

# A DIRECTLY ELECTED PRESIDENT: MAXIMISING BENEFITS AND MINIMISING RISKS

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## INTRODUCTION

The future path of Australian republicanism will largely depend upon an assessment of the reasons why the 1999 referendum failed. Among those that have been suggested are:

- insufficient public knowledge regarding the Constitution and the details of the proposed model;
- commitment to the monarchy or 'Governor-Generalate';
- preference for the status quo over the republican model offered; in other words, insufficient reason given to alter the status quo;
- preference for direct presidential election over the indirect method embodied in the referendum model; and
- objection to particular features of the referendum model, especially the Prime Minister's power to dismiss the President.

The first and last reasons may be discounted as critical factors in the defeat. Regarding the first, there is little evidence that voter ignorance regarding either Australian government in general or the details of the model in particular, contributed substantially to the referendum defeat. The difference in voting patterns between federal electorates can be attributed more plausibly to the level of alienation from the political and economic power structures of Australian society than to levels of education. As Paul Kelly noted in *The Australian* on 8 November 1999:

This was not a vote for the Queen; it was not just a vote against the republic on offer; it was, at a deeper level, *a vote of distrust in the political class and its agenda* of 1990s reform by people who simply said the republic was not a core issue for them.<sup>1</sup>

As to the last hypothesised reason, concern regarding particular features of the referendum model undoubtedly contributed to the result. But the

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<sup>1</sup> Kelly, P. *Paradise Divided: The changes the challenges the choices for Australia* *The Australian* 8 November 1999 253 (Emphasis added)

margin of defeat, especially in the four smaller States,<sup>2</sup> suggests that even a 'politicians' republic' lacking these defects would have proved unable to secure the double majority required by s128 of the Constitution.

Public opinion polls over the last few years, including those conducted around the time of the referendum, reveal majority support in principle for a republic and, even more consistently, overwhelming support for a directly elected president. A Newspoll conducted a few days before the referendum, which accurately forecast the referendum's defeat<sup>3</sup>, registered a margin of 74% to 23% in favour of 'Australia becoming a republic,' and the Australian Constitutional Referendum Study (ACRS), conducted in November and December 1999, revealed a similar margin of 76% to 24% in favour of a republic.<sup>4</sup> Interestingly, 53% of voters intending to vote 'no' in the referendum were in favour of Australia becoming a republic.<sup>5</sup> Since many republican supporters of the McGarvie model — such as Peter Costello and Greg Craven — would have supported the referendum model, most of these voters would have been supporters of direct election.<sup>6</sup> These results are compatible with those in slightly earlier polls. A Newspoll of mid-August 1999 registered a margin of 51% to 35% 'in favour of Australia becoming a republic'<sup>7</sup>, and a Herald/AC Nielsen poll a week earlier produced a slightly larger margin of 54% to 32%<sup>8</sup> Significantly, that margin would have increased to 67% to 24% had a direct-election model been offered<sup>9</sup>

Public opinion polls have shown overwhelming support for direct presidential election over parliamentary election or prime ministerial appointment since such polling commenced in 1993. Indeed, the margin in favour of direct election had declined slightly in recent years. From

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2 South Australia: 56%: 43%; Western Australia: 58%: 41%; Tasmania: 59%: 40%; Queensland: 62%: 37%: Australian Electoral Commission *Electoral News File* No 87, December 1999. 2 The national margin was 54 8%: 45 1%.

3 By 50% : 47%, with 3% uncommitted: *The Weekend Australian*, 6-7 November 1999, 8. The uncommitted voters clearly decided ultimately to vote no.

4 Popularly elected President: 55%; President chosen by Parliament: 21%; retain Queen and Governor-General: 24%: see McAllister, I 'Elections Without Cues: The 1999 Australian Republic Referendum' (paper prepared for APSA Conference ANU, Canberra, 3-6 October 2000) 11.

5 *The Weekend Australian*, 6-7 November 1999, 8. The ACRS figure was 52% (popular election: 49%; parliamentary election: 3%; retain Queen and Governor-General: 48%): McAllister, I 'Elections Without Cues: The 1999 Australian Republic Referendum' (paper prepared for APSA Conference Australia ANU, Canberra 3-6 October 2000), 11.

6 See the ACRS figures: McAllister, I 'Elections Without Cues: The 1999 Australian Republic Referendum' (paper prepared for APSA Conference Australia ANU, Canberra, 3-6 October 2000) 11. However that study appears not to have tested support for the McGarvie model.

7 *The Australian* 17 August 1999, 2.

8 *The Age*, 9 August 1999 2.

9 *The Age*, 9 August 1999 2.

1993 to 1997 the vote for direct election rarely fell below 75%, but after the Constitutional Convention of February 1998 it declined a few points to 68%<sup>10</sup> or 66%<sup>11</sup> in February 1998. A poll in late October 1999 registered a margin of 70% to 27% in favour of direct election over parliamentary election<sup>12</sup>, and a Newspoll taken around the same time showed republicans preferring direct presidential election over parliamentary election by a factor of 3 to 1.<sup>13</sup>

These opinion poll results, read in light of the advertisements of proponents of a 'No' vote, suggest that the referendum result is explained principally by the third and fourth reasons noted above. As Greg Craven observed several months before the referendum, a negative result would be explained 'not because people have voted for the Monarchy, but because they have voted in favour of a more radical form of republic'.<sup>14</sup> Those who favoured the status quo, not because of commitment to the monarchy or the Queen, but because they felt no motivation to change it, might well be induced to support a republic if the model offered appeared to improve Australian government and/or reduced their sense of alienation. Proponents of direct presidential election make such claims for their — as yet unspecified — model.

Attribution of the referendum defeat to the third and fourth factors is supported by a Herald/AC Nielsen poll conducted two weeks before the referendum, which identified the following motivations for those intending to vote 'no':

- There is no need for change: 50%;
- I want to vote directly for the president: 37%;
- I like having the Queen as our Head of State: 5%; and
- Don't know: 7%.<sup>15</sup>

These figures suggest that more than a third of those who voted 'no' would potentially support a republic with a directly elected

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<sup>10</sup> *The Bulletin*, 27 February 1998, 22

<sup>11</sup> *The Australian*, 10 February 1998, 6

<sup>12</sup> *Sunday Telegraph*, 31 October 1999, 4

<sup>13</sup> *The Australian*, 27 October 1999, 7: republic with a directly elected President: 46%; republic with a President appointed by Parliament: 15%; no change: 36%; uncommitted: 3%.

<sup>14</sup> Craven G. 'The Republican Debate and the True Course of Constitutional Conservatism' in *Upholding the Australian Constitution. Vol 11 Proceedings of the Eleventh Conference of The Samuel Griffith Society* Australia, Melbourne, 1999, 17

<sup>15</sup> *Sydney Morning Herald*, 26 October 1999, 4. A similar poll of voters in NSW and Victoria three weeks earlier had revealed the following reasons for voting no: If it ain't broke, don't fix it: 27%; Agree to a republic but not this model: 20%; Queen still the best Head of State: 13%; Don't know enough to make a choice: 10%; Other reasons: 17%. *Sun-Herald* 3 October 1999, 6.

President<sup>16</sup>, and it is probable that some of the 50% who saw no need for change might be induced to see such need if a different model were offered. As four experts in the field of opinion polling concluded,

[T]he public's preference for an elected president . . . is the principal reason the referendum failed . . . [A] referendum offering a republic with a Head of State elected directly by the people would have won handily in Australia as a whole . . . [T]he vote would have been about 55% in favour and 45% against. . . If there is a republic in Australia's future it will be one with a directly elected president.<sup>17</sup>

Australian republicans realistically face two, and only two, alternatives: either develop an acceptable model for a republic with a directly elected President or shelve the republic for the foreseeable future, hoping that circumstances will change sufficiently to render other republican models electorally viable. For the moment at least, the referendum model<sup>18</sup> and the McGarvie model<sup>19</sup> are dead; their only hope of resurrection lying in the wake of rejection of a direct-election model either in a non-binding plebiscite or at a future referendum. In deciding which alternative to pursue — the development of a direct-election model or temporary abandonment of the republic — close attention should be given to the advantages and disadvantages of direct election, and to the possibility of at least ameliorating the latter.

A directly elected President may offer significant advantages, apart from the electoral considerations already noted. Since a republic is essentially a state based upon popular sovereignty, direct election of the Head of State is, perhaps, the most natural form of republic. Moreover, the authority of the people is the only realistic substitute for any legitimacy the constitutional system derives from the Crown. With a directly elected Head of State this legitimacy is derived directly from the people rather than indirectly, as under the referendum model.

While Australia will not become completely republican until its Head of State ceases to be a hereditary monarch, Australian constitutionalism

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16 The ACRS figure was even higher: 49% of those who voted no favoured a directly elected President: McAllister, I. *Elections Without Cues: The 1999 Australian Republic Referendum* (paper prepared for *APSA Conference* Australia ANU, Canberra, 3-6 October 2000), 11.

17 Kelley, J. Evans, M. D. R. Mearns, M. and Headey, B. *Monarchy, republic parliament and the people: 20 years of survey evidence* (1999) 2(5) *Australian Social Monitor* 104, 111, 109, 111 respectively.

18 The core of this model originated in the present writer's draft Constitution published in *The Independent Monthly* in March 1992. For a (slightly) revised version see Winterton, G. *A Constitution for an Australian Republic* in Winterton, G. (ed.) *We, the People Australian Republican Government*. Sydney 1994, 1.

19 However, Richard McGarvie views the prospects of his model more optimistically. See, e.g., McGarvie, R. E. *Resolving the Republic Issue After the 1999 Referendum* (unpublished paper, 2000); and see generally McGarvie, R. E. *Democracy Choosing Australia's Republic*. Melbourne, 1999.

already embodies popular sovereignty<sup>20</sup>, and the Australian ethos is republican. The Australian electors' preference for direct presidential election reflects essential elements of Australian political culture, such as egalitarianism and a 'fair go' for all. Respect for the Constitution and the governmental system are enhanced when constitutional arrangements are in harmony with national culture; conversely, Australian constitutionalism is diminished when only 5% of those voting for retention of the Crown feel particularly attached to the monarchy and a majority of the electorate favours a republic. Direct election would bring the constitutional system into harmony with Australian political culture, thereby helping to reduce feelings of alienation from the political system, since it would be 'an expression of the democratic desire of people to reconnect with national political life'.<sup>21</sup>

For some, a further benefit of direct election is the almost inevitable diminution of the Prime Minister's authority relative to that of the Head of State, or at least a perception thereof; and authority clearly reflects perceptions. Of course, for many the inevitable enhancement in the authority of a directly elected Head of State is a major defect of that model.

Before considering the disadvantages or risks of direct election, it is necessary to determine the preliminary question of whether the present 'Washminster'<sup>22</sup> system of government should be retained, or whether some other system — such as the American or French — should be adopted. Some commentators have suggested adoption of the United States model, principally because it embodies a greater separation between legislative and executive power,<sup>23</sup> but there is little to commend that course. Were one establishing a constitutional system from scratch, like the framers of the Australian Constitution in the 1890s, the American system would have much to commend it.<sup>24</sup> But were it to be introduced now, with our strong party system and different political and constitutional culture, including the absence of a Bill of Rights, it

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<sup>20</sup> Winterton, G. 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *FL Rev* 1.

<sup>21</sup> Brett, J. 'Political Cynicism and the Head of State' (1995) 18 *Arena Magazine* 5–6.

<sup>22</sup> See Thompson, E. 'The Washminster Mutation' in Weller, P. and Jaensch, D. (eds) *Responsible Government in Australia*. Melbourne, 1980, 32.

<sup>23</sup> See, e.g., Ratnapala, S. 'The Case for Adopting the American Model in an Australian Republic' (1999) 20 *UQd LJ* 242; Solomon, D. 'Elect the Government!' in Coper M and Williams, G. (eds) *Power, Parliament and the People*. Sydney 1997, 49; Solomon, D. 'Parliament and Executive in a Republic' (1994) 8(2) *Legislative Studies* 42; Solomon, D. 'A Single-Chamber Australian Parliament?' in *Parliament and the Public Interest*. Canberra: Department of the Senate, 2000, 5 (Papers on Parliament, No 36).

<sup>24</sup> However for a warning against transplanting the American system of government see Ackerman, B. 'The New Separation of Powers' (2000) 113 *Harv. L. Rev.* 634.

would operate very differently from the way it does in its homeland. In short, if the American system of government were introduced into Australia now, the introduced system would not be the *American* system, but some indigenous hybrid possibly combining the worst features of both systems<sup>25</sup> The same is true of the French system which, in any event, is inherently less satisfactory<sup>26</sup>

Moreover, the limited evidence of public opinion polls offers no support to the introduction of these alien systems of government. While one may doubt the respondents' knowledge of the American system, let alone the Australian, the polls indicate a strong preference for retaining our present system of government over adopting the American: 65% to 24% in a *Bulletin* poll of February 1998 and 72% to 21% in a *Time* Morgan poll of January 1994<sup>27</sup> Hence, it will be assumed that an Australian republic with a directly elected President would retain the present system of responsible parliamentary government.

There are two principal concerns regarding a directly elected President. That the type of person likely to be elected and the method of choosing the President are inherently unsuited to the position of a Head of State in a parliamentary republic. Secondly, that direct election would so enhance the power, or at least authority, of such a Head of State that the stability, and perhaps even continuity, of the present governmental system would be jeopardised. These issues will be considered in turn.<sup>28</sup>

## SELECTION OF CANDIDATES

The prescribed process for choosing a Head of State should ideally be tailored to the nature and functions of the office. The office of Head of State (or 'President') in a parliamentary republic is modelled on that of

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25 See Winterton, G. *Monarchy to Republic: Australian Republican Government* Melbourne 1994, 1-7-8 101-102; Winterton, G. 'A Republican Constitution', in Winterton, G. (ed) *We, the People: Australian Republican Government* Sydney, 1994, 38, 41

26 See Winterton, G. *Monarchy to Republic: Australian Republican Government* Melbourne, 1994, 1-9, 66-67

27 *The Bulletin*, 17 February 1998, 23; *Time*, 3 January 1994 7. A Quadrant poll conducted for the Australian Republican Movement in October 1992 indicated that only 12% of respondents (not merely those favouring a republic) in all State capitals except Hobart favoured adoption of the United States system: Australian Republican Movement, (1992) 3 *Newsletter* 1. For earlier poll statistics see Winterton G. 'Presidential Power in Republican Australia' (1993) 28 *Aust. J. Pol. Sc.* 40, 41-42

28 For further discussion of these issues, see Winterton, G. 'The President: Adapting to Popular Election' in Coper, M. and Williams, G. (eds) *Power, Parliament and the People* Sydney, 1997, 23; Winterton G. 'Choosing a Republican Head of State' (1995) 2 *Agenda* 135, 142-145.

the archetype of such systems of responsible parliamentary government ('Westminster' systems): the Queen of the United Kingdom. Such a Head of State combines the ceremonial and symbolic functions of acting as a unifying focus of national identity and public recognition of achievement with the vital governmental role of ultimate constitutional guardian to enforce the Constitution and its principles when threatened. Such functions require wide public acceptance and absolute political impartiality. Notwithstanding its defeat, the referendum model combining public input into the nomination process, bipartisan selection of the President and endorsement by a parliamentary super-majority was ideally suited to the selection of the Head of State in a 'Westminster' system such as ours. It should not be jettisoned on account of the referendum's defeat, but rather incorporated into a direct election model.

Direct presidential election is seen as inherently incompatible with the qualities required for a Head of State in our governmental system in two respects. First, it is considered likely that only political parties or extremely wealthy individuals would have the financial and organisational resources to mount a national election campaign, so that the President will likely be a politician, media or sports star, millionaire or captive of wealthy interests.<sup>29</sup> Gough Whitlam, for example, has remarked that 'there is no sure way of absolutely guaranteeing that the President of Australia will always be a party politician than by making the presidency directly elective.'<sup>30</sup>

This may well be so, but it would be wrong to assume that a former politician could not serve as competently and impartially in the presidency as former politicians have as Governor-General. It would be fanciful to suppose either that their nominal representation of the monarch had somehow constrained Sir William McKell, Sir Paul Hasluck or Bill Hayden<sup>31</sup>, or that the political parties would not nominate candidates of this calibre. They would, after all, want to win! Moreover experience in other direct-election parliamentary republics, such as Ireland, Austria, Iceland and Portugal, suggests that former politicians are quite capable of shedding their former partisanship and becoming impartial Heads of State. Indeed, if Austria and Portugal with far less stable constitutional and political histories than ours can achieve this,

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<sup>29</sup> See, e.g., McGarvie R.E. *Democracy Choosing Australia's Republic* Melbourne 1999, 137

<sup>30</sup> Whitlam, G. 'The Seed from which a Republic Sprang' *Canberra Times*, 12 November 1994, 12. Neville Wran has likewise commented that if you want to guarantee absolutely that the President of Australia will be a party politician then make the Presidency an elected office: Wran, N. *The Australian Republic* (1998) 2 *Wiser* 25-32

<sup>31</sup> Lord Casey's conduct in seeking to heal rifts in the Liberal-Country Party Coalition was less than exemplary

there is little reason to doubt Australia's capacity to adapt successfully to direct election in this respect.

Former Prime Minister Paul Keating proposed that Commonwealth, State and Territory parliamentarians be ineligible for the presidency for five years after leaving Parliament.<sup>32</sup> However, there is little to commend this proposal, which to the writer's knowledge is unprecedented in republican constitutions: the public's freedom of choice should not be constrained; all citizens, including politicians, should be entitled to be considered for nomination; and politicians — those we have elected to represent us in Parliament — should not be further denigrated. Moreover, such exclusion would ultimately be pointless, for exclusion of first-rate politicians would merely leave the field to second-raters: 'Whoever we vote into the presidency, a politician will get the job. The only question is whether he or she is a neophyte or an experienced politician'<sup>33</sup>

The public, incidentally, appears far less troubled by the prospect of a former politician becoming President than by the politicians choosing the President. Since politicians are, after all, those they have elected to public office, the public is, understandably, not overly troubled by the former prospect; it appears that they don't mind a politician being chosen as president, so long as *they* do the choosing. Thus in a Newspoll of November 1997, in which 78% of respondents favoured direct presidential election<sup>34</sup>, almost half the respondents said it did not matter whether or not the President had been a politician, although one-third would have preferred a non-politician<sup>35</sup>. A similar view was evident in the Australian Constitutional Referendum Study of 1999:

[W]hile many Australians sought greater involvement in the selection process, they were not concerned if the successful nominee had been a politician.<sup>36</sup>

The second alleged incompatibility between direct election and our present system of government is that the electoral process itself will

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<sup>32</sup> Keating P. *An Australian Republic The Way Forward* Canberra, 1995, 13

<sup>33</sup> McGuinness P.P. Polity Demands a Political President *The Australian*, 7 October 1993 9

<sup>34</sup> *The Australian*, 13 November 1997 2: popular election: 78%; election by Parliament: 13%; another way: 3%; uncommitted: 6% (The result in a poll of teenagers three weeks later was 72%, 11%, 5% and 12%, respectively: *Australian* 3 December 1997, 4 )

<sup>35</sup> *The Australian*, 13 November 1997 2: politician: 15%; non-politician: 33%; doesn't matter: 49%; uncommitted: 3% ( Teenagers: 20% 12%, 64% and 4%, respectively: *The Australian*, 3 December 1997 4 ) Compare with *The Weekend Australian* 9-10 October 1999, 1: 'The President should be someone from outside politics': agree: 56%; disagree: 29%; neither agree nor disagree: 10%; uncommitted: 5%

<sup>36</sup> Tranter, B. Voting in the 1999 Australian Constitutional Referendum and Support for an Australian President (paper prepared for APSA Conference Australia, ANU, Canberra, 3-6 October 2000) 9



impair the impartiality of the successful candidate, or at least the perception thereof. Sir Robert Menzies remarked that 'the notion of a non-political President periodically elected by popular vote, after an election campaign, is a contradiction in terms'<sup>37</sup> Yet, again, European republics such as Ireland, Austria and Portugal manage to achieve it.

The concern that aspects of direct presidential election detract from the necessary excellence and impartiality of the Head of State in our governmental system is valid and, in the present writer's view, was one of the considerations which made the referendum model preferable to direct election. However, with careful constitutional architecture, the risks can be ameliorated, if not avoided altogether. While it is impossible to ensure that unsuitable candidates do not stand for election, the prospect of electing suitable candidates could be enhanced by ensuring that the constitutional architecture encourages their nomination. The Constitution should ensure, as far as possible, that the electors will be offered suitable candidates for the presidency but, of course, more it cannot do. The health of the Australian political system must ultimately depend upon the good sense and judgement of the Australian people.

The process whereby candidates are nominated for the presidency is, therefore, vitally important in addressing both concerns, for high calibre candidates will not only ensure impartial and respected Heads of State, but will also reduce the partisanship and acrimony of the election itself. It is suggested that there should be three avenues for the nomination of presidential candidates:

- One candidate should be chosen in much the same manner as presidential election under the referendum model. As already noted, that mechanism was carefully crafted to ensure election of an impartial, highly respected President enjoying strong public confidence. However, the nomination procedure contained in the *Presidential Nominations Committee Bill 1999* (Cwth) could be improved upon in several respects. First, the Prime Minister's power to appoint half the members of the Committee (the 'community representatives') should be diminished or even removed altogether. Direct election of the community representatives, which could occur in conjunction with federal or State/Territory elections is worthy of serious consideration.<sup>38</sup> Such persons could perhaps also participate in the nomination or

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<sup>37</sup> Menzies R *Afternoon Light* Melbourne, 1967, 236

<sup>38</sup> Some commentators proposed that the Nominations Committee under the referendum model be popularly elected: Williams, J. Faith, Hope and Self-Interest: The President in the Future Republic (1998) 21 *U.N.S. W.L.J.* 897, 902; Uhr, J. What's in a Name? (1999) 9(2) *Eureka Street* 27, 28. However, with respect, popular election of the entire Committee would be unwise: see Winterton G. The 1998 Convention: A Reprise of 1898? (1998) 21 *U.N.S. W.L.J.* 856, 857

appointment of the relevant State's Governor The Committee would thus comprise sixteen directly elected members and an equal number of parliamentarians: eight representing all major parties represented in the Commonwealth Parliament and one from each State and Territory. Secondly, the Committee's short list of nominees should be published. The Prime Minister should probably not be limited to choosing a candidate on that list but, if an unlisted candidate is chosen, the Prime Minister should be obliged to explain the reasons to Parliament.<sup>39</sup>

A direct-election model moved by Dr Geoff Gallop at the 1998 Constitutional Convention provided for direct election among no fewer than three candidates approved by a two-thirds majority at a joint sitting of both Houses of the Commonwealth Parliament after a very open nomination process allowing nomination by any Australian House of Parliament, local government authority or citizen qualified to stand for Parliament.<sup>40</sup> This proposal is certainly worthy of serious consideration, though the present writer does not favour it for two reasons. First, as is noted below, the electors' choice should not be limited to candidates allowed through the parliamentary sieve; moreover, the factors motivating popular support for direct election would presumably rebel at such a constraint. Secondly, the three or so candidates would probably be the nominees of the principal political parties. If a two-thirds parliamentary majority must choose *one* candidate, that person will be a non-partisan, neutral nominee acceptable to both parties. But if three candidates are to be chosen, there is likely to be a division of the spoils among the principal parties.

- As was noted before the 1999 referendum, candidates from the smaller States are unlikely to fare well under direct election, and that may also be true of women.<sup>41</sup> To ensure fair geographical representation among presidential candidates, any three State or Territory Parliaments should be entitled jointly to nominate one candidate, with no Parliament participating in the nomination of more than one candidate.
- The public should not be limited to a choice among candidates selected for them by their representatives, but should have a direct role

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<sup>39</sup> This was recommended (unsuccessfully) by the Commonwealth Parliament's Joint Select Committee on the Republic Referendum: Australia *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill* Canberra, 1999, para 3.44

<sup>40</sup> See *Report of the Constitutional Convention* Canberra, 1998, vol 1, 124. A similar method had been proposed earlier by Hugh Mackay: Mackay H. Stability for the Commonwealth *The Weekend Australian* 30-31 July 1994, 16.

<sup>41</sup> Proposals that the presidency alternate between the sexes (e.g. Rubenstein K. The Future President of Australia 2000 *ALSA Reporter* 8) would be difficult to implement under a system of direct election, unless the electorate's choice of candidates was unduly restricted or its first choice possibly denied it.

in the nomination process. As in Iceland and Portugal,<sup>42</sup> a specified number of electors should be entitled to nominate a presidential candidate. The number should be large enough to ensure that only candidates with a realistic prospect of election are nominated, but not so large as to be prohibitive. In Iceland (population about 270,000) the number is between 1,500 and 3,000 electors; in Portugal (population about 10.5 million) between 7,500 and 15,000; and the Hayden model at the Constitutional Convention, which included this proposal, specified 1% of the electorate (about 124,000)<sup>43</sup>, which is proportionally much larger than Portugal's requirement, though similar to Iceland's.

The Commonwealth Parliament should be empowered to regulate the details of presidential elections, though the Constitution should probably specify whether a preferential or first-past-the-post system is to be employed. It would obviously be desirable for Parliament to provide for public funding of presidential campaigns, or at least the nominees of the Commonwealth and States/Territories. Unlike Ireland<sup>44</sup>, an election should be required even if there is only one nominee.<sup>45</sup> It is difficult to predict whether persons such as Sir Zelman Cowen, Sir Ninian Stephen or Sir William Deane would allow the Commonwealth Parliament to nominate them for election. Such nomination would itself be a significant honour, but the decision of candidates of this calibre would probably depend on the manner in which presidential elections were conducted. That could not be legislated for; only the Australian electorate could enforce decency and decorum in such elections through use of its vote.

## PRESIDENTIAL POWERS

The most worrisome aspect of a directly elective presidency is that the enhanced authority which will inevitably accrue to that office will destabilise and radically alter Australian government. A directly elected President will be the only person elected by the entire nation — or at least 50% plus one — whereas members of Parliament, including the Prime Minister, are elected only by one electorate. Even if the President's election platform is devoid of policy content, as it should be, the President will be able at least to claim a 'mandate' from the entire electorate to ensure probity, compassion and wisdom in Australian government. As President Mary Robinson asserted during her election campaign in 1990:

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<sup>42</sup> *Constitution of Iceland* art 5; *Constitution of Portugal* art 127(1)

<sup>43</sup> See *Report of the Constitutional Convention*. Canberra, 1998, vol 1, 129

<sup>44</sup> *Constitution of Ireland* art 12.4.5

<sup>45</sup> See Duffy, J. Ireland in Australia Republic Advisory Committee, *An Australian Republic: The Options*. Canberra, 1993, vol 2: The Appendices, 109, 139-140, 147, 177-178

As President directly elected by the people of Ireland, I will have the most democratic job in the country. I'll be able to look [the Prime Minister] in the eye and tell him to back off if necessary because I have been directly elected by the people as a whole and he hasn't.<sup>46</sup>

The concern is that a directly elected President will challenge government policy in speeches, perhaps addresses on television, and by meeting foreign and domestic leaders both at home and abroad, leaving both the Australian people and foreign governments confused regarding government policy, destabilising government, and jeopardising the political neutrality of the presidency. Barry Jones graphically described such a system as 'a car with two steering wheels'<sup>47</sup>, and John Howard has warned that it:

would alter for all time the nature of our system of government. It would entrench rival centres of political power. [A]n Australian president, having a popular mandate, would feel infinitely more powerful in dealing with an incumbent Prime Minister than would any Governor-General irrespective of the formal powers which might be given to that president.<sup>48</sup>

Some commentators see value in a President able to 'provide a balance to an otherwise autocratic prime minister',<sup>49</sup> or at least believe, perhaps correctly, that 'opposing centres of political authority is just what most people want'.<sup>50</sup> But the virtue of such a 'checking' President must be strongly questioned on at least two grounds. First, such a President would have limited information sources, be unaccountable to Parliament and to the electorate unless standing for re-election, and possibly have a 'mandate' which is several years old and, in any event, not based on specific policies. The value of checks and balances should not be exaggerated; it all depends on who is checking whom, and to what end. One ought to be wary of a single unaccountable individual, possibly

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<sup>46</sup> Quoted in Mee, M. The Changing Nature of the Presidency (Part 1) [1996] *Irish Law Times* 2, 3.

<sup>47</sup> Jones, B. *Framing a New Australian Republic* (Australian Academy of the Humanities, 30<sup>th</sup> Anniversary Symposium, Australia, Canberra, 3 November 1999) (unpaginated).

<sup>48</sup> Howard, J. Mr Keating's Mirage on the Hill: How the Republic, Like the Cheshire Cat, Came and Went in *Upholding the Australian Constitution, Vol 3. Proceedings of the Third Conference of The Samuel Griffith Society* Melbourne 1994, 115, 130-131. For similar comments, see Winterton, G. Choosing a Republican Head of State (1995) 2 *Agenda* 135, 143-144; McGarvie, R. E. *Democracy. Choosing Australia's Republic* Melbourne, 1999, 138; Craven, G. The Republican Debate and the True Course of Constitutional Conservatism in *Upholding the Australian Constitution, Vol. 11. Proceedings of the Eleventh Conference of The Samuel Griffith Society* Australia, Melbourne, 1999, 23-28, 43-44, 48; Kirby, M. The Australian Referendum on a Republic — Ten Lessons' (2000) 46 *Australian Journal of Politics and History* 510, 533.

<sup>49</sup> Evans, H. *Essays on Republicanism small r republicanism*. Canberra: Department of the Senate, 1994, 16 (Papers on Parliament, No 24).

<sup>50</sup> White, D. Dead Referendum (1999-2000) 44 *Arena Magazine* 7, 8.

dependent for re-election on special interests, checking a government which enjoys the support of the House of Representatives and is subject to numerous checks including the party room, the media and, ultimately, the electors. Secondly, for better or worse, such a 'checking' President would amount to a significant departure from the present role of the Governor-General; if the Australian people really favour such a development, they should be fully aware of the possible consequences of governmental deadlock and instability. Harry Evans, Clerk of the Senate, has remarked that 'an elected president, with an independent mandate, would most closely approximate the existing constitutional arrangement'<sup>51</sup> but, with respect, there is no basis for this view.

What measures might be taken to address these concerns?

- Little can be achieved by way of constitutional provision to prevent presidential speech-making or social conduct which embarrasses the government. The Irish attempt to control speech-making<sup>52</sup> has not been particularly successful<sup>53</sup>, and it is doubtful whether the electorate would approve such measures. The best guarantee of presidential impartiality and discretion is the election of candidates possessing those qualities.
- The present Constitution confers power on the Governor-General and Governor-General in Council on the assumption that the powers will be interpreted against the background of the conventions of the monarchy; consequently, apart from the few 'reserve powers', the Governor-General's powers are exercisable only in accordance with ministerial advice. However, this principle should not be left merely to convention under a republic, especially one with a directly elected President, but should be expressed as law in the Constitution and be judicially enforceable.

The 1998 Constitutional Convention resolved that 'the non-reserve powers' should be 'spelled out so far as practicable'<sup>54</sup>, but the proposed constitutional provision put to referendum did not do this since it failed to specify which were reserve powers and which not.<sup>55</sup> Such a provision would be inadequate for a directly elective presidency, since it is essential that it be expressly provided that 'the executive power of the Commonwealth' conferred by s61 of the *Australian Constitution* be

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<sup>51</sup> Evans, H. *Electing a President in Republicanism, Responsible Government and Human Rights*. Canberra: Department of the Senate 1995. 35-36. (Papers on Parliament. No. 26)

<sup>52</sup> *Constitution of Ireland* art 13.7

<sup>53</sup> Winterton, G. 'The President: Adapting to Popular Election in Coper M and Williams, G (eds) *Power, Parliament and the People*. Sydney, 1997, 35-36.

<sup>54</sup> *Report of the Constitutional Convention*. Canberra 1998 vol 1. 45

<sup>55</sup> See *Constitution Alteration (Establishment of Republic) 1999* (Cwth), proposed s 59

exercisable only on ministerial advice.<sup>56</sup> It may even be preferable to provide that such power is vested in the government.<sup>57</sup> If s61 is not amended to make it crystal clear that 'the executive power of the Commonwealth' is not exercisable by the President except pursuant to ministerial advice, there would be a real risk of a directly elected President exercising executive power independently of the government, ultimately converting our system of government into one resembling the French. The Constitution should likewise make clear which powers are reserve powers and which not, either by a general provision or by expressly providing in regard to each of the latter that it is exercisable only on ministerial advice.<sup>58</sup>

- The power to assent to legislation is sometimes considered a reserve power<sup>59</sup> but this should not be so. The Constitution should either dispense with presidential assent to legislation and constitutional alterations or make it clear that presidential signature is a purely ceremonial function involving no independent discretion.<sup>60</sup> The executive power to prorogue Parliament appears to be unnecessary and could be abolished.
- There is understandable fear that a directly elected President, bolstered perhaps by public opinion, will feel unconstrained by the conventions hitherto governing the exercise of the reserve powers and exercise those powers according to personal whim, thereby undermining the constitutional system. Such a President might appoint a personal crony as Prime Minister<sup>61</sup> and prorogue or even dissolve Parliament to avoid a House of Representatives vote of no-confidence in the government or, perhaps, dismiss or force to a general election a Prime Minister who is unpopular or out of favour with the President. (We can be sure that the monarchists and their republican allies of the moment will dream up even scarier scenarios to terrify the electorate.) While the more extreme scenarios are no doubt fanciful, the concern

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56 See, e.g. Winterton, G. *A Constitution for an Australian Republic* in Winterton, G. (ed) *We, the People Australian Republican Government* Sydney 1994 20 (s. 61).

57 *The Constitution of Ireland* art. 28.2: The executive power of the State shall be exercised by or on the authority of the Government.

58 See e.g. the present writer's draft Constitution: Winterton, G. *A Constitution for an Australian Republic* in Winterton, G. (ed.) *We, the People Australian Republican Government* Sydney 1994 1.

59 This was the view of a Governor-General of New Zealand, who acknowledged that opinion thereon was divided: Hardie Boys M. *The Role of the Governor-General under MMP* (1996) 21(4) *New Zealand International Review* 2, 3.

60 Winterton, G. *A Constitution for an Australian Republic* in Winterton, G. (ed) *We, the People Australian Republican Government* Sydney 1994 17, 36 (ss. 58 and 128).

61 Such a person need not initially be a member of Parliament: Commonwealth Constitution s. 64.

that a directly elected President would feel less constraint than a Governor-General in exercising reserve powers is realistic.<sup>62</sup> Hence, the present constitutional position of granting power in unlimited terms, leaving its exercise to be governed by convention, will not suffice for such a republic.

There is nothing sacrosanct about the present reserve powers: to appoint and dismiss the Prime Minister and to refuse to dissolve Parliament (including a double dissolution under s57 of the *Constitution*). They reflect constitutional history rather than logic. The power to appoint the Prime Minister could effectively be left to the House of Representatives, as in Ireland, Germany, Sweden and Japan; the parliamentary term could be fixed, subject to early dissolution if the House passes a simple vote of no-confidence in the government, thereby dispensing with a presidential power to dissolve Parliament; and it is doubtful whether a presidential power to dismiss the Prime Minister is really necessary.<sup>63</sup> The Irish and German Presidents have no such reserve power.<sup>64</sup> Concerns regarding incompetent or politically partial Presidents would certainly be diminished if the reserve powers were reduced or even abolished.

However, our constitutional tradition sees an impartial constitutional umpire or guardian as necessary and there are strong arguments for a Head of State exercising that function, whose value was demonstrated in Tasmania in June 1989.<sup>65</sup> The Austrian and Portuguese directly elected Presidents have a similar role, as indeed does the Irish, though with fewer powers than our Governor-General.<sup>66</sup> Moreover, opinion polls support the impression gained during the 1999 referendum campaign that the public would not support a significant reduction in the Head of State's powers.<sup>67</sup> Hence, the three current reserve powers should probably be retained, but the Constitution should make it clear that they are the only powers which the President can exercise without or contrary to ministerial advice.

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<sup>62</sup> But contrast the view of Harry Evans, noted in Winterton, G. 'The President: Adapting to Popular Election' in Coper, M and Williams, G (eds) *Power, Parliament and the People* Sydney, 1997, 37 n 49.

<sup>63</sup> For further discussion, Winterton, G 'Presidential Power in Republican Australia' (1993) 28 *Aust. J. Pol. Sc.* 40-44; Winterton, G 'Reserve Powers in an Australian Republic' (1993) 12 *Utas L. Rev.* 249, 251-252; Ward, A. J. 'Trapped in a Constitution: The Australian Republic Debate' (2000) 35 *Aust. J. Pol. Sc.* 117, 120-123; Hull, C 'An Exercise in Power that Stunts Democracy' *Canberra Times*, 10 August 2000, 9.

<sup>64</sup> The German President's dismissal power conferred by Basic Law art 67(1) is not discretionary.

<sup>65</sup> Winterton, G 'Presidential Power in Republican Australia' (1993) 28 *Aust. J. Pol. Sc.* 40, 45-46.

<sup>66</sup> The Irish Senate can defer Supply for only 21 days: *Constitution of Ireland* art 21.2.2°.

<sup>67</sup> Winterton, G 'The President: Adapting to Popular Election' in Coper, M and Williams, G (eds) *Power, Parliament and the People* Sydney 1997, 36-37.

• It is generally accepted that the conventions governing the exercise of reserve powers should be codified if the President is directly elected.<sup>68</sup> Complete codification would be both inadvisable — because the flexibility necessary for dealing with political crises would be lost — and extremely difficult, if not impossible, because the community is divided on some powers, especially the power to dismiss a Prime Minister denied Supply by the Senate. However, partial codification, along the lines suggested by the Republic Advisory Committee<sup>69</sup> would be desirable, and received considerable support at the 1998 Constitutional Convention, especially from proponents of direct election.<sup>70</sup>

The principle underlying codification should be that the President is granted only such power as is *absolutely necessary*<sup>71</sup> to enforce the fundamental constitutional principles of the rule of law and representative and responsible government.<sup>72</sup> The Constitution should provide that after a general election the President should appoint as Prime Minister the person most likely to enjoy the confidence of the House of Representatives. The President should be obliged to refuse a dissolution of Parliament to a Prime Minister who has lost a constructive no-confidence motion;<sup>73</sup> while a motion of no-confidence is pending; and before the House of Representatives has met after a general election, unless the House has proved unable to elect a Speaker. The most controversial reserve power to codify is the power to dismiss the Prime Minister and thus the government. The power should probably be exercisable only if the Prime Minister refuses to comply with an order of the High Court or has contravened a fundamental constitutional provision or, more questionably, a fundamental constitutional principle. The last provision would include an attempt to ignore a House resolution of no-confidence and, for those who believe that Sir John Kerr was entitled to dismiss Gough Whitlam in November 1975, could include an attempt to ignore denial of Supply by the Senate. The Labor Party may

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68 See, e.g. the views cited Winterton, G. *The President: Adapting to Popular Election* in Coper M and Williams, G (eds) *Power, Parliament and the People* Sydney 1997 37; Saunders C. *Reflections on the Referendums* [Summer 2000] *ALSA Reporter* 5, 6.

69 Australia Republic Advisory Committee *An Australian Republic The Options* Canberra 1993, vol 1: The Report 101-106

70 See *Report of the Constitutional Convention* Canberra 1998, vol 1 125-129

71 Winterton, G. *Presidential Power in Republican Australia* (1993) 28 *Aust J. Pol. Sc.* 40, 46-47; McGarvie, R E. *Democracy. Choosing Australia's Republic* Melbourne 1999, 146.

72 For High Court recognition of these principles, see, e.g. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 per Dixon J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

73 That is, a motion that expresses confidence in a named person (such as the Leader of the Opposition) as well as no-confidence in the Prime Minister or the government



have to compromise on this issue in order to achieve a republic, by leaving open the possibility of the Prime Minister's dismissal on the ground of failure to secure Supply from the Senate.

- The exercise of power in the interstices of the reserve powers æ that power remaining after the partial codification has been implemented æ should continue to be governed by the established constitutional conventions. The Constitution should expressly provide for continuation of the present conventions notwithstanding abolition of the monarchy<sup>74</sup>, and provide for their continuing evolution<sup>75</sup>
- A wise precaution, especially since a President may have no experience of government or the law, would be to establish a Constitutional Council whose advice must be sought, but not necessarily followed, before a reserve power is exercised without or against ministerial advice. Such a Council of perhaps three to five members might include former Presidents and High Court justices<sup>76</sup> selected according to a formula similar to that proposed by Richard McGarvie<sup>77</sup>. However, since an automatic formula would not guarantee appointment of suitable members, the appointment power might be vested jointly in the State chief justices or, less satisfactorily, in a two-thirds majority of the Commonwealth Parliament<sup>78</sup>. The pool from which Councillors are chosen could be limited to former Presidents and High Court justices; alternatively, the selectors could be left at large subject, perhaps, to minimum requirements regarding the appointee's expertise. Provision might also be made for the eventual publication of the Council's advice. Precedents for such advisory councils are found in Ireland and Portugal.
- Further checks and balances could be introduced to constrain presidential power, if considered necessary or advisable. Concern that a directly elected President might too readily dismiss the Prime Minister

<sup>74</sup> See *Constitution Alteration (Establishment of Republic) 1999* (Cwth), proposed s 59; Australia Joint Select Committee on the Republic Referendum: *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill* Canberra 1999 para 4 10-4 22

<sup>75</sup> See *Constitution Alteration (Establishment of Republic) 1999* (Cwth) Sch 2, cl 7; Australia Joint Select Committee on the Republic Referendum: *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill* Canberra, 1999, para 4 58-4 60

<sup>76</sup> See e.g. Brennan, F. Where do we go now with the Republic Debate? (2000) 10(3) *Eureka Street* 30, 31-32; Brennan G. 100 Years On: Strengths and Strains in the Constitution (*Fourth Geoffrey Sawer Lecture* Australia, ANU Canberra, 18 July 2001) 31-32. However unlike Frank Brennan the present writer would not include former Prime Ministers or Solicitors-General

<sup>77</sup> See McGarvie, R E *Democracy Choosing Australia's Republic* Melbourne, 1999 218-220

<sup>78</sup> For such a proposal, see Winterton, G. The President: Adapting to Popular Election in Coper, M and Williams, G (eds) *Power, Parliament and the People* Sydney 1997 39

could, for instance, be addressed by providing that a President who dismisses the Prime Minister vacates office forthwith, either permanently or subject to re-election, which would enable the electors to pass judgement on the President's action.<sup>79</sup>

## CONCLUSION

It has rightly been observed that a direct-election republic will 'encounter very rocky ground in the Australian constitutional garden'<sup>80</sup> It will face condemnation as a 'constitutional catastrophe', a 'disaster' involving the utter 'destruction' and 'repudiation' of our system of government.<sup>81</sup> That, with respect, is a considerable overstatement Direct presidential election could change Australian government significantly — which some, perhaps many, consider a virtue, not a defect However, we are surely capable of constructing constitutional architecture, including checks and balances, to protect against undesirable consequences Ultimately, it must be decided whether the goal of an Australian republic is worth the possible risks. But, provided precautions like those outlined here are taken, many who believe Australia should have its own Head of State or consider hereditary succession to public office abhorrent will probably conclude that it is<sup>82</sup>

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79 See Winterton, G. The President: Adapting to Popular Election in Coper, M and Williams, G (eds) *Power, Parliament and the People*. Sydney, 1997, 40

80 Brennan, F. Where do we go now with the Republic Debate? (2000) 10(3) *Eureka Street* 30, 30.

81 Craven, G. The Republican Debate and the True Course of Constitutional Conservatism in *Upholding the Australian Constitution, Vol 11 Proceedings of the Eleventh Conference of The Samuel Griffith Society* Melbourne, 1999 22, 28, 43, 44, 48

82 Compare with Wran, N. Dismissal to Republic in Coper M and Williams G (eds) *Power, Parliament and the People* Sydney, 1997 193, 199: provided that the powers of the Head of State are properly defined and contained, a popularly elected president is preferable to no president and no republic at all