the last days of the referendum campaign.

Early in the life of ACM, I drafted its *Charter*⁶⁵. I recall that I did so quickly, between argument in an appeal in the Court of Appeal in Sydney where I was then serving. The *Charter* espouses the inclusive character of ACM. It declared that some supported ACM out of loyalty to the Queen. Others, because they considered that Australia was already a "crowned republic", removing the need for any change. Others still, because they were not convinced of the need to change the Australian Constitution at this time. The *Charter* and its expression of the basic reasons for "defending the Constitution" became a statement of the common commitment of the members of ACM. It was, in a sense, the adoption of the ACM's principle of unity to uphold the Australian Constitution despite differing viewpoints. Bringing together people in such diverse viewpoints was to be a major challenge. Eventually it proved a prudent strategy.

⁶⁵ Set out in J Arnold, P Spearitt and D Walker *Out of Empire - The British Dominion of Australia* (1993), 315-318 and in G Grainger and K Jones (eds) *The Australian Constitutional Monarchy* (1994) 212-213.

A question arose soon after the establishment of ACM as to what the group should be called. Advice was taken from an advertising consultant that it was important to adopt a name that would indicate precisely the cause which it advocated. For a time, it was proposed that this should be "Leadership Above Politics", on the ground that a constitutional monarchy as a system of government provides a cohesive, symbolic leadership which politicians, as such, could not give. I did not feel comfortable with this title. My own conception of the Crown in Australia involved a role far more passive than "leadership". Yet in the words "above politics" lay the seeds of a major aspect of the ACM campaign as it was to unfold.

Another possible title that was canvassed was "Australians to Defend the Constitution". But ultimately, "Australians for Constitutional Monarchy" was chosen. Even then, some journalists and commentators called the body "Australians for a Constitutional Monarchy". The assertion of the actual title, without the indefinite article, was that this was the system of government Australians had. The onus was on those who wished to change it.

After Mr Abbott entered Federal Parliament at a by-election in 1994 Mrs Kerry Jones was appointed executive director of ACM in his place. She was to lead ACM with dedication through the CONCON (Constitutional Convention) and the referendum campaign to the ultimate defeat of the republican amendment.

The achievement of a republic became a matter of the highest importance to Mr Keating during the closing months of his Government in 1995-6. His hope that it would divide the Coalition was effectively deflected by the express commitment of Mr Howard, when re-elected Leader of the Opposition, to hold a Convention and, if consensus were reached, a referendum. Mr Keating was aware of my involvement in ACM. It was a matter of public record. I attended a number of its gatherings. Because I was a serving judge and the matter was becoming, in part at least, one of partisan politics, I confined most of my activities to the National Council of ACM. As ACM gathered its own substantial momentum, I gradually withdrew from active service. The last major event in which I took part was an address to a crowded Town Hall in Adelaide in 1995. In that address I referred to the merits of constitutional monarchy as a system of government for those committed to effective checks on rulers and to liberal democracy.

When in late 1995, Mr Keating proposed to the Queen that Sir William Deane, a Justice of the High Court of Australia should succeed Mr Hayden as the Governor-General of Australia, it was widely reported in the media that Sir William would be "the last viceroy" of the monarchy in Australia. The usual term of appointment of a Governor-General was shortened upon that hypothesis. Upon his selection and consequent resignation as a Justice, a vacancy arose in Australia's highest court. Because of my involvement in ACM, it did not occur to me that the call would come to me to take Justice Deane's place. Everyone knew of Mr Keating's strong intellectual and emotional commitment to republicanism. Yet on 14 December 1995, his Attorney-

General, Mr Michael Lavarch, informed me of the offer of appointment as the fortieth Justice of the High Court of Australia. I accepted. By one of the ironies that happens in life, that day was the hundredth anniversary of the birth of King George VI - the King during the Second World War and in my Australian childhood and schooldays. Immediately, I resigned from ACM and other bodies and offices. I took up my appointment on the High Court. From that moment, I played no part in ACM's activities. I watched the Constitutional Convention and the referendum campaign at a distance.

It says something about the way government operates in Australia, and the conventions that it generally observes, that the appointment to the highest court was offered to me. It also says something about Mr Keating who, as Prime Minister, would certainly have been able to prevent my appointment, had he chosen to do so.

REASONS FOR THE DEFEAT

There are many reasons why the 1999 referendum to alter the Australian Commonwealth to a republic failed. Others with greater expertise and knowledge will examine the results and proffer explanations. After the referendum defeat, the editorialists entered

upon their recriminations. The *Sun Herald* editorial, the day after the referendum⁶⁶, observed:

"The people have spoken. Now be prepared for the debate over exactly what they meant. Expect both sides to claim a moral victory. But don't be fooled by any of that. Last night's historic result represents a massive setback for the cause of republicanism. It really was time. And it is hard to see when it will be time again. ... Australia's intellectual elite ... were roundly rejected in so many parts of the country, it is hard to see how they can recover. Worse, they were routed by a Coalition of battlers, supported by a Dad's Army, and a monarch living 17,000 km away. What on earth, they will be asking this morning, went wrong?"

Let me venture a few suggestions to answer the editor's question. I will offer ten reasons for the defeat of the 1999 referendum on the republic:

1. *The partisan error:* The lesson of formal constitutional alteration in Australia is that, without affirmative support by 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. Especially where the proposal involves politicians and the possible accretion to their powers, the electors of Australia have proved extremely suspicious and reluctant to be wooed. Where a potentially

⁶⁶ 7 November 1999, 74.

significant constitutional change was proposed, to alter a basic feature of the system of government which had endured in Australia, effectively from 1788, it was specially important for those advocating change to approach the matter in a scrupulously bipartisan way. On the evidence of past referenda, any attempt to do so for party political advantage would be bound to enliven the scepticism of the people. It would fail to build the coalition necessary to achieve the dual majorities required by s 128.

Prime Minister Keating felt passionately about the republic. He also felt passionately about the political party which he led. He effectively claimed the republic for himself and for his party. It sometimes seemed that, by this issue, he was seeking at last to exorcise the ghost of Menzies' dominance of Australian politics in the second half of the first century of federation. Whilst this ensured that the republican proposal would have a large initial momentum, it made it difficult (although not impossible) to build the bridges to the Coalition parties throughout Australia to secure the broad consensus which Quick and Garran talked of soon after the Constitution was adopted. There is some indication, in the post-referendum rhetoric, that similar mistakes may be made by the continuing advocates of a republic. Although the personal opposition of Prime Minister Howard to the proposed constitutional change was undoubtedly a very important

factor in the defeat of the referendum⁶⁷, there will always be, in both sides of politics, opponents of such a change. That is the ineradicable 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 past 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. Three deadlines seemed to inject in the minds of some of the proponents an urgency to accomplish the change quickly. The first was the coming turn of the century. The opening of a new millennium seemed to some an important moment to re-express the constitutional bedrock of the nation. Secondly, the decision to hold the Olympic Games in Sydney in September 2000 presented the need to identify the person who would officiate at the ceremony. In 1956 at the Olympic Games in Melbourne, there had been no controversy. The Duke of Edinburgh, as the representative of the Queen, did so. But in September 2000, it seemed unacceptable to many Australians in an international sporting fixture (which of late has become chiefly associated with nationalistic rivalry)

67 Turnbull, above n 52, 245, 251.

to ask a monarch living on the other side of the world to do so. Thirdly, the centenary of Australian federation will be celebrated on 1 January 2001. To many republicans, including Mr Keating, this seemed the appropriately symbolic time to effect the change to the character of the Commonwealth. It would mean, effectively, that the first century of Australia's modern existence after settlement was colonial, the second century as a federal constitutional monarchy, and the third and thereafter as a republic, with its own Head of State.

To many Australians, none of these dates was sufficiently important to press forward a change, effectively on the national agenda for less than a decade, which was bound to upset a significant number of people. To 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"⁶⁸, there are powerful reasons to hasten slowly in such matters. In retrospect, it appears that ARM might have been wiser to have taken more time and to have organised State and Territory conventions of their own at which the constitutional issues involved in changing to a republic could have been publicly thrashed out.

68 Quick and Garran, above n 16, 988.

Although the sizeable number of Australians attached to the constitutional monarchy (many having feelings of loyalty, affection and respect for the Queen) were repeatedly denigrated and belittled in sections of the media, they are Australian citizens too. Their views, even if thought by some others to be erroneous, old-fashioned and "out of touch", have to be considered in relation to constitutional alteration. They must be given time, as some humourless commentators put it, to die or at least to change their minds or "accept the inevitable".

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 process⁶⁹. 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.

3. *The elitist error:* The post-referendum analysis of the voting patterns throughout Australia repeatedly indicated the way in which the republican proposal divided the electors. The country against the

⁶⁹ 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.

cities. The small States against the big States. The high income earners against 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 support for the idea of a republic outside city centres.

The votes were also analysed by reference to the electorates which return members to the House of Representatives. Overwhelmingly, electorates in country districts and in outlying suburbs of the cities, with large segments of under-privileged or unemployed people, voted against the republic, irrespective of their current party political allegiance. It was suggested that a criterion for a vote for the republic amongst the electors was a household income of \$80,000 pa. The referendum therefore amounted to a significant rejection of the advocacy of constitutional change by national leaders. Polling for ACM also suggested that there was significant lack of support for a republic amongst younger electors. Slick but rather patronising slogans targeted at the young ("Give an Australian the Head Job"; "Rooting for a Republic") may have been counterproductive.

Clearly enough, in sufficient numbers to reject it, 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. Now, referenda are inevitably "elite driven"⁷⁰. However, to secure the requisite support amongst the electors of Australia the proponents of change must somehow secure the understanding and support of a wide range of ordinary citizens. On big issues this is a big ask.

4. *The patriotism error:* Some republican advocates, before and after the vote, denigrated their fellow citizens who did not agree to the proposed change as somehow less patriotic and even un-Australian. Some of the supporters of the republic could not accept that other Australians 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

⁷⁰ 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, 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".

us" and who lived in Australia, "postcode 2600" (Canberra) as it was sometimes put.

Difficult as it may be for enthusiasts for the change to accept the fact, a majority of Australians did not, in the end, embrace this vision of nationalism⁷¹. In some cases, this can doubtless be explained by reference to a commitment on the part of many electors to a directly elected President - a more radical republican model than that offered. But in many cases it was a belief that constitutional monarchy is a "cautious and prudent" form of government⁷² which denies to political ambition the top office which such ambition commonly most prizes. I would judge many electors to have been concerned less with links with the United Kingdom or even the Queen and more with notions of what was best for Australia's government.

To upbraid half the people of Australia, or at least a good proportion of them, as "un-Australian" because they do not happen to agree with a proposal, is a sure way to alienate them. Yet this was a theme of the advertisements and some of the arguments urging an affirmative vote. If the twentieth century has taught anything, it should

⁷¹ E Simper, "We just can't get it right" *Weekend Australian* 20 November 1999, 29.

⁷² J Uhr, "After the Referendum: The Future of Constitutional Change" [2000] *Public Law*, 7.

be the dangers of crude nationalism. Jingoism seems strangely alien to most Australians. They are fiercely loyal to their country in war and in sport; but for the most part they are quiet about their allegiance. They are embarrassed about breast beating patriotism. Those who, after the vote, castigated other Australians who had rejected the republic, probably simply confirmed the healthy disrespect for the elite which, in the circumstances, the negative vote reflected.

5. *The Convention error:* It is very easy for those who are caught up in events, on whatever side, to become carried away with their own rhetoric. 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. Newspaper headlines declared "It's All Over Bar the Shouting".

The vision of a compromise proposal, hastily worked out in the committee rooms of the Constitutional Convention, was precisely the kind of constitutional alteration 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. Ideally, from a republican point of view, there should have been an in principle plebiscite, followed by a less hasty procedure and a more intense period of public education and debate. Such a procedure would have quietly laid emphasis upon the shedding by Australia, successively, of its constitutional links - legislative, executive and judicial - with the United Kingdom so that the only link left was with the sovereign. Such a strategy, rather than anti-monarchical, nationalistic rhetoric and denigration of fellow citizens, with a lot more information⁷³, might have carried the day for the republican cause.

However, even if Mr Keating had won the 1996 federal election, he was also committed to a republican referendum "some time in 1998 or 1999". In other words, impatience for change would possibly have taken him to the elector's vote a year before Mr Howard's process.

73 A "Deliberative Poll" conducted amongst 347 Australians randomly chose who met at Old Parliament House, Canberra shortly before the republican referendum saw a significant rise (53 per cent to 73 per cent) when the details of the proposed changes to the Constitution were explained. This raised calls for a more informed debate about Constitutional reforms but also criticism of the "Yes" campaign for its failure to use available space in the distributed literature to explain and support the details of the proposed changes. cf G Williams "Where to now?" (1999) 24 *Alternative Law Journal* 299.

Neither side was willing to take the time which retrospect suggests was essential if the proposal was to have a chance of being accepted. 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 locked into 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 Olympic, millennial and federationist 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 1999 referendum. Critics certainly raised many false issues. The opponents played on fear about some of these. The notion that Australia would, as a republic, not be invited to rejoin the Commonwealth of Nations (of which the Queen is the Head) was absurd⁷⁴. The Commonwealth Secretary-General made this plain in a statement issued at the last stages of the referendum campaign. Equally absurd was the suggestion that, upon the removal of the Queen, Crown land in

74 A Banerji "The 1949 Declaration: Birth of the Modern Commonwealth" (1999 25 *Commonwealth Law Bulletin* 1 at 6. ACM contends that it did not suggest otherwise but merely sought to correct an assertion by the Federal Attorney-General that Australia "would not need to reapply for membership of the Commonwealth of Nations if it becomes a republic". By convention it would need to do so but there is no doubt that it would be readmitted. See D Flint, *The Cane Toad Republic* (1999).

Australia would revert to Aboriginal Australians⁷⁵. A similar distraction, in my view, was the argument that the Governor-General was actually the Head of State of Australia. Ultimately Mr Howard⁷⁶ stated accurately that the Governor-General was *virtually* the Head of State, performing as he does the functions common to that kind of office in other countries when the Queen is absent from Australia, which is most of the time.

However, if these matters are put to one side, there remained genuine concerns about the proposed amendments to the Constitution. They worried some electors⁷⁷. Probably the chief of these was the fear about the ease with which, under the proposed changes, the Prime Minister could dismiss the proposed President⁷⁸. Although 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, the provision, as drafted, contained obvious defects. These grew out of a compromise struck at the Constitutional Convention. Following such

75 D M Williams (Attorney-General) "Republic will not affect rights over land", News Release 644, 3 November 1999.

76 J W Howard, Letter to Electors of Bennelong, October 1999.

77 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.

78 *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.

dismissal of the President, an affirmative vote was required of the House of Representatives. But 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, remarkably, the vote of the House of Representatives went against the Prime Minister⁷⁹. 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 the events surrounding the dismissal of Prime Minister Whitlam in November 1975. They therefore received a measure of attention. They could not be brushed aside.

To 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.

The strategy of the opponents of the alteration substantially left alone the committed monarchists who (according to opinion polls)

⁷⁹ 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.

numbered at least a third of the Australian population. Their votes were assured. The entire focus of the "No Coalition" was to address the multifarious concerns of those who, whatever their general inclinations on a republic as a constitutional idea, were opposed to, suspicious of, or uncertain about, the model contained in the proposal actually voted upon. This strategy would also appear to have been an attempt by ACM to drive the republican cause in Australia towards embracing a proposal for a directly elected president, as reportedly favoured by a majority of the Australian people according to successive surveys. Such a proposal could not in the foreseeable future, secure the majority in the Federal Parliament, a step constitutionally essential to submit it to the electors. Even if it did, it would be likely to attract new supporters for the cause of the *status quo* to supplement the actual monarchists whose support was assured because cemented in place by intangible bonds of loyalty and allegiance.

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. The presence on so many platforms together of the former bitter foes, Mr Whitlam and Mr Fraser, was designed to promote a sense of security and of safe bipartisanship. In part, this was doubtless successful. But when accompanied by the music of election jingles of a quarter century earlier, it clearly alienated some electors⁸⁰. In talk-back radio programmes and letters to the editor (often their only outlet) these disgruntled citizens expressed dismay and suspicion at the reappearance of politicians from the past and a cynical view that their real motivation was a desire by them (or their contemporary equivalents) for the top job of President which the current constitutional arrangements safely denied them.

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

⁸⁰ Barry Jones endorsed the criticisms of journalist Margo Kingston concerning features of the ARM campaign. She listed: (1) celebrity endorsements; (2) poor provision of information with the published "Yes" case; (3) arguing that change would help Australia internationally; and (4) securing the endorsement of media proprietors. See B O Jones, "Framing a New Australian Republic", unpublished lecture to the Australian Academy for the Humanities, 3 November 1999, 15.

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.

For the most part the churches kept out of the campaign. The Anglican Archbishop of Sydney (Archbishop Harry Goodhew) was reported as supporting retention of the constitutional monarchy. Shortly before the vote, the Roman Catholic Archbishop of Melbourne (Dr George Pell) newly returned from a meeting at the Vatican (at which the Sisters of Charity in Sydney were forbidden from participating in experimental legislation concerning injecting heroin users) to tell Australians that it was necessary to vote for the republic as a sign that Australia had "grown up". But Mr Tony Abbott, advocate for the monarchy's cause, and a known Catholic, pointed out that after the Vatican, the monarchy of which the Queen is the incumbent, is the most enduring institution in Western civilisation. Although there were some partisan appeals to Irish Catholic sentiment, for the most part this element was muted, at least in the formal campaign. Mrs Kerry Jones, Mr Abbott's successor in ACM is, like him, a practising Catholic. In most of Australia, the churches kept their distance. There was no thundering from the pulpits.

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 throne⁸¹. It is virtually impossible to have a modern constitutional monarchy without the hereditary principle. However, the critics obviously had more merit in their criticisms on the other grounds. The British government, in 1999 addressed itself to reducing to 92 the number of hereditary peers who sit in the House of Lords. Constitutional monarchists may hope that the other two objections referred to above will be attended to before long, as much in the interests of the constitutional monarchy in the United Kingdom as in Australia⁸². Other monarchies have removed the primacy of male heirs. And it is not difficult to understand the objection of non-Protestant; indeed non-Christians to a requirement that the Head of State of their country and sovereign must adhere to one religious conviction only. Such a provision had historical reasons; but they have long since passed⁸³. Most people today, at least in Australia, would regard the religion, or lack of religion, of the monarch as a purely private matter.

⁸¹ Act of Settlement 1700 (Imp) 12 and 13 Will III.

⁸² C Munro, "More daylight, less magic: the Australian referendum on the Monarchy" [2000] *Public Law* 3 at 6.

⁸³ T Abbott, *The Minimal Monarchy* (1995), 141; V Bagdanor, *Monarchy and the Constitution* (1995), 59.

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 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 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 electors⁸⁴. 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.

⁸⁴ 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 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.

This last consideration is specially significant for any attempt to return quickly to the referendum process on a republic⁸⁵. It is obvious that any future attempt to change the Australian Constitution on this question will need to pay closer attention to the electors in the smaller States. Sometimes their disinclination to change the Constitution appears to stem from their suspicion of politicians in Canberra and of the power which Sydney and Melbourne are thought to wield upon the fortunes of the rest of the continent⁸⁶.

9. *The media error:* There were no real exceptions to the strong editorial line on the republic followed by the Australian media. Even the national broadcaster, the Australian Broadcasting Corporation, in the opinion of many ACM observers but also others, exhibited substantial bias in favour of the republic proposal and against the constitutional

85 A proposal to include Territory electors in the national referendum count in 1974 secured a national vote in favour of 47.99% and a majority in only one State. In 1977 it secured 77.72% and was carried in all States. However, the inclusion proposal was mainly uncontroversial. It only failed on the first attempt because linked to a much more divisive proposal to reduce the double majority required by s 128 of the Constitution to a majority in three (instead of four) of the States.

86 There is also the consideration that a change to a republic would require a change to the Constitution of the Australian States which include the Queen and her representative, the Governor, as part of the polity. In Queensland and Western Australia the abolition of the office or alteration of the powers of, the Governor and other sections referring to the Queen require a referendum. See R D Lumb "The Framework of Constitutional Monarchy in the States" in G Grainger and K Jones *The Australian Constitution* (1994) 57 at 61

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. The publications of News Limited were especially strident. This was not confined to an editorial opinion in which a distinction was carefully preserved between the editors' opinions and news coverage. It extended into the factual reportage, the quantity and content of coverage provided to the opposing causes and the photographs, cartoons and other depictions that were published. Most of these showed the Queen and her supporters in a bad light and the republicans as the only cause which patriotic Australians could possibly support.

On the day of the referendum vote the entire front page of *The Australian* newspaper, published throughout Australia by News Limited, was devoted to an appeal to its readers to vote "Yes". In Britain *The Sun*, a tabloid newspaper from the same corporate family, showed a picture of the Queen opening the British Parliament with the question "Is this really what you want for the 21st century?" This was stated to be "Britain's message to all Australia". In fact it was the message of News Limited. The suggestion was that the decision of the Australian electors to maintain their own Constitution as it was would be a cowardly and weak-kneed one, almost defying belief. If this was intended to promote a last minute rush of patriotism and change of heart in Australia, I suspect that it had precisely the opposite effect.

The suggestion of another British journal of the same publisher, the *Sunday Times*, following the result, that the British Royal Family

would "go quietly" was equally misconceived, as if the Queen could lawfully renounce her position under the Constitution which Australians themselves adopted and have now, for the time being, reconfirmed unchanged.

So uneven and biased was the media coverage of the referendum issues that I consider that this 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. In any future return to this issue, it is probably too much to hope that the media would display a more professional differentiation between fact and opinion. And more respect for the varied beliefs of the citizens of the country who may not share all of the media's enthusiasm for newsworthy change. But if the media in Australia does not learn a lesson from its generally discreditable performance in the republican proposal, it will be bound to repeat its error to the damage of the republican cause in Australia⁸⁷.

⁸⁷ Mr Barry 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, 15. cf G Henderson, "Limited Influence", *Sydney Morning Herald*, 30 November 1999, 19.

10. *The republican problem:* As editorialists⁸⁸ observed immediately after the referendum vote, 1999 was logically the time for a minimal proposal of constitutional reform to be accepted. In the short term it would appear to be difficult to push forward successfully anything similar. If a plebiscite were held shortly on the general question of whether Australia should become a republic, as promised by the Leader of the Opposition (Mr Kim Beazley), it might produce the response from the people - that the answer to the plebiscite depends upon the detail and the precise kind of republic proposed. The electors are now better informed about the issue than they were when Mr Keating first raised it. Such a plebiscite 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 put and carried, the proponents of change would still have to advance a new specific model. A plebiscite cannot alter the Constitution, although it could wound its institutions. If 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.

⁸⁸ *Sun Herald*, 7 November 1999, 74.

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 authority⁸⁹. It would involve a conception of the Head of State which Australians have never held. It has disadvantages in the way of potentially politicising the office of President. This was a point constantly made by the ARM about the minimalist proposal put to the people in 1999. Very few members of the Federal Parliament in Australia are advocates of a directly elected President. The only prominent advocate of that type of constitutional change is Mr Peter Reith, Minister for Workplace Relations. Some State leaders of the Labor Party supported the idea. But others do not. Because the change would challenge the power of the Prime Minister who is elected from the members of the Federal Parliament (and on one view the Federal Parliament itself) it seems unlikely that it would 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.

⁸⁹ 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 gridlock⁹⁰. The opinion polls indicate that 70% of Australians insist that if Australia is to move to a republic, the President should be directly elected⁹¹. This is said to be in harmony with Australia's basic democratic traditions. Yet if such a change to the Constitution were proposed, the office would be fundamentally different from any in our present system. The chances of political instability and a popular distaste for radical change are such as to discourage the prospects of electoral acceptance. The constitutional monarchists in Australia would remain attached to the current Constitution. On present figures they would only need to attract fewer than 15% of potential republicans or undecided electors to their cause to defeat any proposal for change. Many who voted for the minimalist republic would vote against a directly elected President if it were proposed.

This, then, is 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,

⁹⁰ cf G. Williams, "Major reforms needed before another vote, Australian National University, *News*, November 1999, 11.

⁹¹ A poll published in *The Bulletin*, 9 November 1999 at 41 showed that "if Australia becomes a republic", 68% believe in popular election. Only 25% favoured election by Parliament.

will probably persuade all but the most intrepid that it is best to leave things alone for the time being. At least to do so during the reign of Queen Elizabeth II whose admirable personal qualities continue to attract a vital cohort of support to the negative case⁹². Whether such support would wane on the succession of her son or be enhanced by the personality of her grandson, remains for the future.

PERSISTING WITH THE PARADOX

Republicanism has been a cause within Australia since colonial days. It has a very large number of sincere and committed supporters. In all but its final link with the Crown, the Australian Constitution is republican in substance. That is why most Australians – whether constitutional monarchists or not - already feel themselves substantially republican in orientation⁹³. They are generally suspicious of heredity. They are egalitarian. They are also quietly patriotic and proud of their stable Constitution and independent national traditions.

The republican referendum of 1999 showed once again the difficulties of changing the Australian Constitution. But it also showed

⁹² cf M D Kirby, "Australia's Monarchy - Meeting the People's Needs" in G Grainger and K Jones (eds) *The Australian Constitutional Monarchy* (1994) 87 at 97.

⁹³ J Uhr, "After the Referendum: The Future of Constitutional Change? [2000] *Public Law Review*, 7.

the special difficulties of changing the Constitution from a monarchy to a republic. Those difficulties are likely to remain for the foreseeable future⁹⁴. Those who persist with the proposal for change need to reflect upon the errors made that eventually contributed to the 1999 republican defeat. Unless those errors are addressed and repaired, the prospect in the immediate future of an alteration to the Australian Constitution to a republic being approved as s 128 requires appears (to use a word much deployed in the months before 6 November 1999) minimal.

Meantime, the Australian Constitution continues to operate. The symbols of monarchy in Australia will probably continue to erode. Royal visits will diminish in number, formality and duration. The Governor-General will increasingly take over as *virtual* Head of State. His or her office will continue to evolve as an Australian peculiarity. Most Australians will continue to feel republican in their hearts⁹⁵. Many will continue to have a vague lingering affection for the monarch. Those who think about it may feel a measure of respect for the idea of

94 K R Handley, "Where to Now?", unpublished paper for a seminar of the New South Wales Bar Association, November 1999, 5.

95 D Malouf, "Yes, but what's the Question?", *Sydney Morning Herald*, 9 November 1999 at 13, pointed out that the New South Wales Premier Mr Carr had urged the Constitutional Convention to avoid use of the distracting "demon" of "republic" and adhere to the notion of a "Commonwealth" as an Australian equivalent. The actual amendment proposed in 1999 did not suggest alteration of the name "The Commonwealth of Australia".

the Crown - a notion above the transient allegiances of party politics with its vital but often banal concerns⁹⁶. When their fellow citizens⁹⁷, the journals of newspaper barons and others shout at them for their folly and ignorance or other foreign editors accuse them of putting a curse on themselves⁹⁸, most Australians will probably look on such calumny with indifference or contempt. Fleetinglly, they will acknowledge the paradoxes of their constitutional situation. And then they will turn their attention to the issues that seem to them to have greater priority.

One day Australia may well become a republic. But it will not happen until the lessons of the referendum of 1999 are learnt.

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 ventured an opinion seem to think

⁹⁶ G Melleuish, "Crown, People and Republic", *Quadrant*, July-August 1999, 11.

⁹⁷ G Barnes, "Not the vote of a Clever Country", *Sydney Morning Herald*, 12 November 1999, 17. Mr Barnes suggested that the republic was "shot down by scaremongers and opportunists".

⁹⁸ *The Nation*, (Thailand), 7 November 1999 reported *Sydney Morning Herald*, 8 November 1999, 8.

not⁹⁹. 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 arrangements. The presence of the Queen for the most part in the United Kingdom deprives local nationalists 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 domestic constitutional terms. The removal of the holders of hereditary peerages from the House of Lords¹⁰⁰ may reflect the same impatience in the United Kingdom as exists in Australia, with the very notion of heredity. But in the Australian Commonwealth, the notion of heredity has only one lingering role to play in our governance, namely in the monarch. The United Kingdom has taken a distinct step in the same direction.

In the United Kingdom, a larger adjustment of thinking is required to narrow the concept to the monarch and close members of her family but to stop the narrowing there. Australians have enjoyed that situation

⁹⁹ C Munro, "More Daylight, Less Magic: The Australian Referendum on the Monarchy [2000] *Public Law*, 3.

¹⁰⁰ Under the *House of Lords Act* 1999 (UK).

for a century. Much still obviously depends on the personalities involved. No longer can a modern Royal Family be cloistered from the fascinated gaze of the people. Satellite television and the Internet are everywhere.

One of the arguments which recurred in the Australian debate, concerning the exclusion from the Crown of persons who profess or marry a Roman Catholic, has already surfaced in Scotland¹⁰¹. A motion calling for the removal of this provision from British constitutional law attracted all Party support, although an amendment recognising it as a complex issue was also carried. Given that the Queen becomes a Presbyterian when she is in Scotland, it may not be unreasonable, in modern conditions, to release the conscience of every member of the Royal Family 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 Queen Elizabeth II made her most recent Royal visit to Australia. She will return again 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

¹⁰¹ *Scotland's Parliament*, Cm 3658, para 2.5.

2000 was by everyone's estimation a happy and successful one¹⁰². In a major speech in Sydney on 20 March 2000, the Queen renewed her commitment "to serve as Queen of Australia under the 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 was 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 her removal from the Constitution continued to do so¹⁰³. Their opinion columns repeated the institutional obituaries¹⁰⁴. The ARM regrouped. Reportedly it invited a number of prominent direct electionists to stand for election in its new National Executive Committee¹⁰⁵. Some republicans have complained

¹⁰² See eg *Sydney Morning Herald* 1 April 2000, at 16.

¹⁰³ "Farewell to the Queen", *Sydney Morning Herald*, 1 April 2000, at 16.

¹⁰⁴ P Botsman, "Time to Wish our Lilac Queen Well - And Wave her goodbye", *Australian Financial Review*, 31 March 2000, at 36.

¹⁰⁵ *Sydney Morning Herald*, 24 April 2000, at 6.

energetically about the return of Australians to London during this historic week. Invoking the ghost of Alfred Deakin, they have suggested that Australian centenaries should be celebrated "anywhere in Australia, just not bloody London!"¹⁰⁶

The warmth of the Australian response to the Queen personally in March 2000 appeared to surprise some Australian journalists for she had not visited the country since 1993 as it debated, and ultimately voted on, its future. One journalist described how "everywhere hard-nosed newspaper men and women are losing their marbles. Only the Queen remains unruffled, efficiently working and charming her way through the conversation groups"¹⁰⁷. The journalists 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"¹⁰⁸.

¹⁰⁶ P Botsman, "Our history should be celebrated at home", *Australian Financial Review*, 5 May 2000, at 39.

¹⁰⁷ M Chipperfield, "Class act - surprising scenes from a royal tour", *The Eye*, 6 April 2000, 22 at 25.

¹⁰⁸ Quoting G L Martin, *The Eye*, 6 April 2000, at 25.

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!"¹⁰⁹. 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 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"¹¹⁰.

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"¹¹¹.

Although he probably would not have used such a vulgar word, that would almost certainly have been 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 for a certain caution in large constitutional changes is very deeply ingrained. It has

¹⁰⁹ *The Eye*, 6 April 2000, at 26.

¹¹⁰ Chipperfield, *The Eye*, 6 April 2000, at 26.

¹¹¹ Quoted Chipperfield, *The Eye*, 6 April 2000, at 26.

been repeatedly displayed. It is probably wise. And whether it is wise or is not, it is a political and constitutional reality.

Perhaps this is the greatest tribute to the Constitution which was accepted at Westminster a hundred years ago tomorrow. It is a hundred years young. It has shown an astonishing capacity 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 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 Chifley's "handy constitutional fiction"¹¹². It is a fiction that reminds us, if ever revisionists would have it otherwise, of our indelible, special, legal, cultural and emotional links to the United Kingdom, its people and the Crown.

¹¹² Chifley, quoted in Bongiorno, above n 1, at 42.