

STATES IN AN AUSTRALIAN REPUBLIC: CONSTITUTIONAL CONUNDRUMS

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'Any constitutional alteration which would transform Australia at the federal level into a republic has significant implications for the States'.¹

I INTRODUCTION

One great advantage and strength of the Australian Constitution² and, therefore, the federal structure it creates and sustains is obvious: the High Court – or at least 4 of its 7 Justices³ – is not the only⁴ or even the

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- 1 Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd, August 1999, 85.
 - 2 *Commonwealth of Australia Constitution Act 1900* (UK) Sections 1-8 are colloquially known as 'covering clauses'. Section 9 contains '[t]he Constitution of the Commonwealth'. In addition to an enactment clause and recognizing the expediency of 'provid[ing] for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen' the Act's preamble states: 'the people of New South Wales, Victoria, South Australia Queensland and Tasmania have agreed to unite in one indissoluble *Federal Commonwealth* under the *Crown of the United Kingdom*' (emphasis added) See Winterton, G. *An Australian Republic* (1988) 16 *Melb U L Rev*, 467 at 475-476 (discussing alternative views of the preamble's nature and relationship with section 18) See also footnotes 14 and 15.
 - 3 Compare Judge Learned Hand's observation: 'Who in hell cares what anybody says about [constitutional questions] but the Final Five of the august Nine [justices of the United States Supreme Court]?' Mason, A *Harlan Fiske Stone Pillar of the Law* New York: The Viking Press, 1956 reprinted 1968, 384 (quoting Hand's letter of 6 February 1934 to Justice Stone).
 - 4 For examples see Thomson, J. *Principles and Theories of Constitutional Interpretation: Some Preliminary Notes* (1982) 13 *Melb U L Rev*, 597 at 599-600; Sawyer, G. *Australian Federal Politics and Law 1901-1929* Melbourne: Melbourne University Press, 1956 reprint 1972; Sawyer, G. *Australian Federal Politics and Law 1929-1949* Melbourne: Melbourne University Press 1963, reprint 1967, 1974; Peabody B. *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research* (1999) 16 *Constitutional Commentary*, 63; Devins, N. *The Democracy-Forcing Constitution* (1999) 97 *Michigan I Rev*, 1971; Lawson, G. & Moore, C. *The Executive Power of Constitutional Interpretation* (1996) 81 *Iowa I Rev*, 1267; Tushnet, M. *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty* (1995) 94 *Michigan I Rev*, 245; Symposium *Elected Branch Influences in Constitutional Decisionmaking* (Autumn

ultimate⁵ interpreter or guardian of that Constitution's⁶ text, structure, premises or silences That is, there is room - perhaps, more than adequate

1993) 56 no 4 *Law & Contemporary Problems*, 1; Miller G The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law (Autumn 1993) 56 number 4 *Law & Contemporary Problems*, 35; Easterbrook, F Presidential Review (1990) 40 *Case Western Reserve L Rev* 905; Symposium The Role of the Legislative and Executive Branches in Interpreting the Constitution (1988) 73 *Cornell L Rev* 281, 371-400; Symposium, Congress and the Constitution (2001) 50 *Duke LJ* 1165-1425; Marshall I Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation (1990) 66 *Chicago-Kent L Rev* 481; Brandon M *Free in the World. American Slavery and Constitutional Failure* Princeton: Princeton University Press, 1998, 34-84; Currie D *The Constitution in Congress: The Federalist Period 1789-1801* Chicago: University of Chicago Press 1997; Currie D *The Constitution in Congress The Jeffersonians 1801-1829* Chicago: University of Chicago Press 2001; Larson, C Recovering the Congresses Constitution (1998) 10 *Yale J Law & Humanities* 647 (book review); Harrison, J Book Review (1998) 15 *Constitutional Commentary* 383; Flaherty, M Post-Originalism (2001) 68 *U Chicago L Rev* 1089 For the US Supreme Court's view of Congress role in constitutional interpretation see Tushnet M 'Shut Up He Explained' (2001) 95 *Northwestern U L Rev* 907 at 917-918 For proposals to end judicial review see Tushnet M *Taking the Constitution Away from the Courts* Princeton: Princeton University Press 1999; Larsen J Constitutionalism without Courts? (2000) 94 *Northwestern U L Rev* 983; Prakash S America's Aristocracy (1999) 109 *Yale L J*, 541; Chemerinsky, E Losing Faith: America Without Judicial Review? (2000) 98 *Michigan L Rev* 1416; Fleming, J The Constitution Outside the Courts (2000) 85 *Cornell L Rev* 215; Griffin S Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review (2000) 17 *Constitutional Commentary*, 683 See also Brandes, S 'Erie and the History of the One True Federalism' (2001) 110 *Yale L J* 829 at 859-65 (Book Review) (discussing the countermajoritarian difficulty thesis and its refutations)

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At least six reasons might be advanced

- (i) Non-justiciability. See, Williams, D The Australian Parliament and High Court: Determination of Constitutional Questions IN Samford C & Presten K (eds) *Interpreting Constitutions Theories, Principles and Institutions* Sydney: Federation Press 1996, 203-217; Thomson J Non-justiciability and the Australian Constitution IN Coper M & Williams, G (eds) *Power, Parliament and the People* Sydney: The Federation Press 1997 56-67 For the suggestion that 'the question of whether an issue or provision [in the Constitution] is non-justiciable is itself a justiciable question' see Thomson J Non-justiciability and the Australian Constitution. IN Coper, M & Williams, G (eds) *Power, Parliament and the People* Sydney: The Federation Press, 1997, 64
- (ii) Appeals from the High Court to the Privy Council This 'theoretical possibility' is preserved by s 74 of the Australian Constitution; s 16(1) of the *Australia Act 1986* (Cwlth & UK) (definition of 'Australian Court' excluding the High Court) and voters' rejection in 6 November 1999 s 128 referendum of the proposal to repeal s 74 in clause 34 of schedule 2 of the *Constitution Alteration (Establishment of Republic) 1999* Compare *Sue v Hill* (1999) 199 CLR 462 at 492-493 (discussing this 'obsolete' jurisdiction); Twomey A. *Sue v Hill - The Evolution of Australian Independence* IN Stone, A & Williams G *The High Court at the Crossroads* Sydney: Federation Press, 2000 105-108
- (iii) Electors via a s 128 referendum Compare the sweeping assertion of judicial supremacy in *Boland v Hughes* (1988) 83 ALR 673 at 675 ('If there is a defect in the form and content of the proposed [section 128] law and that defect goes to the validity of the amendment, the issue of validity will nevertheless then be susceptible of determination by the [High] Court') (Mason CJ). See also Detmold M 'Legislation and Adjudication' (2000) 22 *Adelaide L Rev* 87 at 89 (suggesting that the courts have the ultimate power

space – for others to discuss, resolve and create constitutional issues. Examples are plentiful: the 1980 offshore constitutional settlement;⁷ *Australia Act 1986* (Cwlth and UK);⁸ family law, child support, mutual recognition and corporations law reference of powers;⁹ and the States' *Australia Act (Requests) Act 1999*.¹⁰ Indeed, perhaps the most important constitutional issues may fall precisely and easily into this category: how can and should Australia (comprising the Commonwealth, States and Territories) move from a constitutional monarchy to a (presidential) republic?¹¹ What institutions, structural arrangements and powers can and should be established to achieve the transition?

to rule on the substantive [and procedural] validity of referenda under the Australian Constitution') (footnote omitted). Compare Thomson, J. *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law* (1997) 30 *John Marshall J Rev.* 627 at 697-680 (noting various issues, including justiciability, concerning judicial review of constitutional amendments in Australia, the United States, India and Canada).

- (iv) Commonwealth Parliament utilizing section 51(xxxvi) power. See also *Sue v Hill* (1999) 199 CLR 462 at 490-492 (discussing termination 'at least since 1986' of UK Parliament's legislative power vis a vis Australia and a fortiori vis a vis the Australian Constitution).

(v) Governor-General

(vi) Comparative constitutional law. See footnote 6

For elaboration of the above six reasons see Thomson, J. *History, Justices and the High Court: An Institutional Perspective* (1995) 1 *Australian J Legal History* 281 at 288-291, 302-308.

- 6 Compare the US Constitution in relation to which these issues have been extensively debated. In addition to footnote 5 see Symposium, *Perspectives on the Authoritativeness of [US] Supreme Court Decisions* (1987) 61 *Tulane L Rev.* 997-1095; Chang, D. *A Critique of Judicial Supremacy* (1991) 36 *Villanova L Rev.* 281; Apfel, G. *Whose Constitution is it Anyway?* (1994) 46 *Rutgers L Rev.* 771; Gunther, G. & Sullivan, K. *Constitutional Law*, 13th ed. New York: Foundation Press, 1997 20-27; Ides, A. *Judicial Supremacy and the Law of the Constitution* (1999) 47 *UCLA L Rev.* 491; Alexander, I. & Schauer, F. *Defending Judicial Supremacy: A Reply* (2000) *Constitutional Commentary*, 445.

- 7 See e.g. *Coastal Waters (State Powers) 1980 (Cwlth)*; Crommelin, M. *Offshore Mining and Petroleum: Constitutional Issues* (1981) 3 *Australian Mining & Petroleum L J.* 191; Zines, I. *The High Court and the Constitution* 4th ed. Sydney: Butterworths, 1997 310-311.

- 8 See generally Lee, H.P. *Legislative Comment – The Australia Act 1986 – Some Conundrums* (1988) 14 *Monash U L Rev.* 298; Thomson, J. *The Australia Acts 1986: A State Constitutional Perspective* (1990) 20 *UWAIR*, 409; Twomey, A. *Sue v Hill – The Evolution of Australian Independence*. In Stone, A. & Williams, G. *The High Court at the Crossroads*. Sydney: Federation Press, 2000 77 at 77-78, 96-108; Zines, I. *The High Court and the Constitution* 4th ed. Sydney: Butterworths 1997 304-312.

- 9 See e.g., Note, *Referral of Power by Queensland* (1990) 4 *Australian J Family L.* 186; Brown, B. *Mutual Recognition on the Way* (1992) 66 *Law Institute J.* 808; Lane, P. *State Reference of Corporate Matters to the Commonwealth* (2001) 75 *ALJ*, 289; Rose, D. & Lindell, G. *A Constitutional perspective on Hughes and the referral of powers* (2001) 3 *Constitutional Law & Policy Rev.* 21.

- 10 All State Parliaments enacted an *Australia Acts (Request) Act 1999*. See e.g. New South Wales Parliament *Parliamentary Debates (Hansard)* 1999, 17-18 (Second reading speech, 12 May 1999).

- 11 As to the justiciability of s 128 issues see *Boland v Hughes* (198) 83 ALR 673. Compare Vile, J. *Judicial Review of the Amending Process: The Dellinger-Tribe Debate* (1986) 3 *J Law & Politics*, 21. See also footnote 5(iii).

From a State perspective both aspects – means and ends – have two – State and Commonwealth – important dimensions. Consequently, to maintain their powers, responsibilities and functions (and, therefore, their viability and importance), States will, on all issues, be concerned about any Commonwealth and State constitutional law changes, consequences and impacts made or necessitated by an Australian republic. Assuaging State concerns, other than by the Commonwealth not putting¹² or voters' rejection of a proposal, depends upon two factors: terminology and placement of new, altered or deleted provisions and Commonwealth/State consultation, dialogue and agreement over those issues

II EXAMPLES: NOVEMBER 1999

Four examples might be culled from the proposed law – *Constitution Alteration (Establishment of Republic) 1999* – that voters rejected on 6 November 1999¹³ First, proposed new section 126 stated:

This Constitution, and all laws made under it by the Parliament, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.

¹² Section 128 states that 'the Governor-General may submit the proposed law . . . to the electors . . . Does that phrase contain or confer a reserve power on the Governor-General to act without or contrary to prime ministerial advice, at least as to amendments the Senate proposes to protect itself or the States? See Thomson, J. 'Reserve Powers of the Crown' (1990) 13 *UNSWLJ* 420 at 424 n 24 (bibliography containing opposing views); Thomson, J. 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal L Rev*, 323 at 341-342; Evatt, H. 'Amending the Constitution' (1937) 1 *Res Judicate* 264 (discussing Governor-General's refusal in June 1914 to submit to electors six referendum Bills passed by the Senate but not by the House of Representatives); Sawyer, G. *Australian Federal Politics and Law 1901-1929* Melbourne: Melbourne University Press 1956 reprint 1972, 124-125 (concluding that 'the circumstances [in June 1914] were much too ambiguous to justify the Governor-General in exercising the discretion given to him by sec. 128 contrary to the advice of his responsible ministers'); Australia *Final Report of the Constitutional Commission* (Byers, M. Chairman). Canberra: Australian Government Publishing Service, 1988, volume 2, 884 paragraph 13.177; Winterton, G. *Monarchy to Republic: Australian Republican Government* Melbourne: Oxford University Press, 1986, reprint 1994, 122-123, 182

¹³ Commonwealth of Australia Gazette number S 570 (30 November 1999) (providing voting statistics) See generally Faulkner, J. & Orr, R. *The Republic Referendum* (8 March 2000) (unpublished paper, Australian Government Solicitor's Constitutional Law Forum: The Constitution and Good Government); Williams, G. 'Why Australia Kept the Queen' (2000) 63 *Saskatchewan L Rev*, 477; Williams, G. 'Where to Now?' (1999) 24 *Alternative L J* 299; Saunders, C. 'Reflections on the Referendums (Summer 2000) *Reporter Australian Law Students Association* 5; Munro, C. 'More daylight, less magic: the Australian referendum on the monarchy' [2000] *Public Law* 3; Ward, A. 'Trapped in a Constitution: The Australian Republic Debate' (2000) 35 *Australian J of Political Science*, 117; Winterton, G. *The Resurrection of the Republic* Sydney: Federation Press 2001 1-4 (Law & Policy Paper 15)

That provision is remarkably similar to covering clause 5:

This Act and all laws made by the Parliament of the Commonwealth under the constitution shall be binding on the courts judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships the Queen's ships of war excepted whose first port of clearance and whose port of destination are in the Commonwealth

Should that be of concern or interest to the States? No amendment to or repeal of covering clause 5 was in the proposed law. However, proposed section 126 was (unlike covering clause 5) to be placed inside the textual parameters of "[t]he Constitution of the Commonwealth" contained in section 9 of the *Commonwealth of Australia Act 1900* (UK). Two aspects might have given States reason to pause before endorsing this constitutional change. First, that section 126 could quite clearly be subsequently amended by a section 128 referendum to the detriment of States and State laws.¹⁴ Secondly, given the existence of two similar provisions (section 126 and covering clause 5), it might be that they have different meanings and operations¹⁵ and that, for example, section 126's phrase "notwithstanding anything in the laws of any State" has a wider and

¹⁴ For debate over whether s 128 can amend the preamble and covering clauses see Winterton, G. 'An Australian Republic' (1988) 16 *Melb U L Rev*, 467 at 476; Australia Report of the Republic Advisory Committee. *An Australian Republic The Options* (Turnbull, M. Chairman). Canberra: Australian Government Publishing Service, 1993, 119-120 volume 1, 298-305 volume 2; Mason, A. 'Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *UNSWLJ*, 750.

¹⁵ For the view that many aspects of the preamble and covering clauses (but note covering clause 5) are merely recitals of historical fact or otiose see Winterton, G. 'An Australian Republic' (1988) 16 *Melb U L Rev*, 467 at 475. Australia *Final Report of the Constitutional Commission* (Byers, M. Chairman). Canberra: Australian Government Publishing Service, 1988, 101-120 volume 1; Australia Report of the Republic Advisory Committee. *An Australian Republic The Options* (Turnbull, M. Chairman). Canberra: Australian Government Publishing Service, 1993, 296-297 volume 2; Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum. *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999*. Canberra: CanPrint Communications Pty Ltd, August 1999, 93-96. For differing views of the preamble's significance see Webber, J. 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney L Rev*, 260; Winckel, A. 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melb U L Rev* 184; Winckel, A. 'So what exactly IS a preamble?' (April 2000) 25 number 2 *Alternative LJ*, 85; Goldsworthy, J. 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 number 2 *Constitutional Forum*, 60; Lawson, C. 'The Literary Force of the Preamble' (1988) 39 *Mercer L Rev* 879; Handler, M., Leitter, B. & Handler, C. 'A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation' (1990) 12 *Cardozo L Rev*, 117; Hammelfarb, D. 'The Preamble in Constitutional Interpretation' (1991) 2 *Constitutional I J*, 127.

more detrimental effect than section 109 in rendering State legislation inoperative¹⁶

A second example is the proposed inclusion in a new schedule 2 to the Constitution of a new clause 5:

A State that has not altered its laws to sever its links with the Crown by the time the office of Governor-General ceases to exist retains its links with the Crown until it has so altered its laws

From the States' perspective the objective motivating this provision (which was premised on the view that 'a republican Commonwealth would be compatible with monarchical States'¹⁷) was laudable: preserving State autonomy, powers and responsibilities for dealing with State constitutional arrangements regarding their change, if any, to a State republic¹⁸ However, would that or a completely different meaning and operation be the effect of this new clause 5? At least some perceived this provision as making both the retention and severance of State links with the Crown flow from and depend upon the Constitution¹⁹

A third example resided in a new clause 6 to be included in the proposed new schedule 2:

The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 1999* do not affect the continuity of the federal system including the unified system of law under this Constitution

In addition, clause 6 was introduced by a bold heading: "Unified Federal System" Again, the meaning and operation of that clause (and its

16 Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd August 1999, 95-96 (discussing proposed s 126)

17 Winterton, G 'An Australian Republic' (1988) 16 *Melb U I Rev*, 467 at 470; Australia Report of the Republic Advisory Committee *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing Service, 1993, 125 volume 1, 305-307 volume 2.

18 See Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd, August 1999, 85-86

19 Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd, August 1999, 87-88 (discussing differing views) For the view that such a clause was necessary to obviate the possibility that 'removal of the monarch as head of state at the Commonwealth level would *ipso facto* eliminate the monarchy at the State level also' see Australia Report of the Republic Advisory Committee *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing Service 1993, 125, 128-129 volume 1, 306-307 volume 2 See also footnote 41

heading²⁰) were the subject of differing views, including the possibility of it having centralising tendencies detrimental to States ²¹

A fourth example illustrates movement towards alleviating State concerns. In March 1999 an Exposure Draft of the Constitution Alteration (Establishment of Republic) 1999 proposed to insert in a new Schedule 3 a new clause 7:

The Parliament may make a law that amends section 7 of the *Australia Act 1986* to provide that the section does not apply to a State that has altered its laws to sever its links with the Crown

An accompanying Explanatory Statement (dated 5 March 1999) concluded that '[t]he grant of [legislative] power [to the Commonwealth Parliament] is framed very narrowly'²² However, in the proposed law introduced into the House of Representatives on 10 June 1999 was a re-drafted clause 7:

The Commonwealth Parliament may at the request of a State Parliament amend section 7 of the *Australia Act 1986*, and section 7 of the *Australia Act 1986* of the United Kingdom to the extent that it forms part of the law of the Commonwealth or that State, to provide that those sections do not apply to the State

Nothing in this clause prevents the amendment of section 7 of the *Australia Act 1986*, or section 7 of the *Australia Act 1986* of the United Kingdom to the extent that it forms part of the law of the Commonwealth or a State in accordance with subsection 15(1) of the *Australia Act 1986*

The proposed law agreed to by the Senate and House of Representatives and put to electors on 6 November 1999 did not contain those

²⁰ Generally on section headings sidenotes or marginal notes see Gifford, D *Statutory Interpretation* Sydney: Law Book Company Ltd, 1990 128; Pearce D. & Geddes, R *Statutory Interpretation in Australia* 4th ed Sydney: Butterworths 1996, 125-126

²¹ Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd August 1999 88-89 For analogous debate concerning s 106 of the Commonwealth Constitution and its effect of bringing State Constitutions within the Commonwealth Constitution (including s 128) and making the latter the basis and legal authority for the former see Twomey A State Constitutions in an Australian Republic (1997) 23 *Monash U L Rev* 312 at 318; Douglas, N The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution (1990) 20 *UWA L Rev*, 340; Graham, D. State Constitutions (2001) 75 *ALJ* 600; *Yougarla v Western Australia* (2001) 75 *ALJR* 1316 at 1329, 1333-36

²² Draft Explanatory Statement (5 March 1999) page 48 paragraph 13 20. Similarly, Explanatory Memorandum (9 June 1999) page 35 paragraph 13 19 The Second Reading Speech is in Australia Parliament House of Representatives *Debates* 10 June 1999 6656

provisions. A view more sensitive to the States prevailed²³ Utilising section 15(3) of the *Australia Act 1986* (UK)²⁴ to amend, via section 128, the Constitution to confer legislative power on the Commonwealth Parliament was abandoned. Instead, the legislative - Commonwealth and State - power and procedure in section 15(1) of the *Australia Act 1986* (Cwlth and UK) was to be used²⁵

III CONSTITUTIONAL IMPLICATIONS: FEDERALISM AND STATE CONSTITUTIONS

Of course, a good deal of scholarship has already explored the myriad of constitutional law issues and problems affecting States in the Commonwealth's and States' transition to a republic.²⁶ Principally, three

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- ²³ Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd, August 1999, 90-91
- ²⁴ For the view that s 15(3) of the *Australia Act 1986* (Cwlth) is unconstitutional see Zines, I. *The High Court and the Constitution* 4th ed Sydney: Butterworths, 1997, 305-308. For the view that s 15(3) of the *Australia Act 1986* (UK) amended s 128, without a s 128 referendum see Zines I. *The High Court and the Constitution* 4th ed Sydney: Butterworths, 1997, 306-308; Winterton, G. An Australian Republic (1988) 16 *Melb U I Rev*, 467 at 480-481
- ²⁵ See footnote 10. See also Winterton, G. An Australian Republic' (1988) 16 *Melb U I Rev*, 467 at 478-479 (discussing the use of s 15(1) of the *Australia Act 1986* (UK) and the Commonwealth Parliament's legislative power for example s 51(38) of the Commonwealth Constitution to repeal or amend s 7 of the *Australia Act 1986* (Cwlth & UK)).
- ²⁶ See, e.g. Winterton G. *Monarchy to Republic Australian Republican Government* Melbourne: Oxford University Press, 1986 reprint 1994 11-17, 20-22 (pages of Introduction in 1994 reprint), 103-107, 132-142, 178-180, 186-190; Winterton, G. An Australian Republic (1988) 16 *Melb U I Rev*, 467; Winterton G. The States and the Republic: A Constitutional Accord? (1995) 6 *Public I Rev*, 107; Twomey, A. State Constitutions in an Australian Republic' (1997) 23 *Monash U I Rev*, 312; Twomey A. Monarchy or Republic? The Constitutional Options of the States' (Commonwealth Parliamentary Research: Background Paper 7) (1993); Mason, A. Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *UNSW LJ*, 750; Williams, G. The Australian States and an Australian Republic (1996) 70 *ALJ*, 890; Williams G. Legal Implications of a Republic for New South Wales (Spring 1996) 11 number 1 *Legislative Studies*, 1; Bannon, J. What about the States? (23-30 January 1996) *The Bulletin*, 22; Symposium 'The Republic and the States' (1999) 20 *U Qld LJ*, 222-300; Note, Republicanism and the States (Autumn 1993) 6 number 1 *Intergovernmental News*, 1; Lumb, R. The Framework of Constitutional Monarchy in the Australian States. IN Grainger, G. & Jones, K. *The Australian Constitutional Monarchy*. Sydney: ACM Publishing, 1994, 57; Lumb, R. The Australian States and Australia's Head of State System (4 June 1993) (unpublished paper Australians for a Constitutional Monarchy Seminar); Thomas T. 'A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework' (1999) 28 *UWA I Rev*, 225; Craven G. The Constitutional Minefield of Australian Republicanism' (Spring 1992) *Policy*, 33; Craven, G. *Implications of a Republic for Western Australia* Perth: Government Printer, 1998; Australia Report of the Republic

documents are involved: the Constitution, the State Constitutions and the *Australia Acts 1986* (Cwlth and UK). Examples of constitutional conundrums are: Does section 128's penultimate paragraph require that alterations of the Constitution which affect the provisions of that Constitution in relation to a State, in addition to the usual majority of electors and a majority of electors in a majority of States, be approved by a majority of voters in the affected State or States? Can section 128 amend State Constitutions? Can section 128 amend, other than by an amendment conferring power on the Commonwealth Parliament to do so, the *Australia Act 1986* (Cwlth and UK)? Can the Commonwealth Parliament, without any State request or concurrence, amend the *Australia Act 1986* (Cwlth)? Can the Commonwealth Parliament with the requisite State request or concurrences, pursuant to section 15(1) of the *Australia Act 1986* (UK), amend the *Australia Act 1986* (UK)? Can State Constitutions' manner and form provisions be avoided or evaded by Commonwealth legislation, under section 51(38) of the Constitution or section 15(3) of the *Australia Act 1986* (UK), authorizing State Parliaments to legislate without complying with those manner and form requests?

Despite the range of possible and variable answers, four alternative positions emerge:

- (i) unilateral Commonwealth power exercised under s 128, without State consent, involvement²⁷ or consultation, to amend the Commonwealth Constitution in respect of Commonwealth or state republican purposes or to amend the *Australia Act 1986* (Cwlth);
- (ii) exercise of such Commonwealth power with States' concurrence and agreement;

Advisory Committee *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing Service 1993 9 123-132 volume 1, 305-309 volume 2; Faulkner J & Orr R *The Republic Referendum* (8 March 2000) (unpublished paper Australian Government Solicitor's Constitutional Law Forum: The Constitution and Good Government) 19-21; O Farrell, E The Role of a State Governor in an Australian Republic IN Winterton G (ed) *We, The People Australian Republican Government* St Leonards New South Wales: Allen & Unwin, 1994, 177-188 For the Territories see e.g. Lindell G. The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government? (1992) 3 *Public L. Rev.* 5 at 13-15, 20-26; Williams, G The Australian States and an Australian Republic (1996) 70 *ALJ*, 890 at 898 901 Under the *Australia Capital Territory (Self Government) Act 1988* (Cwlth) the ACT does not have a Governor or equivalent position Compare the *Northern Territory (Self-Government) Act 1978* (Cwlth) ss 31-42 (establishing the office and powers of the Northern Territory's Administrator)

²⁷ Of course electors in each State vote in s 128 referendums and Senate elections where their votes are tabulated on a State basis For the possibility of electoral divisions within a State for Senate elections see s 7 and s 51(xxxvi) of the Commonwealth Constitution

- (iii) co-operative exercises of Commonwealth and State powers exemplified by utilization of section 15(1) *Australia Act 1986* (Cwlth and UK) procedures or section 51(38) of the Constitution to avoid State manner and form provisions;
- (iv) accomplishing State constitutional requirements (other than amending the *Australia Act 1986* (Cwlth and UK) which may not be necessary²⁸) by State power, without any Commonwealth involvement, influence or coercion

Especially if it encompassed all that was necessary to convert Australia (Commonwealth, State and Territories) to a republic via amendments to the Constitution, State Constitutions and the *Australia Acts 1986* (Cwlth and UK), the initial position, for this purpose, renders States constitutionally irrelevant and impotent. Other than attempting to influence voters, States are excluded while, for example, their executive institutions, structures and powers are changed, qualitatively transformed and, perhaps, relocated. In this context federalism, at least in its executive dimensions, and State constitutions are most vulnerable. However, accomplishing this republican conversion via the second position could, of course, have more than a rhetorical flourish. Concurrence and agreement, which is significantly more than mere consultation, signify the possibility of States determining or influencing the text and, therefore, scope and meaning of new provisions, including amendments to and removal, without replacement, of existing provisions. Of course, the legal or constitutional status of those changes is identical to that resulting from the initial position. Co-operative use of Commonwealth and State legislative powers – the third position – is even more of a federal approach and, perhaps, solution. Significantly, unlike the two preceding positions, it requires the involvement not only of State governments, but also of State Parliaments. Where State governments do not command or control a majority of votes in the Legislative Council,²⁹ this adds an extra political dimension as well as clearly revealing that both State executive and State legislative powers are contributing to the legal edifice erecting a republic. Again, however, this State involvement – executive and legislative – is confined to the means of achieving a republic. The end result – the existence and continuation of the republic – rests, in part,³⁰

28 Winterton, G. An Australian Republic (1988) 16 *Melb U I Rev.* 467 at 479 (discussing opposing views); McGarvie, R. *Democracy Choosing Australia's Republic*. Carlton: Melbourne University Press 1999 245-261

29 An analogous position exists in the unicameral Queensland Parliament when the State government relies on independent members to form a majority. See, e.g. Preston, N. Parliament Rediscovered? Parliament under Minority Government in Queensland (Autumn 1997) 11 Number 2 *Legislative Studies*, 88; Scott I. The Power of One (11-12 January 1997) *Australian Weekend Review*, 3

30 Other parts may be in the Commonwealth Constitution. In addition, there are two suggestions

on Commonwealth, not State, legislation. Consequently, even with this degree of Commonwealth/State co-operation, the federalism benefits or significance may be transient, not enduring.

What if those positions and their consequences are politically, constitutionally or legally an anathema to States? Can State power, without the need for or reliance on, the Commonwealth, accomplish the transition to and sustain a republic? Do States have 'constitutional power to abolish the monarchy at State level'³¹? Of course, State powers cannot amend the Commonwealth Constitution. However, such an amendment is not required because 'the Commonwealth Constitution contains no provision recognizing [or entrenching] the monarchy at State level'³². If United Kingdom legislation, such as sections 30 and 31 of the *Australian Constitutions Act 1842* (UK), was 'interpreted as entrenching the position of State Governors as representatives of the Queen' it could 'be amended or repealed by State Parliaments pursuant to [sections] 2(2) and 3 of the *Australia Acts 1986* (Cwlth and UK), and New South Wales

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- (i) '[W]hile s 51(xxxviii) [of the Constitution] may not extend to allow the Commonwealth [Parliament] to repeal State manner and form provisions ... s 51(xxxviii) may support Commonwealth legislation which grants power to a State legislature to legislate inconsistently with its manner and form provisions in specified circumstances ... Twomey, A. State Constitutions in an Australian Republic (1997) 23 *Monash U I Rev*, 312 at 316. See also Winterton, G. *Monarchy to Republic Australian Republican Government*. Melbourne: Oxford University Press, 1986, reprint 1994, 142, 190. For examples see s 13 and s 14 of the *Australia Act 1986* (Cwlth). Section 13 purports to amend s 11A of the *Constitution Act 1867* (Qld) which is protected by a manner and form provision in s 53(1) of the *Constitution Act 1867* (Qld). Section 14 purports to amend s 50 of the *Constitution Act 1889* (WA) which is itself protected by a manner and form provision in section 73(2)(a) of the *Constitution Act 1889* (WA) which is protected by a second manner and form provision (that is double entrenchment) in section 73(2)(c) of the *Constitution Act 1889* (WA). See Thomson, J. The *Australia Acts 1986*: A State Constitutional Law Perspective (1990) 20 *UWA I Rev* 409 at 415-416 (discussing s 13 and s 14 and their constitutional validity).
- (ii) Section 51(xxxviii) 'confers by implication, power upon the Parliament of a State to participate in the legislative process which [s 51(xxxviii)] requires ... *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 68 CLR 340 at 378. Similarly, see *Sue v Hill* (1999) 199 CLR 462 at 491 (concluding that s 51(xxxviii) represents an actual enhancement of the legislative powers of the States 'to participate in the s 51(xxxviii) legislative process and also that "[t]here is a potential enhancement of State legislative powers because the Parliaments of the States are the potential recipients of legislative power under a [Commonwealth] law made pursuant to [s 51(xxxviii)]'.

Therefore, in all three steps - State legislation requesting or concurring in Commonwealth action; Commonwealth legislation pursuant to s 51(xxxviii); and State legislation pursuant to that Commonwealth Act's grant of power - there is Commonwealth constitutional and legislative power. See also footnote 40.

31 Winterton, G. 'An Australian Republic' (1988) 16 *Melb U I Rev*, 467 at 478.

32 Winterton, G. 'An Australian Republic' (1988) 16 *Melb U I Rev*, 467 at 478-479.

has already repealed them.³³ In this context, exclusive reliance on the *Australia Act 1986* (UK) by State Parliaments would avoid Commonwealth involvement.³⁴ By relying on the argument that the monarchy is not entrenched at the State level by the *Australia Act 1986* (Cwlth and UK),³⁵ there would be no need for Commonwealth or even State action. However, if that argument was incorrect or if constitutional caution and certainty required legislative amendments, State Parliaments cannot “amend or repeal” the *Australia Act 1986* (Cwlth and UK).³⁶ Commonwealth involvement would be required.³⁷ Of course, no such involvement is necessary to amend State Constitutions, including provisions protected or entrenched by manner and form requirements. That can be accomplished by State legislation and, where necessary, compliance with manner and form stipulations.³⁸ Consequently, given either Commonwealth acquiescence or constitutional inability, through section 128 of the Constitution³⁹ and Commonwealth legislation,⁴⁰ to intervene; and given the constitutional feasibility of a republican Commonwealth and a State monarchy;⁴¹ States can control their destiny:

³³ Winterton G ‘An Australian Republic’ (1988) 16 *Melb U I Rev*, 467 at 479

³⁴ However, note the *Australia (Request and Consent) Act 1985* (Cwlth) which preceded the *Australia Act 1986* (UK). The earlier Commonwealth Act was preceded by State legislation for example *Australia Acts (Request) Act 1985* (WA).

³⁵ See footnote 28

³⁶ Winterton G ‘An Australian Republic’ (1988) 16 *Melb U I Rev*, 467 at 479 (noting that ‘in the case of s 7 of the *Australia Act 1986* (Cwlth) because of s 109 of the Commonwealth Constitution and, in regard to s 7 of the *Australia Act 1986* (UK) because of the combined effect of s 2 of the *Colonial Laws Validity Act 1865* (UK) and s 5(b) of the *Australia Act 1986* (UK)’).

³⁷ Commonwealth legislation could amend the *Australia Act 1986* (Cwlth). Amendments to the *Australia Act 1986* (UK) would require either Commonwealth and State legislation (pursuant to s 15(1)) or an amendment to the Commonwealth Constitution, and, subsequently Commonwealth legislation (in accordance with s 15(3)). See Winterton G ‘An Australian Republic’ (1988) 16 *Melb U I Rev*, 467 at 479-480.

³⁸ But see Lumb, D ‘Fundamental Law and the Processes of Constitutional Change in Australia’ (1978) 9 *FLR*, 148 at 175-177 (suggesting that some aspects of State Constitutions, including the monarchy, are unamendable).

³⁹ See footnotes 11, 12, 14 and 21

⁴⁰ For example, are s 13 and s 14 of the *Australia Act 1986* (Cwlth) valid? Presumably not under s 51(xxxviii) of the Commonwealth Constitution. See footnote 30. Can they be sustained under other s 51 powers for example, s 51(xxix)? See *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 (suggesting that a UK Act applying in Australia could be repealed by Commonwealth legislation pursuant to s 51(xxix) of the Commonwealth Constitution).

⁴¹ Australia. Report of the Republic Advisory Committee: *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing Service, 1993, 123-126 volume 1; Winterton G *Monarchy to Republic Australian Republican Government* Melbourne: Oxford University Press, 1986, reprint 1994, 11-12, 21 (pages of Introduction in 1994 reprint), 103-105, 178-179; Winterton G *The Resurrection of the Republic* Sydney: Federation Press, 2001, 23 (Law & Policy Paper 15); Australia. Report of the Republic Advisory Committee *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing

how and when they will move to a republic and what type of a republic – institutional arrangements, procedures and powers – the State will promulgate. Indeed, in a federation encompassing toleration and diversity and, as a matter of constitutional law, permitting Brandeisian experimentation,⁴² all or some of these aspects can diverge from the Commonwealth's republic.⁴³

IV PLANNING AND PROCESS: SOME OPTIONS

From that perspective persuasive reasons can be garnered to support a simple proposition: States should discuss, debate and resolve State republican issues. Those discussions and debates could occur in at least three ways: State only meetings; joint Commonwealth/State

Service, 1993 305-309 volume 2; Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic)* 1999 and *Presidential Nominations Committee Bill* 1999 Canberra: CanPrint Communications Pty Ltd, August 1999, 85-88, 90-91; Faulkner, J & Orr, R *The Republic Referendum* (8 March 2000) (unpublished paper, Australian Government Solicitor's Constitutional Law Forum: The Constitution and Good Government), 19-21. There is another possibility: republican States within a Commonwealth monarchy. Endeavours to achieve this might occur either by Commonwealth and State co-operation or by unilateral State action. For discussions of the constitutional law issues practical feasibility and appropriateness of this possibility, see Winterton, G. *Monarchy to Republic Australian Republican Government* Melbourne: Oxford University Press 1986 reprint 1994 15, 21-22 (pages of Introduction in 1994 reprint) 104; Williams, G. 'The Australian States and an Australian Republic' (1996) 70 *ALJ* 890 at 893-901; Fetter, J. 'Unilateral State Republicanism: Can Victoria Independently Sever Its Links with the Crown' (2000) 4 *Macarthur J. Rev.* 87; Australia Report of the Republic Advisory Committee *An Australian Republic The Options* (Turnbull, M Chairman) Canberra: Australian Government Publishing Service, 1993 305-309 volume 2.

⁴² Justice Brandeis envisaged a federal system [where] a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' *New State Ice Co. v Liebmann* (1932) 285 US 262 at 311 (Brandeis, J dissenting). For discussion see Thomson, J. *State Constitutional Law: American Lessons for Australian Adventures* (1985) 63 *Texas J. Rev.* 1225 at 1247; Iarr, G. 'Laboratories of Democracy? Brandeis, Federalism, and Scientific Management' (2001) 31 *Publius J. of Federalism* 37. On Brandeis see e.g. Strum, P. *Brandeis Beyond Progressivism* Lawrence, Kansas: University of Kansas Press 1993; Purcell, E. *Brandeis and the Progressive Constitution* Eirle, the Judicial Power, and the Politics of the Federal Courts in Twentieth Century America New Haven: Yale University Press 2000. However there is a contrary perspective: '[T]he people of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division' *Baldwin v G.A.F. Seelig, Inc.* (1935) 294 US 511 at 523 (Cardozo, J). Of course, neither position must be pushed to extremes. See also *Boy Scouts of America v Dale* (2000) 120 S. Ct 2446 at 2457-58 (Rehnquist CJ) (suggesting that Brandeis did not advocate State experimentation with free speech protected by the First and Fourteenth Amendments of the US Constitution).

⁴³ See Winterton, G. *Monarchy to Republic Australian Republican Government* Melbourne: Oxford University Press, 1986, reprint 1994, 107, 180 (discussing the advantages of State republican governments having different forms and structures from each other and the Commonwealth).

conferences;⁴⁴ or exclusively Commonwealth meetings that encompass State issues⁴⁵

(A) STATE CONVENTIONS

Obvious venues include State Parliaments and parliamentary committees;⁴⁶ State Republican Conventions;⁴⁷ State government constitutional forums;⁴⁸ and committees,⁴⁹ inquiries and royal commissions.⁵⁰ For example, a State Convention need not be confined to one State. A combination of several or all States could be convened. An agenda might encompass all constitutional issues relating to a republic. However, the focus should be on State Constitutions, the *Australia Acts 1986* (Cwlth and UK) and any other relevant UK legislation⁵¹ with an

⁴⁴ See Thomson, J. *Altering the Constitution: Some Aspects of Section 128* (1983) 13 *Federal L Rev* 323 at 324 note 6(ii) and (iii) (citing references).

⁴⁵ See Thomson, J. *Altering the Constitution: Some Aspects of Section 128* (1983) 13 *Federal L Rev*, 323 at 324 note 6(i) (citing references); Australia Constitutional Commission *Final Report* (Byers, M. Chairman) Canberra: Australian Government Publishing Service 1988, 2 volumes.

⁴⁶ Western Australia Joint Select Committee of the Legislative Assembly and the Legislative Council on the [WA] Constitution *Final Report* Perth: Government Printer, 1991, 2 volumes; Queensland Parliamentary Committee [of the Legislative Assembly] for Electoral and Administrative Reform *Report on Consolidation and Review of the Queensland Constitution* Brisbane: Government Printer, November 1994; Queensland Legal Constitutional and Administrative Review Committee [of the Legislative Assembly] *Consolidation of the Queensland Constitution* Brisbane: Government Printer, April 1999.

⁴⁷ Compare the November 1998 Constitutional Convention held in the old Parliament House in Canberra. See generally Forum *The Constitutional Convention: An Experiment in Popular Reform* (1998) 21 *UNSWLJ*, 854-946; Winterton, G. *Australia's Constitutional Convention 1998* (1998) 5 *Agenda*, 97. Compare Conventions to amend US State Constitutions. See, e.g. Wheeler, J. & Kinsey, M. *Magnificent Failure The Maryland Constitutional Convention of 1967-1968* New York: National Municipal League, 1970; Gove, S. & Kitsos, I. *Revision Success The Sixth Illinois Constitutional Convention* New York: National Municipal League 1974; Williams, R. *State Constitutional Law Cases and Materials* 2nd ed Charlottesville, Virginia: Michie Co., 1993, 973-990; Williams, R. *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commissions in State Constitutional Change* (1996) 1 *Hofstra Law & Policy Symposium*, 1.

⁴⁸ For example, the Western Australian Constitutional Forums and People's Convention. See Craven, G. *Implications of a Republic for Western Australia* Perth: Government Printer, 1998; Black, D. *Federation Issues* Perth: Government Printer, 1998; Martin, W. *The Western Australian Constitution* Perth: Government Printer, 1998.

⁴⁹ For example, Western Australia. *The Report of the Western Australian Constitutional Committee* (McCusker, M. Chairman) Perth: Government Printer, January 1995. See also Western Australia Parliament *Parliamentary Debates* (Hansard) vol 325, 1995, 6380-6382 (Premier's Ministerial Statement).

⁵⁰ For example, Tasmania. *Royal Commission into the Constitution Act 1934 Tasmania Report* (Zines, I. Chairman) Hobart: Government Printer, 31 May 1982; Western Australia. *Royal Commission into Parliamentary Deadlocks. Report* (Edwards, E. Chairman) Perth: Government Printer, 1985.

⁵¹ This does not include the *Commonwealth of Australia Constitution Act 1900* (UK). See text accompanying footnote 32.

objective of adopting resolutions or recommendations relevant to a single issue: What legally and politically can and should States achieve without Commonwealth assistance, intervention or coercion? In this undertaking, legal and constitutional issues and their practical, political and legal significance and ramifications can be exposed.

Before that process commences, one further aspect - timing - should be addressed by States. Three options are constitutionally feasible:

- (i) Simultaneous or concurrent State and Commonwealth transition to and attainment of republican status. This would have been possible pursuant to arrangements contemplated by the *Constitution Alteration (Establishment of Republic) 1999* and all States' *Australia Act (Requests) Act 1999*
- (ii) State transition to and attainment of republican status after the Commonwealth had done so. That is, for a period of time or, perhaps indefinitely, States would remain constitutional monarchies within a Commonwealth republic. Again, the 1999 arrangements contemplated and supported this possibility⁵²
- (iii) State transition to and attainment of republican status before the Commonwealth. Given that no amendment or alteration of the Commonwealth Constitution is required,⁵³ this might be achievable by a State or States without Commonwealth assistance.⁵⁴ Assume a State or States attempted to do so: would they be vulnerable to an amendment to the Commonwealth Constitution⁵⁵ or Commonwealth legislation⁵⁶ that attempted to compel States to remain monarchies? If that was not constitutionally sustainable or the Commonwealth agreed with State republics, a Brandeisian advantage⁵⁷ - experiments with

⁵² See text accompanying footnote 17 (referring to proposed new clause 5)

⁵³ See footnote 32 (Commonwealth Constitution does not recognize or entrench a State monarchy) Compare text accompanying footnotes 17-19 (postulating the need for an amendment if States retain the monarchy in a Commonwealth republic)

⁵⁴ See text accompanying footnote 35 (discussing effect of the *Australia Act 1986* (Cwlth & UK)).

⁵⁵ Compare the issue: Can s 128 amend State Constitutions? In the context of s128 compelling States to be a republic see footnote 26 The reverse scenario may entail similar constitutional issues and debates

⁵⁶ Compare footnote 30 (indicating that Commonwealth legislation under s 51(xxxviii) may not be able to repeal State legislation) To the extent that State constitutions are not UK Acts s 51(xxix) may not be of assistance See footnote 40 (referring to the *Kirmani* case). Also account would need to be taken of implied federal constitutional prohibitions applicable to Commonwealth legislative powers See e.g. Winterton, G., Lee, H., Glass, A. & Thomson, J. *Australian Federal Constitutional Law Commentary and Materials* Sydney: IBC Information Services 1999, 759-790 (discussing Commonwealth laws and the States)

⁵⁷ See footnote 42

differing republican institutions, arrangements and powers to assist not only States but also the Commonwealth to achieve the best republican model or system – could eventuate. For example, various forms of electing and appointing State republican Governors might be implemented. The resulting experience should provide, for all jurisdictions, future guidance.

(B) JOINT CONFERENCES OR PROCEEDINGS

Generally, in a federation co-operation, rather than conflict, produces better constitutional and political arrangements. Therefore, a process involving joint Commonwealth/State co-operation and consultation – rather than movement to the extremes of exclusivity of Commonwealth and State deliberations – should prevail.⁵⁸ To some extent the 1998 Constitutional Convention achieved this outcome: delegates included Commonwealth, State and Territory parliamentarians and Ministers. However, concentration on the Commonwealth Constitution and an Australian presidency left State issues and concerns relatively neglected. This was perpetuated even up to the 6 November 1999 referendum. An important illustration involved the development, drafting and enactment of the *Constitution Alteration (Establishment of Republic)* 1999 by the Commonwealth Government, Commonwealth Parliament and, to a lesser extent, the Joint Select Committee on the Republic Referendum.⁵⁹

⁵⁸ See Winterton, G. *The Resurrection of the Republic* Sydney: Federation Press 2001 22-25 (Law & Policy Paper 15) (discussing several proposals including a joint Commonwealth State and Territory committee; joint Commonwealth parliamentary committee with state and territory parliamentarians; and an elected Constitutional Convention) See also Lumb R. *Methods of Constitutional Revision in the Federal Sphere: An Elected Constitutional Convention?* (1972) 22 *UWA I Rev* 52 (discussing various methods to debate and develop s 128 referendum proposals); Livingston W. *Federalism and Constitutional Change* Westport Connecticut: Greenwood Press 1956 reprint 1974 (providing comparative survey of methods to amend Constitutions).

⁵⁹ For an indication of the extent to which States were involved and State issues were considered see Australia Parliament Joint Senate and House of Representatives Select Committee on the Republic Referendum *Advisory Committee Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* Canberra: CanPrint Communications Pty Ltd August 1999, 85-91; Faulkner J & Orr R *The Republic Referendum* (8 March 2000) (unpublished paper Australian Government Solicitor's Constitutional Law Forum: The Constitution and Good Government) 6-9 (providing an overview of the process, including details of the referendum steering group referendum taskforce expert panel for the neutral public education program and two committees which developed Yes and No advertising campaigns).

V CONCLUSION

From a legal and constitutional perspective one lesson from the years 1993–1999⁶⁰ is obvious: through a process of Commonwealth/State consultation, co-operation and agreement a clear and comprehensive proposal or proposals, encompassing Commonwealth and State issues, concerns and options, must be developed. Then, that should be subject to a lengthy period of public discussion. Changes can be made and new proposals developed. Inevitably, this should lead to a conjunction of events: a constitutionally secure and acceptable proposal; public endorsement of the means of achieving republican status and the substantive and procedural aspects of the proposed republic; and enactment of legislation and approval of constitutional amendments. Of course, neither uniformity nor simultaneous movements need occur. What is required is patience, persistence and care.

⁶⁰ For the 1993 Republic Advisory Committee Report see footnote 14. For the 6 November 1999 referendum results see footnote 13.