

## **A People's Head of State**

Even before Australians voted in the November 6 1999 referendum to republicanise the head of state, two things were already abundantly clear. One was that the monarchy was pretty much a dead issue for most Australians. The other was that the model on offer was not supported by a majority of people. Because death of the monarchy and design of the office were conflated in the proposal, we need to be careful in interpreting the outcome.

### ***Death of the Monarchy***

The negative result was not an endorsement of the monarchic status quo, except by default. Death of the monarchy was evident in the official No case for the referendum. In the 10 reasons for voting No that ran over 8 pages, the Queen was not mentioned once. For the hard-heads who put this together, there was no currency in mentioning, let alone championing, the monarchy. The strategy was to highlight flaws in the proposed model.

The weightiest arguments for the status quo, made by Justice Michael Kirby and others, were more constitutional than monarchical. These were for maintaining a proven constitutional system and ensuring an independent office that could properly exercise the reserve powers required for a the parliamentary responsible government form of executive. If Australia were to republicanise its head of state, conservatives like Dame Leonie Kramer supported popular election of the office. That was to keep the head of state independent of the ruling politicians of the day.

### ***Politicians' President***

The model put to the people in referendum mixed together two separate things: certifying the death of the monarchy and designing the new republican head of state. On offer was what we might appropriately call the 'politicians' president'—a head of state to be selected by the prime minister, endorsed by parliamentarians, and able to be summarily dismissed by the prime minister.

This model divided the republicans. In support were those who gave primacy to formally registering the death of the monarchy, including republican Don Quixotes still tilting at exaggerated images of monarchical rule and British influence. Opposed were republicans like me who did not like the model, and 'republicans—and more', or self styled 'real republicans', who wanted to use the occasion to advance other constitutional and aspirational agendas.

The 1999 referendum proposal was doomed to fail, given the strong support of the Australian people for an elected head of state. Such popular support was clearly expressed in opinion polls taken during the Canberra Constitutional Convention in 1998 when the minimalist model was being framed; otherwise a majority favoured the status quo. A Newspoll at the time found that 66 percent favoured popular election, 17 percent parliamentary election and 15 percent appointment by a council. When asked whether they

were for or against a republic under each of the three models, only popular election won a majority.<sup>i</sup> Moreover, support for an elected head of state was always stronger than support for republicanising the head of state. That is because constitutional monarchists who value the independence of the head of state favour popular election as a means of preserving the independence and dignity of the office.

So why was a proposal that most people did not want put to referendum? The answer is because politicians and leading elites rejected an elected head of state. Currently the prime minister controls effective appointment and, indirectly through advice to the Queen, dismissal of the surrogate head of state, the governor-general. Only the Queen can appoint and dismiss the governor-general, and she is entirely beyond the patronage of the prime minister. The Queen was to be axed, however, and the head of state made the gift of politicians. The prime minister would choose candidate for head of state, not necessarily from a list to which there could be popular input; the opposition party leader was effectively dealt into the appointment procedure in order to ensure the requisite two-thirds parliamentary majority would be achieved; and the prime minister's power of dismissal was enhanced. Altogether, a politicians' head of state.

Another group of advocates for the politicians' president were the would-be appointees who are uncomfortable with popular election. Better to keep it among select elites so that worthy candidates like themselves can be readily appointed. It is revealing how many superannuated grandees have supported the politicians' presidency. The *Australians'* 18-person list of 'Who's who in the presidential race' included 12 retired notables, two current High Court judges and a multi-millionaire (*The Australian*, 16-17 October 1999).

Selling the minimalist proposal was a marketing nightmare. The Australian people were told that they could not have an elected head of state because that might politicise the office and produce a politician. Instead, they were asked to entrust elected politicians with choosing a suitable non-politician. Moreover, the people were told how important it was to make the change. On the other hand, they were offered a model that purported to make minimalist change and very little difference to the way things worked. Most remained unconvinced that the proposed change was what they wanted, or the minimalist model worth supporting.

### ***Lessons of the Past***

The lessons to be learnt from the 1999 republican referendum are reinforced by the century of mainly abortive attempts at constitutional change.<sup>ii</sup> Australia's referendum record is a sobering one: more than 100 referendum proposal bills have been considered in parliament; 44 proposals have been put to the people on 19 occasions; and only 8 proposals from 6 occasions have passed. It is worth reflecting on that record for two reasons. One is to correct mistaken diagnoses that the people are to blame and cannot be trusted with prudential choice in constitutional matters. The other is to avoid the pitfall of pestering the people with referendum proposals that politicians and other elites might favour but the people do not. What the hundred year record shows is that governments typically put propositions to enhance their own powers or that suit elite preferences, which the people invariably reject.

Of the 28 referendum questions put to the people between 1901 and 1973, twenty-four were for increasing commonwealth power and of these only two passed. Those two were

for powers over social services in 1946 (the constitutional basis for much of the postwar welfare state) and to make laws with respect to Aboriginal people in 1967. Both commanded majorities in all states, the former with 54 percent support overall and the latter with an extraordinary 90 percent. The long list of failures includes mainly proposals for expansion of commonwealth power: broadly in 1911, 1926 and 1944; and over more specific matters of finance, monopolies (three times, in 1911, 1913 and 1919), trade and commerce, corporations, industrial matters (twice in 1913 and 1946), railway disputes, trusts, essential services, aviation, marketing (twice in 1936 and 1946), rents, prices (twice in 1948 and 1973), Communists, and incomes. Of the four proposals for changing the machinery of government or restructuring financial arrangements, three passed –concerning senate elections (1906) and financial arrangements and state debts (1919 and 1928). The one that failed was to break the Senate nexus and decrease the relative size of the Senate (1967). After 1974, referendums shifted entirely to machinery of government issues. Of the 16 proposals put to the people since 1974, 13 failed and 3 passed. Those three concerned casual senate vacancies, territorial votes and retirement of judges, all in 1977. A fourth proposal, to have simultaneous elections for the Senate and the House of Representatives, failed in 1977. This proposal had failed previously in 1974 and would fail again in 1984 and 1988. Again, there is a pattern of consistency: proposals to interfere with the separate electoral cycle of the Senate are rejected by the Australian people, and federal governments are rather slow to learn.

The lessons of Australia's referendum record are obvious and should guide, because they will likely determine, the fate of any future republican initiative. The first is that the people must be support the proposal. While this might seem obvious, it was not followed for the 1999 republican proposal that opinion polls consistently showed did not have majority support. A century of Australian referendum experience shows that the people are sceptical of attempts by federal politicians to make changes that concentrate power in Canberra or in the House of Representatives. Given this record, a politicians' president in any shape or form is unlikely to succeed. Nor does persistence in repeating failed proposals work: failed proposals have not been adopted on second, third or even fourth attempts. When will they ever learn!

Besides popular support, a referendum proposal needs considerable consensus among elites. At a minimum that means agreement among republican elites. While there is always a place for radicals and ratbags on the fringes of public debate, serious division in the republican camp is a recipe for disaster. But unity among republicans is probably not enough if there is strong opposition from monarchists to the change. Many who do not see the matter as urgent might see change as premature if there is strong opposition, even if that is a minority position. Monarchism is stronger among aging Australians so should weaken over time. As the 1999 republican debate showed, however, some monarchists are strongly constitutional and are prepared to shift to a preferred republican model if a republican outcome is likely. So the challenge is to come up with a reasonable republican model with constitutional qualities that have broad appeal.

### ***Populist Constitutionalism***

We need a bolder approach to institutional design than minimalist tinkering. The minimalist models on offer are curiously conservative in wanting to retain the current executive arrangements and constitutional formulations, shorn only of their formal monarchic names.

Merely substituting the name 'president' in place of 'queen' and 'governor-general' –the minimalist proposal –enshrines an absolutist model of neutered despotism. Surely this is unacceptable for the executive chapter of a republican constitution. Enshrining executive power in a president who appoints ministers according to pleasure and otherwise does what they please is textual absolutism. In practice, such minimalism endorses the current variant of parliamentary responsible government that has become party responsible government dominated by the prime minister. Hence, minimalist tinkering to replace the queen and governor-general with a president is not properly a republican move at all but an endorsement of executive absolutism in principle and modern prime ministerialism in practice. There must be a better republican alternative.

While modern Australian elites are prone to disparage the constitution and ignore those who drafted it, when it comes to thinking about republicanising the head of state they are strangely captured by their constitutional design and current practice. Minimalism is an uncritical acceptance of the hybrid product of the 1897-98 constitutional convention combined with contingent developments of disciplined party government during a century of practice. But were the colonial leaders of the late 1890s, Barton, Deakin and O'Connor, such constitutional giants that their executive design should so constrain today's republicans as minimalist dwarfs? The founders were innovative constitutionalists in combining parliamentary responsible government from their own British colonial tradition with American style federalism. They were also quite radical constitutionalists in acknowledging the sovereignty of the people over the process of constitution making and the amendment process.

It is worth pointing out that the crucial difference between the 1897-98 Convention and successful adoption of its draft constitution in contrast to the 1891 Convention and its abortive efforts was popular input. The 1897-98 delegates were elected by the people of the Colonies and the draft ratified in popular referendums in the Colonies. Moreover, the 1897-98 draft included a Senate directly elected by the people of the States and a referendum process entailing approval of constitutional changes by a double majority of the people overall and in a majority of States. In contrast, the 1891 draft had the Senate appointed by State governments and amendments approved by State elected conventions. Involving the people directly in constitutional decision making was quite radical for the time; certainly more radical than anything envisaged by comparable countries like the United States or Canada. For Australians, however, it was the legitimating and practical foundation of the constitutional system.

### ***Minimalist Fallacy***

Minimalism is making over formal monarchism as secular despotism by switching the name and leaving everything the same, including the constitutional text. The minimalist mistake is re-branding the archaic formulations of absolutist monarchism in the constitution as republicanism. This absolutist language is wrong both literally and symbolically. Presidential absolutism, if only in the formal language of the constitution, is antithetical to republicanism. Moreover, prime ministerial dominance of the system should be constrained and redressed, not reinforced and extended as the ConCon model would have done.

Republicanising the head of state is not so much getting rid of the Queen –she will graciously go when the Australian people decide –as getting rid of the monarchic

office of head of state from the constitution and devising an acceptable republican substitute. That cannot be done by a simple name change, but requires radical surgery to the constitutional text and substantial change in the practices of constituting the office. The executive section of the constitution needs basic rewriting to expunge absolutist monarchism and avoid presidential despotism. The office of republican head of state needs to be one of status and independence, and in particular free of prime ministerial and political influence.

Because of an exaggerated attachment to the current forms of responsible government, minimalists view an elected presidency with some horror. The system proposed in the 1999 referendum entailed having the president chosen by the prime minister and endorsed by parliament. Giving the prime minister the power of instant dismissal of the president in that model was an extreme manifestation of obsessive attachment to the supposed status quo. In fact, however, it was a distortion because the prime minister cannot sack the monarch under the present system, and can only have the governor-general removed by advising the monarch to withdraw their commission. Quite properly, Richard McGarvie rejects prime ministerial dismissal as an unacceptable innovation on current practice. In particular, it reduces the indirect formality and time lag in having a genuinely independent head of state make the dismissal.

McGarvie's own ultra minimalist model would replace both monarch and governor-general with a select group of superannuated grandees who would formally process the prime minister's decisions on appointment and dismissal.<sup>iii</sup> Such a committee would effectively rubber stamp the prime minister's decision. John Power's ingenious proposal for substituting an Australian president for the queen and keeping the office of governor-general intact preserves the status quo while allowing for an elected president.<sup>iv</sup> But why this obsession with minimalism and concern to preserve parliamentary responsible government in its current prime ministerial form? Why retain monarchic forms without the monarch?

If the monarchy is dead then we should discard it. That means, if we stick with responsible government, finding a new head-of-state arrangement with appropriate constitutional and political bases that ensure the independence and dignity of the office. It should be free of influence and manipulation by politicians and, in particular, the prime minister. It is not that we don't trust our elected politicians; it is rather that this is an office that needs to be independent of them since it stands above parliamentary political contests and has reserve powers of intervention in special circumstances. Mutual deterrence might have ensured an uneasy peace during the Cold War, but setting the prime minister and president in such a relationship so that each can sack the other is a poor constitutional recipe. That is particularly the case given the institutional incompatibility between responsible government and the Senate that would continue.

### ***An Elected Presidency***

An elected president with largely symbolic function and limited reserve powers is not such a radical change. There is indeed a case for bolstering the powers of the president to re-balance the system and restrain prime ministerial dominance. Popular election of the office would no doubt achieve that. The other key point in favour of popular election is that it gives the people who are the source of all political power in the system ownership of this high office. Would popular election produce a pop star or a

political hack? I doubt it. The best politicians who are elected are people of quality. Would it ensure a politically partisan candidate? Not if the people expect and support a person of quality and independent stature for such an office. How would candidates be selected to stand and what would they campaign on? There are any number of ways of selecting appropriate candidates, not least through political parties choosing an appropriate person. And campaigning in the usual political and partisan way would probably be counter productive.

There seems a strange reluctance among elites to take this office out of the gift of politicians and entrust it to the Australian people. Such distrust of popular sense and choice would have been out of place a century ago when colonial Australians were forging their national constitution. The issue of a popularly elected head of state did not arise because Australians at the time were committed to retaining constitutional monarchy and membership of the British Empire. But in all other significant aspects of constitutional design, key institutions were grounded on popular choice. These included the constitution itself, both ratifying and changing it, and the Senate.

I see no good case against directly democratising the office of head of state. Such an office would then satisfy the criteria of republicanism and democracy. Since Australia has a century of experience in popular choice in major constitutional matters, entrusting the people with this office is hardly novel or revolutionary. Rather it would give them a renewed stake in, and enthusiasm for, political and constitutional affairs. Furthermore, the sleeper issue of institutional incompatibility would be safeguarded through having a genuinely independent reserve authority. Republican virtue and institutional balance would be enhanced in additional ways through creating an independent office that constrained prime ministerial dominance of the system.

### ***Defining the Office***

An Australian republican head of state should be an office mainly of status but also have the necessary reserve powers that operation of parliamentary responsible government requires. That means constitutional definition of the office and popular election by the people. To an extent, that was done in the 1999 referendum proposal anyway. While the reserve powers were not spelt out, the presidential office was defined as having the same reserve powers as the current head of state.

Creating an alternative source of power to the prime minister symbolically and in aspects of overseeing the parliamentary system is a good thing, contrary to what the minimalists claim, and the least that a decent republic requires. If an elected republican head of state clips some of the overblown power and prestige of the prime minister, that also is a good thing and would be a republican bonus. The last thing Australians should want for their federal republic is a head of state that has absolutist powers according to the constitutional text yet in practice is the creature of the prime minister and politicians.

### ***Getting on with Regularising the Australian Republic***

The 1890s Corowa Convention was important in re-booting the constitution making process and giving it a popular basis. One was dependent upon the other. Australia's constitution was made by delegates elected by the Australian people, ratified by them, and given a popular amending formula.

The 2001 Corowa Convention was a forum for elites touting ingenious proposals—19 of them are printed in the Report of the Peoples Conference—Corowa 2001. They range in complexity but all have some combination of a series of conventions, national polls or plebiscites, and referendums. They range from Tim Fisher's alternative Green and Gold proposals, the Gold proposal requiring a referendum to change the referendum procedure to allow a vote on alternative models, having that vote, then reverting back to a normal referendum to put the preferred model. Others substitute national polls or plebiscites for discerning the preferred mode. And they all differ in their 19 variations. Corowa 2001 had all the symptoms of amateur constitution making where everyone can have a go.

We can jettison all of this because it is clear what the majority of people want. A majority want a republican head of state and a larger majority want to elect the head of state. All that is needed is for that proposal to be put to the people in referendum. The specific design of the office—limiting its open-ended powers—can be done by a joint parliamentary committee, taking up where the 1999 proposal left off.

So let's work to support that option and have it put to the people of Australia who will likely support it.

### ***Conclusion***

In conclusion, I have been arguing the following:

1. Australia is already a federal republic, retaining only vestiges of monarchy in a formal and archaic head of state. Moreover, the people know this. Hence, the change does very little and should not be hyped up and oversold.
2. We know what the people want: a majority favour republicanising the head of state; and a larger majority prefer direct election of the head of state. Hence, we should put that to referendum, and cut out all of the complications proposed by most of the proposals on offer.
3. Republicanising the head of state entails specifying and limiting its powers; not just switching the name of the current absolutist/monarchist formal office. In this sense, republicanising the head of state is rather more complex and complicated than the minimalism so many champion.

Australia has a century old tradition of popular constitutionalism that was quite radical in its time and continues to be even today. After the 1890s Corowa conference, popular sovereignty was the driving force of the Australian constitution and nationhood. The people elected delegates to the 1897-98 Convention, endorsed its draft constitution before it was sent to Westminster for formal passage, and had continuing control of constitutional change through the referendum procedure of section 128. The 2001 Corowa conference belatedly admitted popular election of the head of state as one option among a number in a complicated process of decision making. Better to short circuit all of this and give the people what they want. After all they have been the masters of constitutional change in Australia for a century, and this is only a small addition.

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<sup>i</sup> Newspan reported in *The Australian*, 10 February 1998.

<sup>ii</sup> Discussed in B. Galligan, 'Amending Constitutions through the Referendum, Device', in M. Mendelsohn and A. Parkin, eds, *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns*, Palgrave, 2001, pp. 109-124, at pp. 116-19.

<sup>iii</sup> R. McGarvie, *Democracy: Choosing Australia's republic*, Melbourne University Press, Melbourne, 1999.

<sup>iv</sup> J. Power, 'Accommodating the McGarvie Model in a Directly elected Presidency', Paper presented to a seminar on 'Republicanising the Australian Head of State: The Way Forward', Political Science Department, University of Melbourne, 11 October 2000.