COMMENT

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The title to Professor Craven's paper[1] poses the question: 'The Republic: Is the 1999 Proposal Beyond Repair?'. The answer that both Professor Craven and I would give to that question is 'No'. However, despite a large measure of agreement between us, we disagree on some things.

AUTHOR'S RESPONSE TO THE VIEWS OF PROFESSOR CRAVEN

I begin by responding to the main views expressed in Professor Craven's paper.

Subject to two points, I agree with the reasons he has cogently expressed to explain the failure of the 1999 referendum proposal. *Firstly,* I place less emphasis on conservatism[2] than on split in the republican vote which Professor Craven regarded as overrated. I believe the defeat can be attributed to a combination of the votes cast by the conservative monarchists and radical direct election supporters, who entered into what I think can be described as an unholy, and what must surely prove to be temporary, alliance with each other. Together they made up 55 per cent of the overall 'No' vote. However, like Professor Craven, I think that one of the remarkable developments in 1999 was the extent to which conservative elements in the community were prepared to support the model on offer. *Secondly,* another factor which Professor Craven's comprehensive analysis did not stress, was the tendency of urban electors to support, and rural electors to oppose, the 1999 proposal. This was, I think, something that was acknowledged by political analysts and others.

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1 Craven, G. 'The Republic: Is the 1999 Proposal Beyond Repair?' (2001) 3 *UNDALR* 59.

2 Craven, G. 'The Republic: Is the 1999 Proposal Beyond Repair?' (2001) 3 *UNDALR*, 59 at 61-62.

Professor Craven has advanced two main criteria for ensuring the success of any referendum proposal to establish an Australian Republic. The criteria, in short, are that any referendum proposal must be sound in principle and also pay sufficient attention to practicality. The latter criterion in particular, is a consistent theme that runs throughout Professor Craven's paper. Its particular emphasis is on what is needed to ensure that a measure attracts the requisite public support.

I confess to some scepticism regarding the competence of constitutional lawyers to assess the political acceptability of proposed amendments to the Australian Constitution. This is, I am sad to say, based on my involvement with constitutional review and its failure to bear much fruit. That said, no one could deny the relevance of practicality. The same scepticism does, however, explain my personal attraction for the holding of plebiscites as is proposed by the Federal Leader of the Opposition.[3] Even so, like many public opinion polls run in the past, plebiscites may run the risk of not predicting the success of referendums since they only reflected what voters thought nine to twelve months out from a referendum. This failed to correspond in many cases with the result of the referendum.

I do not disagree with Professor Craven's five detailed criteria for success aptly summarised in his paper and I generally share his opposition to a direct election model. Although, I question whether his suggestion that the 'deeply conservative'[4] character of the 'wider Australian electorate … in constitutional terms'[5] will necessarily lead to the rejection of a direct election model. My reason for questioning Professor Craven's suggestion is obvious. That is, of course, the opposite result consistently recorded in reputable public opinion polls. Perhaps Professor Craven's reply would be that those views would change and crumble in the face of the usual rigours and scrutiny of a referendum campaign, as has so often happened with previous referendum proposals. My main difficulty with any direct election model is a factor that was not highlighted by Professor Craven.[6] That difficulty is the critical need for such a model to clearly define the exact nature of the presidential powers and codify the existing constitutional conventions that govern the exercise of the powers presently conferred on the Governor-General.

Professor Craven supports the 1999 model with modifications. I saw the mechanism for dismissing the President as the main difficulty with the

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3 Beazley, K. 'How may the People be heard? – Planning for a new Republic Referendum – Process and Content' (2001) 3 *UNDALR* 1 at 6.

4 Craven, G. 'The Republic: Is the 1999 Proposal Beyond Repair?' (2001) 3 *UNDALR* 59 at 70.

5 Craven, G. 'The Republic: Is the 1999 Proposal Beyond Repair?' (2001) 3 *UNDALR* 59 at 70.

6 Craven, G. 'The Republic: Is the 1999 Proposal Beyond Repair?' (2001) 3 *UNDALR* 59 at 66-70.

1999 model. However, in Professor Craven's view the need to modify the procedure for appointment remains the most pressing and urgent task: presumably in an attempt to win over as many supporters of direct election as possible. I think that the experience of the last referendum has proved that this will not work. The supporters of the direct election model were not won over by compromises that fell short of accepting their basic position, no matter how elaborate the appointment process was made. In other words, no amount of modification will avoid the fact that this does not constitute direct election in the sense sought by its main supporters.

My view is that we should recognise, as Professor Winterton[7] and Anne Twomey[8] have shown, that the parliamentary model of appointment is well supported for our system of government by international experience. It is also supported by the essential principles that underlie our parliamentary system. That is, a system of executive government which seeks to relegate the role of a Head of State to a ceremonial office with the ability to intervene as a last resort to resolve constitutional crises.

Having indicated my response to the main views expressed by Professor Craven I can now concentrate on my own views.

AUTHOR'S PREFERRED APPROACH

I should at this point acknowledge that I probably remain an unreconstructed supporter of the model put forward by the former Prime Minister Mr Paul Keating.[9] I have thought for some time that it was a pity that the model put forward by the former Governor of the State of Victoria, Sir Richard McGarvie, had not been devised first. Both are essentially variations of the minimalist models for establishing an Australian Republic. However, if the McGarvie model had been devised first, it might have been easier to see the Keating model as a compromise model that may go as far as is possible without fundamentally altering the essential nature of the present system of government. The Keating model's appeal is necessarily limited to those in the community who favour the retention of that system, consistent with the aim of removing the remaining symbols of our past colonial attachments to the United Kingdom.

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7 Winterton, G. *Monarchy to Republic: Australian Republican Government*. Melbourne: Oxford University Press, 1994, 108-114 especially 113-114. Compare Winterton, G. 'A Directly Elected President: Maximising Benefits and Minimising Risks' (2001) 3 *UNDALR*, 27 at 32 -33.

8 Twomey, A. 'A Federal Process: Options for Presidential Selection involving the People, the States and the Commonwealth' (2001) 3 *UNDALR*, 113 at 115-117, 126.

9 The model was outlined in a speech made by the former Prime Minister in the House of Representatives: Australia. Parliament. House of Representatives. *Parliamentary Debates*, vol 201, 7 June 1995, 1434-1441. The same speech was published as a booklet: Prime Minister Keating, P.J. 'An Australian Republic: The Way Forward' Speech. Canberra: Australian Government Publishing Service, 1995.

This brings me to the compromises that were made at the Constitutional Convention in February 1998. Compromise has been defined as '[a]n agreement between two [persons] to do what both agree is wrong.'[10] It is well known that the Australian Republican Movement delegates were forced to engage in important compromises over their support for the Keating model. This was done in the understandable hope of obtaining the support of delegates at opposite ends of the spectrum, or, in other words, supporters of the McGarvie and direct election models. The result of those compromises was to produce an amalgam, which in the end failed to achieve that aim, both at the Convention and at the referendum. This lies at the heart of what I think went wrong at the Convention: too much compromise that, in the end, did not win over the persons who it was designed to persuade.

I can recall a reputable public opinion poll taken shortly before the referendum was held suggesting that as little as 10 per cent of the electors still supported the retention of the Monarchy with the remainder favouring the establishment of a republic. The difficulty for those who favoured a republic was that they were divided almost equally between those who favoured the direct election of a President and those who favoured a President appointed by the Parliament. It will be recalled that about 55 per cent of the electors voted against the proposal put to the people in November 1999. If the public opinion figures are accepted as an accurate indication of why those electors voted the way they did at the referendum, it might mean that the result might still have been the same even if the electors had been faced with a proposal based on the direct election model. This time, however, the positions of the two opposing republican camps would have been reversed. The supporters of a parliamentary model of appointment would have voted against the proposal unless enough of them would have been prepared to accept any republican model rather than none at all. This is something which direct election supporters were not prepared to do.

If a direct election proposal were to be put to a referendum in the future there might be a further difference. This time the supporters of such a model would be confronted with one significant difficulty they did not encounter with the proposal that was put to referendum in 1999. That difficulty would be the need for those supporters to codify the so-called 'reserve powers' of the Governor-General. I venture to suggest that this task will not be easy despite the assertion by Lindsay Tanner that '[t]here is no fundamental reason why an essentially ceremonial President with

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10 Lord Hugh Cecil, *The Times*, 24 June 1901, quoted in Jay, A. (ed) *The Oxford Dictionary of Political Quotations*. New York: Oxford University Press, 1997, 79.

certain reserve powers could not be directly elected by the people.'[11] The problem of course is to identify what those reserve powers should be.

As I have indicated before, I regard the mechanism for the dismissal of a President to be the main weakness of the 1999 referendum proposal. In short, and as many others have pointed out, the ease with which the Prime Minister could dismiss the President is incompatible with the status that a President should enjoy as a Head of State.[12] It severely compromises the ability of the Head of State to act as a constitutional umpire in the few cases where such a role is required. I believe this was an important issue despite predictions that this would not give rise to problems in practice. The present tenure of the Queen's representatives in Australia should not be seen as providing the model for a Head of State in a republic. That tenure tends to reflect their nominal status as the Queen's agents and not as Heads of State.[13] As Professor Winterton has demonstrated, this contrasts with the position of Heads of State in other countries whose tenure is made a more secure.[14]

In this respect I favour two changes to the Keating model mentioned earlier. The *first* is to provide for specified grounds for removal using the kind of formula adopted for the dismissal of federal judges.[15] This should preferably be accompanied by a judicial commission to advise on whether the conduct of an impeached President is capable of satisfying that formula. The formula should make it explicit that one ground for removal would be for breach of constitutional convention. It may also be necessary to place temporary restrictions on the power of a President to dismiss a Prime Minister until the removal procedure has been completed. *Secondly,* and in relation to the process, I would favour a relaxation of the two-thirds majority of both Houses of Parliament required to make the removal effective.[16] I believe that an absolute majority should suffice for that purpose.

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11 Tanner, L. *Open Australia*. (1999), at 205.

12 For example see: Mason, Sir A. 'The Convention Model for the Republic' (1999) 10 *PLR*, 147 especially at 147-148; Saunders, C. 'The Republican Model' (1999) 10 *PLR*, 64 especially at 64-65; and Winterton, G. 'Presidential Removal Under the Convention Model' (1999) 10 *PLR*, 58 especially at 61.

13 Winterton, G. 'Presidential Removal Under the Convention Model' (1999) 10 *PLR*, 58 at 60.

14 Winterton, G. 'Presidential Removal Under the Convention Model' (1999) 10 *PLR*, 58 especially at 58-59.

15 The importance of having specified grounds for removal was highlighted by the events surrounding the call for the resignation of the current Governor-General, Dr Peter Hollingworth.

16 Australia. Parliament. House of Representatives. *Parliamentary Debates*, vol 201, 7 June 1995, 1440; Prime Minister Keating, P.J. 'An Australian Republic: The Way Forward' Speech. Canberra: Australian Government Publishing Service, 1995, 12.

One other change that I would support in relation to the 1999 referendum proposal is to ensure that any future proposal deal with the establishment of a republic at both the State and national levels of government. This would avoid the unseemly potential of allowing the emergence of a 'patch work quilt' with some jurisdictions in Australia retaining the Queen as their Head of State and others not doing so, even if the Queen were prepared to accept such an incongruous outcome.[17] At the same time, I would also favour making the adoption of the proposal conditional upon it receiving the support of a majority of electors in *all* States.[18]

In my view the States should have arrangements in place for dealing with the consequences of abolishing the Monarchy for Australia and establishing a new Head of State for their level of government so as to replace the Governors as the Queen's representatives. This could probably be done by using s15(1) of the Australia Acts 1986.[19] These arrangements should be in force and ready to operate if and when the main referendum succeeds. There is no reason why the States could not provide for their own referenda to decide on these arrangements.

The unsuccessful referendum proposal of 1999 provided an insight into the vexed question of justiciability in relation to the reserve powers of the Governor-General that would have been conferred on the President.[20] The modification of the proposal, which resulted from concerns expressed by some about this matter, suggests that it may not be possible to make the *nature* and *existence* of such powers non-justiciable, if, as was proposed:

- one of the most important conventions governing the exercise of non-reserve powers is made justiciable (by requiring that as a general rule the President shall act on advice of Ministers); and
- the reserve powers are not identified.

Even if it were provided, as it was, that the exercise of a reserve power in accordance with the relevant conventions is not to be justiciable, this would still give the courts the final say on which powers fall into the category of reserve powers. That is, of course, the very issue which to date

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17 Sir Anthony Mason was critical of such an unseemly outcome: Mason, Sir A. 'The Convention Model for the Republic' (1999) 10 *PLR*, 147 at 149.

18 Even though I do not think this is legally required by the penultimate paragraph of s128 of the *Commonwealth Constitution*.

19 Even though I think s15(3) of the Australia Acts 1986 could also be used for the same purpose.

20 The *Constitution Alteration (Establishment of Republic) Bill 1999* (Cth) s3, sch 1, Item 3: proposed insertion of new s59 in the Commonwealth Constitution; Sch 3: proposed the insertion of new sch 2 in the Commonwealth Constitution, see specifically sch 2, Item 8.

has been left to be resolved by the gradual way in which constitutional conventions evolve and develop over time. This is not to suggest, however, that under the constitutional alteration proposed in 1999 a court would also be able to review the *way* a power was exercised once it was identified as a reserve power. The lesson which may perhaps be learnt from this, is that it may be necessary for any proposed constitutional alteration to spell out which powers will fall into the non-justiciable category instead of merely rendering 'reserve powers' non-justiciable without defining the nature of that general expression.

In conclusion and on a broader note, I agree with Professor Craven in thinking that there is no point in proceeding to another referendum with a new proposal unless it is possible to obtain the necessary consensus mentioned earlier and also ensuring that the same proposal enjoys Prime Ministerial support. This does not augur well for the immediate future given the present political stalemate on the issue of the republic. In my darker moments I sometimes think that only the imminent removal of the Monarchy in the United Kingdom will force the Australian nation to resolve this issue for its own affairs.

In the meantime, and with perhaps one qualification, I am prepared to live with the present situation (as unsatisfactory as it is from a symbolic point of view) if the necessary consensus cannot be obtained to support the kind of republic I have favoured in this comment. I would probably support a direct election model if it were devised with a satisfactory codification of the reserve powers of the Head of State. The difficulty with this qualification is that I regard that possibility as somewhat unlikely as things stand at the moment. That said, I do not regard it as incumbent on persons who do not favour such a model to perform that task, especially given its inherent difficulty.