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When no Means No: the failure of the Australian November 1999 Republican Referendum and its Roots in the Constitutional Convention of 1998

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Background

The structure of the Constitution of the Commonwealth of Australia was based substantially upon the republican constitution of the United States of America. However, in order to preserve the supremacy of parliament and the Westminster or responsible system of government intact, Australia's constitutional framing fathers deliberately omitted three of the American Constitution's most original features. These were: the separation of the legislative and executive branches or powers of government; the direct election of an executive head of state; sovereignty of the people; and, to protect that sovereignty, a bill of rights limiting the scope of government—leaving only the principles of federation as enshrined in the equality of State representatives in a fully-elected Senate or state's house, the enumeration of federal powers, the recognition of the States, and the establishment of a High Court. Ever since the inauguration of federation in 1901, the Commonwealth Parliament has, from time to time, unsuccessfully attempted to increase its powers by initiating, under one pretext or another, referendums designed further to shift the balance of power in its favour. Seen in this light, the November 1999 referendum on the republic had as much to do with the maintenance of the Westminster or responsible system government as with turning Australia into a federal republic. This is confirmed by the fact that the

proposed republican model on which the proposed law amending the constitution was based was the outcome of a bi-partisan arrangement between those who wanted a republican Australia on the one hand, and the die-hard supporters of a Westminster system of parliamentary government on the other. This largely explains why the republic camp had to argue its case on nationalist rhetoric in which the monarchy was made the central issue; and why, with so many members of Australia's political elite among its supporters, their proposal was quickly identified as being a politicians' republic. Although these are perhaps the fundamental reasons why the proposed law replacing the Queen of Australia and the Governor-General as *de jure* and *de facto* heads of state respectively by an Australian citizen president was rejected, the 1999 referendum stands unique as the first referendum to have been forced upon a reluctant people by a single agenda extra-parliamentary organization determined to have its way.

Republicanism has always been an incipient feature of Australian politics. However, it would never have reached centre-stage in the late 1990s without the determined efforts of the Australian Republican Movement (ARM) under the leadership of Malcolm Turnbull for most of the time since its foundation in 1992.

According to its supporters, the 1999 referendum failed to pass because the people did not understand what a boon the proposal would have been for Australia to be freed from the monarchy—its last link with Britain. Malcolm Turnbull in his book, *Fighting for the Republic* (1999)¹ was so convinced of the virtues of his cause that he failed to appreciate that there was nothing special in removing the monarchy, as this would occur no matter what the form of republic. As he was to discover, the monarchy was never really an issue at any time among the overwhelming proportion of the people.

To work, the ARM's republican argument had to be translated into the precise wording of a proposed law, which, in turn, would appropriately amend the constitution. What was then to be tested was not, as the ARM wrongly believed, the rhetoric of their republic, but the validity of a proposed law. Consequently, the answer to this particular referendum question could not be deduced from the question itself (with 69 changes there were far too many for that) but only from the actual wording of the proposed law. Furthermore, although according to the ARM the referendum was about amending the Constitution on nationalist grounds, the Australian Constitution is in fact clause 9 of the British Parliament's Commonwealth of Australia Constitution Act (1900). Legal opinions differ as to whether section 128 procedures to amend the Constitution extend to the other nine clauses, but there can be no doubt that had the proposed amendments been accepted, Australia's constitution would still not have been a free-standing document over and above the reach of Parliament as are most other constitutions.

Lastly, the ARM and its Australian Labor Party allies claim that the anniversary of the Commonwealth Constitution, January 1, 2001 represented a unique opportunity to bring about a republic was not, as they had imagined, a sufficient reason for voting 'yes' at the referendum. But it made some sense as a part of a wider strategy to woo those republicans who, although supportive of Australia becoming a republic, were not convinced that the ARM-backed republican model was the right way of doing it. Ultimately, the referendum failed not because people were opposed to Australia becoming a republic, but because they were opposed to what was on offer.

These, in bare outline, are some of the reasons why the 1999 Australian republican referendum failed to get up. What follows is an attempt to explain, from the perspective of one who, as a true republican, took an active part in Western Australia in opposing the bi-partisan ARM, Australian Labor Party and

conservative republican push for the replacement of the Queen of Australia and her viceroy, the Governor-General, by an Australia citizen appointed by a two-thirds majority of the Commonwealth Parliament on the joint nomination of the Prime Minister and the Leader of the Opposition and who would be liable to instant dismissal by a Prime Minister without notice, appeal or reinstatement.

The Australian States and the Constitution

The inauguration of the Commonwealth of Australia on January 1, 1901 represented the culmination of ten year's effort by the six founding self-governing colonies, Victoria, New South Wales, South Australia, Queensland, Western Australia, and Tasmania, to create "one indissoluble Federal Commonwealth under the Crown of the United Kingdom." Strictly speaking this declaration could be interpreted to mean, as it has by the High Court, that the Australian States, having no prior existence as independent states before the proclamation of the Constitution in 1901, were, like the Commonwealth itself, created by the Constitution. For that reason, Australian States are thought not to be comparable to the States of the United States of America. In that federation, the thirteen original States, having unilaterally declared their independence from Britain prior to federation, established the principle that they were the contracting parties to a constitution of their own making and ceding powers for their common good.

Australian states are, as a consequence, at risk from interference in their constitutional arrangements either directly by the Commonwealth Parliament or indirectly by the Australian High Court's tendency to bias its interpretations of the Constitution in favour of Federal interests rather than in support of States' rights. In addition, the High Court's preference for uniformity rather than the diversity expected of a federation of different jurisdictions has similarly diminished State powers.

For these and other reasons, federalism has never sat as easily upon the Australian polity as it has in Canada or the United States. Indeed, for much of its recent history the Australian Labor Party (ALP) actively supported the abolition of the States and the Senate and their replacement by a national single-chamber parliament “clothed with unlimited powers” governing subordinate regions.

In contrast to the United States of America, Australian State parliaments play no direct role in the process of constitutional amendment under section 128. They were used, however, as a backdoor route for constitutional change in 1986 when the acts requesting breaking the last remaining legislative links between Britain and her former Australian colonies were passed concurrently by all Australian State Parliaments and affected by their British and Commonwealth counterparts.²

All proposals to amend the Constitution must come directly from the Commonwealth Parliament either by absolute majorities in both houses, or in one if the other refuses. Recommendations for constitutional change may come from executive-appointed commissions (as in 1988) or constitutional conventions (as in 1999), but the right to initiate remains with the Parliament.

Since federation there have been 18 referendum days on which the people have been asked 43 questions involving around 120 specific changes to the Constitution. Of these, more than half (69) was put at the failed 1999 referendum. The people have consistently refused to pass amendments (whatever their supposed merits) that they believe would effectively increase Parliament’s powers of government.

Because of Federal Parliament’s absolute control over the processes of constitutional amendment and the conduct of referendums, the Australian States have little directly to do with constitutional change. This was made very apparent during the course of the 1998 Constitutional Convention whose domination by the

Federal Parliament made it virtually impossible for State parliamentary representatives to speak on behalf of their States.

The November 1999 referendum result

The November 6, 1999 referendum on the republic required (on pain of a fine for not so doing) some twelve million electors to receive a ballot paper and, if they wished, to record whether not they agreed:

- (a) to the wording of a preamble to clause 9, THE CONSTITUTION, and;
- (b) to the replacement of all references to the Queen of Australia and her viceroy, the Governor-General, by a President nominated by the Prime Minister and the Leader of the Opposition and confirmed by a two-thirds majority of both Houses of Parliament and enjoying substantially the same powers as those formerly enjoyed by the Governor-General.

Both proposals were defeated in such a way as to confound the experts. The national no-vote on both questions exceeded fifty-five per cent of the votes cast and no-voters were in the majority in all six States and the Northern Territory. Only the Australian Capital Territory voted 'yes'.

The extent of the debacle is best illustrated by the distribution of yes-voters by states in order of their size: New South Wales 46.43 per cent; Victoria 49.84 per cent; Queensland 37.44 per cent; Western Australia 41.48 per cent; South Australia 43.37 per cent; and Tasmania 40.43 per cent. The Northern Territory voted 48.77 per cent 'no', only the Australian Capital Territory, with 63.27 per cent 'yes' votes favoured the republic.

The yes-voters were highly localised. Out of 148 electoral divisions, each of which had approximately the same number of voters, only 44 divisions voted in favour of the proposed amendment. These were concentrated in metropolitan electoral divisions having the highest educational and professional status. Surprisingly, in view of their usual loyalty to the ALP party line, and the way in

which the 1999 yes-vote was concentrated in these higher socio-economic status electorates, many (if not most) non-professional class ALP supporters in the remaining suburban and rural constituencies must have voted 'no'.

The debacle was even more remarkable when one considers that most newspaper journalists and feature article writers, radio and television commentators and talk back radio hosts were overwhelmingly in favour of the replacing the Queen and Governor-General. With the solitary exception of the *West Australian*, all major newspapers wrote editorials in favour of the amendment. The *Australian*, a national newspaper owned and closely controlled by Rupert Murdoch, was the country's most extreme republican supporter. On referendum day, this newspaper went so far as to print its editorial on the front-page where it declared:

We believe that by voting yes in today's republic referendum, we shall be saying proudly that Australia is a land filled with people of all races and creeds, from all countries of the globe, and an egalitarian land in which people are entitled to aspire to succeed regardless of race, gender, age, or belief.

This piece of emotionalism is only one example of media support ranging from expressions of outright anti-British and anti-monarchist sentiment, to claims that Australia's trade and political relations with Asia were suffering because Australia's head of state also happened to be the Queen of England. Among some commentators there was also more than a whiff of traditional Irish nationalism in the claim that Roman Catholics in Australia were discriminated against because the Queen, as a hereditary head of state and head of the Anglican Church, was constitutionally debarred from membership of the Church of Rome.³

Apart from attacks on the irrelevancy of an hereditary head of state in a democracy, and the replacement of both the Queen and the Governor-General by a parliamentary appointed Australian citizen as head of state, very little was said

about republicanism as a system of government. By concentrating all its attention upon the head of state, the ARM and its supporters became known as the minimalist republicans. Having founded their republican movement on a single-issue, the ARM locked out all those who might have preferred a different approach. This had the immediate effect of alienating those republicans (who were always in the majority) who wanted a popularly elected and not a parliamentary appointed head of state. Thus, from the very beginning the ARM, having rejected the possibility of a directly elected presidency, split the pro-republicans into two opposing camps.

To support their argument that their proposal was ‘safe’, the ARM minimalists enlisted the help of celebrities including former Prime Ministers and Justices of the High Court, Members of Parliament, some State premiers, lawyers, prominent millionaires, writers, artists and stage and screen personalities.⁴ The only major exception to this parade of heavy weights was the Prime Minister, John Howard, who, as a constitutional monarchist, preferred the *status quo*. He did so because he believed that the Constitution, having served Australian well these past one hundred years, was in no need of change. His steadfast refusal to support the republican amendment infuriated the minimalist republicans. Howard did, however, support the proposed preamble (in the writing of which he had had a hand) in the knowledge that it would have had no legal effect. His stance drew the contempt of the ARM and its supporters who believed that it was his duty actively to campaign for a republic in which he did not believe. Turnbull went so far as to allege in defeat that Howard “was the prime Minister who broke a nation’s heart.”⁵

The minimalist republic and the roots of its failure

The referendum’s failure can be traced back to the arrogant way in which a group of well-financed zealots drawn from Australia’s political and power elite tried to present a minimalist ‘change nothing’ republic as a done deal, awaiting

only a grateful public's seal of approval. The republican referendum originated in four almost simultaneous events that had occurred in 1991.⁶ The first was the holding of a Constitutional Centenary Conference in Sydney in April at which the issue of the republic was raised and commented on by Prime Minister Bob Hawke who gave a balanced 'when the time is ripe' point of view. Convened by leading members of the legal fraternity it led to the creation of the Constitutional Centenary Foundation. The Foundation, dependent on federal government subsidy, was formally launched a year later on 14 April 1992 and within a year was in receipt of a government grant of \$500,000. The second event was the Australian Labor Party's unanimous decision at its national conference in Hobart on 25 June 1991 to "embark on an education campaign, culminating in a referendum which would effect reform of the Australian Constitution and other political institutions to enable Australia to become an independent republic on 1 January 2001."

Leading Liberal and National Party members opposed the idea and Malcolm Fraser, who was to take a leading part in the 1999 referendum 'yes' campaign, stated then that the issue would be divisive. In that same month, John Howard made his position clear when he said that the Westminster system of government was "where you have a division between the head of State and the head of Government." He also believed that left alone the republican issue "would in the fullness of time solve itself in a non-divisive manner."⁷ The third event occurred two weeks after the ALP Hobart conference resolution on the republic when, on 7 July, the Australian Republican Movement was inaugurated with the stated object of having Australia declared a republic on 1 January 2001. A day later, millionaire lawyer Malcolm Turnbull (who was shortly to become the movement's chairman and its chief and most public advocate) put forward the idea that all that was necessary to achieve the republic was to replace both the Queen and the Governor-General by an Australian citizen as its head of state. In January 1992 the

ARM called for a republican convention to draft the necessary constitutional amendments to bring this about. As Turnbull was later to explain in his book, *The Reluctant Republic*, (1993) “the ARM’s platform had to be simple and as short as possible so that our opponents would be left without anything to defend except the monarchy itself.”⁸ These events helped initiate a debate among Australia’s more vocal political leaders and commentators.

On 4 June 1992, a group calling itself Australians for a Constitutional Monarchy (ACM) was launched in Sydney to defend the *status quo*. Although by no means a royalist organization, the unbecoming conduct of Prince Charles and the prospect that he was likely to be proclaimed King of Australia on the present Queen’s death or abdication did little to help the ACM’s cause. Opinion poll support for a republic passed 50 per cent during this period. The fourth event occurred in the December of 1991 when Paul Keating replaced Labor Party Prime Minister Bob Hawke in a ‘palace coup’. As the new Prime Minister, Paul Keating quickly displayed his nationalist feelings. On 27 February 1992 during question time in Parliament he falsely accused the British of having abandoned Australia in World War II by not defending Malaysia against the Japanese, and by denying the return of Australian troops from the Middle East theatre to defend Australia against the Japanese. In his inimitable style, Paul Keating also castigated Anglophile Australians who, he claimed, were not “aggressively Australian.” He capped this on 7 March by declaring his support for removing the Union Jack from its position in the corner of the Australian flag. These remarks drew the response that he was beating the Irish nationalist drum.

The idea, therefore, that the republican cause was essentially a nationalistic cause could not have been made clearer when Malcolm Turnbull wrote, “The republic is an unashamedly patriotic or nationalistic goal. If it cannot be justified as an affirmation of national identity, it cannot be justified at all.”⁹ In other words,

the ARM was to have no truck with republicanism as a separate and distinct form of government, with its own measures of sovereignty and approaches to democracy.

On 28 April 1993, following his unexpected return to office, Prime Minister Paul Keating announced the establishment of a Republican Advisory Committee (RAC) and appointed Malcolm Turnbull as its chairman. The committee, which had been promised as part of Keating's election manifesto, was asked to advise him, as Prime Minister, on the manner, form, powers and methods of appointing and terminating a citizen head of state to replace both the Queen and the Governor-General in such a way as not to "otherwise change our structure of government."¹⁰ Even although the RAC's terms of reference were designed to attract conservative support by requiring the committee to maintain "the effect of our current conventions and principles of government," the conservative coalition opposition declined an invitation to join the committee.¹¹ The RAC's terms of reference, focused as they were almost exclusively upon matters relating to replacing the monarch with an Australian citizen as head of state, now gave official credence to minimalism and the aims and objectives of the ARM.

The committee examined five methods of appointing a citizen head of state. These were: selection and appointment by the government of the day without reference to parliament; selection by the government followed by endorsement by both Houses of Parliament; appointment by an electoral college comprising representatives of various parliaments; election by the federal Parliament; and lastly, direct or popular election.

Although it covered a wide exploration and discussion of the issues, the RAC report made no definitive recommendation. However, basing its claim upon the debateable point that Australia "is a state in which sovereignty derives from the

people” it concluded that the “only constitutional change therefore required to make Australia a completely republican system of government is to remove the monarch.”¹² From this the report also concluded that a republic was achievable without detracting from Australia’s fundamental constitutional principles—in other words, without disturbing the Westminster system of government. From internal evidence, it would appear that the committee’s preference was for an Australian head of state appointed by the Parliament on the nomination of the Prime Minister, who in turn was to be advised by a selection committee. The report made scant reference to a range of key issues. Indeed, as was later explained by Mike Pepperday, the RAC report gives the impression “it was written to counter the people’s preference for direct election.”¹³

Given that the Constitution contains 35 sections referring to the Governor-General, of which 15 confer power on that office, the Governor-General is constitutionally Australia’s chief executive officer and commander-in-chief of the armed forces. He, therefore, theoretically enjoys more power than the President of the United States. Furthermore, as the Queen’s representative, but not her agent, the Governor-General is responsible for “the execution and maintenance of this Constitution and the laws of the Commonwealth” (sec. 61). The exercise of these enormous powers is by convention, but not by law, only on the advice of ministers according to the unwritten British precedents of a constitutional monarchy. Nevertheless, as the RAC report pointed out, without a monarch, a head of state with the same powers, and acting in his or her right, would occupy a more important and prominent role than a Governor-General presently enjoys.

In addition to such powers as are listed in the constitution, there are others known as the reserve powers. The existence of these powers signals the fact that the authority to govern, coming directly from the Crown, is an act of delegation to those who, having the confidence of the Parliament, are capable of forming a

government. The extent of these somewhat controversial powers includes the right to appoint and to dis-appoint a Prime Minister, to refuse a prime ministerial request to dissolve Parliament and the right to force the dissolution of Parliament. However, much of the power of a Governor-General and the controversy surrounding its exercise would disappear if both Houses of Parliament operated on fixed and not maximum terms. And would disappear altogether if the people directly elected the Prime Minister. This helped bolster the argument that the Crown was such an implicit part of the constitution that section 128 (powers of amendment) could not be used to change either the eight covering clauses or the Constitution Act itself beyond clause nine.¹⁴

On 7 June 1995, Prime Minister Keating proposed in federal Parliament putting a law amending the Constitution to make Australia a republic by 1 January 2001 directly to the people at a referendum. His proposed law would have created an Australian head of state appointed on a single nomination by the Prime Minister and confirmed by a two-thirds majority at a joint sitting of both houses of Parliament and dismissible by the same majority. This became ALP policy and was substantially reaffirmed by Kim Beazley, as leader of the Labor Party opposition, in his opening address to the 1998 Constitutional Convention. Opposed to such a drastic change without prior debate, the leader of the opposition coalition, John Howard, on the following day proposed a People's Convention half of whose delegates would be elected. His predecessor, Alexander Downer, had first put this idea forward on 10 November 1994. The Australian Democrat Party, while supporting the idea of a republic, wanted a bill of rights, a petition system of nomination to Parliament, and the government funding of a national republican debate organised by the Centenary Foundation.

The genesis of the minimalist republic of the kind preferred by the ARM, the RAC report and former Prime Minister Keating, is to be found in constitutional

law professor George Winterton's book, *Monarchy to Republic* (1986). Although more philosophical in approach than the RAC report and covering many other aspects of republicanism (principally American), Professor Winterton focused his attention on replacing both the monarchy and its nominal representative, the Governor-General, by an Australian citizen as head of state. Close reading of Winterton's text leads to the inevitable conclusion that his main objective was not to explore ways of introducing a truly republican system of government, but to bring about change without in any way threatening Australia's Westminster system of government. Since this was a system developed expressly to preserve the monarchy and its executive powers, Professor Winterton's thesis was in effect an argument in support of the monarchy, albeit under a different name—and in different hands.¹⁵

Prime Minister Keating's so-called 'big picture' view of Australia and its future as an 'independent' nation with a new national flag under a republic helped encourage a flurry of works on republicanism in Australia.¹⁶ However, since most were written by academics it is doubtful whether they were much read by the public at large; or even by many of the educated laity for whom they were obviously intended. Nevertheless, it is worth noting that most authors supported retaining Australia's present system of government in all its essentials through the creation of a parliamentary republic. Only one author, Professor Alan Atkinson, grasped the nettle of sovereignty and the Crown's role as the cornerstone of constitutional government in Australia. His explanation for the waning support for the monarchy in Australia is the way in which the "paternalist state has given way to the proactive, managerial and amoral state: in which case the monarchy, whether Australian or British, has no part to play" in the affairs of state.¹⁷ Professor Atkinson was particularly incensed by the divisive nature of the Keating proposal which he compared to pulling down a building with the people inside.

The general public, however, was not entirely unaware of what was happening. Successive opinion polls revealed three instructive aspects about its attitude. The first was a slow but steady switch from a small majority support for the Queen of Australia as head of state to a small majority preference for an Australian citizen in her stead.¹⁸ The second, and by far the more important, was the discovery that if (and one should underline ‘if’) Australia were to become a republic as many as 70 per cent of those questioned would prefer a popularly elected head of state. The third and perhaps not surprising discovery was that the public understanding of Australia’s Constitution was abysmal. According to a 1994 survey, only 18 per cent of the people had some understanding of what it contained. Worse still, 62 per cent of those questioned did not know what a republic would mean, and 73 per cent had no idea of what was expected of a Governor-General.¹⁹

The 1998 Constitutional Convention

The 1999 referendum only makes sense as the sequel to the implementation, on taking office in March 1996, of the newly elected Coalition government’s 1995 pre-election promise to institute a People’s Constitutional Convention. The Labor Party’s preference, enunciated by Paul Keating during the election campaign in February, was for a plebiscite as an alternative to a constitutional convention to establish whether or not the people wanted an Australian head of state and a republic. Had the people agreed to Keating’s proposal, an all-party committee of the Commonwealth Parliament would have then drafted a proposed law to alter the constitution. Kim Beazley, Keating’s successor as leader of the parliamentary Labor Party, announced in December 1996 that this was still his party’s policy in opposition. The Coalition government was, for a time, in two minds as to whether to hold a convention and had even considered, albeit briefly, holding a plebiscite instead, before finally deciding in February 1997 to keep its promise. In that same

month, the British High Commissioner, Sir Roger Carrick, speaking at a public meeting, made it clear that the republic was a matter entirely for the Australian people to decide, and not the British.

The necessary legislation to implement a half-elected Constitutional Convention was introduced in March 1997. As part of the lead up to a Constitutional Convention, which was now to be held in February 1998, the government began a national information campaign on the issues.²⁰ In November 1997, the government financed the distribution of 7 million copies of a booklet titled *Republic - Yes or No?* Assuming, incorrectly, that the issue was solely between monarchists and republicans, it contained formal statements written by the Australian Republican Movement in support of a minimalist or parliamentary republic and the Australians for a Constitutional Monarchy in favour of the *status quo*. The circulation of this document not only gave unfair publicity to both organizations at the public expense, but it also helped create the false impression that the question was simply about whether or not Australia should become a republic, when in fact the practicalities of change could only be about the specifics of amending the Constitution.²¹ Thus, although the question might be stated as “Republic - Yes or No?” the answer would ultimately hinge upon the people’s understanding and interpretation of the actual wording of the proposed amendments to the Constitution. This was to be a differentiation which the ARM was either unable to understand, or unwilling to accept.

In March 1997, Prime Minister Howard introduced legislation to establish a Constitutional Convention. Its terms of reference were to consider whether Australia should become a full republic, and if so, to propose a suitable model for the electorate to consider against the *status quo* as well as the timing and circumstances necessary to implement the proposed changes to the constitution.

The Convention was expected to resolve these two issues in 10 working days between the 2nd and the 13th February 1998.

The issue of republicanism, however, was so narrowly focused on the issue of the head of state as virtually to preclude any discussion of it as a system of government standing in its own right. The Convention, run entirely under the aegis of the federal government, prefigured the arrangements for the referendum a year later.

The Convention comprised 152 delegates of which 76 were elected at a non-compulsory postal ballot conducted through November-December 1997 at which less than half those eligible to vote bothered to do so. Of the 76 appointed delegates, 36 were appointed directly by Prime Minister Howard as representing the community at large; 20 were drawn from Federal Parliament; 18 from the State Parliaments, with one each from the Northern and Capital Territory Assemblies. This was the first convention since 1897 to have included partly appointed and partly elected delegates and, for this reason, was more widely representative than any of its predecessors.

It was again assumed that the delegates would divide neatly into monarchist and republican factions. However, the nomination process was so open that more than 609 persons stood as candidates.²² These comprised 80 named groups and 176 independent candidates. The unexpected emergence of so many non-ARM candidates split the republicans into two camps—‘official’ or ARM republicans, and ‘direct electionist’ republicans. The official republicans early on succeeded in creating the illusion that they had special standing—at least in the eyes of the government and the ALP, both of which deferred to them and their media-backed supporters thanks to Malcolm Turnbull’s tireless attention.

It is a startling and little commented upon fact the total ARM-ACM share of the primary vote was only just over half the total. After preferences were allocated, the 76 elected positions were allocated as follows: ARM 27; other republicans 22; Australians for a Constitutional Monarchy 19; and supporters of the *status quo* 8. This gave the alternative delegates 40 per cent of the elected delegates as against 47 per cent of the primary votes—close, but still 5 delegates short of what should have been allocated on the basis of the primary vote. Surprisingly, and in spite of the ARM having spent millions of dollars on publicity in the three most populous states (New South Wales, Victoria and Queensland), it was outvoted and outnumbered in delegates 15 to 17 by mainly direct electionist republican delegates. Consequently, had it not been for the least populous states, South Australia, Western Australia and Tasmania (which between them sent 10 ARM delegates), the ARM would have been powerless to act without the cooperation of (and therefore compromises with) the other and mainly direct electionist republicans.²³

Having no prior national or even state organization, and, as a consequence, neither a common front, nor even an opportunity to organise before the Convention, the direct electionist republicans were at a disadvantage. Nevertheless, starting from scratch they were able to present to the Convention a credible direct election model; more about which will be said later. Although some did, most ACM delegates decided not to take part in voting for any of the proposed republican models as being contrary to their brief as monarchist delegates. This effectively removed at least 19 delegates from the debates and probably more as, for example, when a crucial vote aimed at deleting the direct election model was taken there were 32 ‘no model’ votes cast. Those that did vote did so in the belief that if the worst came to the worst at least they would have helped secure the ‘least worst’ option.²⁴

The Constitutional Convention took place in the old Parliament House, Canberra, February 2-13, 1998. Its proceedings were published in four volumes later that year.²⁵ The constitutional debate operated at five levels. The first level consisted of a series of televised set-piece and undebated speeches by delegates on the question of whether or not Australia should become a republic. The second comprised a series of closed working groups each delegated to report on specific issues. The third level, brief and strictly controlled public ‘debates’ on the working party reports as well as on the models. The fourth level involved behind the scenes lobbying and pressuring of delegates. And the fifth level, about whose workings little is known, took place in the Resolutions and the Agenda Committees. The Agenda Committee was the more important of the two. It comprised the two chairmen, Ian Sinclair MP (Government, National Party) and Barry Jones MP (Opposition, ALP and ALP National President), Special Minister for State Senator Nick Minchin (who was also Prime Minister John Howard’s proxy delegate), together with senior staff of the Prime Minister’s office, senior staff of the Convention Secretariat and two non-delegate Honorary Counsellors, Hon Howard Nathan QC and Peter King of the Sydney Bar. The committee’s task was to ‘monitor the progress’ of the Convention. Some idea of what might have transpired in this committee was given by Mr Howard Nathan who, an avowed opponent of the direct electionists, was later to describe them, along with other less than tasteful remarks, as a “shrieking fringe of delegates.”²⁶

The proceedings and inner workings of the Agenda and Resolutions Committees, particularly during the last three days of the Convention, have yet to be revealed. Barry Jones in reporting on his role as deputy chairman was moved to remark in his report on the Convention that chairing the Resolutions Committee was “something I will never forget and will certainly be worth a chapter in the memoirs.”²⁷

Although the Chairman, Ian Sinclair and his Deputy, Barry Jones, may have tried their best to be impartial in what was obviously a highly partisan situation, both had previously declared their support for minimalism and their opposition to direct or popular election. Barry Jones in his report on the Convention confessed to having to suppress strong views on the issues and a desire to make helpful suggestions and corrections of fact.²⁸ A similar bias was also evident among many State and Federal parliamentary delegates most of whom (including the Prime Minister) were, with certain honourable exceptions, absolutely and vehemently opposed to the direct election of an Australian head of state.²⁹ The Attorney General, Daryl Williams, who was *ex officio* to play a key role in drafting the 1999 referendum legislation, made a speech in which he knowingly departed from tradition as the Crown's chief law officer by stating his private view as to the advantages of minimalism and the dangers of direct election—and was rebuked by a very senior former member of Parliament delegate.³⁰

Chairman Ian Sinclair and Deputy Chairman Barry Jones, having long been chosen in an arrangement between the Prime Minister and the Leader of the Opposition, left the delegates with no choice but accept this *fait accompli*. The Convention was organised along lines similar to those already tried out by the largely federally funded Constitutional Centenary Foundation's mock constitutional conventions held the year before to commemorate the centenary of Australia's founding Constitutional Convention of 1897-98. As he had attended the 1997 Adelaide centenary mock convention it was all-too-obvious to elected convention delegate Professor O'Brien that a similar procedure was being used to steer the Convention toward a predicated outcome. The 1998 Constitutional Convention turned out to be, in Professor O'Brien words, a piece of Westminster style "political engineering" with the Agenda and Resolutions Committees firmly in control.³¹

Much of this lack of debate was due, despite its limited objectives, to the fact that the government had only allocated ten working days to the Convention. This left little time for serious debate on any topic and, in particular, on working group reports and on the all-important republican models.

The most revealing account of the 1998 Convention is Steve Vizard's *Two Weeks in Lilliput: Bear-baiting and Backbiting at the Constitutional Convention*.³² In this amusing almost tongue-in-cheek account, Vizard explains how any semblance of a genuine debate was frustrated by the way in which the ARM minimalist republicans and ACM monarchists operated very much as voting blocs, with the uncoordinated direct electionists following in the rear. With such a strong and unexpectedly large number of direct election republican delegates, a working compromise between the two republican factions was a possibility. However, as Steve Vizard reports, any chance of this happening was lost when, at a private meeting on the first day of the convention, the ARM decided to defer any contact with the direct electionists, with the result that, as Vizard commented an "idle procrastination will return to bite us."³³ Which it did at the 1999 referendum.

One may conjecture that the meeting did not take place because it was soon discovered that with the majority of the appointed candidates being in favour of its minimalist objectives, the ARM had the numbers to go it alone. In turn, parliamentary delegates who opposed direct election did so more out of protecting their own self-interest in sustaining the privileges of Prime Minister, Parliament, and party, than out of any deep commitment to the republican cause as such. It was not, therefore, very difficult to see that the direct electionists were, by contrast, more concerned with the principles of republicanism than was the ARM with its purely symbolic 'Queenless' republic. As Steve Vizard portrays in much detail and with more than a dash of humour, the ARM high command (with the

tacit support of most of the appointed delegates) managed to dominate the 1998 Constitutional Convention through its behind-the-scene manoeuvrings.

The adoption of the ALP's favourite technique of 'exhaustive balloting' allowed the ARM to get itself of the detested direct electionists in short order. However, although Labor leader Kim Beazley had again reaffirmed the ALP's federal support for a parliamentary head of state, three State Parliamentary Labor Party leaders, Geoffrey Gallop (Western Australia), Peter Beattie (Queensland) and Michael Rann (South Australia) were direct electionists. All three were of the opinion that a true republic was one characterised by popular sovereignty, the people's right to elect their head of state and a codified constitution. Peter Beattie, the ALP Premier of Queensland, warned the ARM leadership when he said, "The bottom line is the direct election of the president and the empowering of the Australian people. ... It is no good winning the argument at this Convention and losing the referendum. ... It has to be won in the hearts of the Australian people. ... It is about giving a heart to democracy in Australia." His words were completely ignored.

Although Prime Minister Howard took little discernable part in the public part of the proceedings, the Convention's fate ultimately hinged on what little he had to say. In opening the Convention, Howard repeated his opposition to Australia becoming a republic by claiming that not only would none of the options on offer deliver a better system of government, but also that some would even gravely weaken the present arrangements. Howard was particularly concerned to defend the role of the head of state as the politically neutral defender of the constitutional integrity of the nation and to support the corollary that a cabinet headed by a Prime Minister should exercise executive power. He was also of the opinion that under a republic the conventions currently governing the operation of Prime Minister and cabinet, as well as the powers currently enjoyed by the Governor-

General, would have to be codified. This he believed would, in turn, necessarily affect the position of the Senate and its powers; as well as questioning extent to which the Governor-General's replacement in a republic should have the power to dismiss a government enjoying majority support in the lower House as happened in 1975.

Codification was made the bogey by more than one speaker, either on the ground that it was simply too difficult a task, or because it would inevitably involve intervention in the affairs of Parliament by the High Court. Whichever the objection, most commentators regardless of their position on the republic were agreed that codification would be essential under a directly elected head of state. But, as the direct electionists pointed out, these objections, as with most other objections to direct election, were merely issues that would be settled during the formulation a truly republican constitution. Nevertheless, the Gallop direct election model did make a preliminary stab at codification. By defending current practice, the Prime Minister (with his belief in the *status quo*), along with likeminded monarchists and minimalist republicans, was really demonstrating the extent to which Australia is currently governed by the rule of men rather than the rule of law.

John Howard's central objection to direct election was that it "would inevitably create a rival power centre—and I mean a political power centre—to that of the Prime Minister, and thus weaken the parliamentary system itself."³⁴ He instanced a hypothetical case where, with a Prime Minister having only a small majority in the House of Representatives and a minority in the Senate, a directly elected president "could easily be emboldened to believe that he or she were performing more than formal or ceremonial functions." This, like so much else said against direct election, was merely the consequence of imagining that powers designed to suit a constitutional monarchy could be passed to a republic—

minimalist or not—and continue to operate as before. It is ironic that the Prime Minister, whose office is nowhere to be found in the Constitution, exercises powers delegated to him by a Governor-General in whom are vested all save the legislative powers of government—and even here the Governor-General has certain rights of veto.³⁵

Nevertheless, having made plain his support for the *status quo*, Howard promised the Convention that “if clear support for a particular republican model emerges from this Convention my government will ... put that model to a referendum of the Australian people.” What he meant by “clear support” (and later “clear view”) did not become apparent to anyone, not even to the Prime Minister, until the last crucial hours of the Convention.

The Prime Minister then made another promise. He said:

If this Convention does not express a clear view on a preferred republican alternative, then after the next election the people will be asked to vote on a plebiscite which presents them with all the reasonable alternatives. A formal constitutional referendum, offering a choice between the present system and the republican alternative receiving most support at the plebiscite, would then follow. It is the hope of my government that this Convention will speak with sufficient clarity to obviate the need for a plebiscite.³⁶

Nevertheless, he was also making it plain that the last thing he wanted was a plebiscite. Or, in other words, he did not want the people to be allowed to choose for themselves what they wanted—and, as he knew, neither did the monarchist, minimalist and most parliamentary delegates.

The conventional explanation of the difference between a referendum under section 128 of the Constitution and a plebiscite is that whereas only questions on a ‘yes’ or ‘no’ basis can be put at a referendum, people may choose from a number of alternatives at a ‘non-binding plebiscite’. However, since section 128 does not in fact debar Parliament proposing multiple-choice amendments, the real reason

for a plebiscite is that whichever way it goes, Parliament is not bound to act on the result, whereas it must on a referendum. Either way, the institution of a multiple-choice plebiscite or referendum would have taken the Convention debate to the people. This possibility had to be stopped because a plebiscite would have suited only the direct electionists.

The Convention decides on a model.

The Convention was to end on Friday, February 13. On the morning of the day before the Convention closed delegates were presented with four republican models labelled A, B, C and D. Models A and B were, respectively conservative and a radical direct election models. Models C and D were parliamentary models with, in the case of Model C (usually referred to as the McGarvie model after its proposer, former State Governor Richard McGarvie), the monarch was to be replaced by a super elite committee chosen from among former Governors-General, Presidents, State Governors and Lieutenant Governors and judges and Justices of the Federal and High Courts. To be known as the Constitutional Council, its role was constitutionally to endorse the appointment and the dismissal of the President on the recommendation of the Prime Minister in a manner similar to that already applying in respect to the Queen with the constitution remaining otherwise virtually unchanged. As a minimalist model, McGarvie's model was absolutely minimal. Model D, also known as the Bi-Partisan Model, was the Keating model adapted to make it even more palatable to conservative and Westminsterite republicans.

The ARM-Turnbull Bi-Partisan Model D introduced the idea of a community based nomination procedure by which the Prime Minister received a non-binding list of presidential nominations. The Prime Minister, with the prior agreement of the Leader of the Opposition, would then nominate a candidate for confirmation without debate by a two-thirds majority of Parliament at a joint sitting. Once

appointed, a president could be dismissed, without notice or appeal or reinstatement, by a Prime Minister who need only seek, within 30 days, confirmation by the House of Representatives, where he would normally have majority support. Richard McGarvie's principle objection to the Bi-Partisan Model was to the Prime Minister's right instantly and without warning to dismiss the president. This, as McGarvie commented, demeaned "the president to less than that of any base clerk." This particular criticism was widely echoed and played a crucial role in helping reject the 1999 referendum.

The preferred model was chosen by exhaustive voting involving four rounds of elimination voting. Delegates were given a vote for only one of the models presented, and, where appropriate, for "no model." Early in the Convention it had been agreed that the key question, "monarchy or republic?" would be left until the very end of the convention in order that delegates be fully informed as to the alternatives before voting. This explains why there was such a large a "no model" vote. In round one, votes were cast as follows: for Model A (Gallop 'direct election') 27; Model B (Hayden 'people's choice') 4; Model C (McGarvie 'wise men') 30; Model D (Turnbull 'bi-partisan') 59; 'no model' 31 votes. Model B having been eliminated the second round of voting proceeded as follows: Model A 30 votes; Model C 31; Model D 58, "no model" 32 votes. Direct election was out by only one vote, but that was sufficient to end the matter.

The framers of direct election Model A had gone a long way to preserve the supremacy of Parliament by giving it the exclusive right to nominate a short list of presidential candidates for the people's choice at a general election. With the exception of codification, these compromises met every 'in principle' objection to direct election raised by its conservative Westminsterite and ARM critics while, at the same time, providing a low-cost system of electing a non-political president. Why this model should have been rejected on the day was made painfully clear by

Malcolm Turnbull in his account of the 1998 Convention and the 1999 referendum in his autobiographical book *Fighting for the Republic*.³⁷ From the general tone of his book one gathers that there was to be no compromise with the direct electionists who were in his opinion, in comparison with his 'Who is Who' list of conservative supporters, low life characters. In order to ensure that it was not going to be the alternative at the final ballot, direct election had to be defeated and the earlier the better.

While one may understand Turnbull's objection to direct election prior to the Convention, his outright rejection of the Gallop compromise is inexcusable and can only be explained by his eagerness to secure the bi-partisanship of the conservative republicans. The story is, however, complicated because, as most delegates realised, the inclusion of codification in the Gallop model was bound to be a stumbling block. This was despite the fact that without some codification a genuinely republican model could not be developed. The Gallop Model accepted this fact and used as its exemplar the codification recommended by the Republic Advisory Committee under the chairmanship of none other than Malcolm Turnbull. Turnbull later admitted that the RAC's draft partial and complete codification was that part of the report of which he was most proud. He should have stuck to his original ideas. The key issue of codification had come up as early as Tuesday, 3 February, the second day of the Convention when, following the presentation of reports by seven working groups deputed to look at the question of the powers of a new head of state, complete or even a partial codification were debated and rejected.

According to Turnbull, the decision to retain the existing powers of the Governor-General without codification struck a deadly blow to direct election because no one, as he believed, would support a directly elected president with such clearly defined powers. He also claimed that the Gallop proposal to give

Parliament the task of nominating three presidential candidates for direct election would have provided three party political candidates with little likelihood of an independent ever entering the contest. All this may be true, but the fact that the ARM caucused every single day of the Convention and agreed in advance that none of their delegates would support direct election without complete codification of powers (which very few of them would have agreed to under any circumstances) helped to put paid to any idea of a compromise. Having done his best to see that direct election was not on offer, Turnbull then had the effrontery to accuse Clem Jones, the leading direct electionist, of doing his best to ensure that the referendum would be defeated. With the direct electionists off the board, the ARM then set about suborning the direct electionists to their side.

On the third round of voting “Status Quo” was included as an option to Models C and D. The voting was as follows: Model C 22; Model D 70; Status Quo 43; “no model” 12; abstain 4. On the basis of this result one would have thought that the next round of voting would have been between “Status Quo” (43 votes) and Model D (70 votes). However, it was agreed to drop “Status Quo” and the Convention went into round four of exhaustive voting. The results were: Model C 32 votes; Model D 73; “no model” 43; abstain 3.

As it did not have the required absolute majority of 77 votes, two direct electionists, Professor O’Brien (WA) and Councillor Tulley (Qld.), immediately questioned Chairman Sinclair’s prompt ruling “that [thus] Model D, the bipartisan model, is the preferred model.” The chairman, without apparently batting an eye, then slyly declared what was clearly not a majority according to the rules to be a majority on a “preferred model on an indicative basis”—leaving Messrs Tulley and O’Brien spluttering helplessly on the sidelines. Forced through at a cracking pace on the Thursday morning, with virtually no debate until after the lunch, exhaustive voting had succeeded, as intended, in disposing of Models A, B, and C.

Nevertheless, with fewer than half the delegates voting for Model D in the morning, it was becoming obvious that when it came to the final round of voting on the Thursday evening, the Bi-Partisan Model D could be facing defeat. With only 75 votes for, 71 against, and abstain 4, the motion, not having secured an absolute majority, should have been declared lost.

But chairman Sinclair, having overruled Tulley and O'Brien's objection that the preferred model had not won a simple majority of the delegates present and voting, set a precedent for the final day by clearly indicating that abstainers would not to be counted in defining what was, or was not, a majority. Steve Vizard, in writing up what happened that evening after the close of play, reported that a group of disconsolate ARM members, realising that they were facing defeat, discussed how they might have won the support of as many as 10 delegates (most of whom would have been McGarvie-ites led by lawyer Greg Craven) had they played their cards better. The question uppermost in their mind was "would any of these come across during the night?"

The Convention is taught a lesson in political arithmetic

On the last day, Friday 13 February 1998, the Convention made four fateful decisions. The first was whether or not to support, in principle, Australia becoming a republic; the second, to decide on the principles and transitional procedures affecting the introduction of the preferred model; third, to decide whether or not the Convention supported the Bi-Partisan Model (D); and lastly whether that model should be put to the people at a referendum. The ensuing voting was most instructive.

On the question of Australia becoming a republic there was an absolute but not overwhelming majority of 89 votes in favour. As a percentage of those voting, it was, at 59 per cent, closely in line with what the opinion polls were showing at

the time. Although some would argue that on such an important matter as this it was far from a convincing majority, it was to carry much weight with Prime Minister John Howard later in the day. The resolution setting down the principles and transitional procedures to be followed should Thursday's "preferred model on an indicative basis" be adopted, was passed by 102 votes, with 16 'No' votes and 32 abstentions—most of which were ACM supporters. Surprisingly, the direct electionists voted in all three categories. This indicated that they had not caucused on the issue and were in some disarray.

The outcome of the crucial vote on Thursday's "preferred model on an indicative basis" (Model D), depended on whether overnight any republicans in the McGarvie-ite and direct electionist camps would, or could be, persuaded to change their minds. The ARM heavies, who had been lobbying hard for support for a parliamentary president, must have approached a number of delegates in attempt to swing the vote their way on the Friday.³⁸ Among those approached was Federal Treasurer, McGarvie-ite republican Peter Costello, who gleefully informed delegates later that Malcolm Turnbull had "come like Nicodemus in the night to steal my vote". It is no wonder, for had they succeeded, it would have encouraged other McGarvie-ites to defect.

However, in the event the Bi-Partisan Model actually lost support as three delegates who had voted for it on the day before, voted against it on the Friday, while three delegates who had voted against it changed their minds and voted 'yes', with two former 'yes' voters abstaining. The net result was that only 73 voted for the Bi-Partisan Model, 57 voted 'no', and 22 delegates abstained. That there was certainty in the minds of at least some delegates as to the meaning chairman Barry Jones would attach to an abstained vote is clearly indicated in the fact that out of the 22 abstentions, 17 were by direct electionist republicans. Among them were Phil Cleary, Clem Jones, and Ted Mack. The fact that Richard

McGarvie was also among those who abstained confirms that they voted “abstain” to avoid appearing as though they had abandoned their republican principles, and in the expectation that to have passed the motion would require a majority of those present and voting—that is, 77 votes. Chairman Sinclair’s previous day’s ruling on what constituted a majority must be held responsible for swelling the abstain vote. The late Professor O’Brien, who voted against the proposal, rightly told me a day or two after the event that he had voted ‘no’ because the final vote had nothing to do with whether or not one was a republican, but whether one approved of the resolution. Thus, had all 17 abstaining republicans followed Professor O’Brien’s admirable example in voting ‘no’, the result would have been ‘yes’ 73 votes, ‘no’ 74, abstain, 5.

On the numbers, the Bi-Partisan Model had been rejected. It was now open for a plebiscite. To the astonishment of many, and probably a large percentage of those who had either voted ‘no’ or abstained, Barry Jones, a Labor member of Parliament, Federal President of the ALP, highly skilled Labor Party rulebook chairman, and a staunch supporter of a minimalist republic, declared the motion carried. Immediately, Queenslander Councillor Tulley and Western Australia Professor Patrick O’Brien moved a motion of dissent from the chairman’s ruling. After a brief exchange, during which the chair trumped his argument by reference to Australia’s standard text on the conduct of meetings and the common law precedent that an abstention is neither for nor against a motion, a motion that the motion be put was passed, gagging any further debate. But, as Professor O’Brien later pointed out, the chairman’s ruling was contrary to the Constitutional Convention’s *Order of Proceedings and Rules of Debate* as set out under rule 24 that “Questions shall be decided by a simple majority of delegates present.” As there were 152 delegates present on that afternoon, the majority should have been 77 (half of 152 plus 1), and not, as the chairman ruled, the number of votes cast for

the motion. Since no one appears to have referred to rule 24 at the time, the chairman's decision was allowed to stand and the plebiscite was lost.

Even so, the objection that 73 was not a majority might have been further debated following Bill Hayden's observation (using the Prime Minister's own words) that "there is a clear view emerging. The clear view is 79 vote 'no' and Abstain and 'yes' 73. That is a clear view as distinct from any legal interpretation." The Prime Minister, hearing his own words used to determine the issue in the negative, immediately responded by declaring that:

The only commonsense interpretation of this Convention is, firstly, that a majority have voted generically in favour of a republic. In fact 89 out of 152 voted generically in favour of a republic. Secondly, amongst the republican models, the only one that has got 73 votes is clearly preferred. When you bind these two together, it would be a travesty in commonsense terms of Australian democracy [which is colloquially regarded as a "numbers game"] for that proposition not to be put to the Australian people. Moreover it would represent a cynical dishonouring of my word as Prime Minister and the promises that my coalition made to the Australian people at the last election.³⁹

And then, to make sure delegates understood what he was saying in support of the chairman's ruling, the Prime Minister interjected a few minutes later to say that in his meaning of a clear view "we do not need a plebiscite. I do not want to have a plebiscite and I will not have a plebiscite." This is exactly contrary to what he had said at the beginning of the Convention when he said "If this Convention does not express a clear view on the preferred republican alternative, then after the next election the people will be asked to vote in a plebiscite which will present them with reasonable alternatives."

The possibility that this situation might arise had already been foreseen by Professor O'Brien during the previous week when, realising that there might be insufficient support for a particular model, he had tried unsuccessfully to get the Prime Minister to say exactly what he had in mind in using the expression "clear

view”. As O’Brien said, “it may be the case that there is not a substantial majority in favour of any particular model.” In that event, there will need to be a plebiscite “to determine which proposition should go to a referendum.” Unfortunately O’Brien, in asking his question, used the word “consensus” instead of “clear view”, this gave Howard, a highly skilled parliamentarian, the opportunity to deny ever having used the word consensus and thus to avoid giving an answer to a question on which the result of the convention would depend a week later.⁴¹ Howard, knowing that only the direct election delegates (of whom Patrick O’Brien was among its staunchest supporters) could possibly benefit from holding a plebiscite, relied on the ARM and ACM delegates (for quite different reasons) to support him in breaking his promise to hold a plebiscite.

Thus, in the dying hours of Friday the thirteenth, Howard, having accepted the deputy chairman’s ruling that 73 out of 152 those present and voting was a majority in favour of the Bi-Partisan Model, combined this with the 89 votes in favour of Australia as an (unspecified) republic to disclose what he had all along meant by a “clear view”. And that was, if a majority were in favour of a generic republic, then the model with the largest number of votes, regardless of how many, was the preferred model!

The Prime Minister’s declaration that there would be no plebiscite turned the ARM and their supporters’ feeling of dismay at not having obtained the support of the majority of those present into one of joyous release at being saved from an humiliating defeat either then or at a plebiscite they knew they could not win. It is no wonder the chamber resounded with cheers more of relief than victory. The die was now cast and with the Bi-Partisan Albatross strung about their necks, the ARM and its minimalist and its conservative establishment and ALP supporters were sent joyously to meet their fate.

Malcolm Turnbull's version of the political arithmetic is somewhat different and worthy of note. Turnbull agreed with the chairman's ruling that those who abstained did not vote. If this is so, why did such knowledgeable campaigners as Clem Jones, experienced Labor Party member and former Lord Mayor of Australia's most politicised capital city, abstain? A clue as to why he should have believed that an absolute majority was required to pass, is a ruling made as early as Tuesday 3 February by chairman Sinclair in answer to the question querying what constituted a majority of the House. His reply was:

No, I counted a simple majority. In the final resolution, as we determined in the rules of debate, everybody's name will be recorded and whether they voted for, or against or abstained. On this occasion, as you will note from the rules of debate, the requirement is that we determine it by a show of hands and a simple majority. At this stage it is a simple majority of those present. At the final stage there will be a different method of taking the vote.

This, as Professor O'Brien pointed out, is precisely the reason why Clem Jones and his republican colleagues voted abstain in the expectation that their votes would still count as being among "those present" and not stolen by the legal sleight of hand so adroitly used by Barry Jones to crush opposition to his ruling.

Turnbull also argued that because the delegates voted 133 to 17 in favour of putting the Bi-Partisan Model to a referendum they were somehow confirming the choice of model. There were quite a few members of the ARM who believed this was a measure of the support for their model, when in truth at least 60 of those who voted in favour of the model going to a referendum wanted it to fail. Turnbull then went on to argue that because only 31 voted (at most) for direct election, it would never have succeeded because 14 later voted for his model. He has a point, but as direct election was the people's choice he fails to recognise that the majority of elected delegates (42) voted against the model on the Friday.

As part of their strategy to attract both direct electionist and conservative support, the minimalists had secured in the convention communiqué a conditional promise that should the referendum pass, then all those aspects of republicanism, which should have been discussed at the Convention, would be the subject of another convention to be held not less than three nor more than five years after the referendum. This was intended to be no more than a sprat to catch those who believed, as many did, that such vital issues as a bill of rights should have been part of the 1998 Convention debates. The communiqué was also designed to encourage the direct electionists and true republicans to switch and vote ‘yes’ at the referendum. During the run-up to the referendum, a group of ARM supporters started a ‘Yes but More’ campaign with that aim in view. Their efforts had little, if any, effect.

The parliamentary minimalist republicans may have been ecstatic at having, as they thought, won the day. But they ignored then, and continued to ignore, the plain fact that the Bi-Partisan Model was not only against the often confirmed wishes of the people to have a direct say in the appointment of their head of state, but contrary to the warnings given them by even some of their supporters. At the Convention, even super-minimalist Richard McGarvie, a former State Governor and establishment figure, was moved to describe Model D as the “Turnbull camel.” The father of minimalism, law professor George Winterton, in declaring his support for Model D on the Thursday made the amazing admission that it would look bad for a Prime Minister to be sacking the president. As he put it, “the president should be appointed by the authority of the people and should be removed by the authority of the people.” He went on to say with “the president and the Prime Minister racing to sack each other” there was the possibility that “if the president sacked the Prime Minister [first] you would not have a Prime Minister to move a motion of removal of the president.” He also pointed out that the Prime Minister’s motion to remove the president should “not treated as a vote

of no confidence”—to which he added “the idea of a head of state being basically removed, whether or not the House agrees, is bizarre.” Nonetheless, the learned professor still voted ‘yes’ to a model that contained precisely that proposition.

The ARM’s failure to compromise with their fellow republicans was the root cause of their eventual defeat. In practical terms, had there been choice on the Thursday between Direct Election Model A (instead of McGarvie Model C) and Bi-Partisan Model D, a compromise could have been worked out overnight between the two camps. As it was, the lack of consultation between the two republican groups turned them into enemies.

The gulf between the two schools of republic rested on the difference between those who believed in the sovereignty of the people and those who believed in the sovereignty of parliament. This was most clearly revealed in the dying hours of the Convention by elected ARM delegate Steve Vizard, a lawyer, and an accomplished wit. Vizard, utterly convinced of the sovereignty of parliament, spoke of a differentiation between Parliament as the cornerstone of democracy in Australia, and Parliament as the workplace of politicians. He claimed that to demean Parliament as an institution was to demean “our democracy, our history, our country and our tradition, including the British ones we have inherited.”⁴² He then went on to claim that a parliamentary president would make “the least changes to our basic democratic structure and traditions.” By stressing the almost unlimited extent of the power and authority of Parliament, he was also asking people to accept the proposition that a Prime Minister had the right instantly and without notice to dismiss the guardian of the Constitution. As the ARM’s last major speaker Vizard demonstrated that whereas the Movement stood for nothing less than the total and complete sovereignty of Parliament, the direct electionists based their case on the foundation stone of the people from whom all other sovereignties are derived. It is difficult to believe that Vizard did not realise that

he was asking the people to entrench in the constitution an unassailable Thomas Hobbesian Leviathan-like Parliament, and one more akin to a seventeenth century republican Parliament under Cromwell, than to the needs of a twenty-first century continental federal republic.

Shortly after Vizard had stopped speaking, cleric and elected delegate, The Right Reverend John Hepworth, pointed out that the Crown was, as he put it, “the encapsulation of the sovereignty of the people ... which does not give sovereignty to the Parliament”. The direct electionists took the view that in a republic the sovereign powers of the Crown must descend upon the people whose legislative and executive powers are periodically delegated to Parliament, and to Prime Minister and cabinet, respectively.

The last word on this issue is best reserved for Malcolm Turnbull who, in these words, confirms what the fight for the republic is really about.

Direct election would not be about symbols, but about our Westminster system of government. It is one thing for people to say in an opinion poll that they would like to have a directly elected President. But would they feel the same way after months of listening to some of the most respected leaders of this country telling them a directly elected President would radically undermine Australia’s system of parliamentary government?

Well, as we know, his proposition was put to the test and the public parade of Australia’s power elite probably did more harm to Turnbull’s cause than any other. But in saying that, Turnbull confirmed that the war, not just the battle, is about reforming Australia’s parliamentary system.

Turning the Bi-Partisan Model into a constitutional amendment bill

The task of converting the principles laid down by the Constitutional Convention into a proposed law fell to Federal Attorney General, Daryl Williams. Williams, a republican and active supporter of the Bi-Partisan Model, who had already played a key public and private role during the Convention. An exposure

draft of the proposed *Constitution Alteration (Establishment of Republic)* 1999 was released on March 9 and shortly became widely available through the Internet. The amendments, which were principally to do with the nomination, appointment, and dismissal of the president together with the removal of all references to the Queen and Governor-General, amounted to 69 alterations, in total more than all the previous changes to the constitution.

The amendments may be summarised as follows:

- The new head of state was to be an Australian citizen and known as the president. No reference was made to either prior residence in Australia or to minimum age.
- The president was supposed to be neither a politician nor a member of a political party at the time of appointment - but could be immediately prior to nomination.
- The president was to have all the powers and privileges of the Governor-General, including the appointment of the Prime Minister and all other ministers, plus, by specific reference, all the unwritten conventions of the highly disputed reserve powers to which there had been no previous constitutional reference.
- There was no provision prohibiting combining the offices of president and Prime Minister in the one person.
- A 32-member nominations committee, 24 of whose members were to be appointed either by the Prime Minister or the federal Parliament, was to make a secret, but non-binding, nomination report to the Prime Minister. Any qualified citizen was entitled to nominate.
- Although a federation, the States were only to be allowed to appoint eight of the 32 positions on the nomination committee.
- On receipt of a nomination, the Prime Minister in secret consultation with the Leader of the Opposition, was to present a single nomination (of their choosing) for confirmation by a two-thirds majority at a joint sitting of the Senate and the House of Representatives.
- Once appointed, the president was to serve an indefinite number of renewable five-year terms at the sole discretion of the Prime Minister, unless the occupant was to resign beforehand.

- The Prime Minister was to be given the right summarily to dismiss the president without notice, without explanation and without any rights of appeal or reinstatement. Once he had dismissed a president a Prime Minister had 30 days in which to have his action confirmed by a simple majority of the House of Representatives—the one house that he, as Prime Minister, controlled. If the Prime Minister failed to obtain the necessary approval, (which would probably then lead to the PM's resignation and most likely force a general election) the president would nevertheless stay sacked.
- The offices of Prime Minister and Leader of the Opposition, whose powers (except those relating to the nomination and dismissal of the president) and manner of appointment were nowhere defined in the constitution, were to remain appointments according the convention of responsible government.

Discussion will be limited to these amendments only.

Seen in the cold light of a parliamentary bill, the inherent deficiencies of the Bi-Partisan Model and the consequences of not codifying became all too apparent. The most obvious was the sudden appearance of Prime Minister and Leader of the Opposition in the constitution (without explanation as to who they were and how they got there) jointly as part of the presidential nomination process and the Prime Minister alone in connection with to the dismissal procedures. Yet, as Malcolm Turnbull had already made plain in a draft constitution published in his book *The Reluctant Republic* (1993) it is vital that the rules governing the appointment and dismissal not only of a president but also a Prime Minister must be along strictly constitutional lines—and with just cause. Thus, according to Turnbull in 1993, dismissing a president must require not only a two-thirds parliamentary majority, but also a replacement within 90 days of the dismissal. Indeed, it is only by systematically comparing Turnbull's original ideas as set out in his *The Reluctant Republic*, with those to which he later agreed to in 1998, can one can begin to understand the extent to which he compromised not, one might have expected, with his fellow republicans, but with the *status quo* Westminsterites. Thus, the reserve powers, whose conventions make sense in a constitutional monarchy, were

now to apply in a proposed republican constitution according to the “conventions hitherto applied.” Since these highly controversial powers had never been made law, this attempt at compromise could only make matters worse. But that is what Turnbull agreed to in 1998-99.⁴³

As was intended, the office of president was to pose no threat or alternate centre of political power to the Prime Minister. However, so slight were the qualifications required that there were no minimum age, and nor residence or born in Australia requirements, and no bar to a Prime Minister (with the connivance of Parliament) in a real or imagined emergency becoming president (*de jure*) and Prime Minister (*de facto*) and governing the country through the Executive Council and ministers appointed by him as president. Since the proposed new constitution was supposed to last for another 100 years and propounded by no lesser person than the Attorney General as being 'safe', one was entitled to look into our own and European recent history to discover what could happen in a crisis.

For example, since there were no age, place of birth or residency in Australia requirement (as there are for example in the United States) the possibility of having a president with an undeclared or biased cultural allegiance or an association through a previous citizenship of another country, or as the result of long residence abroad, were ignored. Similarly, the much trumpeted idea that the proposed law would make Australia a truly independent country ignored the fact that the Australian Constitution is not a freestanding extra-parliamentary document, but merely clause 9 of the British Parliament's *Commonwealth of Australia Act* of 1900. The remaining eight clauses of the British Act, including those affecting the title, a preamble similar to that heading up the US constitution, and the supremacy of federal law, were left untouched.⁴⁴ These further emphasized the incomplete and shallow thinking of the minimalists. It also revealed the

inadequacies of the Australia Acts (1986) which although intended to ensure Australia's absolute sovereignty did not, as had Canada four years before, patriate the Commonwealth of Australia Constitution Act by title.⁴⁵

Aside from these aspects, the most objectionable proposal, as Professor Winterton had already pointed out, was the Prime Minister's power of dismissal. There were others of a seemingly minor importance—at least to those who saw nothing wrong with the proposed amendments. The largest of number of these covered the many replacements of references to the Queen and the Governor-General by the word President who was now to become the two persons in the one. However, as was made plain by many speakers, and not least by the monarchists, references to the Queen are references to the Crown whose underlying authority legitimises all governments in Australia. Therefore, in absence of any reference in the proposed law as to who or what replaces the sovereignty of the Crown, one can only assume that sovereignty was to rest with Parliament or (if not that in institution), with the metaphysical nation-state. In either case, the legitimacy of government, which constitutionally had its roots in Queen and Crown, was to find no expression in the living sovereignty of the people and of their right to govern themselves and for which so many speakers pleaded at the Constitutional Convention.

The referendum campaign and how it was fought

Amendments to the Commonwealth Constitution must not only be approved by a double majority of states and people, but also framed and passed by an absolute majority as a proposed law by either one or both Houses of Parliament.⁴⁶ The 1999 referendum bill differed from all previous attempts to amend the Constitution in the scope and number of the proposed amendments to the extent that it came close to being a rewrite. Consequently, the answer to the question was no longer in the content of the question, but in the meaning of the proposed law.

The Howard government recognised this by financing a massive publicity campaign which included financing independent ‘yes’ and ‘no’ case committees to the tune of \$7.5 million dollars each. This was in addition to the required by law distribution of by parliamentary ‘yes’ and ‘no’ case statements along with copies of the proposed law. The 1999 referendum also differed from most other referendums in having large privately as well as publicly financed non-party political organization in the shapes of Australian Republican Movement and, in an informal alliance of convenience with direct electionist republicans, the Australians for a Constitutional Monarchy to argue the ‘yes’ and ‘no’ cases.⁴⁷

The distribution of the required by law “Yes/No” pamphlet was the responsibility of the independent Australian Electoral Commission under whose auspices attendance at a polling station was compulsory. According to law, this pamphlet must be posted and available to the electors not later than 14 days before polling day. This was really far too short a period in case of the 1999 referendum. Fortunately, the early publication of the draft law on the Internet played a significant role in serving as only freely available copy.

As one who had long believed that the only just cause for Australia to become a republic was one which advanced democracy and the status of the people, my feelings on first sighting of the new law affecting the implementation of Australia as a republic was one of complete and utter rejection.⁴⁸ It was not that I was unaware of what was to come (I had after all stood as a candidate for the Constitutional Convention and had followed its debates), what shocked me was the impact of seeing the principles of the Bi-Partisan Model translated into parliamentary legalese.⁴⁹ Indeed, it was so bad that it could not, by any stretch of imagination, be considered an improvement on what we already had. It was not only bad from the absolute minimum requirement that it improve Australia’s existing system of government, but even worse for the future of democracy and

the status of the people in Australia. The no-case was no longer a question of helping defend the *status quo* because it patently better than what was on offer, but of protecting Australia against something far worse, a parliamentary dictatorship.

Within a few days of the publication of the draft law I invited a small group of people to join me in opposing the proposed law by doing all we could to convince our fellow West Australians not to vote ‘yes’ on referendum day sometime in either late October or early November.⁵⁰

Our “Elect the President Group” (as we called ourselves) had two priorities. The first, and foremost, was to convince (if they had not already done so) the ACM—now calling itself “No Republic-ACM”—that, the real issue was to expose the proposed law and all its faults for what it was, a dud. The last thing we wanted was for the ACM to turn the referendum into a contest between direct electionist and monarchists by making the Queen their central concern. Aside from enabling us to have common cause with the monarchists, who kept their side of the bargain to the letter, this would enable the ACM to put the monarchy within the context of the *status quo* with which, given the proposed alternative, we had no quarrel. By about the end of March we had reached agreement with our Western Australia branch of the ACM that we would argue our case on the merits of the amendments as set out in the proposed law, while attacking the ARM’s case for what it was, a smoke screen of emotion and nationalist focused on the symbols of a republic epitomised by an Australian citizen as head of state. Our principle worry in the early days was whether the monarchists in the other States would give credence to the ARM’s thin gruel of emotion and nationalist rhetoric by arguing for the monarchy and the *status quo* rather than against the proposed law.

A meeting with senior members of the newly created “No Republic -ACM” followed by urgent telephone calls to our counterparts in Sydney and Brisbane

allayed our fears on this score. Reg Withers, former Member of Parliament, and leader of the Western Australian ACM campaign, and law professor David Flint of the national ACM organization impressed us by their grasp of the political realities and the vital importance of attacking the proposed law. In Western Australia, we agreed to work in parallel each attacking the proposed law as each saw fit. On our limited budget our main thrust as direct electionists was aimed at getting invitations to speak at public meetings and debating the ARM wherever the opportunity offered itself.

Our second priority was to educate the public. This meant making use of any and every possible opportunity that came our way to meet what used to be called the “man [and woman] in the street.” We did everything we could to make our presence felt in clubs, associations and in a wide range of informal meetings. Wherever we went we hammered home the brute fact that the referendum was about *consenting to a proposed law to alter the constitution*. To do this we had to plunge into detail about the proposed amendments, and in doing so we confounded those who had a low opinion of the staying power of the people by asking our audiences to read and consider the proposed law line-by-line, and word-by-word. In all our encounters with the ARM and their yes-case supporters we learned that the thinking public—in practice those who were not already ideologically or emotionally pre-committed—were quick to realise that the speakers for the yes-case were generally unable either to support or defend the proposed law on its merits.

We were heartened by the crucially important fact that polls taken after the 1998 Constitutional Convention continued to show a preference for a directly elected head of state. Our task was, thus, to convince direct electionists to stay firm and not to be persuaded by the ARM’s false and misleading promises and arguments to switch merely on the grounds that this would give them a republic.

As a result, some of our members found themselves involved in exchanges of opinion with people in clubs and hotels in typical Australian fashion. As the group's main public speaker, I addressed between 750 and 1,000 people at various metropolitan venues either alone or with ACM and ARM speakers.

However, the task of educating the public would have been impossible without outside help. Unfortunately, the electronic and print media were of little help as most were either openly or covertly peddling the by now familiar ARM line, and even when we were reported, the stories and photographs were slanted.

Indeed, one of the most frightening aspects of the entire referendum campaign was the almost total hostility among journalists, radio and television commentators, photographers, and cameramen toward direct electionists. The Australian Broadcasting Corporation's two locally produced well-balanced Western Australia television panel discussions were among the few bright spots in an otherwise bleak media landscape. By contrast the print media and most talk back shows gave the distinct impression that they uncritically favoured the ARM's yes-case. If this supposition is true, the most charitable explanation could be that it was easier for journalists and talk back hosts to concentrate on the emotionalism of the republic than present detailed criticisms of the proposed law. Indeed, very few writers and journalists seemed to comprehend that this was what the referendum was really about. This accounts for the fact that the media could be generally relied upon to give favourable reports of ARM gatherings and personalities. Because the media could not accept the fact that there were many reasons for supporting the *status quo* other than being a monarchist, all those who opposed the ARM were tagged as being monarchist sympathisers. In fact, so few journalists appeared to have taken the trouble to read the proposed law that they (and even those who had) used the "keep it simple stupid" principle to justify not going into any detail. The print media did, however, print some fine pieces in

support of the no-case, but as most were written by outsiders their publication was clearly intended to balance the newspaper's own bias. One of the few exceptions to an otherwise almost universal newspaper editorial support for the yes-case was the *West Australian* newspaper which came out strongly against a parliamentary appointed head of state. For his pains, Paul Murray, *The West Australian's* direct electionist editor, received a drubbing from Malcolm Turnbull who accused Paul of wanting to be "the man who killed the republic."⁵¹

Lacking any real contact with the media, the direct electionist's no-case in Western Australia owed much of its ultimate success to some generally unacknowledged developments. The most vital was the Howard government's decision to fund the referendum campaign with a grant of \$40 million dollars to be divided three ways: \$7.5 million each to the ARM and (initially) the ACM to be used (under strict guidelines) to foster their respective 'yes' and 'no' cases; and \$25 million for a government-controlled neutral information and education campaign.

Our joint agreement with the ACM to leave aside our differences on the bigger issue of republic 'yes' or 'no' began to pay off. Two direct electionists were invited to join what would have otherwise been an entirely "No republic-ACM" publicly funded 'no' committee. The direct electionists were, philanthropist Clem Jones, long time supporter of the ALP, former Lord Mayor *extraordinaire* of the Greater City of Brisbane, and Ted Mack, former Mayor of North Sydney, and independent member of the New South Wales and Federal Parliaments who, on leaving the latter had declined to accept, on principle, the usual golden handshake. The no-case committee was chaired by that redoubtable monarchist and elected Constitutional Convention delegate, Ms Kerry Jones, who was also the executive Director of the ACM.

This marriage of opposites worked extremely well and throughout the campaign there was unity of purpose based on our conviction that the proposed law was neither in the national nor in the public interest. Although it was clearly understood that on another occasion we would most certainly be in opposite camps we shared the conviction that, fundamentally, the question was really about where sovereignty should lie—with the Crown or People.⁵²

Another development was the contribution to the no-case by a handful of ministers and parliamentarians. Chief among them was Peter Reith, the Minister for Labour. He prepared and distributed an extremely well-written and researched statement rejecting the proposed law. Although it could not be widely circulated, it was very effective in reaching and encouraging those who were organising local no-case campaigns. The Reith report was given a very shabby reception by the press who, by reminding people that he had led the triumphant opposition (and quite rightly so) to the 1988 constitutional referendums, probably did more to help than hinder his case.⁵³ Reith's support for direct election was also made to appear as a ploy for the prime ministership as his rival, the Federal Treasurer, Peter Costello, was making speeches (duly and exhaustively reported by Australia's, Rupert Murdoch owned, national newspaper *The Australian*) in support of a proposed law whose principles he had voted abstain along with the true republicans, at the Constitutional Convention. Costello's support, in utter contrast to Reith's measured attack, was pure 'ARM speak' and in complete contrast to what he had said at the Convention. It was especially worrying to discover that most parliamentarians were supporting the 'yes' case along similar lines. Although members of the Liberal and National Party coalition, the governing party, were given a 'free vote', and many used this unusual privilege to vote against Howard and for the amendments, members of the parliamentary Labor Party were obliged to support the proposed amendments. This left one wondering how many parliamentarians were in fact convinced minimalist republicans and just how many

either jumped, or were forced to jump, aboard what seemed be a politically expedient bandwagon.

Andrew Murray, Australian Democrat Party Senator for Western Australia and an ARM patron switched sides and along with Dan Sullivan, a Liberal member of the Western Australian Parliament, rendered sterling service to the true republican cause in their home state. But aside from these and a few others it was noticeable that the no-case movement was a people's movement.

The Federal Parliament instituted an all-party joint committee on the proposed laws. It heard little wholehearted unqualified support for the proposed law during a whistle stop tour round Australia.⁵⁴ Malcolm Turnbull did, however, succeed in persuading the committee to advise Parliament to change the title of the proposed law. As the title to a proposed law becomes the question, the difference between the two versions is instructive. The original version, which made no reference to either the Queen or the Governor-General, was as follows:

A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament.⁵⁵

Apart from the incorrect statement that Parliament was to choose the President (it was only to approve or confirm a single nomination), this version emphasised the change to a republic.

The modified version switched the emphasis from a republic to removing the Queen and the Governor-General:

A Bill for an Act to Alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by an Australian President.

That Malcolm Turnbull should have pushed for the inclusion of the Queen and Governor-General in the referendum question was at first considered too much to

accept, even by his supporters, but he and others prevailed upon the joint Select Committee to switch emphasis from Parliament and the republic to the Queen and the Governor-General. This was in line with his 1993 argument that the republic was all about removing the Queen and the Governor-General—the republic was thus only a consequence, not a cause. But both he and the Select Committee made a blunder, so typical of so many ARM blunders along the line, in thinking that because (as he put it) “the long title is the substance of the question” people would vote in answer to the question, when in fact the substance of the question lay in the proposed law as set down in the “Yes/No” pamphlet’s amended version of the Constitution.⁵⁶

Having succeeded in changing the question, the ARM yes-case campaign managers and their media allies focused their attention on the Queen’s ‘foreigner’ and hereditary status, and her constitutional position as the head of the Anglican Church with the prospect of Prince Charles and “Queen Camilla” as her successor thrown in for good measure. Having decided not to advocate a republic as such but to focus on the monarchy instead, it must have been particularly exasperating for the ARM to discover that the ACM dominated no-case committee’s campaign continued to focus its attention almost exclusively on the proposed law’s deficiencies.

The ARM had always argued that direct election would politicise the presidency and make the occupant more likely to be a politician, and used the American party and ‘millionaire’ and power elite money-backed presidential campaigns as an awful example of what would happen if Australia were to follow suit. To this end, the March 1999 exposure version of the proposed law barred the nomination of incumbent members of Parliament. However, Parliament later amended the bill to allow an incumbent politician to be nominated, provided the member had resigned immediately prior to nomination.

The ‘yes’ campaign’s evident lack of success was demonstrated by the fact that a majority in favour of Australia being a republic was not being translated into support for the republic on offer. As the core support for the Bi-Partisan Model was only about 20 per cent of those polled, the ARM knew it could only win if the 40 per cent who were direct electionist republicans could be persuaded to defect. The ARM initiated ‘Yes but More’ campaign was one way of seducing true republicans to vote ‘yes’ when they really meant ‘no’ by adding the words “but more” on the ballot paper.

Although Labor Party supporters generally vote the party ticket, many had made up their minds to vote ‘no’ because they knew that leading State Labor Party politicians had supported direct election at the Constitutional Convention.⁵⁷ Labor Party yes-case spokespersons tried to rebut our word-by-word attack on the proposed law by accusing us of cynicism of the worst kind. Indeed, we were so distrustful of such a poor and ill-conceived law that that we were bound to doubt the motives of even its most dedicated advocates. Fond as they were of claiming that a directly elected head of state could have disastrous and unforeseen consequences, the ‘yes’ campaigners would not acknowledge that the proposed law promising minimalism today lacked so few constitutional safeguards that, with its lack of codification, it open the way to maximalism tomorrow.

The Australian Electoral Commission’s “Yes/No” pamphlet served to provide every household in Australia with a copy of the amended Constitution in full showing precisely where the proposed amendments, deletions, and additions were to go. This played a crucial role in providing more than 90 per cent of the population with their first sight of the Australian Commonwealth Constitution, and their only opportunity to judge for themselves the pros and cons of the 69 proposed amendments. Although it would be foolish to suggest that everyone read

the pamphlet, had only 10 per cent chosen to do so this would have been sufficient to tip the result in favour of the no-case.

The “Yes/No” pamphlet also included ‘yes’ and ‘no’ case parliamentary statements. The ‘yes’ statement confined itself to repeating already familiar generalities about Australia’s future with an Australian citizen as president of a republic. It claimed that replacing the Queen and the Governor-General with “an Australian President” who was “not a politician” was “a small but important step” and would ensure a “stable parliamentary system.” Having decided to say almost nothing about the details of the proposed law, the parliamentary the no-case authors had so little else that they left five of their allotted pages blank.⁵⁸ Their inclusion of a list of Australia’s top political and legal elite who supported the ‘yes’ case statement probably did more harm than good, as it helped confirm the idea that the proposed law was more about sustaining the interests of the political elite, than protecting the rights of the people in a democratic society.

By contrast, and in a somewhat colourful style, the no-case authors set out their argument as ten reasons why people should vote ‘no’ on referendum day. Leaving no blank pages, the no-case authors instanced and explained the following:

the dismissal; how the president would be no more than a prime ministerial puppet; the result would be “a politicians’ choice, not yours”; why “if it ain’t broke don’t fix it”; how it would be a “major change [with] unknown results”; how the “change would divide Australia”; why “Australia is already independent”; why there would be “no benefits only problems”; how a “Prime Minister can keep a president in office indefinitely”; why a “Prime Minister is not bound to accept Nomination Committee’s advice”; and how with the change it would be “politician one day, president the next”.⁵⁹

The preamble law was intended to place a contemporary style preamble at the beginning of the Constitution under clause 9, leaving the old-style opening preamble to the Constitution Act unchanged. The original wording, first drafted by

poet Les Murray with amendments by Prime Minister Howard, included such Australian expressions as “mateship” and absurdities such as “equal sovereignty.” Its appearance was greeted with such derision that, despite later amendment, it never became part of the referendum debate and sank ignominiously at the referendum. It should be noted, however, it would have been attached at the beginning of clause 9 whether or not the proposed amendments passed and in its final form covered a number of salient aspects of life in Australia.

Reasons why the 1999 republic referendum was bound to fail

Had the ARM high command adopted the Constitutional Convention’s parliamentary nomination and popular election Model A as proposed by Geoffrey Gallop and supported by the direct electionists, there is no doubt that the referendum would have passed in all States with possibly a 60 – 70 per cent majority in its favour. Although Model A was a compromise that would have given the Westminsterites almost everything they wanted it was, nevertheless, a direct election model. Michael Rann put the direct election case at the Convention when he said:

I came to this Convention supporting four basic propositions: firstly, to support a republic where Australians were citizens not subjects; secondly, to support an Australian head of state; thirdly, to enshrine the sovereignty of the Australian people through the direct election of the head of state by the people of Australia; and fourthly, to secure a commitment to ongoing constitutional change.⁶⁰

The Gallop-Rann compromise included parliamentary nomination of the president, prime ministerial dismissal (with safeguards), parliamentary bi-partisanship; and, by timing presidential elections to coincide with general elections, low election costs. The proposal also included codification along lines recommended by the 1993 Republican Advisory Committee. Had Model A been adopted by the ARM there would have been no split in the republican vote and a united republican referendum campaign. Model A could have been fine-tuned later

either by negotiation or through the intercession of a joint parliamentary committee, and, as should have been obligatory, passed to State parliaments for their approval. After all, that was how the 1900 Commonwealth Constitution Act was agreed: indeed, Professor Winterton had already begun to point the way at the Convention with helpful suggestions.⁶¹

Having read and reread and compared Models A and D there is no doubt in my mind that the root cause of the republic referendum's debacle lay with the ARM's higher command's relentless insistence on railroading their model through regardless of the consequences. Carried away by their own élan and more than a dash of arrogance, the ARM and its supporters made many egregious errors of judgement of which the most serious was, having locked on to an uncoded version of minimalism, blinding themselves to the possibility that with Model A they could win the referendum.

The tragedy is, however, that the ARM, the Federal ALP, and their media supporters, oblivious to possibility that they were wrong, seem to be determined to pin the responsibility for their failures on others. The chief scapegoat was John Howard who, having freely and openly declared his opposition to a republican Australia, was supposed by the ARM to have then fought for a cause in which he had no faith. Howard was quite open about his opposition to the republic but, nevertheless, he had pre-committed his government to carrying out whatever the Convention recommended. If there was a complaint to be made against Howard it was his Machiavellian stroke in giving the ARM a seeming way out of defeat while conveniently ridding himself of an unwanted plebiscite when he declared at the Convention that a less than an absolute majority vote was the required "clear view". The ARM's joyous response to the Prime Minister's offer of public execution tomorrow was one of blind relief, so they thought, on having avoided execution altogether.

The people's failure to approve the amendments of 1999 was completely in line with their previous rejection of referendum questions whose effect would have been increased power for either the government or Parliament.⁶² While it is true that the 'yes' campaign aimed at disproving the rule, it could have only have succeeded by fooling the people into thinking that the amendments posed no threat to their democratic rights.

The argument that the referendum was lost because the direct electionists divided the 'republicans' is false. The truth is that the ARM was never able to win the support of the great majority of the people who wanted a true republic because it was not prepared to commitment itself to a true republic with a people-as-sovereign constitution with a head of state directly appointed by the people. Consequently, by distancing itself from the sentiments of the people for fear of losing the support of the conservatives, the ARM assured itself of defeat.

Part of the ARM's problem was to have forced republicanism centre stage when it was not a hot public issue. A post referendum survey asking respondents whether they had followed television programmes on the referendum, revealed that 73 per cent had not even bothered to watch the much publicised *Deliberative Poll* in Canberra—a response which rose to 80 per cent with regard to the special *60 Minutes* TV programme on the same event. Those who said they paid a good deal of attention to reports on the referendum in newspapers and on television were 25 and 28 per cent respectively; with less at 17 per cent paid attention to it on radio. As regards the respondents' general interest in the referendum campaign, 59 per cent said they only had some or not much interest.⁶³

Although the January 1, 2001 constitutional centenary deadline is an important date, and one that should be celebrated for what it represents, the ARM/ALP republican push should have used the centenary celebrations as a

launching pad for a serious debate on constitutional reform in which changing to a republican form of government could have taken pride of place. At such a time, an open-ended debate on the republic would have provided a far better opportunity to develop a wide-ranging discussion on the issues, options, and republican alternatives than was ever possible under their crash through programme instituted by the ARM/ALP coalition.⁶⁴

Once the details of the proposed law were known, the ARM failed to understand that the symbols of the republic on which they had previously relied were no longer relevant. The fact that the ARM continued use them through their referendum campaign turned them into smokescreen of deceit and disinformation aimed at disguising, as one commentator put it, a “shonky dud” of a proposal. The ARM also failed to realise that in defending the Westminster system and the power of the politicians and of the Prime Minister in particular, they confirmed the idea that the proposal was a politicians’ republic.

Thus the ARM and Prime Minister Howard’s argument, in his words, that an elected president would “inevitably create a rival power centre” served only to confirm widespread fears that the president was going to be a toothless tiger. In this regard, the proposal to give a Prime Minister the right instantly to dismiss a president was damning.

An alternative explanation

The republican no-vote campaign, ill-funded though it might have been in Western Australia, was founded upon the premise that Australians are not quite the free and easy people they would have others believe, but a nation of seriously concerned men and women who think and care deeply about their country and its future. In contrast to the political and power elite, which thinks as a class, ordinary Australians have to think for themselves. It was our confident belief, therefore,

that once they were fully informed as to the actual wording and meaning of the proposed law, the people could be relied upon to make the right decision. If our surmise was correct, the ARM's dependence on the symbolism of the republic and its associated nationalistic rhetoric, espoused as it was by the power elite, would have little effect in a debate based on fact and not fancy. Even so, it was somewhat disconcerting to have to listen to what we assumed was a spontaneous chorus of support for the proposed law. Malcolm Turnbull was later to reveal in his published diary that most of this was an orchestrated response to his appeals for help. For example, on September 3 he telephones "Tony Mason [Sir Anthony Mason] and ask him if he and Sir Gerard Brennan, as two former Chief justices, will write an open letter denouncing this sort of extreme talk and expressing their confidence that if we become a republic our system of parliamentary democracy will continue".⁶⁵ Indeed, most of the big names who came forward to support the ARM seem to have been prompted to do so either directly or indirectly by Turnbull. There is no doubt that he was indefatigable in his efforts, but most of what he did seems, in retrospect, to have been counter-productive.

In the event, our faith in the intelligence of the average Australian was vindicated by the fact that the overwhelming percentage of no-votes was cast in those suburban and outer suburban metropolitan and country and provincial constituencies dominated by non-professional and non-graduate socio-economic populations. As monarchist and official no-case campaign leader, Kerry Jones commented immediately after the referendum, "From start to finish it was the big-end-of town republic. From its inception it was a movement that came from the elites. ... Saturday's vote demonstrated the shrewd judgement of everyday Australians who have far more intelligence than many of the nation's leaders often assume. It is proof that Australians don't want to be told what to think."

Ted Mack, a leading direct electionist, put the blame squarely on the ARM for not responding to the people's clearly and repeatedly expressed wish for a directly elected head of state. As he put it, "This totally unsatisfactory situation is a result of the partisan manoeuvring in setting up a Constitutional Convention to fail, not listening to the people, conducting the debate by ridicule, humiliation and character assassination, and putting a double barrelled question at the referendum."⁶⁶

However, most 'yes' vote commentators took quite the contrary view and jumped to the conclusion that either no-voters were conservative and ignorant, or, more charitably, had voted 'no' out of a reluctance to say 'yes'. While it is true that historically very few referendum questions have been successful, the facts indicate a different explanation than one of mere reluctance. Referendum questions fall into one of two categories; those that are to the benefit of the people, and those that extend, directly or indirectly, the power of executive government. Successful referendums were all, without exception, to the benefit of the people and covered such matters as State debt, federally financed social services, the status of Aborigines, the filling of Senate casual vacancies, the Territory's right to vote at referendums, and the retirement age of Justices of the High Court. Most failed referendums failed because people interpreted them as increasing the powers of government.

On this hypothesis, the electorate, realising that the proposed law on the republic would involve a shift of power from the people to the Parliament, voted 'no' simply because it was not in their best interest. If this is true, then the rejection of the 1999 Republic Bill was an informed decision in line with the people's long established reluctance to grant additional powers to Parliament. The Electoral Commission's circulation of the full text of the Constitution and the proposed amendments, as late in the day as it was, must have provided those who

cared to read it their only opportunity dispassionately to judge the validity of our criticisms. Nevertheless, Malcolm Turnbull and the ARM accused the direct electionists of conducting a cynical scare campaign. It is ironic that having conducted an uncompromising campaign against direct electionists in pursuit of its narrow aims, Malcolm Turnbull should have the effrontery say, only three days after the ARM push had failed, “We need a process that is fair, includes the people and ensures they have the choice of making an informed choice. ... We should consider having two direction election models: one similar to the US Constitution where the president is the head of government, the other being one where the president has a similar, though largely ceremonial, function to the governor-general.”⁶⁷ On this basis one is entitled to ask, why did not he think of something like this earlier? But again it should be noted that he proposes polar opposites—are we not entitled to find something in between?

The greatest obloquy was reserved for Prime Minister Howard. He was widely accused of having defeated the referendum single-handedly. For example, the *Sydney Morning Herald*’s editorial (8.11.99) raged against Howard, claiming that he had lost his place in history by ignoring:

the inevitability of a republic, the depth of support for it and its potential as unifying force. He should have used his considerable power and tactical skills to build a consensus for a model that would deliver a republic which preserved national strength and stability.

Aside from perfectly illustrating our point that the media never grasped either the purpose or the meaning of the proposed law, the *Herald* editorial conveniently ignored the plain fact that it was the ARM’s responsibility to translate “the depth of support” into an acceptable model, not the Prime Minister’s. Then there were those who, having chosen the wrong horse, echoed the near universal post-referendum mantra sung by such ALP luminaries as staunch minimalist Westminsterite New South Wales Premier Bob Carr and Commonwealth

parliamentary opposition leader Kim Beazley that it all could have been done differently. Well, they were there when it was done and did nothing later to stop the ARM from plunging on willy-nilly. Without admitting it, these and so many other post-referendum comments confirmed the no-case republican argument that in voting ‘no’ Australia escaped becoming an unstable parliamentary republic driven by the day to day play of party politics and the quest for power.

Why the majority ‘yes’ voters should have been confined almost entirely to constituencies heavily weighted in favour of the educated professional classes is in itself an intriguing question, but more intriguingly, why was this particular group prepared to accept such a shoddy substitute for a real or true republic?

From talking around among those of my friends who belonged to the professional classes, my impression was that, as members of the group most likely to be influenced by media opinion makers, those who voted ‘yes’ did so more out of emotion than out of reason. As one put it to me “I voted ‘yes’ because I thought it time we moved on.” Or as another put it, “It’s time we got rid of the Queen”—or, as one member of the State Parliament shouted at me in passing “God save us from the House of Windsor.”⁶⁸ There are serious doubts whether such people, believing themselves above such trivia, had actually read the proposed law as set out in the “Yes/No” pamphlet. Worse still, if they had read it, how then did they come to accept its preposterous proposals? We can only assume they were unconcerned about or, worse still, oblivious to, the likely consequences of that to which they were emotionally attached. Or, if they had read and understood the changes they must have been content with a dramatic increase in the powers of Parliament and of the Prime Minister in particular. If the latter is true, they most likely voted as compliant (if not complaisant) members of the lower echelons of a power elite whose cultural norms were being both set and echoed by their betters in Melbourne, Sydney, and Canberra. One also suspects that the educated middle

class voted ‘yes’ as an acceptable way of preserving, albeit under a new set of symbols, the Westminster system and the monarchy in all its respects— save for the Queen herself. That this makes some sense is evidenced by the writings of former monarchist and later a McGarvie-ite “wise men” republican Western Australian law professor Greg Craven, an appointed delegate to the 1998 Constitutional Convention, who vociferously supported the ‘yes’ vote because, as he said, it would “rejuvenate the monarchy”.⁶⁹

On this ground alone one is entitled to suggest that the rejection of the 1999 republic Bill was an informed decision by the mass of the people in line with their proven unwillingness to grant any more power to Parliament than it already had. In this regard, the Electoral Commissioner’s decision to circulate the entire Constitution must have played an important part.

The scale of the rejection by the ‘no’ vote constituencies is well marked by the fact that over a third of all 148 electoral divisions (49) voted 60 per cent or more against the proposed republic, and over half (75) voted 60 per cent or more against the preamble. Furthermore, if all states had had as good a direct election campaign organization as existed in Queensland (where 25 out of 27 divisions voted ‘no’, and 18 cast more than 60 per cent ‘no’ votes) the scale of the ARM debacle would have been total and absolute.

If this is a valid hypothesis, then it gives substance to the claim that the Australian Republican Movement’s push did in fact come from the so-called chardonnay power elites of Sydney and Melbourne ably assisted by their media opinion-maker mouthpieces.⁷⁰ The localisation of the yes-vote in the leafy-laned metropolitan moneyed professional class suburbs demonstrates how the influence and the power elites can cooperate to work against the interests of the majority of Australians. Perhaps this was ever so, but one cannot help wondering whether

Australia's higher educational institutions and their professional equivalents have lost the art of teaching people how to think: and for those who do think, to be careful how they express thoughts which may not be in accord with the latest politically correct piece of received dogma.

A similar line of argument is to be found in Katherine Betts' hypothesis that the referendum divided Australia along a fracture line between "new-class cosmopolitans ...who had never cared much for the old Australia they were seeking to transform" and the the rest of society who regarded the new class's agenda "as an affront to the way they felt about their identity as Australians."⁷¹

The new class's agenda:

is not part of the old power struggle between capital and labour. It belongs to a new struggle between sections of the new class of professionals (and managers) and the remnants of the old British-oriented establishment together with the majority of Australians *who are not new class, particularly the socially conservative working and lower-middle class.*⁷⁴ (Emphasis added)

This conclusion is closely and independently in accord with my own reasoning and helps explain why the ARM and the media were so offensive in the their criticisms of John Howard.

In presenting the year 2000 R. G. Menzies Lecture at King's College, London, High Court Justice Michael Kirby, one of the more freethinking members of Australia's judiciary, listed ten reasons why the republic referendum failed, with which I am in full agreement.⁷⁵ These were that the proposal was: partisan; too much in haste; elitist; pseudo patriotic; constrained by the Convention; flawed ; not helped by a parade of "pundits"; decided by the smaller states; so media biased as to "reinforce opinions that this was a push by intellectual, well-off east coasters, not necessarily to be trusted". His tenth and final error was that "if, in the short term, the republicans were to put forward another version with a president elected in some way by federal parliament (or any other group including politicians), it

seems likely that such a proposal would face the same fate as the 1999 proposal.” He ends by raising the question as to whether the republicans (by which I assume he means those who made the above listed ten egregious errors) will have learned the lessons of the 1999 referendum. The short answer to that question is no.

Conclusion

As there is not the slightest doubt that had they been given the right preparation and the right model, the people would have voted overwhelmingly ‘yes’ to a republic at the November 6 referendum, the ARM has only itself to blame for the November 1999 debacle. The people’s preference for some form of direct election should have been taken as a clear indication that they were prepared to accept big changes to their Constitution—provided that these were aimed at advancing democracy (that is, shifting the balance of power from ministers and party to constituency and deliberative law making in the Parliament) and lifting the status of the people from subjects of the Queen to sovereigns in their own right. Unfortunately, by blindly pushing such a flawed model, the ARM did a great injustice to the cause of republicanism and to the fundamentals of democracy, and, in the process put the clock back.

Sadly, there is very little evidence to indicate that the ARM and its minimalist republican supporters have learned anything from the November 1999 referendum. Its leaders still persist in blaming everyone but themselves for their failure. At the 1998 Constitutional Convention they not only arrogantly threw away a golden opportunity to unite the two republican factions by rejecting Geoffrey Gallop’s 1998 Constitutional Convention Model A, but also failed to appreciate that his proposal would have given them practically all their minimalist objectives. Had all 30 delegates who voted for the direct election Model A been joined by the ARM in making Model A the preferred model (instead of Model D) they would have ensured success at the referendum and thus the preservation of responsible

government—which was, after all, ARM’s real objective. But the fact that this did not happen lends support to the conclusion that true republicanism is really about the future of democracy in Australia and the status of its people. This helps explain why so many independent and group non-ARM republican candidates stood for election as delegates to the 1998 Constitutional Convention.

The ARM should have accepted the fact that its failure in 1999 was directly attributable to its Pyrrhic victory at the 1998 Constitutional Convention. Instead, having made the wrong diagnosis, the ARM still persists in peddling its pro-establishment and anti-democratic line of argument. As a result, and with no evidence that the ARM has learned anything from its crushing defeat, Australia is left with an unsettled constitutional future and a class and regionally divided nation.⁷⁶

Nevertheless, it should be remembered that although Australia’s 1901 federal Constitution was ten years in the making, they were not wasted years, but years of contemplation, quiet debate, and a growing public recognition of the need for the Australian colonies to unite as a federation. Similarly, the 1998 Constitutional Convention and its wasteful referendum aftermath must now be regarded as but the first steps in a long process of cultural acclimatisation to the concept of Australia as a true republic. In this respect, the 1998 Convention provided us with valuable advice for the future:

- The failure of the 1999 referendum queries whether a constitutional convention is an appropriate method by which to begin amending a working and long established constitution—and especially one about which the common people know little or nothing. Or, if it still thought the right way to go, whether a future convention should be either fully elected or, like the founding 1890s conventions, a truly federal convention with equal representation all the State, Territory and Commonwealth Parliaments. This would permit delegations to debate and caucus from the perspectives of their respective territorial viewpoints, rather than, as happened at the 1998

Convention, seating delegates around the chamber as though they were party-like voting blocks.

- Australia should never again hold a convention so poorly resourced by way of truly independent experts and advisors and expected to do so much in such a short space of time that delegates had to submit to being put under the thumb and close scrutiny of unelected chairpersons and honorary advisors.
- One hundred and fifty two was far too many delegates: half that would have been more than sufficient. Furthermore, since most delegates lacked understanding of the special nature of a republican constitution, the convention was bound to fall into the hands of the few who knew what they were doing. As a consequence, behind the scene caucusing and lobbying were the order of the day. Where delegates were allowed to speak for themselves as, for example, in their prepared addresses, they said much that was important, but delivered and undebated in at times a near deserted debating chamber these addresses were made more for the record than to change the course of events.
- If, despite the lesson of 1998, a large gathering is still preferred, then India's example of a fully elected constituent assembly charged with formulating a republican constitution in whatever time it took is a workable example. India's remarkable achievements of a half century of stable democracy are due in large measure to the two years it took to formulate a federal constitution combining past experience under the British raj with hopes of a future democratic and independent federal republic.⁷⁷ To follow India's example would require full-time paid delegates, a professional secretariat, legal and political advisors, and a public interactive educational and informal programme linking assembly and people.
- The organisers of the 1998 Convention totally neglected the lesson that the success of the 1897-98 Convention was due almost entirely to the fact that it was conducted by the colonies as equal partners. The 1998 convention was overshadowed, controlled and paid for by federal government with the States treated more like local governments in a unitary system of government than equal partners in a federal compact. This had the effect of completely discouraging elected and appointed State representatives, (many of the former having arrived on the basis of preference votes) of working as State delegations.
- Although the 1890s Conventions were composed of colonial delegations, their resolutions were referred back for local parliamentary approval. As a

result, the Commonwealth Constitution Bill of 1900 was not cast in concrete until all the colonies had agreed to it.⁷⁸ Likewise, had all four 1998 Constitutional Convention models been put to the State parliaments, in a fashion similar to that used in securing the passage of the almost equally profound 1986 Australia Acts, there would have been little likelihood that the three State Labor Party leaders, Beattie, Gallop and Rann would have so meekly submitted to their federal parliamentary bosses in going back on Model A: the only model which they knew was most likely to succeed at a referendum. The reason why the Labor Party direct electionists meekly complied was because the ARM/ALP coalition made the fatal blunder of imagining that a winning vote at the 1998 Convention was all that mattered.

- Another approach would be to follow the example set by South Africa. There, a Commission for a Democratic South Africa (CODESA) proposed a constitution for a new post-apartheid democratic federal republic. CODESA prepared a uniquely South African constitution based on one of the most thorough studies in comparative constitutions ever made. A similarly organised Australian Federal Republican Constitutional Commission (AFRCC) could be briefed to draw up (in close and working consultation with the people and their State and federal parliamentary representatives) a range of federal republican constitutions for later consideration by the people at a multiple choice referendum.
- Although there is nothing in section 128 that prohibits a proposed law giving the people a choice of proposed amendments, the fiction that there was allowed Prime Minister Howard to insist, without contradiction, that unless there was a decision on a single model there would have to be a plebiscite—which he not only did not want, but for which there is absolutely no reference in the Constitution. The role of an intermediary plebiscite stage is, therefore, of questionable validity. It is also one that would effectively delay the promulgation of a workable and acceptable set of amendments whereas section 128 allows a binding choice. In any case, the idea that the people might themselves want a particular model of their own choosing is stifled by the fact that section 128 does not allow of either popular or State parliamentary initiated referendums—either of which would help ground swell support for a republic.
- The proposal by Kim Beazley, the Leader of the Opposition in the Federal Parliament that the next stage following 1999 referendum ought be a non-binding plebiscite to decide whether Australia should become a republic is unsatisfactory. Because even if the people were to prefer an elected head of

state in principle, there would be no guarantee that the model then on offer would be to their liking. It is vital, therefore, that the people be given a choice from a range of models; and preferably ones drawn up by a competent Constitutional Commission of the kind outlined above rather than asking the people to sign a blank check to whatever Parliament decides to put forward. This is especially important because of the way in which the executive controls the referendum process.

- Consideration should be given to the possibility that a new republican constitution for Australia will only emerge after each of the States have gone through the processes of modernising, democratising and codifying their existing colonial constitution to bring them into line with modern constitutional practice and in such a form as to allow the States to make an instant and painless change to a republican form of government.⁷⁹
- Had Paul Keating remained Prime Minister it was his intention to leave the initiation of a referendum on the republic entirely to Parliament. This method is still open to a future government. However, since Parliament is unlikely to initiate a referendum limiting either parliamentary sovereignty or the authority of the Prime Minister, the proposed law would be more to the liking of Parliament than the people. The Hawke Labor government scuttled its own 1987-88 Constitutional Commission by unwisely putting some of its least important recommendations to an unsuccessful referendum in 1988.⁸⁰ The lesson here being that proposed Australian Federal Republican Constitutional Commission (AFRCC) might suffer the same fate if Parliament were again to set out to protect its sovereignty.
- As part of the federal compact, State parliaments ought to be directly involved in all future attempts to change the constitution and whatever is proposed should be done jointly by the States and the Commonwealth as equal partners. The passage of the 1986 Australia Acts by State as well as Commonwealth parliaments indicates how this could be accomplished, but with the proviso that the people must directly involved at State level via open joint parliamentary constitutional committees and State referenda.

One of the biggest obstacles to the advance of democracy in Australia is that all Australian State constitutions were devised to fit the needs of independent colonies under the English Crown and to ensure the continuance of the Westminster system of government. This is in complete contrast to the American experience where the newly formed states (and latterly colonies) had already

devised republican constitutions rejecting the Crown and the English parliamentary system years before drawing up a “more perfect” federal Constitution in 1787. Had the 1999 Australian republic referendum passed, there would been no constitutional requirement that a republican system of government prevail throughout the federation.⁸¹ Instead it was assumed that in the course of time, and of their own (?) volition the Australian States would renounce their allegiance to the Queen.

Experience in the United States of America indicates that it is easier to amend and reform state than federal constitutions. The reform of State constitutions in Australia could, therefore, be the first step in a longer but surer path to a truly federal republic. However, from experience already gained from attempts to bring about genuine constitutional reform in Queensland and the Northern Territory, the States’ political elites would most likely frustrate any move away from the Westminster parliamentary system and the powers, patronage, privileges and perks which it bestows on the executive arm of government: an arrangement which suits the major political parties. Nevertheless, a programme of State constitutional reform would provide the firmest foundation on which to build a republic. It is, however, very doubtful whether any existing Australian State government would be willing (as was the State of Hawaii for example) to permit a completely and freely elected constitutional convention to establish a new constitution. In Western Australia, which was promised a constitutional convention years ago, the government is still trying to find a way of arranging a non-threatening Constitutional Convention that will ensure that it and the Westminster system on which it depends would remain in control throughout the proceedings. To that end it has quietly appointed three senior research positions ahead of any announcement of actually holding the promised convention.

Nonetheless, State constitutional reform aimed at creating republican forms of government based upon the fundamental principle of citizen-as-sovereign is one of the better ways to go. Were this to happen, State delegations (elected and/or appointed) would then go to any future federal constitutional convention or assembly armed with the experience of republican constitutions and constitution making that the 1998 Constitutional Convention delegates all too obviously lacked.

Whichever route is chosen, the only way forward is to begin with a consideration of republicanism as a form of government in its own right, separate and distinct from that of a constitutional monarchy. The fact that the current crop of self-styled republicans feared republicanism and fought against it is a telling point. Constitutional law professor George Winterton fathered minimalism in his scholarly and carefully researched book, *From Monarchy to Republic* (1986). Even so, his advocacy for a republican Australia did not extend to embracing republicanism as a form or system of government. This lack of conviction about republicanism as a system of government applied equally to the Australian Republican Movement—if it did not apply, why else would the movement have chosen to do battle with the direct electionists? Having chosen not to embrace republicanism, it was obvious that a minimalist republic would be, like the non-alcoholic beverage advertisement, a Clayton's republic—that is, “the republic you are having when you are not having a republic.”

The battle for the republic has only just begun. However, the real war is about the Westminster system of government and its reform. Victory will be the establishment of a more perfect democracy in a rejuvenated federation of truly republican States in which the people are made sovereign. The concept of popular sovereignty is not new, but as was so brilliantly put by Alexis de Toqueville in his classic study *Democracy in America* (1835-40) it is not without its dangers:

The will of the nation” is one of the phrases most generally used by intriguers and despots of every age. Some have seen it in the bought votes of a few agents of authority; others in the interests of a frightened minority, and some have even discovered it in the people’s silence thinking that the fact of obedience justifies the right to command But in America the sovereignty of the people is neither hidden nor sterile as with some other nations; mores recognise it, and the laws proclaim it; it spreads with freedom and attains unimpeded its ultimate consequences.⁸²

It is for this reason, as de Toqueville advised, that one should pay attention to the United States of America and especially with regard to the lessons to be had from a critical study of that country’s federal constitutional experience, and wide variety of lesser known state republican constitutions. Unfortunately, comparisons between Australian and American constitutional and governmental practice are not as much appreciated as they once were. As a result of this ignorance, diehard Westminsterites were able to play the anti-American card very cleverly during the 1998 Constitutional Convention and 1999 referendum debates along the lines of “this must not happen in Australia”. To turn away from the American experience for the wrong reasons is not only to overlook America as a great storehouse of experience of constitutional and governmental theory and practice dating back to before 1776, but also to overlook the fact that Australia’s framing fathers based their constitution substantially upon that of the United States.⁸³

Many delegates to the 1890s Constitutional Conventions were well acquainted with American constitutional practice, but none more so than Inglis Clark, the Tasmanian Attorney-General, who had prepared himself for the event by spending some six months in America obtaining first-hand knowledge of that country’s unique system of government. The outcome was a draft Australian federation bill whose structure and content, borrowed largely from the American Constitution, laid the groundwork for an informed debate on the constitution.⁸⁴ Had it been adopted it would have transformed Australia and its system of government. However, most of its innovations were put aside for favour of responsible

government. Aware of its deficiencies, Winthrop Hackett warned delegates at a meeting of colonial delegates in 1890 of the inappropriateness of responsible government in a federation. He claimed that it would “lead to one of two alternatives—either responsible government will kill federation, or federation, in the form in the form in which we shall, I hope, be prepared to accept it, will kill responsible government.”⁸⁵

There is no going back. To survive, the ARM, having deliberately and with full knowledge opposed the will of the people and their clear preference for a popularly elected head of state and lost, must now embrace the people’s will. This they can only do by working for a republic that truly represents the people and not the ghost of a banished monarch represented by the more substantial edifice of a Parliament exercising, without restraint, of all the powers it expropriated from a defunct Crown.⁸⁶ Unless it does this, the movement will find itself in alliance with the monarchists defending under another name its core belief—the continuance of the Westminster system and all its trappings. The recent announcement that the ARM intends to relaunch itself as *Republic Australia*, complete with a new ‘democratic’ constitution that makes no reference to the abandonment of minimalism and which continues to focus on the issue of an Australian head of state, confirms this conclusion.

To ignore the plain fact that there is widespread unease about the conduct of Australia’s version of responsible government is to ignore a growing groundswell of opposition to a system of government that was better suited to meet the nineteenth century needs of a governing class, than to twenty-first century wants of the community at large. David Solomon in his stimulating book, *Coming of Age: Charter for a New Australia* (1998), reached a similar conclusion when, talking about a possible causal relationship between the practice of politics and the republican mood in Australia, he predicted that “the politicians (in both major

parties) are making a serious mistake in trying to restrict debate to one or other of the minimalist republic options.”⁸⁷ Republicanism only makes sense if it establishes the people as the new sovereigns as heirs and successors to the Queen of Australia in perpetuity.

Epilogue

In fighting for and securing the defeat of minimalism, my fellow Western Australians were aiming for something better than what was on offer. We continue to believe that if Australia is to become a federal republic its constitution must be founded absolutely on the sovereignty of people, not collectively, but individually with each a sovereign person. The minimalists argued that their a republic would have been a sign of maturity but not, apparently, one mature enough to give the people the right to choose their own head of state. By this sleight of hand, the minimalists betrayed themselves to be more interested in order than in liberty; more concerned with the past than with the future, more concerned with their own and their sponsors’ interests than those of the people; and more determined to keep society as it is, than let it grow to what it ought to be.

Earlier I quoted de Toqueville to warn as well as arm us for what is to come. A constitution for a uniquely continental Australia will not be a new Britannia, nor for that matter a new America. Nevertheless, to be uniquely Australian we need to see ourselves mirrored not in narcissistic self-admiration, but in a wider world of constitutional and democratic change. For their part, the minimalist republicans, obsessed as they were with their nationalistic anti-monarchical cause, would have us believe that there was nothing to be learned, not even from our own past mistakes.

Constitutional development in Australia is a mishmash of unfinished business. The federal constitution was deliberately and with foreknowledge constructed so

as to deprive the people of their just rights and for which they had argued long before federation. The American model was deliberately mauled in order to preserve the hierarchic Westminster system and the right to rule first of the old governing class and then of the new party class who continue to rule to this day. If the minimalist republicans had any real interest in throwing off Australia's colonial shackles they would have fought for throwing off those which we Australians willingly allowed our post-colonial forefathers, to place upon we the living. To blame the Queen or the British for our predicament, as did the ARM zealots, may make good theatre, but the reality is a country hung up on its colonial constitutional past and its ultimate failure to deliver what was promised.

This is most conspicuous in the States where colonial constitutions still govern as though Australia was still a melange of Crown colonies governed from London through autocratic governors lauding it over larrikin colonials. One has only to run through the names and memories of Australia's State premiers to realise the extent to which their respective State constitutions gave them free reign to act as elected dictators. Perhaps Australia needs to be governed by little dictators, it is after all still a developing country. However, a more likely explanation is that the continuance of Australia's colonial past, rooted as it was in the foundations laid by its London appointed autocratic governors, helped create an authoritarian constitutional culture in which democracy is merely the means to secure and to exercise in the same autocratic way the powers of long-dead governors. There can be little doubt that having exchanged one governing class for another, the new class is holding on to its powers, patronage and privileges with just as much tenacity as did the old moneyed class.

State constitutional reform is one of the keys to the further advancement of democracy in Australia but nothing will happen unless the people press for genuine reform. Trial runs on this aspect of constitutional development in

Queensland, the Northern Territory and from what indications from what little has been revealed in Western Australia about its long promised, give little indication that their Parliaments have any intention of giving up power. It is ironic that non-ministerial members of State Parliament, who are its most immediate sufferers, rush to the defence of the Westminster system whenever even the simplest and most obvious of reforms are suggested. Yet, the power to change is in their hands, at least in the short run. Thanks to television, the public is becoming increasingly aware that the parliamentary process is pure theatre. At question time, for example, the sight of non-ministerial members of the government sitting on their hands trying to look attentive and ready exchange epithets with members of the opposition benches who, in turn, are doing their best to give the impression that they would be as democratic in government as might appear to be in opposition. It is no wonder that people are becoming increasingly cynical about Parliament, parliamentarians and the manner in which representative democracy operates in Australia. The problem lies essentially with the executive's almost complete domination of Parliament to the extent that deliberative debate on the issues seldom occurs; and where an element of deliberation has been introduced, as for example by way of the parliamentary committee system, such deliberation as is permitted is highly coloured by party considerations. The power of the executive lies in the application of the medieval principle that the king must have his way—the only difference being that the king in modern terms happens to be a Prime Minister, a Premier or Chief Minister, depending on where one happens to be. This is bolstered by the theory of mandate that preached that a party winning government had thereby obtained the consent of the governed. This may be true, but at best it can only be so on the basis of an in-principle support. It is also true that if sufficient pressure can be applied in party rooms a government can be persuaded to change its mind, but seldom does it change its mind in open debate or even at the committee stage where legislation should be argued on its merits.

The distinction between the Commonwealth and State Constitutions in terms of procedure is blurred because both were written to preserve an antipodean colonial version of the Westminster system. However, they differ markedly in the manner of the construction of their respective constitutions. This while they share almost the same problems with regard to fulfilment of the democratic process, they differ in the modernity of their two constitutional systems. The State constitutions are essentially documents transferring power from London to local elected assemblies. Nearly all can be changed at will by their respective parliament, and none actually set out government as it in fact operates. Most State constitutions are alterable by their respective Parliaments without reference to the people, and although changes to some aspects of some State constitutions need to be put to the people at a referendum, none provide for citizens' initiated referendums.⁸⁸

By contrast, the Commonwealth Constitution is a shining example of what a modern constitution should look like. Thus, constitutional reform is one of amendment and not, as it would be with all State constitutions without exception, total reformulation. Although section 128 of the Commonwealth Constitution serves to protect the propriety rights of the citizen against unwanted constitutional change, the people have not right to initiate constitutional amendments of their own choosing. This means that any further hope of peaceful change rests entirely with Parliament and the willingness of the government of the day to put forward a proposal which takes into account the already well-known preference of the people for a directly elected head of state. The difficulty is that none of the major political parties is prepared to accept the people's verdict and declare their support for a true republic in which popular sovereignty is recognised by the people's right directly to elect their own head of state. It is for this reason that the people should not, under circumstances, agree to a proposal to hold a plebiscite on whether Australia should be a republic without also being asked at the same time whether

or not the head of state should be directly elected by the people or appointed by the Parliament. Furthermore, based on the extremely poor voter turnout for the election of delegates to the 1998 Constitutional Convention, such a plebiscite would have to be compulsory.

The Commonwealth Constitution as written provides an excellent basis on which to build a new citizen-as-sovereign republic. One could do no better to begin by revisiting those aspects of republican government which Australia's founding father deliberately rejected:

- a true bill of rights based on Magna Carta's principles of mandates (what must be done) and prohibits (what cannot be done) and limited government;
- direct election of the head of state and whether this office should combine head of government; or whether with a ceremonial head of state, the head of government (the Prime Minister) should be directly elected;
- separate legislative from the executive branch of government;
- recognition that sovereignty resides in the people who are the sole source of all authority to govern which may only be delegated for temporary and limited periods;
- recognises Members of Parliament as representatives of the people and not of the party to which they happen to belong;
- constitutionally protects the sovereignty of the people;
- codifies in plain language the duties, responsibilities and limits of all elected and appointed officers of state, beginning with the head(s) of state and government;

- examines fixed parliamentary terms and tenures of all officers of state.

There are others, but in recognising that the Commonwealth Constitution is essentially a republican constitution we have also to recognise that it has, at its heart, the monarchical Palace of Westminster system of responsible government: a system of government which the ARM and its minimalist supporters were determined to defend. Once this is appreciated then the battle lines are drawn between the true and the false republicans.

The same principles apply in the reformulation of the State constitutions. The applications of the principles would be more difficult in the case of the State constitutions because their structures are completely out of line with those long established by the federal constitution. However, because there are far more state constitutional models (both in number and in relevance) to be found outside Australia, and especially in America, which embody most of the principles as set out above, the task of State constitution making, given the will, would prove to be a great easier than is imagined.

The 1999 referendum did not so much divide the country as reveal a yawning divide that was already there. The direct electionist republican movement, or true republicans as I prefer to call them, defeated the referendum in spite of support of almost any kind from the power and political elite. It was a people's movement and, for that reason will not go away. The monarchists fared no better as those who had done well out of the monarchy with imperial honours and high positions in government and the legal profession deserted their former patron in droves declaring, as they left, that they had always been passionate republicans since their school days. If so, it is a sad reflection upon their character and their honesty of purpose.

The last word on direct election might be said by pointing out that the two most well known countries with directly elected presidents, France and the United States, operate under fundamentally different forms of republican government. This makes the all-important point that a direct election should reflect rather than determine a country's underlying system of government: a point which those who rejected the referendum proposal knew full well when they simultaneously rejected the Westminster or responsible system of government. As the Constitutional Convention and the Referendum proved, the biggest obstacles to constitutional change are Australia's State, Federal political, and power elites. Peaceful change will only occur if the people acquire confidence in themselves, in their cause and in their ability to govern: these things they can do by educating and informing themselves on the fundamental issues of government. The essence of true republicanism lies, therefore, in ourselves as individuals. All that remains is for the people to learn enough about constitutional republicanism in a democratic society to build a new Australia on the old foundations.

Notes and References

¹ Malcolm Turnbull, *Fighting for the Republic*, Hardie Grant Books, Melbourne, 1999.

² In 1985 all State Parliaments passed an Australia Acts (Request) Act. The request was direct to both the Commonwealth and United Kingdom Parliaments and in theory was not to affect the Commonwealth Constitution.

³ This provision, or one like it, was once common to all European monarchies. The Constitution of the Kingdom of Norway, for example, still provides that the King shall at all time profess the Evangelical – Lutheran religion.

⁴ Malcolm Turnbull (op. cit.) 1999, gives a full account of the way in which he attracted establishment figures to his cause and for most of those he either wrote or outlined what they were expected to say in their public utterances.

⁵ Malcolm Turnbull, (op. cit.) 1999, p. 244.

⁶ Before 1991, Australian republican sentiment was little more than a series of spasmodic outbursts each of which was quickly forgotten.

⁷ The dates have been extracted from Carol Hide, Karen Davis, Ian Ireland, “The Recent Republic Debate – A Chronology: 1989-1998”, *Background Paper 11 1997-98*, Parliament of Australia, Canberra, 1999. The paper is fully referenced and is a mine of useful information.

⁸ Malcolm Turnbull, *The Reluctant Republic*, Heinemann Australia, Melbourne, 1993, p. 187.

⁹ Malcolm Turnbull, (op. cit.) p. 247.

¹⁰ The Prime Minister's report was published as *An Australian Republic: The Report of the Republic Advisory Committee*, Canberra, vols. 1 and 2, 1993. Malcolm Turnbull published his book *The Reluctant Republic*, (Sydney) later that same year. It remains the best account of the ARM and its minimalist position. Volume 2 of the RAC report contains a wealth of information particularly on overseas' practice, Australia's Executive Council, the reserve powers of the Governor-General, codifying constitutional conventions. The report made much use of the reports of the Australian Constitutional Commission to consider constitutional reform. The Commission operated from 1973 to 1985 and covered a wide range of subjects.

¹¹ RAC Report, p. iv.

¹² RAC Report, p. 1.

¹³ For a fuller explanation of the role played by the RAC in setting up everything that followed see Mike Pepperday, “Republic Derailed: How the Turnbull Committee Set the Agenda and Lost the Plot”, *Proceedings, 1999 Conference of the Australasian Political Studies Association*, Sydney, September, 1999 pp. 633-640

¹⁴ Jeff Kennett, reported address to the Samuel Griffith Society, Melbourne, entitled *The Crown and the States*, 30 July 1993.

¹⁵ George Winterton, *Monarchy to Republic: Australian Republican Government*, Oxford University Press, Melbourne, 1986.

¹⁶ Among them were Malcolm Turnbull, *The Reluctant Republic*, (1993); Wayne Hudson and David Carts (eds.), *The Republican Debate*, (1993); David Headon, James Warden and Bill Gammage (eds.), *Crown or Country: The Traditions of Australian Republicanism*, (1994); John Hirst, *A Republican Manifesto*, (1994), George Winterton (ed), *We the People: Australian Republican Government*, (1994). Al Grassby's, *The Australian Republic*, (1993) was the most vitriolic. For a contrary view see, Alan Atkinson, *The Muddle*

Headed Republic, (1993). The republic issue was explored in a Special Issue of *The Australian Journal of Political Science*, S. Lawson and G. Maddox (eds.) vol. 28, 1993.

¹⁷ Atkinson, (op. cit.) p. 124.

¹⁸ The 1988 data is from a table in George Winterton (vid. sup.) p. 73.

¹⁹ Quoted from National Civic Survey, *The Australian Community and its Government, Constitution, Citizenship and Civics*, ANOP Research Pty., Ltd. by RAC Report (op. cit.) p.51.

²⁰ The government bill establishing a people's convention was at first refused by the Senate and was not passed until August. Senate objected to voluntary postal voting and wanted compulsory voting on an issue as important as this.

²¹ The matter of fairness was made the subject of an unsuccessful High Court challenge.

²² The author was one such and stood, along with the late Associate Professor O'Brien, as an Elect the President candidate for Western Australia. Professor O'Brien was elected and duly served.

²³ It is an interesting fact although the movement was Sydney based, the Australian Republican Movement, as a name and organization, was first founded in Western Australia.

²⁴ This was actually put to me personally by a Western Australian Member of Parliament as a reason for trying to improve the proposed law to amend the Constitution.

²⁵ The convention proceedings and debates were fully reported as *Report of the Constitutional Convention*, Vols. 1-4, Commonwealth of Australia, Canberra, 1998.

²⁶ The quote and comment came from Howard Nathan, "Concon: A Fest or a Republic", *Australia/Israel Review*, 12 March-9 April 1988, p. 23 and quoted by Patrick O'Brien (op. cit.) p. 12.

²⁷ *Convention Report*, vol., 1, p. 11.

²⁸ *Constitutional Convention Report*, vol., 1, p.11.

²⁹ Only one senior cabinet minister, Peter Reith, publicly declared himself in favour of popular election.

³⁰ *Constitutional Convention Report*, vol., p. 269,

³¹ Patrick O'Brien, *Breaking the Rules: the political alchemy and crooked arithmetic of the Constitutional Convention*. Perth, Western Australia, privately circulated monograph, 1999, p. 9. The late Professor O'Brien was so incensed by the conduct of the ARM at the convention that he wrote two other privately distributed reports. *Why the Constitutional Convention was a Triumph for Political Extremism* (March 1998) in which he argued that the model opened the door to a future parliamentary installed dictatorship. The report also explains how the direct electionists fought against exclusion from further debate following a manoeuvre by their opponents on the second day of the convention. He later revised this in a second report entitled *Political Executive versus Parliament and the People: The '98 Constitutional Convention*.

³² Published by Penguin Books, Melbourne, 1998.

³³ Steve Vizard, (op. cit.) 1993, p. 10.

³⁴ *Convention Report*, vol., 1, p. 3.

³⁵ At least according to the wording of sections 58, 59, and 60. Similar reconsideration provisions are to be found, for example, in the American and French constitutions allowing their respective presidents to intervene in the processing of assenting to bills..

³⁶ Quotes are from *Convention Report*, vol., 1, pp. 3-4.

³⁷ Malcolm Turnbull, *Fighting for the Republic: The Ultimate Insider's Account*, Hardie Grant Books, Melbourne, 1999.

³⁸ The extent of the lobbying is fully described by Vizard, op. cit., p. 273

³⁹ *Convention Report*, vol., 4, (op. cit) p. 986.

⁴¹ Ibid., vol., 3, p. 331.

⁴² This and following quotes from *Convention Report*, Vol., 4, p. 976.

⁴³ The shortest definition of a reserve power was that given by Professor Cheryl Saunders in her *The Australian Constitution*, The Constitutional Centenary Foundation, Melbourne, 1997, p. 135, as “a power which may be exercised by the Governor-General against or without advice.” The proposed law (section 59) provided that “the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.”

⁴⁴ The need for a repetition of covering clause 5 governing the supremacy of the Commonwealth Parliament almost word for word in the body of clause 9 was never fully explained.

⁴⁵ With the repatriation of Canada’s British North America Act (1867) and following the passage of the Canada Act (1982) came the *Constitution Act* (1982). It has subsequently been much revised. Since the Canada Act constitutional revision in Canada is a matter for the Canadian parliaments alone.

⁴⁶ The full provisions are set out in the *Referendum (Machinery Provisions) Act 1984*.

⁴⁷ These were grouped under the title of *Real Republic*, a company registered under the corporation law of New South Wales. No real national organisation actually existed and the state groups worked out their own salvation as best they could by keeping in touch with one another. Clem Jones of Queensland and Ted Mack of New South Wales and Phil Cleary of Victoria were the most high-profile members.

⁴⁸ As early as February 1990 I had published a people-as-sovereign republican constitution for the people of Western Australia entitled *Sovereigns Not Subjects: A New Constitution for the People of Western Australia*, privately published, Perth, 1990 and available from the author, and have long argued for a genuine People’s State Constitutional Convention for Western Australia, ideally one which was entirely elected.

⁴⁹ I stood along with the late Professor Patrick O’Brien and others on an *Elect the President* ticket. Professor O’Brien (a political scientist) was elected and made a sterling contribution to the convention debates.

⁵⁰ Without wishing to embarrass all those who joined me I would like here to recognise the unstinted help given me by Grant Martyn who voluntarily resigned a full-time course he was attending to become the group’s unpaid executive officer.

⁵¹ Malcolm Turnbull (op. cit.) p. 321. To be fair, Malcolm Turnbull heaps praise on all his friends.

⁵² This had the unexpected result that if Australia were to become a monarchy many monarchists would support a directly elected head of state.

⁵³ Four questions were asked each of which would have increased the power of Parliament, and thus of the executive. The referendums were defeated by one of the biggest margins on record.

⁵⁴ Known as the *Constitution Alteration (Establishment of Republic) 1999*, and *Nominations Committee Bill 1999*. The latter would have been passed as an ordinary bill had the referendum succeeded. It was not put to the people. Parliament of the Commonwealth of Australia Joint Select Committee on the Republic Referendum, *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999*, Canberra, 1999. The committee’s report focused on fine-tuning, it contains a lot of useful material, but for true republicans, such as myself who gave evidence, there was nothing to be gained in pointing out the bill’s fundamental flaws.

⁵⁵ The quotations are from the Joint Select Committee Report.

⁵⁶ Malcolm Turnbull, (op. cit.) 1999, p. 97.

⁵⁷ Dr Geoffrey Gallop, who spoke for direct election at the convention and against it during the referendum campaign, has now called for the direct election of Western Australia's State Governor, a largely ceremonial position.

⁵⁸ The 'yes' (left side) and 'no' (right side) cases were placed on facing pages. The five missing pages were, therefore, glaringly obvious.

⁵⁹ Words in inverted commas taken from the "Yes/No" pamphlet, Australian Electoral Commission, Canberra, 1999.

⁶⁰ *Constitutional Convention Report*, vol. 4 p. 866.

⁶¹ Professor Winterton George Winterton had indeed begun to make suggestions to this effect when he was cut short, as were most speakers, for lack of time.

⁶² The full list of all referendums and votes cast is to be found in *Electoral Newsfile*, Australian Electoral commission, Canberra, No., 84, September 1999.

⁶³ David Gow, Clive Bean, Ian McAllister, *Australian Constitutional Referendum Study 1999: User's Guide for the Machine-Readable Data File*, Australian National University, Canberra, 2000. This contains a wealth of key data on the referendum.

⁶⁴ As much as I resented having to appear before the Joint Select Committee on the Republic Referendum, because of its evident pre-commitment to the proposed law, I must admit that, as shoddy as was the proposed law, the committee did make the kind of critical review which all the options would have received had it gone to a plebiscite.

⁶⁵ Malcolm Turnbull, (op. cit. 1999) p. 148.

⁶⁶ Quotations from *The Australian* (8.11.1999). Ted Mack was himself the subject of "ridicule, humiliation and character assassination" in Malcolm Turnbull's *Fighting for the Republic*.

⁶⁷ Both quotes are from *The Australian Newspaper*, November 8, 1999, p. 15.

⁶⁸ Or perhaps, although he did not stay long enough to say that he had, he may have just finished reading Professor Stephen Haseler's polemic, *The End of the House of Windsor: Birth of a British Republic*, Tauris, London, 1993. At least Haseler did have some idea of what republicanism might actually represent. In a similar vein, see also Al Grassby, *The Australian Republic*, Pluto Press, Leichhardt, NSW, 1993.

⁶⁹ Article in the *Australian Financial Review*, 1999.

⁷⁰ *The Australian Newspaper*, the strongest of all the 'yes' media supporters, went so far as to print on page 6 of its referendum result issue of Monday 8 November a photograph of a two very trendy 'yes' voters discussing the results over what appears to be a bottle of chardonnay!

⁷¹ Katherine Betts, "The Cosmopolitan Agenda and the Referendum on the Republic," *People and Place*, vol. 7, no. 4. 2000, p. 32-41. See also Katherine Betts, *The Great Divide: Immigration Politics in Australia*, Duffy and Snellgrove, Sydney, 1999.

⁷⁴ Betts, (op. cit. 2000) p. 34.

⁷⁵ As reported in *The Australian* (4.7.00 p. 15). The newspaper article was headed "Ten ways to halt a republic."

⁷⁶ The ARM has recently published a new constitution whose stated objectives confirm its underlying belief in the importance of Australia having an appointed head of state rather than Australia becoming a federal republic. Its focus upon the head of state and references to “our heritage” and the republic as “the next natural progression in the evolution of democracy” as well as ARM’s decision to change the association’s name to “*Republic Australia*” are in line with this conclusion. See Website <http://www.republic.org.au> updated April 2000.

⁷⁷ The delegates were housed in New Delhi in a residential complex known as Constitution House (now demolished). Keeping the delegates in one place gave vent to a high degree of post-debating chamber debates and discussion, especially around the dining tables in Constitution House’s restaurant.

⁷⁸ This explains why Western Australia is not mentioned in the opening preamble of the 1900 Commonwealth of Australia Act; provision was made for it to enter later under clause 3 “if Her majesty is satisfied that the people of Western Australia have agreed.

⁷⁹ My own model state constitution specifically written for Western Australia was designed just for that purpose. See “A New Constitution for the People of Western Australia” in Patrick O’Brien and Martyn Webb, *The Executive State: WA Inc., and the Constitution*, Constitutional Press, Perth, 1991, pp. 353-386.

⁸⁰ Constitutional Commission, *Report of the Advisory Committee to the Constitutional Commission*, 5 vols., 1987; and *Final Report of the Constitutional Commission*, 1988. The final report was summarised in *Final Report of the Constitutional Commission – Summary*, Canberra, 1988.

⁸¹ Compare with *Constitution of the United States of America*, Article IV, sec. 4, “The United States shall guarantee to every state in this Union a Republican Form of Government.”

⁸² Alexis de Toqueville, *Democracy in America*, (13th edition 1850) Translated by J.P. Meyer, Doubleday, New York, 1966, p. 58.

⁸³ P. H. Lane, *The Australian Federal System with United States Analogues*, Law Book Company, Sydney, 1972, is the most thorough study of these relationships.

⁸⁴ His bill included a bill of rights for which he fought to have included in the Commonwealth Constitution until it was stifled by lawyer delegates at the 1898 Convention using much the same specious arguments as were used to stifle codification at the 1998 Constitutional Convention.

⁸⁵ J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972. For a more recent review of Inglis Clark’s contribution to constitution making see John M Williams, “With Eyes Open: Andrew Inglis Clark and our Republican Tradition”, *Federal Law Review*, vol., 23, no., 2, Australian National University, Canberra, 1996. Hackett was particularly concerned to see a strong and independent Senate.

⁸⁶ This issue is roundly treated in Andrew Fraser, “In Defence of Republicanism: A Reply to George Williams,” *Federal Law Review*, vol., 23, no., 2, 1996. Responsible government operates under ‘inherited’ powers. These include the Crown’s prerogative powers, rights, and immunities of the British Crown as well as the conventions relating to the exercise of the Crown’s reserve powers.

⁸⁷ David Solomon takes up this point in his stimulating book, *Coming of Age: Charter for a New Australia*, University of Queensland Press, Brisbane, 1998. David Solomon was among the first to put forward, in his book *Elect the Governor-General*, (1977), that the Governor-General’s powers were so powerful and so all-embracing that it ought to be an elective office.

⁸⁸ In Western Australia, for example, proposals for change the status of both the Governor and the Legislative Council must be put to the people.