

# THE WISDOM OF HINDSIGHT - THE 1999 REPUBLICAN REFERENDUM - LESSONS FOR THE FUTURE

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## INTRODUCTION

Australia's constitutional health requires an early resolution of the republic issue. The Newspoll of city and country voters in September 1999 showed 95 per cent agreeing that the head of state should be an Australian, 88 per cent strongly agreeing<sup>1</sup> Support for the colonial legacy of having our head of state in another country on the other side of the world has almost evaporated Yet only 45 per cent voted for the republic package in the referendum the following November and in no state was there majority support. That indicates that over 40 per cent of voters strongly desired the change that would make Australia a republic but voted no because they did not regard themselves as offered an acceptable package

It is unhealthy to leave the body politic with a constitutional running sore where over 85 per cent do not identify with a central feature of their Constitution - close to national sentiment The succession of long-lasting disputes over Canada's Constitution since the late 1970s has weakened the authority of that constitution and accordingly the democratic and federal compact of the country<sup>2</sup> Events could force a decision on us without much warning. Britain could abolish its monarchy or something could quickly produce an urgent consensus here to separate from the monarchy. With the complexities involved and the time and consensus necessary to amend the Australian Constitutions, the sooner we know our preferred form of republic for the next referendum, the better. We should not risk having to make a pressured and ill-considered decision while time is running out

Many support and many oppose becoming a republic and I do not take sides; however, no one can deny that the constitutional health of this country demands an early resolution of the issue. This basic

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1 *The Weekend Australian*. 9-10 October 1999 8

2 McGarvie, R. *Democracy: choosing Australia's republic*. Melbourne: Melbourne University Press, 1999, 5-6

constitutional issue will be resolved only by a referendum vote upon a proposal which can genuinely be presented in a way that will catch the public imagination and vision; where people can vote free of partisan political impulse and be secure in the knowledge that whichever way the vote goes our democracy and federation will be safe for future generations. The package for the 1999 referendum satisfied none of these requirements and its rejection resolved nothing but its own utter unsuitability for our kind of democracy and federation. The move to resolve the issue is now stalled. It is vital to restart it by initiating a process of effective resolution.

With many distinguished constitutional lawyers involved in this seminar of the Australian Association of Constitutional Law, I must disclose that my paper does not have much to do with constitutional law. It is mainly concerned with constitutional politics which, primarily, could be said to be comprised of the following:

- i) an understanding of the constitutional system which operates upon the base of the law of the Constitution;
- ii) a perception of the way that proposed changes in the Constitution will be used in the harsh realities of politics; and
- iii) in a country where the people have the final say on a proposal to change the Constitution, knowledge of how to devise and promote such a change so that the necessary majority of voters will be satisfied to approve it.

Lawyers may contemplate such proposed changes from a different perspective altogether: because they know that courts try to give new constitutional provisions an operation consistent with the law-makers' intention disclosed by the relevant words and inferences, lawyers tend to assume that the provisions will operate as intended. Geoffrey Sawer reminds us that in the constitutional area, 'Legal powers are habitually used for purposes not contemplated by those who framed the law'.<sup>3</sup> Of course, like others, constitutional lawyers may through experience and learning become knowledgeable in constitutional politics and I proceed on the basis that every member of this seminar has done so.

## WHAT HAS TO BE RESOLVED?

To decide what would be necessary for Australia to become a republic let us start from our present position. This has been stated by the Republic Advisory Committee:

Australia is a state in which sovereignty resides in its people and in which all public offices, except that at the very apex of the system are

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<sup>3</sup> Sawer, *G. Federation Under Strain Australia 1972-1975* Melbourne: Melbourne University Press, 1977, 123.

filled by persons deriving authority directly or indirectly from the people

All that is required to make Australia completely republican is to remove the monarch; no other constitutional change is required <sup>4</sup>

By gradual and evolutionary steps Australia's federal and state systems have become almost entirely detached from the United Kingdom. The slim remaining constitutional connection is that whoever is monarch of the United Kingdom is also the monarch and formal head of state of Australia and appoints or dismisses the Governor-General and Governors as advised by the Prime Minister or State Premier. The Governor-General and Governors have long been the de facto heads of state of their systems, exercising their own constitutional powers and the remaining powers of the Queen, as advised by their federal or state ministers. The Queen has no authority to direct, control or veto a governor-general or governor.<sup>5</sup> Neither the British Government nor Parliament has any control over our Federal or State Governments or Parliaments or the Australian people. For years Australia has been a totally independent country in all that it does. Yet because of the remaining connection with Britain which survives from colonial times, Australia constitutionally is not totally self-sufficient and autonomous. Eliminating the Monarchy from any involvement in the systems of the Commonwealth and States and making Australia entirely a republic would finally secure that autonomy by updating the formal constitutional structure to correspond with the practical substance of the present operating system.

In 1995 in his book, *A Federal Republic, Australia's Constitutional System of Government*,<sup>6</sup> Professor Brian Galligan made a perceptive and prophetic statement. Having concluded that Australia is already in substance a republic he recognised that his book:

might not be congenial to modern-day monarchists or republicans since it undercuts their often passionate debate and the claims that both sides make. If Australia is already in substance a republic monarchists are overstating the significance of the monarchy in the present order and the consequences of regularising the republic by eliminating monarchic forms altogether. Likewise, Australian republicans make similar exaggerated claims in order to fire up themselves and the public to make what is in fact a relatively small but technically difficult change to the constitutional system.<sup>7</sup>

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<sup>4</sup> Republic Advisory Committee *An Australian Republic: The Options*. Vol 1. Canberra: Australian Government Publishing Service, 1993, vol 1 39

<sup>5</sup> McGarvie, R. *Democracy: choosing Australia's republic*. Melbourne: Melbourne University Press, 1999, 16-23

<sup>6</sup> Galligan, B. *A Federal Republic Australia's Constitutional System of Government*. Melbourne: Cambridge University Press 1995.

<sup>7</sup> Galligan, B. *A Federal Republic Australia's Constitutional System of Government*. Melbourne: Cambridge University Press, 1995, 4

Thus monarchists have asserted in vague terms, never giving precise explanations, that there is no model that would maintain the strength of the Westminster System in a republic. It is claimed that without a monarch the important conventions of our system would cease to bind. Both assertions are demonstrably wrong.<sup>8</sup> On the other side, republicans have proposed to replace the present simple machinery by involved and showy structures with presidents elected by parliament or the people. They have portrayed change to a republic as an event of the significance and magnitude of the French Revolution or American War of Independence.

A deep problem flows from the fact that while the change appears a small and formal one it is technically difficult. Many practical people are not interested to involve themselves in working out a change they see as a formality. Most of the theorists who take it up have no appreciation of the unacceptable risks produced by distortions of the sophisticated balances on which the democracy of our system depends. There are no villains in the piece who want to damage our democracy. The peril comes from enthusiasts who think it easy and proceed without the knowledge, thought and care which are crucial.

## PACKAGE FLAWS

The fundamental flaws in the package rejected at the referendum illustrate this. Initially the model which resulted from the report of the Republic Advisory Committee<sup>9</sup> and the announcement by Prime Minister Paul Keating in June 1995<sup>10</sup> had presidents dismissible by a two-thirds majority of parliament. In our political culture that meant that a president who breached convention in a way that favoured the opposition was for practical purposes undismissible and therefore not bound by the vital conventions that ensure the democracy of our system.<sup>11</sup> This flaw was brought to public attention, and at the Constitutional Convention<sup>12</sup> the design lurched to the other extreme,

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<sup>8</sup> McGarvie, R. *Democracy choosing Australia's republic* Melbourne: Melbourne University Press, 1999, safe republican model: 86-7, 121-123, 145-150, 167-173, 185-187, 188, 190-193, 197, 205-206, 207-225, 232, 239-240; conventions remain binding: 11-12, 36-38, 42, 53-63, 88-92, 210-214.

<sup>9</sup> Australia Republic Advisory Committee (Turnbull M. Chairman) *An Australian Republic The Options*, vol 1. Canberra: Australian Government Publishing Service, 1993, 39.

<sup>10</sup> Keating, P. *An Australian Republic The Way Forward* Australian Government Publishing Service, 1995, p3; also Australia Parliament House of Representatives *Parliamentary Debates*, 29 June 1995, 2639-2678.

<sup>11</sup> McGarvie, R. *Democracy choosing Australia's republic* Melbourne: Melbourne University Press, 1999, 36-8, 89-92, 95-100.

<sup>12</sup> Constitutional Convention held in Canberra, 1998. Half the delegates were elected, the other half were appointed. See also the Report: Australia *Report of the Constitutional Convention* Canberra: Australian Government Publishing Service, 1998.

providing presidents instantly dismissible by the prime minister. This would have crippled the fail-safe mechanism of the discretionary reserve authority which now enables the Governor-General in the last resort to act independently of ministerial advice and refer an exceptional constitutional malfunction to the Parliament or People for resolution where that is absolutely necessary to ensure the continued operation of the constitutional system and its safeguards of democracy. That power of instant dismissal would not only render unworkable the safety device which allows the democratic resolution of an intractable constitutional crisis with which neither the political nor judicial processes are able to cope, but it would free the Prime Minister from the binding conventions that require resignation on losing an election or a no confidence vote.<sup>13</sup>

In the package that went to referendum the selection process would have given presidents a great mandate; encouraging rivalry with the elected government and producing celebrity presidents of very different calibre from those who have been our governors-general.<sup>14</sup> Constitutional provisions relating to the reserve powers would have required presidents to follow supposed conventions which do not exist, and would be unworkable anyway, and have left it open to an activist High Court to shift great constitutional influence to itself by exercising jurisdiction in respect of those powers.<sup>15</sup> Dissenting states would have been forced firstly into a commonwealth republic they did not trust with their democracy; and then by circumstance and ridicule to make the change to republics at state level. This would have produced tensions weakening the Federation.<sup>16</sup>

## PARTISAN TAINI

Referendums pass only if they have consensus support right across the political spectrum and support from the major parties. As John Button has written,<sup>17</sup> Australians like to think of the republic issue as something above or beyond politics. He adds that Paul Keating woke up republican sentiment in 1993 and understood its symbolic power: 'He held it in his hand like the Welcome Stranger gold nugget. Then he dropped it in the

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<sup>13</sup> McGarvie R *Democracy. choosing Australia's republic* Melbourne: Melbourne University Press, 1999, 145-151, 158, 168-177, 183-184, 185-187, 190-201, 224-225.

<sup>14</sup> McGarvie, R *Democracy. choosing Australia's republic* Melbourne: Melbourne University Press, 1999, 123-135.

<sup>15</sup> McGarvie, R *Democracy. choosing Australia's republic* Melbourne: Melbourne University Press, 1999, 157-162, 170-171, 189-190, 213-216; Constitutional Alteration (Establishment of Republic) 1999, Schedule 1, substituted s 59; Schedule 3, Transitional provisions ss 7 and 8.

<sup>16</sup> McGarvie, R *Democracy. choosing Australia's republic* Melbourne: Melbourne University Press, 1999, 246-255.

<sup>17</sup> Button J *On the Loose*. Melbourne: Text Publishing.

murky waters of acrimonious partisan politics'.<sup>18</sup> To negate the political advantage Keating derived from promoting a republic and criticising the coalition for not supporting it, John Howard undertook to hold a convention and put to referendum a model which had clear support, and the referendum followed from that. Although it received some extras and alterations from the Constitutional Convention in 1998, the referendum model was Paul Keating's original one and never lost the identity of its birth. For a political party to brand a model as its property for use in extracting political advantage from its opponents, is to brand it a referendum reject. This would have to be a major factor in the extent of correlation between party support and referendum vote appearing in a Newspoll of voting intention taken in the week before the referendum. It indicated 53 per cent of Australian Labor Party ('ALP') voters voting yes with 2 per cent uncommitted but 63 per cent of coalition voters voting no with 2 per cent uncommitted.<sup>19</sup>

### QUALITY ASSURANCE

In 1999 voters were left without the usual quality assurances available in a referendum. Usually a government puts forward a referendum proposal and in the interests of its political future is careful to ensure that it is a sound one. An opposition only gives the support essential for a successful referendum if it has critically scrutinised the proposal and is satisfied there are no major flaws. In 1999 the Coalition Government<sup>20</sup> had not put forward the model and accepted no responsibility for its quality. For every coalition member who identified a flaw in it, another denied the flaw existed. As it was Paul Keating's model with modifications, the opposition was protective of it and not prepared to concede, much less expose its flaws.

### CATCHING PUBLIC IMAGINATION

In considering constitutional amendment we must constantly keep in mind that Australians a century ago adopted a constitution with a democratic provision giving the people the final say on amendments. Quick and Garran<sup>21</sup> emphasised that, while provision for amendment is essential, a constitution is a charter of government which should not be lightly or inconsiderately altered. They saw the requirement by s 128 of a double majority as a necessary safeguard to secure maturity of thought,

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<sup>18</sup> Button, J *On the Loose*. Melbourne: Text Publishing 131.

<sup>19</sup> *The Australian*, 2 November 1999, 6.

<sup>20</sup> The Coalition was comprised of the Liberal and National Parties.

<sup>21</sup> Quick J and Garran, R *The Annotated Constitution of the Australian Commonwealth (1901)*. Sydney: Legal Books 1995.

encourage discussion, and delay change until there is strong evidence that it is desirable, irresistible and inevitable. They commented that

Where a community is founded on a political compact it is only fair and reasonable that that compact should be protected, not only against the designs of those who wish to disturb it by introducing revolutionary projects but also against the risk of thoughtless tinkering and theoretical experiments <sup>22</sup>

The rejection of the 1999 referendum proposal was a good illustration of the last part of that sentence.

If the fair test of public opinion is to resolve the republican issue then this can only be done in a referendum where the proposal for change from monarchy to republic is soundly constructed and soundly advocated

History shows that with a proposal for constitutional change of a fundamental nature, such as becoming a federation or becoming a republic, something more is needed. The community will only adopt the proposal by referendum if it is seen to rise above mundane considerations, such as sectional advantage and disadvantage; and if it generates an image that creates a positive public feeling and sentiment - that it would be something very good for the community to accomplish. My own experience in support of basic reform within a political party, the court system, universities and in law reform is that support for it is attracted in a similar way. Helen Irving, in her book, *To Constitute a Nation: A Cultural History of Australia's Constitution*,<sup>23</sup> shows that while considerations such as defence, business and taxes played their part, it was the image of an Australian nation that played a very significant part in moving people to the idea of the inevitability and desirability of federating. That attracted the necessary support in the referendums in the six colonies.

As there are few credible claims which can be advanced to show that practical advantage would accrue from becoming a republic, an awareness of the needs of good advocacy should have impelled those designing the referendum package to design one which would enable the symbolic and sentimental dimensions of the change to be pitched at their zenith.

## CHANGE AS THE CULMINATION OF OUR HISTORY

The way in which a proposal to change to a republic can be advocated so as to catch the imagination and vision of contemporary Australians is

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<sup>22</sup> Quick, J and Garran, R *The Annotated Constitution of the Australian Commonwealth (1901)*. Sydney: Legal Books, 1995 988-989.

<sup>23</sup> Irving H. *To Constitute a Nation: A Cultural History of Australia's Constitution* Melbourne: Cambridge University Press 1997

obvious. The system of Colonial Government which started in Australia in 1788 was not constitutionally autonomous in any way but relied entirely on the sovereignty of the colonial power. By evolution over more than two centuries, Australian initiatives, either not resisted or even encouraged by Britain, have taken us to the stage where we are an entirely independent country with constitutional self-sufficiency except for the slim connection to the former colonial power existing through the person who is Britain's monarch. It would place advocates for change in a strong position if they invited fellow Australians to take the last step and bring that broad historical sweep of Australian initiative to its inevitable conclusion by giving Australia, at last, entire constitutional self-sufficiency so that it becomes, in every sense, an autonomous nation state.

The designers of the referendum package seem to have placed little importance on the fact that we are a federal country and democracy. The package on which we voted could not be claimed as ushering in the culmination of the inevitable sweep of history and bringing complete national maturity. The referendum proposal related only to the commonwealth system. Even if it had passed, most of the Federation - all of the states - would still have been monarchies. It was a monumental mistake to forsake the spirit of a century-old federation, disregard the States and concentrate only on the Commonwealth.

Without inviting the country to take the opportunity to complete the architectural design, the package promoters concentrated instead on the fixtures and fittings. They expounded on the attractions of features never on offer before: a system of nominations, a short list committee, a parliamentary election and the instant dismissal of unwanted presidents.

During the referendum campaign voters were told that if they voted for the package they would increase overseas trade and improve respect for us in Asia. It was made clear to voters that they must overlook any blemishes in the package and vote it in, or otherwise they would later be so irresponsible as to vote for a far worse package of direct election. Some of the promoters of the package took quite an unwarranted anti-British stance. Some, acting with the courage that comes from the knowledge that she cannot answer back, were content to sneer publicly at the Queen. I am not overlooking that there were breaches of credibility and good taste on both sides of the debate; however, looking to the future, at the next referendum more substance should be expected from those who advocate that Australia should attain final maturity as an autonomous nation state by becoming a republic.

## THE POLITICAL PARTIES

The referendum placed great strains on the major political parties. The Liberal Party endured the risks and tensions produced when its members,



as they were allowed to do, publicly opposed each other on the issue. The Prime Minister clearly favoured a no vote but only 65 per cent of the Party's most recent electoral constituency voted that way. The National Party opposed the package but a number of its members publicly supported it. Only 80 per cent of its most recent electoral constituency voted no. The Labor Party has had to live with the fact that Paul Keating as Prime Minister advanced a republic model which, in the form it took until the constitutional convention, would clearly have been inconsistent with the democratic operation of our system, as few of its then supporters would now deny.<sup>24</sup> The Labor Party supported a yes vote but only 57 per cent of its most recent electoral constituency voted yes.<sup>25</sup>

Paradoxically, the unhappy experience of the political parties on the republic issue makes its resolution more feasible. Since the referendum no party has promoted a particular model; so that factor, which could destine a model to referendum death, is absent. Each of the major parties has reason to postpone its reinvolvement and identification with the issue. The Liberal Party is treating the issue as having disappeared with the referendum. The Labor Party proposes that there should first be a referendum on whether we wish to be a republic, then another plebiscite on which model we prefer and finally a referendum on whether to change the Constitution. That would postpone resolution for many years. While this state of party inactivity lasts, the time is ripe to initiate a non-partisan process for resolving the issue in a constitutional way. We must use that opportunity while it lasts.

## THE CONSTITUTIONAL WAY

The need to resolve the issue in a constitutional way has been demonstrated on the other occasion. Australians resolved by referendum a basic constitutional issue that involved both the quality of our democracy and our character as a nation. I refer to the resolution of the federation issue a century ago. Effective resolution in a constitutional way requires the resources of people, parliaments and governments all to be used in working out the proposal ultimately put to referendum.

Instead, following the fashion of the time, we have sought to resolve the republic issue in a privatised way. It has not worked. In substance we left the proposal ultimately put to referendum, to be worked out by

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<sup>24</sup> See for instance: Turnbull, M. Dismissal Mechanism Keeps PM in Check *The Australian*, 10 July 1998 13; Turnbull, M. *Fighting for the Republic The Ultimate Insider's Account* Melbourne: Hardie Grant Books 1999 39-40

<sup>25</sup> The percentages indicating how the most recent electoral constituencies of the parties voted were supplied to the author from an impending article by Associate Professor Malcolm Mackerras

a private organisation, the Australian Republican Movement ('ARM') Scrutiny of the proposal was left mainly to another private organisation, Australians for Constitutional Monarchy ('ACM')

Mr Keating, having raised the republic issue, did not refer it to a parliamentary committee but in 1993 appointed the Republic Advisory Committee ('RAC') to consider and describe the viable options for a republic after consulting with the community. The committee's chairman was Malcolm Turnbull, who later that year became the chairman of the ARM. All members of the RAC favoured Australia becoming a republic. The submission of the ARM to the RAC was that a president should be elected by a two-thirds majority of both houses of parliament.<sup>26</sup> The clear tenor of the RAC report favoured that method of election and that the president should be dismissible in the same way. That model was advanced by Paul Keating. At the Constitutional Convention the ARM had the largest delegation which caucused and voted as its majority decided.<sup>27</sup> With the other votes it could count on, it prevailed on all major issues. The legislation for the referendum reflected the Convention's decisions. After the referendum failed, it was fair to treat the position, as *The Australian* did in its editorial of 14 August 2000, as one where the people know that they do not like Mr Turnbull's model for a republic.

Under this privatised mode of resolution there was little influence upon the form of the referendum package by republicans who did not favour parliamentary election, by monarchists or by the vast numbers whose main concern is to retain the strength and stability of our democracy and federation if we become a republic. In complete contrast to the way Federation was achieved, the contribution of members of governments and parliaments; with their experience and feel for the constitutional system, the realities of politics and the electorate; has been minuscule. That has shown.

The first move towards Federation stalled. None of the Colonial Parliaments passed legislation that would enable the Federal Constitution drafted by the 1891 Convention to be adopted. Then a process which brought the constitutional way of resolving the issue to the task was developed.

It began in 1893 at a conference in Corowa organised by federation supporters. After much inconclusive talk a proposal for a practical process to resolve the federation issue was put and carried. The

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<sup>26</sup> McGarvie, R. *Democracy: choosing Australia's republic*. Melbourne: Melbourne University Press, 1999, 123-124

<sup>27</sup> Turnbull, M. *Fighting for the Republic: The Ultimate Insider's Account*. Melbourne: Hardie Grant Books, 1999, 34, 57

conference decided each Colonial Parliament should pass an act providing for the election of representatives to a second Constitutional Convention to consider and adopt a bill for a federal constitution, to be put before the people by referendum. That decision, made by a people's conference, would have brought the people into the process at the stage of electing delegates to the Convention but it lacked the mechanisms to introduce the positive input from parliaments and governments that would give it political momentum.

The process that brought that momentum was activated by an influential political leader, George Reid, premier of New South Wales, who initiated a premiers' conference in Hobart in 1895. John Lahey in his recent book, *Faces of Federation: An Illustrated History*,<sup>28</sup> tells us that, at that meeting of heads of government, 'there was an important change: politicians were brought into the process'<sup>29</sup> The Premiers decided to bring in the parliaments. When the Convention had drafted its bill it was to go to each Colonial Parliament which could propose amendments. Then the convention would reconvene, accept or reject those amendments and the resulting bill would go to referendum. Lahey says, 'The Hobart conference and its outcome were like the peak of a mountain. Once the Premiers had been there and seen the view - or the vision - there was no going back.'<sup>30</sup>

Over a century later, the restart of the stalled move to resolve the republic issue awaits an influential political leader or leaders prepared to take the first step to generate the necessary political momentum. As it was then, an effective practical process will be quite complex but we now have the advantage of a century's experience of cooperative federalism and the *Australia Acts* 1986 enable us to make for ourselves the constitutional changes which only the United Kingdom Parliament could then make. We must remember Samuel Griffith's words to the Constitutional Convention in 1891, 'It is no use for hon members to want Federation while they refuse to accept the means necessary to obtain it.'<sup>31</sup>

As in 1895, the obvious activating agency is a meeting of the Heads of Government, the Prime Minister, Premiers and Chief Ministers. Parliaments would best be brought in by an agreement to set up an all-

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<sup>28</sup> Lahey, J *Faces of Federation An Illustrated History*. Melbourne : Royal Historical Society of Victoria, 2000.

<sup>29</sup> Lahey, J *Faces of Federation An Illustrated History*. Melbourne : Royal Historical Society of Victoria, 2000, 33

<sup>30</sup> Lahey, J *Faces of Federation An Illustrated History*. Melbourne : Royal Historical Society of Victoria, 2000, 90

<sup>31</sup> Lahey, J *Faces of Federation An Illustrated History*. Melbourne : Royal Historical Society of Victoria, 2000, 39

party committee within the Federal Parliament, including representatives from the State and Territory Parliaments. It would investigate and report on two questions: Which republic model would best preserve the strength of our democracy? What method of deciding the republic issue would least strain the Federation? The committee should consult a lot with practical people. The model recommended by the majority, and any with minority support, should be described with the detail required by the 1998 Constitutional Convention, and its supporters give full reasons for favouring it over the other models.

Would the reports of the committee be based on the genuine individual opinions of its members acting in a bipartisan manner? Parliamentary committees on a subject where the major parties have conflicting interests usually divide on partisan lines. Where there are no such conflicting interests they operate very effectively. Much of our best legislation results from all-party committee reports. We have reached the stage where no party is promoting a particular model or a particular method of making the final decision. The major parties share a reluctance to take the lead on the issue and their interests would be served by encouraging the responsibility to be taken by a distinguished parliamentary committee operating in a bipartisan way. All parties share an interest in preserving the strength of our democracy and federation if we become a republic. There is the example of a century ago. If the leaders on the federation issue, instead of adopting the common objective of seeking the best constitutional structure within which to continue their political contests in future, had divided into free-traders campaigning for one model of federation and protectionists for another, the Australian nation would not have been born when it was.

The community would expect a bipartisan approach from the committee. After all, the committee would not be reporting on whether we become a republic but on how to ensure retention of the quality of our democracy and federation if we do.

Some cast doubt on the feasibility of such reliance on a parliamentary committee and claim there is now little faith in our representative institutions.<sup>32</sup> That overlooks the federation experience. As Helen Irving records,

the ever familiar character of intransigent party rivalries and public disdain for politicians as a type were well entrenched. They were frequently the subject of ridicule, criticism and popular amusement. They were mistrusted for their motives and often assumed to be ruled by self-interest. But when it came to the constitutional creation of a nation

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<sup>32</sup> See for instance Turnbull, M. *Fighting for the Republic: The Ultimate Insider's Account*. Melbourne: Hardie Grant Books, 1999, 248.

almost all those elected to the conventions were politicians. Their experience and knowledge were recognised.<sup>33</sup>

A good constitution resulted

A method of deciding the republic issue with minimal strain on the Federation would also most effectively engage governments, parliaments and people in working out the ultimate referendum proposal. The committee would be highly likely to recommend it.

Under that method the first step would be that within each of the Commonwealth, State and Territory systems the Government and Parliament would decide on and pass the necessary legislation and hold a plebiscite on which republic model the voters of that system would prefer if it became a republic. That would give the commonsense of the people of each system, informed by the committee report, the vital role of showing voter preference within the system. Ascertaining that preference would greatly influence the building of political consensus on the model for the system. I consider that, for the reasons I mention below, there is the highest likelihood that plebiscites in all systems would favour the same model but there is no constitutional reason why different systems could not have different models.

Then a bill would be drafted and passed by the houses of the Federal Parliament proposing constitutional amendments to go to referendum. There would be a single referendum where voters would vote yes or no to one question, asking, in effect, whether they approved the proposal to make the whole Federation republican. The systems of the Commonwealth, States and Territories would each convert at the same time to its preferred model of republic if the proposal received support from an overall majority of Australia's voters and the voting majority and parliament of each state. Australia would then have total constitutional autonomy and be entirely a republic. The support of each State Parliament, necessary to enable the whole federation to change together to a republic, would be expected to follow as a matter of course if majorities in every state voted yes. If the support necessary to convert all systems to a republic were not received all would remain monarchies.

In my book, *Democracy: choosing Australia's republic*,<sup>34</sup> I identify the relevant constitutional powers and explain how they could be used to make the whole federation a republic in the way mentioned above. Before the book was published I asked Sir Daryl Dawson to read the

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<sup>33</sup> Irving H. *To Constitute a Nation. A Cultural History of Australia's Constitution*. Melbourne: Cambridge University Press, 1997. 137, 142-143.

<sup>34</sup> McGarvie, R. *Democracy: choosing Australia's republic*. Melbourne: Melbourne University Press, 1999.

relevant chapter and he confirmed that the method I propose would be valid in constitutional law and has authorised me to mention that.

Amendment of the Commonwealth Constitution in reliance only on its s.128 requires referendum support from the overall majority of voters and majorities in at least four states. My proposed method would simultaneously amend to republican form the constitutions of the Commonwealth and each State and Territory in reliance also on s 15(1) of the *Australia Acts 1986* (Cwth and State) and s 51(38) of the Commonwealth Constitution. The amendments would occur only if, in addition to the overall majority of voters, there were a majority in every state, and every state parliament requested or concurred in the amendments. The higher requirements of support than s 128 specifies, would not be a requirement significantly higher than has in practice usually been obtained in Australia. We moved to Federation after all states (then colonies) approved in referendums. Seven of the eight amendments made to the Commonwealth Constitution – all those made since 1910 – had referendum support from an overall majority of voters and majorities in every state.

## RESOLUTION OF THE REPUBLICAN ISSUE

For the reasons fully discussed in my book and the papers on my <http://www.chilli.net.au/~mcgarvie> website, I consider that the report of the Parliamentary Committee, and the plebiscites held within each of the systems, would identify as the preferred model one which is the republican equivalent of the present system; such as the Australian Democracy model I have advanced, commonly called the McGarvie model. I reach that conclusion on the basis that, of all the models so far proposed, such a model would best preserve the strength of our democracy, and because life's experience has given me a high degree of confidence in the constitutional wisdom of the ordinary Australian voter. This paper is not the place to discuss those points.

If the process I propose is initiated soon, carried through and so a second referendum on the republic issue is held for the whole Federation; proposing that each system change to the republican equivalent of the present system; it would resolve the republic issue. It would do that because it would be a referendum upon a proposal which could genuinely be presented so as to catch the public imagination and vision, and in which people could vote free of partisan political impulse; secure in the knowledge that whichever way the vote went, our democracy and federation would remain strong for future generations. If the result of the referendum were that the Federation became a republic the issue would obviously be resolved. If the referendum failed although the case for change was at its strongest, the issue would be

treated as resolved for a good many years. That conclusion rests on the assumption that not only would the proposed change in fact preserve the strength and stability of our democracy and federation in a republic, but that the proposal would be advocated appropriately and competently. Making due allowance for the caution that a consciousness of the package's fundamental flaws may have induced, there were during the 1999 referendum campaign basic and glaring deficiencies in presenting and advocating the case for change; however, this is not the occasion to discuss them.