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Constitutional Monarchy or Republic? The November 1999 Referendum

by

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EXECUTIVE SUMMARY

On 6 November 1999 the Australia people will vote in a constitutional referendum on whether Australia should become a republic and whether to insert a preamble to the Commonwealth Constitution. The two questions, on the republic and the preamble respectively, are independent and the result of one does not affect the other.

This paper looks at the background to the referendum. It presents a brief historical overview of the debate on the republic, pointing out the landmarks in the movement towards presenting the republican issue to the Australian people in the form of a constitutional referendum (pages 3-14).

The paper also presents the main arguments for and against a republic, both generally and in relation to the specific republican model which forms the basis of the referendum question (pages 14-30).

The issues relating to the preamble question are considered subsequently in a separate section of the paper (pages 30-34).

1. INTRODUCTION

On 6 November 1999 the Australia people will vote in a constitutional referendum on whether Australia should become a republic and whether to insert a preamble to the Commonwealth Constitution (henceforth, the Constitution). The two questions, on the republic and the preamble respectively, are independent and the result of one does not affect the other.

This paper looks at the background to the referendum. On one side, it presents a brief historical overview of the debate on the republic, pointing out the landmarks in the movement towards presenting the republican issue to the Australian people in the form of a constitutional referendum. On the other side, the paper also presents the main arguments for and against a republic. The issues relating to the preamble question are considered subsequently in a separate section of the paper.

2. DEFINING TERMS

Defining terms - constitutional monarchy: Vernon Bogdanor, Reader in Government at the University of Oxford, a noted commentator on constitutional matters, has said that:

> In a modern constitutional monarchy, the constitution, whether codified or not, permits the sovereign to perform only a small number of public acts without the sanction of his or her ministers. Thus today a constitutional monarchy is also a *limited* monarchy: the constitution does not allow the sovereign actually to govern...A constitutional monarchy, then, can be defined as a state which is headed by a sovereign who reigns but does not rule.[1]

Defining terms - republicanism: The term 'republic' is ancient in origin and has a diverse range of usages.[2] However, as Brian Galligan has argued, its core modern meaning 'is rule not by a monarch in his or her own right but by the people through a constitution that controls all the parts of government'.[3] To this he adds, 'Republicanism means that the people have supreme constitutional power'.[4] In a similar vein, based on the Report of the

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1 V Bogdanor, *The Monarchy and the Constitution*, Clarendon Press 1995, p 1. This can be said to correspond with Bagehot's famous distinction between the dignified and the efficient parts of the constitution - N State John-Stevas, *The Collected Works of Walter Bagehot*, Volume 5, The Economist 1974, p 206.

2 For a brief overview see - H Evans, 'Essays on republicanism: small r republicanism', *Papers on Parliament No 24*, Department of the Senate September 1994, pp 1-6.

3 B Galligan, *A Federal Republic*, Cambridge University Press 1995, p 10.

4 Ibid, p 15. Galligan's argument is that Australia is already a federal republic, 'albeit one that is thinly disguised by monarchical symbols and formulations of the executive office' (at p 16). However, Galligan would still support the removal of those monarchical symbols from Australia's constitutional system (at p xi).

Republic Advisory Committee, a 'republic' can be defined as a 'state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people'. The following definitions of the term from the Macquarie Dictionary were cited in the Report:

> **1**. a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them...**3**. a state, especially a democratic state, in which the head of government is an elected or nominated president, not an hereditary monarch.

3. THE AUSTRALIAN SYSTEM OF GOVERNMENT

The Australia system of government is based on the concepts of representative democracy and responsible government within the context of a federal compact. The irony is that these fundamental concepts of constitutional law and practice are barely discernible in the written Constitutions of either the Commonwealth or the States. To a large extent they must be inferred from these texts, developed from and interpreted in terms of political practice and tradition. In the language of constitutional law these are known as constitutional 'conventions'. These operate in particular with reference to responsible government, under which the Crown acts, other than in exceptional circumstances, on the advice of Ministers who are responsible to Parliament, and where the government of the day is chosen from those who have the confidence of the lower house.

On the other hand, the institution of the Crown is written into the texts of the Commonwealth and State Constitutions in express terms. Professor Zines has said in this regard that 'The notion of the Crown pervades the Constitution', a comment made in a federal context but which can be taken to have general application. The irony of course is that the formal and express significance of the Crown is in inverse proportion to its actual, practical importance. Precisely the reverse is true of the concepts of representative democracy and responsible government. Government is administered in the name of the Queen, but it is her 'advisers' who actually make the decisions.

The Queen, as head of the Australian nation state, is now titled 'Queen of Australia'. This legal title was introduced by the *Royal Style and Titles Act 1973*, which in addition removed references found in the *Royal Style and Times Act 1953* to 'United Kingdom' and 'Defender of the Faith'. References to 'the Queen' in the Constitution are in effect references to 'the Australian Government'. In her capacity as Queen of Australia, the Queen formally appoints the Governor-General on the advice of the Australian Prime Minister. As the Republic Advisory Committee explains, the only other constitutional power at present exercised by the Queen in respect of Australia is the granting of royal assent to legislation 'in circumstances where it is considered appropriate for the assent to be given by the monarch rather than the Governor-General'. For example, the *Royal Style and Titles Act 1973* was 'reserved for Her Majesty's pleasure'. Section 61 of the Constitution provides that the Governor-General is the Queen's representative. Since the Imperial Conferences of 1926 and 1930 the Governor-General represents the Queen only in her capacity as head of state

of Australia.

The Queen is head of state of all the States. The Crown's constitutional position is the same in each of the States and basically conforms with its position under the Commonwealth Constitution. The Australia Acts of 1986 clarify the relationship between the State Governments and the Crown. Section 7(1) provides that the Queen is represented in the States by the Governor; section 7(4) that the Queen is not precluded from exercising her powers when personally present in a State; and section 7(5) holds that, in respect of these powers, the Queen acts on the advice of the State Premier. Further, section 8 removed the monarch's power to disallow legislation in the States.

The functions of the Governor-General and the State Governors are primarily symbolic and ceremonial in nature. Other powers, such as the issuing of writs for an election, are performed on advice (this does not apply in NSW where there are fixed-term Parliaments). Distinct from these are the reserve powers, in which are the Governor-General and the State Governors enjoy some personal discretion. The scope of these powers, which are exercised in accordance with the constitutional conventions, is not entirely clear. Following the Republic Advisory Committee, in the federal context they can be said to include:

- the power to appoint the Prime Minister;
- the power to dismiss the Prime Minister, and therefore the Government; and
- the power to refuse to follow advice to dissolve the House of Representatives, or both Houses.

The dismissal of Premier Lang in 1932 is a controversial example of a State Governor dismissing the Premier for, in the words of the Republic Advisory Committee, 'persistently refusing to comply with a Commonwealth law'.[5]

4. BACKGROUND TO THE REFERENDUM[6]

The Republic Advisory Committee and beyond: The debate about whether Australia should remain a constitutional monarchy is not new. It has however gained in intensity during the 1990s. In July 1991 the Australian Republican Movement (ARM) was formed, followed in June 1992 by the counter organisation, Australians for Constitutional Monarchy (ACM). The republican cause gained new impetus when the Prime Minister of the day, Paul Keating, announced on 28 April 1993 the establishment of the Republic Advisory Committee. Its purpose was to prepare an 'option paper which describes the minimum constitutional changes necessary to achieve a viable federal republic of Australia, while

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5 Republic Advisory Committee, *An Australian Republic - the Options*, 1993, vol. 2. As noted, the dismissal of Premier Lang remains controversial, from the standpoint of both historical and legal opinion. One account of the circumstances of the dismissal is set out in Appendix 6 to the Report.

6 For a detailed account of the background to the referendum see - *The recent republic debate - a chronology 1989-1998*, Commonwealth Parliament Library Background Paper No 11, 1997-98.

maintaining the effect of our current conventions and principles of Government'. The Committee's Terms of Reference went on to say, 'There is no intention that the Committee should examine any options which would otherwise change our structure of government, including the relationship between the Commonwealth and States'. This become known as the 'minimalist' approach to constitutional reform.

The Republic Advisory Committee reported on 5 October 1993. In conclusion, the Committee said it was satisfied that:

> ...it is 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 out system of government is based.[7]

In summary, the report stated that, in order to replace the monarch with a republican head of state, the Constitution would need to be amended in only three substantive ways: (a) establishing the office of a new Australian Head of State (including the method of appointment and removal); (b) providing for the powers of the Head of State; and (c) providing for the States. The Republic Advisory Committee's findings on these issues can be summarised as follows:

(i) Method of appointment:

Concerning the key issue of the appointment of an Australian President, the report canvassed four options, namely: appointment by the Prime Minister; appointment by the Parliament; appointment by popular election; and appointment by an electoral college. Of all these, appointment by parliament received the Committee's most favoured treatment, notably appointment by a special majority at a joint sitting of the two Houses of Federal Parliament. This special majority mechanism, it was said, would be 'in keeping with the importance of the occasion and could provide a symbol of unity appropriate to a Head of State who would represent the nation as a whole'.[8]

Subsequently, the minimalist republican model advocated by the Australian Republican Movement and adopted by the Keating Government in 1995[9] reflected this approach, with both opting for presidential appointment by a two-thirds majority of both Houses of Federal Parliament sitting together. This was also the appointment model preferred by the Constitutional Convention in 1998.

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7 Republic Advisory Committee report, vol 1, p 10.

8 Ibid, p 3.

9 PJ Keating, *An Australian Republic: The Way Forward*, AGPS 1995, p 11. Mr Keating responded to the Republic Advisory Committee report on 7 June 1995 - Commonwealth Parliament Debates, p 1434.

(ii) Method of removal

On the issue of the removal of the President, the Republic Advisory Committee report noted, 'There is much to be said for adopting the same method of removal as appointment, unless there are good practical reasons for not doing so'. Thus, if the Head of State is appointed by a special majority at a joint sitting of the Houses of Federal Parliament, as favoured by the Committee, then removal would be achieved by the same method. At the same time, the Republic Advisory Committee acknowledged that there may be difficulties with a mechanism of this kind and therefore canvassed alternative options, including removal by a parliamentary commission of inquiry to investigate specified forms of misconduct or incapacity. In other words, the Head of State under this option would be removed by a mechanism akin to that which operates in relation to the justices of the High Court under section 72 of the Constitution.

In the event, both the Australian Republican Movement and the subsequent Keating minimalist model in 1995 adopted removal of the Head of State by a two-thirds majority of both Houses of Federal Parliament in joint session.[10]

(iii) The powers of the Head of State

The Republic Advisory Committee distinguished between the 'ordinary' and 'reserve' powers of the Head of State and, with respect to the latter, the report discussed a range of options: (a) leaving the reserve powers in the same form as are presently set out in the Constitution, but stating in the Constitution that the existing constitutional conventions will continue to apply to the exercise of those powers; (b) again, leaving the reserve powers under the Constitution undisturbed, but formulating the constitutional conventions in an authoritative written form separate to the Constitution; (c) maintaining the present constitutional regime once again, but providing that Federal Parliament can make laws to formulate the constitutional conventions in a legislative form; and (d) 'codifying' the constitutional conventions relevant to the reserve powers by setting out the circumstances in which the Head of State may exercise those powers. This last option could be achieved by means of 'partial' or 'full' codification.

The Republic Advisory Committee was of the opinion that some relevant provision referring to the reserve powers should be made in the Constitution. It was thought that saying nothing about the constitutional conventions and assuming that they will continue to apply was not a viable option.[11] Alternatively, the minimalist option of expressly stating in the Constitution that the present conventions will continue to apply was seen to entrench the current uncertainty concerning the operation of the reserve powers. A definitive solution was not attempted, but the balance of the Committee's discussion favoured some form of codification, although again the problems with this option were also discussed, including its

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10 G Winterton, 'The 1998 Convention: a reprise of 1898?' (1998) 21 *UNSW Law Journal* 856 at 859.

11 Republic Advisory Committee report, p 7.

tendency to produce rigidity in the Constitution.

For its part the Keating Government rejected the codification option decisively in 1995, commenting that 'it is probably impossible to write down or codify these powers in a way that would find general community acceptance and cover every possible contingency'.[12] In 1998 the Constitutional Convention recommended, not that the reserve powers be codified, but that the Constitution should state expressly that the reserve powers and conventions relating to their exercise continue to exist.

(iv) Providing for the States

Complex constitutional issues were debated in the Republic Advisory Committee report in this regard, with the report concluding that, in order to minimise the legal debate, 'it would be desirable for amendments creating a republic to deal specifically with the position of the States'. On the other hand, the report did accept that it would be 'legally possible for the Constitution to allow a State to retain the monarch as its head of state...'.[13]

In 1995 the Keating Government adopted a laissez faire approach, saying that 'It would be up to each State to decide how in future they would appoint their respective Head of State'.[14] The communique of the Constitutional Convention was in similar terms, noting the desirability of the States adopting a republican form of government when it occurs at the Commonwealth level, but asserting the autonomy of the States in matters relating to their Head of State.

The Constitutional Convention: On 7 June 1995, eighteen months after the release of the Republic Advisory Committee report, in a speech to the Federal Parliament the then Prime Minister, Paul Keating, set a timetable for achieving a republican system of government by 2001. The following day the then leader of the Opposition, John Howard, proposed the establishment of a 'Peoples Convention' in 1997 which would examine issues relevant to Australia becoming a republic. The Convention was to consist of 50 per cent elected members and another 50 per cent selected by the government of the day (10 per cent of which would be between 18 and 25 years of age). A Convention of this kind had, in fact, been proposed by the former leader of the Opposition, Alexander Downer, in 1994; it had also been advocated previously by the Constitutional Centenary Foundation, a body formed in 1991 and devoted to public education on matters relevant to constitutional reform.[15]

The Peoples Convention proposal was part of the Coalition's platform in the March 1996 federal general election campaign. Then, on winning office, the Coalition Government set

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12 *Commonwealth Parliamentary Debates*, 7 June 1995, p 1438.

13 Republic Advisory Committee report, p 9.

14 *Commonwealth Parliamentary Debates*, 7 June 1995, p 1440.

15 Its first meeting was held on 23 July 1992 - *The Recent Republic Debate - A Chronology: 1989-1998*, Commonwealth Parliament Library Background Paper No 11 1997-98, p 22.

about putting its promise into effect, with the Constitutional Convention (Election) Bill 1997 receiving its second reading on 26 March 1997. Under the Bill, 76 delegates were to be elected to the Convention; 76 delegates were also to be appointed by the Prime Minister - 40 parliamentarians and 36 non-parliamentarians. The subsequent election for the Constitutional Convention was by voluntary postal ballot, with voting papers being mailed out in the period 3-14 November and the polling closing on 9 December 1997. A full list of appointed and elected Convention delegates was then published on 24 December 1997. Subsequently, the Convention met at Canberra from 2 February 1998 to 6 February 1998 and from 9 February 1998 until 13 February 1998.

In relation to the election of the 76 elected delegates, Professor John Warhurst has written:

> The distribution of seats was: New South Wales (20); Victoria (16); Queensland (13); Western Australia (9); South Australia (8); Tasmania (6); Australian Capital Territory (2); Northern Territory (2). A Senate-style voting method was used. The turnout was 46.93 per cent of eligible voters...There were 609 candidates including 80 groups and 176 non-aligned individuals. The two largest groups, ARM and ACM, polled the lion's share of the votes and won the bulk of the elected positions. ARM polled 30.34 per cent and ACM polled 22.51 per cent. Republican candidates led the count in NSW, Victoria, WA, ACT and NT, while monarchists won in Queensland, SA and Tasmania.[16]

As for the appointed delegates, these included representatives from Federal, State and Territory parliaments, including all State Premiers and Opposition leaders. The non-parliamentary delegates appointed to the Convention included seven youth delegates, indigenous representatives and certain noted contributors to the republic debate, including constitutional experts, Professor George Winterton and Professor Greg Craven, the former Victorian Governor, Richard McGarvie, and the former Governor General, Bill Hayden. As Professor Warhurst has noted, the election for the Constitutional Convention brought into the open the competing elements within the republican movement which, until that time, had been dominated by the minimalist model supported by the Australia Republican Movement. Some of these had expansive agendas going far beyond the subject of an Australian Head of State.[17] Others were more directly, although not exclusively, concerned to advocate that any Australian Head of State should be popularly elected. Warhurst explained: 'They held caucus meetings during the convention to organise opposition to a President elected by Parliament. After the convention a majority of these delegates, led by Ted Mack, Phil Cleary and Clem Jones formed the Real Republicans. Other direct election

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16 J Warhurst, *From Constitutional Convention to Republic Referendum: a Guide to the Processes, the Issues and the Participants*, Commonwealth Parliamentary Library, Research Paper No 25, 1998-1999, p 7.

17 For example, the group A Just Republic stated that 'The Republic debate presents a significant opportunity for Australians to take control of our collective life, but entrenching principles of equality, fairness and ecological sustain ability in our new Constitution'.

republicans, including Reverend Tim Costello, chose to join the Yes campaign'.[18]

(i) What was the purpose of the Constitutional Convention?

In the Second Reading Speech for the Constitution Convention (Election) Bill 1997, the Prime Minister said:

> The convention will provide a forum for discussion about whether or not our present constitution should be changed to a republican one. In particular:
>
> - whether or not Australia should become a republic;
> - which republic model should be put to the electorate to consider against the status quo; and
> - in what time frame and under what circumstances might any change be considered.[19]

Speaking on the Nine Network's *Sunday* program on 9 November 1997, the Prime Minister called on those attending the Constitutional Convention to engage in constructive dialogue, stating:

> I think the convention should spend its time, both republicans and non-republicans alike, trying to reach agreement on the alternative to the present system...I want it to be constructive because, at the end of the day, what is more important than whether we have a republic or a constitutional monarchy is a united workable system of government.[20]

The Federal Government had said that if the Convention produced a consensus in favour of a republic, the question would be put to the Australian people voting in a referendum under section 128 of the Commonwealth Constitution.[21] Then in the Prime Minister's opening address to the Convention it was said that, if 'clear support' for a particular republican model emerged from the Convention, 'my government would, if returned at the next election, put that model to the Australian people in a referendum before the end of 1999'.[22]

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18 Ibid, p 3.

19 *CPD (HR)*, 26 March 1997, p 3061.

20 'MP's must elect any president, says Prime Minister', *The Sydney Morning Herald*, 10 November 1997.

21 M Steketee, 'Decision we have to have', *The Weekend Australian*, 8-9 November 1997; C Saunders, 'Why a convention' (1997) 8 *Public Law Review* 213. Professor Saunders queries what is meant by the word 'consensus' in this context. She also asks whether the terms of reference of the Convention should have been confined to the republican issue and asks 'whether the agenda of a Convention can effectively be confined, once it is called together' (at 215).

22 Constitutional Convention report, vol 1, p 1.

Quite what was meant by 'clear support' was never explained, however; nor was it stated in express terms that the former requirement for 'consensus' had been abandoned.[23] The Prime Minister also told delegates that, if the referendum was successful, a republican system of government would be established in time for the Centenary of Federation on 1 January 2001.

(ii) What did the Constitutional Convention achieve?

The full text of the communique issued by the Constitutional Convention is attached at Appendix A. Basically, the Constitutional Convention reported that it supported, 'in principle, Australia becoming a republic'.[24] Following an exhaustive balloting process, the Convention also supported the adoption of a republican system of government on the 'Bipartisan Appointment Model', the details of which are discussed below.[25] Thirdly, the Convention recommended to the Prime Minister and Parliament that that Model (and other related changes) be put to a referendum, to be held in 1999.[26] If that referendum was successful, it was recommended further that the new republic come into effect by 1 January 2001.

(iii) Choosing the President - the Bipartisan Model

The Bipartisan Model of choosing a President was one of four models considered by the Constitutional Convention.[27] Model A was the Direct Election Model; Model B was the 'Hayden model' under which candidates for the presidency would be nominated by 1% of voters, by way of petition, and the President would be directly elected; Model C was the 'McGarvie model' under which the President would be appointed by a three-member Constitutional Council acting on the advice of the Prime Minister. On the other hand, the Bipartisan Model, which represented a compromise agreement between the Australian Republican Movement's minimalist model and supporters of the McGarvie alternative, has four main elements:

- a committee established by Federal Parliament invites and considers nominations from State and Territory Parliaments, local government and the public and gives a report on the nominations to the Prime Minister;
- following consideration of the committee's report, the Prime Minister moves in a joint sitting of the Commonwealth Parliament that an Australia citizen be chosen as

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23 G Winterton, N 10, at 866.

24 This resolution was carried by 89 votes to 52 with 11 abstentions.

25 This resolution was carried by 73 votes in favour to 57 against with 22 abstentions.

26 This resolution was carried by 133 votes to 17 with 2 abstentions.

27 Model A was the Direct Election Model; Model B was the 'Hayden model' under which candidates for the presidency would be nominated by 1% of voters, by way of petition, and the President would be directly elected; Model C was the 'McGarvie model' under which the President would be appointed by a three-member Constitutional Council acting on the advice of the Prime Minister.

President;
- the Leader of the Opposition seconds the Prime Minister's motion; and
- a two-thirds majority of the members of the Commonwealth Parliament approves the Prime Minister's motion.

(iv) Removal of the President

Under the Bipartisan Model the President may be removed by the Prime Minister. However, the Prime Minister must seek the approval of the House of Representatives for the removal within 30 days unless an election is held. Even so, if the House does not ratify the Prime Minister's action, the President would not be restored to office, but would be eligible for re-appointment. Significantly, the Constitutional Convention recommended that the vote of the House in these circumstances would constitute a vote of no confidence in the Prime Minister, a recommendation which was not reflected subsequently in the Constitution Alteration (Establishment of Republic) 1999 Bill.

(v) The powers of the Head of State and qualifications for office

As noted, the Constitutional Convention recommended, not that the reserve powers of any future President be codified, but that the Constitution should state expressly that the reserve powers and conventions relating to their exercise continue to exist under the republican system of government. The Convention also recommended, with respect to the ordinary or non-reserve powers of the Head of State (those exercised in accordance with ministerial advice), that Parliament consider spelling these out 'so far as practicable'.

Australian citizenship was recommended to be the one required qualification for the presidency, with the Head of State being subject to the same disqualifications as are set out under section 44 of the Constitution. The Commonwealth Government and Parliament were also asked to consider that 'The Head of State should not be a member of any political party'. Also, the President was to have a five-year term.

The Republic Bill - Constitution Alteration (Establishment of Republic) 1999:[28] After the close of the Constitutional Convention the Prime Minister announced that it was the intention of the Government, if re-elected, to hold a referendum on the republic issue before the end of 1999. Upon re-election, on 1 December 1998, the Referendum Task Force was established in the Department of the Prime Minister and Cabinet. Subsequently, to give effect to the recommendations of the Constitutional Convention, on 9 March 1999 a draft version of the Constitution Alteration (Establishment of Republic) 1999 Bill (the Republic Bill) was released for public comment. It was accompanied by the Presidential Nominations Committee 1999 Bill, also in draft form.[29] Before either Bill was introduced into Parliament,

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28 The short title of the Bill does not contain the word 'Bill'. This reflects the fact that it is a proposal for constitutional alteration rather than an ordinary Bill.

29 The Presidential Nominations Committee Bill 1999 outlines in more detail the procedure for the establishment of a committee to invite and consider public nominations for a President and prepare a short list to be presented to the Prime Minister. Under the Bill the nominations

it was determined in May 1999 that both were to be examined by a Joint Select Committee.[30] The two Bills were then introduced into Parliament on 10 June 1999. It was also determined that the Constitution Alteration (Establishment of Republic) 1999 Bill had to be passed by 12 August in order for the referendum to be held on 6 November 1999. To conform with this deadline, the Joint Select Committee had to report by 9 August.

On 12 August 1999 two proposed laws, both of which are to be put to referendum, were passed: the Republic Bill and the Constitution Alteration (Preamble) 1999.

(i) Overview of the Republic Bill

The Constitution Alteration (Establishment of Republic) 1999 provides for:

- a long title which will constitute the referendum question;
- a President as Head of State;
- the mechanism for selecting a President, including a committee to receive and consider nominations;[31]
- the powers of the President;
- the term of office and power for removal of the President;
- the removal of monarchical references from the Constitution; and
- transitional arrangements.

(ii) The long title

Much of the immediate public debate concerning the Bill centred on its long title which corresponds with the question which will be put at the 6 November referendum. In its original form the Bill's long title read:

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

In its report the Joint Select Committee on the Republic Referendum noted the many concerns with this long title, including the fact that it failed to make any reference to the replacement of the Queen and Governor General by an Australian President. In the event,

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committee will comprise: 8 members of the Commonwealth Parliament; 8 members from the State and Territory Parliaments (one member each); and 16 community members to be chosen at the discretion of the Prime Minister. The Government will seek passage of the Bill if the amendments to the Constitution are agreed to at the referendum (*Commonwealth Parliament Debates*, 10 June 1999, p 6660). This Bill would not amend the Constitution and would not therefore have to be approved at a referendum.

30 *Commonwealth Parliamentary Debates (Senate)*, 26 May 1999, p 5391.

31 As noted, the establishment of this committee is outlined in more detail in the Presidential Nominations Committee Bill 1999 (see N 29).

the Joint Select Committee supported an inclusion of this kind, but the omission of any reference to the mechanism by which the appointment of a republican Head of State is to be achieved. Its view was that the referendum question should present 'clearly and simply the essential purpose and outcome of the proposed legislation'.[32] Thus, it recommended that the long title of the Republic Bill be as follows:

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

In the event, the legislation which was eventually passed was a hybrid of these two proposals, in that it still included a broad reference to the method of appointment of the President.[33] The Bill's long title and republic question at the forthcoming referendum will be whether voters approve

> A proposed law to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor General being replaced by a President appointed by a two-thirds majority of the Members of the Commonwealth Parliament.

(iii) Appointment and removal of the President

These aspects of the Republic Bill follow closely the recommendations of the Constitutional Convention. With respect to appointment, proposed section 60 of the Constitution would provide: (a) a committee invites and considers nominations from the public and gives a report on the nominations to the Prime Minister; (b) following consideration of the committee's report, the Prime Minister moves in a joint sitting of the Commonwealth parliament that a named Australia citizen be chosen as President; (c) the Leader of the Opposition seconds the Prime Minister's motion; and (d) a two-thirds majority of the members of the Commonwealth Parliament approves the Prime Minister's motion.

With respect to removal, under proposed section 62 of the Constitution the President may be removed by the Prime Minister. However, the Prime Minister must seek the approval of the House of Representatives for the removal within 30 days unless an election is held. Even so, if the House does not ratify the Prime Minister's action, the President would not be restored to office. Against the recommendations of the Constitutional Convention, mention is made in the Republic Bill that the vote of the House in these circumstances would constitute a vote of no confidence in the Prime Minister. Nor is mention made of the eligibility of the former President for re-appointment.

(iv) Qualifications for office

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32 Joint Select Committee on the Republic Referendum, *Advisory report on: Constitution Alteration (Establishment of Republic) 1999; Presidential Nominations Committee Bill 1999*, August 1999, p 12. (Henceforth, Joint Select Committee report).

33 For the background to these amendments see - *Government response to the report of the Joint Select Committee on the Republic Referendum*, http://www.dpmc.gov.au/referendum/response.htm

Under propose section 60 of the Constitution the qualification requirements of the President are twofold. First, he or she must be an Australian citizen and must be capable of being chosen to be a member of the House of Representative. This means that, at the time the Prime Minister's motion of nomination is moved and affirmed, the person must conform with the requirements of section 44 of the Constitution which states, among other things, that a person cannot be chosen as a member of either House if he or she is a citizen of a foreign power, or holds any office of profit under the Crown. Secondly, the person cannot be 'a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party'.

(v) Powers of the President

Again the Republic Bill follows closely the recommendations of the Constitutional Convention. The conventions relating to the exercise of the reserve powers are explicitly recognised and continued by proposed section 59 of the Constitution, and the broad convention that the ordinary powers may be exercised only on advice is expressed as a constitutional requirement. Moreover, clause 7 of the proposed new Schedule 2 to the Constitution would put beyond doubt that the conventions applying to the exercise of the ordinary and reserve powers may continue to evolve.

The recommendation of the Joint Select Committee that the Republic Bill include a provision stating that the 'conventions which currently apply to determine the appropriate source of advice [be it the Federal Executive Council, the Prime Minister or an individual Minister] for the Governor General apply in respect of the President' was rejected by the Government. The Government took the view that the Constitution at present states which powers must be exercised 'in Council' (that is, on the advice of the Federal Executive Council) and would continue to do so under the republican model. Further, the Parliament's existing power to determine in other cases which minister should advise on any particular matter will also continue, thereby making it unnecessary to spell this out in the Constitution.

(vi) Justiciability

In response to a recommendation of the Joint Select Committee in its August 1999 report, the Government agreed to amend the Republic Bill to put it beyond doubt that the exercise of the reserve powers by a republican Head of State would not be justiciable if they had previously been non-justiciable under a constitutional monarchy. The Explanatory Memorandum stated in this regard: 'The traditional view is that the reserve powers, and the conventions which govern their exercise, are highly political matters which are not justiciable. However, that view has been questioned. Proposed s. 59 of the Constitution, in continuing the reserve powers and conventions, is not intended to resolve that uncertainty'. Continuing, the Explanatory Memorandum said that 'Clause 8A is intended to ensure that the changes made by the Bill do not themselves make justiciable the exercise of a reserve power that was not justiciable when exercised by the Governor General'. In other words, the proposed alteration to the Constitution leaves untouched the question of the justiciability

of the reserve powers.[34]

(vii) The States

Consistent with the recommendation of the Constitutional Convention, under the Republic Bill, Clause 5 of the new Schedule 2 to the Constitution would provide that any State may, if it wishes, retain a monarchical system of government after the Commonwealth has severed its links with the Crown.

5. THE REPUBLIC REFERENDUM - THE SPECIFIC ARGUMENTS CONCERNING THE BIPARTISAN MODEL

The republican referendum question: As noted, on 6 November 1999 two referendum questions are to be put to the Australian people: one on the proposal for a republic, which follows in most respects the preferred model which emerged from the 1998 Constitutional Convention; and one on a new preamble for the Constitution.

The republic question will be whether voters approve '*A proposed law to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor General being replaced by a President appointed by a two-thirds majority of the Members of the Commonwealth Parliament*'.

The general debate: With the approach of the republic referendum and the official launch of the 'yes' and 'no' cases in October 1999, public debate about the Bipartisan Model, in particular its mechanism for removing the President, has intensified. At the same time the there is also debate about the more general symbolic issues concerned in the republican issue. In her analysis of these developments, Michelle Grattan, has described the republican debate as 'highly layered' and 'more restrictive' than an election campaign. She states:

> Layered - in that there's the 'egghead' discussion about the ins and outs of the model, the low-level 'scare' arguments about it, and the general debate about the symbols involved in having the Queen versus an Australian head of state.
>
> Restricted - in that there's limited scope for the campaign to develop. Most of the points that can be made, certainly about the constitutional pros and cons, have been made already. It's now a matter of how they are put.[35]

With these observations in mind, this analysis of the key arguments in the republican debate is in two parts: the first, more 'academic' discussion, looking at the specific arguments arising from the Bipartisan Model; the second concentrating on the symbolic and other general arguments for and against Australia becoming a republic. The specific arguments

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34 The 'justiciability' clause would constitute clause 8 of the new Schedule 2 to the Constitution.

35 M Grattan, 'So much for the experts', *The Sydney Morning Herald* 8 October 1999.

are considered first.

The arguments of the constitutional monarchists: In respect to the republic referendum question, a number of issues can be noted from the perspective of constitutional monarchists. One is that the referendum would vest the executive power of the Commonwealth in the President and, while that power must normally be exercised on the advice of the Federal Executive Council (or the Prime Minister or some other Minister of State), the President would possess the same reserve powers as the Governor General now enjoys. The question, then, is what are these reserve powers and would a President be more inclined than most Governor Generals to exercise independent judgment in a time of political crisis? 1975 notwithstanding, most Governor Generals have adopted a very cautious and conservative view of their role. Would a President, the holder of a differently constituted office, adopt a similar approach? The reserve powers must be exercised 'in accordance with the constitutional conventions relating to the exercise of that power'. But what are these? Didn't 1975 show that there are areas of fundamental disagreement when it comes to the interpretation of these conventions? The issue, then, is how a President appointed by Parliament would exercise and interpret the reserve powers and the conventions associated with them. Deputy Prime Minister, John Anderson has argued in this regard:

> The Governor General derives his authority from those conventions through the Crown. If this link is lost, a President will be tempted to establish new conventions.[36]

Conversely, would a President appointed under the bipartisan model be less inclined to take an independent stance, seeing himself as somehow subservient to the Parliament, thereby failing to fulfill the role of the Head of State as the ultimate guardian of the Constitution in a time of political crisis? The President would be the creature of the Parliament and, more particularly, of the Prime Minister. This is especially so because the President can be very easily dismissed by the Prime Minister, who only needs his decision to be ratified by the House of Representatives. In any event, the failure of the House to approve the removal of the President does not operate to reinstate the President who was removed. In the words of Sir Harry Gibbs, the former Chief Justice of the High Court, the proposed model would 'place the President entirely at the mercy of the Prime Minister, who can effect an immediate dismissal'.[37] The concern is that the President lacks the kind of security of tenure required of a constitutional guardian. It is the Prime Minister's position which is enhanced under the proposed system, while that of the Head of State is diminished. As the official 'no' case puts it:

> It will be easier for the Prime Minister to sack the President than his or her driver. The President would be a Prime Minister's puppet. The President as

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36 'Clash of symbols: republicans dodging the issue, says Anderson', *The Sydney Morning Herald*, 15 September 1999.

37 H Gibbs, 'Some thoughts on the Constitutional Convention' (1998) 21 *UNSW Law Journal* 882 at 883.

> the umpire in our Constitution should be free from being sacked at the whim of a Prime Minister. An umpire needs to be independent.[38]

Basically, constitutional monarchists argue that we simply do not know how the republic model will operate in practice. There is the assumption that the change will be largely symbolic in nature, having little if any practical effect. But how can we be sure, the constitutional monarchists ask? 'If, by some possibility', the proposed model were adopted, Sir Harry Gibbs wrote, 'the result would be a disaster for Australia'. [39]

Opposing versions of republicanism - direct democracy versus minimalism: The debate concerning the republic referendum question is complicated by the fact that not all republicans find themselves in complete agreement with the 'yes' case. Indeed, some republicans some are so dissatisfied with the Bipartisan Model that they have decided to actively support the 'no' case. In a sense there is nothing new in this. Much of the argument for and against a republic has long been in terms of the precise model which is to be voted upon, with the republican camp itself split along various lines, notably between some form of the 'minimalist' model, particularly that advocated by the ARM, and those favouring the direct election of the President. The arguments between these two factions are not so much about the pros and cons of republicanism per se, but more about what the move to a republican form of government means for Australia's parliamentary democracy. The minimalists contend that a directly elected President with a popular mandate would alter that system in a fundamental way, adding a new and potentially destabilising element into the political equation, a possible alternative source of legitimate authority to the elected government of the day. It is argued in this respect that 'Conflict between a president elected by the people and the Prime Minister or parliament would present a threat to the stability of our system of "government responsible to parliament"'. On the other hand, the proposed republican model 'presents no threat to our established system of government. That model leaves the president simply with the functions of the Queen and the governor-general and makes no change to the structure of the constitution'.[40]

On the direct election side, the argument is that any version of the minimalist model favouring appointment of the President either by Parliament or by a Constitutional Council, as in the McGarvie Model, is elitist and contrary to the ideals of a participatory democracy. As the official 'no' case puts it:

> Only politicians will be allowed to pick the President. The Australian people will never get the chance to vote for the President.[41]

Added to this is the criticism that the nominations committee won't give ordinary people a

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38 The case for voting 'no', page 11.

39 H Gibbs, N 37, at 885.

40 Z Cowen, A Mason, and G Brennan, 'Safe, workable and accountable', *The Australian* 7 October 1999.

41 The case for voting 'no', page 13.

say. Half the committee will be politicians and the other half will be appointed by politicians. Further, a Prime Minister can completely ignore the committee's nominations.

In fact, the actual proposal which is to be put to the Australian people does take on board some of these concerns. As stated in the official 'yes' case, the bipartisan model which emerged from the Constitutional Convention gives all Australians the 'opportunity to nominate a fellow Australian for the office of President' . Moreover, the Constitution will stipulate that an Australian President cannot be a member of a political party or an MP. The argument continues:

> Our Australian President will be chosen on merit and, because he or she will need the support of both sides of politics, will be a person who is above party politics and who will unify all Australians.[42]

That, however, has not proved a sufficient enticement to bring all direct election supporters, including former federal Members of Parliament, Phil Cleary and Ted Mack, into the 'yes' camp. The Commonwealth Minister for Employment, Workplace Relations and Small Business, Peter Reith, is also of this persuasion arguing that 'The proposed republic model posits de facto sovereignty in the Prime Minister and leaves the people powerless spectators in the choosing, and un-choosing, of the head of state'.[43]

Ultra-conservative republican concerns - McGarvie's critique of the republican referendum: Before the Constitutional Convention the favoured 'minimalist' approach to the removal of the President was that advocated by the ARM, namely, that a President should be dismissed by the same means as he or she is appointed - by a two-thirds majority of both Houses of Federal Parliament in joint session. Both in the lead up to the Convention, as well as at the Convention itself, critics of that proposal, notably the former Victorian Governor, Richard McGarvie, pointed out that such a mechanism could well make dismissal of the President too difficult. In particular, McGarvie raised the prospect of an Opposition preventing removal of a President who improperly obstructs a government.[44]

McGarvie's remedy was in the form of his own model of appointment and removal under which the nomenclature of Governor General would remain, there would be no constitutional recognition of the reserve powers and the Head of State would be appointed by a three-member Constitutional Council acting on the advice of the Prime Minister. Under this model a republican Head of State could only be dismissed within two weeks of the Prime Minister advising the Constitutional Council to do so.

In the event, the Constitutional Convention favoured the Bipartisan Model for removal of the President which, it is often said, went from one extreme to the other, making dismissal

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42 The case for voting 'yes', p 12.

43 P Reith, 'Seven fatal flaws', *The Institute of Public Affairs Review*, September 1999, p 3.

44 RE McGarvie, *Democracy: Choosing Australia's Republic*, Melbourne University Press 1999, p 95.

too easy now instead of too difficult.[45] In essence, McGarvie's core criticism of the proposed republican model is that it abandons the existing system's 'crucial component of a short delay in the dismissal of a Governor General, so that a Prime Minister cannot incapacitate the protective mechanism of the reserve authority...'. The argument seems to be that, in a 1975 situation, where it appears the Prime Minister could have dismissed the Governor General but that there would have been a delay in that dismissal coming into effect, then the Governor General, acting as the guardian of the Constitution, could use that delay to exercise the reserve powers. Of the proposed model, McGarvie went on to say:

> The depth of the flaw inherent in this method of dismissal should not be underestimated. That it would render the reserve powers ineffective in a situation where an election becomes absolutely necessary upon a Senate blockage of supply is only the first of the problems it creates. More importantly, it would enfeeble the vital conventions that enable the people or their parliamentary representatives to choose who will and, just as importantly, who will not govern. The conventions that bind a Prime Minister to resign on clearly losing an election or on a vote of no confidence or refusal of supply by the House of Representatives draw their force from having the backing of the Governor General's reserve authority to dismiss a Prime Minister who does not comply with them. An ineffective reserve authority translates into an ineffective sovereign right of the people or their representatives to chose who will be in government.[46]

McGarvie re-iterated these views at the launch of his book where he said that the proposed model would 'impair or paralyse the fail-safe mechanism that enables an exceptional constitutional malfunction to be referred in the last resort to the Parliament or people for resolution'.[47] With these and other considerations in mind,[48] McGarvie's preferred option would seem to be for a second referendum held in 2005 to decide the republic issue, this time on the basis of a more suitable alternative to the present system - the McGarvie alternative.[49]

Moderate republican concerns about the proposal's removal mechanisms: Professor George Winterton has been a significant player in the republican debate throughout the 1990s. As a member of the Republic Advisory Committee, he is associated with the minimalist side of the pro-republican argument. He was also an appointed non-parliamentary delegate to the Constitutional Convention, in which capacity he voted in favour of the compromise Bipartisan Model while expressing a preference for an alternative approach. He

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45 M Steketee, 'Our destiny in transition', *The Weekend Australian*, 9-10 October 1999.

46 RE McGarvie, N 44, pp 195-196.

47 'New twist in republic row', *The Sydney Morning Herald*, 7 October 1999.

48 Another of McGarvie's major concerns is that the change to a republic should include all the States and therefore be Federation-wide in effect.

49 RE McGarvie, N 44, p 263.

later spelt out his position in an article published in the *University of NSW Law Journal* where he took particular issue with the proposed model's removal mechanisms. Indeed, Winterton stated that the Convention's removal provision 'is its most unsatisfactory feature', adding that it 'has been criticised by virtually every commentator'. Winterton described the removal mechanism as a 'constitutional safety valve or insurance policy, unlikely to be used, but colouring perceptions of the office. Its purpose is to enable removal of a President unable or unwilling properly to execute the functions of the office'.[50]

Many of Professor Winterton's criticisms concerning the removal mechanisms are relevant to the model which is to be put to referendum on 6 November. Thus, Professor Winterton noted that the Constitutional Convention's removal mechanism fails to achieve its purpose in the following respects:

- No ground for removal is stipulated, nor need any reason be given for removal. This is a denial of natural justice. The High Court might conceivably imply procedural, and even substantive, limitations and thereby subject presidential removal to judicial review.

- The removal mechanism unnecessarily excludes the Senate, which is difficult to justify on the ground either of principle or pragmatism.

- Prime ministerial removal of the President is incompatible with the status of a head of state.[51]

- This mutual dismissibility of the President and Prime Minister facilitates the playing of "constitutional chicken"; a "'who will shoot first?' scenario", as Sir Anthony Mason aptly expressed it.[52] According to Winterton: 'The Convention squandered a significant opportunity to improve Australian government, beyond merely symbolic features, by according the President greater security of tenure than that enjoyed by the Governor-General. This should encourage a President to warn the Prime Minister of the impending exercise of a reserve power, enabling the latter to take action to alleviate the necessity for its exercise, and thus avoid repetition of Sir John Kerr's error of acting prematurely without giving the Prime Minister adequate warning'.

- What is the justification for not re-instating a President found to have been wrongly removed?[53]

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50 G Winterton, N 10, at 859.

51 Winterton added that, to his knowledge, it has no precedent among republican constitutions.

52 A Mason, 'The Convention model for the republic' (1999) 10 *Public Law Review* 147-149.

53 G Winterton, N 10, at 859-860. His other criticisms of the Constitutional Convention's model are omitted as these do not feature in the referendum proposal. These related to the lack of provision for an acting President, something which is covered under proposed section 63 of the Constitution, and to the way the Convention's model linked the Prime Minister's

In the same issue of the University of NSW Law Journal, Professor Cheryl Saunders went so far as to call the Bipartisan Model's dismissal mechanisms 'unworkable'. Saunders explained that the proposed model would permit the Prime Minster to dismiss the President by notice in writing, and that the President could dismiss the Prime Minister as well, 'when the Senate blocked supply or, perhaps, when the Prime Minister was acting unlawfully'. She continued:

> Arbitrary dismissal of the President by the Prime Minister is inconsistent with the status of a head of state. Powers of reciprocal dismissal are, to say the least, undignified. And the mechanisms run the additional risk that a head of state may be dismissed by a Prime Minister with a majority in the House of Representatives just when he or she is needed most, on the assumptions which our system presently makes. If the real intention was to remove the power of the head of state to dismiss a Prime Minister with the confidence of the Lower House, it would have been far better to say so.[54]

As Winterton noted, the former Chief Justice of the High Court, Sir Anthony Mason, has also commented unfavourably on the proposed removal mechanisms, arguing among other things that the Senate should be included in the process. Sir Anthony concluded:

> The Convention model strengthens the power and status of the House of Representatives as against the Senate and strengthens the Prime Minister as against the President. Whether these developments are desirable is a matter which is open to serious question.[55]

However, neither Winterton, Saunders nor Mason would oppose the move to a republic on the basis of these concerns. In evidence to the Joint Select Committee on the Republic Referendum Winterton said that, while the proposed section 62 essentially mirrors the present situation, it actually 'improves upon the current position because it ensures that the House of Representatives considers the presidential removal'.[56] Likewise, Professor Saunders has written that, while she is critical of the removal provision, she does 'not want to be understood to be alarmist about the Convention model'; and, further, she accepts that the provision is 'broadly similar to the present arrangement and that political considerations

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removal of a President with a possible vote of no-confidence in the Prime Minister, a link which does not feature in the referendum proposal. For an explanation of why this is so see - Joint Select Committee report, pp 68-71.

54 C Saunders, 'How important was the Convention?' (1998) 21 *UNSW Law Journal* 868 at 872.

55 A Mason, 'The Convention model for the republic' (1999) 10 *Public Law Review* 147 at 148.

56 Joint Select Committee report, p 65. Winterton would ideally prefer a removal mechanism similar to that for the removal of High Court judges under section 72 of the Constitution - that is, 'for proved misbehaviour or incapacity' or some other formula (see Joint Select Committee report, p 72).

would make it unlikely the prime minister would use the power improperly'.[57] As for Sir Anthony, he said in October 1998 that 'These are problems which can be considered after a republican system has been adopted. They are essentially matters of fine tuning'.[58]

As Mike Steketee has remarked, the criticisms from within the ranks of such moderate republicans as these, are to a substantial degree 'a reflection of the frustration that the republican model fails to tackle defects in the present Constitution', notably those which arose in the constitutional crisis of 1975; the criticisms, Steketee writes, are often 'balanced by their unhappiness with the present Constitution'. [59]

The republican case for the referendum proposal - the three jurists: Sir Anthony Mason was one of the three signatories, in company with Sir Zelman Cowen and Sir Gerard Brennan, to a letter published on 7 October 1999 in *The Australian* arguing that the referendum proposal is 'Safe, workable and accountable'. The key aspects of their letter can be summarised as follows:

- a directly elected President would present a threat to the stability of our system of government. Sir Zelman added in later radio interview that a directly elected President would really be out of place in a system where the Prime Minister, to take one example, is not directly elected;

- the proposed model is not threat to that system. It leaves the President with the functions of the Queen and the Governor General and makes no change in the structure of the Constitution;

- the nomination process under the proposed model is more 'open' than the existing system under which there is 'no constraint on the Prime Minister choosing the Governor General and conveying his advice in confidence to the Queen';

- under the present system the Queen must terminate the appointment of the Governor General if so advised by the Prime Minister - 'the Queen has no discretion to reject that advice, though she can question the advice and offer cautionary counsel'. Effectively, the Prime Minister has the sole power to dismiss a Governor General 'without being under an obligation to explain his decision to parliament or to secure its support'. Under the proposed republican model, on the other hand, the sole power of dismissal is still in the Prime Minister's hands, only now the decision must be approved by the House of Representatives: 'This new requirement for approval is designed to make the Prime Minister accountable and to ensure that the power of termination will never be exercised irresponsibly';

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57 Reported in M Steketee, 'Dismissal's great divide', *The Weekend Australian,* 9-10 October 1999.

58 A Mason, N 56, at 148..

59 M Steketee, 'Dismissal's great divide', *The Weekend Australian,* 9-10 October 1999.

By this and other means, the three jurists concluded, the proposed republican model 'reinforces the principle of responsible government that is central to our Constitution', making arbitrary action even less likely 'than it is under our existing system.' If it is not a 'perfect solution', the proposed model does provide a 'reasonable' answer to the issues of appointment and termination.[60]

The republican case for the referendum proposal - Turnbull's defence of the Constitutional Convention model: Malcolm Turnbull has been a pivotal participant in the republic debate, in his capacity as the Chairman of the ARM, as Chairman of the Republic Advisory Committee and as an elected delegate to the Constitutional Convention. In responding to the critics of the model proposed by the Convention, Turnbull has argued that:

- the model is 'essentially a republican facsimile of the status quo with four significant innovations';

- the first innovation is that the President is appointed by a bipartisan, parliamentary process instead of the present arrangements where the Governor General is appointed on the decision of the Prime Minister and the Queen is an hereditary Head of State;

- the second innovation is that public consultation will be injected into the process of determining Australia's Head of State;

- the third innovation is that while the reserve powers remain the same, the non-reserve or ordinary powers of the Head of State are 'to be stated to be exercised on advice thereby making the Constitution a more accurate reflection of how the system works';

- the fourth innovation relates to the removal mechanism, with Turnbull stating that 'while the President can be dismissed by the Prime Minister, thereby preserving the current arrangement as between the Prime Minister and the Governor General, the Prime Minister cannot, in a republic, sack the President and appoint a new one in his place'. This is because the casual vacancy which arises must be filled by the senior State Governor in office. A new President would then have to be appointed by a joint sitting of the Commonwealth Parliament, thereby requiring the support of Government and Opposition. The point is that in a constitutional crisis, where an unscrupulous Prime Minister wanted to remove a President who was in fact performing his or her functions properly and responsibly, there would be no practical possibility of the Prime Minister being able to appoint a political stooge in the President's place.

Expanding on this last point, Turnbull went on to say that the Convention model for removal

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60 Z Cowen, A Mason and G Brennan, 'Safe, workable and accountable', *The Australian*, 7 October 1999.

'presents a very considerably improved mechanism'. Along with the above considerations, the mechanism would impose a formal discipline on the Prime Minister in requiring his or her actions to be ratified by the House of Representatives. Turnbull commented: 'A Prime Minister would be most unlikely to consider sacking a President unless he or she was absolutely certain of the support of their party room and wide support in the community'.[61]

Comments on the republican debate - in the shadow of 1975: If the arguments about the proposed removal mechanisms prove anything, it is that the 1975 constitutional crisis casts a long shadow over the republican debate. That the Queen's representative dismissed an Australian Prime Minister who continued to have the support of the lower house of the Commonwealth Parliament, and that the Governor General acted without warning the Prime Minister of his intentions, remains the most audaciously improbable event in Australian constitutional history. Significantly for present purposes, the fact that a Governor General has in the recent past exercised the reserve powers of the Crown in this way colours any debate we are likely to have both on the use of those powers and on the question of the relationship between the Prime Minister and the President, in particular concerning the mutual power of one to dismiss the other. Because of 1975 we know that constitutional crises do happen, with the result that expert speculations based on seemingly unlikely political scenarios are taken seriously in the present republican debate. In short, there can be no doubt that, at this highest level of executive power, our constitutional arrangements must be put to the most stringent 'failsafe tests' we are able to construct.

The other, brighter, side of the legacy of 1975 is the assumption that the mistakes of that time will not be repeated in future and that, keeping in step with the evolutionary nature of our constitutional arrangements, our political leaders will heed the warnings of history. For example, as Richard McGarvie states, the temptation for a President in any future constitutional tussle with the Prime Minister 'to use reserve powers without warning is tempered by reflection on what happened to Sir John Kerr and his reputation'.[62] The situation in 1975 appears to have been that the Prime Minister, on one side, took the view that the reserve powers did not operate in Australia and, as well, simply never contemplated the possibility that he might be summarily dismissed by the Governor General; on the other side, the Governor General seems to have taken an especially robust view of his reserve powers and combined this with a near obsession that the Prime Minister was about to dismiss him. Seen in this light, Kerr's dismissal of the Prime Minister was a pre-emptive strike.[63]

In any event, 1975 is never far from the surface of the republican debate, in particular as this relates to the controversial power to remove the President under the referendum model. It resonates deeply in the comments that the mutual dismissibility of the Prime Minister and the President facilitates the playing of 'constitutional chicken' - Mason's 'who will shoot

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61 M Turnbull, 'Why the Constitutional Convention produced the best republican model' (1998) 21 *UNSW Law Journal* 940-945.

62 RE McGarvie, N 44, p 196.

63 The account is based on P Kelly, *November 1975*, Allen and Unwin 1995.

first' scenario. It also colours the assumption in some republican circles that any alternative model should be a marked improvement on existing arrangements. In 1995 by Paul Kelly commented that, under a republic, 'by guaranteeing a President tenure against the whim of a Prime Minister, a President would be more secure than a Governor General. This removes the fear of insecurity that influenced Kerr so much in Whitlam's dismissal'.[64] The criticism of the referendum model, even from within republican circles, is precisely that it fails, on one reading, to achieve the purpose of establishing what Winterton calls a sound 'constitutional safety valve or insurance policy'.

As noted, the republican rejoinder to this is that the proposed system for nominating and removing a President has more checks and balances than does the present method of appointing and removing a Governor General. The Governor General is appointed on the advice of the Prime Minister and can be removed on the same basis. Any prospect of the monarch refusing to follow that advice just is not plausible at a practical level. One lesson of 1975 is that the Prime Minister could have recommended the dismissal of the Governor General and that this recommendation would certainly have been followed. Dismissal may not have been instantaneous, with the monarch taking the appropriate time to give the matter due consideration in accordance with constitutional niceties.[65] Nonetheless, dismissal would have resulted. The idea that the monarch would refuse to follow the advice tendered to her by a Prime Minister of a sovereign nation is unthinkable. Thus, having regard to considerations of this sort, the proposed republican system, it is argued, would constrain the powers of the Prime Minister in this context by channelling them through clearly defined procedural mechanisms.

Then again a republican might say that the events of 1975 show that the present system will not always work smoothly, according to what are supposed to be the conventions underlying the Constitution. In the end of the day, when various extreme scenarios are canvassed, all constitutional arrangements may have some potential limitations. From the republican side, it can be argued that the kind of faults found by the constitutional monarchists are just instances of scare mongering and that the actual likelihood of the bipartisan model resulting in political instability is as close to nil as it is possible to be.

Key questions about the republican referendum: In summary, the issues surrounding the present debate can be considered in relation to the following questions:

- ***Is the proposed method of removal of the Head of State similar to the present one?*** In a number of important respects the answer is 'no'. As Professor Zines told the Joint Select Committee on the Republic Referendum: 'The present system does not allow the Prime Minister to get rid of the Governor General simply by directing that that should be so in writing, and the Queen has those rights to be consulted, to warn, to encourage, and that takes time. Time could very well be of the essence if

64 Ibid, p 315.

65 Ibid, p 217. Kelly discusses the procedures for the removal of the Governor General, noting Sir Martin Charteris's advice in 1975 that the Queen would require formal advice through a signed letter; a communication by phone would not suffice.

you have a situation of constitutional high noon when you are wondering who is going to shoot first'.[66]

- ***Is the omission of a delay in removing the President significant?*** Opinion varies, with some expert witnesses informing the Joint Select Committee that the omission of a similar delay in the republican model would 'alter the balance of the present system between the Governor General and the Prime Minister'.[67] Other witnesses, however, expressed the view that, given the speed of modern communication, there is little difference between the instant dismissal provided in the referendum model and the present position regarding the dismissal of the Governor General.

- ***Would a delay mechanism be of practical value in a constitutional crisis?*** For some, the answer is 'no'. For example, the former Prime Minister, Malcolm Fraser, told the Joint Select Committee that the possibility of delay 'could result in an interregnum because the Governor General could not legitimately exercise any powers at a time when the Prime Minister had sought his dismissal'.[68] The Committee itself concluded against incorporating a 'cooling-off' period in the removal mechanism, stating that 'as the present system for dismissing a Governor General has never been tested, it is not clear what benefit, if any, such a delay would ultimately have'.[69]

  In a scenario where the President was dismissed for 'good' reasons, in that he or she may have arbitrarily refused to assent to government legislation, to offer one example of constitutional impropriety, there would not appear to be any case for delay. The President, in endeavouring to cling to office, could use such time to then dismiss the Prime Minister, but that surely would only serve to damage still further his or her personal credibility. Richard McGarvie's view is that the prospect of this 'occurring exists in theory not reality'.[70] However, McGarvie is an advocate of a short delay between advice to dismiss and the actual dismissal of a Governor General who is contemplating use of the reserve powers where, for example, the Prime Minister has engaged in persistent illegality. For McGarvie, the Governor General as the guardian of the Constitution should have 'primacy over the Prime Minister in bringing about the other's dismissal'.[71] In other words, from this perspective, delay is seen to be crucial to the rationale behind the reserve powers.

- ***Is the proposed removal model an improvement on existing arrangements?*** For some, 'yes'. The Joint Select Committee noted that the model 'imposes a form of

66 Joint Select Committee report, p 64.

67 Ibid. These included Sir Zelman Cowen and Brian Galligan.

68 Ibid, p 65.

69 Ibid, p 66.

70 RE McGarvie, N 44, p 225.

71 Ibid, p 224.

accountability upon a Prime Minister who dismisses a President to which a Prime Minister who dismisses a Governor General is not presently subject'.[72] This is because the proposes model ensures that the House of Representatives considers the removal of the President. As noted, that is the view of the three jurists, Sir Zelman Cowen, Sir Anthony Mason and Sir Gerard Brennan.

Responding to this, a counter-group of constitutional heavyweights, featuring Bill Hayden, Sir Harry Gibbs, Bob Ellicott and Richard McGarvie, said that the views of the three jurists was 'at best a declaration of high hopes which ignores the reality of politics, a field in which none of the signatories has any real understanding, let alone experience'. On behalf of the counter-group, Mr Hayden said the dismissal procedure would 'entrench the House of Representatives in its role as a cipher for the government of the day'. He added, 'A government in the hands of a leader with an uncommon touch of megalomania could convert the dismissal procedure into an instrument with which to bully and cower the president'.[73]

6. GENERAL ARGUMENTS FOR AND AGAINST A REPUBLIC

Moving away from the more detailed arguments about the specific republican model which is to be voted upon on 6 November, the more general debate about whether Australia should or should not become a republic can be summarised as follows:

(i) General arguments for a republic[74]

- Why should Australia's Head of State be the King or Queen of England?

- Shouldn't every Australian be able to aspire to hold any Australian public office? From a standpoint of republican principle, a monarchical form of government, however constitutional it may be, is essentially undemocratic and therefore inappropriate to a modern system of government based on the idea of the sovereignty of the people. The heredity principle necessarily contradicts the values inherent to democracy.

- Does it still make sense for our parliamentarians and judges to swear allegiance, not to Australia, but to the Queen?

- The present Queen is respected and admired by Australians. However, she is not an Australian and does not live here. She is seen around the world as the Queen of England. She cannot represent the unity and aspirations of the Australian people.

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72 Joint Select Committee report, p 66.

73 M Grattan, 'Republican jurists derided for lack of political savvy', *The Sydney Morning Herald*, 8 October 1999.

74 This is an expanded version of the account found in K Healey (ed), *A Republic - Yes or No?* (Volume 92, Issues in Society), The Spinney Press 1998.

- Our present legal system, based on British common law, and our federal parliamentary system of government would remain unchanged if Australia became a republic.

- Our flag and national anthem would also remain unchanged, as would the number of public holidays.

- An Australian Head of State need involve no extra expense. The present budget and accommodation for the Governor General are more than sufficient.

- Australia should enter the new millennium with one of its own citizens as Head of State.

- The monarchy plays a powerful symbolic role in Australian life which carries negative connotations in terms of our sense of independent nationhood. What it suggests to the world is the lingering subservience to the political culture of Britain.[75] We should stand on our own two feet.
- The monarchy is the weak link in Australia's political system, one which has lost the appeal it once had and may, in future, work to undermine the stability of the system is supposed to uphold.[76]

- As a republic Australia can remain part of the Commonwealth, 28 members of which are already republics. This underlines the point that the argument for republicanism is not in any way anti-British.

- The monarchy simply becomes less relevant the more Australia develops into a diverse, multicultural society. Many post-1945 migrants have little or no connection with Britain's monarchical tradition. The weakening of the once powerful ties with Britain is also felt amongst younger Australians, thus making our constitutional monarchy a cultural anachronism.

- The gradual loosening of personal and formal ties with Britain is a two-way affair. Britain's joining of the Common Market in 1973 makes republicanism part of the natural evolution of nationhood. There is a sense therefore in which republicanism is historically inevitable.[77]

- The Australian Constitution should present an accurate and accessible description of the way the country is governed. This is not achieved at present, say republicans, largely because of the operation of the Crown within the framework of the unwritten

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75 D Horne, 'Letter to the Editor', 1991 *Eureka Street* 1(7) at 7.

76 'Keep the crown and lose democracy, says Costello', *The Australian*, 17 September 1999.

77 N. Greiner, 'The Republic', Speech delivered at the Sydney Institute, 19 October 1993 at 5'.

constitution.[78]

(ii) General arguments against a republic

- Our system of government, with the Queen as Head of State and the Governor General as her representative in Australia has worked well, so why change it? 'Don't fix what isn't broken'.

- The present system may look rather curious on paper, especially to those unacquainted with the Westminster model of government, but in practice it has stood the test of time. Australia is one of the oldest continuous democracies in the world. Only Britain, the USA, Canada, Switzerland and Sweden can look back on longer period of democratic rule.[79] In fact, four of the six oldest continuous democratic nations are constitutional monarchies (Britain, Canada, Sweden and Australia). It is argued on this basis that the system of government derived from Britain is a success, delivering the benefits of a stable, parliamentary, responsible democracy. The argument states that we should avoid rejecting something that is old simply because it is old and seems to be unfashionable.

- Becoming a republic will require many changes to our Constitution. It would mean a new theory and system of government. Why do it? This is the argument of complexity which holds that even the minimalist approach to republicanism takes us into a constitutional minefield. The Crown is integral to the present system as are the conventions underlying the written Constitution. The minimalist strategy seeks to retain the best elements of the present system, while in fact having the potential to unravel it.[80]

- Indeed, the move to republicanism may be fraught with danger. Simply substituting President for Governor-General in the existing Constitution would create an executive presidency and the potential, without major additional changes, for a Presidential dictatorship.

- What of the exercise and possible codification of the reserve powers? If these were codified, would it not either entrench the existing reserve powers, thereby making them more likely to be used, or would it not reduce them, thereby enhancing the

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78 The Queen and the Governor-General act in accordance with constitutional conventions which are not recorded either in the text of the written Constitution or any other legislative instrument. The result is that core elements of the machinery of responsible government - notably the office of Prime Minster and the Cabinet - are not found in the Australian Constitution.

79 Cited in D. Smith, 'Australian Constitutional Monarchy', Occasional Paper No 1 - Australians for Constitutional Monarchy, October 1992 at 3.

80 G. Craven, 'The constitutional minefield of Australian republicanism', *Policy*, Spring 1992 at 33.

power of the Prime Minister and executive government beyond historical and conventional restraint?

- Adherence to constitutional monarchy does not compromises Australia's independence, still less that it is indicative of some other kind of lingering subservience. For Justice Michael Kirby, in every legal and practical respect Australia is already a completely independent country, in legislative, executive, judicial and administrative terms. He argues that Australia is in fact a '*crowned* republic' which leads him to the conclusion that 'republicans in Australia are not dealing with practical realities of constitutional independence. Their concern is only with a symbolic link in the person of the Queen. It is symbols not realities, that they want to eradicate...'.[81]

- Constitutional change should unite, not divide us. The debate is sure to be divisive, along generational and other lines, and should only be undertaken at the level of a proposal to alter the Constitution if it promises to deliver real and substantial benefits.[82]

- A republic will not address any of the major social problems facing Australia today and into the foreseeable future, such as unemployment, the environment, or our national debt. Former Chief Justice, Sir Harry Gibbs, has stated that, 'Australia faces grave problems of an economic, industrial and social kind. The debate about the republic is diverting the energies of Australians from matters which require more immediate attention'.

- On the other hand, adopting a republican model of government will, in time, change the Australian flag and other symbols, as well as established features of our cultural landscape which help to unite us as a nation (for example, the RAAF).

- The Queen, as Head of the Commonwealth, unites around 1.6 billion people in 53 countries. A republic will put those ties at risk and jeopardise the political stability we now enjoy.

- In the Governor General we already have an Australian Head of State, so why risk change?

- What about the States? Could we find ourselves in the anomalous situation where, at the Federal level, Australia is a republic, but a monarchical system remains in place in some or all of the States? What would a position of this sort tell the world about Australia's constitutional identity and maturity as a nation?

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81 M Kirby, 'A defence of the constitutional monarchy', *Quadrant*, September 1993.

82 Sir H. Gibbs, 'Changes would bring country no material benefit', *The Australian*, 9 October 1993.

7. THE PREAMBLE REFERENDUM

The preamble question: On 12 August 1999 two proposed laws, both of which are to be put to referendum, were passed: the Republic Bill and the Constitution Alteration (Preamble) 1999 (henceforth, the Preamble Bill). This second referendum Bill had only been introduced on 11 August 1999, although an exposure draft had been released for public comment on 23 March 1999. In effect, this exposure draft was the Prime Minister's preamble proposal, co-authored with the poet, Les Murray. In the interim various other proposed preambles were released including, on 14 April, Jeff Kennett's 'Declaration of the People of Australia' and, on 28 April, a Working Draft Preamble released by Gareth Evans (ALP), Senator Stott Despoja (Australian Democrats) and Senator Bob Brown (Greens). Then, on 19 July, the Australian Democrats had called for wider community consultation on the Prime Minister's draft preamble. With all these political developments afoot, it was not until 11 August that the Government and the Democrats agreed on a revised from of words for the proposed preamble, thereby permitting the Preamble Bill to be introduced into Parliament.

On 6 November voters will be asked whether they approve the *'proposed law to alter the Constitution to insert a preamble'*.

The Constitutional Convention: Again, the immediate background to this question was the resolution of the Constitutional Convention that 'the Constitution include a Preamble'.[83] It noted, however, that 'the existing preamble before the Covering Clauses of the Imperial Act which enacted the Australian Constitution (and which is not itself part of our Constitution) would remain intact'. The Convention also noted in its communique that 'Any provisions of the Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed'.

Following this, the communique then set out which elements should be included in a new Preamble, including 'Acknowledgement of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders'. Importantly, the communique also said that the Constitution should make it clear that the Preamble is 'not to be used to interpret the other provisions of the Constitution'. The full text of the communique is set out at Appendix A.

The Prime Minister's preamble: The draft Preamble released for public comment on 25 March 1999 contained a reference to 'mateship' which was the source of considerable comment,[84] as was the sentiment that our political and legal system exists 'to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement'. As well the draft stated: 'Since time

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83 However, the debate pre-dated the Constitutional Convention which could refer to the many draft preambles already in existence - G Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186-194.

84 For example, see - 'PM stands by his mates in preamble', *The Australian* 14 April 1999.

immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures'. This can be contrasted with the ALP's insistence that the preamble should refer to Aboriginal 'custodianship' of the land.[85] The Australian Democrats also said at one stage that reference to Aboriginal 'custodianship' in the preamble was for them 'non-negotiable'.[86]

The proposed preamble: This represents a compromise worked out between the Prime Minister and representatives of the Australian Democrats, including the Party's reconciliation spokesman, Aden Ridgeway. In the event, reference to 'mateship' was dropped, the Democrats backed away from the 'custodianship' formulation and suggested instead reference to the 'kinship' of indigenous Australians to the land. Senator Ridgeway said kinship, although not completely adequate, 'comes closest to capturing the essence of the deeply spiritual, intimate relationship that indigenous peoples share with their country'.[87] Not everyone agreed. One Nation's Pauline Hanson called it a 'disgrace', while the chairman of ATSIC, Gatjil Djerrkura, was reported to be 'profoundly disappointed'.[88] The ALP remained opposed, voting against the preamble in Parliament, but later decided to support the 'yes' vote, presumably in the hope that this would improve the chances of the republic referendum.[89]

The proposed preamble reads as follows:

> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.
>
> We the Australian people commit ourselves to this Constitution.
>
> > proud that our national unity has been forged by Australians from many ancestries;
> >
> > never forgetting the sacrifices of all who defended our country and liberty in time of war;
> >
> > upholding freedom, tolerance, individual dignity and the rule of law;
> >
> > honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;

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85 'Opposition mateship puts PM's preamble in doubt', *The Australian* 29 April 1999.

86 'Ultimatum to PM: alter the preamble', The Australian 20 July 1999. For the ALP's position see - 'Labor vows no negotiation on custodianship', *The Australian* 9 August 1999.

87 'Aborigines and Hanson attack revised preamble', *The Sydney Morning Herald* 12 August 1999.

88 Ibid. See also 'Mateship is lost in preamble squabble', *The Australian* 12 August 1999; 'Black leaders split on changes', *The Australian* 12 August 1999.

89 'A lonely "no" voice prepares to argue against the preamble', *The Sydney Morning Herald* 14 August 1999.

> recognising the nation-building contribution of generations of immigrants;
>
> mindful of our responsibility to protect our unique natural environment;
>
> supportive of achievement as well as equality of opportunity for all;
>
> and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Proposed section 125A: In addition, if successful the preamble referendum will insert a new section 125A, headed 'Effect of preamble', into the Constitution. The proposed section is designed to allay concerns, expressed by some expert commentators, among them Dennis Rose QC, that unless it is clearly stated that the preamble 'was not intended to have any legal significance, it could conceivably become relevant in legal proceedings'.[90] Thus, proposed section 125A provides that the preamble has no legal force and cannot be used to interpret either the Constitution or any federal, State or Territory statute. The proposed section reads as follows:

> The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

The preamble debate: Debate on this second referendum question has been very muted, barely extending beyond the official 'yes' and 'no' cases. The 'yes' case reassures the voters that the proposed preamble would have no legal force and concludes with the argument that:

> A vote in favour of a preamble to our Constitution would enable the Australian people to make a significant statement on the values, beliefs and aspirations which unite us in our commitment to our Constitution. Now is a very appropriate time for such a statement and the opportunity which is presented should not be missed.

The 'no' case states that the preamble proposal is: *premature* and should only be considered after we know if Australia is to become a republic; a *rush job*; a *politician's preamble*, prepared without adequate public consultation; a part of a *political game*, in as much as the ALP voted against the proposal but will not campaign against it; a *deliberate diversion* from the debate about the republic; *defective in content* and likely to divide rather than unite Australians; and it has *legal problems*. On this last point, the 'no' case says that 'Legal experts including the former Chief Justice of he High Court, Sir Harry Gibbs argue that regardless of the addition of a clause barring its use, the Preamble may have considerable legal force'.

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90 Republic Advisory Committee report, p 136. Reference was made to the reliance placed by some High Court judges in *Leeth v Commonwealth* (1992) 174 CLR 455 (Brennan, Deane and Toohey JJ) on certain words in the present preamble, namely, 'the people...have agreed to unite in one indissoluble Federal Commonwealth'. Sir Anthony Mason has also expressed concern in this regard, admittedly on the assumption that the there would be no bar to the courts giving legal effect to words in the new preamble, stating in 1996 'Just what this would achieve, apart from uncertainty, is difficult to say' - quoted in G Winterton, 'A new constitutional preamble' (1997) 8 *Public Law Review* 186 at 188.

Principles for framing a preamble: George Winterton is one of those who sees value in including in the Constitution 'a commitment to fundamental beliefs and principles which enjoy virtually universal community support'. Winterton's principles for framing a preamble include:

- the existing preamble should be retained as far as possible (under the proposal it is in fact retained in its entirety).

- the preamble must be honest; it should not, for example, assert that certain rights are constitutionally protected if they are not.

- the preamble should be expressed in succinct and pithy prose, avoiding jargon and platitude;

- only the most fundamental, uncontroversial and universally accepted principles and values should be recognised. The principles and values must be enduring and not foreseeably liable to obsolescence. The preamble should not read like a catalogue of political correctness;

- and the preamble should avoid provisions likely to have legal effect.[91]

Without commenting on the success or otherwise of the proposed preamble, these principles for framing a preamble are a good gauge against which, for discussion purposes, the present preamble referendum question can be measured.

91 Ibid at 188-189.

8. CONCLUSIONS

That the republic referendum is the more significant and far-reaching of the two proposed alterations to the Constitution is mirrored in the balance of debate about the referendum questions, with the weight of public discussion firmly on the side of the republic referendum. There the debate has focused largely on the issues of the proposed methods of appointing and removing the President, with removal proving particularly controversial. The challenge in this respect for the republican cause, at least in its minimalist guise, has been to formulate a model with an executive Head of State along the familiar lines of the existing system which somehow retains the present balance of power and status between the Prime Minister and the Governor General, yet in some way addresses the mixed bag of constitutional problems associated with the 1975 crisis.

Under the proposal, the term 'reserve power' would be used for the first time in the Constitution, but the intention is only to preserve the status quo - whatever that may be. The argument that there should be a short delay between Prime Minister dismissing a President and that decision coming into effect boils down to a concern that, in a situation of constitutional high noon, there should be an opportunity for the exercise of the reserve powers by the Head of State acting as the guardian of the Constitution. In the absence of such a delay, it is argued, the reserve powers would be rendered inoperative at precisely the time of crisis when they may be required. On the other side, it is argued on behalf of the republican model that, in a constitutional crisis, where an unscrupulous Prime Minister wanted to remove a President who was in fact performing his or her functions properly and responsibly, there would be no practical possibility of the Prime Minister being able to appoint a political 'stooge' in the President's place.

Whether the intricacies of the 'academic' debate about the republic have much impact on the way most people vote on 6 November is a moot point. Perhaps in many cases it will come down more to a sense that 'it's time to change' or a preference for 'the tried and trusted'. Whatever is decided on 6 November 1999, both in regard to the republic and preamble questions, the results will be of the highest constitutional importance.

APPENDIX A

Constitutional Convention 1998 Communique