

A practical way to early resolution of the head of state issue

by Richard E McGarvie*

Richard McGarvie previews the conference to be hosted by the Corowa Shire Council on 1 and 2 December 2001, as the end piece of the federation year. The conference aims to perform the same function as the Corowa Conference of 1893, which recommended the process that was followed to resolve the issue of whether Australia should federate. +

Our strong and stable federal democracy is a priceless community asset which belongs to the people. So does the responsibility for keeping it strong and ensuring that whenever it is adapted to fit changing circumstances, this is done in a way that preserves or improves it.

Is early resolution necessary?

A Newspoll in September 1999 showed 95 per cent agreeing that the head of state should be an Australian, 88 per cent strongly agreeing. In the referendum two months later only 45 per cent voted for the package offered and no State gave majority support. This indicates that over 40 per cent of voters were not satisfied they were offered an acceptable package and voted 'no' despite their desire for an Australian head of state. A later study shows 89 per cent agreeing an Australian should be head of state, 70 per cent agreeing strongly.

That shows a latent instability in our constitutional system. Constant wrangling over basic features of the constitution has a destabilising effect in a federal democracy. That has been the experience of the long-running series of constitutional disputes in Canada since the late 1970s. It would not be responsible for

the Australian people to leave the body politic unhealthy, with a constitutional running sore where about 90 per cent do not identify with a central feature close to national sentiment.

What is the issue?

The issue is whether we have reached the stage of history where we should cast off the legacy of colonial times, which gave us a head of state in a foreign country on the other side of the world, and finally attain entire constitutional autonomy.

Since 1788 we have moved so far in that direction that only a slim residue of constitutional dependence on Britain remains. For years the operative or de facto heads of state, the

governors-general, governors and administrators of the Northern Territory, have performed virtually all the head of state responsibilities for the Australian federation. They operate as advised by their Australian ministers and are entirely free of any control by the Queen. Our only remaining constitutional dependence is that whoever is monarch of the United Kingdom is monarch of Australia and the formal head of state of the Commonwealth and each State and Territory. The only constitutional function the Queen now performs is the fairly mechanical and infrequent one of complying with the binding convention to appoint or dismiss the governor-general, State governors or administrator of the Northern Territory as advised by the prime minister or State premier.

The issue which faces us is whether we have reached the stage where the whole federation should separate from the Monarchy.

While that would be a relatively small change, it is a difficult one. The quality of our federal democracy has endured mainly because the law of its constitutions and the operating constitutional system developed on that, between them leave power holders no real option but to exercise their powers consistently with the continuation of democracy and its safeguards. They have that effect because they combine to provide incentives and disincentives and to bind power holders to act in that way. Particularly important are the constitutional conventions which are made binding on power holders by the way the constitutional system actually works and the non-legal penalties it imposes for their breach.

The main difficulty in moving to complete constitutional autonomy is to ensure that a model which replaces the Monarchy would not reduce the incentives and disincentives provided by the operation of the constitutional system and would not lead it to work in a way that would weaken or destroy the binding power of those conventions. Avoiding these unintended consequences depends very little on a knowledge of law but on a knowledge of humans and their behaviour within organisations, particularly when influenced by the impulsive attractions of obtaining or retaining power.

What is needed for effective resolution?

The experience of resolving the issue of whether Australia should become a federation, and of the 1999 referendum, show what will and what will not resolve the head of state issue. It must be resolved in a constitutional way which makes full use of the resources of people, parliaments and governments in working out the proposal ultimately put to referendum.

The issue will be resolved only by a referendum vote upon a proposal that can genuinely be presented so as to catch the public imagination and vision, and where people can vote free of partisan political impulse and secure in the knowledge that whichever way the vote goes our democracy and federation will be safe for future generations.

In practice the issue will be resolved only in two events. If a referendum passes. Or if a sound and acceptable proposal for change is strongly put and voters reject it because of a genuine preference against making the change at the present stage. Both those events depend on there being a sound and acceptable proposal.

The effective resolution of the issue is retarded by loose thinking. Regarding or describing the issue in the vague terms of whether Australia becomes a republic is an instance of this.

+ 'A practical way to early resolution of the head of state issue' by Richard E McGarvie, published in (2001) 117 *Victorian Bar News*, p. 38

* Richard McGarvie was formerly a Supreme Court judge and governor of Victoria, 1992-1997.

The word 'republic' distracts attention from the realities and rouses conflicting responses based on emotion. Use of the word has led many to concentrate on copying the constitutional structures of very different overseas republics rather than on how best to maintain the strengths of the federal democracy that has been evolved to suit Australia's history, tradition and culture. In some, the word evokes utopian ecstasy which convinces them that if we become a republic our trade will automatically increase and all our problems become easier to solve. In others it has the opposite effect. Within living memory we have seen republics which produce good democracy, such as the United States and Ireland. But we have also seen the republics that produced the tyrannies of Hitler, Stalin, Mao Zedong, Idi Amin, Pinochet and Robert Mugabe. This predisposes people, particularly those who or whose families came to this country to escape the tyrannies of such republics, to regard all republics with repugnance. It is better to use tight and objective words which do not distort clear thinking and which convey what is actually proposed. Since the 1999 referendum the issue is increasingly being described as the 'head of state issue' and it is recognised that the real question is whether the Australian federation finally separates from the Monarchy and attains the constitutional self-sufficiency of a nation state.

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Didn't the 1999 referendum resolve the issue?

The package rejected at the 1999 referendum lacked a number of the attributes which are essential if a referendum vote is to resolve the issue. I refer only to some of them.

The package was not developed in the constitutional way, in which the resources of people, parliaments and governments are fully utilised in working out the proposal put to referendum. In reality, the people, parliaments and governments had very little involvement in putting the package together. Instead we sought to resolve the issue in a privatised way. The main influence on the form it took was a private organisation, the Australian Republican Movement. The main critic of the package was another private organisation, Australians for

Constitutional Monarchy.

The process by which the package was determined was not one which led people to vote free of partisan political impulse. The process was designed and operated so as to suit the purposes of the government of the day. John Button has observed that Paul Keating woke up republican sentiment in 1993 and understood its symbolic power. 'He held it in his hand like the 'Welcome Stranger' gold nugget. Then he dropped it in the murky waters of acrimonious partisan politics.' What he did was to brand the model as the one endorsed and promoted by his party. To brand it that way and use it in extracting political advantage from his party's opponents was to brand it a referendum reject. To negate the political advantage over the Coalition that Keating and his party were deriving, John Howard undertook to hold a convention and put to referendum a model with clear support, and the 1999 referendum was the result.

Resolution of the issue became to a large extent politically partisan. This showed in the Newspoll of voting intention taken

a week before the referendum. It indicated 53 per cent of ALP voters voting 'yes' but 63 per cent of coalition voters voting 'no'.

Although it was put together as we approached the centenary of federation, paradoxically the designers and promoters of the referendum package hardly looked at, and never seriously considered, a resolution of the issue for the whole federation. The referendum was confined to the Commonwealth unit of the federation. People could not vote secure in the knowledge that whichever way the vote went our federation would have been safe for future generations. The destabilising effect if the referendum had succeeded with one or two States strongly dissenting would have been considerable. The majority in the dissenting States would have been forced into a system of government for the Commonwealth in which they lacked confidence. Although theoretically possible for them to remain monarchies, circumstance and ridicule would have forced the dissenting States to become republics at State level. This would have produced a destabilising factor in the federation, unequalled since Western Australia voted in 1933 almost two to one to secede from the federation.

The referendum package could not be presented so as to catch the imagination and vision of Australians. A referendum to separate the whole federation from the Monarchy could be presented as completing the long sweep of evolution from being totally dependent on Britain in 1788 to becoming finally totally self-sufficient. That was not open to the advocates of change in 1999. If the referendum had succeeded, most of the federation – all of the States – would still have been monarchies. The advocates had to content themselves with extolling the virtues of novel fittings and fixtures in the package.

What is the aim of the Corowa Peoples Conference 2001?

The conference, to be hosted by the Corowa Shire Council on 1-2 December 2001 as the end piece of the federation year, aims to perform the same function as the Corowa Conference of 1893. It recommended the process that was followed to restart the stalled move to resolve the issue whether Australia should federate and to progress it to resolution.

This year's conference will confine itself to recommending a process for early resolution of the head of state issue. It will not consider whether the Australian federation should separate from the Monarchy nor the merits of models to replace the Monarchy in that event. It will consider a process that will empower the people to decide those questions in an informed, fair and effective way.

It will have the advantages of the lessons that come from the experiences of federation and the 1999 referendum.

Why is it a peoples conference?

It is designed to enable the conference members to make recommendations in exercise of their responsibility to ensure that if Australia separates from the Monarchy, it is done in a way which preserves or improves the strength of our federal democracy. The influence of the people is essential if the stalled move to resolve the head of state issue is to be restarted.

The reality at present is that the main political parties share a strong interest in retarding resolution of the issue. They all had their fingers badly burnt in the referendum and

naturally do not wish to repeat the experience. Apart from enduring the strains of permitted disagreement between party members, the Prime Minister, who favoured a 'no' vote, carried only 65 per cent of the Liberal Party's most recent electoral constituency that way. The Nationals opposed the package but a number of senior members broke rank and supported it, and the party carried only 80 per cent of its constituency to a no vote. Labor supported a 'yes' vote but carried only 57 per cent of its most recent electoral constituency that way.

The Coalition is treating the issue as having disappeared with the referendum. Labor's approach is first a plebiscite on whether we desire an Australian head of state, then another plebiscite on the preferred model and ultimately a referendum on whether to change the constitution. That seems only the start, as it does not appear to encompass resolving the issue for the States. If that process eventually resolved the issue, it would take many years.

Fortunately many within all parties see that the national interest demands an early resolution of the issue.

About half the Corowa Conference will be self-selecting. They will be members of the public who respond to advertised invitations to register. Up to a quarter are automatically invited because they have constitutional experience from holding office related to government. They include current and former prime ministers, premiers and leaders of the opposition; former operative heads of state; current Australian presidents of the main political parties, leaders of parliamentary parties, independent members of parliament, presiding officers of the parliaments and councillors holding office in the main local government organisation in Australia. The other members will be people of all views who have experience or knowledge relevant to recommending a process for consideration of a constitutional change. They include people holding the various positions held on the head of state issue and those with experience in business, unions or other organisations.

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Can the conference work in a non-partisan way?

For a conference to recommend the best process for resolving the head of state issue, Australians expect the membership to include people of all viewpoints and that each will vote according to what they individually think best for our community and future generations. Every Australian, whatever their political preference and whatever their position on the head of state issue, shares an identical interest in identifying and following the best process. It is not an occasion for partisan voting on the dictates of a party, group or faction.

The response from all community sectors has been magnificent. A crucial lead was given by the early agreement of Australian presidents of political parties, Shane Stone (Liberal), Greg Sword (Labor) and Michael Macklin (Democrats) to attend the conference. Showing similar leadership, Greg Barns, Australian Republican Movement Chairman and David Flint, National Convenor of Australians for Constitutional Monarchy, are attending. So is business leader, Stella Axarlis. Former governors, Gordon Samuels (NSW), former chief justice, Sir Gerard Brennan and former High Court justice, Sir Daryl Dawson, will be there. Seldom, if

ever, has a conference been convened which combines in a national task members of the public and community leaders of all viewpoints. Seldom has there been such a prospect of non-partisan approach to the recommendation of process.

How did the conference originate?

John Lahey asked me to launch his book, *Faces of Federation: An Illustrated History*. On reading it I saw how much the experience of federation confirmed the practicality of the process advanced by a working group at the 1998 Constitutional Convention and in my book, *Democracy*, to resolve the head of state issue for the whole federation. I said so in my launch speech. Sir Zelman Cowen read the speech and in his notable lecture to the St James Ethics Centre in Melbourne on 31 October 2000 urged Australia to follow that process, which he saw as combining 'political realism with expert advice'. Jack Hammond Q.C. read the speech and the lecture and came up with the idea of Corowa again taking the initiative. He put it to the Mayor, Cr Gary Poidevin, who responded 'Sure it can be done'. Jack Hammond and I presented a paper and spoke at Corowa. Two days later, on 19 December 2000, the Corowa Shire Council decided to host the conference. Sir Zelman Cowen is its Patron and will give the opening address.

What process will the conference consider?

The conference will consider a number of processes, set out in some detail on its web site.

One process prepared by Jack Hammond Q.C. and me for consideration proposes that the conference appoint a high level and non-partisan drafting committee to prepare legislation to establish all-party committees within each of the parliaments. First, the State and Territory committees would each investigate, listen to their community and report on two questions:

- 1 Which head of state model would best preserve or improve our democracy if it replaced the Monarchy?
- 2 Which method of deciding the head of state issue would place least strain upon our federation?

Then the all-party committee in the Federal Parliament, with a representative from each State and Territory committee, would give a report on those questions and append to it the State and Territory reports. That report would go to the proposed coordinating authority, the Council of Australian Governments (COAG) and be widely publicised on the Internet and elsewhere.

All-party parliamentary committees have a good record in Australia for their reports on questions where the political parties have no conflicts of interest. Much of our best legislation comes from them. The proposed process would start with investigation and reports by committees within the parliament closest to the people of a State or Territory. This will come immediately to people's attention and begin to provide the information they need to make their decisions. The capacity of the process to provide the people with information and expert advice from a variety of sources is one of its great strengths.

It is proposed that on the second question, the parliamentary committees consider the following method of deciding the issue without strain on the federation.

With the community informed by the work and reports of

the parliamentary committees and media discussion of it, there would be a plebiscite in which the people would express their preference between the models supported by either the majority or a minority in the report of the federal parliamentary committee. The people of each unit of the federation, the Commonwealth and each State and Territory would choose the model they would prefer for their unit if it separated from the Monarchy. Each Australian voter would mark a ballot paper showing their preference of model for the Commonwealth and another showing their preference for their State or Territory. There is no constitutional necessity for each unit to have the same type of model though that is the most likely outcome. The traditions, culture and operating systems of government within each unit are essentially the same as within each other unit and it is difficult to see why a model considered best for one unit would not also be considered best for the others. The plebiscite could be held with the federal election to be held not later than 2004.

Finally, all Australian electors would vote in the one referendum on the one question of whether the whole federation – all its units – separate from the Monarchy. That method would enable the change to be made with political and constitutional legitimacy and without strain on the federation.

No State would separate from the Monarchy and substitute a self-sufficient model for it, unless the majority of the State's voters had voted for that. While a Territory could change, without a majority of its voters voting for that in the referendum, it would change to the model preferred by its voters in the plebiscite. All powers of constitutional change would be relied on, particularly the new powers created by the Australia Acts in 1986. If supported by the overall majority of voters and a majority in every State, and if every State parliament requested it under the Australia Acts, the whole federation would separate from the Monarchy at the same time, with each unit converting to the model it chose in the plebiscite. Otherwise there would

be no change. Either way the issue would be resolved, at least for this stage of history. The referendum could be held in about 2005.

The potential of Australia Act powers for resolving the issue for the whole federation was perceived at an early stage by South Australian Solicitor-General, Brad Selway Q.C.. That appears from the South Australian Constitutional Advisory Council report, *South Australia and Proposals for an Australian Republic*, (Peter Howell, Chairman), Adelaide, 1996. My book, *Democracy*, pp.255-63, outlines constitutional mechanisms relying on those new powers.

Every successful referendum after 1910 has been carried with the support of an overall majority of voters and a majority in every State. The proposed process does not require a level of support for constitutional change that is significantly higher than that usually attained. If a majority of a State's voters vote for the change, in political reality, the State parliament would have no option but to make the necessary request.

Are there valid objections to the proposed process?

It is said that December 2001 is far too early to start making decisions on recommended process and much more

time should be left for discussions before that is done. Whatever satisfactions come from sessions of endless talk that lead only to more talk and never to decisions or action, the need for Australians to move from theory and face up to taking practical steps, must outweigh the temptations of serial postponement. Discussions have gone on since 1993 and if the propounders of an alternative process cannot put it on the conference web site in as much detail as the one displayed since last May, and thus expose it to public scrutiny well before the conference, it must have little substance.

It is not only the deepening constitutional running sore mentioned earlier, that should impart a sense of some urgency. We now have an opportunity we have not had for years and which may not last for long. At present no political party is identifying itself with a particular model and promoting it. The fact that they are licking their referendum wounds is a great plus. This atypical situation gives the best chance ever of resolving the issue free of partisan political impulses. We should not squander it through inertia.

Then it is said that instead of the first step of the recommended process being inquiries and reports by parliamentary committees, the process should go first to a constitutional convention which is all or mainly elected. The precedent of the 1897-8 Constitutional Convention is relied on. That seems to overlook the realities. Although politicians were about as unpopular then as they are today, voters knew who best understands how the constitutional system actually works, and all but one member of the convention were parliamentarians. The convention was, in effect, a large committee of parliamentarians.

The elections for that convention were held about thirteen years before the modern party system asserted itself in Australia. Today, if members of parliament stood for election to a constitutional convention on the head of state issue, the parties would seek political product differentiation by sponsoring different models and processes. Political partisanship would mar the second attempt to resolve the issue. As the election for the 1998 Constitutional Convention showed, if parliamentarians were barred from standing, electors would tend to elect people they had heard of. Usually this would elect celebrities who have little understanding of the working of the constitutional system rather than those who had that understanding but lacked the public recognition of celebrities.

It is also said that instead of the process starting with parliamentary committees or an elected convention, the first step should be a plebiscite on whether we desire an Australian head of state.

That has two obvious weaknesses. First, however ready some 90 per cent of the people are to reveal to an opinion poll their desire for an Australian head of state, many of them would be reluctant to express themselves in that way in a public plebiscite. Constitutional caution would predispose against giving what many would regard as a blank cheque. They would regard a yes vote as politically committing Australia to dispense with the Monarchy and would desire that no such commitment be given until they were satisfied that the substituted system would be safe for the democracy and federation of future generations.

Second, even if the result of such a plebiscite showed a majority desire to separate from the Monarchy, we would have

placed ourselves in the position where our declaration of no confidence in a central feature of our constitution would be likely to resonate for years. It would continue to restate our position until we did the hard stuff necessary to resolve the issue through a referendum vote with the essential qualities mentioned earlier. We would be most unwise to place ourselves in that constitutional no-man's land for many vital years.

No doubt, in the pre-conference debate upon the conference web site and at the conference itself the cases for and against the recommended process starting with parliamentary committees, an elected convention or a plebiscite on whether we desire an Australian head of state will be put strongly. Other processes with other initial steps are likely to join the contest. The conference decision on that contest will be very important.

What effect could the conference have?

As with the first Corowa Conference, the effect of the recommendations of this year's Corowa Conference will depend on the persuasive authority they carry with people, parliaments and governments. The conference has the potential to initiate an orderly exercise of the people power which underlies our democracy. It could bring the weight of public opinion upon parliaments and governments to take the action necessary for early resolution of the head of state issue, despite the hesitancy of political parties to do so. If it does, it will not only have

provided a significant end piece for the year of celebrating federation. Corowa will again have served its nation well.

Sources

The information relied on in this article is to be found in my papers on the www.corowaconference.com.au or www.chilli.net.au/~mccgarvie web sites or in my book, *Democracy: choosing Australia's republic*, Melbourne University Press, 1999. That book is also entirely on the www.mup.unimelb.edu/democracy/index.html web site.

Note: During the original publication of this article, it was reported that Opposition Leader Kim Beazley proposed a referendum in 2005 if elected: *The Age*, 21 July 2001, p. 3.

An innovative feature of the conference, likely to set the pattern for consideration of constitutional change in the electronic age, is that the debate on the process the conference should recommend is well under way.

It is open to every Australian, whether attending the conference or not. More than six months before the Conference, the Conference website (www.corowaconference.com.au) was opened six months before the conference.

It displays processes proposed for consideration by the conference and papers and comments on processes.

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