AN AUSTRALIAN REPUBLIC

BY GEORGE WINTERTON*

[*An Australian republic has been mooted for at least the last 150 years. The author discusses not only the prospects for a republic, but also the practical means of implementing such a change to Australia's political structure. The practical difficulties in amending the Commonwealth Constitution are analysed with special regard to the problems to be encountered in amending the preamble to the United Kingdom Act in which the Constitution is to be found. The article then discusses the position of the States in a republic, and the constitutional power to abolish the monarchy at the State level.*]

In November 1985, Gough Whitlam declared that

> The preservation of an Australian democracy and the development of an Australian identity lead inexorably to an Australian Republic.[1]

Is this so? Is an Australian republic inevitable? What would a republic entail, and is an Australian republic even constitutionally *possible*? These, and related questions, are the subject of this article.

1. *WHAT A REPUBLIC ENTAILS*

There is a vast, and rapidly expanding, literature (mainly American) on the meaning of 'republican' government in the United States and, to a lesser extent, in Renaissance Italy and Classical Greece and Rome. The meanings of 'republic' and 'republican' have certainly changed over the last three centuries[2] but, for present purposes, the definition of a 'republic' given by the *Oxford English Dictionary* should suffice:

> A state in which supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler; a commonwealth.

Judged against this definition, Australia presents something of a paradox. It is, surely, a 'state in which supreme power rests in the people', expressed through the ballot box both at general elections and in Constitution-amendment referenda, yet it also has a hereditary monarch as (formal) head of state. But since the monarch exercises virtually no powers, it is not fanciful to suggest, as one recent commentator has, that 'in the constitutional (as opposed to sentimental) sense Australia is already a republic'.[3] However, since sentiment is not unimportant in matters concerning the symbolic head of the state, it is more appropriate to regard Australia as a 'governor-generalate'[4] or 'governor-generalship',[5] because the Governor-General and his State counterparts are the *de facto* Australian heads of state.

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1 Whitlam, E. G., 'Electoral and Party Reform', *The Whitlam Phenomenon: Fabian Papers* (1986) 77, 90-1.

2 For a brief summary of these changes see Winterton, G., *Monarchy to Republic: Australian Republican Government* (1986) 2-4. For a very interesting detailed survey, see Everdell, W. R., 'The Meaning of "Republic"' (unpublished paper presented at the Seventh International Conference on the Enlightenment, Budapest, 31 July 1987).

3 Detmold, M. J., *The Australian Commonwealth* (1985) 227.

4 Horne, D., *Death of the Lucky Country* (1976) 54.

5 Howard, C., *The Constitution, Power and Politics* (1980) 67, 77, 78.

What constitutional changes would be necessary to convert the Australian monarchy/governor-generalate into a republic? The short answer is that it would be necessary to amend the Commonwealth Constitution to delete references therein to the Queen, but beyond that the degree of constitutional amendment required would depend upon the type of republican government adopted.

If the present Australian system of responsible government were to be retained, very little constitutional amendment beyond that already mentioned would be necessary. It can safely be presumed that Australia would retain a head of state, since, for good practical reasons, virtually every country has one. An Australian republic which maintained the present system of responsible government would obviously need to substitute some new method of appointment to that office for the combination of heredity and appointment by the Queen now employed to determine Australia's formal and *de facto* heads of state. Section 2 of the Commonwealth Constitution would, accordingly, need to be replaced by a provision specifying the head of state's necessary qualifications, mode of selection, term of office, salary, and method of removal. If Australians were willing to retain the title 'Governor-General' for their head of state,[6] that would be the full extent of constitutional amendment *necessary* to convert Australia into a republic at the Commonwealth level. (If some other title, such as 'President' were preferred, a further constitutional amendment would, of course, be required to effect that.)

It would not, of course, be necessary to change the national designation 'Commonwealth of Australia' because, as the *Oxford English Dictionary's* definition of 'republic', quoted above, indicates, the word 'Commonwealth' itself has republican connotations (as some Australian constitutional framers realized). It is, in fact, a loose English translation of *respublica*, the Latin etymon of 'republic', and has been employed by several republics, including republican England, Massachusetts, Pennsylvania, Virginia, and Kentucky.

However, such a symbolically important change as conversion to a republic is likely to be accompanied by a more fundamental examination of Australia's governmental structure, or at least the executive branch thereof, quite possibly leading to a re-examination and consequential re-definition of the head of state's powers and functions, if not wider constitutional reform. But it is important to note that, while such wider constitutional reform may well accompany Australia's transition to republicanism, it is not a *necessary* concomitant thereof.

If, on the other hand, Australia decided upon more radical change to its governmental system, such as abandoning responsible government and adopting a different system, such as an executive presidency modelled on that of the United States, much more extensive constitutional amendment would be required because, in addition to the necessary changes already noted, the Constitution would need to be amended to remove the system of responsible government. Although a superficial reading of the Commonwealth Constitution might suggest

[6] A course favoured by Professor John Warhurst, for example see Warhurst, J., *Political Studies and the Monarchy* (unpublished Presidential Address to Annual APSA Conference, University of Auckland, 25 August 1987) 18. (This paper will be published in *Politics* in May 1988.)

both that responsible government is not entrenched therein, and that the provisions of Chapter II dealing with the Governor-General would allow him to occupy a position akin to that of the President of the United States, that superficial view, like most superficial views, is incorrect because, although not *explicitly* recognized in the Constitution, responsible government is indeed *implied* therein, as the High Court has frequently recognized.[7] As Quick and Garran noted in 1901,

> for better or for worse, the system of Responsible Government as known to the British Constitution has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment of the instrument.[8]

Since misperceptions regarding the effect of conversion to a republic appear to be quite widespread, it is appropriate to note some remarks of the late Professor Daniel O'Connell. Having argued that

> it would be naive in the extreme to suppose that the change [to a republic] could be made without the most fundamental changes occurring in the way the country is governed,[9]

he went on to assert that it was

> [difficult to envisage] any change in the monarchical system of government . . . without an overall dismantling of the system of Australian government, including the Federal system. The Monarchy is the keystone of the system. Remove it and the system must collapse . . . [I]t is now made crystal clear that the fate of the Monarchy and the fate of the Federation are the sides of the same coin.[10]

With all respect, these comments are misconceived because the change to a republic need have no effect whatever upon the federal system. There are many federal republics, including Switzerland, West Germany, Austria, India and, of course, the United States, the archetypal federation, whose federal principle was adopted by the framers of our Constitution. So the argument that abandonment of the monarchy would cause the federal system to collapse is, simply, nonsense. As Justice Dawson of the High Court, certainly no fervent centralist, has noted,

> To my mind, the final, formal end to the role of the monarchy in Australia, if it occurs, need not mean a fundamental change in our constitutional structure . . . If it were thought desirable to substitute the Governor-General, elected or appointed, as the head of State it would, I think, be possible to achieve that in a manner which would involve little disruption to the present constitutional set-up and may even serve to eliminate some of the difficulties which still remain in discerning the role of the Crown in our federation . . . [T]he bare change from a monarchy to a republic could be quite simple.[11]

One question, having 'federal' implications, which would be raised by Australia's conversion to a republic, is whether the Commonwealth and all States must convert simultaneously. Would monarchical States be compatible with a republican Commonwealth? Or, conversely, could an adventurous State abandon the monarchy before the Commonwealth had done so?

Both practice and the weight of opinion suggest negative answers. The constitution of virtually every federal republic imposes a republican form of govern-

7 See Winterton, G., *Parliament, the Executive and the Governor-General* (1983) 4-5, 76, 77-8, 80.

8 Quick, J. and Garran, R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 706-7.

9 O'Connell, D. P., 'Monarchy or Republic?', *Republican Australia?* (Dutton G., ed. 1977) 23, 25.

10 *Ibid.* 23-4, 32.

11 Dawson, D., 'The Constitution — Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353, 353-4.

ment upon its constituent units — States, cantons or *Länder*. The only relatively modern federation to combine both monarchies and republics was the post-1871 German Empire — which Sir Kenneth Wheare did not consider a federation at all[12] — which included three city republics in a federation otherwise comprised of monarchies and headed by an emperor.[13] Moreover, several commentators (not including the present writer[14]) have asserted that the combination of monarchy at one level of federal government and republic at another is 'impossible',[15] or at least 'not feasible'.[16]

However, with all respect, it is difficult to see why this should be so. While admittedly somewhat untidy, even incongruous,[17] there seems to be no insuperable barrier, theoretical or practical, to the combination. The contrary view appears, with respect, to be based upon some unarticulated quasi-mystical conception of the role of a head of state. But if that position is viewed prosaically as simply a public office with certain functions, including symbolic ones (a property not unique to that office), there is no inherent reason why that office must be constituted identically in all governments at both levels of a federal polity. Hence, a republican Commonwealth would be compatible with monarchical States.

2. *THE PROSPECTS FOR A REPUBLIC*

In view of the fact that conversion to a republic (at least at the national level) could be effected only by a constitutional amendment under s. 128 of the Commonwealth Constitution, requiring approval at a referendum by a national majority of electors and a majority in at least four States, the prospects for an Australian republic in the foreseeable future appear dim.[18] Public opinion polls (which show remarkable consistency in the pro-monarchy vote despite the seriously deficient framing of the alternatives posed by several of them) suggest that the pro-monarchy vote is fixed at around 60%, and that the more variable pro-republic vote is about 30%, with the remainder undecided. Moreover, the republican percentage seems not to have altered appreciably over the last decade (it has been suggested that it may even have fallen since the demise of the Whitlam government in November 1975),[19] perhaps even over the last two decades.[20] Yet several commentators in addition to Gough Whitlam, quoted at the outset, including monarchists, suggest that, ultimately, an Australian republic is inevi-

12 Wheare, K. C., *Federal Government* (4th ed. 1963) 29.

13 See Bryce, J., *Studies in History and Jurisprudence* (1901) Vol. I., 470.

14 Winterton, *op. cit.* n. 2, 103-5.

15 See O'Connell, *op. cit.* n. 9, 38; Marquet, L., Book Review (1987) 2 *Legislative Studies*, No. 1, 31, 32. Accord Bjelke-Petersen, J., 'Australian Federalism: A Queensland View', *Australian Federalism: Future Tense* (Patience, A. and Scott, J. eds. 1983) 63, 71.

16 McMillan, J., Evans, G. and Storey, H., *Australia's Constitution: Time for Change?* (1983) 176.

17 Accord Field, P. A., *Union Under the Crown: The Legal Possibilities of an Australian Republic* (unpublished LL.B. (Hons) thesis, Monash University, September 1984) 37: 'anomalous'. See also Russell, P., Book Review (1987) 53 *Canberra Bulletin of Public Administration* 116, 117.

18 Accord Constitutional Commission, Advisory Committee on Executive Government, *Report* (June 1987) 6; Russell, *op. cit.* n. 17, 117.

19 See Goot, M., 'Monarchy or Republic?', *Report, op. cit.* n. 18, Appendix IV, 85, 99.

20 For the polls, see *ibid.* 105-8, esp. Tables A.5 and A.7; Winterton, *op. cit.* n. 2, 13, 15-7.

table.[21] Others, of course, see no justification for such confident prediction.[22]

In assessing the likely direction of future developments, several factors need to be borne in mind. First, the existing public opinion polls are not necessarily a reliable guide to the likely outcome of a Constitution – amendment referendum on an Australian republic[23] because respondents answered the questions posed without the benefit of any campaign to educate the public as to what a republic entails, and usually without any stipulation as to the sort of republic envisaged. It is, for example, probable that most Australians would prefer to retain their system of government, and not adopt an executive presidency model,[24] yet many people equate a republic with the latter system of government. Had they been made aware that their present system of government could be retained under a republic, their vote on the monarchy vs republic question may well have been different. (On the other hand, of course, it may not have been.)

Secondly, the limited evidence we have (one opinion poll, taken in June 1953, less than a month after the coronation) suggests that republican sentiment doubled over the next generation, from 15% to around 30%, and that pro-monarchy sentiment fell commensurably from 77% to about 60%. This is thought to be due largely to the change in the ethnic balance in the community, the proportion of Australians of non-British origin having increased substantially since the early 1950s. Opinion polls do, indeed, reveal that a majority of European-born electors favour a republic: by 67% to 32% in an *Age–Sydney Morning Herald* poll of December 1976, and by 53% to 30% in an *Age* poll of February 1986.[25] The continuing influx of non-British migrants, it is thought, may have a corresponding effect over the next generation. But there certainly are defects in this line of reasoning: it relies too heavily upon a single opinion poll (that of June 1953), and it cannot, of course, be presumed that developments over one generation will necessarily repeat themselves over the next, especially when the political and social environment has changed so substantially. There is, for example, reason to doubt that the children of non-British immigrants follow their parents' opinions.[26] Experience suggests that they might well become 'more Australian than the Australians', which may manifest itself in attachment to the monarchy.

Nevertheless, there are grounds for believing that the opinion polls may be understating republican support. Apart from the possible reduction in that vote through respondents being unsure of what a republic entails, or presuming that an executive presidency is a necessary concomitant of a republic, or that an Australian republic would necessarily leave the Commonwealth of Nations, which it

21 See, *e.g.*, Constitutional Commission, Advisory Committee on Executive Government, *Transcript of Proceedings* (1986) 6, 7, 8, 12 (Sir Roden Cutler), 151 (Geoffrey Dutton), 534 (Dr Cheryl Saunders); Winterton, *op. cit.* n. 2, 14.

22 See, *e.g.*, Warhurst, *op. cit.* n. 6, 10, 15-7; Markwell, D. J., *The Crown and Australia* (Trevor Reese Memorial Lecture, University of London Australian Studies Centre, 1987) 20-22.

23 See Goot, *op. cit.* n. 19 *passim.*

24 See the December 1978 Gallup Poll noted in Winterton, *op. cit.* n. 2, 101; Goot, *op. cit.* n. 19, 102.

25 See *Republican Australia?* (Dutton, G. ed. 1977) 212; Winterton, *op. cit.* n. 2, 17.

26 *Cf.* Goot, *op. cit.* n. 19, 102.

almost certainly would not (although, surprisingly, the last-mentioned assumption seems not to have reduced the republican vote appreciably),[27] there has been an unfortunate tendency for the opinion polls to coincide with royal visits or other royal events, which no doubt distorts the result in a pro-monarchy direction.

Moreover, several opinion polls have indicated a higher pro-republic vote than the usual 30% already noted. Thus, *Age* polls of December 1976 and April 1980 indicated republican support of 39% and 36% respectively (interestingly, the pro-monarchy vote remained relatively constant at 58% and 61% respectively),[28] and a January 1985 *Sunday Telegraph* (Sydney) poll in New South Wales registered a pro-republic vote of 37%, with the pro-monarchy vote having fallen to 55%.[29] The National Social Science Survey similarly indicated a pro-republic ratio of 43% to 53%.[30] Republican support was even higher among the young: in the January 1985 New South Wales poll, respondents aged 18-34 years favoured a republic by 44% to 43%,[31] and in the national *Age–Sydney Morning Herald* poll of December 1976, the republicans among the 21-24 age group outnumbered the monarchists by a remarkable 54% to 43%.[32] Yet such youthful republicanism seems not to last: the *Age* national poll of February 1986 suggests that a decade later the age-groups which registered a republican majority in 1976 now favoured the monarchy by the wide margin of 58% to 35%.[33] Indeed, even the youth (18-24 year olds) of 1986 apparently favoured the monarchy by 53% to 37%.[34]

Although republicanism has been a live issue in Australian politics for at least 150 years, it has been a 'fringe' movement for most of the last century. But that is gradually changing, with its espousal by respected intellectual leaders such as Donald Horne, Patrick White, Manning Clark and Colin Howard, and by prominent political leaders like Gough Whitlam. Although republicanism slipped into the Australian Labor Party's Platform virtually by 'accident' in 1981, it is significant that it *remains* there, waiting, no doubt, for a more propitious political climate to bring it onto the political agenda. In this respect, the recent speech of former New South Wales Premier Neville Wran, calling for an Australian republic around the year 2001, after the end of the present Queen's reign, was noteworthy.[35]

Increasing public advocacy of republicanism by leading intellectual and political figures should lead to greater public awareness of the issues and, ultimately, to the cause being taken up by a political party, most likely the Australian Labor Party. But that is certainly not imminent at present.

27 See *ibid.* 93, 102.

28 For a discussion of this see Winterton, *op. cit.* n. 2, 14, and Goot, *op. cit.* n. 19, 95.

29 Winterton, *op. cit.* n. 2, 15.

30 Warhurst, *op. cit.* n. 6, 5, citing Bean, C. S., 'Politics and the Public: Mass Attitudes towards the Australian Political System', *Society and Politics in Australia: Analyses from the National Social Science Survey* (Kelley, J. and Bean, C. S. eds 1987). *Cf.* the Saulwick poll published in the *Age*, 9 May 1988, which could be interpreted to suggest a pro-republic ratio of 45% to 53%.

31 Winterton, *op. cit.* n. 2, 15.

32 *Republican Australia?*, *op. cit.* n. 25, 211.

33 Winterton, *op. cit.* n. 2, 16.

34 *Ibid.*

35 See Quinn, S., 'Wran Calls for an Aussie Republic', *Daily Telegraph* (Sydney), 8 October 1987.

So, is an Australian republic ultimately inevitable? Inevitability cannot, of course, be proved — and would not be proved even if the pro-republic vote rose steadily each year. Ultimately, one's assessment depends upon how one perceives the 'logic' of Australian history — and whether one believes it has any inherent 'logic'. The direction of the last 150 years has certainly been towards independent nationhood, and a reduction of formal links with the United Kingdom, highlighted by representative government, followed by responsible government, federation, the Statute of Westminster 1931 and, finally, the Australia Acts 1986. From that perspective, an Australian republic, giving Australians their own indigenous head of state, is, as Patrick White noted, 'the only logical goal'.[36] But, admittedly, nations and peoples do not always fulfil 'logic', and can change direction. As John Warhurst has argued,

> The 'withering away of the monarchy' assertion depends on two assumptions: firstly, that the monarchy will go the way of the other ties between Britain and Australia because *their weakening in turn weakens* the monarchy; and secondly that events will not occur which will *reverse the perceived trends* and strengthen rather than weaken the monarchy. Each of these assumptions may be challenged.
>
> Firstly, the connection with the British monarchy rather than being undercut by fading economic, military and other ties may in fact be strengthened by them. As a symbol of an attachment to Britain, the monarchy in Australia, serves to *balance*, even to *redress*, in the perception of its supporters, growing economic and other links with the United States of America and Japan. This is how I understand the strength of the monarchy in Canada; where it acts to balance Canada's relationship with the United States with an equivalent relationship with Britain . . .
>
> Secondly, events will occur which will strengthen rather than weaken the monarchy. The passage of time itself will see to that . . .[37]

3. *TYPE OF REPUBLICAN GOVERNMENT*

The decision whether or not to become a republic cannot, of course, be taken in a vacuum, without consideration of the type of republican government to be adopted. (As already noted, many opinion polls suffer from this defect.) Indeed, a desire to adopt an executive presidency modelled on the American system is, for some, the principal reason for advocating a republic.[38] Hence, it is necessary to consider the principal forms of republican government. But, since it is obviously impossible to do justice to this subject in the limited space available here, a brief summary must suffice.[39]

Although the possible forms of republican government are virtually infinite, most of the world's democratic republics fall into two broad categories: an executive presidency modelled on that of the United States, or a parliamentary executive modelled, at least originally, on the essential features of British government. There are, of course, some very significant hybrids, such as the governments of France, Sri Lanka (which followed the French model), and Kiribati, and the virtually unique Swiss system, which might be considered a type of

36 White, P., 'A Democratic Australian Republic', *Republican Australia?* (Dutton, G. ed. 1977) 197, 201.

37 Warhurst, *op. cit.* n. 6, 16-7. (Emphasis in original.) For an earlier, more optimistic (from a pro-republic perspective) assessment, see Warhurst, J., 'The Future of Australia's Political Relationship to Britain' (1986) 24 *Journal of Commonwealth and Comparative Politics* 35.

38 *E.g.* Professor Colin Howard: see Howard, *op. cit.* n. 5, 93, 98, 100-1, 138-9.

39 For a fuller discussion, see Winterton, *op. cit.* n. 2, chs 4-7.

executive presidency where the presidency is a committee rather than one person. But for a nation with Australia's historical, constitutional, political and cultural background, the choice will surely reduce itself to two alternatives: whether to retain the present form of Australian government, or adopt an executive presidency modelled on that of the United States.

The American system of government is, of course, based upon a reasonably strict separation of legislative, executive and judicial functions, each vested primarily in a separate branch of government, albeit tempered — and, ironically, thereby enforced — by a series of 'checks and balances'. The terms of both the President and members of Congress are fixed. Apart from the extraordinary remedy of impeachment, neither can interfere with the tenure of the other: the President cannot dissolve Congress, and Congress's lack of confidence in the President is constitutionally (although, of course, not politically) irrelevant. The great strength of the American system, especially when compared with the parliamentary executive, is the legislature's independence from the executive, which enables the legislature to enforce executive accountability in many ways, although not to the extent of dismissing the government by a vote of no-confidence.

On the other hand, the American system has several weaknesses. Ironically, the very feature which gives it its strength — legislative independence from the executive — is also the source of its principal weakness: stalemate and deadlock over legislation, including appropriation. There is, in short, no certainty that the policies on which a President was elected will be implemented in legislation. The other serious defect is that the system places too much power in the hands of one person — the President. (These defects are not contradictory, as is seen when the American system is compared with ours: although our executive branch is much stronger relative to the legislature, or at least the Lower House, than the American executive is, our Prime Minister enjoys nothing like the President's personal power within the executive branch.)

The great defect of the parliamentary executive which is, of course, our present governmental system, as well as that of monarchies and governor-generalates such as the United Kingdom, Canada and New Zealand, and republics such as India, Ireland, Italy, Israel and West Germany, is that the legislature or at least its Lower House (where it is bicameral), is dominated by the executive. The very fact that the government's continued existence depends upon the support of the Lower House has meant that governments believe that they must control that House through rigid party discipline. A vote of no-confidence in the government is possible only if the governing party lacks a majority — as in the United Kingdom in March 1979 and Canada the following December. Hence, although the Opposition can embarrass governments through adverse publicity, sometimes quite effectively, governmental accountability to the Lower House as a corporate entity is ineffective, if not quite the 'sham' often alleged.

So, which system of government should an Australian republic choose?

In view of the disruption which a departure from the present system of government would cause to our constitutional and political fabric, it should not even be contemplated unless the alternative system were considered vastly superior, which the American system assuredly is not. Moreover, one can be certain that

its translation to our alien political, constitutional, and cultural environment would severely distort its operation, so that it would not be the 'American' system that was introduced in any event. Hence, we clearly should retain our present system of government, a conclusion reached also by the Constitutional Commission's Advisory Committee on Executive Government.[40] That does not mean, of course, that it may not be desirable to reform it in certain respects. It would, for example, be necessary to define the powers of the head of state with greater particularity than at present, because an Australian republic could no longer rely upon the applicability of the inherited conventions and traditions of the monarchy.[41]

4. *CONSTITUTIONAL AMENDMENT*

As the writer has discussed elsewhere the issues raised by amendment of the Commonwealth and State constitutions to achieve a republic (albeit prior to the coming into effect of the Australia Acts 1986 (Cth and U.K.) on 3 March 1986),[42] the present discussion may be brief, especially on issues unaffected by that legislation. Because the issues raised by amendment of the Commonwealth and State constitutions differ, separate treatment is necessary.

(a) *Commonwealth Constitution*

Since the Australia Act 1986 (U.K.) s. 1 terminated the British Parliament's power to legislate for Australia, no consideration need be given to possible amendment of Commonwealth and State constitutions by that body.

(i) *Section 128*

The constitutional amendments necessary to abolish the monarchy and establish a republic were noted above. These amendments, and any further amendment thought desirable, such as replacement of responsible government by some other governmental system, could all be accomplished under s. 128 of the Commonwealth Constitution which (impliedly) authorizes unrestricted amendment of the Commonwealth Constitution.[43]

The only conceivable limitation upon this s. 128 power arises from the preamble to the Commonwealth of Australia Constitution Act 1900 (U.K.), which recites that the people 'have agreed to unite in one indissoluble Federal Commonwealth *under the Crown of the United Kingdom*' (emphasis added). But the preamble is no barrier to abolition of the monarchy, for at least two reasons. First, it is not prescriptive, but merely recites an historical fact. As Dr Wynes remarked,

> it is clear that, when all is said and done, the preamble at the most is only a recital of a present (i.e., as in 1900) intention. But in any event the insertion of an express reference to amendment in the Constitution itself must surely operate as a qualification upon the mere recital of the reasons for its creation.[44]

[40] *Report*, *op. cit.* n. 18, 12-3, endorsed by the Constitutional Commission: *First Report of the Constitutional Commission.* (April 1988) Vol. II, 473. Accord Winterton, *op. cit.* n. 2, 96-102; Warhurst, *op. cit.* n. 6, 18.

[41] Winterton, *op. cit.* n. 2, 118-21. *Cf. Report*, *op. cit.* n. 18, 36-44.

[42] Winterton, *op. cit.* n. 2, ch. 8.

[43] *Ibid.* 122-3.

[44] Wynes, W. A., *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 542. For other authorities, see Winterton, *op. cit.* n. 2, 124 (and notes).

Secondly, even if the preamble were considered prescriptive, it is submitted that it could be amended or repealed pursuant to s. 128 of the Constitution. Opinion on this question is, admittedly, divided (there being no authoritative judicial pronouncement), because s. 128 authorizes (impliedly) alteration of '[t]his Constitution' which, *prima facie*, would seem to include only 'The Constitution of the Commonwealth' contained in s. 9 of the Commonwealth of Australia Constitution Act 1900 (U.K.), and not the other provisions of that Act. Hence, several commentators have argued that s. 128 does not extend to the preamble and covering clauses,[45] but the contrary position has also been propounded, based upon various grounds.[46] It is submitted that the latter is the preferable view, essentially because the term 'this Constitution' in s. 128 should be interpreted to include the entire Constitution Act, not merely s. 9 thereof.[47]

(ii) *Section 51(xxxviii)*

However, because several eminent scholars have concluded that s. 128 does *not* extend to the amendment or repeal of the preamble and covering clauses,[48] it is appropriate to consider the possible alternative source of power to amend those provisions: s. 51(xxxviii) of the Constitution.

Section 51(xxxviii) empowers the Commonwealth Parliament to make laws with respect to

> the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom . . .

If s. 128 of the Constitution authorizes alteration of the preamble and covering clauses, as has been argued above, the power to alter those provisions would not be one which in 1901 was exercisable only by the United Kingdom Parliament and, therefore, would fall outside s. 51(xxxviii). Moreover, *placitum* (xxxviii), like all s. 51 powers, is expressly 'subject to this Constitution'. If the term 'this Constitution' in s. 128 extends to the entire Constitution Act, as was argued above, the identical term in s. 51 must, surely, be interpreted likewise. The result, once again, would be that s. 51(xxxviii) would not authorize amendment or repeal of the preamble and covering clauses.

However, on the view of several commentators, already noted, that 'this Constitution' in s. 128 (and, therefore, presumably s. 51 also) includes only 'the Constitution of the Commonwealth' contained in s. 9 of the Constitution Act, and not the entire Act, *prima facie*, s. 51(xxxviii) would appear to authorize amendment or repeal of the preamble and covering clauses. Since all States would be 'directly concerned' therein, all would have to request or consent to such legislation.

45 Including Sir Robert Garran, H. B. Higgins, Professors Harrison Moore, Sawer, Howard and Lane, Dr Wynes, and Gregory Craven: see *ibid.* 183 n. 14; Howard, C., *Australian Federal Constitutional Law* (3rd ed. 1985) 3; Craven, G., *Secession: The Ultimate States Right* (1986) 160-1, 165-7, 168, 170, 174-5, 179, 182, 185; Lane, P. H., *Lane's Commentary on The Australian Constitution* (1986) 1, 256, 643.

46 See Winterton, *op. cit.* n. 2, 124-5; Field, *op. cit.* n. 17, 16-9, 66.

47 Winterton, *op. cit.* n. 2, 125; Field, *op. cit.* n. 17, 18-9. This is essentially the conclusion reached by the constitutional commission: *First Report*, *op. cit.* n. 40, Vol. I, 184-7

48 *Supra* n. 45.

However, in 1901, since the Commonwealth of Australia Constitution Act 1900 (U.K.) was an Imperial Act applying to the Commonwealth by paramount force and Commonwealth legislation enacted under s. 51(xxxviii) was a 'colonial law', pursuant to s. 2 of the Colonial Laws Validity Act 1865 (U.K.) that legislation would have been 'absolutely void and inoperative' to the extent of its repugnancy to the Imperial law. Accordingly, it would not have been possible to amend or repeal the Constitution Act by legislation pursuant to s. 51(xxxviii). (With all respect, the writer is not convinced by contrary arguments, which some scholars have found persuasive, to the effect that s. 2 of the Colonial Laws Validity Act did not apply (in 1901) to s. 51(xxxviii),[49] or that s. 51(xxxviii) was, in effect, a sufficiently specific power to amend the Constitution Act so as to avoid s. 2 of the Colonial Laws Validity Act, even though that provision applied (in 1901) to inconsistency between s. 51(xxxviii) legislation and other Imperial legislation applying in Australia by paramount force.[50])

That position was not altered by the adoption of the Statute of Westminster 1931 (U.K.), which generally freed Commonwealth legislation from the restriction imposed by s. 2 of the Colonial Laws Validity Act,[51] because s. 8 of the Statute of Westminster provided that

> Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia . . . otherwise than in accordance with the law existing before the commencement of this Act.[52]

(It is arguable that, because s. 8 of the Statute of Westminster was not itself entrenched against amendment or repeal by the Commonwealth Parliament (for example, by including itself among the provisions of s. 8), by legislation under s. 51(xxxviii) the Commonwealth Parliament could have repealed s. 8 and then amended or repealed the Constitution Act.[53] However, this argument seems to give insufficient effect to the limiting language of s. 8 of the Statute of Westminster.[54])

However, the position *has* now been altered by s. 15(1) of the Australia Act 1986 (U.K.) which, in effect, includes amendment or repeal of the Statute of Westminster 1931 (U.K.) (including s. 8, of course) and the Australia Act 1986 itself within the Commonwealth's power under s. 51(xxxviii) (the request or consent of *all* State Parliaments being required), although the power conferred by

[49] A position taken by Graycar, R. and McCulloch, K., 'Gilbertson v. South Australia — The Case for s. 51 (xxxviii)?' (1977) 6 *Adelaide Law Review* 136, 150-1; and, rather tentatively, Field, *op. cit.* n. 17, 30-1, 36, 67. For the (better) contrary view, see Booker, K., 'Section 51(xxxviii) of the Constitution' (1981) 4 *University of New South Wales Law Journal* 91, 97; Craven, *op. cit.* n. 45, 181-2.

[50] The position adopted by Craven, *ibid.* 182-3, and apparently accepted by Professor Geoffrey Sawer: Sawer, G., 'The ending of the Imperial dream', *Canberra Times* (Canberra) 13 January 1987. (This is the 'critical juncture' referred to in Winterton, *op. cit.* n. 2, 183 n. 16.)

[51] See the Statute of Westminster 1931 (U.K.) s. 2, adopted by the Statute of Westminster Adoption Act 1942 (Cth) s. 3.

[52] Winterton, G., 'Section 51(xxxviii) of the Constitution and Amendment of the "Covering Clauses"' (1982) 5 *University of New South Wales Law Journal* 327, 328.

[53] *Cf.* Craven, *op. cit.* n. 45, 197-8; Craven, G. J., 'The Kirmani Case — Could the Commonwealth Parliament Amend the Constitution Without a Referendum?' (1986) 11 *Sydney Law Review* 64, 70 ff. (discussing repeal of s. 8 pursuant to the power conferred by s. 2(2) of the Statute of Westminster).

[54] See *Kirmani v. Captain Cook Cruises Pty Ltd* (1985) 159 C. L. R. 351, 415, 418 (Brennan J.), 430 (Deane J.).

s. 15(1) is not, unlike that conferred by s. 51(xxxviii), expressly 'subject to this Constitution'. Accordingly, because s. 8 of the Statute of Westminster no longer prevents it, since 3 March 1986, when the Australia Act 1986 (U.K.) came into effect, the Commonwealth Parliament acting pursuant to s. 51(xxxviii) *can* amend or repeal the preamble and covering clauses of the Constitution. But, as noted above, no provision therein could, in any case, reasonably be interpreted as a barrier to introduction of an Australian republic.[55]

(b) *State Constitutions*

The Queen of Australia is, of course, the formal head of the State governments as well as the Commonwealth government. Accordingly, if and when Australia decides to become a republic, it will be necessary to decide whether or not to remove the monarchy at the State level as well and, if so, what form of government to adopt at that level. Although State governments in federal republics — both those with executive presidencies and those with a parliamentary executive — have generally adopted the same form of government as their national government, there is no reason why this need be so.[56] Since an Australian republic would be likely to retain its present form of government at the national level, the most relevant models for republican government at the State level would be the other federal republics with a parliamentary executive form of government: India, Austria and West Germany. In Austria and West Germany, the form of State (*Land*) government generally parallels the national government (although there are some quite significant differences, especially in Austria), but with one important exception: there is no *Land* equivalent of the national President.[57] Among federal republics with parliamentary executives, only India replicates the national executive at the State level to the extent of appointing a State equivalent of the national President, a 'Governor' appointed by the President.

Bearing in mind the Austrian and West German examples, there is no reason why Australian republican States need appoint separate formal heads of the State government. But a natural inclination to retain governmental institutions with which one is familiar, and which have worked well, makes it likely that, in this respect, the Indian model would be followed.

But, whatever model is followed, it is necessary to consider the question of constitutional power to abolish the monarchy at State level.

Any constitutional entrenchment of the monarchy at State level stems from two possible sources: Imperial legislation and 'manner and form' entrenchment provisions in the State's own Constitution Act. These will be considered separately, but it is appropriate first to note that the Commonwealth Constitution contains no provision recognizing the monarchy at State level. This is not, for example, accomplished by those provisions vesting certain functions (regarding the election of Senators) in the State Governor[58] because, as s. 110 of the Constitution recognizes, these functions are conferred upon the officer who happens at

55 On covering clauses 2 and 3, see Winterton, *op. cit.* n. 2, 124.
56 *Ibid.* 105-7.
57 See *ibid.* 106-7.
58 Commonwealth Constitution ss 7, 12, 15, 21.

the time to be the 'chief executive officer or administrator of the government of the State', whatever his designation.[59]

(i) *Imperial Legislation*

Apart from the Australia Act 1986 (U.K.), the only Imperial legislation which could be regarded as entrenching the monarchy at State level are ss. 30 and 31 of the Australian Constitutions Act 1842 (U.K.) and subsequent Imperial legislation extending them to other colonies, which empower the State Governor to propose legislation and amendments to Bills, and to assent or withhold assent from Bills, or reserve them for the Queen's assent.[60] These provisions could be interpreted as entrenching the position of State Governors as representatives of the Queen. However, they can now be amended or repealed by State Parliaments pursuant to ss. 2(2) and 3 of the Australia Acts 1986 (Cth and U.K.), and New South Wales has already repealed them.[61] Moreover, they could, in any event, be amended or repealed by Commonwealth legislation under s. 51(xxxviii) of the Constitution,[62] or a constitutional amendment under s. 128.[63]

It might be argued that the monarchy is entrenched at State level by s. 7(1) of the Australia Acts 1986 (Cth and U.K.), which provides that 'Her Majesty's representative in each State shall be the Governor'. However, this provision is too unspecific to be regarded as entrenching the monarchy. Surely, all it provides is that, while there is a Queen of Australia, her representative shall be the Governor. But it does not entrench the position of the Queen. The other provisions of s. 7 are expressed even more allusively: when read carefully, they are seen not to ensure that the Queen has any 'powers and functions in respect of the State', not even the power to appoint and dismiss the Governor which is not, itself, conferred by s. 7(3).

However, were s. 7 of the Australia Acts to be regarded as providing, at least impliedly, that the Queen should be formal head of the State government, what effect would it have upon abolition of the monarchy at State level?

A State Parliament could not amend or repeal s. 7: in the case of s. 7 of the Australia Act 1986 (Cth) because of s. 109 of the Commonwealth Constitution and, in regard to s. 7 of the Australia Act 1986 (U.K.), because of the combined effect of s. 2 of the Colonial Laws Validity Act 1865 (U.K.) and s. 5(b) of the Australia Act 1986 (U.K.).

However, the Commonwealth Parliament could clearly amend or repeal s. 7 of the Australia Acts. In the case of the United Kingdom Act, pursuant to the power conferred by s. 15(1) of the Australia Act 1986 (U.K.) which, as already noted, in effect extends s. 51(xxxviii) to the amendment or repeal of the Australia Act 1986 (U.K.). The Commonwealth version of the Australia Act 1986 could be

[59] See Winterton, *op. cit.* n. 2, 140.

[60] See the Australian Constitutions Act 1842 (U.K.) ss 30, 31; the Australian Constitutions Act 1850 (U.K.) s. 12; the New South Wales Constitution Act 1855 (U.K.) s. 3; the Victoria Constitution Act 1855 (U.K.) s. 3; the Western Australia Constitution Act 1890 (U.K.) s. 2, all as amended by the Australia Acts 1986 (Cth and U.K.) ss 9 and 10.

[61] The Constitution (Amendment) Act 1987 (N.S.W.) s. 3.

[62] Winterton, *op. cit.* n. 2, 135–6.

[63] *Ibid.* 135, 140–2.

amended or repealed by the Commonwealth Parliament pursuant to s. 51 (xxxviii), or any other Commonwealth legislative power which applied (such as the power to implement treaties under s. 51(xxix)).[64] (Insofar as s. 15(1) of the Australia Act 1986 (Cth) purports to deprive the Commonwealth Parliament of whatever power it might have to amend or repeal the Australia Act 1986 (Cth) under powers other than s. 51(xxxviii), it is submitted that it is an ineffective attempt to impose an invalid 'manner and form' limitation upon itself.[65])

It is, of course, conceivable that the consent of all State Parliaments, required by s. 15(1) of the Australia Act 1986 (U.K.) for amendment or repeal of that Act, might not be forthcoming, and that, consequently, the Commonwealth might seek to abolish the monarchy at State level through a constitutional amendment under s. 128 of the Commonwealth Constitution. Could it do so?

Section 15 of the Australia Act 1986 (U.K.) appears to allow only two methods of amendment or repeal of that Act:

- By a Commonwealth Act 'passed at the request or with the concurrence of the Parliaments of all the States' (s. 15(1)); and
- By an Act of the Commonwealth Parliament pursuant to any power that may be conferred upon it by a future constitutional amendment under s. 128 (s. 15(3)).

The notable omission, of course, is an amendment under s. 128 itself. Does the Australia Act 1986 (U.K.) prevent its amendment or repeal by a s. 128 amendment? and, if it does, did the British Parliament have power in 1986 to restrict s. 128 which, as noted above, would otherwise authorize a constitutional amendment to remove the monarchy from State governments?

Unfortunately, both questions must be answered affirmatively. In light of the explicit language of s. 15(3) of the Australia Act, it cannot reasonably be suggested that the British Parliament did not (notionally) direct its attention to s. 128 when it enacted that section. Hence, although it is obnoxious from a democratic perspective that the power of the people of Australia to alter their Constitution should have been restricted by the combined efforts of the State, Commonwealth and British Parliaments without the people's consent, and ironic that a s. 128 amendment cannot accomplish directly what it can achieve indirectly by authorizing the Commonwealth Parliament to do, the language of s. 15 appears to compel the conclusion that a s. 128 amendment cannot amend or repeal the Australia Act 1986 (U.K.).[66] Moreover, notwithstanding the contrary views of Sir Maurice Byers, Professor Lumb and the late Justice Murphy, no sound basis exists for holding that the British Parliament's power to amend the Common-

[64] *Cf.* Booker, *op. cit.* n. 49, 102-3 (discussing only repeal); Sawer, G., Opinion on Commonwealth powers in relation to hazardous waste management, House of Representatives Standing Committee on Environment and Conservation, *Hazardous Chemical Wastes. Storage, Transport and Disposal: First Report on the Inquiry into Hazardous Chemicals* (Commonwealth Parliamentary Paper No. 104/1982) Appendix VII, 78, 79 (repeal, but not amendment, possible without State request or consent).

[65] See Winterton, G., 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167, 192. See also *infra* text accompanying n. 68.

[66] *Cf.* Lindell, G., 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 35 n. 22, 40, discussing this question.

wealth Constitution (including s. 128) had terminated prior to the enactment of s. 1 of the Australia Act 1986 (U.K.).[67]

Finally, it hardly needs to be mentioned that s. 15 of the Commonwealth version of the Australia Act 1986 could not, of course, validly restrict the Constitution amendment power under s. 128, because that Act is enacted pursuant to s. 51(xxxviii) of the Constitution which, like all s. 51 powers, is expressly 'subject to this Constitution', which includes s. 128.[68]

(ii) *'Manner and Form' Legislation*

The Constitutions of New South Wales, South Australia and Tasmania do not entrench the monarchy or the position of Governor by a 'manner and form' provision, but those of the other States do. The Victorian Constitution, in effect, requires a Bill altering the position of the Crown or the Governor to be passed by an absolute majority in both Houses of Parliament; the Queensland Constitution requires a Bill altering or abolishing the office of Governor to be approved by the electors at a referendum; and the Western Australian Constitution requires such a Bill to be approved both by an absolute majority in both Houses and by a referendum of electors.[69] Moreover, the relevant constitutional provisions are 'doubly entrenched', in that the entrenching provision is itself protected by a 'manner and form' provision.

These provisions are almost certainly effective to bind State Parliaments, either pursuant to s. 6 of the Australia Acts 1986 (Cth and U.K.), the successor to s. 5 of the Colonial Laws Validity Act 1865 (U.K.), or pursuant to the general legislative power conferred upon State Parliaments to make laws for the State.[70]

However, although the Parliaments of Victoria, Queensland and Western Australia must comply with the specified 'manner and form' requirements if they wish to abolish the monarchy, those constitutional provisions do not prevent the Commonwealth promoting the establishment of State republican government, either through a direct amendment of the State Constitution pursuant to s. 128 of the Commonwealth Constitution, or by Commonwealth legislation under s. 51(xxxviii) (or under s. 15 of the Australia Act 1986 (U.K.) in regard to State 'manner and form' provisions falling within s. 6 of that Act) authorising the State Parliament as usually constituted to repeal (or ignore) the 'manner and form' provision.[71]

Accordingly, an Australian republic is constitutionally attainable, at both Commonwealth and State level.

67 See Winterton, *op. cit.* n. 2, 127-8, and notes, where the views of Sir Maurice Byers, Justice Murphy and Professor Lumb are cited.

68 Accord Lindell, *op. cit.* n. 66, 35 n. 22.

69 The Constitution Act 1975 (Vic.) Part I, ss 15, 18(2)(a) and (b); the Constitution Act 1867 (Qld) ss 2A, 11A(2), 53; the Constitution Act 1889 (W.A.) ss 2, 50(2), 73(2)(a) and (e).

70 See Winterton, *op. cit.* n. 2, 187 n. 57. But see Goldsworthy, J. D., 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403, especially 422, 426, 428-9.

71 Winterton, *op. cit.* n. 2, 140-2.