

# ANALYSEN UND BERICHE

## The Referendum on an Australian Republic

By *Petra Butler*, Wellington\*

On 6 November 1999, a proposal to replace the Queen as head of state of Australia with a president appointed by a two-thirds majority of the members of the Australian federal parliament was comprehensively rejected at a referendum. This article details the background to the referendum, explores some of the reasons for the failure of the republican proposal and briefly considers the future of the republican agenda in Australia.

### 1. The Crown in the Australian Constitution

Prior to 1901, Australia was a geographical term not a political entity. In fact, six colonies existed on the great continent: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.<sup>1</sup> As a result of two Constitutional Conventions held in the 1890s, and subsequent referenda at the end of that decade, agreement was reached between the several colonies to constitute a continent-wide federation to be styled the Commonwealth of Australia.<sup>2</sup> A delegation was sent to the United Kingdom to have the British parliament enact the draft Constitution that had been approved at the referenda. With a minor alteration to accommodate concerns over the continuance of the appeal to the Privy Council, the Commonwealth of Australia Constitution Bill was introduced into the House of Commons containing the draft constitution. The Bill completed the parliamentary stages

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<sup>1</sup> In addition to these six states, there now exist two territories: the Australian Capital Territory and the Northern Territories.

<sup>2</sup> For helpful material on the history of the making of the Australian Commonwealth constitution, see *J.A. La Nauze*, *The Making of the Australian Constitution* (1972), *J. Quick & R. Garran*, *The Annotated Constitution of the Australian Commonwealth* (1901).

on 5 July 1900 and received the royal assent four days later. The Act<sup>3</sup> and the Constitution to which it gave the force of law took effect on 1 January 1901.

The Crown occupied a central role in the Commonwealth Constitution.<sup>4</sup> The Preamble to the Commonwealth of Australia Constitution Act recorded that the people of the several states “have agreed to unite in one indissoluble Federal Commonwealth *under the Crown of the United Kingdom of Great Britain and Ireland, [...]*” (emphasis added) Section 1 of the Constitution itself vested the legislative power of the Commonwealth in the federal parliament to consist of the Queen and the Senate and House of Representatives. Section 2 provided for the office of Governor-General to be “appointed by the Queen [to] be her Majesty’s representative in the Commonwealth”, with such “powers and functions of the Queen as her Majesty may be pleased to assign to him [subject to specific provisions to the contrary in the Constitution itself].” Under s 61, “The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, [...].”

In placing the Crown at the focal point of its constitutional arrangements, the Australian constitution-makers were acting entirely consistently with Australia's status as a British dominion: measure of responsible self-government exercisable under the British Crown with the potential for intervention in domestic affairs by the mother country.<sup>5</sup> This form of government had been adopted by the Canadians upon federation of the British North American colonies in 1867, and was followed in turn by similar arrangements in South Africa (1910) and the Irish Free State (Southern Ireland) (1922). Indeed, it would not be

3 63 & 64 Vict c. 12.

<sup>4</sup> As one of the leading contemporary constitutional lawyers observed: "The Crown does in fact pervade every part of our political system, and is the hardest worked of our legal institutions." *W. H. Harrison*, *The Constitution of the Commonwealth of Australia*, 2<sup>nd</sup> ed (1910) at 85.

5 Notwithstanding the enactment of the Commonwealth Constitution, the British parliament retained the legal right in terms of the Colonial Laws Validity Act 1865, s 5 to legislate for Australia (see also *Union Steamship Co v. Commonwealth* (1925) 36 CLR 130). The Statute of Westminster 1931 which gave the Commonwealth the legal capacity to free itself from the shackles of the Westminster Parliament was only adopted by the Commonwealth in 1942 (with retrospective effect to 1939) and did not apply in favour of the individual states. Appeals to the Privy Council in London were abolished by two pieces of legislation between 1968 and 1975. Full severance of legal links between the UK and Australia had to wait until 1986 with the passage of the complementary Australia Acts in both the United Kingdom and Australia. The 1986 Acts remove any possibility of state laws being held invalid for conflict with UK legislation. (See generally *R.D. Lumb & G.A. Moens, The Constitution of the Commonwealth of Australia, Annotated* 5<sup>th</sup> ed (1995) 9-14.) In addition, by s 59 of the Commonwealth (a provision still in place), the Queen may disallow any law within one year from the date of royal assent given by the Governor-General, while s 58 of the Constitution allows the Governor-General to reserve legislation for the Queen's pleasure (*ie* refuse to give the assent). Both of these powers have fallen into disuse.

until the mid-1930s that serious challenges to the incorporation of the monarchical forms in dominion constitutions would be made, starting in Ireland.

In common with the other Dominions, over the course of the twentieth century the links between Australia and the United Kingdom were gradually loosened so that Australia developed into an entirely independent, sovereign nation-state. Crucially, at the 1926 Imperial Conference, the Balfour Declaration was made recognising that the Governor-General of each of the Dominions would no longer act as the agent of the British Government therein. This meant that though on their face the powers of the British authorities to intervene in Australian affairs might appear substantial, for practical purposes the powers of the Queen and “her”<sup>6</sup> Governor-General would be exercised in accordance with Australian wishes. Moreover, once the practice became entrenched of the Queen (on advice from her Australian ministers) appointing only Australians as Governors-General the possibility of British intervention in the working of Australian government disappeared.

Nonetheless, though in reality only exercising ceremonial functions (other than a few specific tasks, such as appointing a Governor-General, upon advice),<sup>7</sup> the Queen continued to be the head of state – the words of the Constitution said so. To remove her, and substitute a new presidential head of state, would require an amendment of the Commonwealth Constitution, not ordinary legislation. In terms of s 128 of the Commonwealth Constitution, no alteration to the constitution can be made except upon:

- Approval of the proposed alteration by an absolute majority of each of the two houses of parliament; and
- Approval of the proposal by a majority of the voters as a whole, and by a majority of the voters in a majority of the states<sup>8</sup> (*ie* in at least four of the six states).<sup>9</sup>

<sup>6</sup> A dispute between King George VI and the then Australian Prime Minister over the appointment of Governor-General resulted in the 1930 Imperial Conference confirming that the Balfour declaration applied equally in respect of such appointments: see eg *L. Crisp*, *The Appointment of Sir Isaac Isaacs as Governor-General*, (1964) 11 *Historical Studies* 253.

<sup>7</sup> Witness for example, the Queen’s refusal to intervene in the dispute over the decision of the then Governor-General to dismiss the Whitlam government in 1975. Relevant documents can be found in *C. Howard & C. Saunders*, *Cases and Materials on Constitutional Law* (1979) 124-5.

<sup>8</sup> For the purposes of calculating the national number of voters, voters in the territories are counted; but there is no need for there to be a majority of voters in favour of a referendum proposal in any of the territories for the constitutional amendment to be passed.

<sup>9</sup> Readers interested in the legislation enacted to govern referenda can usefully consult *G. Orr*, *The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective*, (2000) 11 *Pub L Rev* 117.

## 2. The republic as a central political debate

While debate over whether the monarchy was the most appropriate form of government for Australia has a long history,<sup>10</sup> it only recently emerged as a matter of serious political concern. Supporters of a move to an Australian republic were historically always in a minority (though a steadily growing one)<sup>11</sup> and the issue was a peripheral one, not seen as touching on issues relevant to the lives of most ordinary Australians. That view of the debate began to change in the 1980s. In 1982 the Australian Labor Party (ALP) (one of the largest parties in Australia) declared itself in favour of republicanism. Still, in 1987, the Advisory Committee to the Constitutional Commission<sup>12</sup> felt confident enough to recommend, on the basis of an analysis of public opinion polls, that no referendum on republicanism take place:<sup>13</sup>

“We reach this conclusion because we believe that, regardless of the merits of the arguments, there is no prospect, on the evidence available to us, of a change in public opinion in the near future which would result in there being majority support for a republic.”

By the beginning of the 1990s however the tide was starting to turn more strongly in favour of the republican viewpoint as opinion polls showed growing support for abolition of the monarchy. In July 1991, the Australian Republican Movement (ARM) was launched. It was to play a very prominent role in fighting for a constitutional referendum on the republican issue and in support of the proposal actually put before the electorate in November 1999. In June 1992, the anti-republican Australians for Constitutional Monarchy (ACM) held its first public meeting in Sydney. It was to become the leading proponent of retaining the monarchy.

<sup>10</sup> See eg *D. Headon, J. Warden & B. Gammie* (eds), *Crown or Country: The Traditions of Australian Republicanism* (1994); *M. McKenna*, *The Captive Republic: A History of Republicanism in Australia, 1788-1996* (1996).

<sup>11</sup> A helpful chronology of opinion poll data on the republican issue is to be found in *J Warhurst, From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants* (Australian Parliamentary Library, Research Paper 25, 1998-99) App 4. For example, a Morgan Gallup poll in June 1953 found only 15% support for a republic as against 77% support for the monarchy, while by February 1985 a similar poll by The Age newspaper disclosed figures of 30% and 63% respectively.

<sup>12</sup> In late 1985, the federal Attorney-General established a Constitutional Commission under the chairmanship of Sir Maurice Byers QC to undertake a study of the Constitution with a view to its revision in order to adequately reflect Australia’s status as an independent state with a federal parliamentary system; provide the most suitable framework for the economic, social and political development of the federation; recognise an appropriate division of responsibilities between the states and the federation; and ensure that democratic rights are guaranteed. The Commission was assisted in its work by several specialist advisory committees.

<sup>13</sup> Report of the Advisory Committee to the Constitutional Commission, Executive Government (1987) at 6.

In the political arena the republican issue moved centre-stage. In December 1991, Bob Hawke was ousted as leader of the ALP and as Prime Minister by Paul Keating. A significant feature of Keating's political activity was his interest in issues of Australian identity. In a major policy initiative just before the March 1993 federal general elections, Keating announced that if returned to office the ALP would establish an advisory committee consisting of "eminent Australians" to develop a discussion paper that would consider the options for an Australian republic. The ALP won those elections and in April 1993 the government established the Republic Advisory Committee (RAC), to be chaired by Malcolm Turnbull of ARM. The terms of reference of the RAC were "to obtain an options paper which describes the minimum constitutional changes necessary to achieve a viable Federal Republic of Australia, maintaining the effect of our current conventions and principles of government."<sup>14</sup> The RAC reported back on 5 October 1993 with a detailed set of options for how the Queen might be replaced as head of state. The RAC concluded that it was "both legally and practically possible to amend the Constitution to achieve a republic without making changes which will in any way detract from the fundamental constitutional principles on which our system of government is based."<sup>15</sup> Consistent with its terms of reference, the RAC did not make any recommendations as to which options should be preferred.

The Keating government took time to consider the RAC's paper. On 7 June 1995, Keating made a televised address to the federal parliament committing his government to replace the Queen as head of state with an Australian president, with minimal changes to the existing constitutional arrangements, by 2001. The following day, erstwhile Leader of the Opposition, John Howard, proposed the holding of a People's Convention to consider the Republic issue.<sup>16</sup>

In the run-up to the federal elections in March 1996, Howard advanced the People's Convention model as the better way to consult with the people on the issue, while the Labor government proposed the holding of a non-binding indicative referendum to test popular support for a republic, before moving to a binding referendum on a particular form of republic. A coalition of Howard's Liberal Party and the National Party (as well as other minor parties) won the 1996 elections. A Bill was introduced into Parliament in 1997 to allow for the holding of elections to a People's Convention. The Convention was to consist of 152 members, 76 elected, 76 appointed. The 76 elected delegates were drawn from a

<sup>14</sup> Report of the Republic Advisory Committee, *An Australian Republic – The Options* (1993) at iv.

<sup>15</sup> *Ibid.*, at 10.

<sup>16</sup> The idea of such a Convention had been previously mooted by then Leader of the Opposition Alexander Downer in November 1994 and had been endorsed by the Constitutional Centenary Foundation, a group of prominent non-partisan constitutional lawyers formed in 1991.

range of non-party groups, with the ARM and ACM prominently represented.<sup>17</sup> Overall the pro-republicans formed a majority of the elected Convention delegates.<sup>18</sup> As for the 76 unelected delegates, these were appointed by the Prime Minister, Mr Howard: 40 were parliamentary delegates, divided between the Commonwealth and State legislatures; 36 were prominent Australians and representatives of community groups, churches, aboriginal leaders, etc.

The Constitutional Convention took place between 2–13 February 1998. Its proceedings were broadcast on television and were open to the public. It attracted considerable media interest. In his opening address to the Convention, Howard undertook that if clear support for a particular republican model were to emerge from the Convention, his government, if returned at the next election, would put that model to the Australian people in a referendum before the end of 1999. This was a highly significant commitment from a committed monarchist such as Howard and clearly meant that the republican issue would be brought to a head, regardless of which main political party held power.

It is important to understand that the Convention's purpose was quite limited. It was asked by Howard to deliberate three questions:

- Whether Australia should become a republic?
- If yes, which model should be put to the voters?
- If yes, what time frame and under what circumstances should any change be considered?

The most significant discussion in the Convention centred on the second question: the appropriate model for the selection of president. Four principal models were advanced:

*Direct Election Model:* Under this two-stage model any Australian could nominate a person for president, with a joint sitting of the federal parliament to choose by at least a two-thirds majority a minimum of three of those nominees to be put forward as presidential candidates at a popular election.

*Hayden Model:* Under this model a person whose nomination for president had been endorsed by way of petition supported by at least 1% of voters (approx 120,000 persons) would be allowed to stand for that office at a popular election.

*McGarvie Model:* Under this model the head of state would be chosen (and dismissible) by the prime minister whose choice (or decision to dismiss) would require the ratification of a specially constituted three person Constitutional Council. This model involved the minimum change necessary to preserve the status quo.

<sup>17</sup> ARM won 30.3% of the national vote, while ACM took 22.5%.

<sup>18</sup> The results of the elections are helpfully tabulated in *Warhurst* *supra* n 11, App 1.

*Bipartisan Appointment Model:* Under this model any person could be nominated for President by any other citizen; the nominees would be vetted by a special parliamentary committee and a short-list prepared by that Committee for the Prime Minister's consideration. From that short-list, the Prime Minister would present a single nomination for the office of president, seconded by the Leader of the Opposition, for the approval of the federal Parliament at a joint sitting. The nominee had to receive at least a two-thirds majority of the votes cast at that sitting.

The delegates chose a preferred model among these four by a process of elimination. On a first vote, the Hayden model received only 4 votes in favour and was eliminated. At the next round of voting, there was a narrow difference between the two lower models: the Direct Election model received 30 votes, one less than the McGarvie Model, and hence was eliminated. In a vote-off 73 votes were cast for the Bipartisan Model and only 32 for the McGarvie Model. In addition, there were 43 votes for no model, and 3 abstentions.

At the end of its deliberations, the Convention voted clearly in favour of a republic (89 in favour, 52 against, 11 abstentions). It then supported the Bipartisan Model by 73 votes in favour, 57 against, with 22 abstentions.<sup>19</sup> Finally, the Convention overwhelmingly recommended that the Bipartisan Model be put to a referendum to be held in 1999, with the republic to come into effect on 1 January 2001 if the proposal was approved by the people.

### **3. Putting the republic proposal to the people**

Following the deliberations of the Constitutional Convention, Howard undertook to give effect to its recommendations. In 1999, the constitutional amendment process got under way with the parliamentary approval of the referendum question and the passage of the relevant amendment legislation<sup>20</sup> (as well as the enactment of legislation setting up a presidential nomination process).<sup>21</sup>

<sup>19</sup> It will be seen that on this vote, the Bipartisan Model did not actually enjoy the support of an absolute majority of the delegates. This point was taken by one of the delegates. The Chair of the Convention ruled that the motion in favour of the recommendation for the bipartisan model was carried, since more people had voted in its favour than against. A challenge to this ruling was overwhelmingly rejected by the Convention.

<sup>20</sup> Bill 99107, Constitution Alteration (Establishment of Republic) Bill 1999 containing the relevant amendments to the text of the Commonwealth Constitution.

<sup>21</sup> Bill 99111 Presidential Nominations Committee Bill 1999.

The referendum question was simple enough. The people were asked to answer either Yes or No to whether an alteration to the Constitution, described as follows, should be approved:<sup>22</sup>

“To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.”

The main features of the new presidential model to be put before the people were as follows:

- A 32 member national nomination screening committee consisting of 16 persons appointed by the prime minister (and representing broad community interests) and 16 persons chosen from the federal, state and territorial legislatures would receive presidential nominations from any member of the public. It would prepare a report for the prime minister, including a short-list. Importantly, however, that short-list would not bind the prime minister. The prime minister would present a single nomination, seconded by the Leader of the Opposition, to a joint sitting of the federal parliament. The nominee would be appointed as president if approved by a two-thirds majority.
- The president would ordinarily hold office for five years (and be re-appointable). However, the Prime Minister could at any time dismiss the president with immediate effect and without reasons. In such a case, the Prime Minister would have to seek the approval of the lower house of parliament. Where such approval was not forthcoming, the president would not reassume office: rather the lack of such approval would probably at most give rise to a motion of no confidence in the prime minister. But it would be unlikely in the realm of practical politics that the lower house would not approve the prime minister’s decision, since that house is usually controlled by the prime minister’s political party/(coalition) government.
- The president would enjoy the same powers as held by the Governor-General. Contrary to the recommendations of the Constitutional Convention, the non-reserve powers (*ie* those powers which have to be exercised in accordance with the advice of the prime minister) were not codified, nor (but this time consistently with the Convention’s recommendation) the reserve powers (*ie* those exercisable personally). Instead the powers would be incorporated by reference to the Governor-General’s existing powers rather than actually being listed.<sup>23</sup>

<sup>22</sup> The text of the referendum question can be found at the web-site of the Australian Electoral Commission: <http://www.referendum.aec.gov.au>.

<sup>23</sup> The Constitutional Convention’s recommendation against spelling out the reserve powers of the president reflected uncertainty as to the exact scope and extent of the existing reserve powers of the Governor-General.

Looking at these features, a number of points should be made. At the level of generality, they were highly consistent with the minimalist approach originally proposed by Paul Keating and subsequently endorsed by the Constitutional Convention. That said, the nomination and dismissal procedures, which would be the subject of considerable public disquiet during the referendum campaign, were more open than those currently applied to the appointment and dismissal of the Governor-General. (This issue is discussed below in more detail.) Finally, the proposals left the states in a curious position: since the constitutional amendment was only being made at the federal level, the prospect existed that the monarchy's links with the federal entity of Australia would be severed, but that individual states might retain their constitutional links to the monarchy. If the referendum proposal succeeded, it would be for each individual state to determine how its constitutional arrangements should respond; and some states might prefer to retain the monarchy.<sup>24</sup>

#### 4. The Preambular distraction<sup>25</sup>

The Constitutional Convention had also considered issues surrounding the drafting of a new preamble to the Constitution. The current Constitution itself contains no preamble, although the Commonwealth of Australia Constitution Act 1900 which enacted it does. That preamble is short, noting that, "humbly relying on the blessing of Almighty God", the peoples of the several states have agreed to form a Commonwealth under the British Crown and under the Constitution. The Constitutional Convention recommended that a new preamble to the text of the Constitution itself be drafted. The new preamble would include a number of elements such as references to God and to the constitutional origins of Australia, recognition of federalism and the representative system of government, affirmation of

<sup>24</sup> See eg *G. Craven*, Implications of a Republic for Western Australia (Paper prepared for Western Australia's Constitutional Forums and People's Conventions, 1998). Interestingly, each of the states enacted in 1999 an Australia Acts (Request) Act asking the Commonwealth Parliament to enact an amendment to s 7 of the Australia Acts 1986. (The Australia Acts are legislation of both the Commonwealth and the UK parliaments, but are now amendable only by the former. In accordance with the rules of amendment of those Acts, generally speaking a section of the Australia Acts may only be amended upon the request of or with the concurrence of all the states.) Section 7 of the Australia Acts provides for the Queen to be represented in each state by a Governor and regulates how the Governor is to exercise his or her powers. The Request Acts asked the Commonwealth Parliament to amend s 7 so as to in effect allow each state the legal capacity to opt-out of the monarchical form of government. Each of the Request Acts as passed in almost identical form and their entry into force was conditional upon a Yes vote at the November 6 referendum. With the defeat of the republic referendum proposal, each of these state Request Acts failed to take effect, and no move has been made by the Commonwealth parliament to amend the Australia Acts.

<sup>25</sup> For helpful material on this topic, see *M. McKenna*, The Tyranny of Fashion: John Howard's Preamble to the Australian Constitution, (1999) 10 Pub L Rev 163; *Warhurst* *supra* n 11; and *G. Williams*, Why Australia Kept the Queen, (2000) 63 Sask L Rev 477, 490-492 and 495.

the rule of law, acknowledgment of the original occupancy and custodianship of Australia by Aboriginal and Torres Strait Islander peoples, recognition of cultural diversity and so on. It was further recommended that the new preamble could not be relied upon by the judges to interpret other provisions of the Constitution.

In February 1999, Prime Minister Howard offered his support for the idea of a new constitutional preamble. He saw the task of drafting such a preamble as one which he should personally take charge of. Together with poet Les Murray, Howard drafted a proposed new preamble.<sup>26</sup> Once released, the proposed preambular text raised a political storm: there had been no public consultation on its content; it followed the outlines of the Convention preamble framework in part only; its treatment of issues such as acknowledgment of aboriginal rights was regarded by many as inadequate; it failed to mention anything about Australia as a republic (it was, in Howard's words, "republic-neutral"); and overall its wording was confusing, divisive and, in places, did not make sense.<sup>27</sup>

Leading pro-republicans lobbied against the preamble issue being put to a constitutional referendum. It was a distraction from the very separate issue of who should be Australia's head of state, and the divisiveness which it might create could in the minds of some voters at least taint by association the republican concept. Initially, it looked as if the republicans' lobbying had been successful: when the republic referendum legislation was introduced into parliament, no complementary legislation in respect of a new preamble accompanied it.

However, once the parliamentary committee examining the republican proposals had completed its work, Howard introduced legislation providing for a constitutional amendment to adopt a new preamble. The proposed preamble was differently worded to Howard's original proposal,<sup>28</sup> but still contained textual difficulties and insufficient (at least in the view of many) acknowledgment of the aboriginal issue. To make matters worse, again there had been no public consultation on the text. In fact it had been hammered out as a compromise text between Howard and the Democrats (who held the balance of power in the upper house of Parliament), making it look like a politicians' preamble. Moreover, due to the late point at which it was introduced into Parliament, the text was rushed through the legislative stages and there was no time for it to be the subject of examination by a parliamentary committee. The preamble proposal was approved by the federal parliament; the referendum on it was to take place on the same day as the republic proposal: 6 November

<sup>26</sup> The text of the original Howard preamble can be found at *McKenna* *supra* n 25 at 163; *Williams* *supra* n 25 at 490; and <http://www.pm.gov.au/media/pressrel/1999/preamble.htm>.

<sup>27</sup> A number of the criticisms made of the preamble can be found in *McKenna* *supra* n 25 at 163-164; and *Williams* *supra* n 25 at 491.

<sup>28</sup> For the text of the revised preamble actually submitted to the people at the 6 November 1999 referendum, see *Williams* *supra* n 25 at 491-492 or *Proposed Preamble*, (1999) 10 *Pub L Rev* 221.

1999. The people were asked whether they agreed to a proposed alteration to the Constitution to insert a new preamble.

## 5. The campaign

Keating's moves to place republicanism at the top of the political agenda appeared to resonate with the public mood on the issue. While support for the monarchy continued to be solid till the end of the 1980s<sup>29</sup> a number of factors likely contributed to a swing of support in favour of a republic by the beginning of the 1990s: the Bicentennial celebrations in 1988 created a sense of national identity; the ethnic background of Australians continued to diversify as more immigrants arrived without English affinity; a growing perception that somehow links to the British monarchy affected Australia's independence; disenchantment with the monarchy; and so on. From February 1992, opinion polls consistently showed voters to be either evenly divided on or in favour of a move to a republic.<sup>30</sup> In large measure this helps explain why a pro-monarchist such as John Howard felt impelled to advance the republican debate, even if he personally opposed a republican outcome.

However, once it became obvious that community support for a republic outweighed that in favour of the monarchy, pollsters began to question the electorate as to what type of republic they wanted to have. The results showed a substantial preference for a directly elected president, not a president selected through the political process. For example, during the Constitutional Convention a Newspoll published in the Australian on 10 February 1998 showed 66% support for a directly elected president and only 17% and 10% support respectively for election by parliament and the McGarvie Model. A survey by the same pollsters in March 1999 showed that the Bipartisan Model would only receive 33% support of the electorate at a referendum, even though in the same survey respondents clearly favoured a move to a republic. In short then it was becoming obvious that the form of presidential selection would have a significant impact on whether Australia would make the move to a republic at all: if the pro-republicans did not get the type of republic they wanted, many would prefer retention of the status quo.

And so it was that as the referendum campaign got under way the No campaign consisted of foes joined in force against the Bipartisan Model. Monarchists advocated no change. For many, the constitutional arrangements modelled around the monarchy had worked well, were not broken and did not need fixing. Moreover, monarchists attempted to assuage nationalist concerns by pointing out that for all practical purposes the Governor-General was head of state, and he (or she) would always be an Australian. At the other end of the

<sup>29</sup> See the poll data collected in *Warhurst* *supra* n 11.

<sup>30</sup> See the poll data collected in *Warhurst* *supra* n 11.

spectrum, a significant group of pro-republican activists argued that a republic with a president selected by politicians was not worth having: the shift to a republic was meant to be an affirmation of popular sovereignty, yet that sovereignty would be denied if the choice of head of state was left in the hands of the parties. Moreover, commentators of all hues noted a number of weaknesses in the Bipartisan Model, such as the incongruity of electing a president with the approval of a special majority of parliament, yet permitting his or her dismissal by one person, the prime minister.<sup>31</sup> In the result, ARM had to fight the Yes campaign on several fronts.

Largely speaking the republic referendum campaign was not driven by the political parties.<sup>32</sup> Indeed, in terms of Australian law then in force there were severe restrictions on the extent to which the government may get involved in referendum campaigns. Under the Referendum (Machinery Provisions) Act 1984 government distributes to every household a pamphlet setting out the proposed changes to the Constitution, along with a statement (limited to 2000 words) of the case in favour and against the proposed alterations. The Yes and No statements of case are drawn up by the parliamentarians who voted accordingly when the matter was before parliament. In the case of the 1999 referendum, however, one-off legislative amendments allowed the Government to fund a A\$ 4.5m public education programme in the run-up to the referendum to explain aspects of Australia's constitutional arrangements to the public. In addition, it also enabled the Government to fund both the No and Yes campaigns equally to a total of A\$ 7.5m each.<sup>33</sup>

All of this is not to say that there were no party positions. The Liberals were split down the centre and Prime Minister Howard made it clear that the republic issue was one upon which each member of his government (including backbenchers) was entitled to advocate their personal position. Howard promised to stay outside the fray (although in the last few days of the campaign made a number of strong statements against the referendum proposal). The ALP favoured a republic and supported the Bipartisan Model. The National Party was solidly pro-monarchy.

<sup>31</sup> It should be noted, however, that the procedures in place for the dismissal of a Governor-General are in no material particular different: the Queen, if advised to do so by the Australian Prime Minister, must withdraw a Governor-General's commission. No parliamentary approval is required as a condition precedent to the Prime Minister so advising the Queen. There will of course be a period of delay while the Queen formally consults with her representative in Australia, the soon-to-be-dismissed Governor-General: see *P.H. Lane*, Referendum of 1999, (1999) Aust L J 749, 753.

<sup>32</sup> See *D. Freeman*, Public Information Machinery and the 1999 Referenda, (1999) 10 Pub L Rev 243, 245-6.

<sup>33</sup> For a discussion of the legislative amendments which permitted the more generous funding of participants in the 1999 referendum campaign, see *Freeman* *supra* n 32.

The lack of bipartisan support for the referendum proposal did not augur well for its success. The experience of previous referenda in Australia<sup>34</sup> clearly indicated that without cross-party agreement a constitutional amendment would be unlikely to be approved by the people.<sup>35</sup> Of the previous 42 referenda proposals, only eight were ultimately endorsed by the voters.<sup>36</sup>

## 6. The result

The republic referendum proposal was comprehensively defeated. Nationally 54.87% of voters voted No. In every state the No vote was in a majority; only in the Australian Capital Territory was there a vote in favour. The preamble proposal was even more heavily defeated: nationally 60.67% voted No, and it received no majority support in any state or territory. The breakdown of results is set out below:<sup>37</sup>

### National Results – Question 1 – Republic

State <sup>38</sup>	Enrolment	Yes		No	
		Vote	%	Vote	%
NSW	4,145,650	1,817,380	46.43	2,096,562	53.57
VIC	3,163,934	1,489,536	49.84	4,499,138	50.16
QLD	2,225,835	784,060	37.44	1,309,992	62.56
WA	1,176,311	458,306	41.48	646,520	58.52
SA	1,027,535	425,869	43.57	551,575	56.43
TAS	327,729	126,271	40.37	186,513	59.63
ACT	212,586	127,211	63.27	73,850	36.73
NT	108,149	44,391	48.77	46,637	51.23
<b>Totals</b>	<b>12,387,729</b>	<b>5,273,024</b>	<b>45.13</b>	<b>6,410,787</b>	<b>54.87</b>

<sup>34</sup> For a very helpful discussion of previous referenda with statistics, an outline of issues and so on, see *Standing Committee on Legal and Constitutional Affairs*, Constitutional Change: Select sources on Constitutional change in Australia 1901-1997 (1997) ch 2 (available at <http://www.aph.gov.au/house/committee/laca/reports>).

<sup>35</sup> C. Saunders, The Australian Experience with Constitutional Review, (1994) 66 Aust Qly 49, 54.

<sup>36</sup> See the helpful table in *Warhurst* *supra* n 11, App 2.

<sup>37</sup> This table is based on the figures reproduced at the Australian Electoral Commission's web-site, *supra* n 22.

<sup>38</sup> New South Wales (NSW), Victoria (VIC), Queensland (QLD), Western Australia (WA), South Australia (SA), Tasmania (TAS), Australian Capital Territory (ACT), Northern Territories (NT).

State	Formality		Informality		Total		
	Vote	%	Vote	%	Vote	%	
<b>NSW</b>	3,913,942	99.12	34,772	00.88	3,948,714	95.25	NO
<b>VIC</b>	2,988,674	99.07	28,063	00.93	3,016,737	95.35	NO
<b>QLD</b>	2,094,052	99.31	14,642	00.69	2,108,694	94.74	NO
<b>WA</b>	1,104,826	99.15	9,500	00.85	1,114,326	94.73	NO
<b>SA</b>	977,444	99.09	8,950	00.91	986,394	96.00	NO
<b>TAS</b>	312,784	99.09	2,857	00.91	315,641	96.31	NO
<b>ACT</b>	201,061	99.23	1,553	00.77	202,614	95.31	YES
<b>NT</b>	91,028	99.07	852	00.93	91,880	84.96	NO
<b>Totals</b>	11,683,811	99.14	101,189	00.86	11,785,000	95.13	NO

### National Results – Question 2 – Preamble

State	Enrolment	Yes		No		
		Vote	%	Vote	%	
<b>NSW</b>	4,145,650	1,647,378	42.14	2,261,960	57.86	
<b>VIC</b>	3,163,934	1,268,044	42.46	1,718,331	57.54	
<b>QLD</b>	2,225,835	686,644	32.81	1,405,841	67.19	
<b>WA</b>	1,176,311	383,477	34.73	720,542	65.27	
<b>SA</b>	1,027,535	371,965	38.10	604,245	61.90	
<b>TAS</b>	327,729	111,415	35.67	200,906	64.33	
<b>ACT</b>	212,586	87,629	43.61	113,293	56.39	
<b>NT</b>	108,149	35,011	38.52	55,880	61.48	
<b>Totals</b>	12,387,729	4,591,563	39.34	7,080,998	60.66	

State	Formality		Informality		Total		
	Vote	%	Vote	%	Vote	%	
<b>NSW</b>	3,909,338	99.01	39,144	00.99	3,948,482	95.24	NO
<b>VIC</b>	2,986,375	98.99	30,341	01.01	3,016,716	95.35	NO
<b>QLD</b>	2,092,485	99.23	16,174	00.77	2,108,659	94.74	NO
<b>WA</b>	1,104,019	99.06	10,436	00.94	1,114,455	94.74	NO
<b>SA</b>	976,210	98.95	10,325	01.05	986,535	96.01	NO
<b>TAS</b>	312,321	98.94	3,343	01.06	315,664	96.32	NO
<b>ACT</b>	200,922	99.16	1,696	00.84	202,618	95.31	YES
<b>NT</b>	90,891	98.90	1,015	01.10	91,906	84.98	NO
<b>Totals</b>	11,672,561	99.05	112,474	00.95	11,785,035	95.13	NO

## 6. Why did the referendum proposal fail? An assessment

In the conclusion to its 1993 Options Paper, the RAC had observed that:<sup>39</sup>

“[F]ears that [a move to a republic] must involve substantial and unwelcome change to our political system are not well founded. The establishment of an Australian republic is essentially a symbolic change, with the main arguments, both for and against, turning on questions of national identity rather than questions of substantive change to our political system.”

Certainly, legally speaking the effect of adopting the referendum proposals would have been minimal – the replacement of the Queen as head of state with a president, who would exercise the same powers as those previously enjoyed by the Governor-General in the name of the Queen. The big issue would therefore appear to have been a simple one: did Australians want those powers to be exercised by an Australian who was nominally the representative of a foreign monarch, or did they want them exercised by an Australian president?

While this assessment may well be correct at an analytical level, it was not the principal focus of the referendum debate, despite the efforts of the Yes campaigners. As the referendum campaign unfolded, in fact the symbolic change which the RAC members had in mind – cutting the link with the British Crown<sup>40</sup> – was not the symbol around which the debate centred, but rather an altogether different symbol – that of who holds political power, the people or the politicians. It was the belief of many voters that a president who was not directly elected by the people was not a president worth having at all.

Interestingly, a Morgan Gallup Poll conducted two weeks after the referendum indicated a clear majority in favour of Australia becoming a republic with an elected president (54% in favour, 39% against, 7% undecided). Revealingly, the same poll recorded that of those respondents who had voted No at the referendum, some 29% were in favour of a republic with an elected president.<sup>41</sup>

Accordingly, it would appear that the principal reason that the proposal was defeated was that instead of the vote being seen as one resolving whether the Queen should be dropped as head of state, it became one as to whether her presidential replacement would be selected in a particular manner.<sup>42</sup> As a number of commentators have suggested, the Yes campaign

<sup>39</sup> *Supra* n 14, at 151.

<sup>40</sup> *Supra* n 14, at 150.

<sup>41</sup> See findings recorded at <http://www.roymorgan.com/polls/1999/3264>.

<sup>42</sup> Dr Jenny Hocking of Monash University, shortly after the defeat, wrote: “The essence of this final stage of our republican evolution was a simple one: to remove the Queen as our head of state. Contrary to the repeated claims of the no campaigners, the Queen was the central issue here. This

was doomed from the moment that a model was chosen in the face of public preference for a directly elected president.<sup>43</sup> The debate was not: Why have a monarchy; but rather, Why have a politicians' president?

There is, of course, some irony at the ability of those republican voters who voted No to have criticised the method of selection of a president under the Bipartisan Model: there is nothing particularly democratic about the accident of birth by which the monarch is selected, and the Bipartisan Model, while not involving direct election, would have involved significant public participation in the selection process. Moreover, the Bipartisan Model was also an improvement on the current method of selecting the Governor-General; as noted above that position is filled by the Queen on the advice of the Australian prime minister, without any need for public consultation, or pre-publicity. In contrast, the proposed presidential model would have allowed for a lot more public participation in the selection of the head of state than ever occurs under current procedures for selecting a Governor-General, usually done behind closed doors.<sup>44</sup>

Numerous other interlocking reasons have been proffered as to why the referendum proposal was defeated. Public scepticism of politicians had a role. A growing sense of alienation from political parties and processes was bound to taint any proposal that appeared to allow the perpetuation of party control of key governmental posts,<sup>45</sup> a factor not alleviated by ignoring voters' preferences for the selection system. Indeed, the decision to go for the Bipartisan Model was taken by some as an indication of how the presidential selection process itself might be undertaken. Moreover, for some the processes (the Constitutional Convention notwithstanding) were not sufficiently inclusive.<sup>46</sup>

final stage involved no change to the nature of our system of government as a parliamentary democracy, no change to the powers of the Governor-General.

Yet the proposal of 'president' as the title of our republican head of state allowed the campaign to deflect from these simple realities; for in the popular imagination the symbolism of president took hold, marking out its own expectations and possibilities that the architects of the republic had not anticipated."

*J. Hocking*, Blame the president for saving the Queen, *The Age* (Melbourne) 10 November 1999: <http://www.theage.com/news/19991110/A34371-1999Nov9.html>.

<sup>43</sup> *C. Saunders*, Legacies of Luck: Australia's Constitution and National Identity in the 1990s, (1999) 15 SAJHR 328, 342 (predicting defeat prior to the referendum on this ground); *G. Morgan* (pollster writing after the elections), 'Yes men' Learn the Hard Way: Republic Doomed Since February 1998 Constitutional Convention, *The Bulletin* 9 November 1999.

<sup>44</sup> To similar effect, see *Lane* *supra* n 31 at 752.

<sup>45</sup> See the views recorded in the following newspaper reports: *L. Morris*, How the west was lost in Sydney, *Sydney Morning Herald*, 9 November 1999 and *A. Stephenson*, Why the republic was bushwhacked, *Sydney Morning Herald*, 13 November 1999. See also *J. Uhr*, After the Referendum: The Future of Constitutional Change, (2000) 11 Pub L Rev 7, 7.

<sup>46</sup> See eg *A. Robb*, Another vote against the politics of exclusion *The Age* 8 November 1999: <http://www.theage.com/news/19991108/A30598-1999Nov7.html>; *Williams* *supra* n 25 at 492. In

Next, the absence of bipartisan political support meant that the Yes campaign was always going to struggle: as noted earlier, history reveals that without such support most referenda are doomed to failure.

Third, there will always be an element of scepticism among voters about changing a system that appears not to be broken: the Yes campaign was not particularly successful at demonstrating to the swing voters why the change to a republic was necessary.

Fourth, a number of commentators have noted (both prior to and after the referendum) that as a whole the level of awareness of governmental and constitutional arrangements among Australians is not high.<sup>47</sup> To some minds this meant that swing voters could become readily confused (some even suggesting that certain participants in the debate deliberately and mischievously added to that confusion)<sup>48</sup> in determining the relative merits of the arguments of the Yes and No campaigns, and choose ultimately to retain the status quo. Yet other commentators blamed the narrow focus of the republic issue as contributing to its defeat – they suggested that only a broader constitutional revision agenda could have carried along sufficient Australians.<sup>49</sup>

Finally, throughout the republic referendum campaign the preamble issue had an impact. As Williams has noted, on one level confusion was introduced into the debate on the republic by concerns that the republic would clash with the terms of the preamble to the Commonwealth of Australia Constitution Act 1900 (which curiously was not to be affected by the insertion of the new preamble), a matter not helped by the wording of the official pamphlets on the preamble issue.<sup>50</sup> Equally, the fact that the new preamble would explicitly not be justiciable, yet nothing was said about the justiciability of the preamble to the 1900 Act raised the spectre in public debate of the bizarre idea of judges relying on the 1900 Act preamble with its reference to the British Crown, when interpreting a republican constitution.<sup>51</sup>

particular, it should be noted that there was considerable public disquiet about the way in which the wording of the new Preamble proposal (which was voted on at the same time as the republican alteration: see *supra* n 28) was reached. For a useful discussion of this aspect, see *Williams supra* n 25 at 490-492 and 493.

<sup>47</sup> See eg *Hocking supra* n 42; *Williams supra* n 25 at 492-494.

<sup>48</sup> *G. Burns* (campaign director for ARM), Not the vote of a clever country, *Sydney Morning Herald* 12 November 1999; *P. Keating* (ex-Labor prime minister), Now for our crisis of confidence, *The Age*, 8 November 1999; *J. McCalman*, The tyranny of ignorance rules" *The Age* 10 November 1999 (criticising those republicans who argued for a No vote for a campaign of misinformation); *Williams supra* n 25 at 498.

<sup>49</sup> See *Williams supra* n 25 at 498-501.

<sup>50</sup> *Williams, supra* n 25 at 493.

<sup>51</sup> *Williams, supra* n 25 at 493.

More importantly, however, the preamble debate meant that the 6 November vote was not solely concentrated on the republic issue. Indeed, the fact that the preamble debate involved the prime minister putting his political credibility on the line heightened even more the media's interest in the preamble issue. From at least part of the republican perspective this was unfortunate, because the republic issues were sufficiently complex as to require the public's full attention, if comprehension of the salient issues was to occur.

In addition, as already noted, the preamble debate also heightened the disdain that some voters would have felt towards the political class creating a sense of negativity which affected perceptions on the republican issue as well.

## 7. The future?

Straight after the defeat of the referendum proposal, many pro-republican groups vowed to carry on with the fight to remove the Queen. Indeed, federal Leader of the Opposition, ALP's Kim Beazley, has promised to revisit the issue if his party is returned to power. Researcher John Uhr has argued that the referendum result requires ARM to accept that it has to share the republican field with the "yes and more" camp, and in turn both of those groups will need to forge an alliance with the No-voting direct election proponents.<sup>52</sup> Whether this results in ARM being pushed from centre-stage of the republican movement remains to be seen.

Whatever the real reasons for the referendum proposal's defeat (and in things such as referenda these are usually many and often contradictory), and whatever new political configurations emerge, it is clear that the republic issue is not off the political burner. As so many commentators have noted, the defeat of the republic proposal did not amount to an affirmation of faith in the constitutional monarchy.<sup>53</sup> Indeed, the Morgan Gallup poll carried out just after the referendum (referred to above) clearly indicated a continuing preference for an Australian republic.<sup>54</sup> It is inevitable that pressure to drop the Queen as head of state will produce a future constitutional amendment proposal. The outcome will likely be determined by the level of public participation in the selection of the new model, and in the selection of any new head of state.

<sup>52</sup> *Uhr supra* n 45 at 9.

<sup>53</sup> *Uhr supra* n 45 at 7.

<sup>54</sup> See p. 7.