

THE REPUBLIC: IS THE 1999 PROPOSAL BEYOND REPAIR?

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INTRODUCTION

The vital point to grasp in Australia's frustrating republican debate is that the claims of any particular model for adoption must depend upon two basic criteria. The first is one of principle: would the particular model produce a desirable republic? The answer to this question will depend significantly upon one's own subjective constitutional preconceptions. The second criterion, equally important, is that of practicality: will this particular republican model receive the requisite public support at referendum? As the 1999 referendum showed, this criterion - unlike its companion - is ruthlessly objective.

It needs to be clearly appreciated by supporters of an Australian republic that any republican model must fulfil both, and not merely one of these two criteria. Obviously, on the point of principle, a republic could not be implemented that would have seriously negative effects upon the Australian Constitution, merely because its success could be assured at referendum. Correspondingly, however, there equally is no point in designing what one regards as a theoretically perfect republic if it would be inconceivable that such a republic would succeed at a referendum.

These dual truths must lie at the heart of any future Australian republican debate. The tendency thus far has been for adherents of the republican cause to concern themselves far more with principle than practicality. They tend thoroughly to enjoy themselves designing their own pet model for an Australian republic, and having engaged in such a satisfying act of constitutional genesis, aggressively assume that the Australian people will not dare to disagree with their predilections. This tendency is evident right across the republican spectrum. Thus, former Victorian Governor, Richard McGarvie, having produced his own most impressive, ultra-conservative model, was intolerant of any other version of that model that deviated in the least from the original. He was more than matched in this respect by the Australian Republican Movement at the Constitutional Convention who derided and mocked every model

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but its own, without the slightest recognition that the same fate inevitably would befall its favoured position during the referendum campaign. Finally, those republicans favouring a directly elected president typically are contemptuous of any less radical proposal.

The sad truth is that no matter how conceptually attractive a model may be to its proponent and his or her adherents, that model will be doomed unless it is able to pass the test of a referendum, which will involve its acceptance by many millions of Australians quite outside the coffee-circle of its author. This is a fundamental consideration, not some ingenuous debating point in the wider republican controversy: it quite simply is impossible to divorce the question of the constitutional attractiveness of a model from its likely popular acceptance. Consequently, the claims of any model to be put to referendum, including the much maligned Convention model, will have to be simultaneously and rigorously assessed on two grounds: first, its constitutional desirability in an abstract sense; and secondly, its constitutional practicability in the sense of whether it will succeed at referendum. In any meaningful way, the second question cannot be divorced from the first.

In light of all this, those who are inclined to dismiss the Convention model (either specifically or as a genre) may need to think very carefully concerning its claims to practicality when compared to their own preferred republican options. This is because, paradoxically in light of its failure at the 1999 referendum, the Convention model (or some variant thereof) may represent in the long term the only practical genre for an Australian republic, a possibility explored in detail later in this essay. In any event, and whatever the claims of the Convention model, the practicability of any alternative republican model will need to be considered in light of a clear-headed assessment of the true reasons for the failure of the 1999 referendum.

Consistent with this approach, this essay will attempt the following things. First, it will address the question of why the 1999 referendum failed. Second, drawing upon this analysis, it will try to enunciate some criteria for the success of future republican referenda. This is a crucial undertaking: criteria for success must be identified and possible solutions tested against them before any attempt is made at implementation. Thirdly, these criteria will be applied specifically to the possibility of a republican model including a directly elected president. The conclusion will be reached that no model for direct-election would ever be likely to satisfy the relevant requirements for referendum success. Finally, the essay will conclude that the only republican model that conceivably could comply with the posited criteria for of a successful republican referendum would be a model which, if not the Convention model itself, then at least was one falling within that broad

genre Consideration will be given to the manner in which a model along the lines of the Convention model might (or might not) be made more attractive, both in constitutional and in popular terms

WHY DID THE 1999 REFERENDUM FAIL?

A great deal of nonsense has been spoken concerning the reasons for the failure of the 1999 referendum In particular, there has been something of an industry in republican hindsight, with various pundits opining that “the referendum was there to be won”, and that if only a better model had been put forward, the requisite majorities would have been straightforwardly attained The uncomfortable reality is that, regardless of what model is put forward, it will always be extremely difficult to secure success for a republican referendum This is something that the proponent of any future republican model would do well to remember:

Thus, the starting point for an analysis of the failure of 1999 must be the simple acknowledgment that it is inherently difficult to secure victory at a referendum¹ It is the most banal of constitutional statistics in Australia that only eight of forty-four referenda have succeeded, and the conclusion from this must be that virtually any referendum faces an uphill battle This always was going to be true for the 1999 referendum, as it will be for any other republican referendum In reality, of course, the position in 1999 was even more fraught Not only is it difficult for a referendum to succeed in Australia, but the greater the constitutional change proposed, the greater the challenge in securing popular support The reality is that any republican proposal will be “big” in the world of referendum politics, no matter how consistent it may be with the underlying suppositions, and even the text of the Constitution This is because, inevitably, a large change of symbolism will be involved, even if not a large change in functional reality This would be true even of a republic along the minimalist McGarvie lines, and certainly was true of the Convention model

This leads into the fundamental factor in the defeat of the 1999 referendum, the profound constitutional conservatism of the Australian people Historically, this has been repeatedly demonstrated in the prevalent failure of referendum proposals, particularly “large” or “controversial” referendum proposals It was, once again, massively demonstrated in 1999 Broadly speaking, the attitude of the Australian people towards any proposed constitutional amendment is, “If in doubt, vote No”² This is not, as is sometimes suggested, an irredeemably

¹ See for example: Solomon, D *The Political Impact of the High Court*, North Sydney: Allen & Unwin 1992, 146-54

² Compare: Sawyer, G *Australian Federalism in the Courts* Melbourne: Melbourne University Press, 1967, 206-8

irrational position. At heart, it is based on an assessment of the strength of the existing constitutional system, and a willingness to sit on one's hand unless one is absolutely certain that some significant problem is to be solved, or some probable improvement clearly to be achieved.

This undoubtedly was the fundamental reason for failure of the republican referendum. People were not prepared to vote in favour of a republic unless they were entirely sure that it was safe. Clearly, the Australian people were not satisfied in this sense by the Convention model for a variety of reasons. Some of these considerations will be considered separately later in this essay, but it may be noted at this point that many of the reasons underlying the popular rejection of the Convention model could not be regarded as objectively persuasive, while some do not appear to fall within the spectrum of constitutional rationality. However, the effectiveness of an argument in a referendum depends upon its ability to persuade (or dissuade), not to pass muster in an examination in constitutional law. Thus, for example, it was a perfectly open view (though not one shared here) that an appointment process which did not include the people, or a dismissal process centred around the Prime Minister, was unacceptable. Vastly less reasonable were alleged qualms based upon the status of crown land, the expense involved in becoming a republic and the name of the head of state (President or Governor-General). Downright silly were suggestions that Australia would be expelled from the Commonwealth and become ineligible to compete in the Commonwealth Games. But impressive or unimpressive, all such arguments played upon the innately conservative constitutional character of the Australian population. There is no point in any republican believing that the Australian people will change in this respect. Their conservatism must be faced in assessing the claims to practicability of any republican proposal.

A further fundamental reason for the failure of the 1999 referendum was that it faced intense partisan political opposition. This meant that it contravened one of the acknowledged general criteria for referendum success, namely that any proposal must receive bi-partisan political support: no referendum in Australia's recent history has succeeded without such general political backing.³ In the case of the 1999 referendum, the proposal was vigorously and skilfully opposed by the Prime Minister of the day in a steadily escalating campaign. The effect of this prime ministerial opposition was threefold. Firstly, the very fact of such obvious political division worried and confused the constitutionally

³ See: Galligan, B. 'The 1998 Referendums in Perspective' IN Galligan, B and Nethercote, J. *The Constitutional Commission and the 1988 Referendums*, Canberra: Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (ACI Division), 1989. 119-33

conservative Australian electorate Secondly, it gave gravity and weight to the negative arguments sponsored by anti-republicans Thirdly, and perhaps most critically, it strongly implied to political conservatives that they could not be both conservative and republican.

The combined effect of the intrinsic conservatism of the electorate and partisan opposition should be understood as the key factors behind the defeat in 1999 Alongside them must be set the important, but often over-rated factor of the "split" republican vote This, of course, was one of the most obvious features of the entire referendum A significant number of direct-electionist republicans publicly advocated a "No" vote, including such former Convention delegates as Phil Cleary, Ted Mack and Clem Jones This obviously had a dire effect upon the republican cause. In the first place, it involved a whole new series of enemies and attacks Secondly, and probably most importantly, it had the effect that the fire of the "Yes" Case had to be divided Instead of concentrating upon its obvious enemy, the monarchists, the referendum republicans were forced in addition to respond to charges from more radical republicans, which in turn created a dangerously confusing atmosphere with semi-contradictory arguments directed simultaneously against both a more conservative (monarchist) and a more radical (direct election) constitutional position. Finally, it is a truism that a number of republicans voted against the referendum proposal on the grounds that they would not support a republic that did not include a directly elected Head of State.

Perhaps paradoxically, it seems to me that this ultimate blow at the ballot box probably was the least objectively damaging of all the outcomes of the split in the republican camp This may seem counter-intuitive, on the grounds that were votes of direct electionists to be added to the votes of those who voted in favour of the referendum proposal, then it is conceivable that referendum might have won the day. The obvious conclusion to draw from this would be that were direct election now to be adopted as the official republican contender, it would win some future referendum. This argument will be considered later, but it may be noted here that it is naive on a number of levels

First, and crucially, the adoption of a direct election proposal undoubtedly would win the republican cause significant numbers of direct electionists It would, however, also lose a large constituency of conservative republicans who never would accept direct election Thus, the only effect of direct election upon the republican equation which matters ultimately is its net effect Secondly, this type of reasoning invariably assumes that those people who were to some degree inclined towards direct election and who voted "No" did so for this reason alone, and not for some other consideration. It is, in fact, highly arguable of many of those who voted "No" in the 1999 Referendum, and tended to justify their decision by reference to direct election, in fact possessed a variety of

difficulties with the referendum model, only one of which was a general preference for direct election. Frequently, if curiously, such a preference subsisted within a much more fundamental uneasiness with the whole notion of basic change to the Constitution, along the lines already discussed. In this sense, it is highly arguable that the notion of direct election served to provide many typically conservative Australians with a simple catch cry with which to explain and justify their negative vote at referendum. Yet, crucially, were they to be offered the possibility of a directly elected head of state, they unhesitatingly would vote "No" once again, precisely because of the fundamental constitutional conservatism which underlay their rejection of the original republican proposal.

A further factor in the loss of the 1999 Referendum was the campaign tactics on either side. One vitally important campaign decision was that of the monarchists and those republicans supporting direct election to work together to defeat the referendum. This decision was not inevitable, rather being a clear campaign choice by both parties, but most particularly the monarchists, who significantly chose to down play their support of the monarchy in order to maximise the benefit of allying themselves with more radical republicans. It was this decision that underlay the referendum's desperately confusing split, not only in the republican vote, but in republican rhetoric.

The other vitally important decision of campaign tactics also was on the "No" side. This was the decision embodied in what Malcolm Turnbull somewhat characteristically termed the "great lie", namely, the general willingness of prominent opponents of the model to say quite literally anything to bring it down. This was a ruthless tactic with a number of aspects, the most important of which was a willingness by monarchists to pretend tolerance or even enthusiasm for some future republic containing direct election when they were in fact irrevocably opposed to it. The second aspect of the "great lie" was the willingness of prominent opponents of the referendum to utilise any argument, no matter how intellectually disreputable. Thus, for example, Australians were ritually told that a successful referendum would lead to everything from a dictatorship, to expulsion from the Commonwealth. Notwithstanding the inherent implausibility of such arguments, the intense natural conservatism of the Australian constitutional electorate meant that many people were inclined to treat any argument against the convention model, no matter how far-fetched, as a reason for caution.⁴

A more specific factor against the success of the referendum concerned the question put, a matter that effectively was in the

⁴ For a general conspectus of anti-republican arguments see: Flint D *The Cane Toad Republic*. Kent Town: Wakefield Press 1999

unsympathetic hands of the Prime Minister.⁵ Simply stated, the referendum question carefully stressed key points of possible division, most prominently through use of the word “republic”, and its underlining of the fact that the head of state would be chosen by a two-thirds majority of Federal Parliament. Against this, balancing positive features of the model were conspicuous by their absence: there was no mention of the central feature of the proposal, namely, that Australia was to receive a citizen as its head of state, and no reference to the process of popular participation that would precede the parliamentary election.

Another reason for the failure of the referendum was its inability to engage the Australian population. The most obvious feature of this was that support and opposition to the referendum closely paralleled the so-called “class divide”. To this end, the model received strong support among the educated elite, and prevalent indifference and hostility the further down the social spectrum one moved, a fact that prompted much criticism of the tactics of the “Yes” campaign. The general strategy of that campaign was to present material that was positive and uplifting; that placed Australia, its history and its future in a positive light; and which prompted people to vote in favour of the referendum upon a surge of national pride and good feeling. It is a matter of history that this approach failed. One question that might be asked is whether the campaign was simply too positive, in the sense that while it made perfectly clear what people were voting for, it never provided a strong negative case as to why they should abandon the monarchy.

Of course, all this raises the much bigger question of whether the Australian people ever will be passionately engaged upon the republican issue? Often, it seems to be the assumption of proponents of divergent models that, if one only gets the model right, the people will march in the streets. An alternative thesis would be that the Australian people will at best be mildly interested in the issue of a republic, and even with enormous luck mildly supportive, but we will never see the antipodean equivalent of the tennis court oath. The crucial point here is that within such a climate of pathologically moderate support, the tendency of the electorate to take fright at the first sign of constitutional difficulty undeniable is maximised.

All of these factors relate either to the referendum process as such, or to the particular circumstances of the referendum of 1999. This is as it should be: it was these fundamental factors above all else which spelled

⁵ Concerning the framing of the question based on the long title of the Bill, see: Joint Select Committee on the Republic Referendum *Advisory Report on the Constitution Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999/ Joint Select Committee on the Republic Referendum*, Canberra: Parliament of the Commonwealth of Australia 1999.

doom for the republican referendum. However, there clearly were specific features of the model which provided particular focus for opposition

The most obvious of these was the appointment process for a head of state, whereby two-thirds of the Federal Parliament would vote upon a name submitted by the Prime Minister⁶ which also enjoyed the support of the Leader of the Opposition.⁷ This was opposed on two quite different grounds by two quite different forces. Firstly, it was opposed in its own right by a wide section of the Australian electorate (including, but not limited to, monarchists and direct electionists) on the basis that it would create a "politicians' republic", the most devastating slogan of the referendum. Such opposition was based on intense community dislike of politicians. Secondly, it was opposed by many Australians on the negative ground that it did not provide Australia with a directly elected head of state and that this was the only form of Republican government that would be acceptable. It should be noted that these positions do not necessarily amount to the same thing. Specifically, a general mistrust of politicians does not automatically infer some firm commitment for direct election

The second feature of the model which aroused opposition, though far less than the appointment provisions, concerned the dismissal of the President. Under the model, the President could be dismissed by the Prime Minister, although the Prime Minister later had to face the House of Representatives upon that issue.⁸ Opposition on this point tended to be most intense among monarchists offended by the ease with which the substitute viceroy could be discarded, but the dismissal mechanism clearly added to the impression that this was a republic where "politicians" would have the whip hand

To summarise, the 1999 referendum failed from a complex combination of constitutional-cultural, political and structural considerations. Consequently, there is no simple panacea to extract from the referendum, such as the glib proposition that "the wrong question was asked," and that a proposal for a direct election republic clearly would have won. Rather, the altogether more complex challenge is to extract from the referendum's failure lessons for the future in the form of criteria for the choice of a republican model that would indeed succeed at referendum.

CRITERIA FOR THE SUCCESS OF A REPUBLICAN REFERENDUM

The first criterion for success of a republican referendum is simple. No republican referendum will win without substantially bi-partisan political

⁶ *Constitution Alteration (Establishment of Republic) Bill* (Cwth) cl 60

⁷ For an intelligent discussion of this issue, see: Kirk, L. 'Till Dismissal Do Us Part? Dismissal of a President' (1998) 21 *UNSWLJ* 892.

⁸ *Constitution Alteration (Establishment of Republic) Bill* (Cwth) cl 62.

support. The failure of the 1999 referendum illustrates in horribly clear terms the manner in which a partisan divide on a republican proposal will politicise that proposal, alienate the supporters of the opposing party and desperately confuse the referendum issues for all electors. The second point flows from the first. No republican referendum will succeed without prime ministerial support. Not only does a hostile Prime Minister have the undoubted capacity to wreak havoc during a referendum campaign, but the Prime Minister of the day almost invariably will have control of the framing of the relevant referendum question.

The third requirement also follows the necessity for bi-partisan support: any republican model indispensably must receive the support of the conservative side of politics.⁹ The reality is that the cause of Labor is inherently inclined to republicanism. Conservatives are not naturally so inclined, tending to have an unsurprising attachment to existing constitutional arrangements. However, given that they always will constitute around half the total population, they possess an undoubted capacity to attack and ultimately destroy any republican proposal. It was for this reason that former Prime Minister Keating apparently expressed the view that Australia would not become a republic until such a proposal was put by a conservative Prime Minister. Thus, there is simply no point in pretending that all that is required for a successful republican referendum is a model that will arouse general support of the broad left of Australian politics. Rather, a republican referendum must also attract very significant support from conservatives, or perish.

The fourth criterion for a successful republican referendum is that the model it puts forward must be demonstrably safe and as simple and straightforward as possible. This follows inevitably from the fact that any republican model will be attacked on every conceivable charge, every unclear feature and every dubious quibble. In this respect, after 1999, we now know that republican referenda are dirty referenda. Moreover, one only has to recall the extraordinary play that was made by the "No" case of the fact that "67 changes" would be made to the Constitution under the Convention model to realise that every constitutional change proposed as part of a republican settlement is another reason for somebody to vote no. All of this is based on the fundamental reality of referendum politics that the Australian people are, and will remain, intensely conservative concerning their constitutional arrangements.

The fifth criterion for success of a republican referendum, emerging clearly from the experience of 1999, is that the processes for the removal

⁹ As to the whole notion of 'conservative republicanism' see generally: Craven G 'Conservative Republicanism: the Convention and the Referendum' (1998) 21 *UNSWLJ* 886

and appointment of the head of state must not offend the sensibilities of the Australian people. As regards removal, the relevant mechanisms must not give the impression that the Head of State is subject to summary execution by the Prime Minister. It is not clear precisely what this might involve, but clearly the 1999 proposal was deficient in this respect. As regards appointment, any republican model must at least be such as to arouse in the Australian people a conviction that they are involved in the process and not mere onlookers to a political event. This does not mean that some form of direct election would be unavoidable, but that there manifestly will have to be a genuine element of popular involvement in the appointment process.

By way of summary, then, the indispensable criteria for the success of any republican referendum would seem to be as follows. First, a republican proposal must have the bi-partisan support of both sides of Australian politics. Second, (and consequently) it will have the active support of the Prime Minister and the government of the day. Third, it must be supported by conservatives, as well as those more naturally inclined towards republicanism. Fourth, the proposal must have the virtue of constitutional modesty, in the sense that it is simple, straightforward and demonstrably safe. Finally, it must be constitutionally "decent" meaning that a proposal's processes for appointment and removal of the head of state must not rest solely in the hands of politicians.¹⁰ These "criteria of republican plausibility" are the fundamental lessons to be derived from the 1999 referendum. Any proposal that does not satisfy them is not a model, but a spectre.

THE INABILITY OF DIRECT ELECTION TO SATISFY CRITERIA OF PLAUSIBILITY

The critical point to emerge from these criteria is that it is virtually certain that no direct election republic will be capable of satisfying them. This is because the hard reality of referendum politics in Australia is that the vast majority of conservatives will never support any form of direct election,¹¹ and the inevitable consequence is that a direct election republic cannot win a referendum. It is vital that this point be clearly understood. Direct election republicans tend to be republicans of the broad left, and thus have at best a weak (and unsympathetic) understanding of the constitutional psychology of conservatives.

¹⁰ For a criticism of the Convention model on these and other points, see: Evans H. 'A Non-Republican Republic: The Convention's Compromise Model' (1999) 20 *UQLJ* 235.

¹¹ See for example the comments of the Federal Treasurer, Mr. Peter Costello: *Report of the Constitutional Constitutional Convention 1998*, III, Barton: Department of the Prime Minister and Cabinet, 1998, 128-9.

Accordingly, they can never quite understand the deep attachment that constitutional conservatives feel toward Australia's existing system of government, and can never quite bring themselves to believe that conservatives will not eventually contemplate the sort of major constitutional change that would be involved in direct election "once they have been educated"

In reality, one of the most remarkable things about the 1999 referendum was that so many conservatives were prepared to go so far in order to back the Convention model. Typically, such conservatives reached that destination via a path which began with reluctant doubts about the viability of the Monarchy, which developed into support of the McGarvie model as encapsulating the Crown without the Queen, and finally arrived at the Convention model as achieving a viable constitutional resolution without going too far beyond this point. However, the critical point to grasp about such conservatives is that this quite literally was as far as they were prepared to go: it represented the outer limit of their republicanism, not its starting point. They never would accept a republic that they regarded as inimical to the essence of Australia's form of government as contained in the Constitution. The fact that so many of these conservative republicans refused at the Convention to vote even for the convention model, and were only brought on-side after months of agonised introspection, should tell more radical republicans just how difficult it would be to persuade them to a further

The result is that there is not the slightest chance that these conservative republicans, who are at least sufficiently "radical" that they are republicans in the first place, will accept even the mildest form of direct election. The reason for this is clear. They believe that direct election inevitably would involve massive change to our constitutional system, in that it would create a head of state with a democratic and moral claim to the substantive exercise of power, leading to an unstable constitutional structure where the Prime Minister and head of state represented rival poles of power.¹² In my view, this analysis is entirely correct, but that is not the point here. Right or wrong, it represents the settled view of mainstream conservative opinion and there is no serious prospect of change.

Moreover, whether or not one accepts the reasonableness of this conservative position, conservatives always will be in a position to defeat a republican referendum. In the crudest form, they will be able to do so simply by the weight of their votes. More pervasively, however, the general capacity of conservatives to wreck a referendum upon a direct

¹² See for example the comments of the Federal Treasurer, Mr. Peter Costello: *Report of the Constitutional Convention 1998* III Barton: Department of the Prime Minister and Cabinet, 1998 128-9

election republic would be unsurpassed. The wider Australian electorate, itself deeply conservative in constitutional terms, would be faced with a devastating array of negative arguments against a direct election, which would make those advanced against the relatively confined 1999 model pale by comparison, with the added embarrassment that such arguments actually would be founded in genuine constitutional concern. Of course, it also is perfectly clear that direct election necessarily would fail a number of the other criteria of republican plausibility. Thus, the unacceptability of direct election to conservatives inevitably would prevent the fulfilment of the criterion bi-partisan support.

It also should be appreciated that direct election must fail that other criterion of republican plausibility, constitutional modesty. Direct election necessarily would involve vastly greater constitutional change than other, more modest forms of a republic thereby offering a much greater target to opponents and presenting many more unsettling and unresolved questions to the Australian people. Thus, a direct election republic presumably would be vulnerable to attack on a wide range of issues, including the relationship between the head of state and the head of government, the exact nature of the presidential powers, codification of powers, method of election and so forth.

A PRACTICABLE REPUBLICAN MODEL – FINESSING 1999

Assuming that the conclusion reached above is correct, and that direct election is not practicable, the immediate task is to devise a republican model that does not involve direct election and which conforms to all relevant conditions for referendum success. That is, a model that is safe; predictable; conservatively acceptable; and contains appropriate provisions for the appointment and removal of the head of state. In practice, such a model will have three fundamental features. Firstly, the model will closely adhere to the general suppositions underlying existing constitutional structures. Secondly, it will unequivocally provide Australia with its own head of state, and hence with a republic. Thirdly, it will contain processes for appointment and removal of the head of state that reflect the community's interest in that position, and its own inherent dignity.

As soon as these stipulations for an acceptable republican model are articulated, it becomes extremely clear why the Convention model merged from the Convention in the first place. It was, in fact, an obvious attempt to meet precisely these conditions. Thus, the Convention model in essence attempts to replicate existing constitutional arrangements, minus the Queen, with close attention to the preservation of relevant conventions. It contains a dismissal process which reflects the reality of the present relationship between the Prime Minister and the Governor-

General. It accords some, although limited, acknowledgment to the desire for popular involvement in the appointment of the head of state via the nominations process. Crucially, however, it contains no hint of direct election.

The fact that the Convention model was indeed based very much upon the unavoidable design necessities for any republican model obviously gives it a special status in any future republican debate. That is, if we accept as valid the criteria postulated in this paper for a practicable republic, it is extremely difficult to see how one could move too far away from at least the central aspects of the Convention model, given that this model seems to sit more or less at the conjunction of the various criteria for the production of a saleable republic. Thus, if one accepts that direct election is constitutionally unsaleable by virtue of its repugnance to a wide conservative opinion it is hard to see what model other than one which closely resembles the Convention model could successfully negotiate a referendum. One must face the fact that while various elements of the model might be modified, either to render it more acceptable or simply because improvements obviously are feasible, its central assumptions and basic structures remain the most viable option for an Australian republic.

In fact, there are some obvious minor improvements that could be made to the model which would improve its chances at referendum without involving major difficulty. One good example would relate to the title of the head of state. "President" was a term chosen at the Constitutional Convention, largely as a result of the ARM's long standing commitment to that terminology.¹³ But this title occasioned major fear among a significant proportion of the electorate, conjuring up visions of a United States style head of state. However, the real issues that have to be faced in any attempt to re-launch the Convention model are those perceived during the referendum campaign as the chief defects: the appointment process, and particularly the perception that this was anti-popular and politician dominated; and the dismissal process, with the corresponding perception that the Prime Minister was awarded uncontrolled power over the President.

Appointment of the Head of State

Any discussion of appointment has to address both stages of that process, namely, nomination and confirmation of the head of state. It is most convenient to take the confirmation stage first.

¹³ See: *Report of the Constitutional Convention 1998*, III Barton: Department of the Prime Minister and Cabinet 1998, 405-18

Confirmation

Under the Convention model, the President ultimately was to be chosen by a two-thirds majority of a joint sitting of the Federal Parliament. This presented the chief perceived problem in the model, namely, that it constituted a politician's republic. This is not the place to debate the realities of that perception, but it has to be conceded that the charge was a potent one. Clearly, if at all possible, this perception of the "politicians' republic" must be removed from any future version of the Convention model. However, the fundamental problem is that, assuming one is not prepared to accept direct election, there is no obvious alternative to selecting the head of state via some special majority of a joint sitting of Federal Parliament. There are, indeed, a number of theoretical possibilities, but it is difficult to see any of them working as effectively as the Convention proposal, or failing to attract just as many (or more) political and constitutional difficulties.

One obvious possibility would be to revert to the McGarvie model¹⁴, which was prominently supported by conservatives at the 1998 Constitutional Convention. Under this model, appointment would be by a constitutional council composed of former heads of state, former State Governors, Lieutenant-Governors and retired judges selected according to a set constitutional formula. This council would appoint the head of state on the recommendation of the Prime Minister, subject to precisely the same binding conventions that apply to the appointment of a Governor-General by the Queen. In terms of technicality, there is quite literally no plausible suggestion that McGarvie would not "work". In effect, that model employs precisely the same constitutional apparatus as the monarchy, with the Council discharging the office of the Queen in commission, as it were. Obviously enough, it is not the Convention model as such, but its determined preservation in matters of appointment and dismissal of the dominance of the Prime Minister (backed by his majority in the House of Representatives) places it firmly within the same genre for the purposes of considering "improvements" to the Convention's proposal.

The difficulty with McGarvie is one of packaging, not substance: in the heat of a referendum campaign, it would be highly likely to be even less popular than the convention model. True, it would remove the hated politicians from the appointment process, at least until its opponents were able to alert the people that it was the ultimate politician - the Prime Minister - who lurked behind the constitutional council. However, even more problematically, McGarvie includes within it absolutely no element of popular involvement. The head of state is appointed not even

¹⁴ This is fully expounded in McGarvie R *Democracy. Choosing Australia's Republic* Carlton: Melbourne University Press, 1999

by the parliamentary representatives of the people, but by what would be perceived - inaccurately - as a profoundly elite group of retired prominenti. The sort of abuse that McGarvie would be subjected to in a referendum was prominently on show at the Convention. There, the council was referred to as, "the three wise men", while the infuriating and devastating suggestion was made that they would be collected for meetings in a cardiac ambulance from their respective nursing homes.¹⁵ The reality of McGarvie is that while it is extremely easy to sell to conservative aficionadi of our existing constitutional arrangements (such as the present writer), it has no intrinsic appeal outside these circles, while readily lending itself to ridicule by everyone from self-proclaimed democrats, to feminists angered by its perceived bias against women. The conclusion which must regretfully be reached in relation to McGarvie is that whatever its technical perfections, it would be unlikely to succeed at referendum, given its lack of any element of public involvement in the choice of a head of state, a lack which proved so crippling to the Convention model in 1999.

Another possibility, occasionally suggested, would be for the Head of State to be elected by a body which combined the members of the Federal Parliament with, say, an equal number of members of the Parliaments of the States. Such a system would, in some respects, be similar to that which applies in Germany.¹⁶ As regards the advantages of such a model, it is maintained that it would render the selection of the Commonwealth head of state more "federal" in character, and thus would be pleasing to the smaller states of federation, no mean consideration in a referendum. In addition, the inclusion of State parliamentarians would lessen the influence of the hated Federal "politicians". In reality, however, any modification along these lines would be highly unlikely to improve the acceptability of the Convention model, most obviously because selection would still be carried out by politicians, even if these politicians were now a combination of the federal and state varieties. Indeed, while the smaller states might well be pleased that their own parliamentary representatives had a direct role in choosing the national head of state, the larger states might well be significantly irritated by the over-representation of their lesser brethren. Finally, there is relatively little evidence that one of the major problems besetting the Convention model was any States rights-based hostility.

Once one rejects these relatively obviously possibilities, one is faced with altogether more exotic possibilities of constitutional design.

¹⁵ *Report of the Constitutional Convention 1998* IV, Barton: Department of the Prime Minister and Cabinet, 1998 840-5

¹⁶ See: Winterton, G. *Monarchy to Republic. Australian Republican Government* Melbourne: Oxford University Press, 1986 109-14.

Possibly the furthest that the Convention model could be pushed without altogether losing its character as a model of essentially parliamentary appointment, would be to supplement the existing proposal for selection by a joint sitting of the Commonwealth Parliament by including within that sitting an equal or other number of "non-Parliamentary electors", chosen from among the population at large. This would produce a type of hybrid parliamentary, non-parliamentary electoral college. Such a model might be thought to have some significant attractions, moderating the influence of politicians in the selection process, while introducing into that process a genuinely popular element. At the same time, it would retain the perceived benefits of the involvement of Australia's federal parliamentarians in the selection of the head of state, including the parties and party leaders who would have to deal with that dignity once selected.

However, the huge problem involved in such a model would be that of selecting the electors themselves. The notion of electing the electors in a direct election must be discarded at once. This would not be a modification of the Convention model, but simply the adoption of a form of direct election with all the difficulties that this would involve. Thus, for example, if electors themselves are to be directly elected, how are they to succeed at the polls without standing on some form of inevitably political or quasi-political platform? Having done so would they not be bound to select as head of state a person who reflects the platform upon which they themselves stood? Indeed, they may well stand on the basis that, if elected, they would support a particular candidate or potential candidate as presently is the case in the United States, where the world's most famous system of direct election in fact involves the election of an electoral college. The result inevitably would be that the direct election of an electoral college would produce a head of state who would derive a transferred popular mandate essentially as troubling as that enjoyed by a President who was immediately elected by the population at large. Similarly, a President that had been selected by such an electoral college inevitably would not be dismissible in any expeditious way (for example, by a constitutional council; the McGarvie model, or a combination of Prime Minister and House of Representatives; the Convention model), but rather through some more restrictive process, fundamentally altering the balance of power between the head of government and the head of state.

One possible means of selecting non-parliamentary electors would be to require their approval by a joint sitting of the Federal Parliament. There would, of course, be the danger that political parties would use their parliamentary numbers to install their own allies as electors. For this reason, a two-thirds (and therefore bi-partisan) requirement for appointment as an elector would seem attractive. Beyond this, some

ancillary means of reducing the number of candidates to manageable proportions also would be required. One possibility here would be selection by a two-thirds majority of an all-party parliamentary committee, possibly supplemented by respected non-parliamentary figures such as the Chief Justice of the High Court, or possibly former Governors-General and retired Judges along the lines of the McGarvie model.

It must be admitted, however, that a republican model along these lines undeniably would be cumbersome, and open to attack at each point of its operation. On the one hand, it still would involve the strong presence of the "hated" politicians. On the other, it undoubtedly would distance the selection of the head of state from both the Parliament and the Prime Minister, thus involving a greater degree of change in our existing constitutional arrangements than the Convention model, and imperilling conservative support. Such a proposal also would be complex and difficult to explain at referendum, while attacks inevitably would be made upon the process for the selection of electors to the effect that the process was politicised and invalid. Indeed, in this connection, a supporter of such a model almost might be tempted to contemplate the random selection of non-parliamentary electors by the Commonwealth Electoral Commission on the basis of their distribution across the states, and other "blind" factors such as gender, age, occupation, and rural or urban domicile, all mediated via some sophisticated computer program. Such a system would, however, rightly be condemned as the constitutional equivalent of roulette.

The conclusion concerning the process for confirmation of the head of state, having regard to criteria of republican practicability, thus is that it is extremely difficult to abandon selection by a two-thirds majority of a joint sitting of Federal Parliament. This conclusion is reached notwithstanding the irredeemable taint of "the politician" that necessarily applies to that process, and the fact that it already has failed at referendum. The reasons are simple and have been well enunciated in the past: the process is clear; bi-partisan in operation; will not produce a politician; will generate a head of state with no rival mandate to the Prime Minister; and preserves the influence of the head of government in selection of the head of state. Finally, it is moderate and non-radical, and thus far more likely to appeal to critical conservative sensibilities than more exotic alternatives.

However, were one determined to engage in radical surgery upon the Convention model from aspect of confirmation, possibly the most plausible (or least implausible) model would be along the lines outlined above. Thus, an electoral college could be established, half of whose seats were occupied by members of both houses of Federal Parliament, chosen in proportion to the numbers of the two houses and party representation within them. The remaining seats would be taken by

ordinary citizens drawn from each of the States in proportion to their population, but with a minimum number of electors from each State. The name of each non-parliamentary elector would be approved by a two-thirds vote of a previously convened joint sitting of Parliament, ensuring that each non-parliamentary elector enjoyed bi-partisan support.

As regards the crucial task of sorting through the names of potential non-parliamentary electors, a name could not be considered by the joint sitting until it had been recommended by a nominations committee, again by a two-thirds vote, imposing a strong requirement of consensus. With a view to ensuring both objectivity and political balance, the nominations committee would be chaired by the Chief Justice of the High Court. Its first four members would be retired heads of state, and Governors and so forth along the lines of the constitutional formula contained in the McGarvie model. These four members, with the chair, would in turn select four further members on stated grounds and criteria, such as contribution to the Australian community. The remaining members of the committee would be eight members of the Commonwealth Parliament, chosen on an all-party basis. The inevitable affect of constituting the nominations committee in this way would be to ensure that any non-parliamentary elector would have strong support across all conceivable party political boundaries.

The Prime Minister could put a name to the Electoral College only if it were supported by the Leader of the Opposition. This conforms with the Convention model, and ensures both that any potential head of state will meet with some minimal degree of approval on the part of the Prime Minister of the day and his or her most likely successor, and will enjoy bi-partisan support. Similarly, a two-thirds vote of the Electoral College would be required to approve the presidential nomination, again underlining the requirement for bi-partisan approval. Such a model would need to provide mechanisms to deal with the situation where the proffered name was rejected. The most obvious possibility would be to adopt the notion of the most senior State Governor serving as acting head of state, as was the case with the Convention model,¹⁷ but such a mechanism would be complicated by the interpolation of a specialised Electoral College in place of the relatively easily convened Joint Sitting of Parliament.

What could one say of such a model for confirmation? Obviously, it is significantly more complex than the 1999 model, which is highly problematic. On the other hand, it is significantly more "popular". The Federal Parliament no longer is the sole determinative of the identity of the head of state, with the Electoral College being composed to the

¹⁷ *Constitution Alteration (Establishment of Republic) Bill 1999* (Cwth) cl 63.

extent of half its number of "the people" themselves. Crucially, this popular element of the College could veto any choice which might commend itself to the parliamentary element. Unquestionably, the model is highly consensual and bi-partisan in character. Thus, a two-thirds vote of the nominations committee is required to send the name of a potential parliamentary elector to a joint sitting; a two-thirds vote of the joint sitting is required for the appointment of such an elector; and a two-thirds vote of the Electoral College is required for the ultimate selection of the head of state. However, and by way of balance, popular membership in the Electoral College clearly is limited, both by the presence of parliamentary representatives and by the fact that the nomination of the head of state would remain in the hands of the Prime Minister, and (to a lesser extent) the Leader of the Opposition. In this sense, the Prime Minister would retain the power of veto over any particular nomination to the office of Head of State, as was the case under the 1999 model.

This model is put forward here, not in any sense as a desired outcome, but as representing the *absolute outer limit of modification* to which the Convention model - conceivably - could be put while retaining the support of constitutional conservatives. In fact, it is highly likely that such a model would greatly exceed such tolerance. As already stressed, the model also is immensely more complex than the Convention model, and to this extent vastly more open to attack. To take only one example, while the identities of those to compose the nominations committee (the Chief Justice, retired heads of state), might be expected to confer a "respectability dividend", no doubt there would be others to whom their presence involved a fatal and anti-popular fustiness. Once again, one is left with the uncomfortable impression that for every vote one gains by altering the Convention model, one loses another.

Nomination

There remains the maze of issues relating to nomination, in which context a whole series of problems (whether of perception or reality) beset the Convention model.¹⁸ Most centered around the nominations committee which was to perform this task. Much criticism was directed to the fact that the Prime Minister would appoint sixteen of the thirty-two members, thus ensuring his or her dominance.¹⁹ Other criticism related to the fact that the remaining sixteen members of the committee all would be politicians, whether Commonwealth or State.²⁰ A final criticism concerned the lack of any requirement that the name put to a

¹⁸ See: *Presidential Nominations Committee Bill 1999* (Cwth)

¹⁹ See: *Presidential Nominations Committee Bill 1999* (Cwth) cl 9.

²⁰ See: *Presidential Nominations Committee Bill 1999* (Cwth) cl 7 and 8.

joint sitting by the Prime Minister actually was a name that had been identified by the committee ²¹

Such claims tended to be overstated, but not entirely without substance. At the Convention, the nominations committee undoubtedly was tacked on to the model in an effort to confer upon it enhanced popular appeal. As such, it was rather hastily conceived, and in an effort to placate conservative constitutional opinion, extremely limited in its function. Unquestionably, its proponents were constrained by the fact that constitutional conservatives at the Convention were determined to strongly resist any nomination model which unduly restricted the Prime Minister's capacity to choose a head of state

Ideally, the membership of the nominations committee would need to be changed if the appeal of the Convention model were to be significantly improved. First, the committee needs to appear more independent, and less of a prime ministerial signet. Second, it should be less "political" in appearance, with a reduced parliamentary component. The most obvious proposal would be for the nominations committee to be constituted in the same way as the nominations committee previously put forward here for the purpose of selecting members of an Electoral College, namely, the Chief Justice as chair; the four constitutionally selected eminenti according to a McGarvie formulation; four more eminent Australians chosen by this group; and eight members of Federal Parliament chosen on an all-party basis. Such a committee would enjoy a great deal more independence from both the Prime Minister and the political parties than that proposed in 1999. Thus, such eminent figures as the Chief Justice, the four "constitutional" members and their four nominees could not be expected to toe any political line. For similar reasons, the recommendations of the committee could be expected to have more status and weight than those which emanated from a body dominated by prime ministerial and political appointments. Finally, the domination of the committee by politicians would cease, given that they would compose, rather than two-thirds of the committee, slightly less than half.

Such a nominations committee then would draw up a report, sending a list of names to the Prime Minister, as per the Convention model. However, there would be a requirement for a two-thirds vote of the committee before a name could be placed on the short list, further stressing the importance of bi-partisanship and consensus, and adding considerable weight to the names that went forward. The real question, of course, relates to the existence or lack of any compulsion upon the Prime Minister to choose a name put forward by the committee. If the

²¹ *Constitution Alteration (Establishment of Republic) Bill 1999* (Cwth) cl 60

Prime Minister is under no duty to adopt a name from the committee's list, there is a real danger that the public will perceive the committee process as a sham. On the other hand, if the Prime Minister is compelled to accept such a name, he or she will be at the mercy of the committee and may be compelled to accept as head of state someone of whom he or she does not approve. A middle course would be not to require the Prime Minister to choose a name from the list proffered by the committee, but to require him or her to make a formal statement to Parliament if proposing a name that did not appear on the list, which also would include a statement of reasons why the Prime Minister considered that name to justify departure from the nominations of the committee.

Dismissal of the Head of State

Interestingly, the difficulties of the Convention model in relation to dismissal seem relatively easier to resolve than those concerning appointment. The real difficulty here was not - as might be supposed - that the President effectively was readily dismissible at the behest of the Prime Minister. This is precisely the position under existing constitutional arrangements, and provides the necessary foundation for the political supremacy of the Prime Minister over the Governor-General, a point most clearly expressed at the Convention by the Hon Richard McGarvie.²² Consequently, any change to our constitutional system that meant the removal of the head of state was not practically procurable by the Prime Minister would immediately challenge the basic conventional suppositions underlying that system.

This means that in seeking to sanitise the Convention model on the point of dismissal, one is not attempting to provide the head of state with a notably greater security of tenure, for the simple reason that this would critically alter the balance of power between the head of state and the political head of government. Thus, for example, dismissal on grounds by resolution of both houses of Parliament would mean that the Senate was able to block the dismissal of the head of state, effectively making him or her secure from any attempt at prime ministerial removal. The same position would apply where dismissal was by a two-thirds majority of a joint sitting, where a government virtually never would enjoy the requisite degree of parliamentary support. The inevitable consequence would be that a head of state would be free to strain against the constitutional conventions of their office in the almost certain confidence that the parliamentary opposition would resist their dismissal on the grounds of political convenience.

²² For an expression of this principle, see: *Report of the Constitutional Convention 1998*, IV, Barton: Department of the Prime Minister and Cabinet, 1998 589.

In "renovating" the Convention model on the point of dismissal, therefore, one faces an altogether different challenge. As a matter of constitutional design, one is seeking to produce a situation under which the head of state remains subject to reasonably ready dismissal at the behest of the Prime Minister, but in a dignified, and indeed a decent way. It was a widely perceived failure in this respect that excited broad opposition to the Convention model as it related to dismissal.

At present, the surrogate head of state, the Governor-General, effectively may be dismissed by the Prime Minister; but the relevant constitutional apparatus is markedly less brutal in appearance than that proposed by the Convention. Instead of a curt prime ministerial decapitation, dismissal of the Governor-General is veiled in the decency of a recommendation to the Queen, who takes the final formal action in removing him or her, though there can be no question that a Prime Minister's proposal for dismissal invariably would be accepted. Existing practice also contains the potential for delays to occur while the Queen actuates the Prime Minister's recommendation, though such delays quite literally would be administrative in character, and could not possibly involve the opportunities for independent assessment sometimes suggested. While the Convention model faithfully replicated the fundamentals of dismissal of the head of state by the Prime Minister, it undoubtedly eliminated those refinements relating to formal dispatch by a respected and independent third party (the Queen), along with any minor incidental delays that this might involve. An improvement of the Convention model would include equivalent features.

The obvious solution would seem to be to adopt the dismissal processes of the McGarvie model. Under that model, the Prime Minister would be entitled to recommend dismissal of the head of state but not to effectuate that dismissal himself. Rather, the recommendation would go to a constitutional council composed of former heads of state, State Governors, et cetera, that would perform precisely the same role as the Queen. That is, it would act out of a habit of "considerate obedience", receiving, considering but invariably giving effect to the wishes of the Prime Minister. Moreover, simply because an external body was involved in giving effect to the decision of the Prime Minister, the types of incidental delay that might be anticipated in connection with the exercise of the present royal power similarly would apply to the operations of the Constitutional Council. Indeed, it is highly arguable that the McGarvie form of dismissal always should have been part of the Convention model, with the failure of the Australian Republican Movement to appropriate its dismissal provisions having had more to do with a disinclination to adopt the language of an adversary than with any objection of principle.

In summary, the chief effect of including dismissal by a Constitutional Council within the Convention model would be to remove the widely

perceived constitutional indecency involved in the Prime Minister possessing the power to unilaterally dismiss the head of state. The fact that the Council would be able to advise, counsel and warn the Prime Minister in precisely the same manner as the Queen would seem to render this mechanism for dismissal significantly more acceptable than its predecessor, as would its capacity to mirror the delays inherent in the existing system.

CONCLUSION

The fundamental conclusion of this essay is that in designing a republic we must satisfy two requirements. First, any proposed republic must be sound in constitutional principle, and second, must be sound as a matter of constitutional practicality. No republic involving the direct election of the head of state could easily satisfy the test of practicality. Realistically, therefore, our choice probably lies between the Convention model, and that model less or more fundamentally modified. It would be possible to make limited changes to the Convention model that probably would improve it significantly, most obviously through the adoption of the McGarvie mechanism for dismissal. It also should prove relatively straightforward to improve the composition and functioning of the nominations committee. In addition, it would be possible to devise a more extensive reworking of the appointment process along the lines of the Electoral College model set out here. This would provide for an enhanced degree of popular involvement in appointment, but such a scheme would be so considerably more complex than the Convention model as to comprise virtually a major redefinition of that model. The inevitable result must be that such a model would, for each avenue of attack that it closed off, open another

