# *A VINDICATION OF THE POLITICAL SOVEREIGNTY OF THE PEOPLE*

**A Submission**

**To the Australian Senate**
**Legal and Constitutional References Committee**

**Inquiry into**
**An Australian Republic**

**By**

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*For all the power a Government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the People may know their duty, and be safe and secure within the limits of the law, and the Rulers too kept within their due bounds, and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.*

John Locke, Two Treatises of Government.

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## PREFACE: THE POLITICAL SOVEREIGNTY OF THE PEOPLE:

This submission examines the political values embedded within Australia's system of government. It identifies a continuing conflict in values behind the structures of *federalism* and *responsible government*, and submits that this conflict is best overcome, within the context of the current inquiry by the Senate Legal and Constitutional References Committee into an Australian Republic, by the transition to a republican form of government that preserves the office of Governor-General, repatriates the function of the British Monarchy to the institutional body that best represents the consent of the people of the Commonwealth of Australia – the Senate – and establishes the position of Prime Minister as a directly elected office.

The political values at play stretch all the way through our British political heritage, even to Cromwell's desire to entrench the proposition that, under God, all just political power derives from the people and that their representatives exercise political sovereign power on their behalf and for the public good[1]. The events surrounding the vacancy of the British throne by James II, and the establishment of William & Mary as Monarchs in 1688, reinforced the notion that just political power derives from the consent of the governed. While Locke has been used to justify these events, Locke firmly argued that the doctrine of consent stands decidedly against the notion of hereditary succession.[2] Therefore, an integral part of this submission is that the legitimacy of Australia's Head of State must be adjusted to become a constitutional office based upon the notion of consent, not succession.

This submission argues for the adoption of a republican form of government for Australia and suggests that this would reconnect our system of government back with some of the key political values incorporated through the process of Federation, a process which, through its constitutional amendment procedure and its nationally elected parliament, reinforces the vindication of the political sovereignty of the people.

[1] Woolrych, A., *Commonwealth to Protectorate*, Clarendon Press, Oxford, 1982, p. 3.
[2] Locke, J., *Two Treatises of Government* [1698], Cambridge University Press, 1960, Para. 115. p. 363. Quote on title sheet from p. 378.

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## 1. INTRODUCTION

It has been said that the 'hybrid' nature of Australia's system of government is the result of an American-derived set of *federal* arrangements being overlaid over a British-derived tradition of parliamentary government.[3] But the 'hybrid' nature of our institutional arrangements goes much deeper than that. Australia's system of government contains a conflict between two opposing notions of government, each underpinned by a differing set of political values. Wright has identified that both 'institutionalist' and 'revisionist' approaches to analysing the nature of Australia's system of government limit our understanding of the key political values embedded within our constitutional arrangements.[4]

This submission takes up Wright's challenge to analyse the key political ideas behind the Commonwealth of Australia with the objective of discovering, within the context of the recent republican debate, how best to resolve the conflict in key political values underlying Australia's system of government and to provide an answer to the Legal and Constitutional References Committee's inquiry.

Australian democracy has been defined by Lijphart as a system inspired by a majoritarian British Westminster-tradition, that displays both the features of a Westminster 'executive-party' style of government with a federalist structure.[5] Whilst Australian democracy is characterised as being inspired from a British Westminster-style tradition, the act of Federation and the change to proportional representation in the Senate provides ground for Lijphart to argue that Australian democracy is now more 'consensual' (in his terms) than it was before Federation.

[3] J. Summers, 'Parliament and responsible government in Australia', in J. Summers, D. Woodward and A. Parkin (eds.), *Government, Politics Power & Policy in Australia*, 6th edn, Longman, Melbourne, 1997, p. 23.
[4] J. Wright, 'The Nature of the Australian Constitution: The Limitations of the Institutional and Revisionist Approaches', *Federal Law Review*, vol 28, no. 3, 2000, p. 346.
[5] A. Lijphart, 'Australian Democracy: Modifying Majoritarianism?', *Australian Journal of Political Science*, vol. 34, no. 3, 1999, p. 314.

| Dimension II | Dimension I: Majoritarian | Dimension I: Intermediate | Dimension I: Consensual |
|---|---|---|---|
| **Majoritarian** | United Kingdom<br>New Zealand | Ireland | Australia<br>Austria<br>Canada<br>Germany<br>United States |
| **Intermediate** | Iceland<br>Luxembourg | France (5th Republic)<br>Norway<br>Sweden | Italy<br>Japan |
| **Consensual** | Denmark<br>Israel | Belgium<br>Finland<br>France (4th Republic)<br>Netherlands | Switzerland |

**TABLE 1.1 NINE CLUSTERS OF DEMOCRATIC REGIMES**

Lijphart's definition is based upon a two-dimensional framework comprising an 'executives-parties' dimension and a 'federal-unitary' dimension. In 'majoritarian' Westminster-style democracies, executive political power is concentrated in the hands of the majority political party. The institutional characteristics of such a system of democracy are 'one-party majority cabinets', 'executive dominance over the legislature', 'two-party systems', 'majoritarian and disproportional electoral systems', and 'pluralist interest group systems with free-for-all competition among groups'.

In contrast, a 'consensual' style of democracy is characterised by the 'sharing, dispersing and limiting' of executive power and, typically, includes features such as 'executive power-sharing in broad multiparty coalitions', 'executive-legislative balance of power', 'multiparty systems', 'proportional representation (PR)', and a 'coordinated, 'corporatist', interest group system aimed at compromise and cooperation. This provides a basis for with which to characterise a democratic system as being majoritarian, consensual or somewhere in-between. As a result of PR being introduced into the Senate in 1949, with the resulting increasing presence of minor parties and independents represented within the Senate, Lijphart argues that Australia's system of democracy has moved away from a Westminster-style executive-party form of democracy towards a more 'consensual' style as it operates today.

The other dimension that Lijphart uses to define democratic systems is a federal-unitary dimension. This dimension characterises such features as 'bicameralism vs. unicameralism, the degree of difficulty in amending constitutions, the level of judicial review, and the degree of independence of central banks'. Again, a contrast is made between majoritarian and consensual democratic systems. Within this dimension, majoritarian systems tend to concentrate power with such features as a 'unitary and centralised government', a 'concentration of legislative power in a unicameral legislature', 'flexible constitutions that can be amended by simple majorities', 'legislatures that have the final say on the constitutionality of their own legislation' and 'central banks that are dependent upon the executive' government.

Consensual-style democracies, on the other hand, typically exhibit such features as a 'federal and decentralised government', a 'division of legislative power between two equally strong but differently constituted houses', 'rigid constitutions that can only be changed only by extraordinary majorities', 'laws that are subject to the judicial review of their constitutionality by supreme or constitutional courts', and 'strong and independent central banks'. From the characteristics defined by Lijphart within this second dimension, Australian democracy is characterised as 'federalist' due to the adoption of the American structure of 'federalism' within the construction of the Commonwealth Constitution at the time of Federation.

Australian democracy is, therefore, majoritarian by nature of its Westminster tradition but has become increasingly more consensual over time. An example of the impact of this shift is illustrated by John Uhr in detailing the response of the then Prime Minister, Paul Keating, to the contemporary Australian Senate as being a 'spoiling chamber' and the 'unrepresentative swill' of Australian politics.[6] Keating's reaction was based upon a traditional Westminster-style view of majoritarian democracy whereby power was expected to be concentrated and controlled in the hands of the majority party in the Lower House. Yet the electoral changes in the Senate during the late 1940s had earlier changed how democracy in Australia would operate.

[6] J. Uhr, 'Proportional Representation in the Australian Senate: Recovering the Rationale', *Australian Journal of Political Science*, vol. 30, 1995 Special Issue, p. 131.

Lijphart's characterisation of Australian democracy is relevant and useful as it highlights the conflict in values embedded within Australia's system of government. The first aspect of this conflict, or tension, is the way in which the relationship between the Government and the Parliament is arranged - this was Lijphart's first scale. The British Westminster-style tradition does not embrace the doctrine of 'separation of powers' as it has been adopted within the American form of republican government, and concentrates both executive and legislative power in the hands of a majority party. In Britain, these powers are combined, or *fused*, within the Parliament via the agency of the single-party or coalition Cabinet government.

The American view, on the other hand, is one of separating powers between the executive and legislative branches of government, where internal 'checks and balances' maintain the constitutional balance, requiring a consensual approach to government action.[7] With the increasing 'consensual' nature of Australian democracy, there is an increasing tension between the Cabinet, centred in the House of Representatives, and the increasingly multiparty Senate.

The second aspect of this conflict, or tension, is the existence of the structure of federalism - Lijphart's second scale. The source of political values underpinning federalism is found within the American-derived form of republican government, with 'republican' here denoting an arrangement where political authority is limited, divided and shared by representative institutions dependent upon and restrained by the consent of the electorate. These political values are a contrasting notion of democracy compared to a monarchical framework of unfettered authority vested in a hereditary Monarch and exercised through a parliament exercising, more or less, the same unfettered authority. Australia's 'hybrid' system of government encompasses a conflict between these contrasting political values in the way political power is exercised and the way in which the institutions of government have been arranged into what became the Commonwealth of Australia.

[7] M. J. C. Vile, *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, 1967, p. 2. Vile argues that in rejecting monarchy, the only alternative for the American colonies was a system based upon Locke's notion of consent and the doctrine of 'separation of powers'. Yet problems were encountered in implementing the pure doctrine in places such as Pennsylvania. Madison outlined this concern in *Federalist* #47 when arguing that the proposed Constitution would still be structurally valid with a system of *partial* separation even though it did not propose an *absolute* separation of powers.

Maddox provides a description of this conflict through the definition of two differing 'theses of government'.[8] These are described as a 'descendant' thesis of government, on the one hand, and an 'ascendant' thesis of government on the other. That is, Maddox highlights two notions of thought about the exercise of political authority. An 'ascendant' view is one where the legitimacy of government authority is derived from the consent of the people, as characterised by the American form of republican government. A 'descendant' view is where the legitimacy of government is derived from above, for example, from a hereditary Monarch. Maddox describes the British tradition of parliament as originally 'descendant' but with developments over time giving a concession to an 'ascendant' view. Within the arrangement of 'Monarch in Parliament', these two sources of legitimacy meet. That is, a 'mixed' and balanced constitutional set of arrangements exists where the power of the Monarch is checked and restrained within the institution of Parliament.

Alternatively, with all institutions of government dependent upon the people (either directly or indirectly), the United States demonstrates an 'ascendant' thesis throughout but where the people (or majority) are checked and restrained by the internal structure and devices of a republican form of self-government. This new construct of a federation was advanced most articulately through the efforts of James Madison, who argued for this form of republican government in order to persuade the voters of New York to adopt the then proposed Constitution.[9]

Vile provides a picture of the degree to which the doctrine of 'separation of powers' has been incorporated into, or rejected from, the major constitutional theories within Western political thought and the resulting institutional arrangements.[10] Vile reveals the change in nineteenth century Britain where the notion of a mixed and balanced constitution shifted to one of the 'fusion' of the legislative and executive functions of government, balanced by a Cabinet Government. This change, in contrast to the notion of 'separation of powers', was best illustrated through the writings of Walter Bagehot.[11]

[8] G. Maddox, *Australian Democracy in Theory and Practice*, Longman, Melbourne, 1996, p. 192.
[9] B. Wright, 'Editor's Introduction', in A. Hamilton, J. Madison and J. Jay, *The Federalist* [1788], Harvard University Press, Cambridge, 1961, p. 11. Here Wright describes the purpose of the *Federalist*, as written by 'Publius', as 'to convince the reluctant and the sceptical that the proposed Constitution would be a great improvement'. This submission adopts the same approach in its advocacy of a Madisonian republic for Australia.
[10] Vile, p. 2.
[11] W. Bagehot [1867], *The English Constitution*, Collins, London, 1963.

What is at stake today is the consistency of key political values embedded within Australia's system of government.

The inherent inconsistency between two political traditions, or two "packages" of values, creates an environment of uncertainty concerning Australia's constitutional design. This uncertainty goes beyond just the simple inconsistency between two discrete options, but involves the understanding of the operation of our system of government since Federation and its operation into the future. The recent republican debate surrounding the issue of Australia's Head of State is evidence of this.

The 1998 Constitutional Convention provided an opportunity to address some of the issues surrounding Australia's constitutional design, though only focusing of the position of Australia's Head of State, and to present a constitutional amendment for possible assent via a referendum vote according to s.128 of the Commonwealth Constitution. Four different constitutional models were reviewed by the Convention, with one of those four models put forward to the Australian electorate.

The model that was eventually put forward at the 1999 referendum, the Bipartisan Appointment of the President Model, was a republican model drawn from a decidedly British Westminster-style tradition whereby the political power concentrated within the hands of the single-party Cabinet, led by the Prime Minister, was reinforced. The result of the referendum was that it failed to achieve a national majority vote or even a majority in any State. The Australian Constitutional Reference Study 1999, undertaken after the referendum, revealed via its nationwide sample survey that although the referendum failed, there was still a measurable desire for change on the part of the voting public.[12]

Madison faced a similar task of arguing for a constitutional design within the context of the post-war constitutional debate within America in the 1780s. Today, the same opportunity exists, within the context of the Australia's contemporary republican debate. The rejection of the 1999 referendum provides the opportunity to advocate a constitutional design that more fully embraces the key values best articulated by James Madison. This submission represents such an advocacy, as illustrated below in Table 1.2.

[12] D. Charnock 'National Identity, Partisanship and Populist Protest as Factors in the 1999 Australian Republic Referendum', *Australian Journal of Political Science*, vol. 36, no. 2, 2001, p. 271.

The predominant piece of constitutional change that is recommended by this submission is to adjust the Executive branch into one more in line with a Madisonian approach by drawing the Prime Minister and Cabinet out of Parliament, providing for a direct-election mechanism for the office of Prime Minister and by repatriating the function of the British Monarch back to the Australia Senate.

In this way, a consistency is achieved between Lijphart's two-dimensional categorisation of Australian representative democracy such that the predominant feature of Australian democracy is its consensual/federalist approach.

Whilst Winthrop Hackett might have claimed during the Federal Convention of 1891 that 'either responsible government would kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government'[13], the pragmatic combination of the two political traditions was an effort to achieve Federation and at the same time hope that the 'hybrid' balance would remain stable.

[13] Federation Debates, Sydney, *Official Report of the National Australasian Convention Debates*, G.S. Chapman, Acting Government Printer, Sydney, 1891, p. 23.

This submission argues that the original hybrid 'balance' of Australia's system of government, as intended at Federation, is no longer sufficient to ensure the confidence of the people of Australia in our system of government. In order to restore confidence, and reconnect people back, into our political processes, this submission argues for an adoption of a republican form of government that vindicates the political sovereignty of the people.

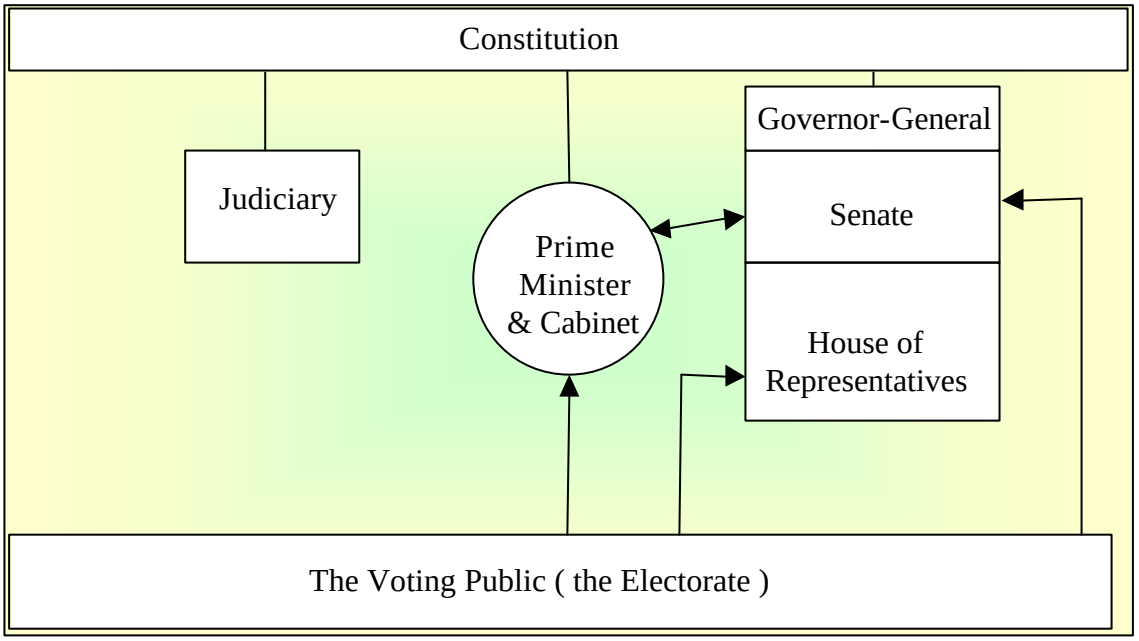


**TABLE 1.2 CONSTITUTIONAL OVERVIEW OF PROPOSED MODEL**

## 2. A MADISONIAN REPUBLIC FOR AUSTRALIA

*I suggest that there are two criteria that we should apply to evaluate the models that have been placed before us. The first is that the model we choose must embody republican principles of government. There is more to a republic than merely removing a monarch. Secondly, it should retain the current system's checks and balances or, if possible, improve upon them.*[14]

*In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence upon the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*[15]

This section presents a model for an Australian republic as a resolution to the question of how best to resolve the inherent conflict in values between the British Westminster system of *responsible government* and the American republican structure of *federalism* as contained within Australia's system of government, within the context of the Legal and Constitutional References Committee's current inquiry into an Australian Republic.

***Question 1:*** *Should Australia consider moving towards having a head of state who is also the head of government?*
***Answer:*** *No.*

The purpose of this section is to present a constitutional design that conforms to the key values of a Madisonian republic and provides a consistent constitutional model for Australia that more fully embraces a consensual style of liberal democracy, from which many elements were adopted at Federation.

***Question 8:*** *If direct election is the preferred method for election of a non-executive president, will this lead to a situation where the president becomes a rival centre of power to the Government? If so, is this acceptable or not? If not, can the office of head of state be designed so that this situation does not occur?*

***Answer:*** *The mechanism of direct election confers political legitimacy and should be directed at the political office of the Prime Minister, thereby preventing rival centres of political power.*

This section proposes the drawing out of the executive Cabinet from the Commonwealth Parliament and the elective basis of the Prime Minister being established via direct-election, as opposed to being, usually, the majority party leader within the House of Representatives. The Commonwealth Parliament, without the

[14] Prof. George Winterton, 1998 Constitutional Convention, Vol. 4, p. 684.

government of the day in its midst, would be free to function as law-maker without the additional complication of Executive Cabinet responsibilities. The High Court would remain as is as it was already established within a conformable framework immediately after Federation and the function of the Monarch would be repatriated to the Senate.

These adjustments would provide a more consistent constitutional design that would resolve the inherent conflict in values underpinning responsible government and those of federalism. This would fulfil the prophetic picture painted before Federation by A.V. Dicey in 1885 when he described the potential of the British tradition of government to become one whereby there was the removal of the Cabinet from the Parliament and that the elective basis of the Prime Minister was by popular vote.

***Question 13:*** *What should the head of state be called, Governor-General, President of the Commonwealth of Australia, or some other title?*

***Answer:*** *We enjoy a rich political heritage from Britain, and there is no reason why our head of state should not be called the Governor-General. Some arguably do so already.*

In November 1999, we saw how the favoured republican model from the 1998 Constitutional Convention, centred on the assumption of the Commonwealth Parliament being the best institution to replace the function of the British Monarchy, failed to achieve sufficient electoral support at the referendum to establish an Australian republic. The result of the referendum was an important event within the contemporary republican debate as it revealed a shift away from the previously accepted values underlying the Westminster system of responsible government in a way that gives us a better picture of the aspiration of a clear majority of Australian voters.

If the predominant values among Australians were most related to those of *responsible government*, along with a consistent aspiration for an Australia republic, then the republican referendum would have been successful. But it was not. The rejected model would have confirmed the Commonwealth Parliament as the 'sovereign' focus of our republican form of government. This would have aligned with Bagehot's observation such that the Parliament would be the *efficient* element within our constitutional arrangements and the office of the intended Head of State would be the *dignified*. The review in chapter 4 describes the political tradition within which this model squarely fits.

[15] J. Madison, *The Federalist*, no. 51, p 356.

The late Richard McGarvie has usefully identified three questions that have to be addressed within the contemporary republican debate.[16] The first was the 'easy' question, which was whether, as a matter of general preference, one favours Australia becoming a republic or remaining a constitutional monarchy. 'Easy' did not mean unimportant or that it was self-evident, just that it was less complicated to get an answer. Though no plebiscite has been conducted as yet, there is sufficient support detected in opinion polls to imply that the answer would most likely be in the affirmative.[17] The second question that McGarvie proposed was 'technical', asking what method should be chosen to affirm the choice of a republican form of government. That is, the way a model was to be introduced in order for it to be constitutionally valid. The conduct of the second Corowa Conference looked at this specific issue of implementation processes as part of the Centenary of Federation series of events and a proposal is included in the concluding chapter of this submission.[18] The last of McGarvie's questions was characterised as the 'hard' question, which was focused on which of the constitutional models for a republic would be best, given Australia's present system of government.

This submission argues that the result of the 1999 referendum has presented a timely opportunity to propose a republican model that both addresses the question of how best to resolve the conflict in values between the two underlying notions of government inherent within Australia's design, and also provides a sufficient answer for McGarvie's 'hard' question of which republican model would best fit Australia's existing conception of democracy. This is a timely and relevant task for Australia today, for until the conflict in political values is recognised and resolved, our system of government will continue to suffer the difficulties highlighted in chapter 4. At the same time, much time and energy will be wasted in a shallow debate that only increases the level of cynicism held by many members of the voting public. The release, in June 2001, of the draft discussion paper by the Australian Republican Movement Constitutional Committee has continued the trend of avoiding the substantial question of how best to resolve this conflict in values and, instead, marginalising the debate to one of largely focuses on the Head of State.[19]

[16] R. McGarvie, *Democracy: choosing Australia's republic*, Melbourne University Press, Melbourne, 1999, p. 2.
[17] McAllister (2001), p. 249. Figure 1 summarises the opinion poll results from 1953 to 1997, showing that from approximately 1992 onwards those favouring a republic outnumbered those favouring a monarchy. The subsequent analysis of the 1999 referendum adds weight to the argument that a majority of voters support an Australian republic.
[18] The Corowa Peoples Conference 2001 papers and draft proposal can be found at [http://www.corowaconference.com.au/The Peoples Conference/Conference 2001/Draft Proposal.htm] as at 3 January, 2002.
[19] M. Turnbull, "*Five Republican Models*", Draft Discussion Paper prepared for the A.R.M. Constitutional Committee, June 2001.

This chapter proposes that the tension between our two competing political value systems should be replaced by the consistency of internal checks and balances that characterise a Madisonian model of republican government. As Wright observed, Madison's views were not simply anti-monarchical and not particularly anti-British as such, but a 'toughminded, cautious optimism' that political power could be so balanced and checked as to protect against the self-interest and ambition of any group of elected representatives, within a republican form of government.[20]

## 2.1 The Governor-General

> *Divorcing head of state from head of government enhances the former by distancing it from politics.*[21]

It is inherent within this submission that the office of Governor-General would be preserved under this republican model, as a non-political executive Head of State. Under such an arrangement, the sources from which the ordinary powers of the office of Governor-General are derived would become a combination of Prime Ministerial nomination with appointment made with the concurrence of the representative institution more strongly reflecting the federal character of the Commonwealth of Australia, the Senate.

Here my argument is that the Senate is the more appropriate representative institution, as reflecting the nature of Australia's federal structure, to transfer the function of Monarchy to, as opposed to the whole Parliament as one joint institution, given the Senate's electoral basis of both popular and State representation.

***Question 2:*** *what powers should be conferred on the head of state?*

***Answer:*** *Same as the current Governor-General except that the 'reserve powers' are codified and reduced.*

In conforming to a Madisonian model of republican government, the main adjustment needed in relation to the office of Governor-General is to refocus the source from which the powers of the office are derived away from a hereditary Monarchy. This requirement is to ensure that the

[20] B. F. Wright, *The Federalist*, p. 62.
[21] McGarvie, p. 233.

Governor-General, as a non-political Head of State, is made dependent upon elected representatives (in the Senate) who are also dependent upon the consent of the people (as the Commonwealth electorate).

As a result, the Governor-General would become indirectly dependent, in a republican sense, upon the consent of the people of Australia. This would the render the traditional British view that all executive authority must flow from the Crown to become obsolete, as all executive authority would flow from the people of the Commonwealth, as defined within the embodiment of Australia's political compact – the Commonwealth Constitution.

***Question 3:*** *What powers (if any) should be codified beyond those currently specified in the Constitution?*

***Answer:*** *There should be no powers left as personal prerogatives. All powers should flow from the Constitution.*

The method of nomination for the office of Governor-General would be preserved under this model as it is at present, solely in the hands of the Prime Minister. The continuation of this nomination process would, as in practice today, ensure that an appropriate person is put forward for the office of Governor-General without the pressures introduced by partisan politics. The difference with this proposal compared to current practice is that the office of the Prime Minister would become one that is directly elected (to be unfolded later in this chapter), rather than being the parliamentary leader of the majority party or coalition of parties in the House of Representatives. In this way, the power of nomination will be exercised by an elected officer of the Commonwealth supported by the direct mandate of a majority of the Commonwealth electorate.

***Question 9:*** *Who should be eligible to put forward nominations for an appointed head of state? For an elected head of state?*

***Answer:*** *The Prime Minister should continue to have the sole power of nomination of an appointed head of state. The head of state should be ratified by the Senate.*

The power of nomination by the Prime Minister alone was supported by the South Australian Constitutional Advisory Council's 1996 report.[22] It presented three main reasons for supporting this mechanism. First of all, nomination from a single office would allow the process to rise above party political pressure. Second, it would support a wider range of candidates than otherwise would be prepared to be considered if the office was simply elected. Third, the constitutional power balance between the Governor-General and the

***Question 10:*** *Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?*

***Answer:*** *No. The only barrier should be that any imprudent nominations will have a potentially negative impact on the re-election chances of the directly-elected Prime Minister.*

[22] South Australian Constitutional Advisory Council Report (1996), p. 108, para 15.8.

Prime Minister would be preserved. As a result, preserving the process of nomination as it is at present is an appropriate step to take to ensure minimal disruption to the relationship between the Governor-General and the Prime Minister, within a Madisonian republic for Australia.

With the power of nomination in the hands of a directly elected Prime Minister, the appointing power should be performed by some other representative institution, so as not to disrupt the continuing constitutional balance between the Governor-General and the Prime Minister. Rather than vesting this appointing power in a new political institution specifically created for this purpose, it would be *sufficient* for this power to be exercised by the existing Senate as the political institution representing the people of the Commonwealth in their federal capacities as representatives of the States.

Therefore, the appointment process for the Governor-General would reflect a mixture of both the *national* and the *federal* characteristics of Australia's system of government.

The reason for including the concurrence of Senate in the appointment process is to protect the Prime Minister against potential claims of favouritism from State prejudice, from favouritism through family connections or through personal attachments.[23] This requirement for the cooperation and concurrence of the Senate would be an important check and restraint upon the Prime Minister's power to nominate a person for the position of Governor-General, just as the interaction of the Monarchy is now under Australia's present arrangements. Thus, in terms of the debate surrounding the 1998 Constitutional Convention, it is submitted that the best place to repatriate the appointing function of the Monarchy is to the Senate, as a representative institution based upon a system of proportional representation, divided along State lines.

***Question 14:*** *What should be the length of a term of office for head of state?*

***Answer:*** *Five years.*

The possibility of rejection by the Senate of a Prime Minister's nomination would also produce a strong sense of restraint, to ensure that an appropriately suitable person is nominated as

***Question 15:*** *Should a head of state be eligible for re-appointment/re-election?*

***Answer:*** *Yes, for one extra term only.*

[23] A. Hamilton, *The Federalist*, no. 76, p. 483.

Governor-General. It would be difficult for the Prime Minister to influence more than only a section of the Senate, given the continuing presence of minor parties and independents under the system of proportional representation. Under a Madisonian view, the Senate must be able to either accept or reject a Prime Ministerial nomination. If a rejection occurs, the advantage of the nominating power being held solely in the hands of the Prime Minister becomes immediately apparent. In providing a subsequent nomination, the Prime Minister would be protected from the influence of any lobbying efforts, to ensure a suitable candidate is put forward. Therefore, the ability to appoint the Governor-General would be shared between the office of Prime Minister and the Senate.

***Question 16:*** *Should there be a limit on the number of terms an individual may serve as head of state?*

***Answer:*** *Yes, there should be a limit of two terms of five years.*

The duration of office of the Governor-General would be for a period of five years, with the possibility of being reappointed for one subsequent term. This length of term is not controversial. In the event of a vacancy in the office of Governor-General, a replacement would be nominated by the Prime Minister and appointed with the concurrence of the Senate. In this way, the present balance of power between the Prime Minister and the Governor-General would be preserved. A substitute Governor-General would be appointed to the position until the current term expired. That person would then be eligible for reappointment for one subsequent term only.

Dismissal of the Governor-General would be provided for, as the mechanism would be the same mechanism as for appointment. The dismissal of a Governor-General would be requested by the Prime Minister and would be either accepted or rejected by the Senate. Under this mechanism, a balance is preserved between the appointing and dismissal procedures and would, as a consequence, provide for some protection for the Governor-General from being dismissed without notice, in that the cooperation of the Senate, acting as the representative institution most strongly displaying the federal aspects of the Commonwealth of Australia, would be required. The concurrence of the Senate would eliminate any fear of 'instant dismissal', as expressed by Kerr in 1975, and would prevent any retaliatory action on the part of the Governor-General against the Prime Minister.[24]

***Question 17:*** *Who or what body should have the authority to remove the head of state from office?*

***Answer:*** *This authority should be balanced between the Prime Minister and the Senate. Therefore, no personal prerogative to dismiss.*

[24] J. R. Mallory, 'The office of Governor-General reconsidered', *Politics*, vol XIII, no. 2, 1978, p. 226

This submission argues that the office of Governor-General should be retained in this way as Australia's non-political Head of State. The nature of the office would reflect both national and federal characteristics through the nomination of persons for this office provided by a nationally elected Prime Minister, with appointment made with the concurrence of the Senate. The office would become constrained within a Madisonian-style republic.

***Question 18:*** *On what grounds should the removal from office of the head of state be justified? Should those grounds be spelt out*

***Answer:*** *The grounds should be proved misconduct or incapacity.*

As was stated earlier, some aspects of a Madisonian model were already incorporated into Australia's system of government at Federation. The sources from which the Senate and the House of Representatives derive their power are already conformable in that both houses of Parliament are dependent upon the voting public, with a mixed basis of representation and a staggered election timetable reflecting Madison's 'auxiliary precautions' against a predominant legislature within a republican form of government. While the change to proportional representation in the late 1940s has increased the 'consensual nature' of the Senate, it is not a constitutional feature of Australia's system of government – but a simple legislative one. This submission argues that electoral mechanisms supporting the Senate and the House of Representatives, and that of the directly elected Prime Minister, should be entrenched within Australia's Constitution. This would provide suitable protection for the electoral laws from being manipulated without reference to the Commonwealth electorate via means of a constitutional referendum.

***Question 19:*** *How should a casual vacancy be filled?*

***Answer:*** *In this situation, the longest serving State Governor shall fill the casual vacancy.*

***Question 20:*** *What should the eligibility requirements be for the head of state?*

***Answer:*** *A minimum requirement should be an Australian citizen who has foresworn any allegiance, obedience or adherence to a foreign power.*

***Question 21:*** *On what grounds should a person be disqualified from becoming a head of state?*

***Answer:*** *A person who is a member of either House of Parliament of the Commonwealth or of a State, or a member of the legislature for a territory, or who is disqualified from becoming a member of either House of Parliament of the Commonwealth or of a State, or a member of the legislature for a territory, or who is a member of a political party, shall be incapable of being chosen or of holding the office of head of state.*

***Question 22:*** *Should the head of state have the power to appoint and remove federal judges?*

***Answer:*** *The requirements of s.72 of the current Constitution should be preserved, whereby the Governor-General-in-Council can exercise the power to appoint and remove federal judges.*

***Question 23:*** *Should the head of state have the prerogative power of mercy?*

***Answer:*** *Yes, the prerogative of mercy should continue, but be formalised in the written Constitution and be exercised by the Governor-General-in-Council.*

***Question 24:*** *Should the head of state be free to seek constitutional advice from the judiciary and if so, under what circumstances?*

***Answer:*** *The office of head of state should not be a mere cipher of the Prime Minister. There should be no prohibition on the head of state seeking constitutional advice from the judiciary.*

***Question 25:*** *What is the best way to deal with the position of the states in a federal Australian republic?*

***Answer:*** *The states should be left to determine their own basis of legitimacy for their respective heads of state. In a federal system, this is as it should be.*

## 2.2 The Prime Minister

> *Surely the argument that we need a popularly elected head of state would have more force and consistency if we applied the same principle to the Prime Minister, and no-one seriously has put that proposition. Ask the punters out there if they would like to elect their Prime Minister, and I will guarantee you that you will get the same result as you will get for asking them if they want a popularly elected Head of State.*[25]

The first feature to be noted under my proposal, freed from the constraints of simply focussing only on the issue of the Head of State, is that of the separation of the Prime Minister and Cabinet from the Commonwealth Parliament. It is proposed that the Prime Minister should become a popularly elected executive Head of Government. It is also proposed that the office of Governor-General as Australia's non-political executive Head of State should be preserved. Within the political culture that has developed in Australia, both executive positions of the Governor-General and the Prime Minister are worth preserving as sharing executive power, distinct from the Commonwealth Parliament as the national legislature.

***Question 4:*** *Should some form of campaign assistance be available, and if so, what assistance would be reasonable.*

***Answer:*** *As the direct election of the Prime Minister is a political event, no extra campaign assistance would be needed to assist political parties.*

The primary requirement of choosing an executive Head of Government, under a Madisonian view, is to ensure that the choice of that person in whom this trust is to be placed is dependent upon the direct support of a majority of the people of the Commonwealth.[26] In this way, no other political institution would stand between the Prime Minister and the consent of the individual elector. This is why direct election is the most appropriate mechanism for a Prime Minister under a republican form of government. It was this picture that A. V. Dicey painted in 1885, as highlighted in chapter 3, describing the potential of the British constitutional arrangements to develop into one containing a popularly elected Prime Minister leading a separated Cabinet.

[25] 1998 Constitutional Convention, Vol 4., p. 857. Comment made at the Convention during debate, on Thursday, 12 February 1998, by Peter Sams, an appointed non-parliamentary delegate from New South Wales.
[26] A. Hamilton, *The Federalist*, no. 68, p. 440. It was Hamilton's proposition that the 'sense of the people should operate in the choice of the person to whom so important a trust was to be confided'.

The office of the Prime Minister, as Head of Government, would become the individual focal point of the exercise of executive political authority in Australia's system of government. This function is distinct and separate from the requirement of the Commonwealth Parliament to debate and deliberate on the making of laws. This drawing out of the Government from Parliament is simply to ensure that a due dependence and direct accountability to the electorate is maintained, rather than an indirect relationship through the party organisations within Parliament. It is to the people, in a republican sense as being the 'governing authorities', that the Government would be accountable, whilst at the same time being accountable to the Commonwealth Parliament for the execution and maintenance of the executive functions of government via the agency of the Public Service. In this sense, the ability to hold the government accountable for its performance, through the individual office of the Prime Minister, would be enhanced. As such, our system of government would be able to regain the constitutional balance whereby the Government would be responsible and accountable to the electorate for the implementation and maintenance of the laws passed by the Parliament, of which Parliament itself would also be directly responsible and accountable to the voting public.

***Question 5:*** *Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?*

***Answer:*** *As direct election mechanism is directed at the office of the Prime Minister, political parties would be involved just as they are for parliamentary elections. Prime Ministerial election and parliamentary elections would be timed to coincide.*

The drawing out, or 'unbuckling', of the Cabinet from Parliament, being led by a directly-elected Head of Government, would cause the relationships surrounding the office of Prime Minister to change. The relationship between the Prime Minister and the Governor-General would remain in a similar relative position as it is now - given that both positions would operate with powers delegated to them under the Constitution. The relationship between the Prime Minister and the Parliament would be adjusted in that the Prime Minister would not be a sitting member of Parliament. The Prime Minister would still depend upon the Parliament to pass the Government's legislative program as now, but the balance of their relationship would result in the Parliament, as legislature, being able to debate and deliberate on legislation without the overwhelming executive influence currently observed at present.

***Question 6:*** *If assistance is to be given, should this be administered by the Australian Electoral Commission (AEC) or some other body?*

***Answer:*** *No extra campaign funding will be required other than what is already allowed for through the AEC.*

The relationship between the Prime Minister and the voting public would be altered in that a directly-elected Prime Minister would be able to legitimately claim a national mandate to form a government. A major consequence of these relationships being adjusted would be to elevate the position of the electorate to being appropriately described as the governing authority, as both the Prime Minister and the members of both houses of Parliament would be dependent upon the direct consent of the people to exercise political authority under the Commonwealth Constitution.

***Question 7:*** *If the Australian head of state is to be directly elected, what method of voting should be used?*

***Answer:*** *As it is the Prime Minister who should be directly elected, the method of voting should be preferential voting.*

The Israeli experience with the direct election mechanism is instructive as it dispels the criticism that the mechanism itself introduces electoral instability, as shown in Table 1.2. [27] The Israeli experience is that the direct election mechanism simply follows or mirrors the electoral voting intentions of the people. The mechanism itself has not skewed any parliamentary results.[28]

| Parliamentary Elections (Knesset) | | | | Prime Ministerial Direct Elections | | |
|---|---|---|---|---|---|---|
| | Main 2 Parties | Others | Major Party | | Likud Candidate | Labor Candidate |
| | Seats | Seats | | | | |
| 1973 | 90 | 30 | Alignment | | | |
| 1977 | 75 | 45 | Likud | | | |
| 1981 | 96 | 24 | Likud | | | |
| 1984 | 85 | 35 | Alignment | | | |
| 1988 | 89 | 31 | Likud | | No Direct Election until 1996 | |
| 1992 | 76 | 44 | Labor | | | |
| 1996 | 66 | 54 | Labor | 1996 | Benjamin Netanyahu (50.49%) | Shimon Peres |
| | | | | 1999 | Benjamin Netanyahu | Ehud Barak (56.08%) |
| 2000 | 45 | 75 | Labor ('One Israel') | | | |
| | | | | 2001 | Ariel Sharon (62.39%) | Ehud Barak |
| 2003 | 57 | 63 | Likud | | | |

**TABLE 2.1 ISRAELI ELECTION RESULTS 1973 - 2003**

[27] Electoral results taken from the Knesset website [http://www.knesset.gov.il/], as at 08/03/2003.

[28] Ariel Sharon was able to form a government in 2001 as Prime Minister due to the direct election mechanism, even though party situation in the Knesset would have previously meant under the pre-1996 rules that the Labour leader (in this case Ehud Barak) would have been Prime Minister and asked to form a Government by the President. Both the 1999 / 2000 election results (to Labour), and the 2001 / 2003 election results (to Likud) confirm the same shift in electoral support. Therefore, the direct-election mechanism itself did not introduce any instability in Israeli's system of government. The changes in the 'party situation' in the Knesset merely reflect the changing electoral shift of voters, predominantly a result of significant immigration into Israel over the previous two decades.

As to the requirements of qualifications of office, nominations for the office of Prime Minister would be open to any qualified Australian citizen, as they are now for parliamentary elections. This would ensure consistency between the two representative institutions. There is no need to define institutional restrictions as to who could nominate for the position of Prime Minister, as the pressures of a national election campaign, both financially and logistically, would ensure only candidates with sufficient national profile would precede with a nomination. It would be expected that there would only be one endorsed candidate per political party nominated for the position of Prime Minister. A nominee would be required to also nominate a person as Deputy Prime Minister and the two would be required to run for direct-election as a pair. In this way, provision would be made for the filling of vacancies in the office of Prime Minister without the need to hold fresh elections - especially under the framework of fixed terms. If necessary, the Deputy Prime Minister would become Prime Minister and would in turn be required to appoint a new Deputy Prime Minister, with the concurrence of the Senate, to temporarily serve in that position until the next Prime Ministerial elections are held.

***Question 11:*** *Should there be a maximum and/or minimum number of candidates?*
***Answer:*** *No. Within the context of a direct election for Prime Minister, the cost of such a national campaign is expected to constrain candidates to registered political parties.*

***Question 12:*** *Should there be a minimum number of nominators required for a nominee to become a candidate?*

***Answer:*** *No. The only constraint should be that candidates should be nominated by political parties.*

The formal appointment of the directly-elected Prime Minister would be effected by the Governor-General, on behalf of the Commonwealth and under the power of the Constitution. This appointment process would be the same as it is now, highlighting how my model preserves the relationship between the Head of State and the Head of Government. The Prime Minister would be required to appoint a Cabinet within three months, in a similar manner as operates under present arrangements. The main adjustment to be observed under this model would be that Cabinet Ministers would be prohibited from being sitting members of Parliament and, as such, would be expected to be individuals exercising delegated authority within their respective areas of expertise. Given the increasing size and complexity of government today, this would enable Cabinet Ministers to perform their duties and responsibilities with a greater degree of responsibility as they would be prohibited from being drawn away by the legislative and constituent requirements of being a member of the Commonwealth Parliament.

The duration of office for the Prime Minister under my model would be for four years with fixed term elections, in conjunction with fixed term parliamentary elections for the House of Representatives and the Senate. This framework adjusts the British notion of the Prime Minister being the constitutional 'regulator' by exercising the prerogative power to call for the dissolution of parliament for the purpose of holding an election.. Fixed term elections would provide more conformity, in a Madisonian sense, whereby the Constitution would regulate the timing of elections, rather than the individual decision of the leader of the government, the Prime Minister. The continuation of office for a Prime Minister would become primarily dependent upon the consent of the Commonwealth electorate rather than the parliamentary party to which the Prime Minister would be expected to belong - given that situation that only endorsed party candidates would be expected to sustain a national electoral campaign. This continuing nature of the office is in accord with current practice and with the original intent of the American republican design.[29] Restricting terms would only destroy the sense of due responsibility towards the end of a term of office and most likely produce a 'lame-duck' or 'caretaker' government. The longer the term in office, combined with the potential for re-election, the greater the advantage held by an elected Prime Minister.

The sources from which the ordinary powers of the office of Prime Minister would be derived, therefore, become national in character and based upon the direct consent of a majority of the Commonwealth electorate. This adjustment would reconnect the relationship between the Prime Minister and the people from one of a single parliamentary electoral division to the whole Commonwealth of Australia as one electorate. The underlying value of this proposal is to elect a single executive Head of Government who is able execute, administer and uphold the laws of Commonwealth as passed by the Federal Parliament. As the source of power of the Prime Minister would be derived from the direct consent of the people, the requirement to directly elect a President or Governor-General as Head of State would be made redundant.

[29] F. McDonald, p. 275. The original provision of the US Constitution was changed by the 22nd Amendment in 1951, whereby presidential terms were fixed to two consecutive terms only.

Under this proposed republican model, the Prime Minister would then become a directly elected Head of Government, with a direct national mandate from a majority of the Commonwealth electorate. The constitutional requirement for the Prime Minister would be to form a Cabinet Government that would be responsible for the administration and maintenance of the day to day functions of executive government through the agency of the Federal Executive Council and the Public Service. In this sense, the operational role of the Federal Government would not alter, as only the basis with which the government would be formed and how it would relate to the Parliament would be adjusted. Another operational consequence of this adjustment would be that the Cabinet Ministers would be prohibited from being involved in the legislative process, and hence from the burdens of representing local electorates within the Commonwealth Parliament itself.

In providing for the actual appointment of Cabinet Ministers, a directly-elected Head of Government would be in a sufficiently accountable position to appoint Cabinet Ministers *'during pleasure'*, with the concurrence of the Senate exercising a ratifying power. In this way, the key principle would be that the Prime Minister would hold the power to nominate Ministers, while the Senate would either accept or reject those nominations. This mechanism would provide protection for the Prime Minister in a similar way as in the process of the appointment process for the Governor-General. A form of Ministerial Responsibility would continue to be achieved through the individual accountability of the Cabinet Minister, but through the agency of a popularly elected Prime Minister. It is here that Ministers would no longer be directly accountable to Parliament, but this submission argues that the current system - notwithstanding its formal structures of accountability - does not render Ministers accountable to Parliament either.

The Prime Minister would have the power to appoint replacement Ministers if the performance of an individual Cabinet Minister was found to be unacceptable. In this respect, issues of personal impropriety or public policy errors would continue to impact the consideration of Ministerial dismissals. The sense that Ministers are not actively held accountable for the actions of their respective Public Service departments would be diminished through the negative reflection such a perception would have directly upon the popularly-elected Prime Minister. Electoral considerations would continue to influence the operation of Ministerial Responsibility as the Prime Minister would be individually accountable to the electorate for the overall performance of the Government. There would be no additional reason to 'tough-out' an issue, as any conflict would directly effect the re-

election prospects of the Prime Minister. This would increase the strength and sense of Ministerial responsibility and accountability operating within a Madisonian republic for Australia.

We move on to the provision under which a Prime Minister may be dismissed. Without this feature, to operate under rare and extreme conditions, there would be no protection against the abuse of office within a framework of fixed term elections. In looking at the constitutional provisions surrounding the dismissal of a Prime Minister, it must be recognised that any crises leading to such a situation would primarily be *political* in nature. Therefore, the institution that would be the most appropriate to resolve such a crises, if political means could not, would be that of a *non-political* nature. If it would be otherwise, then there would be no protection from the passions, and perhaps the bitterness, that might develop with the political pressures that such a crises would no doubt generate.

In an expression of a Madisonian view of government, it would be required that a dismissal process should be initiated from the political institution best placed to scrutinise the Prime Minister, in this case, the Commonwealth Parliament. The final action to remove a Prime Minister should be performed by an institution that would be considered to be 'above politics' and which would be considered sufficiently independent of party influences as to allow the minimum of passionate conflict to occur. As noted later in chapter 3, the intent of the American republican design placed the final determination of such a crises in the hands of the US Senate, as it was considered to be 'above politics' in that its members were not elected but appointed by the various State Legislatures.[30] Therefore, the question becomes: where can an institution or tribunal be found that would, in Madisonian sense, be 'sufficiently independent' to possess the ability and the confidence to preserve the 'necessary impartiality between an *individual* accused, and the *representatives of the people*, his accusers'.[31] The most appropriate institution to action a dismissal request, and the most ironic given the contemporary republican debate, would be the office of the Governor General. This would, in effect, preserving the existing balance defined by the 'reserve powers'. Therefore, the dismissal mechanism would consist of a motion of impeachment against the Prime Minister, initiated solely by a simple majority of the House of Representatives, with the concurrence of a 2/3rd majority vote of the Senate, and enforced by the Governor-General as Head of State.

[30] A. Hamilton, *The Federalist*, no. 65, p. 426. With the ratification of the 17th Amendment in 1913, the US Senate became an elected chamber within Congress.
[31] A. Hamilton, *The Federalist*, no. 65, p. 427.

In the rare event of requiring a substitute Prime Minister, due to dismissal, resignation, incapacity through illness or death, the constitutional position would be filled by the Deputy Prime Minister. The Deputy Prime Minister would be commissioned by the Governor-General to serve in the position of Prime Minister until the next fixed-term election would be scheduled. In the even rarer event of both the Prime Minister and the Deputy Prime Minister were incapable of executing their respective offices, and in order to provide a sufficient line of succession of officers between fixed-term elections, the President of the Senate, and then if required the Speaker of the House of Representatives, would be commissioned as a substitute Prime Minister until the next scheduled elections. If such a circumstance was required, where either the President of the Senate of the Speaker of the House of Representatives were to be commissioned by the Governor-General to fulfil the role of Prime Minister, they would be required to resign from the Commonwealth Parliament. In this way, there would be a clear process of ensuring the position of Prime Minister would not be left vacant for such a length of time as would endanger the continuation of the operations of the Federal Government.

The powers of the Prime Minister, then, would be to execute and maintain the laws passed by the Commonwealth Parliament, laws made in accordance with the current powers vested to it under the present Constitution. This proposed model simply advocates the drawing out of the Prime Minister and Cabinet from the Parliament, and being placed under a separate and distinct constitutional foundation, in order to resolve the conflict in underlying values between the Westminster system of responsible government and the American republican structure of federalism. As a consequence, the distinction between the executive branch of government and the legislative branch of government would be made much more obvious than the present Westminster tradition allows. A further consequence of this arrangement would be to support the realignment of the balance of power between the Government and the Parliament in that it would enhance the position of the Parliament as being the predominant political representative institution within a Madisonian republic for Australia.

## 2.3 Executive – Legislative Relationship

This realignment of the executive-legislative relationship to one of 'legislative dominance' is not a absolute predominance of the Commonwealth Parliament over the Federal Government, as the Prime Minister would be empowered with a 'qualified veto' power as a protection against the possibility of improper laws, being passed by the Parliament, while still allowing for the Commonwealth Parliament to overrule the Prime Ministerial-veto by allowing for a 2/3rd majority vote of a joint sitting of Parliament to prevail. Thus, the existing Senate / House of Representatives balance would transition into a Government / Parliament balance without recourse to a double-dissolution election to resolve the matter.

The operation of powers, in respect to the office of the Governor-General, would formally become that of a non-political executive Head of State. In this regard, the Governor-General would assume the position of Australian Head of State, exercising a non-political executive position under the Commonwealth Constitution, and in most respects, the same operational role as exists at present. The ordinary powers of the Governor-General would continue as they are now, such that the Governor-General would continue, for example, as the Commander-in Chief of the Australian Defence Forces, would continue exercising the power to sign legislative bills into law, and would continue to hold the prerogative power to grant pardons.

The 'reserve powers' of the Governor-General would be codified and reduced to the appointing of a Prime Minister, as is now under normal circumstances, and the dismissal of the Prime Minister under rare and extreme situations upon impeachment by the Commonwealth Parliament.[32] The existing 'reserve powers' to dissolve or prorogue Parliament and to grant or refuse a dissolution would be rendered obsolete due to the establishment of fixed term parliamentary elections. The non-reserve powers, currently exercised by the 'Governor-General-in-Council', would be preserved and exercised as they are now. The Federal Executive Council would continue to be the formal institution that links the non-political Head of State with the political Head of Government. The

[32] South Australian Constitutional Advisory Council Report (1996), para 13.19, p. 87. The Advisory Council advised that the 'reserve powers' could be left uncodified only if the Governor-General was appointed within the same framework as currently exists.

interaction and communication between these two constitutional officers of the Commonwealth would continue as is current practice.

> *… in republics it is the legislative that "necessarily predominates" and threatens the security of liberty - unless it is checked.*[33]

Madison argued that in republican forms of government, the legislature would be the political institution that would predominate - unless it was 'checked'. The operation of the ordinary powers, in respect of the Senate and the House of Representatives, would under my proposal provide for a more conformable balance between the executive and legislative branches of government, in that each would be largely separate and distinct, and no longer 'fused' together as required by the Westminster ideal. Therefore, the Commonwealth Parliament would be populated with elected local representatives, elected without the influence of the electoral contest over 'winning' government. The *'parliamentary struggle'* would then become one primarily of expressing the local interest within the legislative process, given that successful legislation would become binding upon the Commonwealth electorate and would be required to be administered by the Federal Government.

## 2.4 The Senate

The basic principles or values underlying the Senate, as highlighted in chapter three following, were to provide a balance to the House of Representatives, given the view of Madison that in a republican form of government power concentrates in the legislative branch. The main role of the Senate was to be a 'brake' through longer terms combined with half-Senate elections, which would enable the Senate to acquire legislative experience while representing the State as co-equal political bodies.

Although the operation of the Senate has been hampered through the effects of strong party discipline, the ability of the Senate to perform its ascribed role has significantly improved since the

[33] B. F. Wright, 'Editor's Introduction', In *The Federalist*, p. 60. Here Wright attacks the misconception that *The Federalist* was reactionary and anti-monarchical, rather than a reasoned application of the notion that it was not safe to entrust elected officials in a republic with unchecked political power. See also Madison's *Federalist* #51, p. 356.

1960s through the increased use of committees and the increasing representation of minor parties and independents. With the drawing out of the Government from the confines of Parliament, the immediate effects in the Senate of attempted Government control in the passage of its legislative agenda would be removed. With the absence of the Government, and the increasing potential for minor party and independent representation, the passage of legislation would be more consistent with a Madisonian consensual view than it is today.

The relative position of the Senate would be enhanced as a Madisonian model would require the Senate to be an integral ratifying authority (or balance) to the Executive Government in the appointment of executive and senior judicial positions, the ratification of international treaties, and the declaration of war. There is a persuasive argument that the power of a directly-elected national Prime Minister should be balanced and constrained. The most appropriate institution to provide this balance is the Senate. With the interaction between the Federal Government and the Senate formalised within the written Constitution, a more effective federal balance between the States and the Commonwealth would be possible. The removal of the Government reduces the immediate influence of the political parties and enhances the ability of the Senators to more accurately represent the interests of their respective States.

## 2.5 The House of Representatives

In respect to the operation of powers within the lower house of the Commonwealth Parliament, the position of the House of Representatives would be enhanced in that it would become the sole representative institution conferred with the power to initiate money bills, which effect the spending and raising of taxes required by the Government for the annual provision of its services, and would become the initiator of motions of impeachment against the Prime Minister. The Federal Government would be effectively constrained and kept accountable by its reliance for financial resources on the initiation of money bills in the House of Representatives, to be passed by the Senate and, finally, signed into law and activated by the Governor-General. The scope of legislative powers conferred upon the Parliament would, under my model, remain as they are now. The main adjustment would be the removal of the convention of forming the Government from the majority party within this House.

In respect to the duration of parliamentary terms, fixed four year terms would enable the Parliament to devote more time to the passage of considered legislation and would remove the amount of time wasted in 'second-guessing' election timings. It would also enable the ability to define a minimum number of sitting days per year to ensure adequate time is available to advance the Government's legislative program.[34]

In terms of the conflict between the Government interest and the local interest of the electorate, the 1999 referendum highlighted a contrast under Australia's existing arrangements in that the interest of the local district, or division, was in conflict with the interest expressed by the elected representative when operating within the role of a Ministerial position. For example, the electoral division of Bennelong (NSW), represented by the Prime Minister, John Howard, who rejected the referendum question concerning the republic, voted in favour of it by 54.62%. Conversely, the local division of Brand (WA) represented by the then Leader of the Opposition Kim Beazley, who supported the referendum question concerning the republic, voted against it by 66.31%. Under my proposal, being more conformable to a Madisonian view, local representatives of electoral districts would be able to more accurately represent the local people they are required to serve, since the voting public could vote on local issues without the fate of an entire Government of the day being at stake.

The mixed basis of representation contained within my proposal is conformable to a Madisonian view whereby the nature of representation is deliberately different between the respective institutions of the House of Representatives, the Senate and the Prime Minister, but that they are all dependent upon the electoral consent of the qualified voting public. In this way, my model more than satisfies the expectation of an acceptable definition of a republican form of government as expressed by Winterton at the 1998 Constitutional Convention.[35]

The third aspect to consider with this model is that of the extent of governmental power and, in this respect, the balance between the Federal Government and the States would be unaltered by my

[34] According to Winterton (1995), p. 93, the average number of sitting days in the U.K is 168 days, in Canada 187 days, in New Zealand 109 days and in Australia 78 days. Though the comparison was during the late 1970s, the average number of sitting days in Australia has not increased.
[35] 1998 Constitutional Convention, Vol 4., p. 684.

proposal. As the main feature of the adjustments proposed in this submission involves a separation of the Government from Parliament, it preserves the existing distribution of powers between the Commonwealth and State levels of government.

The fourth aspect of this model examines the authority to amend the powers of government. The submission argues that the existing provisions are sufficient in that they reflect the requirement to exhibit both national and federal characteristics in the assent of s.128 referendums. With the provision that the arrangements proposed in this submission would be defined within the formal and written Commonwealth Constitution, it would better said that people of the Commonwealth are ultimately 'sovereign' over Australia's system of government as all political institutions would be framed by it.

## 2.6 Conclusion

My submission, freed from the constraints of simply looking at the issue of our Head of State, consists of a popularly elected Prime Minister, leading an Executive Cabinet government, operating separately from the national legislature, the Commonwealth Parliament, under the authority of the formal Constitution. This model would preserve the office of the Governor-General as Australia's non-political executive Head of State, and also preserves in place the existing powers conferred upon the Commonwealth Parliament in respect to the making of law, with the Senate and the House of Representatives focussed on the legislative process.

The drawing out of the Prime Minister and Cabinet from within the Commonwealth Parliament would manifest A.V. Dicey's speculation that the Westminster system of responsible government could well develop into a system whereby the Prime Minister and Cabinet would be removed from Parliament and that the Prime Minister would be popularly elected.[36]

Federation has provided a one hundred year 'bedding down' period for the values and principles behind the structure of federalism. These values and principles have become well and truly

[36] Dicey, A. V., *Introduction to the Study of the Law of the Constitution*. [1885], LibertyClassics, Indianapolis, 1982, p. 335.

established within Australia's system of government, such that a Madisonian model of republican government would not be considered a significant change in terms of basic values in the way our system operates today. In this sense, the institutional arrangements described within my proposed model provide a answer to the question as to how best to resolve the conflict in underlying values between Westminster system of *'responsible government'* and republican structure of *'federalism'*.

The advantages of this approach, as observed in a comparison made by Blewett between parliamentary and executive government in 1977, would be that:[37]

- it would be more stable, with fixed terms of office;
- it would facilitate more effective scrutiny of the Federal Government by the Commonwealth Parliament;
- it would provide for a consensual legislative process that would be more open to the influence of individual members of parliament, interest groups and constituents.
- it would provide a greater pool of executive talent to draw on for executive Ministerial positions.

For these reasons, given the current state of our system of government as analysed in chapter 4, a transition to a Madisonian form of republican government would be appropriate. The institutional foundation was established at Federation. The seeds of change were sown one hundred years ago. Over one hundred years later, it could be claimed that federalism has overtaken responsible government as the source of the predominant set of political values within Australia's system of government and we need an institutional arrangement that is consistent with those political values, vindicating the political sovereignty of the people.

[37] McMillan, Evans and Storey, p. 223. They are quoted from a paper delivered to the National Conference for a Democratic Constitution in Melbourne, 1977 by Dr Neil Blewett.

## 3. AUSTRALIA'S POLITICAL TRADITIONS

This chapter reviews the two major political traditions that have shaped Australia's system of government as constructed through the process of Federation. This chapter argues that the pragmatic combination of these two traditions, British Westminster-style government and American federalism, installed a conflict in political values within Australia's constitutional design that requires a remedy in order to resolve the continuing debate about the nature of Australian democracy. This chapter reviews these political traditions in order to understand why they are arranged as they are and how an inherent conflict in values exists between the two. This provides a foundation from which to analyse the major changes that have occurred since then, and enables the contemporary republican debate to be placed within context of the continuing conflict in values between these two political traditions.

First of all, the federal model of republican government as developed in America in the late eighteenth century is reviewed. It is from this political tradition that the element of federalism was drawn and utilised at the time of Federation. Within the American context, a republican form of government is one whereby the political authority exercised by representative institutions deriving all their powers directly or indirectly from the consent of the electorate. This form of democracy was best articulated by the work of James Madison[38]. In advocating the adoption of the then proposed American Constitution, Madison extolled the foundation values upon which the institutional arrangements rested.

The second political thread that has helped shape Australia's system of government is that of the British Westminster-style of parliamentary government. Within the Westminster tradition, executive political authority is vested in a hereditary Monarch and exercised through a parliament exercising, more or less, the same executive authority. Political power is combined, or fused, within parliament via the agency of an executive Cabinet, led by the leader of the majority representative party or coalition within the lower house of parliament, the Prime Minister. This form of majoritarian democracy, within a British context, was best described by the works of Walter Bagehot during the late nineteenth century.

Lastly, this chapter looks at the construct of Federation itself and the inherent conflict in values it embodied. The overlay of the principles of federalism within a Westminster tradition set in place a conflict that was not ideologically deliberate, but was not wholly unacknowledged. Winthrop Hackett's warning during the federation debates that federalism, as it was to be adopted, would kill the operation of British Westminster-style government was quite prophetic. The original intention of the construct of Federation is important to appreciate in order to understand the changes that have occurred since the Commonwealth Constitution was proclaimed in 1901.

## 3.1 American Republicanism

*It was said that the United States had a government of laws, not of men.*[39]

The first of the two political threads or traditions that was input into the process of Federation was that of the element of *federalism* as developed in the republican constitution of the United States of America at the end of the eighteenth century. The American constitutional arrangements emanated from the aspiration of the leaders of the American Colonies of the latter 1700's to obtain protection from what they considered to be the oppressive nature of arbitrary government in the form of the British Monarch, King George III.[40] After spending 15 years or so attempting to negotiating a settlement, and failing, the American Colonial leaders declared themselves independent from Britain in 1776. After achieving independence and ratifying a new political compact, a system of government was established that was bound by a law that was entrenched within a written, formal Constitution - a '*novus ordo seclorum'*, a new order for the ages[41].

[38] J. Madison, *The Federalist*, no. 39, p. 281. 'we may define a republic to be a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour'
[39] F. McDonald, *A constitutional history of the United States*, Franklin Watts, New York, 1982, p. 9.
[40] M. A. Beliles and S. K. McDowell, *America's Providential History*, Providence Foundation, Charlottesville, 1989, p. 146. Halfway through the Declaration of Independence, after the list of grievances, it states 'He has abdicated Government here, by declaring us out of his Protection and waging War against us'.
[41] Beliles and McDowell, p. 151.

According to McDonald, the system of government that was established embodied two major points on how the American Colonial leaders viewed 'government'.[42] The first was that the proper *function* of government was to 'protect the natural rights of men and women, which derive from God and could neither be legitimately given away nor taken away, but could be, and in the absence of government were likely to be, transgressed by unprincipled individuals or groups'. The second aspect of the system of government that was established was that the legitimate *source* of governmental authority was derived from 'the consent of the governed as expressed in a written or implicit compact between the rulers and the ruled'. These two points were the culmination of constitutional developments within the American Colonies since the first settlements in the early 1600s, reflecting the influence of new liberal ideas of the age from such people as John Locke.[43]

The Constitution that came out of the Convention of 1787 contained elements that were departures from the then post-Revolution Articles of Confederation that linked the then separate and sovereign, self-governed States. In support of this proposed Constitution, a series of newspaper articles were published between October 27, 1787, and April 4, 1788 in the New York newspapers. They were published under the pseudonym of 'Publius', a collective name for Alexander Hamilton, John Jay and James Madison, and were collectively published as *The Federalist*.[44] These articles argued for the ratification of the Constitution and provide a useful and relevant guide to the political values behind the framework of federalism as constructed into a republican form of government for America.

In order to review the principles and influences on Australia's system of government imported from this constitutional design, an analysis of the system of government, as outlined in the American Constitution, is required. James Madison provides an instructive starting point in this analysis of the American design, from the perspective of five different relationships with which it was possible to ascertain the real character of the then proposed form of government.[45]

[42] F. McDonald, p. 10.
[43] Beliles and McDowell, p. 83. The tradition of formal, written constitutions can be seen through such documents as the *Mayflower Compact* of 1620, the *Fundamental Orders of Connecticut* in 1639 and the Massachusetts *Body of Liberties* of 1641.
[44] A. Hamilton, J. Jay, J. Madison [1788], *The Federalist*, B. F. Wright (ed.), Harvard University Press, Cambridge, 1961.
[45] J. Madison, *The Federalist*, no. 39, p. 280.

These five relationships that Madison described were:

- the foundation upon which the government would be established;
- the sources from which the ordinary powers of government would be derived;
- the operation of government powers;
- the extent of government powers;
- the method of making constitutional amendments.

### 3.1.1 The Foundation of Government

The first relationship that Madison analysed was the foundation upon which the Government would be established. Madison outlined the notion that the actual ratification process of the proposed Constitution would be considered a *federal* act - as it was based upon the double assent of both the people and the States. That is, the successful ratification of the Constitution was dependent upon the voluntary assent of a majority of the various States as distinct and independent political bodies (in this case at least 9 out of 13 States). The States themselves would ratify the proposed Constitution by a successful vote of the individual voting public within the respective States themselves.[46] The nature of this *federal* basis was quite different from previous uses of the term at the time, as previous 'federations' were considered to be either *confederations* or *leagues.*[47] The previous post-Revolution Articles of Confederation was an arrangement whereby all the 'national' authority could only be effected *through* the pre-existing sovereign States. The application within the new Constitution was a new development in arrangements - a *national* government that would have real and direct powers over individual citizens, within a federation of sovereign States. The new *national* government had the power to exercise authority directly over the people of a State in areas such as taxation, as well as exercising authority through the States as before.[48] The development of this new *federal* structure was criticised heavily at the time as far exceeding the power of the

[46] J. Madison, *The Federalist*, no. 39, p. 283.
[47] See Federalist #15 - 22 for a discussion on the defects of past confederations and leagues.
[48] A. Hamilton, *The Federalist*, no. 32, p. 243.

constitutional General Convention, but Madison argued that this structure was critical in forming a workable system of republican government.[49]

A distinctive feature of the foundation upon which the American *national* government was established was that it contained a formal, written Constitution which was considered 'fundamental law', as opposed to ordinary legislative or statute law as passed by a Legislature or Parliament. Written constitutions had long tradition within American Colonial experience going back to 1638 with the Fundamental Orders of Connecticut or even right back to the Mayflower Compact of 1620.[50] The change of parliamentary terms in Great Britain from three to seven years, without reference to the consent of the British electorate, alarmed the Americans. It was held that the result of 'parliamentary sovereignty' could allow unlimited and arbitrary government that would not be accountable or responsible to the people.[51] Madison believed that the ability of a government to change the notions and operation of the constitution without reference to the people, that is, by their consent, was unacceptable.

Another distinctive feature of the foundation of the Constitution was that it was specifically a republican form of government, with 'republican' here denoting an arrangement where political authority is 'shared, dispersed and limited' by representative institutions dependent upon and restrained by the consent of the voting public or electorate. Madison stated that it 'is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government'.[52] This was a significant departure from what was then accepted doctrine as it was only conceived that a republic was possible within a small territory. Madison had to counter the critics that held to this belief - one based upon Montesquieu's view that it was impossible to maintain liberty and stability in a large republic.[53] Madison spent a lot of effort to differentiate the 'compound republic' being

[49] J. Madison, *The Federalist*, no. 40, p. 293. Later, the notion of 'divided sovereignty' was criticised by those defending State sovereignty, such as John C. Calhoun in his *The Works* (1853), ed. R. K. Cralle, Appleton, New York, Vol. I, p. 145, 297.
[50] B. Wright, p. 68.
[51] J. Madison, *The Federalist*, no. 53, p. 365. On the issue of Madison's concern that 'parliamentary sovereignty' could allow arbitrary government that would not be accountable or responsible to the people, B. Wright (1961, p.67) points out that general elections were still held in America whether during wartime or peace, such as during the Civil War (1862 and 1864) and World War II (1942 and 1944). In Britain, on the other hand, no elections were held during the First or Second World Wars.
[52] J. Madison, *The Federalist*, no. 39, p. 280.
[53] B. Wright, p. 5.

advanced in the proposed Constitution from that of a pure classical democracy based upon absolute majority rule.[54] Whilst Madison upheld the notion of government being based upon 'consent of the governed', it was not based upon the principle of simple majority-rule or classical 'direct democracy'. As 'men were not angels', government power was required to be divided and diffused to prevent the abuse of minorities by a majority group or 'faction'. Madison, therefore, countered his critics by asserting that an extensive territory was required in order to provide a sufficient number of disparate groups or factions, such that a 'majority faction' would be unlikely to wield governmental power in its own right.[55] Hamilton also emphasised the point that the existing States, such as Virginia and New York, were already larger than what Montesquieu would have accepted as sufficient to support a republic and to split them up would only lead to 'unceasing discord'.[56]

### 3.1.2 The Sources of Government Power

The second relationship that Madison analysed was the source from which the ordinary powers of government would be derived. Madison considered that the object of exercising government authority was to produce two types of measures, namely:

- Measures which, singly, would have an immediate operation and effect;
- Measures which were more long-term in development and implementation.[57]

Madison outlined the requirement for an elective assembly, of a short-term duration, that would satisfy the first object of government. This short-term body, the House of Representatives, would only provide one or two links in the chain for more long-term government action. Madison argued that 'an additional body, with sufficient permanency and longer-term duration, would provide for

[54] J. Madison, *The Federalist*, no. 18, p.171. Here Madison outlined a survey of various democracies and republics from the past to reveal the conflicts they encountered.
[55] J. Madison, *The Federalist*, no. 10, p. 134. Madison argued that an extensive republic was preferred for two reasons. First of all, the number of elected representatives should be large enough to guard against collusion, and second, as each representative would be elected by a group of people from a large territory, it would be harder for 'unworthy candidates to practice with success the vicious arts by which elections are too often carried'. Madison also recognised that too large a territory did present its own problems in a political representative being able to have sufficient 'local knowledge', but he believed that the proposed Constitution presented a balance.
[56] A. Hamilton, *The Federalist*, no. 9, p. 126.
[57] J. Madison, *The Federalist*, no. 63, p. 414.

such objects that require 'continued attention, and a train of measures'[58]. This other body, the Senate, would also provide a 'check' on the elected, short-term, assembly. In this way, a bicameral system was argued for in the Legislative branch of government. The House of Representatives would derive its powers from the voting public of America, in the same proportion and principle, as they were in the existing State legislatures. Thus, the source of legitimacy for the elected members of the House of Representatives would be *national* - that is, directly linked to the people.

Both Hamilton and Madison agreed that the danger to political freedom in a republican form of government was from an encroaching legislature, that is, a legislature that would 'absorb' authority. As Hamilton stated, 'in governments purely republican, this tendency is almost irresistible'.[59] They argued that short terms of office for the legislature and regular elections would minimise the possibility of this happening. This would also minimise the influence over the election process of the other branch of government, the Executive, especially if the two branches were not on good terms.

Madison commenced his discussion of the House of Representatives by outlining the major criticisms against the proposed Lower House in the Constitution and used them to argue for the ratification of the proposed Constitution. The first criticism cited by Madison was the claim that it was considered that the House of Representatives would be initially too small and would be considered to be an 'unsafe depository' of the public interest. He countered that the initial 65 members would in no way be dangerous to the freedom of American, then or in the future.[60] Madison proposed a census within three years to be held so as to adjust the number of representatives accordingly. With each State having differing numbers of representatives, even where populations were similar, Madison argued that the initial size of the House was reasonable. The second criticism was that the House of Representatives would not possess the requisite local knowledge of the represented district. Madison conceded that there was no 'precise solution' to the number of representatives needed; but held that a representative member for very 30,000 citizens would allow the House to be a 'safe and competent guardian' of the local interest.[61] The third major criticism was that the House would draw members that would be 'least sympathetic' with the mass of the people. Madison rebutted this claim by describing how the House would be dependent and

[58] J. Madison, *The Federalist*, no. 63, p. 414.
[59] A. Hamilton, *The Federalist*, no. 71, p. 460.
[60] J. Madison, *The Federalist*, no. 55, p. 377.
[61] J. Madison, *The Federalist*, no. 56, p. 383.

restrained by a sense of public service, the frequency of elections, and the facility that 'they could make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society'.[62] Both Hamilton and Madison rejected the notion that the House of Representatives would be divided by 'class', as they believed that the motives at work in the legislature were applicable to all classes, and not just one against another.[63] The final major criticism against the House was that it would get more disproportionate in size as the population grew.[64] The response to this claim was that the House would be augmented from time to time as census results would show the extent of population growth. Madison did caution, though, on the House of Representatives becoming too large as to be controlled by only a small group or faction within the larger assembly.[65]

The Senate, on the other hand, would derive its legitimacy from the States, as both political and coequal bodies, and each State would be represented on the basis of equality. Thus, the source of power for the Senate would be *federal*. Madison outlined the purposes of the Senate as being, first of all, a 'salutary' check on the House of Representatives, conforming to the notion of 'checks and balances', in order to remind the members of the House of Representatives of their obligations to their constituents and to ensure that they would remain faithful to the trust placed in their hands.[66] Secondly, Madison considered the Senate to be a 'protection' against 'intemperate and pernicious resolutions' that may be compelled upon the Senate from 'factious leaders' within the House of Representatives.[67] Madison considered a factor that would enable this 'check' to operate was to have the terms of office for the Senate to be considerably longer in duration than that of the House of Representatives. Madison also believed that the numbers of Senators must be less than the numbers of Representatives.[68]

[62] J. Madison, *The Federalist*, no. 57, p. 385. Madison wrote that if "this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to take anything but liberty".
[63] A. Hamilton, *The Federalist*, no. 60, p. 398. Hamilton argued that the composition of the Legislature would not be biased by class, such as the landed interest versus the commercial or mercantile interests. He also rejected the notion of actual representation by class in Federalist #35. Madison asserted in Federalist #10 that interest (as a motive force) would be common to all classes.
[64] J. Madison, *The Federalist*, no. 55, p. 374.
[65] J. Madison, *The Federalist*, no. 58, p. 392.
[66] J. Madison, *The Federalist*, no. 62. p. 409. "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, as a second branch of the legislative assembly, distinct from, and dividing power with, a first, must be in all cases a saluatory check on the government".
[67] J. Madison, *The Federalist*, no. 62, p. 410.
[68] J. Madison, *The Federalist*, no. 62, p. 410. It was said by Madison that 'All that need be remarked is, that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration'.

Thirdly, the Senate would also provide a 'due acquaintance' with the 'objects and principles of legislation'. In this way, the Senate would provide the ability to build up experience in the 'objects and principles' of forming and enacting legislation, and in performing its 'checking' role. Lastly, the Senate would provide further stability in the Legislature through one-third Senate elections. Madison argued that a continual change of representatives and of public policies, even they may well be good policies, would be 'inconsistent with every rule of prudence and every prospect of success'.[69]

Madison considered the equal representation of the States in the Senate to be a compromise between the smaller population and larger population States. Madison argued that it was not unreasonable to construct a 'compound republic', where there was a mixture of both federal and national characteristics. Equally, the two Houses of the Legislature would be founded upon a mixture of principles, proportional representation for the House of Representatives, and equal representation for the Senate.

> *In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty.*[70]

It was recognised, though, that this mixed basis of representation would not only provide an impediment against 'improper legislation', but it would, in some cases, be 'injurious as well as beneficial' in the passing of appropriate legislation.[71] Whilst this could occur, Madison believed that the benefit of this arrangement would become apparent with operational practice and was still a valid characteristic for the Constitution to possess.

[69] J. Madison, *The Federalist*, no. 62, p. 411.
[70] J. Madison, *The Federalist*, no. 62, p. 408.
[71] J. Madison, *The Federalist*, no. 62, p. 409.

In order to highlight the positive nature of his arguments in favour of the proposed Senate, Madison illustrated several negative consequences of a Senate *not* operating as proposed. Madison believed that a badly operating Senate would result in:

- vulnerability to the influence of foreign powers through 'unsteadiness and folly';
- badly made laws due to ignorance and/or the impact of changing trends;
- lead to laws being made to benefit 'vested interests' over the general public.[72]

Madison proposed that one of the advantages of the Senate was its ability to assess the opinion of other nations, as well as engender a sense of respect and confidence from them. Madison reasoned that the Senate should be seen as the product of 'wise and honorable policy' and be able to read the opinions of other nations to provide a guide or 'checking' function against a Government which may be 'warped by some strong passion or momentary interest'.[73] Madison's view was that this ability could not be found in a large, representative body but only in a smaller body such as the Senate. (The contemporary relevance of this view can be seen in the review of treaties now conducted by the Australian Senate).

The sources from which the powers of the Executive government are derived, focussing upon the office of the President, would be based upon an electoral college system of election. The size of the electoral college would be based upon the number of lower house seats contained within the national House of Representatives. The determination of the number of delegates from each State would be determined by a system of 'block voting', where the winner of each respective State would receive all the delegates available. Whilst the number of delegates would be determined by a system of 'block voting', the electoral college would vote as individuals and not as representatives of the States as separate political bodies. The compound ratio of allotting delegate votes was considered by Madison to be a combination of both federal and national characteristics.

[72] J. Madison, *The Federalist*, no. 62, p. 412.
[73] J. Madison, *The Federalist*, no. 63, p. 413.

Hamilton believed that decisive action could only be 'executed' through the agency of a single Executive, rather than through a Committee.[74] He contended that whereas the principle of a 'numerous body' was beneficial for the legislative branch, it was not appropriate for the executive branch.[75] In outlining the powers to be exercise by the office of the President, Hamilton argued that a comparison with a British Monarch was not valid.[76] It was Hamilton's position that the powers of the President were *less* powerful than that of a British King and, therefore, there was less to be feared from the position of the President. The categorisation of powers that Hamilton used to make his comparison is presented in Table 3.1 below. These categories show that the planned powers of the President were to be significantly more limited than that of the then British Monarch, King George III. Within this context, the President would not be simply a replacement for the British King, but would be an indirectly elected executive Head of Government and Head of State operating within a specified and limited framework. With the element of the qualified legislative veto in place, the predominance of the Legislature, as an institution, would be preserved.

**TABLE 3.1 COMPARISON OF EXECUTIVE POWERS**

| *Presidential Powers* | *Monarchical Powers of King of Great Britain* |
|---|---|
| Elected for four years | Perpetual and hereditary |
| Amenable to personal punishment and disgrace | Sacred and inviolable - royal prerogative of 'doing no wrong' |
| Qualified legislative veto | Absolute legislative veto |
| Commander-in-Chief of armed forces | Commander-in-Chief of armed forces |
| Cannot declare war or personally make treaties | Can declare war and make treaties |
| Confer no privileges | Makes noblemen from commoners; erect corporations with full rights - by royal charter |
| Cannot prescribe rules of commerce | Can establish markets; set commercial weights and measures; can 'coin' money |
| No spiritual jurisdiction | Supreme head and governor of the national church |

*Source: Federalist #72, p. 464*

[74] A. Hamilton, *The Federalist*, no. 70, p. 452.
[75] A. Hamilton, *The Federalist*, no. 70, p. 454.
[76] A. Hamilton, *The Federalist*, no. 69, p. 450.

Hamilton also argued that the office of President required the possibility of re-election. If there was to be no possibility of re-election, then he reasoned that the consequences would be:[77]

- no inducement to continue in office;
- greater temptation to take advantage whilst in office;
- likelihood that any experience gained would be lost;
- likelihood that experienced men would be have to stand down in times of crisis;
- cause instability in the Executive administration through constant changes in officials.

He considered that the re-election option would provide greater security for the people of America by allowing them to re-elect a President they favoured, rather than restricting the term of office and causing the people to become disenchanted with the system.[78]

In summary, then, the source of derived powers of the federal government of the United States is a 'mixed source' of both *national* and *federal* characteristics. Madison and Hamilton argued that there would be little common interest between the three different groups of electors in respect to the House of Representatives (being elected directly by the electorate), the Senate (by State legislatures) and the President (by an electoral college).[79] This would provide a balanced source of legitimacy within this new design of a republican form of government.

### 3.1.3 The Operation of Government Powers

The third relationship that Madison analysed was the operation of government powers. Madison considered that, in general, the operation of the Constitution would be *national* and the effect of the government's powers would be felt directly by the people as individuals in the nation, as *national citizens.* Madison did identify several exceptions to this direct impact - mainly the possibility of resolving disputes between States where a 'federal' court may have to have jurisdiction. He felt that

[77] A. Hamilton, *The Federalist*, no. 72, p. 464.
[78] A. Hamilton, *The Federalist*, no. 72, p. 467.
[79] A. Hamilton, *The Federalist*, no. 60, p. 399.

some exceptions were bound to arise but believed the essential nature of the operation of the government would still be as a *national government*.

Much criticism of the then proposed Constitution was made because the intended institutional structure of the government was not 'separated' enough and was seen to be counter to past American practice.[80] This criticism was based upon the view that the three branches of government, within the proposed Constitution, would not be kept totally separate and distinct as was the accepted view within the American Colonies of Montesquieue's maxim concerning the essential nature of free government. Madison's response was that the absolute separation of powers between the executive, legislative and judicial branches of government had not been followed within the constitutions of many of the then American Colonies, citing examples such as North Carolina, Maryland and Virginia, and that the criticism was not warranted either by reference to Montesquieu or to the sense in which the principle had been understood within the American Colonies up until that time.

Madison's task was to argue that the best way to maintain Montesquieue's maxim in practice was to ensure that the three branches of government were sufficiently separated to give each a constitutional protection against the other from the encroachment of exercising power. He argued that the notion of separation of powers was not subverted if the separation was not absolute, but was only subverted if the *whole* power of a branch was exercised by another (such as all executive power being exercised solely by the legislature).[81] Madison did not believe that the required protection could be found within a written document alone, as important as that would be, but argued that additional 'checks and balances' were needed to provide this protection.[82]

Madison did make the point at the time that, in his assessment of the British arrangements in the 1780s, they were in danger of ignoring the drawing of power towards the legislative branch or of Parliament. (We shall see below that Bagehot, writing approximately one hundred years later, confirmed this shift, though not so much as a confirmation of a process of ignoring a danger, but of actually embracing the notion of 'fusion' of powers, as opposed to 'separation').

[80] J. Madison, *The Federalist,* no. 47, p. 336.
[81] J. Madison, *The Federalist,* no. 47, p. 338. Note the rejection of this view in Britain by the 1860s through Bagehot's writing of the "excellence" of the British system being the 'fusion' of executive and legislative powers.
[82] J. Madison, *The Federalist,* no. 48, p. 343

Madison argued that, although the functions of government would be partially separate and overlapping, he did not believe that a written list of powers would provide a sufficient barrier to keeping the institutions apart. He believed that the different institutional branches of government required an internal structure of 'checks and balances' to augment their partial separation.[83] As the accepted view was that in a republican form of government the legislative branch would predominate, the legislature was required to be made so dependent upon and restrained by the consent of the electorate that it would not 'predominate' over the separately elected Executive government. As the President would be constrained within defined legal limits, the legislature would be restrained by its full dependence on the people upon which the legislature had the power to tax. As the legislature alone would have 'access to the pockets of the people', it would be sufficient to stop encroachments by the Executive or the Judiciary as their remuneration would be dependent upon the legislature. Madison also identified other internal balances as being through the division of the legislature into both the Senate and the House of Representatives, a different system of election, and different perspectives upon which their actions would be based (short-term versus long-term).[84]

A further mechanism that Madison considered appropriate within the republican design was a qualified veto power over the Legislature by the Executive. Within the framework of the Legislature being the 'predominant' branch, the ability of the Executive to resist the potential encroachment was seen by Madison to help fortify the position of the President. But it was not an absolute veto, as it could be overridden by a two-thirds majority vote of both Houses of Legislature. In this way, the principle of the Legislature being the focal point of a republican form of government was preserved. The qualified veto power would not be simply to restrict the President; it would enable the Executive some form of protection against improper laws.[85]

[83] J. Madison, *The Federalist*, no. 51, p. 356. Madison stated that 'ambition must be made to counteract ambition'.
[84] J. Madison, *The Federalist*, no. 51, p. 357.
[85] A. Hamilton, *The Federalist*, no. 73, p. 468. Also see J. Madison, *The Federalist*, no. 51, p. 357.

### 3.1.4 The Extent of Government Powers

The fourth relationship that Madison analysed was the extent of the powers of the government. Madison argued that as the powers of the Executive would only extend to specific limits (or enumerated powers) only, and as the residual power would be left to the States, the nature of the government could not, therefore, be considered *national*, but *federal*. This provided for a diffusion of power between both levels of government. Madison outlined different classes of powers when discussing the powers to be delegated to the national government, such as national defence, regulation of the interaction with foreign countries, the maintenance of trade between the States, powers over the seat of government (the District of Colombia), and other powers specific to the new government as a whole.[86] He argued that the division of powers was not determined to place one level at an advantage over the other. Rather, the Federal and State governments were different 'agents and trustees' of the people, constituted with different powers and designed for different purposes.[87] As the State governments were closer to the daily lives of the people, their influence over the people would be greater than the national government. This is not in an exclusive sense, but a complementary one.

The prevailing view was that people would be more interested in their local affairs, their families and neighbourhoods, ahead of their State governments and beyond to the national government. This contrast of influence supported the view put forward by Madison that the members of the federal level of government would be more dependent upon the state level of government, rather than the other way around.[88] A prime example that was used to show the contrast between the state and national levels of governments was that of the administration of criminal and civil justice, as it was an area of immediate and fundamental impact within the local community that would be a 'visible guardian of life and property, having its benefits and its terrors in constant activity before the public

[86] J. Madison, *The Federalist*, no. 41-46, pp. 293-336. These six essays deal with the powers delegated to the national government, as well as the powers that the States would be prohibited from exercising.
[87] J. Madison, *The Federalist*, no. 46, p. 330. Madison's criticism of the 'adversaries of the Constitution' was that they had lost sight of the bigger picture that the ultimate authority of the government, whether National or State, resided with the people and not the government bodies themselves.
[88] A. Hamilton, *The Federalist*, no. 17, p. 168. The general view, put forward by Hamilton, was that there was a hierarchy of influence beginning with the individual, then to the family, to the local community or neighbourhood, to the local government and then to the national government. Madison endorses this view in Federalist #46 where 'A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States'.

eye'.[89] Madison argued that the local government should have power over local affairs rather than to delegate a local power to a national government.

Within the area of the extent of powers, when looking at the *federal* relationships as a whole, it was not immediately specified in the words of the Constitution who or what body would determine whether any limits had been breached. Two main interpretations were to emerge. First of all, the internal check and balance between the Executive and the Legislature would provide sufficient defence against encroachment via the qualified legislative veto. Within this view, this constitutional balance would preserve the 'will of the people' as it would eventually allow the Legislature to prevail. The other interpretation was that it would be the judiciary that would give final interpretation as to the meaning of the Constitution and would determine if laws were valid or void. It would be the judiciary, in this view, that would be the branch of government that would be trusted to maintain the constitutional order and, thus, preserve the 'will of the people'. Eventually, the interpretation of judicial review prevailed through the opinions of Chief Justice Marshall, especially in the 1803 case of *Marbury v. Madison.*[90] Marshall accepted the approach of judicial review and, in doing so, established it as the basic doctrine of American constitutional law.

### 3.1.5 The Alteration of Government Power

The fifth, and final, relationship that Madison analysed in the proposed Constitution was the authority by which amendments to the Constitution would be made. On the one hand, Madison pointed out that if the amending authority were purely national, then a simple majority vote would be all that would be required. On the other hand, if the amending authority were purely federal, then the consent of each State would be required. As Madison had already shown that the Constitution would be neither wholly national or wholly federal, the amending authority would be more than a simple majority but less than the whole number of States. The mechanism of ratifying proposed amendments by a three-fourths majority of State Legislatures, or of a three-fourths majority of State

[89] A. Hamilton, *The Federalist*, no. 17, p. 169.
[90] B. F. Wright, p. 70. Madison argued that the internal balances between the Executive and the Legislative branches would provide protection against encroachment (Federalist #39 and #51). Hamilton viewed the judiciary as the main protection against encroachment (Federalist #78 and 81). It is also noted ( p 72 ) that Hamilton may well have developed the notion of judicial review late in the development of *The Federalist* papers in response to a letter published by Robert Yates in January, 1788.

Conventions, was considered by Madison to be a reasonable solution to amending a written constitution within a framework of federalism under a republican form of government.

Lijphart observed that referendums were not mechanisms normally employed by majoritarian constitutional systems of government.[91] Yet, referendums were part of the American Colonial experience as much as written constitutions were. With written constitutions appearing as early as 1638, the first amending clause appeared within Penn's Frame of Government in 1682. The prior Articles of Confederation had an amending clause, but was unworkable due to being based upon the unanimous consent of the States. By 1787, the existence of an amending clause was an accepted part of the constitutional arrangements that supported a system of government that was limited by law.

In summary, the significance of the American system lay in its solution to the problem created by its break from Great Britain and the Monarchy. In rejecting monarchy, an alternative arrangement had to found for constructing a new form of government. In America, the prevailing constitutional view at the time was that government without separation of powers (with some checks and balances) inevitably led to the abuse of power (or at least the unrestrained use of power), even if all the officers were elected by the people.[92]

The American constitutional solution lay, as argued by Madison, in the adoption of two new principles of constitutional design, namely *federalism* and *partial 'separation of powers'* . Federalism divided authority vertically between the new *national* government and the existing States. *Partial 'separation of powers'* divided authority horizontally whereby the branches of government were partially separate, but still overlapping.

[91] A. Lijphart, *Democracies: patterns of majoritarian and consensus government in twenty-one countries*, Yale University Press, New Haven, 1984, p. 4.
[92] McDonald, p. 32.

To protect against the potential abuse of majority rule, the Constitution separated the people from government in different ways:

- some representatives were elected directly (the House of Representatives);
- some representatives were elected indirectly (the Senate via State legislatures);
- an executive President elected indirectly via a temporary State-based electoral college;
- a time barrier where different representatives were elected for different terms.

By these means, election and timing, all power came from the people. The constraint upon this dependence, though, was that there was no way that all the people or a group of people could express their *will* both directly and immediately upon a minority as it could be in a classical direct democratic state. As Madison argued, they were not proposing a democracy, but a 'compound republic'.

A second aspect of the design of the constitutional system stemmed from the fact that the division and definition of power in the horizontal relationship of the branches of government was neither fixed nor precise. The Executive and Legislative branches both had a foot in each other's door. Therefore, the American Constitution did not enshrine a pure form of the doctrine of 'separation of powers', but only implemented a modified form of it. The consequence of some power being concurrent and free to shift in response to the same kinds of political struggles that had given rise to the American Revolution made the system flexible and, as a result, viable. Despite its design, though, it suffered a significant drawback in that it failed to appreciate fully the effect of political parties. This impact was felt with the election of a President and Vice-President from different political parties.[93] There were also fourteen amendments made to the Constitution shortly after it was ratified that collectively have been known as the federal Bill of Rights.

Despite the amount of literature on the American Constitution, the framework of the American form of government has still been misconstrued over time - especially in the area of separation of powers. Within the current republican debate in Australia, these misconceptions have occurred on both sides of the debate. Turnbull has claimed that the '*founders of the American republic were concerned to*

*establish a clear separation between the three branches of government'*.[94] The notion of a clear separation is not altogether accurate. McGarvie, on the other hand, has claimed that the *'American Founding Fathers created their Constitution upon the British model but provided that the President, unlike the British Monarch, be elected'*.[95] This view does not take in the political values behind Madison's construction of *federalism* and how different it was in nature to the construct of the constitutional arrangements of Great Britain at the time. It has already been shown that the American move to a republican system of government was a result of rejecting Monarchy and parliamentary government, rather than building upon it.

## 3.2 British Responsible Government

The second major tradition that has helped shape Australia's system of government is that of the British Westminster-style of government, often described as 'responsible government', whereby executive political authority is vested in a hereditary Monarch and exercised through a Parliament which exercises, more or less, the same executive political authority. This Westminster-style tradition of government was inherited in the Australian States by virtue of being originally created as separate British Crown Colonies. It is relevant, then, to review the key values behind this Westminster-style of democracy, as it informs us of the source of parliamentary government which, today, is in conflict with the structural overlay of federalism as constructed at the time of Australian Federation.

The description most often used of this model of parliamentary government is that articulated by Walter Bagehot in his observations of the British constitutional arrangements during the 1860s. Bagehot's description is useful as an analysis of the workings of the British Parliament from the viewpoint of an outside observer - though he once tried to be elected to Parliament himself. Whilst he described his observations as the 'English Constitution', it would be more accurate to describe it as the 'British Constitution' as it covered both England, Scotland and Wales.[96]

[93] McDonald, p. 35.
[94] M. Turnbull, *The Reluctant Republic*, William Heineman Australia, Melbourne, 1993, p.114.
[95] R. McGarvie, *Democracy: choosing Australia's republic*, Melbourne University Press, Melbourne, 1999, p. 140.
[96] This was also true of such writers as Blackstone and Dicey.

Bagehot's observations were of a system undergoing subtle changes in the nature of how democracy was defined within Britain, a context much different to that which Madison had found himself. Madison was constructing a set of constitutional arrangements from first principles after the War of Independence against the British. The main thrust of Bagehot's analysis, on the other hand, was of an existing system changing form from one whereby executive political authority was exercised by the British Monarch alone, to that within which the authority of the Monarch was placed in the hands of the 'popular assembly' of the Parliament, which would exercise, more or less, the same political authority though the agency of an executive Cabinet, led by the Prime Minister. It is within this framework that Bagehot described the Cabinet as the "buckle", the institution, that joined the legislative and the executive functions together.

Vile describes this transition as one from a mixed and balanced constitution of King, Lords and Commons, as would have been described before the early nineteenth century, to a new constitutional theory of balance, within a framework of parliamentary government, based in the House of Commons.[97] A more legalistic description of this Westminster-style of democracy, describing the legal standing of Parliament in terms of 'parliamentary sovereignty', was produced by Albert V. Dicey in 1885 in his *Law of the Constitution.* Dicey was a lawyer and his analysis provides a more defined legal view to the status of the constitution and the position of the British Parliament. Dicey, too, observed that ultimate unfettered authority (or 'sovereignty') had moved from the Monarch alone to that of 'legal sovereignty' being exercised within Parliament and 'political sovereignty' being exercised by the electors of parliamentary members.[98]

Bagehot contrasted the changing nature of British democracy to the accepted theory behind it by characterising the British system as being inherently practicable and flexible, and able to change as circumstances required. By describing the British constitution as a 'living constitution' that was in a state of constant change, he stressed that the foundation of the constitutional set of arrangements were not based upon a formal, written document, but was based upon parliamentary law and the operation of 'conventional' parliamentary procedures.[99] This British Westminster-style of

[97] Vile, p. 220. Vile identifies the lecture papers of Prof. J.J. Park published as "*The Dogmas of the Constitution*", London, 1832 as a possible input to the Bagehot's writings.
[98] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*. [1885], Liberty*Classics*, Indianapolis, 1982, p. 285. This is a reprint of Dicey's 8th edition, published by Macmillan, London, 1915.
[99] W. Bagehot, *The English Constitution* [1867], Collins, London, 1963, p. 267. Bagehot described the set of British constitutional arrangements as 'in constant change'.

government was the product of slow, informal growth, as opposed to the deliberate formal design that Madison was required to address.

Bagehot argued that you could not understand the British political institutions, unless they were conceived as being divided into two parts - one 'dignified' and the other 'efficient'[100]. The dignified parts were those parts which 'excited and preserve the reverence of the people'. The efficient parts of the British institutional set of arrangements were those with which the system actually operated and through which exercised the executive authority vested in the Crown. The Monarchy was once 'efficient', but had by the nineteenth century become 'dignified'. The House of Lords has also become, in the main, dignified but still retained an ability to check the House of Commons (later effectively removed through the Reform Act of 1911) . The House of Commons, the lower house of Parliament, had become the 'efficient' element of the British Westminster-system, with the Cabinet being the 'efficient secret' through which political power was exercised.

It was in this sense, with the Cabinet led by the Prime Minister, centred in the House of Commons, exercising, more or less, the executive political authority of the Crown, and being an elected assembly (albeit a restricted franchise at the time), that Bagehot considered the British system to be a 'disguised republic'. Bagehot contended that the Monarchy, within this type of democracy, acted as merely a disguise to the effective exercise of power by the Cabinet. The use of the Monarchy was especially important in allowing changes to take place within the Cabinet to occur without disruption.

[100] Bagehot, p. 61.

### 3.2.1 The Monarchy

> *The use of the Queen, in a dignified capacity, is incalculable. Without her in England, the present English Government would fail and pass away.*[101]

In analysing the institution of the Monarchy within the Westminster-style of democracy, Bagehot observed that there were four general aspects to a constitutional monarch as developed within the British context, namely: [102]

- Monarchy was a strong form of government;
- Monarchy strengthened the system of government with the strength of religion;
- Monarchy acted as the Head of Society or Head of State;
- Monarchy acted as a Head of Morality for society at large.

The first aspect of Monarchy that Bagehot addressed was that he believed Monarchy provided for a strong form of government as the position of the Monarch was easily understood by the majority of the British people, while the real exercise of power was carried out behind the 'seasonable addition of nice and pretty events'.[103] Bagehot did not believe that the majority of the British public had the capacity to cope with any other form of government. In this way, his appreciation of the state of mind of most of the British people was rather bleak, a point drawn out by Galligan in his discussion of Bagehot's view of the British public.[104]

The second aspect of the British Monarchy that Bagehot considered important was that it strengthened government with the strength of religion. He could not easily describe why this seemed to be the case but believed it to be true. He assessed the loyalty to the Monarch as being an outgrowth of the religious traditions of the British people. He described this to be the case, as up to 1688 the legitimacy of Monarchy was held by the assertion and popular acceptance of the notion of

[101] Bagehot, p. 82.
[102] Bagehot, p. 82.
[103] Bagehot, p. 85.

'divine right' to rule. After 1688, this sentiment had become much weaker through the successive changes in the line of succession to the British throne.[105] Bagehot observed that if you asked the people, the 'Queen's subjects', by what right she ruled, 'they would never have told you that she rules by Parliamentary right, by virtue of 6 Anne, c. 7'.[106] Dicey also illustrated this statutory basis of the Crown in Britain by highlighting the *Act of Settlement 1701, 12 and 13 William III., c. 2,* as well as *6 Anne, c. 7.*[107]

The establishment of the Monarchy by Parliament, in the absence of the notion of 'divine right to rule', was simply an expression of 'parliamentary sovereignty' whereby Parliament exercised executive political power upon any legislative subject it liked. The Monarchy was merely another subject to legislate upon. This view of the source of legitimacy of the government was, though, in stark contrast to the American tradition as articulated by Madison. Instead of embracing the notion of 'parliamentary sovereignty', the American Colonial leaders, as we have seen, founded the legitimacy of the government upon the notion of 'consent', as expressed by the likes of John Locke.

These differing political values will become more apparent in addressing the constitutional design of a Madisonian republic for Australia in Chapter Two.

The third aspect of Monarchy that Bagehot considered important was that the Monarch would be the 'Head of Society', or as we would describe today, the 'Head of State'. Bagehot argued that the position of the Monarchy would fulfil the role of Head of State like no other. Bagehot contended that the Monarchy would provide pageantry and stability in the position of Head of State (through its hereditary basis), and allow the Cabinet and the Prime Minister the ability to concentrate on the exercise of the political power. If the Monarchy did not exist, he argued, the Prime Minister would become the 'first person' in the eyes of the nation and reduce the effectiveness of the Cabinet as the 'efficient secret' of the British system.

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[104] B. Galligan, *A Federal Republic*, Cambridge University Press, Cambridge, 1995, p. 19.
[105] Bagehot, p. 88. Bagehot draws attention to the change in the line of succession after the Crown was declared 'vacant' by Parliament, thus removing James II. As a result of the Acts of Settlement, the Monarch could hardly describe his/her legitimacy as being by 'divine right', rather more by 'parliamentary right'. The writings of John Locke are noted by Bagehot for his argument against the notion of rule by 'divine right' and for the support of William and Mary being installed on the British throne after James II.
[106] Bagehot, p. 89.
[107] Dicey, p. 6.

The fourth aspect of Monarchy that Bagehot observed was that the British people had come to regard the Monarch as an example of social morality; as a role model of virtue. This, though, tended to be more a facet of the individual Monarch rather than some inherent quality in the constitutional arrangement itself. Bagehot considered that the virtues of Queen Victoria and George III had sunk deep into the popular heart. This influence could be positive as well as negative, as neither George I, nor George II, nor William IV were patterns of great family merit; George IV was, Bagehot asserted, decidedly 'a model of family demerit'.[108]

The point Bagehot was trying to illustrate was that by leaving this aspect of Monarchy, as a role model to the whole community, to the accident of birth was not an acceptable foundation in providing for stability.

Bagehot described that although the House of Commons had inquired into most things, it had never had a 'committee on the Queen'. That is, there was no authentic blueprint to say what a Monarch could actually do. A description of the Monarch's prerogatives had been provided by Blackstone, and had divided the prerogatives of the Crown into 'direct prerogatives' (such as not being able to be brought before the Courts as the Monarch 'could do no wrong'; and support of a publicly funded income or 'civil list') and 'indirect prerogatives' (such as the regulation and 'fixing' of weights and measures in domestic commerce and being the commander-in-chief of the armed services).[109]

Whilst Blackstone may well have given coverage to the powers of the Monarch, Bagehot's argument was that the essential utility of the monarchy was that it maintained a 'mystic and reverenced position in order to provide a 'disguise' to the efficient exercise governmental power by a Cabinet government that could change 'without heedless people knowing it'.[110] This, then, was the basis for Bagehot proposing his 'three rights' to be expressed by the Monarchy - 'the right to be consulted, the right to encourage, the right to warn'.[111] Bagehot concluded that a Monarch of 'great sense and sagacity would want no others'. Such Monarchs, Bagehot believed, were rare due to the hereditary basis of the Monarchy itself.

[108] Bagehot, p. 96.
[109] W. Blackstone, *Commentaries on the Laws of England,* Cadell & Davies, London, 1809, p. 275. See Book 1, Chapters 7 and 8 for a review of the King's prerogatives. Chapter 7 looks at prerogatives based upon the 'royal character' and 'royal authority' of the Monarch. Chapter 8 looks at various fiscal prerogatives, some of which still exist today - such as the royal income or 'civil list'.
[110] Bagehot, p. 97.

Within the contemporary context of Australia, the prerogatives of the Crown have been divided up into 'reserve powers' and 'non-reserve powers' and exercised by the local representative of the Crown in Australia, the Governor-General. The issue of the 'reserve powers' is a contentious one within the recent republican debate. The codification of 'reserve powers' has been seen as a way of restricting the possible exercise of power by the Governor-General, such that an event like the 1975 dismissal of the then Whitlam Government would not re-occur. The defence against codification is to ensure 'flexibility and adaptability' to cater for any future circumstance and ensure no restriction of the exercise of a 'reserve power'. The submission has addressed this issue in chapter 2.

### 3.2.2 The House of Lords

> *The use of the House of Lords or, rather, the Lords, in its dignified capacity - is very great. It does not attract so much reverence as the Queen, but it attracts very much.*[112]

Although Bagehot observed that the House of Lords attracted a sense of nobility and reverence, he considered that it was not the primary assembly within the British Parliament by the time of his writings during the late nineteenth century. Bagehot submitted that it was once the primary assembly in the past, but the centre of the exercise of political power within Parliament had shifted to the lower house, the House of Commons, through the agency of the Prime Minister and Cabinet.

Several causes contributed to this shift. The main cause discerned by Bagehot was that a hereditary chamber or assembly could not fill members capable of handling the increasing size and complexity of government quickly enough, when compared to an elective chamber or assembly. With hereditary succession, there was no expectation to come to terms with the day-to-day 'business' of government as, Bagehot observed, they were more accustomed to dealing with issues relating to the arts or managing large estates. Legislative changes also diminished the influence of the House of Lords. The Reform Act 1832 also reduced the influence of the House of Lords such that the

[111] Bagehot, p. 111.
[112] W. Bagehot, p. 121. This further changed with the Reform Act 1911 where the House of Lords lost the right to reject legislation. Note the December 2000 example of the age of consent for homosexual relationships dropping to 16 being advanced to stage of Royal Assent without approval of the House of Lords.

chamber could only revise or delay the introduction of legislation, but could not reject it outright.[113] Though the House of Lords still provided something of an independent check against the lower house, it was not a very strong one. As we shall see, the ability of the Prime Minister to create "Life Peers' in the House of Lords, also diluted the power of the Lords in favour of the House of Commons.[114]

The history of the House of Lords in the early 1800s shows that the guiding principle was for the Upper House to 'yield' to the Lower House on important matters of public opinion, as expressed through the popular assembly in the House of Commons. Bagehot illustrated this principle in action by reference to the Corn-Law struggle in 1846 and the efforts of the Duke of Wellington to guide the House of Lords in its dealings with the House of Commons.[115]

In its operation of powers, the House of Lords was not seen by Bagehot as a co-equal chamber with the House of Commons. Adopting Lijphart's perspective on democracy, Bagehot highlights for this submission a shift to a form of democracy whereby one chamber predominates - to the point of being considered 'unitary' in form. This move of power away from the Upper House, and the Monarch, into the hand of the single-party Cabinet, led by the Prime Minister, was not the arrangement that had been adopted by Madison and the other American Colonial leaders.

[113] W. Bagehot, p. 128. Since the Reform Act 1832, the House of Lords had become what Bagehot described as a 'revising and suspending' House. It could alter bills; it could reject bills on which the House of Commons were not determined to pass. Bagehot contended that the House of Lords had ceased to be 'one of latent directors' and had become one of 'temporary rejectors and palpable alterers'.

[114] W. Bagehot, p. 132. Therefore, the balance of power in the House of Lords shifted to the majority party in the House of Commons. Bagehot argued that the Cabinet, as parliamentary executive, could say to the Lords, 'Use the powers of your House as we like, or you shall not use them at all'.

[115] W. Bagehot, p. 128. A letter from the Duke of Wellington to Lord Derby was used by Bagehot to illustrate this guiding principle of yielding to the House of Commons. Wellington's opinion was that the Lords should vote 'to that which would end most to public order, and would be most beneficial to the immediate interests of the country'. Therefore, the House Commons, as an expression of the interests of the country as a popular assembly, would prevail over the House of Lords. See also A. V. Dicey, *The Law of the Constitution*, p.305.

Though the power of the House of Lords had diminished somewhat to the point of Bagehot ascribing the House as a 'dignified' element within the British Westminster system, he did describe several important functions that the House of Lords did perform, namely:

- a Judicial function;
- a Criticising function, and;
- a 'Speaking' function

The judicial function of the House of Lords, Bagehot contended, had been ascribed to it by 'constitutional accident' since the Middle Ages[116]. Bagehot felt that the contradiction of this judicial function within the House of Lords was being made felt more and more over time.[117] Under the institutional arrangements of the British constitution, this judicial function was not entrusted to the House of Lords as a whole, but rather to a smaller committee of the House of Lords known as the Law Lords. Bagehot viewed this as an 'absurdity' due to the operational conflict between having two supreme judicial courts - the Law Lords and the other existing court, the Privy Council. He believed that the conflict was, by the 1860s, operationally resolved, but the institutional error from which it arose had not been fixed - that the structural error of having two supreme courts needed institutional reform.

The judicial function of the House of Lords was to hear criminal and civil appeals that lower judicial courts had granted leave to do so.[118] Its jurisdiction to hear appeals of this nature originated from the thirteenth century body with the medieval appellate role of the Monarch - the *'concilium regis ordinarium'*. This role was exclusively taken over by the House of Lords in the fourteenth century and it has exercised this role since that time.[119] This appellate function was given a statutory basis in the Appellate Jurisdiction Act 1876 which empowered the Monarch to appoint 'qualified

[116] Bagehot, p. 146.
[117] Bagehot, p. 147.
[118] L. Blom-Cooper and G. Drewry, *Final Appeal: A study of the House of Lords in its Judicial Capacity*, Clarendon Press, Oxford, 1972, especially Chapter 2 'A History of the Judicial House of Lords'. See also the Information Sheet No. 8, 'The Judicial Work of the House of Lords', from the Web-page of the House of Lords at [http://www.parliament.uk/pa/ld199697/ldinfo].
[119] R. Stevens, 'The Final Appeal: Reform of the House of Lords and Privy Council, 1867-1876, *Law Quarterly Review*, vol. lxxx, 1964, p. 343. Stevens outlines the changes to the jurisdiction of the House of Lords and the Privy Council from the Select Committees of 1811 and 1812, through to the time that the jurisdiction of the House of Lords was a settled issue, politically, under the Government of Disraeli in 1876. More recently, this was observed in 1998/99 with case of '*In Re Pinochet'*, consisting of the appeal by Gen. Pinochet against extradition back to Argentina

persons' - mostly Lords who were also ex-judges - to the body of 'Lords of Appeal in Ordinary', known as the Law Lords. Thus, the Law Lords could be considered a body of professionals as opposed to 'lay judges' with no judicial experience.[120]

The function of the Privy Council was also to hear various appeals to the Monarch, but especially from overseas Crown Colonies such as Australia and New Zealand. The statutory authority for this tribunal was established in the Judicial Committee Act 1833 and allowed its members to be from the House of Lords (thus overlapping with the Law Lords), past members of the Privy Council, as well as judges from the respective Crown Colonies themselves, such as the Australian colonies and New Zealand. Whilst Bagehot saw the existence of these two institutions as an institutional 'absurdity', they did focus on different avenues of appeal, one internal and the other external.[121]

The second function of the House of Lords, described by Bagehot, was the ability to criticise the Government of the day, the Cabinet, within the confines of Parliament from which the Cabinet was formed. Bagehot submitted that the House of Lords was an appropriate assembly from which to criticise the Cabinet government, as it was in no way dependent upon the House of Commons for its existence, given its, by and large, hereditary basis. The House of Lords also had, as a further consequence of its hereditary basis, no public constituency to fear and no real concern for the Government or Ministers of the day. In this way, the House of Lords could securely criticise and dissent from the views of the Prime Minister and Cabinet. It should be noted that this 'criticising' role, within a Westminster tradition, had in Bagehot's time not yet moved to the House of Commons in the role of the formalised and official 'Opposition'. With the advent of disciplined political parties, the criticising role was adopted by the main opposing party to that which formed

[120] Currently, there are twelve Law Lords and their role can be seen in the recent judgment of 'In Re Pinochet'. This judgement was in relation to the lawfulness of the issue of an extradition warrant issued against Augusto Pinochet for extradition to Spain to face trial for 'crimes against humanity' while he was the Head of State of Chile. Pinochet's petition was ruled valid due to 'apparent bias' in the previous 25/11/98 House of Lord's decision that allowed the extradition to go ahead, as one of the sitting Law Lords (Lord Hoffmann) was also a director of Amnesty International Charity Limited. The point of law upheld was that a judge cannot sit on a case in which he has a direct or perceived conflict of interest - or 'own cause'. The case was set to be re-heard before another committee consisting of other Law Lords.

[121] 'Privy Council to hear civil appeals', *The Scotsman*, 28/02/98, located at [http:194.61.49.3/htdig/ne/06/ne06appe980228.html] accessed on 12 August 1999. The distinction between appeal channels can be seen by the changes put into effect in the 'devolution' of legislative power from the British Parliament back to the Scottish Parliament at Holyrood - a move back to a form of self-rule since the Act of Union was passed in 1707. The House of Lords will no longer be the final Court of Appeal for Scotland-based civil cases. They will now be heard by the Scottish High Court sitting in Edinburgh. The only appeals allowed will be on constitutional grounds over the exercise of legislative powers by the Scottish Parliament, and made, not to the House of Lords, but to the Privy

the Cabinet government. This is the nature of the criticising function we see today in Australian parliamentary practice.

The third function of the House of Lords was even more important to Bagehot, in that the House of Lords, for its own members, had the ability to provide a political platform and a 'voice' for its members who happened to be Cabinet Ministers, as the House of Commons was usually overwhelmed with legislative work. In Bagehot's view, the 'leisured members of the Cabinet speak in the Lords with authority and power'.[122] This is still largely true today, whereby Upper House Ministers do not have to juggle their executive Cabinet responsibilities with those of a locally elected member of the Lower House.

The House of Lords, then, had merits and defects, but Bagehot feared that the Upper House would diminish in significance, more so due to apathy than from some external constitutional crises. Bagehot concluded that if most of the members of the House of Lords neglected their duties, or if all of its members continued to be of one hereditary class, then its power and influence would be less year by year, even to the point that he considered it possible that it would lose its power and influence completely, as had so much monarchical power already passed out of its hand and into the institutions of the Prime Minister and Cabinet.

Council. This would suggest that the issue of appeals from Scotland will be handle more as a external Commonwealth body than as an internal state of the realm - such as Wales (which unlike Scotland rejected the notion of 'devolution').

[122] Bagehot, p. 149.

### 3.2.3 The House of Commons

Bagehot argued that the excellence of the British Westminster-style of democracy was that it had achieved a 'unity of power' within the lower house of Parliament and that, within the institution of the Cabinet, the political authority vested in the Monarch would be, more or less, exercised by a *Cabinet Government.*[123]. This, Bagehot asserted, was 'single, possible, and good'.[124] Bagehot considered that the Cabinet government had become the 'efficient secret' of the British system.

The Cabinet, then, had become the political institution that provided a constitutional balance between the legislative and the executive branches of government. The Cabinet had become the place where legislative power and executive power were 'fused' together, or as Bagehot described it, as a 'combining committee - a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part of the State'.[125]

Bagehot considered the functions of the Lower House, the House of Commons, to be:

- A Choosing function;
- A Legislative function;
- A Financial function.
- An Expressive function;
- A Teaching function;
- An Informing function.

The main function of the House of Commons, according to Bagehot, was to choose the executive Cabinet by acting, as it were, as an electoral college to elect the Prime Minister. The result was usually that the leader of one political party or another was 'chosen'. Bagehot recognised, even in the 1860's, that an integral part of the process of selecting a Prime Minister was the influence of the

[123] Bagehot, p. 72.
[124] Bagehot, p. 221.
[125] Bagehot, p. 68.

political parties. Whilst the emergence of formal disciplined political parties was still several decades away, the notion that the Prime Minister would be the leader of the party or coalition of parties which could command majority support within the lower house was generally accepted. This selection process was founded upon 'conventional' habit as opposed to being prescribed within a formal, written law. This process is still the conventional habit in Australia today.

Dicey considered the Cabinet to present an interesting paradox in constitutional design. This paradox was that the parliamentary-executive, the Cabinet, had become, in both appearance and in name, what it originally was by actually operating as a *non*-parliamentary executive, where every Minister was appointed as a servant of the Crown, and was in form appointed and dismissible, not by the House of Commons nor by a joint sitting of both Houses of Parliament, but by the Monarch alone. The Prime Minister and Cabinet had become the executive vehicle of the State, where many executive powers of the Monarch had passed to the Prime Minister and Cabinet, such as peer creation, making treaties and administering the nation through the civil bureaucracy (though not a well organised bureaucracy in Bagehot's opinion).

Dicey speculated, in 1885, whether the British Cabinet would undergo a gradual, and yet unnoticed change of character, under which it would be transformed from a nominal parliamentary-executive into a fully-fledged non-parliamentary executive. Dicey considered it conceivable that the time may come when the forms of the constitution remain unchanged, but that a British Prime Minister would be directly elected to office by a 'popular vote' as was the American President.[126] As we shall see, the contemporary debate concerning the issue of a republic in Australia presents a timely opportunity for this submission to advocate such a constitutional arrangement as what Dicey speculated - a Madisonian republic for Australia.

The second function of the House of Commons that Bagehot identified was that of making law, by passing legislation. Bagehot saw that this was only less important than the role of choosing the executive Cabinet led by the Prime Minister. The problem with the performance of this particular function, Bagehot observed, was that much of the legislation that was being produced by the Commons was not actually law, as was traditionally viewed, but in reality only regulations to cover specific events. The statute books, Bagehot contended, were filled with such legislation for specific

[126] Dicey, p. 335.

events such as the building of particular railway lines and the like, rather than general, or common, laws.

The third main function that Bagehot ascribed to the House of Commons was a financial one, in that he observed that the royal prerogative to tax the British people had now shifted to House of Commons and was exercised, more or less, by the Cabinet led by the Prime Minister. The Ministers now had the responsibility to raise and levy taxes, but also the responsibility to ensure that the money raised as government revenue was not over-spent.

> *In truth, when a Cabinet is made the sole executive, it follows it must have the sole financial charge, for all action costs money, all policy depends on money, and it is in adjusting the relative goodness of action and policies that the executive is employed.*[127]

Bagehot viewed the House of Commons, now that it was 'the true sovereign' and appointed the 'real executive', as no longer being able to be the checking, sparing, economical body it once was. Those attributes had now moved specifically to the Cabinet, where the real spending and taxation decisions were made. The negative impact of this shift was to diminish the role and importance of those members of the House of Commons that were not in Cabinet - that is, the 'backbenchers'.

The other functions identified by Bagehot - an expressive function, a teaching function and an informing function all relate to parliament's role as an information exchange, as it were, on political issues being debated and deliberated before it. The House of Commons was, first of all, an institution which was an avenue for the British voting public to express its opinion though the electoral process. Whilst the voting franchise was restrictive at Bagehot's time, it was more dependent upon the voting public than was the hereditary House of Lords and the Monarchy. The House of Commons was also an institution from which the British public could be educated about issues before it.[128] Bagehot did consider, though, that this teaching role was one of the tasks the House of Commons did the worst. Lastly, Bagehot ascribed the House of Commons with an informing function - a function to bring before the British people the ideas, grievances, and wishes of special classes of people or interests. Bagehot considered this function analogous to the medieval

[127] Bagehot, p. 155.
[128] Bagehot, p. 152.

function of expressing the feelings of the 'people' to the Monarch. Bagehot viewed a wider voting franchise (later implemented in 1867) as acceptable if it was to be seen as a way to improve the informing and teaching functions of Parliament. Bagehot considered that these function would be defective until it was seen that the special interests of the working class were able to be expressed within Parliament.

From a consideration of these functions, Bagehot concluded that Britain was now ruled by the House of Commons, though it may be said that the House of Commons did not rule, it only elected the rulers. Hence, Bagehot's description of the British Westminster-style of democracy as Cabinet Government.

The success of this system was considered by Bagehot to be primarily due to the peculiar provision of the British constitution which placed the choice of the executive in the 'People's House'. He believed it could not have achieved this but for two constitutional provisions which he ventured to call the 'safety-valve' and the 'regulator'.[129]

The 'safety valve' of the Constitution was the ability of the Executive to create new peers in the House of Lords. The principle was that if a majority could not be found in the House of Lords, the executive (either the Monarch or as advised by the Prime Minister) had the constitutional power to create one - thereby breaking any deadlocks that may exist between the two Houses. The operation of the 'safety valve' allowed the Prime Minister to overcome 'unworkable' Parliaments. Rather than being centred on the Lower House, it is focused on overcoming resistance to the Government of the day in the Upper House.

Bagehot identified two modes in which this peer-creating power operated. The first was by the constant, gradual, creation of life-peers by the Prime Minister. The Prime Minister, as the head of the predominant party in the elected assembly, was considered by Bagehot to be the proper person to slowly modify the composition of the House of Lords. In this way, the House of Lords, which perhaps was initially 'hostile' to the Prime Minister, could be slowly harmonised to the public opinion that the Prime Minister represented in the 'popular assembly'. The second mode was where

[129] Bagehot, p. 221.

the Monarch, in times of political crisis, had the power to create sufficient peers in the Upper House to avert possible 'bloodshed and civil war'.[130] Whilst this situation had been rare, Bagehot offered two cases of it occurring. As a result, the peer-creating power of the Monarch maintained a great and restraining influence or 'check' on the House of Lords.

The 'regulator', as Bagehot ventured to call it, within the constitution was the power of dissolving the Lower House of Parliament, the House of Commons, which by convention determined the composition of the Government of the day. That is, under normal circumstances, the Prime Minister was able to initiate the dissolution of Parliament and cause an election. Therefore, if the Prime Minister could not get his way in one particular Parliament, he could dissolve the Parliament and later appeal to a newly constituted assembly after an election. Bagehot's opinion was that there was nothing more powerful than a freshly elected Government.

> *The mode in which the regulating wheel of our Constitution produces its effect is plain. It does not impair its authority of Parliament as a species, but it impairs the power of the individual Parliament.*[131]

Dicey, on the other hand, did not wholly vest this power in the hands of the Prime Minister, but still ascribed this power of dissolution to the Monarch in that the Monarch could still 'strip an existing House of Commons of its authority'. He considered a forced dissolution by the Monarch allowable, or necessary, whenever the wishes of the Parliament were, or could fairly be presumed to be, different to the wishes of the nation. Dicey used the events of the forced dissolutions in 1784 and 1834 to support this continued doctrine.[132] Within this framework, the forced dissolution of the Whitlam Government in 1975 could well be described as merely drawing upon past 'conventional' practice, within a British tradition, in the operation of the power of dissolution.

Bagehot considered that these two constitutional attributes were among the most important, and the least appreciated, parts of the British system of government, and that many errors had been made in copying the British set of constitutional arrangements from not comprehending them.

[130] Bagehot, p. 233.
[131] Bagehot, p. 222.
[132] Dicey, p. 288.

The classic model of British parliamentary government, as observed by Bagehot and others, centred on a system of parliamentary democracy, with a parliamentary body - the Cabinet - exercising both executive and legislative powers.

The Head of State was a constitutional Monarch with real power - not merely a ceremonial and impotent King or Queen. The 'reserve powers' were real and could be used. Though many of the prerogatives - non-reserve powers - had passed to the Prime Minister and Cabinet, the Head of State was not simply a puppet or a rubber stamp.

Within a bicameral system of Parliament - with an Upper and Lower House - the 'Monarch alone' had become 'Monarch in Parliament'.[133] Executive power was centred on the elected Lower House, where the conventional practice of the day, and still today, was that the majority party in Lower House formed the Government of the day, with a Cabinet led by the Prime Minister. The Cabinet did not enjoy unlimited power, though, as the Monarch still possessed 'reserve powers' and the Cabinet was still nominally *responsible* to Parliament and to the voting electorate at each election. This was the form of *responsible Cabinet government* that developed in Britain during the nineteenth century and was adopted by the Colonial governments in Australia.. This was the system of government which was most understood by the delegates that attended the Australian Federation conventions during the 1891-1897 period that led to proclamation of the Commonwealth Constitution in 1901.

[133] A. Parkin, 'The Significance of Federalism: A South Australian Perspective', in *South Australia, Federalism & Public Policy,* A. Parkin (ed.), Australian National University, Canberra, 1996, p. 4.

## 3.3 Australian Federation

Within the debate preceding the November 1999 referendum on the issue of an Australian republic, much has been said about our 'Founding Fathers' and the stable system of government that they provided.[134] But is this view an accurate assessment of the constitutional design produced at Federation or did our system of government include some inherent conflicting values? Was the Australian Constitution a product of 'popular sovereignty' of the people (an ascendant view) or was it an instrument of the British government created to delegate political authority over domestic affairs to the Colonies of Australia (a descendant view)? The purpose of this section is to review the result of Federation, within the general framework that Madison himself used in his analysis of the then proposed American Constitution within *The Federalist #39*. This analysis will provide a useful comparison and guide, a foundation for the proposed republican model detailed in chapter two.

Galligan, in looking at the manner in which the Commonwealth Constitution was ratified, has provided the perspective that the basis upon which Australia's system of government was founded was decidedly through the popular 'sovereignty' of the people and was not simply an exercise of authority by the British Imperial Parliament.[135] Galligan presents two major arguments that underscores this view. First of all, a series of popularly elected constitutional conventions were held over the 1897/1898 period to produce a draft Constitution. These conventions, held in Adelaide and Melbourne, parallelled the American experience of constitutional development and provide a basis for arguing for the legitimacy of the Federation process.

[134] Australians for Constitutional Monarchy, "*Why Australia should not become a republic*", 30 May 1997, published on the Internet at [http://www.norepublic.com.au/about/viewpoint.html] accessed on 13 July 1998.
[135] Galligan (1995), p. 25.

These conventions were in contrast to the earlier convention held in Sydney during 1891, where the delegates were all appointed from their respective colonial parliaments and failed to attract the attention, or the confidence, of the colonial public to the issue of Federation. As noted by Galligan:

> *Grass-roots initiation by the Australian Natives' Association, Federation Leagues and Border Leagues, culminating in the Corowa Conference of 1893, reactivated the federation movement on a popular basis.*[136]

The second argument that Galligan puts forward is that the ratification process of the then proposed Constitution was achieved through the popular endorsement of the voting public in each of the participating Colonies. A referendum was held in accordance with the various Enabling Acts of each Colony to which the proposed Constitution was put forward. As in the case of the American experience, a written Constitution was presented for approval within each Colony for consent. The first referendums were held in 1898 and were ratified by a majority of voters in four Colonies (Victoria, South Australia, Queensland and Tasmania) but failed to reach the required majority in New South Wales. Adjustments were then made to the proposed Constitution and a second series of referendums were held in 1899. The electors in the five participating Colonies passed the referendums, while Western Australia chose to wait and see what the outcome would be and eventually ratified the Constitution in 1900. The result of the second-round referendums are presented in Table 3.2 which details the size of the majorities gained in each Colony.

| **TABLE 3.2 REFERENDUM RESULTS - SECOND ROUND, 1899.** | | | | | | | |
|---|---|---|---|---|---|---|---|
| | **NSW** | **VIC** | **SA** | **QLD** | **TAS** | **WA** | **TOTAL** |
| **Yes** | 107,42 | 152,65 | 65,99 | 38,488 | 13,437 | 44,800 | 422,788 |
| **No** | 82,741 | 9,805 | 17.05 | 30,996 | 791 | 19,691 | 161,077 |
| **Majorit** | 24,679 | 142,84 | 48,93 | 7,492 | 12,646 | 25,109 | 261,801 |

*Source: Quick and Garran (1901), p. 225, 250.*

Whilst the popular movement towards Federation is not in dispute, it has been argued that the basis of 'popular sovereignty' in the 'Australian people' is not so clear as it might seem. Parkin suggests that the argument that popular sovereignty resides in the 'Australian people' overlooks the

[136] Galligan (1995), p. 26.

collective body of voters associated with each separate State as a separate political body.[137] For example, five national constitutional referendums since Federation have gained national majorities but failed due to a lack of consent by the States as separate entities. These referendums - question 1 in 1937, questions 2 and 3 in 1946, question 1 in 1977 and question 1 in 1984 - are detailed in Appendix 1. They show that while the national vote exceeded 50%, the number of separate States achieving a majority failed to reach the required 4 States.

Botsman argues that the Federation referendums of 1899 were far from representative of the voting public within the Colonies, as there existed a restricted franchise and a system of voluntary voting. Botsman argues that, far from displaying a popular mandate, it was a 'constitutional swindle' over the people of Australia that resulted in a conservative written Constitution that is hard to change.[138] Table 3.3 presents Botsman's argument that only 15.9% of the population voted in the 1899 referendums, with only 11.5% of the 'Australian people' voting in favour. The number of voters was compared to Botsman's own estimate of the respective colonial populations at the time of the 1899 referendums. These figures are reasonably close to the 1899 Census figures as provided by Quick and Garran, also detailed in Table 3.3. In Botsman's view, this fails to support the notion that Australia's Constitution was founded upon the 'sovereignty of the Australian people'.

**TABLE 3.3 COMPARISON OF , SECOND ROUND, 1899.**

| | NSW | VIC | SA | QLD | TAS | WA | TOTAL |
|---|---|---|---|---|---|---|---|
| **Yes** | 107,4 | 152,65 | 65,990 | 38,488 | 13,43 | 44,800 | 422,788 |
| **No** | 82,74 | 9,805 | 17.053 | 30,996 | 791 | 19,691 | 161,077 |
| **Total Voting** | 190,1 | 162,45 | 83,043 | 69,484 | 14,22 | 64,491 | 583,865 |
| **Majority** | 24,67 | 142,84 | 48,937 | 7,492 | 12,64 | 25,109 | 261,801 |
| **Est. Population** | 1,290, | 1,183,0 | 374,97 | 471,94 | 164,7 | 184,12 | 3,669,637 |
| **% Voting (A)** | 14.73 | 13.73% | 22.15% | 14.72% | 8.64% | 35.03% | 15.91% |
| **Census 1899 (B)** | 1,348, | 1,162,9 | 370,70 | 482,40 | 182,3 | 171,00 | 3,717,700 |

*Source: (A) Botsman (2000), p.52; (B) Quick and Garran (1901), p. 459.*

Yet while the argument that Australia's Constitution was founded upon the authority of 'the Australian people' exhibits some difficulties, it does highlight, nonetheless, the different basis upon which the Constitution was formed in that Australia's Constitution was the product of a popular

[137] Parkin, p. 6.

movement within the colonies of Australia itself as opposed to an imposition from the British Parliament.

The draft Constitution, after it was ratified by the second round of colonial referendums, was then taken to Britain to facilitate the enactment of the document via the British Imperial Parliament. As La Nauze observed, in contrast to the British North America Act 1867, the Australians had drafted the actual text of the enabling imperial statute down to the last detail and expected it to be accepted as it stood.[139] Whilst there were some technical concerns over the covering clauses of the proposed Imperial Act, the main objection to the proposed Constitution was the area of Privy Council appeals, as drafted in clause 74. Those in London to 'assist and explain' the proposal - Edmond Barton, Alfred Deakin, Charles Kingston, Philip Fysh, James Dickson and S. H. Parker - were not to know that the Colonial Office officials, apart from their chief, were predominantly on the Australian's side, even taking account of the clause covering Privy Council appeals. The stumbling block to the efforts by the Australians to get the draft Constitution enacted without amendment lay with the Secretary of State within the Colonial Office himself, Joseph Chamberlain, and the legal criticisms of the Law Office. After months of negotiations and meetings, a new clause 74 was proposed and accepted on 21 June 1900, which still allowed appeals to the Privy Council to occur but left open the ability to restrict the scope of appeals by Federal legislation under s.76 and s.77 of the Constitution in relation to the setting up of the High Court.

> *With Clause 74 restored in its new form, and a few slight technical re-adjustments, the Bill was now passed through the Commons and the Lords, amid appropriate felicitations. On 9 July 1900 the Queen's assent was signified to the Act 63 and 64 Vict., chapter 12, an Act to Constitute the Commonwealth of Australia. The making of the Constitution was completed.*[140]

The ratification of Australia's written Constitution has many parallels to the American experience and does provide a platform from which to argue that it was a legitimate Australian construct within the existing framework of British Colonial government that existed at the time. The process of

[138] P. Botsman, The Great Constitutional Swindle: A Citizen's View of the Australian Constitution, Pluto Press, Sydney, 2000, p. 50.
[139] J. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, p. 249.
[140] La Nauze, p. 269.

founding the Constitution was a national act that projected a new system of government into being, such that it was beyond being simply a British instrument of government. The referendum process and the negotiations held in London to secure its enactment provide a persuasive argument that Australia's Constitution was established through a process founded upon the notion of consent, albeit a constricted sense of popular legitimacy. In this respect, it displays more of the American tradition of constitutional development. Galligan ascribes the notion of popular sovereignty, or consent, as the foundation of both modern republicanism and constitutional federalism.[141] This, he argues, supports the assertion that Australia today is a federal republic. While this may apply to the process upon which our Constitution was founded, we need to look further at the result of Federation to gain a fuller perspective on what was constructed and intended by our Founding Fathers.

The Commonwealth Parliament, as created at Federation, was to consist of the Monarch, the Senate and the House of Representatives. The Governor-General would be appointed by the Monarch and would be the Crown's representative in the Commonwealth of Australia. The Commonwealth Parliament would be bicameral, as in both Britain and America, and consist of the notion of 'Monarch in Parliament', as analysed earlier in this chapter by Bagehot. It also contained, though, elements that were foreign to the British Westminster tradition in that the Constitution would be a formal written document and that the Parliament would incorporate a powerful and elected Upper House, the Senate.

The first of these elements established within the Commonwealth Parliament was the British Monarch, in which all executive authority was vested by the Constitution. The British legislative foundation of the Monarchy, in the 1701 Act of Settlement and the hereditary nature of the Monarchy, established the source of power of the Monarchy within Australia's system of government. This has provided the definition for Australia's system of government as being described as a constitutional monarchy. It is unquestioned that the Commonwealth of Australia was established within the framework of the British Empire. Even s.5 of Andrew Inglis Clark's own draft constitution provided to the drafting committee on the Lucinda in 1891, vested all 'executive power and authority' in the Queen.[142] As Clark noted of the work of the Drafting Sub-Committee,

[141] Galligan (1995), p. 25.
[142] J. Reynolds, 'A. I. Clark's American Sympathies and his Influence on Australian Federation', *Australian Law Journal*, vol. 32, no. 3, July 1958, p.67. Reynold's article includes a full reprint of Andrew Inglis Clark's draft constitution, which more fully conforms to the original American principles of federalism.

they 'faced the position that they were going in for absolute legislative independence for Australia as far as it could possibly exist consistent with allegiance to the Crown, and also consistent with the power of the Imperial Parliament to legislate for the whole Empire when it chose'.[143]

The most notable element within the Commonwealth Parliament that was not drawn from the British Westminster system of responsible government was the elected Senate. The existence of the Senate is understandable given the desire of the pre-Federation colonies to unite together into one national union or *commonwealth.* The Senate, as in America, was to be composed of an equal number of representatives from each original State.

Yet, while the composition of the Senate was based upon the system of equal representation no matter what size population the respective States were and paralleled the American model, the source of powers of the Senate did not. In the original American design still in place until 1913, Senators were appointed by their respective State Legislatures. This underpinned the federal relationship of the U.S. Senate. In the Commonwealth Constitution, on the other hand, Senators would be elected directly by the people of their respective States. Therefore, the federal nature of the Senate would be diminished, more conforming to a 'national' house divided along State lines. The Senate would still adhere to Madison's guide of mixed representation and staggered elections, but its source was placed directly upon the voting public. Therefore, it is questionable whether the Senate could ever have been able to operate as a 'State's House', as the source of power for the Senate was not the States as separate political bodies. In Madison's terms, the Senate would have to be considered a national rather than a federal House.[144]

This is Galligan's point in highlighting that Quick and Garran were not accurate in describing the Senate as a federal House, given the more national basis of representation.[145] If the representatives of the Senate were appointed by the State Legislatures, as was proposed in the 1891 draft, then the nature of the Senate would have been more accurately described as being *federal.* With the source of representation changing at the Adelaide session of the Conventions, the nature of the Senate

[143] J. Reynolds, p. 66. Inglis Clark's comments were reported in the Hobart *Mercury,* 17th August, 1897, as he was debating the Commonwealth of Australia Bill from the second National Convention in the Tasmanian House of Assembly.
[144] C. Sharman, 'The Australian Senate as a States house', in *The Politics of "New Federalism"*, Flinders University, Adelaide, 1977, p. 65.
[145] Galligan (1995), p. 68.

became more *national* instead.[146] As Quick and Garran noted, the "principle of popular election, on which the Senate of the Commonwealth is founded, is more in harmony with the progressive instincts and tendencies of the times than those according to which the Senate of the United States and the Senate of Canada are called into existence". The basis of representation of the Senate was an expression of the desire of leading Federationalists in advancing the goals of greater democracy. This basis can be seen as an extension of the Colonial experience, as observed by Henry Parkes:

> *… we must try and evolve our structure bit by bit from the constitutional conditions and the practical experience of the several colonies. The thing must grow out of whatever exists.*[147]

This submission will later argue that the same sentiment is equally valid today, more than one hundred years later, where Australia's system of government has developed to the point where a republican form of government is a reasonable and practical step to take to adjust the constitutional balance between the institutions of the Parliamentary-Executive or Cabinet, led by the Prime Minister, and the Commonwealth Parliament itself.

The Australian House of Representatives bears a resemblance to the House of Representatives in the United States of America, and occupies a similar position within the Commonwealth Parliament.[148] The Australian House of Representatives, though, has more in common with the British House of Commons than with the American Lower House. The members of the House were to be elected by the eligible voters, as with both British and American traditions. The members of the House, in aggregation, would represent a national constituency, as the House would be composed of district seats distributed across Australia as determined by population. The House of Representatives would have pre-eminence in relation to finances, as all bills dealing with general revenue, appropriation and taxes would have to be originated in the Lower House. Lastly, the Executive Government would be determined by the party balance in the House of Representatives. These attributes provided an insertion of the British Westminster system of responsible government into the Commonwealth of Australia. This was also the colonial experience and the expected norm to be carried through the Federation process.

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[146] Quick and Garran, p. 412.

[147] Reynolds, p. 65. Quoted from a letter written by Parkes dated 18th February 1891. This letter forms part of Parkes's personal papers located at the Mitchell Library, NSW.

[148] J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, The Australian Book Company, London, 1901, p. 445.

The difference with the House of Representatives in relation to the British House of Commons, on the other hand, was that it was, as part of the Commonwealth Parliament, limited by a written Constitution containing specific enumerated powers, whereas there was no such limitation upon the British Parliament. The recent action of the British House of Commons in October 1999 to end the 800-year-old system of hereditary membership of the House of Lords is an example of the sort of constitutional change that the House of Representatives is unable to implement in its own right in Australia.[149] The Constitution has limited changes to the written document and enforced an amendment process via a public referendum as specified in s.128, as detailed within Appendix 1.

The source of powers of the House of Representatives was specified within the Constitution. The legitimacy of the political representatives would be provided by the majority vote of the qualified electors in each district. In the American design, Madison noted that there was no absolute answer to the question of how to determine the number of representatives to have, but set a ratio of 1 member for each 30,000 qualified electors as a reasonable figure. Clark's 1891 draft contained a ratio of 1:20,000 electors.[150] With six Colonies joining the Federation, the quota for the number of electoral seats in the House of Representatives was established as 1:51,635 eligible voters based upon the 1899 Census. Table 3.4 presents the number of seats allocated in 1899 within each State, along with the population size. The original allocation of seats for the House of Representatives was defined in s.26 of the Commonwealth Constitution. The number of Senators would be linked by a ratio of half the number of the members in the House of Representatives, via s.24(i). The original States were guaranteed a minimum of 5 seats in the Constitution through s.24 - hence the figures for Western Australia and Tasmania.

[149] 'Oh, Lords, they're dis-a-peering', *The Australian*, 28/10/1999, located at [http://www.news.com.au/news_content/world_content/4358509.htm] accessed on 28-Oct-1999.
[150] Reynolds, p. 69.

| **TABLE 3.4 ORIGINAL ALLOCATION OF LOWER** | | |
|---|---|---|
| State | Pop. 31/12/1899 | Seats |
| NSW | 1,348,400 | 26 |
| Vic | 1,162,900 | 23 |
| Qld | 482,400 | 9 |
| SA | 370,700 | 7 |
| Tas | 182,300 | 5 |
| WA | 171,000 | 5 |
| Total | 3,717,700 | 75 |

*Source: Quick and Garran (1901), p.459*

The operation of powers and functions of the Executive of the Commonwealth are, for the most part, national in focus. Although the main administrative body was described in the Constitution as the "Federal Executive Council", the phrase 'Federal' did not actually describe the nature and form of the Executive. The Framers of the Australian Constitution declined to build the Executive in accordance with strict federal principles by making the Government somehow dependent upon the States. The Governor-General, as the Representative of the Crown in Australia, is a focus of national unity and an outward expression of Australia's link to the British Empire. In selecting a Prime Minister, the Governor-General is constrained by convention to choose the parliamentary leader who possesses a majority confidence of the 'national' House of Parliament - the Lower House or House of Representatives. This is the essence of the notion of responsible government in that it provides for a national government responsible to the Crown.[151] As we have seen, this was the main function of the Lower House within a British Westminster tradition.

Whilst the Constitution recognised the British tradition of government that the Executive power of the State is vested in the Crown (s.61), the discretionary powers would be exercised operationally by the Governor-General and a responsible Ministry (s.62), known as the Cabinet and led by a Prime Minister. This is consistent with the view put forward by Bagehot that the powers of the Executive were no longer operated solely by the Crown itself, but primarily by the Prime Minister and Cabinet. Quick and Garran make the comment that the British theory was not strictly applicable in Australia as the law-making function of the Crown was constrained by the Constitution and the

[151] Quick and Garran, p. 700.

limited powers of the Commonwealth Parliament, while the judicial function was separated out of the Parliament and vested in the High Court.[152]

The Governor-General would not be entirely helpless, though, as the Representative of the Crown still had a limited range of 'reserved powers' available under personal discretion. For example, the right to dissolve Parliament was reserved to the Crown and was one of the few prerogatives which could be exercised by the Governor-General according to his/her discretion as a "constitutional ruler".[153] A refusal to grant a dissolution would no doubt be grounds for the resignation of the Cabinet Ministry whose advice was disregarded. Such refusal could not be strictly regarded as unconstitutional. During the year 1899, three precedents occurred in Australia that demonstrated the exercise of the power of dissolution and showed that the Representative of the Crown was not a mere passive instrument in the hands of the Cabinet Ministry. The first was in September 1899, when Premier George Reid (NSW) was refused a dissolution, and resigned. The second was on 28 November 1899, when Premier Charles Kingston (SA) was refused and resigned. The third precedent was on 1 December 1899, when Premier George Turner (Victoria) was refused and resigned. These precedents showed that the local Representative of the Crown exercised undoubted prerogative power to grant or refuse a dissolution of Parliament, and could wield important influence in the life of a Cabinet Ministry and in the possible duration and action of Parliament.

Quick and Garran provide a picture of the notion of responsible government in that role of the Cabinet would be as an informal body that is "unknown to the law", as *it existed only by convention*.[154] The interesting point to note is that the original balance of the Constitution favoured the national elements inherent within the tradition of British Westminster system of responsible government. It should not come as a surprise that, more than one hundred years later, Australia's system of government, as will be argued in detail later in this submission, has shifted to the point of observable 'Executive Dominance'.

The legislative powers of government and, as a consequence, the Executive function to administer them, are vested in the Commonwealth Parliament by the Constitution. This is a requirement of the overlay of the principle of federalism and is an expression of the American design. This division of

[152] Quick and Garran, p. 702.
[153] Quick and Garran, p. 464.
[154] Quick and Garran, p. 705.

power is unknown within a British Westminster tradition.[155] These legislative powers of the Commonwealth Parliament can be categorised, first of all, as new and original powers not previously exercised by the Colonies, such as the power to legislate with respect to fisheries in Australian waters beyond territorial limits in s.51(x). Another category of powers are the old powers exercised by the Colonies that were redistributed by either being vested exclusively in the Commonwealth (such as customs and excise s.51(i)) or by being concurrently exercised by both State and Commonwealth (such as taxation in s.51(ii)).

The next issue that Quick and Garran addressed was whether the legislative powers of the Commonwealth were absolute (or plenary), or whether they were merely delegated from the Imperial Parliament in Britain. The significance of this distinction was that if the Commonwealth only exercised delegated power from Britain, by precedent in the Privy Council, it would be unable to further delegate any legislative power to a statutory body that the Commonwealth Parliament might create. The conclusion reached by Quick and Garran was that, first of all, as the words of the Imperial Act that created the Commonwealth Constitution were the same as those which created the British North America Act 1867, the Commonwealth was no simple delegate or agent of the British Imperial Parliament. Second, Quick and Garran assessed the authority of the Parliament, within the limits of the written constitution, to be as absolute and ample as the Imperial Parliament is in Britain. Third, within its constitutional limits, the Commonwealth Parliament could do what the Imperial Parliament could do, such as delegate to a statutory body the legislative power to make by-laws and regulations.[156]

Whilst the enumerated legislative powers within s.51 granted specific powers to the Commonwealth, these powers were not unlimited and did carry inherent boundaries. For example, s.51(i) granted the power to legislate in respect to trade and commerce 'with other countries and among the States'. It was an inherent limitation of this power that the Commonwealth could not legislate for trade and commerce that would be conducted within a single State and which did not cross that State's border into another State or foreign country.

[155] Quick and Garran, p. 508.
[156] Quick and Garran, p. 509.

> *It is not founded on any distrust of the Federal Legislature; it is not designed for the protection of individual citizens of the Commonwealth against the federal Legislature. It is, in fact, one of the stipulations of the federal compact.*[157]

There are other sections of the Constitutions in which limitations to the grant of power were placed. The grant of power over trade and commerce in s.51 is further limited by s.92 by restraining the Commonwealth from interfering with the freedom of inter-State trade and commerce after the imposition of uniform duties of custom. Also, s.98 restrains the Commonwealth from passing commercial regulations which give preference to one State over another. s.114 prohibits the Commonwealth from imposing a tax on property of any kind belonging to a State. Whilst these are powers that restrain the grant of specifically enumerated Commonwealth powers, there are also several outright prohibitions contained in the Constitution as constructed at Federation. The first part of s.116 declares that the 'Commonwealth shall not make any law for the establishing of any religion', while at the end of the section the stipulation is made that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

A significant prohibition is from s.71 that provides for the judicial power of the Commonwealth to be vested in the High Court of Australia and in other such federal courts.[158] The significance of this prohibition is that it recognises an element of the doctrine of 'partial' separation of powers and moved the judicial structure of the Commonwealth more in line with the American design. Within a British tradition of judicial powers being 'mixed' within Parliament, the appellate function of the judiciary is handled by the House of Lords. This was not carried through into the Australian Constitution.

Thus overall, using Madison's terminology, the operation of government powers was intended to be part national and part federal, but more predominantly the former than the latter.

[157] Quick and Garran, p. 510.
[158] A. M. Gleeson, *The Rule of Law and the Constitution*, Australian Broadcasting Commission Boyer Lectures, Sydney, 2000, p. 76.

In looking at the extent of government powers, Quick and Garran described that the functions of government as decidedly separated into three distinct departments, the Executive, the Legislative and the Judicial. This was a division common to both unitary and federal systems of government alike.[159] The difference between the American design, as detailed by Madison, and the Commonwealth Constitution was that the Commonwealth did not embody the notion of separation powers to the extent that Madison advocated for the US. As observed by Bagehot, the legislative and executive functions of government, under a traditional British Westminster view, were 'fused' together by the institution of the Cabinet. It was this institution that was transported into Australia.

The Australian Constitution created the High Court as the supreme judicial body within the Commonwealth. The High Court would be the 'crown and apex' of the judicial system[160], the "keystone of the federal arch" of the Constitution.[161] It would be both a court of original jurisdiction in specified matters (s.75, s.76), and also a court of appeal from the Federal courts as well as from the State Supreme Courts. This was a departure from the American design as there was little scope for appeal from the American State courts to the United States Supreme Court. Therefore, the nature of Australia's judicial system would be partly national and partly federal. The High Court, in common with the US Supreme Court, would be established with the notion of being the "guardian of the Federal Constitution".[162] It had a duty to interpret the Constitution and to prevent violations of it. Whilst the separation between the Executive and the Legislative branches would not be clear within the Constitution, the separation of the judicial branch would be.

In looking at the authority upon which alterations or amendments to the Commonwealth Constitution would be made, this was to be neither wholly national nor wholly federal - to use the Madisonian terms. In contrast to a British tradition, in which the constitutional arrangements could be altered by any act of the British Parliament, the Australian Constitution could not be altered by the Commonwealth Parliament alone, but was required to submit the amendment to the people for assent via a referendum, which would then require Royal Assent.

[159] Quick and Garran, p.649.
[160] Quick and Garran, p. 720.
[161] A. M. Gleeson, p. 86.
[162] Quick and Garran, p. 725.

There would be two methods to initiating an amendment: first of all, by a majority vote of both Houses of the Commonwealth Parliament and, second, by a single House of Parliament if one House passed the alteration by a majority twice, and it was rejected by the other House twice. In either case, the amendment process is best classified as a national act as the amendment would generally be initiated by the Government of the day in the House of Representatives. Whilst Parliamentary approval would give weight to a constitutional amendment, it would be far from a deciding factor for it to be successful. The referendum vote would be a federal act as in order to be passed, an alteration would have to be approved by both a majority of qualified voters (national), and a majority of voters in a majority of States (federal).

Quick and Garran interpreted this as follows:

> *It is an undoubted recognition of the qualified electors as the custodians of the delegated sovereignty of the Commonwealth.*[163]

This was Galligan's point about the nature of the amendment process in that it was the qualified voters ('the people') who were the authority by which changes to the Constitution would be made. Yet, there is more involved that just the referendum vote itself. The referendum could only be put to the people after it had been passed by the Commonwealth Parliament first, in one of the two ways outlined above. After the referendum is voted upon, it must be presented to the Representative of the Crown - the Governor-General - for Royal Assent. A British Westminster view of responsible government surrounds the process of amendment inherent in the referendum vote.

In terms of what the amendment process could achieve, there is no specific limit to the alteration power contained in s.128. Quick and Garran commented that while there was a prohibition on removing equal representation in the Senate without the State's consent, there was no prohibition specified to the removing of the requirement that the assent of a majority of States was necessary for the adoption of constitutional amendments. The consequence of this flexibility is that there is also no prohibition of moving the other way, by reinforcing the federal balance by moving to a republican form of government that incorporates the States in the appointment process of an Australian Head of State through the institution of the Senate, as detailed in chapter two of this submission.

[163] Quick and Garran, p. 993.

A summary view of the creation of the Commonwealth Constitution could be categorised as having:

- created a Constitution ratified through a national process of State conventions and popular votes:
- created a Commonwealth Parliament with specific powers, with residual powers being left to the States;
- created a Parliament operating under the notion of responsible government;
- created an elected Senate incorporating the equal representation of the States;
- created a 'separated' judicial system under the High Court, and;
- created an amendment process that incorporated both national and federal elements.

Quick and Garran's view was that the Commonwealth Constitution was a "compound", a view that drew attention to the composite nature of the new Constitution with elements from both a British and American tradition.[164]

## 3.4 Conclusion

The end result of the Federation debates during the 1890s, and the ratification process, was that the Commonwealth of Australia was proclaimed on the first day of January, 1901.

Federation was a practical effort to forge a new national identity by combining the then six British colonies through the principles of federalism. The main reasons for this 'union' were to establish a national presence in international affairs, most notably the issue of defence, and to take advantage of commercial trade between the States by creating an economic union though national laws and tariff control. The framers of the Australian Constitution accepted that some loss of political authority from the States to the national government would occur to enable this union to happen.

[164] Quick and Garran, p. 335.

These reasons bear a striking similarity to those of the then proposed American Constitution, where the objects of an 'energetic and active national government' were to be:[165]

- the common defence of the member States;
- the preservation of public peace (against internal disruption);
- the regulation of commerce between the States and other countries;
- the guidance of political and commercial business with other countries.

Within this framework, it is not surprising to see the element of federalism being utilised during the 1890s to achieve similar aims within the construct of the Commonwealth of Australia.

McMillan, Evans and Storey explain, in a useful way, that the result of the Federation process was largely a common set of expectations of how the new federal system and new national government would work.[166] They identify seven basic elements that illustrate the original thrust of Australia's Federation Fathers.

First of all, it was intended that there would be limited powers for the national government. The national government was principally only given those powers that it was seen to need in practice to fulfil the responsibilities of defence, external affairs, immigration and to smooth out inter-State trade. Not all these powers were made exclusive, but rather most were defined as concurrent powers along with the States - such as the power to levy income taxes. Second, it was intended that there would be substantial autonomy and residual power for the States. The respective States were left with the main business of government - education, health, law and order, public utilities, human services, etc. The States preserved their existing constitutions with the proviso within the Australian Constitution that where both entities legislated over concurrent powers, the Commonwealth legislation would prevail.

The third element highlighting the intent of the framers of the Constitution, according to McMillan, Evans and Storey, was that there would be a Senate that would provide an avenue for the people in

[165] A. Hamilton, *The Federalist*, no. 23, p. 199.
[166] J. McMillan, G. Evans and H. Storey, *Australia's Constitution: Time for Change?*, Allen & Unwin, Sydney, 1983, p. 40.

smaller populated States to voice concerns over issues where interests of the larger populated States such as Victoria and New South Wales might otherwise prevail. We have already seen that the way that the Senate was implemented was not in strict accordance to Madison's conception of federalism, but more a national House divided along State lines. It was expected that the Senate's independence would only be asserted in 'Federal' matters, and that the introduction of a 'strong' Upper House would not be incompatible with the principle of the British Westminster-style of 'responsible government' as practised in the pre-Federation colonies.

The fourth element of original intent was a subordinate role for territory and local government. It was expected that there would be some areas not part of any State jurisdiction that would require to be governed by the Commonwealth Government. Areas such as the seat of national government, the Australian Capital Territory, or any areas surrendered to the Commonwealth by the States, such as the Northern Territory later was by South Australia, would need a framework of government directly controlled by the Commonwealth. Within the overlay of federalism, the State Governments would be responsible for local government as part of the residual powers being left to them.

The fifth element of the intention of Federation, according to McMillan, Evans and Storey, was that there was to be a national common market and fiscal union. The commercial and economic advantages expected by the colonial leaders flowed from the union of the States into one national body, combined with the guarantee of free trade between the various States. It was expected that any imbalance between the States would be corrected by the Commonwealth, and that the Commonwealth would be prohibited from giving preference to any one State over another.

The sixth element was that there would be a limited role for government generally.[167] Whilst the political values inherent in the notion of federalism refer back to American political thought of the late eighteenth century, the political landscape generally owes more to the utilitarian and legalistic character of colonial leaders such as Henry Parkes. Hugh Collins argues that the nature of the adoption of federalism was a product of 'convenience rather than of conviction', as the practical or pragmatic need was to combine separate British colonies, with pre-existing political institutions,

[167] McMillan, Evans and Story, p. 47. "There might be a case for pushing or prodding here, or giving a helping hand there (thus the powers given to the Commonwealth to assist industry by tariffs and bounties, and to pay old-age invalid pensions), but there was not the remotest perception that it might be government's duty, or responsibility, to intervene in any systematic way in the economy or society at large".

together into one Commonwealth nation.[168] Federalism was expedient to ensure a limited range of cooperative action was available at the national level in matters such as defence, trade and immigration.

The seventh, and final, element of original intent was that there would be a separate judicial branch to enforce the rules. The Australian High Court, being modelled on the US Supreme Court, was expected to play an important role in determining the validity of legislation and executive Acts. The independence and impartiality of the High Court followed that of the Supreme Court. Justices could only be removed by the Governor-General upon an address to both Houses of Parliament on the grounds of proved misbehaviour or incapacity, and their remuneration could not be diminished during their term of office. While it was not envisaged that there would be any degree of inter-governmental conflict, the nature of the court under the framework of federalism ensured that the High Court would act as guardian of the Constitution, where its decisions would be authoritative and binding.

The next chapter, Chapter Four, looks at the changes and developments that have occurred since Federation and the relevance these of adjustments to the recent debate concerning a republican form of government for Australia. It further develops the argument of this submission that a conflict between the inherent political values behind federalism and responsible government had been set in place through the process of Federation itself.

[168] H. Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society', in *Australia: The Daedelus Symposium,* S. Graubard (ed.), Angus & Robertson, Sydney, 1985, p. 147.

## 4. CONTINUITY AND CHANGE SINCE FEDERATION

In this chapter, a century of continuity and change observed within Australia's system of government is reviewed in order to reveal the nature of the developments that have occurred since Federation and their impact on the Australia's system of government. By reviewing these developments, the chapter shows that our constitutional arrangements have shifted away from what was originally intended at Federation and that these developments are related to the tension or conflict in values inherent within Australia's 'hybrid' design, incorporating both the notion of the British Westminster system of responsible government and the American republican structure of federalism. These shifts in Australia's constitutional system of government have provided fertile ground for the contemporary debate over the issue of an Australian republic.

As has been seen in Chapter 3, the nature of Australia's system of government at Federation was essentially a pragmatic union of six pre-existing British Colonies, through the adoption of the American republican structure of federalism. It was also detailed in Chapter 3 that the British and American traditions were founded upon different conceptions of democracy and the construction of Australia's Federation drew upon both these sets of political values inherent within each conception of democracy. The focus of the British Westminster system was an executive Cabinet government, led by the Prime Minister, that 'fused', more or less, the traditional unfettered executive power vested in the hereditary Monarch together with the legislative power of the Parliament. The focus of the American design, on the other hand, was a form of republican government, whereby political authority was limited, divided and shared by representative institutions dependent upon, and restrained, by the consent of the electorate. While these conceptions of democracy contained different views as to how political power would be exercised and accounted for, as analysed by Lijphart in Chapter 1, it was not thought impossible at the time of Federation to combine these two different sets of political values into one system of government. However, this tension, or conflict, has underscored constitutional developments ever since.

The Commonwealth Constitution (s.1) defines the Parliament as consisting of the Monarch, the House of Representatives and the Senate. This chapter evaluates the changes that have impacted these institutions by using the four-dimensional framework outlined in Chapter 1, namely, the source from which their respective powers are derived, the operation of those powers, the extent of

those powers and the authority by which amendments can be made to those powers. This provides a consistent approach with that adopted in Chapter 3, and allows us to assess the degree of continuity and change experienced within Australia's system of government since Federation and the implications for the political traditions from which the Australian system draws its values. This flow of change and continuity, observed within Australia's system of government, has been characterised by Reid and Forrest as the *'trinitarian struggle'* between the Monarch, as represented by the office of the Governor-General, the Senate and the House of Representatives.[169] This chapter completes our review of Australia's system of government before embarking in chapter 5 upon an analysis of the key contemporary republican models to justify, in Chapter 2, why a Madisonian republican model will best resolve the conflict in the key values underlying the notions of the Westminster system of responsible government and those of federalism.

## 4.1 The Monarch

During the first three decades after Federation, the Governor-General was clearly seen as the local representative of the British Monarch. As was noted by Andrew Inglis Clark earlier, this is as would be expected given the political framework of the British Empire in which Federation was produced. Crisp argues that the Governor-General was seen more as a British ambassador who would provide a British presence in Australia and who would protect the British interests there.[170] La Nauze argues that one of the key concerns of the British Colonial Office preceding Federation was the protection of British commercial interests in Australia.[171] As a consequence, the Governors-General were initially British officials appointed by the British Monarch, on the advice of the British Government, to be the Monarch's local representative in the now-federated Commonwealth of Australia.[172] This precludes the notion that the Governor-General was established as Australia's Head of State. This is an important point to remember given the arguments put forward by both sides of the contemporary republican debate.

[169] G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press, Melbourne, 1989, p. 484.
[170] L. F. Crisp [1965], *Australian National Government*, 2nd edition, Longman, Melbourne, 1975, p.398.
[171] J. La Nauze, p. 253.
[172] L. F. Crisp, p. 412. Crisp details the political backgrounds of all 18 Governors-Generals up until John Kerr in 1974. There were 9 ex-British Government MPs, 1 ex-British soldier, 1 ex-British Lord, 1 ex-British biographer (Tennyson),

Whilst the position of the Governor-General was clearly seen as a British representative, the office underwent a subtle change of influence during this time which would, on the one hand, restrict the independence and scope for action of the position but, at the same time, adjust the emphasis of the position from a British to a more Australian office. These developments, punctuated by several Imperial Conferences, affirmed, as a consequence, the increased autonomy of the Dominion governments within the formal framework of the British Empire.

The first aspect of our Madison-derived evaluation, in respect to the office of the Governor-General, looks at the sources from which the ordinary powers of the office are derived. A.B. Keith asserts that the ordinary powers of the Governor-General were those conferred upon the office though the Letters Patent, used by the Monarch to appoint the Governor-General, and the powers defined within the bounds of the Commonwealth Constitution.[173] Keith argues that the restriction of powers to only those in the Constitution, as proposed by both Sir John Quick and Prof. Harrison Moore, was not a strong claim to make, as some of the powers conferred on the Governor-General were outside the scope of the Commonwealth Constitution Act, such as the prerogative power to confer oaths and pardon criminal offences.

In affirming the accepted view that the Governor-General was the local representative of the Crown in Australia, Higgins J. declared, in the *Wooltops Case* of 1922, that 'the Governor-General is not a general agent of His Majesty with power to exercise all His Majesty's prerogatives; he is a special agent with power to carry out the Constitution and the laws, and such powers and functions as the King may assign him'.[174] Thus, the source of the ordinary powers of the Governor-General has remained largely unchanged, as deriving from the appointment by the British Monarch and the powers defined by Constitution. This is not to say that the office has been immune to changes in the scope of operation of those powers since Federation. As we shall see, changes surrounding the position of the Governor-General have indeed occurred.

The second thread our Madison-derived evaluation, in respect of the Governor-General, is the operation of the ordinary powers of the office. Since Federation, several developments have

4 Australian MPs (Isaacs, McKell, Casey and Hasluck), 1 Australian soldier (Slim), and 1 Australian judge (Kerr). The first 8 appointees, until 1931, were ex-British officials.

[173] A. B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, p. 104.

[174] *The Commonwealth v. Colonial Combing Spinning and Weaving Co. Ltd* (1922), 31 C.L.R., 453-4.

impacted the operation of the office of the Governor-General. The first development was the removal of the Governor-General as being the intermediary between the British Government and the Australian Government. This development stretched back to the Imperial War Conference of 1918 and the efforts of the then Australian Prime Minister, W. M. Hughes, and the Canadian Prime Minister Sir Robert Borden to change the administrative arrangements between the British Government and the Dominions in order to bring them 'more directly in touch with each other'.[175] This move, resisted by the British Colonial Office and the Dominion Governors-General, was formalised through the 1926 Imperial Conference. From that time on, the Governor-General ceased to act as a channel of communication between the Australian and British Governments. This had the consequence of changing the relative positions of importance between the Governor-General and the Prime Minister in governmental relations with the British Government.

The second development that has impacted the operation of powers of the Governor-General was the Governor-General being affirmed as operating in the Dominion in the same sense that the British Monarch acted in Britain. This development was initiated through the Balfour Report, issued at the 1926 Imperial Conference, which declared that the 'Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of pubic affairs in the Dominion as is held by His Majesty the King of Great Britain'.[176] While this development raised the profile of the Governor-General, it did not equate to the Governor-General being made Australia's Head of State. This position was still firmly held by the British Monarch. (This an important point in view of the contrary arguments made during the recent republican debate).

The third development to impact on the office was the change in convention concerning the process of nomination of the Governor-General, in that it would be the British Monarch's Australian Ministers (namely, the Prime Minister) who would advise the nominations for office, rather than the British Government. This change was made more significant because of the change in the party situation within the Commonwealth Parliament. Crisp characterises the state of affairs as being such that the Governor-General would be operating with a Prime Minister who held the power of nomination and who could request to have him *recalled* by the British Monarch 'at pleasure'.[177] Given this development of the British Monarch taking advice from Australian Ministers as opposed

[175] S. Encel, *Cabinet Government in Australia*, Melbourne University Press, Melbourne, 1974, p.15.
[176] Encel, p. 15. Quoted from *Cmd 2768, 1926*.

to British Ministers, it was seen as unlikely, and unexpected, that the Prime Minister's advice concerning *recall* would be rejected. Crisp notes that this was not a situation that the British Monarch could be found in as there was no procedural *'recall'* available to the British Government (other than changing the legislative foundation of the Monarchy itself by the British Parliament). The abdication of Edward VII in 1937, though, provided a precedent within Britain for a British Monarch to 'step down'.

There was also an impact in the exercise of the power to grant or refuse dissolutions, as emphasised by Evatt.[178] Evatt argued that dissolutions, such as those of 1929 and 1931, were serious constitutional requests that were too easily given consent. He argued that insufficient regard was paid to the 'parliamentary situation' at the time by the then Governor-General. Crisp notes the earlier doctrine of the Governor-General as being the taking 'cognisance only of the parliamentary situation and the strengths of the parties in the house'. This principle, for example, guided the Governor-General in refusing to accept the resignation request of W.M. Hughes in 1918, as the Governor-General was not persuaded that an alternative Ministry could be formed.[179] Evatt recognised, though, that by the 1930s the political environment had changed such that the issue of 'parliamentary struggle' was largely redundant after the party situation coalesced around a two-party (Labor/non-Labor) divide, causing the discretion of the Governor-General to become less operative in comparison to the party position in Parliament. The expectation or convention largely became one whereby a dissolution request would be granted without the need for the Governor-General to investigate the 'parliamentary situation' personally.

The fourth change to impact on the operation of powers of the Governor-General was the passage of the 1931 State of Westminster, which was intended to resolve the issue of legislative conflict of Dominion legislation to British Imperial law. This was another consequence of the Balfour Report, which affirmed the view that the British Parliament should not legislate for any Dominion without the request and consent of the Dominion concerned (ie. Australia, Canada, New Zealand and South Africa). As a result, there was still a legal connection between the British Parliament and the Commonwealth of Australia, though now at a bit more 'arm's length'.

[177] Crisp, p. 398.
[178] H. V. Evatt, *The King and His Dominion Governors*, Oxford University Press, London, 1936, p.235.
[179] L. F. Crisp, p. 408.

The Commonwealth Constitution confers upon the Governor-General the power to reserve bills to the Crown (s.59) for up to one year. Examples of this have been the Customs Tariff (British Preferences) Bill 1906, which was refused assent in Britain, and the amending bill of 1918 to the Judiciary Act, which was given assent. Evatt argued that, by 1942, the nature of the power to refer Bills to the British Parliament was redundant by arguing that 'the practice, in spite of this, must, under threat of invalidity, be continued until the adoption of the relevant sections of the Statute of Westminster'.[180]

The passage of the 1986 Australia Acts formalised the continuing legal autonomy of Australia within the British Commonwealth, without compromising the position of the British Monarch as Head of State. The 1986 Australia Acts finally ended the legal colonial status of the Australian States and provided that when a Premier wished to appoint a Governor, he or she would communicate directly with the British Monarch rather than through the British Colonial Office. This Act also abolished legal appeals from Australian courts to the British Privy Council. The Australia Act 1986, therefore, extended the principles of the 1931 Statute of Westminster to the Australian States.

The end result of these developments was that the operation of the ordinary powers of the Governor-General, after the 1930s, was more constrained compared to the years immediately following Federation. The Governor-General now had a narrower scope for personal discretion, although, by convention, the 'reserve powers' of the Crown would still be available and operable.

The third thread of evaluation, in respect to the Governor-General, is that of the extent of the ordinary powers of the office. Within the context of the Commonwealth of Australia and the States, there are two aspects that reveal the extent of the power of the Governor-General as representing the British Crown in Australia. The first aspect is that of the notion of 'indivisibility' of the Crown, given the seven local representatives of the Crown within Australia, and, second, the notion that the Crown is bound by statute and the impact this has had on the personal exercise of executive authority by the British Monarch while in Australia.

[180] H. V. Evatt, *Monograph on the Statute of Westminster Adoption Bill, 1942*, Canberra, 1942, p. 15.

The general view was, up until the late 1970s, that the position of the Crown within Australia, as emphasised by the High Court in *Taylors* Case in 1917, was that it was permanent and could not be eliminated from any Constitution, except by an act of the British Imperial Parliament.[181] This view was supported by the weight of *Clayton v. Heffron* (1960), in that a Constitution was defined by its 'composition, form or nature of the House or Houses', but excluded any reference to defining the Crown.[182] Therefore, any changes affecting the constitutional position of the Crown and its seven local representatives, could only come from the British Imperial Parliament. Since Federation, the principle of an 'indivisible' Crown in Australia has been made workable through the assertion that the Crown acts in different localities depending upon local legislation which 'binds' the Crown in different ways. This formulation, supported by Encel, accommodates the combination of the Westminster system of responsible government with the structure of federalism as constructed in Australia.[183] Whilst the conception of the Crown is still unchanged, the passage of the Australia Acts 1986 has provided an avenue to remove the Crown from all Constitutions by extending the principles of the Statute of Westminster to the State level. The significance of this change can be seen in the recent republican debate concerning the detailed legal implications of what is required to alter any State Constitutions in order to remove references to the British Crown.[184]

The second aspect is the notion that the Crown is bound by statute and the impact this has had on the personal exercise of executive authority by the British Monarch while in Australia. Although s.61 of the Commonwealth Constitution vested executive power (of the Crown) in the Queen, exercised by the Governor-General as the Queen's representative, it created an anomaly whereby the Constitution precluded the Queen from exercising any of those powers expressly conferred on the Governor-General. The doctrine expressed in the *Engineers* Case 1920, amongst other assertions, was that the British Imperial Act creating the Commonwealth Constitution, by its own authoritative force, bound the operation of the Crown in Australia such that the Queen could not personally perform the functions of Governor-in-Council conferred by statute.[185] The impending Royal visit in 1954 provided the impetus to remove this conflict through the passage of the Royal Powers Act 1953, introduced by the Menzies Liberal Government. The successful passage of the

[181] Encel, p. 16.
[182] W. A. Wynes [1936], *Legislative, Executive and Judicial Powers in Australia*, 5th edition, The Law Book Company, Sydney, 1976, p. 539.
[183] Encel, p 16. Encel describes the position of Wynes as providing an appropriate conception of the Crown within a federation. See also p. 394.
[184] The South Australian Constitutional Advisory Council, First Report, *South Australia and Proposals for an Australian Republic*, SACAC, Adelaide, September 1996, p. 216.
[185] Wynes, p. 393. Refers to *Engineers* Case 1920, 28 C.L.R. 129.

bill enabled the Queen to perform, in person, any statutory power conferred on the Governor General, whenever present in Australia, without diminishing those powers conferred upon the Governor-General by the Constitution[186]. This development further emphasises the office of the Governor-General as being the local representative of the British Monarch, a notion that precludes the proposition within the recent republican debate that the Governor-General is Australia's effective Head of State.

The fourth thread of our evaluation, in respect to the Governor-General, is the ability to authorise changes to the ordinary powers of government. The Governor-General has no power to authorise amendments of any sort. As we saw in Chapter 2, s.128 of the Commonwealth Constitution constrains the initiation of constitutional amendments to the House of Representatives and the Senate, with consent given by a 'double-majority' vote of the national electorate. As we shall see later in this chapter, the power to initiate constitutional amendments has tended to be exercised by the Executive Government formed in the House of Representatives. The formal Letters Patent of the Governor-General, issued on 29 October 1900, are amendable only by the British Monarch and have only been changed once in 1958. Of the three institutions of the Commonwealth Parliament, the Governor-General is in the least position to authorise any changes that can amend the powers of office.

## 4.2 The House of Representatives

As we saw in Chapter 2, the House of Representatives is one of the two national Houses contained within the Commonwealth Parliament. What makes the House of Representatives distinctive within Australia's system of government is that, under the notion of a Westminster-style democracy, the Government is determined from within this parliamentary House. This is supported by the constitutional provision that the House of Representatives is the predominant House pertaining to financial legislation such as annual budgets (s. 53) - usually the preserve of the Government of the day.

[186] Wynes, p. 384.

The first thread of our Madison-derived evaluation is that of the sources of the ordinary powers of government. That is, Madison looked at what legitimised a Government to exercise the powers conferred upon it. Within the British Westminster tradition of a single-party executive Cabinet government, there are two aspects to this analysis of the House of Representatives. The first aspect is the electoral process of voting and electing members into Parliament and, second, the process of actually forming a Government once elections have taken place. This is the 'parliamentary situation' of coalitions / factions / parties as to who the Governor-General, as local representative of the British Monarch, may, or is expected by convention to, appoint as Prime Minister and request a Government be formed. Again, it must be framed within the traditional Westminster view of the Cabinet Government, led by the Prime Minister, exercising the, more or less, traditional unfettered executive authority of the British Monarch.

The result of Federation in 1901 was a Commonwealth Parliament with 75 seats in the House of Representatives and 36 seats in the Senate. As no Commonwealth electoral law existed until 1903, the first Federal election was carried out under the existing State electoral franchise conditions. In New South Wales, Victoria, Queensland and Tasmania, the electoral franchise only extended to men over 21 years of age. In Western Australian and South Australia, it had already been extended to cover both men and women over 21 years old. The voting method was the 'First Past the Post' method (FPP) whereby the candidate who receives the most votes wins, irrespective of whether the winning candidate receives more than 50% of the vote or not. Enrolment to vote and actually casting a vote were both voluntary.[187] Of note for later in this chapter was that this initial election included the system of Proportional Representation (PR) operating in Tasmania, under the Hare-Clark system.

In looking at the scope of electoral impacts on the legitimacy of a Government drawn from the House of Representatives, Jaensch argues that there are three factors to consider.[188] They are, first of all, voter participation or turnout, second, the transfer of votes from one group of representatives to another and, third, the changes in the composition of voters, such as the definition of a minimum age, etc. Whilst both Houses of Parliament are based upon a direct national vote, Jaensch argues

[187] Australian Electoral Commission, *The Electoral Pocket Book*, Commonwealth of Australia, Canberra, 1999, p. 20.
[188] D. Jaensch, *The Australian Party System*, Allen & Unwin, North Sydney, 1983, p. 91.

that this vote is still shaped by the impact of federalism in that the respective States are not uniform in the distribution of voting patterns within the national arena.[189]

The first factor has been significantly impacted since Federation through the imposition of compulsory 'voting' (or more strictly, compulsory attendance) introduced in Federal elections in 1924. Compulsory voting in referendums had been introduced in 1915, but the same legislation in respect to elections, drafted by the Fisher Labor Government, the Compulsory Voting Bill 1915, had lapsed during that year due to the failure of the planned referendums to go ahead. Table 4.1 shows the voter turnout up until 1922, revealing an increase in voter turnout from 1903 to 1917, and a decline in voter turnout in the following two elections in 1919 and 1922.

**TABLE 4.1 VOTER TURNOUT: 1901 - 1922 AS A % OF ENROLMENT**

| Year | Senate | House of Representatives |
|---|---|---|
| 1901 | 54.34 | 56.71 |
| 1903 | 46.86 | 50.27 |
| 1906 | 50.21 | 51.48 |
| 1910 | 62.16 | 62.80 |
| 1913 | 73.66 | 73.49 |
| 1914 | 72.64 | 73.53 |
| 1917 | 77.69 | 78.30 |
| 1919 | 71.33 | 71.59 |
| 1922 | 57.95 | 59.38 |

*Source: AEC, 1999, p. 40.*

The justification for the introduction of the electoral changes was to address the low voter turnout in 1922, the large sums of money spent "getting out" the vote, and the desire to include the 'wider community' in the election process.[190] This change was asserted to be a positive way to reverse the declining turnout experienced over the 1919 and 1922 elections. Since the introduction of compulsory voting in 1924, the general voter turnout has been consistently around 95% of enrolled voters providing a more legitimate result.[191] In a negative sense, it has been argued that compulsory voting potentially causes the electorate to vote for candidates they would not normally support under a voluntary framework.[192] Compulsion, though, could also be considered a relative term, as

[189] Jaensch (1983), p.77.
[190] Reid and Forrest, p. 114.
[191] Solomon (1986), p. 95.
[192] D. Jaensch, *Elections, How and Why Australia Votes,* Allen & Unwin, Sydney, 1995 p. 22. Jaensch provides a table of arguments of both for and against compulsory voting.

the penalty for not voting, up until 1983, was only between $2 and $10 and the electoral law could not stop 'informal' votes being made.[193]

[193] Solomon (1986), p.135.

| UK Elections | | Australian Elections | |
|---|---|---|---|
| **Year** | **Vote%** | **Year** | **Vote%** |
| | | 1913 | 73.49 |
| | | 1914 | 75.53 |
| | | 1917 | 78.30 |
| | | 1919 | 71.59 |
| | | 1922 | 59.38 |
| | | | |
| 1983 | 72.7 | | |
| 1987 | 75.3 | | |
| 1992 | 77.7 | | |
| 1997 | 71.4 | | |
| 2001 | 59.2 | | |
| | | | |

*Source: Reid and Forrest (1989), p.113;*
*House of Commons Library, Research Paper10/01, p.36.*

The reaction by Australian politicians in 1922 is in stark contrast to recent British experience, where voluntary voting is still operating and where the same voting turnout pattern was experienced in the United Kingdom between 1983 and 2001, as was experienced in Australia leading up to the introduction of 'compulsory voting' in 1924.[194]

The second factor that Jaensch identified relates to the transfer of votes from one group of representatives to another through the operation of the electoral mechanism of compulsory preferential voting, introduced in the Commonwealth Parliament in late 1918. The initial method of voting was the first-pass-the-post (FPP) system, whereby the winning candidate was the candidate with a simple plurality of votes, irrespective of the amount of votes received. The system of optional contingent (preferential) voting had been known before Federation (Queensland) as well as afterwards (in New South Wales, Victoria and Western Australia). Pressure grew for change due to the circumstance that multiple non-Labor candidates tended to contest elections with the result of splitting the non-Labor vote, usually resulting in victory for the Labor candidate.[195] In 1918, the Nationalist Government of W. M. Hughes was aware of the potential electoral implications of multiple non-Labor candidates. The result of the October 1918 Swan (WA) by-election confirmed the expected results whereby the Labor candidate won with only 34 percent of the vote. The then upcoming by-election in Corangamite (Vic) in December 1918 provided the impetus for the passage

[194] House of Commons Library, *General Election Results: 7 June 2001*, Research Paper 01/54 [Revised Edition] 18 June 2001.

of the required legislation, as there were expected to be three non-Labor candidates running at that by-election.

The changes, which included *compulsory* preferential voting rather than just optional preferential voting, were hurriedly passed in the Commonwealth Parliament before the Corangamite by-election, which the non-Labor VFU candidate then won. In a similar move, the Government introduced similar legislation for the Senate elections, which was carried in readiness for the expected Federal election due in late 1919. Thus, compulsory preferential voting was introduced as an electoral strategy of the non-Labor side of Australian politics to maximise electoral success. It was stated at the time that there 'can be no doubt this measure would not be before us were it not for party considerations'.[196]

The third factor, in the electoral impacts effecting the sources of governmental power, was that of the changes in the composition of the electorate. In 1901, at the commencement of Federation, the composition of the electorate was defined by the franchise laws operating in the respective States. The Franchise Bill 1902 gave the Commonwealth Parliament the opportunity to advance uniform legislation in respect to who could vote at Federal elections, with the result that both men and women, who were over 21 years of age and who were 'natural born or naturalised subjects of the King' were entitled to vote at federal elections.[197] The position of Aborigines, though, was such that the House of Representatives resisted the franchise being extended to cover their right to vote - even though in 1902 Aborigines and other 'coloured persons' who were naturalised subjects of the British Monarch were already entitled to vote in State elections in all States except Queensland and Western Australia. The electoral franchise was not extended to cover Aborigines at a Federal level until 47 years later with the Commonwealth Electoral Act 1949, provided that they were entitled to enrol for State elections or had served in the Defence Forces. In 1962, this was extended to cover all Aborigines having the right to enrol and vote at Federal elections and, in 1984, they were subject to the same requirements of compulsory enrolment and 'compulsory voting' as all other Australian

[195] Reid and Forrest, p. 115.
[196] Reid and Forrest, p.118. The comment was made in the Senate by David O'Keefe (ALP, Tas) on 15 October 1919 (*CPD*, 15/10/1919, 90, p. 13339-40). He went on to claim that it was only through the advent and lobbying of the then Farmers Union that compulsory preferential voting was introduced.
[197] Reid and Forrest, p. 97.

citizens.[198] The most numerically impacting change effecting the composition of the voting public since Federation occurred in 1973 when the voting age was lowered from 21 to 18 years of age, which added approximately 400,000 young people onto the electoral rolls.[199]

The last significant change affecting the composition of the electorate was the franchise qualification changing to Australian citizenship. Prior to 1949, the right to enrolment and voting was restricted to British 'subjects', as there was no separate concept of Australian citizenship. After the establishment of Australian Citizenship in 1949, the situation was such that British subjects who were not Australian citizens were still required to enrol and vote at Federal elections if they resided in Australia. This situation was resolved in 1984 whereby the right to enrol and vote was established as solely based upon Australian citizenship, though those British subjects on the federal electoral roll before 26 January 1984 were still entitled to vote.

The second aspect to the sources of power for governmental power, in respect to the House of Representatives, is the creation or formation of the actual Government once elections have been held. There have been two distinct periods since Federation that have exhibited different dynamics in the formation of Australia's Government. These two periods are the 1901-1909 period just after Federation and the period since. The contrast between the two periods highlights the role that disciplined political parties have assumed within Australia's system of government.

The first decade of Federation has been characterised by Marsh as a period where 'cross-cutting cleavages' within the States resulted in an absence of national political parties.[200] The Free Trade grouping was mainly centred in New South Wales, the Protectionists were mainly centred in Victoria and the Labor movement was emerging throughout. As a result, Governments were formed by alliances of members of the House of Representatives, usually gathered around an individual leader. As noted earlier, the Governor-General, within this political environment, had some flexibility or discretion, in the appointment of a Prime Minister.

[198] J. Goldhurst, J., *Understanding Citizenship in Australia*, Bureau of Immigration, Multicultural and Population Research, Australian Government Publishing Service, Canberra, 1996, p. 18. See also the Joint Standing Committee on Migration report of September 1994 entitled "*Australians All: Enhancing Australian Citizenship*", p. 19.
[199] Reid and Forrest, p. 123.
[200] I. Marsh, *Beyond the Two Party System*, Cambridge University Press, Melbourne, 1995, p. 274.

Marsh also defines the process of forming, and retaining, Government during this period as a process of 'contingent alliances' as a Government would rise or fall on its ability to pass strategic legislation through the Parliament. The expectation to pass legislation facilitated compromise and the acceptance of legislative defeats. Contrary to pure Westminster doctrine, a legislative defeat was not necessarily a vote of 'no confidence' in the Government from which it would be expected to resign. With nine governments between 1901 and 1909, the test of parliamentary leadership became the ability to form alliances around specific legislative goals and to advance the resulting legislation though to enactment. This consensual, multiparty style of government during the initial period of Federation was at odds to the traditional Westminster-view of single-party majority government based in the Lower House.

> *The requirement for independent political capacity to 'manage' strategic issues offers perhaps the most marked contrast between the pattern and style of policy making in the 1901 - 1909 period and the two-party period that followed.*[201]

From 1909, the parliamentary situation altered such that the process of forming and retaining a Government in the House of Representatives became much more dependent upon the 'party situation' than it had on the impact of alliances between individual members. Marsh identifies three factors that all worked together to provide the necessary ingredients for what has been termed 'the two party system'.[202] First of all, the rising public support for the Labor Party eclipsed the strained relations between the non-Labor factions such as the Protectionists and the Free Traders. Second, strategic legislative issues increasingly caused the non-Labor factions to join together, such as the issue of defence in 1907. The third factor, and most significant, was the increasing influence, at a Federal level, of the Westminster notion of responsible government as a 'conventional' approach to government whereby there would be a single-party Cabinet Government and an 'opposition' party as an alternative. Colonial experience took at least a decade or more to take hold in the new Federal Parliament. The result was, as noted by H. V. Evatt earlier, that the constitutional environment had changed such that the issue of 'parliamentary struggle' was largely redundant after the party situation coalesced around a two-party (Labor/non-Labor coalition) divide. The appointment of a Government became the end-result of the electoral success of the majority political party within the

[201] Marsh, p. 292.
[202] Marsh, p. 298.

House of Representatives. Therefore, political parties needed stable party majorities in order to retain Government. The electoral changes noted earlier are a product of that goal.

The second thread of our evaluation, in respect to the House of Representatives, is the operation of the ordinary powers of government. In this regard, as we have seen in chapter 2, the operation of the powers of government are decidedly national rather than federal, again adopting Madison's terminology, as they mostly impact the population directly and are exercised by a single-party Cabinet Government, led by the Prime Minister, formed by the majority party in the House.

In the conflict between the values underlying the notion of the Westminster system of responsible government and the values supporting the American-derived republican structure of federalism, the House of Representatives strongly represents the operation of the Westminster tradition. This can be seen by examining three key perspectives on the operation of the ordinary powers of government. These three perspectives are the dominance of the Government over the legislative process in the House, the electoral influence of political parties and the operation of the doctrine of Ministerial Responsibility.

> *"Viewed up close, executive government dominates Australian politics".*[203]

The first perspective on the operation of powers in the House of Representatives is that of the dominance of the Government over the legislative process in the House. Whilst Marsh characterised the ability of getting legislation passed as a sign of political leadership in the pre-'two-party' political environment, the ability for Governments to pass its legislative agenda is still paramount.[204] Table 4.2 summarises the average number of Acts passed in the House of Representatives and the time spent deliberating on each.

[203] G. Davis, 'Executive Government: Cabinet and the Prime Minister', in *Government Politics Power & Policy*, J. Summers, D. Woodward, A. Parkin ( eds.), 6th ed, Longman, Melbourne, 1997, p. 57.

[204] Marsh, p. 280.

| TABLE 4.2 LOWER HOUSE: TIME SPENT ON BILLS 1901-1985. | | |
|---|---|---|
| **Period** | **Average Acts Passed per Year** | **Hours per Act** |
| 1901-1910 | 23 | 25.1 |
| 1911-1920 | 40 | 11.2 |
| 1921-1930 | 47 | 9.0 |
| 1931-1940 | 75 | 5.1 |
| 1941-1950 | 73 | 6.2 |
| 1951-1960 | 96 | 4.8 |
| 1961-1970 | 120 | 4.0 |
| 1971-1980 | 173 | 3.1 |
| 1981-1985 | 173 | 2.8 |

*Source: Reid and Forrest, p.192*

These data highlight the increase in legislation passed through the House and the decrease in the average time spent on them. This reveals the pressure that the Government has placed the House of Representatives under in pursuit of its legislative agenda. Within the time-frame of triennial elections, the Government has put pressure on sitting days, the pattern of sitting days to reflect the ability to consider legislation, and the use or manipulation of Standing Orders. Table 4.2 shows the outcome of this pressure.

The Government can also change procedures to reduce the scope of parliamentary scrutiny of bills. A number of changes have had a significant impact since Federation.[205] The first impact was the restriction placed on the time available to debate a bill. The 'closure' motion, introduced in 1905, enabled debate to be closed and the legislative process to be advanced without delay. The second change was the introduction of time limits to speeches adopted in 1912. The third change was in 1918 with introduction of the so-called 'guillotine' whereby it would be possible to declare a bill urgent and that time limits would be set on further consideration of a bill to advance its speedy passage into law. A fourth change in 1963 allowed for the consideration of a bill in a committee to be dispensed with and the bill moved immediately from the second to the third 'reading' stage. This procedure allowed bills, expected to be 'machinery bills', to be passed without any opposition. Reid and Forrest report that, in the period 1963 to 1988, more than three quarters of all bills passed bypassed the committee stage. The argument that scrutiny is reduced by the change in parliamentary procedures by the Government-controlled majority in the House is a strong one. The

[205] Reid and Forrest, p. 192.

balancing trend since the 1970s, as we shall see later in this chapter, has been the increasing role in legislative scrutiny taken on by the Senate, as a result of the influence of minor parties and independents.

A recent example of the dominance over the scrutiny of the House of Representatives has been the changes made by the Howard Government in the reporting to Parliament on Government spending, which has restricted the ability of Parliament to provide scrutiny over where major areas of funding are spent. This move reversed the previous changes by the Fraser Government to ensure Parliamentary scrutiny.[206] This reluctance to be scrutinised parallels the very first budget process after Federation, where the Senate rejected the Budget bills passed in the House of Representatives because of a lack of detail.[207]

Yet the notion of Westminster government requires that the Lower House, the House of Representatives, be dominated by the majority political party, so as to form a single-party Cabinet Government. Therefore, the House of Representatives must be expected to be dominated by the political party or coalition in government.

**TABLE 4.3 BILLS INTRODUCED INTO PARLIAMENT 1981 - 1986**

| | **Bills Introduced into the Senate** | | **Bills Introduced into the House of Representatives** | |
|---|---|---|---|---|
| **Year** | **Private** | **Government** | **Private** | **Government** |
| 1981 | 21 | 19 | 1 | 178 |
| 1982 | 15 | 3 | 0 | 186 |
| 1983 | 23 | 25 | 0 | 151 |
| 1984 | 24 | 20 | 2 | 170 |
| 1985 | 47 | 21 | 2 | 215 |
| 1986 | 21 | 12 | 1 | 177 |
| **Totals** | **151** | **100** | **6** | **1077** |

*Source: Reid and Forrest, p.202*

Table 4.3 summarises the amount of legislation introduced into the Commonwealth Parliament in the 1981-1986 period as reported by Reid and Forrest. It reveals the dominance displayed by the Government in setting the legislative agenda in the House of Representatives through the minimal number of non-government bills actually introduced as compared to the Senate. Whilst the

[206] T. Harris, 'Howard has reversed Fraser's changes', *Australian Financial Review*, 20 June 2001, p. 63.
[207] Reid and Forrest, p.206.

Constitution 'fragments' taxation bills into being treated separately (s.55) and requires a supporting message from the Governor-General (s.56), which could account for a proportion of the bills introduced, Table 4.3 does highlight the effectiveness of the Government in setting the legislative agenda in the Lower House.[208]

The second perspective on the operation of powers in the House of Representatives is that the electoral changes, documented earlier in this chapter, have helped to shape the maintenance of 'party control' beginning with the introduction of compulsory enrolment in 1911 and reaching a high point in 1983 with the introduction of public funding of registered political parties through the Commonwealth Electoral Legislation Amendment Act.[209] 1983 also saw the introduction of party names on the ballot papers, and the optional party list-voting in the Senate. These mechanisms have reinforced the view of the primacy of the political party over the individual candidate.

The impact of disciplined political parties has been different in the House of Representatives compared to the Senate. Unlike the Senate, the House of Representatives has been dominated by the requirement of the Westminster tradition to form an executive Cabinet Government. It has been argued by Easson that the level of party discipline has developed far more strongly in Australia than, for example, in Britain or in America. Australia's political culture, developed within an adversarial 'two-party' system, has arguably developed a far stronger sense of "sticking together".[210] This rigidity of political parties is in contrast to the early years of Federation when parliamentary 'groupings' of Protectionists and Free Traders regularly swapped members. Easson illustrates the reality of this strong party discipline by pointing to the recent publication *True Believers*, where a whole chapter is devoted to Labor Party "rats".[211] Weller and Grattan also attribute the development of strongly disciplined political parties to 'the political style of Australia' which shapes the environment within which Government must operate. A 'victory' for an opponent seems to be seen as a 'defeat' for one's own party and would be reported in the media as a calamity, and a level of personal vindictiveness is seen as a natural part of Australian politics.[212]

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[208] Reid and Forrest, p. 201.
[209] Reid and Forrest, p. 19.
[210] M. Easson, "Solidarity has the whip hand here", *Australian Financial Review*, 8 June 2001, p. 83. Easson argues that the Westminster tradition of a Government versus an official Opposition intensifies in an adversarial party environment. In the US, on the other hand, there is a strong culture of individualism where elected politicians are regarded as representatives of the people, rather than the representatives of the party. Electoral mechanisms such as 'primaries' support this political culture.
[211] *"True Believers"*, S. MacIntyre and J. Faulkner (eds.), Allen & Unwin, Sydney 2001.
[212] P. Weller and M. Grattan, *'Can Ministers Cope'*, Hutchinson, Melbourne, 1981, p.16.

The third perspective on the powers within the House of Representatives is that which results from the 'fused' nature of the House's relationship to the Cabinet Government and the notion of Ministerial Responsibility. Reid and Forrest argue that the behaviour of Ministers under challenge for some matter in relation to their portfolio has not been primarily based upon any particular obligation to the House of Representatives or to any universal Westminster convention of 'Ministerial Responsibility'. Rather, the operation of Ministerial Responsibility has been largely based upon party considerations, which have been dominated by the determination to remain in office.[213] The reality of the Westminster system is that the Government needs to obtain, and retain, a majority position within the House of Representatives. Thompson and Tillotsen argue that while the notion of collective ministerial responsibility is certainly still active, the operation of individual ministerial responsibility, where Ministers are held accountable for individual actions, is only active in the areas of personal or financial impropriety ('smoking gun type 1') or for public policy errors with a direct link to the Minister ('smoking gun type 2').[214] They argue that the notion of Ministers being held accountable for the actions of their respective Public Service departments has become obsolete in the changed administrative environment surrounding the Public Service apparatus of the government.[215]

There is little dispute that the development of strongly disciplined political parties, working to obtain, and retain, Government, surrounded by the legislative procedures of Parliament, have diminished the House of Representative's ability to perform the role ascribed to it by the Westminster system of responsible government. Our current system may well be described as responsible Party government, where the Government is more responsible to the interest of the political party than to any other political institution. This is unsatisfactory. A framework to achieve an environment more conducive to the operation of Ministerial Responsibility in its fullest sense, is the subject of chapter 5. This chapter proposes that the Cabinet be drawn out of the confines of Parliament and placed under the authority and accountability of an individual Executive Officer, the Prime Minister, directly elected by the voting public.

[213] Reid and Forrest, p.327.
[214] E. Thompson and G. Tillotsen, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility', *Australian Journal of Public Administration*, vol 58, no. 1, 1999, p. 49.
[215] Thompson and Tillotsen, p. 50.

The third thread of our evaluation, in respective to the House of Representatives, is the extent of power and the changes that have occurred within this area since Federation. The extent of power relates to the scope of power that may impact the balance between the Commonwealth and the States. While this balance is not directly between the House of Representatives per se and the States, it is useful to review the impact on powers due to the 'fusion' of executive-legislative functions within Parliament, and most predominantly, within the House of Representatives as the determining forum for the identification of the Government. One of the recurring themes of change, since Federation, has been the increasing centralisation of power to the Commonwealth Government in Canberra.

The constitutional means of amending legislative powers, mostly through the initiation of alterations by the Government through the House of Representatives, have not been successful with the Australian voting public. Table 4.4 summarises the attempts since Federation to alter the Commonwealth Constitution so as to increase the legislative power of the Commonwealth over various policy areas. Only one alteration, in 1946 in respect to social service pensions, has been successful.

**TABLE 4.4 REFERENDUMS SEEKING TO INCREASE POWER**

| Date | Proposal | Sponsor | Outcome |
|---|---|---|---|
| 26 April 1911 | To increase powers over Trade and Commerce and over Monopolies | Fisher (ALP) | Rejected |
| 31 May 1913 | To increase powers over Trade and Commerce, Corporations, Industrial Matters, Railway Disputes, Trusts and Monopolies | Fisher (ALP) | Rejected |
| 13 December 1919 | To increase powers as per 1913 referendum for temporary period of 3 years and over Monopolies | Hughes (ALP/NL/Nat) | Rejected |
| 4 September 1926 | To increase powers over Industry and Commerce and Essential Services | Bruce (Nat) | Rejected |
| 6 March 1937 | To increase powers over Aviation and the Marketing of Primary Products | Lyons (UAP) | Rejected |
| 28 September 1946 | To increase powers over Social Services | Chifley (ALP) | Approved |
| 28 September 1946 | To increase powers over Primary Products and Industrial Employment | Chifley (ALP) | Rejected |
| 29 May 1948 | To increase powers over Rent and Price Controls | Chifley (ALP) | Rejected |

| | | | |
|---|---|---|---|
| 22 September 1951 | To increase powers to deal with Communists and Communism | Menzies (Lib) | Rejected |
| 8 December 1973 | To increase powers over Incomes and Prices | Whitlam (ALP) | Rejected |

*Source: Appendix 1.*

The failure of nearly all of these referendums to increase the power of the Commonwealth Parliament highlights the unwillingness of a sufficient number of people within the Australian electorate to widen the scope of powers originally conferred on the Commonwealth Parliament through the process of Federation.

The fourth thread of our Madison-derived evaluation, in respect of the House of Representatives, is that of the authority to make amendments to the powers of the Commonwealth Parliament. The House of Representatives, dominated as it is by the Government within its dual executive-legislative role, can significantly influence the process of alteration both through constitutional means via s.128 referendums or via non-constitutional means. The history of referendums is largely one of failure – see Appendix 1.

There have been three key avenues that the Government has used since Federation, so as to influence the amendment process outside of an official s.128 referendum. The first key avenue has been that of attempting to streamline the amendment process itself. The Scullin Government attempted to 'simplify' the amendment process in 1930 by proposing to confer full power on the Commonwealth Parliament to change the Constitution. Though the Scullin Government argued that the social, economic and industrial circumstances caused the s.128 mechanism to be 'outdated', the proposal was rejected in the Senate at the time. The second attempt to streamline the alteration process by the Government was made by the Whitlam Labor Government in 1974 by proposing that s.128 referendums could be consented to by both a national majority, and by a majority of three States rather than a majority of four. The referendum question only received a national vote of 47.2% and a majority in one State only (NSW).

The second key avenue employed by the Government to maximise its chances of implementing changes has been the Government's control of the issue of writs (under Ministerial 'advice') by the Governor-General and the resulting dates of referendums being held. On three occasions, in 1915,

1965 and 1983, the Government has declined to proceed with referendum questions, due to arguing that the political circumstances had changed.[216]

The third avenue employed by the Government to promote amendments, the most widely used device of all, has been the use of constitutional conventions, or commissions, in which the Government has attempted to gain support for, or resist, constitutional changes before they reach the stage of being put before Parliament.

Table 4.5 summarises the constitutional gatherings that have taken place since Federation. In each case, the Government has attempted to influence the chances of success (or failure) of the expected initiatives before they reached the legislative process, in order to gauge the likely reaction from the various Parliaments around Australia and within the voting public.

**TABLE 4.5 CONSTITUTIONAL MEETINGS SINCE FEDERATION.**

| **Year** | **Type of Meeting Established** |
|---|---|
| 1910 | Two meetings dealing with Commonwealth-State relations |
| 1915 | Commonwealth and State Ministers meetings |
| 1927 | Royal Commission on the Constitution appointed |
| 1934 | Conference of Commonwealth and State Ministers |
| 1942 | Constitutional Convention organised |
| 1957 | Joint Committee on Constitutional Review appointed |
| 1973 | Constitutional Convention established |
| 1986 | Constitutional Convention established |
| 1997 | Constitutional Convention established |

*Source: Reid and Forrest, p.247 for the 1910-1986 period.*

Chapter Five will be taking a closer look at the Constitutional Convention established in 1997 as it was directly related to the issue of an Australian Republic. The major republican models proposed at the Convention, held in 1998, are the subject of analysis and review in that chapter.

[216] Reid and Forrest, p. 245. The first case was the proposed amendment to increase the time available to print and circulate the 'Yes' and 'No' cases relating to amendment questions approved in 1915. The second case was the two bills effecting s.24 and s.127 of the Constitution introduced by the Menzies Government. Shortly afterwards, Menzies retired and Holt recommended to the Governor-General that writs for the referendums not be issued. The third case was in 1983 when the Hawke Government declined to proceed with five alteration questions due to disagreements over the funding of the 'Yes' campaigns and the expected likelihood of the referendum questions failing anyway.

## 4.3 The Senate

The third institution within the Commonwealth Parliament, part of Reid and Forrest's *'trinitarian struggle'*, is that of the Senate. As we saw in Chapter 2, the Senate was conceived as a *national* House divided along State lines, to represent the population of each State as co-equal political communities, within Parliament. While not precisely replicating the American design of the Senate at the time of Federation, the American-derived structure of federalism that supports it, with its key values of sharing and dividing power between institutions of government, have influenced the development of the Senate, the 'trinitarian struggle' within Parliament, and the conception of Australian democracy since Federation.

The first thread of our four-dimensional Madison-derived evaluation, in respect of the Senate, is that of the sources of power of the Senate. This has been significantly impacted through the introduction of the system of proportional representation in 1948.[217] Initially, 36 Senators were created by the Constitution at the time of Federation, and the voting method used to elect the Senate was a 'block vote' such that whichever party won the State won all the State seats up for election. As a result, wide fluctuations were experienced during the initial years after Federation. Table 4.6 reveals the fluctuations that occurred during the period of the 'block vote' being in operation.

**TABLE 4.6 SENATE ELECTION RESULTS, YEARS 1903–1946**

| Year | Labor | Non-Labor |
|---|---|---|
| 1903 | 14 | 5 |
| 1906 | 4 | 14 |
| 1910 | 18 | 0 |
| 1913 | 11 | 7 |
| 1914 | 31 | 5 |
| 1917 | 0 | 18 |
| 1919 | 1 | 18 |
| 1922 | 10 | 8 |
| 1925 | 0 | 22 |
| 1928 | 7 | 12 |
| 1931 | 3 | 15 |
| 1934 | 0 | 18 |
| 1937 | 16 | 3 |
| 1940 | 3 | 15 |

[217] J. Uhr, 'Why We Chose Proportional Representation', *Papers on Parliament*, no. 34, December 1999, p. 15.

| | | |
|---|---|---|
| 1942 | 19 | 0 |
| 1946 | 15 | 3 |

*Source: Crisp, 1975, p147.*

It is relevant to note that the desire for the introduction of proportional representation was not in itself the primary motivation for the changes introduced in 1948. Whist the system of proportional representation was well understood at the time and had been used in Tasmania since before Federation, the main motivation for the change was as a result of the planned increase in numbers of members of the House of Representatives from 75 to 121.[218] The driving force, argues Uhr, was of the electoral interest of the Labor Party in securing victory in the then upcoming 1949 Federal elections.[219] This increase was planned to cope with the increasing size of governmental responsibilities (given post-war reconstruction), but would require a proportionate increase in the Senate numbers due to the provision s. 24 of the Constitution.

Uhr highlights two motivations for the introduction of proportional representation In the Senate. First of all, there was general dissatisfaction with the existing system of 'block voting'. For example, the non-Labor side won all seats on offer in 1918, 1925 and 1934. The Labor Party won all seats in 1943 and 15 out of 18 seats at the 1946 election. The impending increase of Senate numbers would cause this effect to become even more dramatic. The second aspect was a party political justification in that the Labor Party feared that it would be Menzies's turn to dominate both Houses of Parliament and so looked to proportional representation to 'smooth' the long-term movements of the Senate results, while providing a one-off short-term gain as most Labor Senators were not up for re-election in 1949. This strategy worked only until 1951, when Menzies forced a double-dissolution election which had the result of 'flushing' the full Senate. Since 1955, the voting trends in the Senate have consistently supported a multiparty environment with the election of minor parties and independents. In Reid and Forrest's view, the new Senate electoral system was 'not as a result of the pursuit of principles of electoral justice, but from pragmatic consideration of party gain'.[220] The words of Senator Allan McDougall (ALP, NSW) commenting upon the introduction of compulsory preferential voting in 1918, echo the consequent result of PR in the Senate.

[218] J. Uhr (1999), p. 25. Proportional representation was not a new concept in 1948. The first Federal election in 1901 returned members from Tasmania under the Hare-Clark system operating there at the time. The issue of PR was raised in the 1929 Royal Commission on the Constitution. A recommendation was made by T.R. Ashworth proposing the adoption of the system of PR in the Senate. The implications of PR was understood well before 1948.
[219] J. Uhr (1999), p. 17.
[220] Reid and Forrest, p. 99.

> *… every time a political party has manufactured a weapon intended to advance its interests as against those of its opponents, such weapon has returned with a boomerang effect.*[221]

The following table, Table 4.7, summarises the party numbers in the Senate since the 1949 elections. The consistent picture, especially since the late 1970s, has been of a multiparty environment, where minor parties and independents hold a significant position or even the 'balance of power'.

[221] Reid and Forrest, p.117.

| TABLE 4.7 PARTY NUMBERS IN THE SENATE SINCE 1949 | | | | | | |
|---|---|---|---|---|---|---|
| **Year** | **Labor** | **Liberal** | **Nat** | **DLP** | **Dem** | **Ind** |
| 1949 | 34 | 20 | 6 | | | |
| 1951 | 28 | 26 | 6 | | | |
| 1953 | 29 | 26 | 5 | | | |
| 1955 | 28 | 24 | 6 | 2 | | |
| 1958 | 26 | 25 | 7 | 2 | | |
| 1961 | 28 | 24 | 6 | 1 | | 1 |
| 1964 | 27 | 23 | 7 | 2 | | 1 |
| 1967 | 27 | 21 | 7 | 4 | | 1 |
| 1970 | 26 | 21 | 5 | 5 | | 3 |
| 1974 | 29 | 23 | 6 | | | 2 |
| 1975 | 27 | 27 | 8 | | | 2 |
| 1977 | 27 | 29 | 5 | | 2 | 1 |
| 1980 | 26 | 28 | 4 | | 5 | 1 |
| 1983 | 30 | 24 | 4 | | 5 | 1 |
| 1984 | 34 | 28 | 5 | | 7 | 2 |
| 1987 | 32 | 27 | 7 | | 7 | 3 |
| 1990 | 32 | 29 | 4 | | 8 | 3 |
| 1993 | 30 | 30 | 5 | | 7 | 4 |
| 1996 | 29 | 31 | 5 | | 7 | 4 |
| 1998 | 29 | 31 | 3 | | 9 | 4 |
| 2001 | 28 | 31 | 4 | | 8 | 5 |

*Source: Reid and Forrest,1989, p. 124; AEC 2002, p. 1*

The second thread of our evaluation, in respect to the Senate, is the operation of the ordinary powers of government. While the operation of powers in the House of Representatives has been dominated by the actions of the Executive Government, the Senate has developed rather differently. This is due to the presence of minor parties and independents in the Senate, which has largely precluded the dominance of the political party forming the executive Cabinet Government.

The first impact in the operation of powers in the Senate has been that, while the Senate cannot initiate money bills, it can significantly affect the passage of legislation. In 1931, the UAP Opposition in the Senate threatened to bring down the Scullin Labor Government by denying access to public funds.[222] The Labor Government decided to call an election earlier than expected rather than forcing the issue in the Senate to actual constitutional conflict. In 1974, the Liberal Opposition in the Senate threatened to block Supply to the Whitlam Labor Government. The Government

[222] Reid and Forrest, p. 329.

called an early election, again through a double-dissolution request, with the result that the Labor Party won a majority in the House of Representatives, but failed to achieve a majority in the Senate.

In 1975, the Liberal Opposition in the Senate again threatened to block Supply with the result of a seeming standoff. This was broken on 11 November by the intervention of the Governor-General by dismissing the Whitlam Government and requiring an election to be held. While there has been much debate over the events surrounding the 1975 dismissal[223], the impact has been that these events have been used as a justification for looking at restricting the power of the Senate, as described later in this chapter.

The second impact on the operation of powers in the Senate, due to the lack of dominance by the Government party, has been the introduction and operation of the various Senate Committees to increase legislative scrutiny over the Government.[224] The first expression of the increasing Senate oversight of the legislative process was through the introduction of five Estimates Committees in 1970. These committees were empowered to inquire and report on any bill referred to them by the Senate. In 1981, the Scrutiny of Bills Committee was introduced to exercise a 'watching brief' on behalf of the Senate on the clauses of all bills introduced into Parliament. These committees have provided a measure of scrutiny that has not been possible in the House of Representatives due to the lack of a predominant Government party in the Senate. The relative lessening of party dominance in the Senate can also be seen in the amount of private members bills introduce in the Senate since the late 1970s. The period between 1981 and 1986, for example, saw 151 private members bills introduced against 100 Government bills, as summarised previously in table 4.2. This level of non-Government legislative activity has not been reflected in the House of Representatives. The number of private members bills introduced in the Senate can be linked directly to the presence of minor parties and independents.

The final significant effect of the lack of dominance by the Government party in the Senate has been the ability of the Senate to initiate 'censure' motions against Government Ministers, like that against Lionel Murphy in 1973. This action has little constitutional significance in the operation of

[223] See, for example, C. Howard, 'The Constitutional Crises of 1975', *Australian Quarterly*, 48(1), 1976, pp. 5-25.
[224] Reid and Forrest, p. 215.

governmental power, but does highlight the political struggle between the two Houses of Parliament.[225]

The third thread of our Madison-derived evaluation, in respect to the Senate, is the extent of governmental power that the Senate can exercise. This extent is related to the balance of power between the House of Representatives and the Senate. Given that the Senate is considered to be a defect when assuming a pure Westminster-style of government, it is not surprising that it has been the focus of many constitutional attempts to curb its power and influence on the Government based in the House of Representatives.

Table 4.8 reports the attempts that have been made since Federation to amend the Constitution to curb the power of the Senate. As the table shows, each attempt has been rejected by a sufficiently large number of the Australian electorate at the referendum stage.

**TABLE 4.8 REFERENDUMS ON THE SENATE**

| Date | Proposal | Sponsor | Outcome |
|---|---|---|---|
| 18 May 1974 | To hold simultaneous elections | Whitlam ( ALP ) | Rejected |
| 21 May 1977 | To hold simultaneous elections | Fraser ( Lib ) | Rejected |
| 1 December 1984 | To hold simultaneous elections | Hawke ( ALP ) | Rejected |
| 3 September 1988 | To hold 4 year fixed simultaneous elections | Hawke ( ALP ) | Rejected |

*Source: Reid and Forrest, 1989, p.472*

The attempted move to simultaneous elections would have enabled any national 'swings' to apply in the Senate at the same time as in the House of Representatives. (Another way of achieving this is to force a double-dissolution election).

Whilst, constitutionally, the powers of the Senate have not been reduced, there have been other 'non-constitutional' attempts to narrow the scope of power available to the Senate. Senate majorities at the time have been careful to identify these attempts by the Government to reduce its

[225] Reid and Forrest, p. 334.

legislative power, most notably through three particular means, collectively termed 'manner and forms'.[226]

The first attempted avenue of restriction has been in reducing the detail provided by the Government in the House of Representatives in its annual Supply bills, whereby the detail of the expenditure included in the bill is so general as to impede possible scrutiny by the Senate. The very first budget bill, The Consolidated Revenue (Supply) Bill 1901-2 (No. 2), was returned to the House of Representatives with a request to include individual lines of expenditure, which was subsequently conceded to by the Government. The Howard Government has been criticised for this same generalisation in its Supply bills, after a period of increased specification of detail introduced by the Fraser Government during the 1970s.[227]

A second avenue of attempted restriction has been related to the attempt to tack extra material on to financial legislation with the objective of getting the extra material passed as the Senate cannot reject outright any financial bills. In 1943, the Government attempted to incorporate a clause within the Income Tax Bill that linked its activation to the commencement of the impending National Welfare Fund Act 1943. This was rejected twice by the Senate, requiring the Prime Minister to organise a compromise by removing the offending clause but also requiring the advancement of the passage of the National Welfare Fund Bill.

A third avenue of attempted restriction has pertained to the definition of 'ordinary annual services' of Government in relation to financial legislation initiated under s.53 of the Constitution. A wide interpretation of the definition would provide greater flexibility for the Government in advancing financial legislation that could not be rejected by the Senate. A narrow interpretation would require greater drafting work by the Government and greater scrutiny by the Senate. The Senate has consistently won the battles over the definition of 'ordinary annual services', such that an agreement was reached in 1965 so as to exclude unauthorised spending or taxation policies from within ordinary annual service appropriation legislation[228].

[226] Reid and Forrest, p. 206.
[227] T. Harris, 'Howard has reversed Fraser's changes', *Australian Financial Review*, 20 June 2001, p. 63.
[228] Reid and Forrest, p. 208.

The fourth thread of our Madisonian evaluation, in respect to the Senate, is that of the ability to authorise changes to the governmental powers available to it. The picture that Reid and Forrest reveal is that while the Senate has, under s.128 of the Commonwealth Constitution, the power to submit alteration bills for referendum without the concurrence of the House of Representatives, the practical result is that the Governor-General, following the advice of the responsible Government Minister, would not assent to this type of request.[229] In 1914, the Senate attempted to introduce six alteration bills into Parliament, but was opposed by the Government led by Joseph Cook. The Senate submitted the bills to the Governor-General anyway, but was rejected by the Governor-General as a departure from the 'established usage of responsible government'. This demonstrates the difficulty of the Senate initiating alteration bills without the support of the Executive Government based in the House of Representatives. Therefore, in practice, the submission of alteration bills is generally confined to those initiated by the Government formed in the House of Representatives.

The original intent of the Australian Senate, as we have already seen, was to be a *national* House composed along State lines.[230] The Senate was expected to represent the interests of the populations of the States within the context where the issues involved would not compromise the operation of the Cabinet government drawn from the House of Representatives. This was a significant area of debate during the pre-Federation period and occupied much of their time.[231] Without equal representation in the Senate, the smaller Colonies may well have refused to adopt the Commonwealth Constitution. After Federation, the Senate became dominated by the same political influences that dominated the House of Representatives. The Senate, as a result, has become more of a second chamber of Parliament under political party influence. When a political party obtained majorities in both Houses, the Senate's powers were never used against it.

The introduction of proportional representation in the Senate elections of 1949 changed the nature of the Senate such that the likelihood of a political party gaining a majority in the Senate greatly diminished. With the split of the A.L.P. in the 1950s, the impact of this change became apparent and provided the impetus for a 'revival' in the Senate's operation of governmental power. The introduction of new procedures and committees enabled the Senate to better scrutinise legislation and provide some check on the use of executive power by the single-party or coalition Cabinet

[229] Reid and Forrest, p. 243.
[230] Sharman (1977), p. 65.

Government. The continued presence of minor parties and Independents in the Senate indicates that the multiparty state of the Senate will almost certainly be sustained while the current electoral system remains in place. It has been argued that the Senate has increasingly assumed the role of Opposition to the Government in the Commonwealth Parliament. This can be seen in the history of double-dissolution elections. In the first 74 years after Federation, there were only two double-dissolutions - in 1914 and 1951. In the following 13 years, there were four – in 1974, 1975, 1983 and 1987.[232]

## 4.4 A Range of Political Views

While there have been adjustments made within Australia's system of government since Federation, these changes have been viewed in different ways by different political commentators. A brief review of some of these perspectives is useful as a prelude to looking more closely at how best to address the research question of the conflict in key political values between the Westminster system of responsible government and the American republican structure of federalism.

The first perspective that is useful to review is that of Brian Galligan. Galligan regards Australia's constitutional system as essentially a federal republic rather than a parliamentary monarchy. His proposition is that the federal republican nature of Australia's polity has been there all the time, it was just that it had been "hidden". In this sense, any major structural reform to achieve a republican form of government would be unnecessary. The basis for this position is the premise that all the institutions of government are controlled by a constitutional regime, which in turn can only be changed by a referendum vote of the people of the Commonwealth of Australia. In this way, then, the people are 'sovereign' since our political institutions, including that of the Head of State, are subject to the Constitution with its checks and balances.[233] In operation, parallel to Bagehot's observation in Britain as detailed in Chapter Two, our system of constitutional monarchy is a 'disguised republic' through the mechanism of *responsible government*.

[231] Galligan (1995), p. 5.
[232] Reid and Forrest, p. 471.
[233] Galligan (1995), p. 245. The Australia Acts of 1986 finally regulated the appointment of State Governors by eliminating the role of the British Government in this process.

Galligan also views our political traditions as primarily unitary and parliamentary, where monarchic forms have been 'Australianised', though having Australians as Head of State since the 1930s, and especially since 1986. The federal tradition, in his view, is over-exaggerated and under-emphasises the level of 'political prudence and conventional practice'.[234] There is, according to Galligan's perspective, no conflict between responsible government and federalism as the two simply balance each other.[235]

Galligan's argument is persuasive in that Australia's system of government does display a sense of republicanism – but this is more to do with the nature of American-style federalism as incorporated at Federation than it is to do with the 'disguised' republicanism of British responsible government. While the current system of PR in Senate elections is in place, the power of the Senate and the arrangement of powers between the Commonwealth and the States work against the parliamentary supremacy of responsible government - hence conflict occurs. This conflict is more than just some healthy tension or balance; it is a conflict of political values where the two fail to work effectively together. In addition to this, not all aspects of our system of government are subject to the Constitution. Much is left to convention, or political habits of the day. As the adherence to convention is governed by the behaviour of elected politicians, it cannot be argued that they are subject to the Constitution in a republican sense. The Prime Minister and Cabinet are not referred to within the Constitution but operate within the framework of 'conventions' which by their nature can change over time. 'The people' are less sovereign than Galligan would allow and the Government dominates more than it should for Australia to be considered a republican system - even if it is a 'disguised' one.

An alternate view to that expressed by Galligan is presented by Graham Maddox. Maddox's view of Australia's system of government is that while it contains some elements of republican government, it is not a republic in the classical sense.[236] The notion of checks and balances, as constructed by Madison, is a notion with which Maddox is uncomfortable as a doctrine as it inhibits, in his view, necessary action being taken by governments and impedes desirable reforms from occurring.

[234] Galligan, p. 64.
[235] Galligan, p. 158.
[236] G. Maddox, 'Republic or Democracy', *Politics*, vol. 28, 1993 Special Issue, p. 24

Maddox takes a broad view when looking at the term 'republic', arguing that a republic can exist within a monarchy. Maddox highlights the claim of Britain being a 'disguised republic', as observed by Bagehot, with the Monarch having receded from effective political influence. For Maddox, the constitutional monarchy is arguably more democratic than any republic might be - yet it is still 'Monarchy'. Australia's system of government, Maddox sees, is caught between the evidences of Monarchy inherited from Britain and the 'updraft' of popular legitimacy that is displayed by the American tradition.

In the constitutional sense, Maddox identifies the traditions of Britain and America as the sources of our political system, yet sees the introduction of the notion of federalism into Australia as a defect that has complicated the exercise of governmental power. In the conflict of political values between responsible government and federalism, Maddox stands squarely behind the British tradition of parliamentary sovereignty and unitary government.

From Maddox's perspective, democratic processes and necessary reforms can be undermined if the checks and restraints in the parliamentary system are such that the government can be prevented from carrying out its 'mandate'.[237] According to this view, a 'system of strong parliamentary checks and balances may produce *limited* government but it will not necessarily be *responsible* government'[238]. Maddox argues that the Senate is used to limit and frustrate legislative reforms put forward by a Government elected through the House of Representatives. As a consequence, the ineffective element in our system is not the domination of Parliament by the Government, but the instability and uncertainty created by a powerful Senate that can stifle government action. According to Maddox, this defect - the power of the Senate – should be removed. The Government of the day should have a greater capacity to carry out its responsibility unhindered.

Yet it was argued in Chapter 2 that one of the original intentions of Federation was the creation of *limited* government, not merely a system of responsible government in the fullest sense of the British parliamentary tradition. The overlay of federalism and the intention that our system *would* produce *limited* government was acknowledged during the Federation debates as departing from the notion of British responsible government (note Hackett's outcry against federalism during the

[237] G. Maddox, *Australian Democracy in Theory and Practice*, Longman, Melbourne, 1996, p. 241.
[238] Summers, p. 38.

Federation conventions). This departure is acknowledged by Maddox but, from his perspective, it is a defective feature of Australia's constitutional design. [239] Others, as we shall see, view the increased ability of the Senate to perform the role nominally ascribed to Parliament - to scrutinize legislation; to question the Government; to hold the Government to account - as a valuable safeguard rather than as a defect to be remedied.

Campbell Sharman proposes that there is no single defined theory of constitutionalism that fits Australia's system.[240] This creates difficulties, he argues, when trying to categorise Australia's system of government. The range of academic views on Australia's system of government is a product of this difficulty. But whilst there is no neat theory to fit Australia, Sharman does assert that Australia's system of government has drawn from three distinct political traditions, namely British parliamentary processes, Australia's own Colonial tradition, and the American notion of federalism. Australia, therefore, is a 'compound' republic in that it relies on dispersal of power (*federalism*) to achieve individual liberty and government responsiveness combined with a parliamentary executive and a monarchical Head of State (conventional operation of *responsible government*). In this sense, Sharman's view is in accordance with Galligan and Maddox in respect of identifying the institutional tension between responsible government and federalism. Sharman detects a general lack of support among academic interpreters for the structure of federalism (specifically mentioning Maddox) and he attributes this lack of appreciation of, or support for, the political values behind federalism itself.[241]

For Sharman, however, it is the Government dominance of the parliamentary processes that is the cause for concern. Sharman argues that the imbalance between the Executive and the Legislative is basic to the nature of our system of government – as the Executive needs to control the legislature in order to hold office. In this context, a Madisonian would agree with Sharman. Madison's view was that a basic feature of a republican form of government would be the dominance of the Legislature, thus requiring adequate checks and balances in relation to the Executive. Sharman does not advocate wholesale structural change as such, but argues that the 'degree' of control that the Government of the day exerts over Parliament does require reform.[242] Some extra 'checks' are

[239] Maddox (1996), p. 241.
[240] C. Sharman, 'Australia as a Compound Republic', *Politics*, vol 25, no. 1, 1990, p. 2.
[241] C. Sharman, 'Ideas and Change in the Australian Federal System', *Australian Journal of Political Science, vol. 27, 1992 Special Edition*, p. 8.
[242] C. Sharman, 'Reforming executive power', in *We the People: Australian Republican Government*, G. Winterton (ed.), Allen & Unwin, Sydney, 1994, pp. 113-124, p. 119.

required, he suggests, to restore the balance between the Government and the Parliament. Worthwhile reforms, according to Sharman, include such things as defining in the Constitution the nature of Executive/Legislative relationships, placing a restriction on the involvement in, and the proclamation of, legislation by the Government so as to curb potential manipulation, modifying Government control over the introduction of money bills, and ensuring referendums should be able to be submitted to the electorate by the Senate as well as the House of Representatives.

Sharman proposes these types of 'small changes' as ones that have the potential to affect the operation of Government and Parliament within our system of government. Yet while such changes would restrict the ability of a Government to dominate the Parliament, they do not really address the source of the problem – that the Government is actually housed within the Parliament itself where the members of Government are also members of Parliament. This highlights the difficulty in trying to 'fit' republican mechanisms into a system that is not, by nature, republican. Sharman, writing in 1994, predicted that if a move to a republican form of government was restricted to a change in name for the Head of State (or minimalist change), then the move would fail.[243] As events transpired, and as we shall see later, this turned out to be prophetic.

While Galligan sees Australia as essentially a federal republic and Sharman sees Australia as having no 'neat theory that fits' our sort of 'compound republic', Elaine Thompson sees Australia's system of government as simply a 'mutation' of the British and American political traditions. The implication is that the result is not necessarily a coherent step forward. Thompson agrees with Maddox that the system of federalism, which limits parliamentary sovereignty and which, though the power of the Senate, constitutionally checks the majority Lower House, exerts a restraint on the parliamentary Executive.[244] Australia's system of government is a 'mutation' of the British Westminster system and of America's (Washington) system of federalism - a 'Washminster Mutation'. If it is to develop further as a 'washminster' system, it needs to have further 'counter checks' to limit the extent of Government dominance over Parliament - a view that mirrors that of Sharman. Thompson suggests defining the powers of a non-political Head of State within the Constitution, defining limits that should be placed upon the power of the Government which would be specified within the Constitution and enhancing the position of the people with respect to the Government so as to reflect their position (or authority) within Australia's system of government.

[243] Sharman (1994), p. 122.

This last point includes the ability to initiate referendums on constitutional matters, or Citizen Initiated Referendums (CIR), as well as a constitutional Bill of Rights.[245]

Whilst Thompson seeks in this way to reduce the power of Government in respect of the people, this has to be reconciled with the institutional arrangement whereby the majority party of the Lower House of Parliament forms the Government. This again highlights the difficulty in applying mechanisms to address executive dominance when the nature of the system produces executive dominance. A Bill of Rights would accord with a view that sees the position of the people as primary within the system of government. But a Bill of Rights, though, does present difficulties within Australia's parliamentary executive system, as outlined for example by Sir Anthony Mason.[246] There is a gulf, Mason argues, between the traditional Parliamentary/Common Law approach and the notion of fundamental rights. Indeed, Mason acknowledges that it is the inadequacy of the Common Law to protect against the intrusiveness of an immensely bigger Government bureaucracy that provides an argument for a Bill of Rights.

Continuing the theme of executive dominance, David Solomon has been an advocate for constitutional change since the 1975 dismissal of the Whitlam Labor Government. For Solomon, minimal changes would not be worthwhile, as the source of Australia's political problems are structural and only substantive change would provide a remedy.[247] Solomon argues that there are real problems with our system of government, the impact of our strongly disciplined political parties and quality of policies and politicians.[248] For Solomon, it is significant that these problems have not been confined to a single jurisdiction or State.

The real problem, according to Solomon, is that the Executive Government has come to completely dominate the Lower House of Parliament. This problem will not be overcome unless the

[244] E. Thompson, 'A Washminster Republic', in *We the People: Australian Republican Government,* G. Winterton (ed.), Allen & Unwin, Sydney, 1994, pp. 103-110.
[245] Thompson (1994), p. 110. Thompson takes the view that developments in judicial review indicate a growing concern in Australia that requires increased limits placed upon the government directly. From that perspective, Citizen Initiated Referendums and a Bill of Rights can be seen as a logical and congruent development in a '*Washminster'* system, checking Government power by guaranteeing certain rights to the citizens of Australia.
[246] A. Mason, 'A Bill of Rights for Australia?', *Australian Bar Review*, vol. 5, 1989, pp. 79-90.
[247] D. Solomon, *Coming of age: charter for a new Australia*, University of Queensland Press, St. Lucia, 1998, p. 172. Solomon quotes Bob Ellicott QC, 'Our country needs a new political agenda. The major political parties and the institutions they run have become increasingly irrelevant and unresponsive to the need to the country and the silent majority …'.
[248] Solomon (1998), p. 173.

Government is moved out of the Parliament. Solomon argues for the adoption of something like the American system of separation of powers in order for genuine reform to be successful. Adjusting Australia's system of government in this way to a more Madisonian style would free the Parliament from the control of the Government. Solomon argues that, from around 1908 onwards, the Government has ceased to be responsible to Parliament in the sense that the political values behind 'responsible government' require. The idea of responsible government was turned up on its head, such that Parliament was expected to be responsible to the Government.[249]

In relation to the recent republican debate, Solomon does not see that simply getting rid of the Monarchy as the whole solution to our constitutional problems - or even a substantial part of it. It is important for symbolic reasons, Solomon advances, that Australians should cease to be subjects of the Monarchy and become independent citizens of Australia. But a minimalist republic would not make any real difference, and would only be a distraction from the objective of substantive and successful reform.[250] The minimalist republic option (to be analysed in detail in the next chapter) would have virtually no effect on the way Parliament and the Government operates, other than perhaps giving Parliament a role in the selection of the Head of State. Solomon, therefore, proposes that the 'President' of Australia should be elected by the people to be both the Head of Government as well as the Head of State, as in the United States. Along with this option would be the abolition of the Senate to provide a single chamber in Parliament that would provide representation through single member electorates.[251]

Whilst a move towards a separated Government and Parliament would be consistent with the Madisonian style of republican government in which this submission is interested, the abolition of the Senate would not. A bicameral legislature, where both are elected under different basis of representation and elected within different timings, was an integral part of Madison's design.

George Winterton's underlying theme in various pieces written during the 1990s was that an Australian republic will become a reality sooner or later, but he sees this development within the context of the Westminster system of 'responsible government'.[252] According to Winterton,

[249] Solomon (1998), p. 178.
[250] D. Solomon, 'Parliament and executive in a republic', *Legislative Studies*, vol. 8, no.2, 1994, p. 42.
[251] Solomon (1998), p. 86.
[252] G. Winterton, *Monarchy to Republic*, Oxford University Press, Melbourne, 1995, p. 52.

Australia's Constitution established a system of 'responsible government' based upon the supremacy of the Parliament over the Government, in the tradition illustrated by Bagehot as detailed in Chapter 2. The primacy of 'responsible government' requires the Governor-General to follow 'ministerial advice' and only to exercise Bagehot's proposed three rights, ' to be consulted, to encourage and to warn'.[253] For Winterton, the events of the 1975 dismissal of the Whitlam Government has drawn attention to the changes that must be made, in order that a duly elected government could not be dismissed again.

In Winterton's earlier work, he proposed that the Senate should be modified to operate in a similar manner to the House of Lords in Britain, where the Reform Act 1911 ensured the British Upper House could not refuse to pass legislation but could only defer for a short period and for a limited number of times. He also proposed that the 'reserve powers' of the Governor-General should be codified so that the actions of the Governor-General would be justiciable or, alternatively, introduce fixed-term elections to counter the need to exercise the 'reserve powers'.[254]

Winterton's later work has been more closely aligned with the efforts to define a new republican constitutional arrangement for Australia that accords with the notion of responsible government.[255] He was a member of the Keating Government's Republic Advisory Committee that suggested a 'minimalist' republican model. Winterton's own draft proposal centred on the removal of the Monarchy and the creation of an Australian Head of State that would elected by a 2/3rds majority vote of a joint sitting of the Commonwealth Parliament. In this way, a republican framework would be supported by the notion of parliamentary supremacy and the operation of 'responsible government', such that the Head of State would be responsible to both Houses of Parliament as a whole. As we shall see, the eventual model supported by the 1998 Constitutional Convention drew much from Winterton's work, although some elements were modified during the Convention itself.

[253] G. Winterton, *Parliament, The Executive and the Governor-General*, Melbourne University Press, 1983, p. 155.
[254] Winterton (1983), p. 148. Essentially the changes included such things as modifying S.53 of the Constitution to introduce a provision based upon the Parliament Act 1911 (UK) s.1 and the Constitution Act 1902 (NSW) s.5A, such that an appropriation Bill could become law without the Senate's consent if that House would not pass it within a short period. The 'reserve powers' would be codified so that they would become justiciable and so that '*they remain no longer in a state not far from anarchy*'. In reality, Winterton considered that fixed-terms for Parliament, to remove the need for reserve powers, may well be the only type of reform that might be feasible.
[255] Winterton (1994), p. 39. Winterton advanced the view that the published draft Constitution would enhance the 'republicanism' of Australian government and claimed it would fortify" the rule of law and representative government.

## 4.5 Conclusion

While there has been both continuity and change within Australia's system of government, the conflict in political values between the Westminster system of responsible government and the republican structure of federalism has significantly shaped constitutional events since Federation. With a mostly autonomous Governor-General, a House of Representatives dominated by a Cabinet Government led by the Prime Minister, and a consistently multiparty Senate, the *'trinitarian struggle'* within the Commonwealth Parliament has resulted in neither notion of government being able to operate effectively.

The Commonwealth Parliament remains a key political institution in relation to the accountability of Federal Governments.[256] The increasing participation and scrutiny of the media has provided some support to both houses of the Commonwealth Parliament in this process. However, the reality of Australia's system of government is that it no longer accords with the traditional notion of the Westminster system of *responsible government*. It is true that Governments must face regular elections, but between elections the mechanisms to keep the Government 'responsible' and accountable in the House of Representatives have diminished. The traditional procedures of the Parliament have become inadequate to provide the expected oversight within the Lower House assumed within the traditional Westminster ideal. Effective opposition to the Federal Government is now largely exercised through the Senate, due to the continuing presence of minor parties and independents.

The next chapter, Chapter Five, looks at the recent republican debate, focussing on the constitutional models debated by the 1998 Constitutional Convention. The objective is to review the models presented, with a view to seeing how well they would answer the research problem of how best to resolve the conflict in values between the notions of *responsible government* and *federalism*.

[256] H. Evans, 'Parliament and Extra-Parliamentary Accountability Institutions', *Australian Journal of Public Administration*, vol. 58, no. 1, 1999, p. 89.

## 5. THE 1998 CONSTITUTIONAL CONVENTION MODELS

> *For the first time since the early eighteenth century the Republican debate focussed on constitutional reform as much as it did on the Monarchy.*[257]

The aim of this Chapter, given the conclusion of section 4.5, is to present the recent Head of State debate as a continuation of the conflict in values between the two main political traditions inherent within Australia's system of government. This section looks at the major models for constitutional change presented to the 1998 Constitutional Convention. As argued by Solomon, the contemporary republican debate has largely been a distraction from the real issues of inconsistency with Australia's system of government.

This review, then, is a relevant task as it highlights the continuing impact that this conflict in key political values still has and the resulting constitutional uncertainty and tension that it generates. The 1998 Constitutional Convention and the resulting Commonwealth referendum in 1999 is evidence of this continuing conflict or tension. The four models reviewed in this chapter include the McGarvie "minimalist" Model, the Bipartisan Appointment of the President Model championed by the Australian Republican Movement, and two direct-election models proposed respectively by Geoffrey Gallop and Bill Hayden.

The major contention of this Chapter is that, within a Madisonian view of constitutional design, all models fall short of a consistent approach. With the defeat of the 1999 referendum that proposed the acceptance of the Bi-Partisan Appointment Model, the opportunity now exists to advocate a Madisonian republic for Australia. It is the proposition of this submission that the Bi-Partisan Appointment Model, with power centred within Parliament and primary power exercised by the Prime Minister, falls within a Westminster-style of democratic tradition that is now more at odds with the increasingly consensual style of democracy that exists in Australia today.

[257] M. McKenna, "*1788 to 1993: Tracking the History of Australian Republicanism in Australia*", 1993, p. 4. This article is located at A.R.M. website [http://www.republic.org.au/issues/history.html], as at 13 July 1998.

The conclusion to Chapter 4 reiterated that the current arrangements of our constitutional system of government are based on a system of federalism, that informs us of how political authority is limited, divided and shared by representative institutions, within a tradition of the Westminster system of responsible government. Chapter 3 traced the 'trinitarian struggle' within the Commonwealth Parliament between the Governor-General, as local representative of the British Monarch, the House of Representatives as strongly representing the key values of the Westminster tradition of single-party Cabinet Government, and the Senate as strongly representing the consensual multiparty style of politics reflecting more a Madisonian legislature imbued with a multiplicity of 'factions'. As a result of the tensions and conflict that this 'trinitarian struggle' has produced, successive Australian Governments have attempted to reduce the power of the Senate and to allow the Westminster tradition to predominate. The s.128 referendums that have been put before the Australian electorate, with this purpose in mind, have repeatedly failed to achieve the required level of support with voters. The current state of our constitutional arrangements leaves this conflict in underlying values unresolved.

During the period leading up to the early 1990s, there was little significant overt interest in the issue of an Australian republic. When the issue was first raised in an opinion poll in 1953, the year of accession of the current British Monarch, only 15% of respondents supported a republic.[258] It has been argued, though, that the question of an Australian republic has been present throughout Australia's political past and that it did not start with recent events, such as the period surrounding the 1975 Whitlam dismissal, or even with the Bulletin magazine of the 1880s, or even with John Dunmore Lang in the 1850s, but with British settlement in 1788 by people who believed that a 'colonial state' was only an initial stage of political development in Australia and that full self-government would follow.[259] McKenna asserts that the republican debate of colonial times was rarely anti-monarchical, hardly ever revolutionary, and did not entail an anti-British sentiment. It was more a debate that centred on representative self-government and control over domestic affairs than any sense to shrug off a 'foreign monarchy'.

McAllister characterises the political environment leading up to the 1990s, though, as being one of a growing interest in the issue of an Australian republic, punctuated by brief periods of increased

[258] I. McAllister, 'Elections Without Cues: The 1999 Australian Republic Referendum', *Australian Journal of Political Science*, vol. 36, no. 2, 2001, p. 248.
[259] M. McKenna, This article is based upon McKenna's PhD thesis and his published book "*The Captive Republic*", Cambridge University Press, Cambridge, 1996.

nationalist sentiment during the late 1960s and surrounding the period of the Whitlam Labor Government.[260] Although the Australian Labor Party had become committed to an Australian republic in 1983, it was not until Paul Keating became Prime Minister in 1991 that the issue of an Australian republic gained public prominence. In that year, the Labor National Convention agreed to work towards an Australian republic by the year 2001, the year that would celebrate the Centenary of Federation.

In February 1993, Prime Minister Keating appointed a Republic Advisory Committee (RAC), under the chairmanship of Malcolm Turnbull. The resulting report argued that a republic, defined as a 'state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people', could be achieved without threatening the existing parliamentary arrangements.[261] Amongst other issues, the Republic Advisory Committee evaluated four means by which a new Head of State could be chosen: either by Prime Ministerial appointment, by parliamentary election, by direct popular election or election by an electoral college.[262] The report argued that the appointment of a Head of State by the current Prime Minister, though closest to current practice, would result in the process becoming subject to party influence due to the adversarial party contest in forming a Government drawn from the House of Representatives. Popular election, on the other hand, was seen as conferring a popular mandate on the new Head of State, and this would conflict with the perceived mandate claimed by the Government, would be prohibitively expensive and would politicise the candidates for office. An electoral college mechanism, involving a group wider than simply the Commonwealth Parliament, would suffer, the report argued, from the same perceived disadvantages of popular election without the direct involvement of the electorate. The report concluded that the preferred options were either popular election or by parliamentary appointment via a two-thirds majority vote of a joint sitting of both Houses of the Commonwealth Parliament.[263] The focus of the RAC report was, by its nature, simply on the patriation of the function and position of the British Monarch as Head of State to Australia, not a readjustment of Australia's constitutional arrangements and certainly not a Madisonian model of republican government.[264]

[260] McAllister (2001), p. 249.
[261] The Report of the Republic Advisory Committee, *"An Australian Republic: The Options, Volume 1 - The Report"*, Commonwealth of Australia, Canberra, 1993, p. 39.
[262] The Report of the Republic Advisory Committee, p. 3
[263] The Report of the Republic Advisory Committee, p. 82.
[264] The Report of the Republic Advisory Committee, p. 1.

By early 1995, the Keating Labor Government committed itself to a referendum on the issue of an Australian republic by 1998 or 1999, based upon the model of an indirectly-elected President. In its preferred model, the new Head of State would be elected by a joint sitting of both houses of the Commonwealth Parliament, on the nomination of the Prime Minister and Cabinet. The response of the then Liberal Opposition was to argue for a 'People's Convention' which would decide whether or not Australia should become a republic, and, if so, what the most appropriate model to be put at a constitutional referendum. The election of the Liberal-National Party Coalition to Government in 1996 provided the impetus for the Constitutional Conference held in Canberra during early February 1998.

The outcome of the eventual 1999 referendum on the issue of the republican model that emerged from this conference was that it failed, with the republican advocates divided and the monarchist advocates highlighting the proposed model's perceived flaws. Placed in context with the existing record of Commonwealth constitutional referendums, it was always difficult for political commentators to foresee the referendum questions succeeding.[265] They turned out to be prescient. Both referendum questions, on a republican model and a new preamble to the Constitution, failed to win a majority of votes in any State.[266]

This submission argues that the defeat of the 1999 Referendum implied a rejection of a republican model based upon the key values of the British Westminster system of responsible government. The proposed model in the referendum, with its central focus being Parliament and with its advocates claiming 'great faith' in the institution itself as the centre of a Republic, fell squarely within a political tradition that looks to a past, 'golden age', view of parliamentary government experienced in Britain during the mid 19th century. A Bagehotian analysis, as detailed in Chapter 2, suggests that the rejected model was a contemporary application of the values behind 'responsible government'.

Charnock makes a similar interpretation in highlighting the impact in the referendum vote of the 'direct-electionists', whom he concludes cast over half of the 'No' votes.[267] Charnock's analysis of

[265] H. Irving, 'The Republic Referendum of 6 November 1999', *Australian Journal of Political Science*, vol 35, no. 1, p. 111.
[266] See AEC 1999 Referendum Results, located at
[ www.referendum.aec.gov.au/tallyroom/Nat_Table_q1.html, Last Updated 30 November 1999.
[267] D. Charnock, 'National Identity, Partisanship and Populist Protest as Factors in the 1999 Australian Republic Referendum', *Australian Journal of Political Science*, vol. 36, no. 2, 2000, p. 271.

the Australian Constitutional Referendum Study 1999 ( a national sample survey) provides an empirical assessment of the main influences to the referendum defeat. These influences include the role of the respective political parties in advocating their preferences, a protest vote from strongly 'nativist' or 'nationalist' sections of the community, and an interrelated protest vote against perceived elitism. The protest against perceived elitism, while not an example of voter cynicism about Australia's political system, was also identified by Galligan as a tension between those wishing to preserve the monarchy and those wishing to entrench a 'popular sense' of an elected Head of State.[268] Also consistent with this view that the defeat of the referendum implied a rejection of a republican model based upon the values of the British Westminster system of responsible government, the failure has been described as indicative of a system of government 'mired in the politics of the nineteenth century'.[269] This is caused, argues Ward, by our inability to codify an unnecessarily complicated set of conventions, our addiction to 'reserve powers', and our distrust of politicians. We are, according to Ward, custodians of a 'colonial mindset'.

Although the 1999 referendum failed, there is still a perceived tangible aspiration for an Australian republic. The 1999 Constitutional Referendum Study, as detailed in Table 5.1 and Table 5.2 below, lends weight to the view that there is still a strong desire for a republican form of government even though the overall vote for the specific republican model on offer was rejected.[270] Table 5.1 suggests that for a majority of people, the most preferred method of choosing a Head of State would be by direct election. Table 5.2 highlights that of those that did not choose direct-election as their first preference choice, a majority would prefer it as their second choice. Framed within the republican debate surrounding the Head of State only, the results of the study indicate a preference for the mechanism of direct election. This preference is significant and is incorporated within the proposed republican model detailed in chapter 2.

[268] B. Galligan, 'The Republican Referendum - A defence of popular sense', *Quadrant*, October 1999, p. 46.
[269] A. J. Ward, 'Trapped in a Constitution: The Australian Republic Debate', *Australian Journal of Political Science*, vol 35, no. 1, 2000, p. 117.
[270] Gow, Bean and McAllister, p. 7.

| **TABLE 5.1 CONSTITUTIONAL REFERENDUM STUDY, 1999: A14P1.** | | | | |
|---|---|---|---|---|
| Question A14P1. If you had to choose among the following possibilities for Australia, which one would be your first choice? | | | | |
| 1. A President directly elected by the people<br>2. A President appointed by Parliament<br>3. Retaining the Queen and the Governor-General<br>4. Don't know. | | | | |
| | Unweighted | Unweighted | Weighted | Weighted |
| | Number | % | Number | % |
| Direct Election | 1719 | 53.9 | 1148 | 53.6 |
| Parliamentary Appointment | 637 | 20.0 | 430 | 20.1 |
| Retain Queen | 747 | 23.4 | 509 | 23.8 |
| Don't Know | 88 | 2.8 | 55 | 2.6 |
| Missing | 240 | | 169 | |
| **Total** | **3431** | **100.0** | **2311** | **100.0** |

| **TABLE 5.2 CONSTITUTIONAL REFERENDUM STUDY, 1999: A14P2.** | | | | |
|---|---|---|---|---|
| Question A14P2. And which one would be your second choice? | | | | |
| 1. A President directly elected by the people<br>2. A President appointed by Parliament<br>3. Retaining the Queen and the Governor-General<br>4. Don't know. | | | | |
| | Unweighted | Unweighted | Weighted | Weighted |
| | Number | % | Number | % |
| Direct Election | 1022 | 33.6 | 684 | 33.4 |
| Parliamentary Appointment | 891 | 29.3 | 604 | 29.5 |
| Retain Queen | 806 | 26.5 | 534 | 26.0 |
| Don't Know | 325 | 10.7 | 226 | 11.0 |
| Missing | 387 | | 263 | |
| **Total** | **3431** | **100.0** | **2311** | **100.0** |

The purpose of this chapter is to discuss the key contemporary republican models put forward at the 1998 Constitutional Convention. This chapter argues that they are inadequate in design in relation to how best to resolve the conflict in underlying values between the British Westminster system of *responsible government* and the American republican structure *federalism*. This analysis lays a foundation for this submission to argue that this a timely opportunity to propose a Madisonian republic for Australia, as detailed in chapter 2.

## 5.1 The 'Minimalist' McGarvie Model

> *Mr. Turnbull himself has said that my model is a blindingly obvious minimal development. It is a perfectly sensible model if you start from the premise of having absolutely minimal change.*[271]

The 'minimalist' model was proposed by Mr. Richard McGarvie AC, previously a Victorian State Governor and Victorian Supreme Court judge. The model put forward by McGarvie was one whereby the object was to maintain the nature and operation of the current system of government, while replacing the constitutional function of the Monarchy with a proposed Constitutional Council.

Under this model, any Australian citizen could be nominated by another Australian citizen to be listed for consideration by the Prime Minister when choosing the new Head of State. The eligibility requirements for the position of Head of State would be left as they currently were by convention, as an Australian citizen. The Australian nominated by the Prime Minister for the position of the Commonwealth's Head of State would be appointed by a Constitutional Council, in accordance with Prime Ministerial advice. Under the McGarvie model, the Council could only appoint or dismiss a Head of State upon Prime Ministerial advice. The Council would be bound by 'convention' to accept the advice tendered, otherwise the Council member(s) refusing to accept the advice would be publicly dismissed for breach and a new Council formed to carry out the advice tendered.

The three members of the Constitutional Council would be determined by an automatic procedure whereby places would be filled, first of all, by former Governors-General with priority to the most recently retired, and unfilled positions going, on the same basis, to former State Governors, Lieutenant-Governors (or equivalent), judges of the High Court or judges of the Federal Court. A temporary provision would be that for the first thirty years of operation if there were no women in the first two places filled, the third place would go to a woman with the highest priority among

[271] 1998 Constitutional Convention, *Report of the Constitutional Convention*, Old Parliament House, Canberra, Volume 4, Transcript of Proceedings, Week 2, 9-13 February 1998, p. 840.

eligible persons. This is the main feature of McGarvie's model whereby the Constitutional Council would replace the position of the Monarch. With a procedure to fill vacancies, there would always be a pool of suitably qualified retired officers to draw on to fill the positions within the Constitutional Council.

The Head of State, under McGarvie's model, could be dismissed within two weeks of the Prime Minister advising the Constitutional Council to do so. McGarvie proposed that the term of office should be determined as it is now - at pleasure, without any defined term and liable to be replaced at any time. The reason for this was that it would not alter the current 'conventional' or unwritten constitutional arrangement.

The Head of State would have the same range of powers as the current Governor-General which, excepting for the reserve powers, would only be exercised on the advice of the Federal Executive Council or a Cabinet Minister. There would be no codification of the constitutional conventions applying to the Head of State and the conventions would remain binding because the system and its operation and its practical penalties would also remain - other than the role of the British Monarch which would be moved to the Constitutional Council. The reserve powers would continue to be exercised as they are now by the current Governor-General, under 'rare and extreme conditions'. Casual vacancies in the position of the Head of State would continue to be filled by the Senior State Governor.

The McGarvie model, while deliberately being a minimalist one, was underpinned by the notion that the current constitutional balance now in place, as described in Chapter 3, would best preserve the 'quality, strengths and safeguards' of Australian democracy, as McGarvie conceived it. Any move to a republic should, in McGarvie's view, preserve this perceived balance.[272] McGarvie, therefore, argued against both the parliamentary-appointment and the direct-election method of choosing a Head of State, as both of these devices, in his view, would destroy the current constitutional balance and would create problems that would diminish Australia's current constitutional set of arrangements.

[272] McGarvie, p. 3.

In arguing for a 'minimalist model', McGarvie identified four supports for his conception of democracy provided by the present set of constitutional arrangements surrounding the Governor-General.[273] These 'essential features' or pillars, he argued, are required to maintain the strength, stability and quality of our form of democracy. McGarvie's position was that the other republican models of the Convention failed to support this framework.[274]

The first of McGarvie's pillars was to ensure that a Head of State would be chosen in such a way as to give no mandate of power that would rival the Prime Minister as Head of Government. McGarvie's view was that our existing system, as developed over many years, has provided Governors-General who have not regarded themselves as having a rival mandate to wield partisan political power, and whose calibre has satisfied people's expectations.[275] As a result, it would be desirable to preserve the current method of nominating a Governor-General, whereby the Prime Minister individually would exercise the power to nominate a person for the position of Head of State.

> *Our history has shown that prime ministers have accepted and have acted with great discretion in exercising that responsibility as the elected head of the elected government.*[276]

McGarvie advocated the continuation of this practice by invoking Alexander Hamilton's argument that a specialised office should not be dependent upon a group or party vote, as it would only result in either a mediocre choose or a victory of one group over another.[277] To protect against this occurring, McGarvie argued for the power of nomination for the new Head of State being preserved in the hands of the Prime Minister.

The second of McGarvie's pillars was that the Head of State would be liable to prompt dismissal due to such circumstances as a breach of 'convention', such as partisan collaboration with the Opposition. McGarvie believed the dismissal mechanism to be more important that the appointment

[273] McGarvie, p. 13.
[274] McGarvie, p. 14.
[275] McGarvie, p. 122.
[276] 1998 Constitutional Convention, p. 844.
[277] McGarvie, p. 129. McGarvie regards the argument of Alexander Hamilton, from *The Federalist*, no. 76, as being persuasive in its claim that the choosing of an Executive under party control would either produce a victory of one party over another, or a compromise, and that the merit of the candidate would be too easily forgotten about.

process.[278] The Head of State would have the political security of tenure, which would come from the public knowledge that the period of tenure had been arranged informally. McGarvie, like Turnbull at the 1998 Convention, argued that the negative electoral consequences would be enough to avert a 'mischievous' sacking.

To minimise the prospect of dismissal, McGarvie proposed three 'conventional' mechanisms to ensure a compliant Head of State.[279] The first convention would be to only exercise powers upon Ministerial advice. The second would be to refrain from acting or speaking politically or in a partisan way, and, third, to refrain from political collaboration with the Opposition. These conventions, supplemented by an appointment process avoiding a rival political conflict, would ensure the political security of the office of Head of State.

While these conventions are a useful framework, they are also open to interpretation. For example, was the entry of the then Governor-General, Sir William Deane, into the debate concerning Aboriginal reconciliation a "political" or "partisan" move or was it simply an attempt to provide focus of promoting unity within the community for the good of all Australians?[280]

As with the nominating power, McGarvie argued that the power of dismissal would be best left solely in the hands of the Prime Minister.[281] Here, McGarvie draws on the recommendations of the South Australian Constitutional Advisory Council report of September 1996, where a majority of the Council members recommended the above position.[282]

[278] McGarvie, p. 89.
[279] McGarvie, p. 88.
[280] G. Milne, 'Palace visit politicises G-G's office', *The Australian*, 6 December 1999, p.13. Milne's argument was that Sir William Deane's part in arranging the visit of several Aboriginal leaders to the Queen in October 1999 "politicised" the office by intervening in an issue involving the Government of the day. An alternate view was that the Governor-General was simply acting as the Monarch's local representative in arranging a request to petition the Queen and was therefore acting entirely appropriately as the Queen's representative.
[281] McGarvie, p. 98.
[282] South Australian Constitutional Advisory Council (1996), p. 63. Recommendation #6 states that "The Australian people should retain the present system whereby the head of state is in effect appointed by, and can be dismissed by, the Prime Minister. It is the only minimal solution. It does the least violence to our existing arrangements and, of all the proposals that have been put forward, it best accords with our traditions of representative and responsible government". It is arguable whether if this recommendation, in fact, accords with our present constitutional system of government.

> *Significantly, the Council was unanimous that the effective decision which would lead to the dismissal of the Head of State should be solely that of the Prime Minister or Premier.*[283]

Yet the current constitutional system does not place the authority to dismiss in the hands of the Prime Minister or the Premier. The authority to dismiss a Governor-General is held in the hands of the current Monarch. The minimalist application would be that the Constitutional Council would exercise this power. The Prime Minister may nominate a Governor-General, but not appoint. The Prime Minister may request a withdrawal of commission, but not dismiss. This 'reserve power' should be preserved for the Constitutional Council. That would continue the current constitutional balance, in a minimalist sense.

A further issue raised with McGarvie's dismissal process is the handling of the situation where the Constitutional Council refuses to dismiss the Head of State.[284] McGarvie proposed that the Council would be obliged to follow the advice of the Prime Minister according to convention - that is, treating the request as a binding request. The penalty for such a breach, according to McGarvie, would be the removal from the Council of any members rejecting Prime Ministerial advice until appropriate members were found to implement the original dismissal request. Yet conventions have not always been treated as authoritatively binding under Australia's expression of the Westminster system of *responsible government*. For example, the convention of Ministerial Responsibility is one convention that has tended to be followed if it was perceived that negative electoral consequences would ensue.

Another aspect of McGarvie's proposed appointment and dismissal procedures is that the argument he uses to support the appointment process also creates a flaw in relation to dismissal. Alexander Hamilton certainly did provide a persuasive argument for the nominating power of a powerful position to be left in the hands of a single constitutional officer - in his specific case it was the proposed office of President. But, the context of Hamilton's argument was for the President to provide nominations to the US Senate for specific offices, which the US Senate could then either ratify or reject. It would be under the circumstance of rejection that the nomination power held in a

[283] South Australian Constitutional Advisory Council (1996), pp.11-12, 59-67, 107-111.

single hand would become significant, in order to protect against any partisan influence and compromise in any re-submissions. To apply this same argument in its proper context to McGarvie's model, if the Prime Minister holds the individual power to nominate, the Constitutional Council must also hold the appropriate power to accept or reject that nomination.

The question is, then, whether it is a reasonable proposition that the current Monarch could refuse a dismissal request. The answer would be that it could happen under rare and extreme circumstances, but highly unlikely under normal situations. The establishment of self-governing dominion status, achieved during the early 1930s, allows the Governor-General be considered in a similar position to the Monarch in Britain in relation to the British government. The reality of this informal authority, within the framework of domestic affairs, was demonstrated in the 1975 response to then Speaker of the House of Representative's appeal to Buckingham Palace. The Queen's reluctance to become involved, given that the dismissal had already occurred and the Queen had not been consulted, would tend to indicate that the Monarch would be unlikely to intervene unless under very 'rare and extreme' circumstances that went beyond the scope of what would generally be considered 'domestic affairs'.

The third pillar of McGarvie's foundation to preserving the existing constitutional balance in an Australian 'republic' was that the Head of State must be, and be seen to be, 'above party politics' and to be a unifying influence for the community at large. Drawing upon Bagehot's view of the British constitution, the Head of State would need to sit above the 'efficient' elements of government and remain 'dignified'. This would allow the Head of State to provide a community focus that would divert attention away from the day-to-day 'efficient' operations of government undertaken by the politicians in Parliament. The continuation of this British view was important for the minimalist model, because if the Head of State is to be 'above politics', the nomination and/or appointment process cannot be part of, or influenced by, the partisan political processes of government. Allowing the Prime Minister to individually nominate the Head of State, McGarvie argued, allows the Prime Minister to 'rise above' party politics in nominating someone that will work above the political 'fray'. McGarvie refers, again, to the SA Advisory Council in supporting this position.[285]

[284] 1998 Constitutional Convention, p.842. The point concerning whether or not McGarvie's Constitutional Council could reject a request to dismiss a Head of State was put by Neville Wran during debate.
[285] South Australian Constitutional Advisory Council (1996), p. 108.

During the Convention, Turnbull criticised McGarvie's model by noting that it would involve the decision to appoint being implemented by another. That is to say, the decision of the Prime Minister to appoint a Head of State would be implemented by the Constitutional Council. 'He [McGarvie] made it very clear in his remarks today that, of course, the decision is the Prime Minister's'.[286] Yet, by patriating the function of the Monarchy to Australia in the body of the Constitutional Council - within a minimalist framework - the appointing and dismissing authority would reside, in reality, with the Constitutional Council rather than the Prime Minister.

> *.. but it is this council of genial retired governors - like Mr. McGarvie, no doubt - who will implement it. This, Mr. Chairman, is a recipe for immense confusion.* [287]

The fourth pillar that McGarvie depended upon for his argument of preserving the existing constitutional balance in a 'republic' was that of the 'reserve powers'. McGarvie's objective was to preserve the capacity for the Head of State to exercise 'reserve powers' under rare and extreme circumstances to ensure the effective operation of our system of government. It could be argued that the 1975 dismissal of the Whitlam Government was an action by Kerr to ensure the continued operation of our system of government - given the intransigence on both sides of the political divide. The same could be said of the British dismissals of 1784 and 1834, described by Dicey as constitutionally valid appeals to the electorate in order to resolve a conflict, perceived or otherwise, between the Monarch and the Government.[288] Within the context of a tradition of British Westminster government, the exercise of the 'reserve power' of dismissal is certainly not unheard of.

During the Constitutional Convention, it was argued that McGarvie's model was defective because there was no mechanism to stop a repeat of the events of 1975.[289] McGarvie responded that the notion of a 'Mexican standoff' was a misconception because in practice there would be a time delay inherent in the process whereby the Head of State would consult and seek information. This time delay would allow for the possibility for a crisis to be resolved without reaching the point of actual

[286] 1998 Constitutional Convention, Vol. 4, p.847.
[287] 1998 Constitutional Convention, Vol. 4, p.847.
[288] Dicey, p. 290.
[289] 1998 Constitutional Convention, Vol. 4, p. 685.

dismissal. This was, McGarvie argued, the reason for the time delay of fourteen days being built into his model. Yet, essentially this criticism misses the point of McGarvie's model in being a minimalist one. It was not the purpose of McGarvie's model to change the way 'reserve powers' are executed in the first place. To do so would have been against the notion of a minimalist model.

While the model advocated by McGarvie was a "minimalist" one, as such it fails to address the conflict in underlying values between the Westminster system of responsible government and the republican structure of federalism as addressed in this submission. As a consequence, McGarvie's model is a good answer to the wrong question. This minimalist model does patriate the function of the Monarchy with minimal change. McGarvie acknowledges this by indicating that this was the whole basis for his constitutional model in the first place. Yet, as Winterton argued during the Convention, an appropriate and suitable republican model for Australia should be more than just a simple patriation of the function of a hereditary Monarchy.[290] The question of interest to this submission is how best to resolve the conflict in underlying values between the British Westminster system responsible government and the American republican structure of federalism. McGarvie's model not only preserves the existing constitutional system, it must also by consequence preserve the existing conflict. This is not to just to look at the symbolism of the model, as has been done at the Convention, but to look at the substance of the institutional arrangements contained within this model.[291]

## 5.2 The Parliamentary Appointment Model

The model put forward at the 1998 Convention as the "Bipartisan Appointment of the President Model" was proposed by Malcolm Turnbull and seconded by Dr Lois O'Donoghue.[292] This parliamentary appointment model was described by its advocates as providing a consultative nomination process, which would allow a short-list of nominations to be produced by a Community Consultation Committee that would 'reflect the diversity of Australian people having regard to gender, race, age and geographical considerations' and 'include representatives of peak community organisations, Commonwealth, State and Territory Parliaments'.[293] This proposed model was

[290] 1998 Constitutional Convention, Vol. 4, p. 684.
[291] 1998 Constitutional Convention, Vol 4, p. 686.
[292] 1998 Constitutional Convention, Vol. 4, p. 846.
[293] 1998 Constitutional Convention, Vol. 4, p. 846.

centred on parliamentary action to choose the Head of State, who would be appointed by a joint sitting of both Houses of the Commonwealth Parliament in Canberra.

Under this model, as finally accepted at the Convention, any Australian citizen qualified to be a member of the House of Representatives, subject to s.34 and s.44 of the Constitution, would be eligible for the position of Head of State.[294] The objective of the nomination procedure would be to ensure that the Australian people were consulted as thoroughly as possible before a Head of State was chosen by the Parliament. The proposed process of nomination would involve three stages. The first stage of this process would involve the invitation of nominations from State and Territory Parliaments, local government, community organisations, and individual members of the public. Nominations would be not be published without the consent of the nominee. The second stage of this process would involve the consideration by a committee of the received nominations and its preparation of a short list for the Prime Minister and the Leader of the Opposition to consider. This process of community consultation would be established by ordinary legislation or parliamentary resolution. The third, and last, stage of this process would be the consideration of the short list by the Prime Minister and the Leader of the Opposition. The Prime Minister would be expected to present a single nomination for the office of Head of State, seconded by the Leader of the Opposition, for approval at a joint sitting of both Houses of the Commonwealth Parliament. A two-thirds majority vote would be required to approve the nomination for the position of Head of State.

The Head of State, once appointed under this parliamentary appointment model, could be removed at any time by a notice in writing signed by the Prime Minister. The Head of State would be removed immediately once the notice was issued, irrespective of whether or not the notice was actually delivered to the Head of State. The Prime Minister's action would then be presented to a meeting of the House of Representatives for the purpose of ratification within up to 30 days of the date of issue of the dismissal notice. In the event that House of Representatives did not ratify the Prime Minister's action, the Head of State would not be restored to office, but would be eligible for reappointment. Such a vote of the House would constitute a vote of no-confidence in the Prime

[294] 1998 Constitutional Convention, Vol. 4, p. 906. Section A. "Nomination Procedure" was changed by one of the amendments to the model as proposed by Prof. Tannock and agreed to by the Convention such that publication of nominations was removed. The nomination procedure was also changed to specifically include representatives of all registered political parties in the composition of the committee to produce the shortlist of nominations. See Vol 4, p. 908. Section B 'Appointment or Election Procedure' was modified to remove the requirement for the vote to take place 'without debate'. This was proposed by Ms. Julie Bishop. See pp.909 - 912. Section D "Definition of Powers" was

Minister, who must then, by Westminster tradition, either resign and be replaced or request a fresh election.

The powers of the Head of State were proposed to be the same as those currently exercised by the Governor-General. The non-reserve powers would be codified as far as practicable and a statement be made that the reserve powers and the conventions relating to their exercise would continue to exist. The term of office would be for five years and would allow for re-appointment by Parliament.

In essence, the proposed parliamentary appointment model would reinforce the existing character of parliamentary government in Australia, whereby the function of the Monarchy would be replaced by the Commonwealth Parliament, in order to achieve an Australian Head of State. As Turnbull indicated in his summary to the Convention,

> *We trust the people to elect every member of every Parliament in Australia. Those parliaments make our law. Those parliaments choose our heads of government, those heads of governments nominate the ministers that manage the affairs of the Commonwealth, the States and the Territories of Australia.*[295]

In reviewing this model after the 1998 Constitutional Convention, McGarvie argued that this parliamentary appointment model would introduce into Australia's present system of government three operational defects, which would significantly alter Australia's current constitutional arrangements, even allowing for 'minimalist' change.[296]

The first operational defect that McGarvie identified was the introduction of the Leader of the Opposition into the nomination process leading up to parliamentary vote for the Head of State. It was the same concern raised by former Governor-General and Labor Minister Bill Hayden in that the Leader of the Opposition may have a different agenda to the Prime Minister, such that the

modified in wording by Malcolm Turnbull (p. 925) and Julie Bishop (p.926). Sections E (Qualifications of Office) and F (Term of Office) were not modified before the final vote of the Convention (p.929).

[295] 1998 Constitutional Convention, Vol 4, p. 870.

[296] McGarvie, p. 135.

process may be obstructed or delayed by the adversarial nature of Australian party politics.[297] McGarvie raises the events surrounding the 1975 Whitlam dismissal as an example of an Opposition obstructing a Government, in pursuit of political advantage. He offered a reflection on the potential bipartisan support that would have existed immediately following Whitlam's dismissal, and how a President would come to be selected during a time of intense political struggle. A constitutional system, McGarvie believed, 'must have the capacity to cope with difficult times of constitutional crises as well as the calm times'.[298]

The second operational defect that McGarvie addressed was the vagueness regarding the nature and composition of the proposed Community Constitutional Committee that would consider and advance a short-list of possible candidates to the Prime Minister and the Leader of the Opposition. McGarvie argued that the power to create the committee also carried with it the power to influence the 'outcome of its deliberations', namely the short-list of candidates.[299] This 'vagueness' McGarvie considered as unacceptable, as the size and composition of this committee would be left to the Commonwealth Parliament to control and to establish by legislation or by regulation. Turnbull's defence to this claim was that the model was only a draft and that precise details would only develop with time and with practice. Turnbull placed great faith in Australia's system of parliamentary government and believed that time would resolve any ongoing issues with the committee.

> *The point is that we have great faith in our parliamentary system of government. We believe that the parliament is well capable of working out a committee that recognises diversity appropriately and is of a size that is workable.*[300]

Although the final model did not constrain the Prime Minister and the Leader of the Opposition to the short-list of candidates advanced by the committee, it was argued, though, that to ignore the proposed short-list would be difficult to do as it would be seen as carrying negative political consequences. Turnbull believed that political reality would ensure that the nominations would be properly considered by both the Prime Minister and the Leader of the Opposition. In advocating the

[297] 1998 Constitutional Convention, Vol. 4, p. 836.
[298] McGarvie, p. 136.
[299] McGarvie, p. 136.
[300] 1998 Constitutional Convention, Vol. 4, p. 848.

principle behind the nomination process, Turnbull likened the public consultation process to his perceived view of the consultation process involving appointment to the judiciary, where 'State governments and territory governments are already consulted about judicial appointments. This is a perfectly appropriate course of action in a democracy'.[301] This analogy, though, is not strong given the ongoing debate within the judicial community concerning the perceived 'lack of consultation' in judicial appointments, where the Judicial Conference of Australia has been voicing concern over the perceived increase in governments 'abusing their absolute power over judicial appointments for short-term political purposes'.[302] McGarvie, in rejecting this notion that processes applied to judges would be appropriate for the Head of State, enlisted the support of Bagehot by arguing *"what is unnecessary in government is pernicious"*.[303] McGarvie's view was that the office of Head of State is vastly different in nature and scope of operation to that of a judge and therefore the one process cannot be applied to both offices.

The third operational defect identified by McGarvie was that the process of actual appointment would reduce the quality of available candidates as the appointment would be by a vote at a joint sitting of both Houses of the Commonwealth Parliament. McGarvie argued that not only would the selection process itself deter suitable candidates due to media scrutiny, but also the voting process would stigmatise a candidate if a vote failed to reach the two-thirds majority required to actually ratify an appointee, or if the vote took two or three times to be successful. McGarvie supported his argument by reference to the *Federalist*, where Hamilton wrote that it was unwise for a large group of people to choose a person for an office requiring specific qualities.[304] Hamilton's view was that you needed one individual responsible for making the decision and being responsible for it. This decision, though, may be confirmed by another body - such as appointments confirmed or ratified by the US Senate. McGarvie quoted Hamilton: "Sole and individual responsibility produces a livelier sense of duty and consciousness of the implications upon the reputation of the person making the choice".[305] Hamilton argued that if the choice was *not* made by an individual, then the choice would either be a victory of one faction over another or of a compromise. Either way, the best choice possible may not be the result. Hamilton's context was that this power to nominate was important especially when a nominee was rejected.

[301] 1998 Constitutional Convention, Vol. 4, p. 847.
[302] B Lane, "Judiciary getting too political: judges", *The Australian*, 04/06/1999, p. 3.
[303] McGarvie, p. 136.
[304] A. Hamilton, *The Federalist*, no. 68, p. 424.

The other major issue with the 'Bipartisan Appointment of the President' model was the dismissal procedure. While the appointing body would be the Commonwealth Parliament, via a joint sitting of both Houses, the dismissal of the Head of State could be effected by the Prime Minister alone, with post-dismissal ratification by the House of Representatives up to 30 days later.

> *I will just talk very quickly about dismissal. We acknowledge that prime ministerial dismissal is the best option.*[306]

> *That is to say, that if the Prime Minister and President cannot get on, the Prime Minister must prevail.*[307]

This position was at odds with the original design of the Australian Republican Movement model leading up to the 1998 Constitutional Convention, in that it would present a dilemma by reversing the relationship between the Head of State and the Head of Government. This refocus in the relationship would make the Prime Minister the apex of Australia's system of government and would make the position of Head of State vulnerable to the influence of party politics.[308] At the Convention, the Turnbull model was changed to provide for dismissal by the Prime Minister alone. A dismissal would be then ratified by the House of Representatives within 30 days. This focus on the House of Representatives would also tend to heighten the perceived partisanship of the dismissal process in that it would raise the question of why the Senate was left out of the equation. Senator Stott Despoja suggested that the Senate was a more representative political institution within Australia's system of government than the House of Representatives.[309] The *'trinitarian struggle'* was still manifest.

It was argued during the Convention that this model was republican in the sense that the Head of State would be elected indirectly, in that the source of power of the Head of State would be the parliamentary representatives directly elected by the voting public, rather than being based upon

[305] A. Hamilton, *The Federalist*, no. 76, p. 472.
[306] 1998 Constitutional Convention, Vol 4, p. 848.
[307] 1998 Constitutional Convention, Vol 4, p. 854.
[308] McGarvie, p. 100.
[309] 1998 Constitutional Convention, Vol. 4, p.852.

appointment by a hereditary Monarch.[310] As a consequence, it was argued, both the Head of State and the Prime Minister would derive their authority from the one place - the Commonwealth Parliament.

By defining republican government, though, in a Madisonian sense where political power is limited, divided and shared between representative institutions, this model would not be acceptable because it concentrates political power in the hands of the Prime Minister, based in the lower house of the legislative branch, the House of Representatives. This model, though, is quite satisfactory if the intention is simply to extend the notion of the British Westminster system of responsible government, where the traditional unfettered executive power of the Monarch is exercised, more of less, by a Cabinet Government, led by the Prime Minister. This would extend the unitary character of Australian democracy, as characterised by Lijphart earlier in this submission, in that greater power would be exercised by the Prime Minister, as leader of the majority single-party Cabinet within the House of Representatives.

This submission argues, though, that this model would not resolve the conflict in underlying values between the Westminster system of responsible government and the American republican structure of federalism, as it ignores the essentially 'consensual' and multiparty Senate in its design. This model would only heighten the potential conflict between the two institutions most reflecting those values, the House of Representatives and the Senate. This model would also eliminate the current ability of the Head of State to break conflicts between the two institutions, via the 'reserve powers', as the Prime Minister would have the constitutional power to instantly dismiss the Head of State if such a move was to be attempted.

The conclusion of chapter 4 argued that our system of parliamentary government is not working as well as expected or as was originally intended. A flaw of this parliamentary appointment model is the assumption that the Commonwealth Parliament should be the institutional body replacing the role of the Monarchy. This submission argues that it should not. In Australia's representative form of democracy, the position advocated by Turnbull is not borne out in practice. Turnbull may well be drawing upon a 'golden age' view of British parliamentary practice where once individual members of Parliament elected Prime Ministers, and the lower house 'made and unmade' governments. As

[310] 1998 Constitutional Convention, Vol. 4, p. 684.

we have seen in Chapter 3, the developments within Australia's system of government, since Federation, have ensured that this is not the best way to characterise our parliamentary system. As Encel has argued, overlaying a British 'pattern' within an Australian context can create comparisons which are both 'pointless and invidious'.[311] The assumption that the Commonwealth Parliament should be the institutional body replacing the role of the Monarchy is not a strong foundation upon which to build a republican form of government, in a Madisonian sense.

## 5.3 The Direct Election Models

There were two direct-election models advanced at the Convention, the first of which was put forward by a block of delegates known as the Direct Presidential Election Group. This model was proposed by Dr Geoffrey Gallop MLA, the WA Leader of the ALP Opposition, and seconded by Mr Peter Beattie, the Queensland ALP Premier.[312] The second model was put forward by the Hon. Bill Hayden AC and seconded by Mr Phil Cleary. This submission now looks at these direct-election models together, in order to provide a contrast to the previous McGarvie and Turnbull models. (It was suggested at the Convention itself that the Gallop model should simply incorporate Hayden's nomination process to improve the quality of the direct-election option, as both models were similar in respect of other features).[313]

The Gallop model incorporated the mechanism of direct election for choosing a new Head of State, while preserving the current system of parliamentary government. Gallop saw that the office of Head of State, under an Australian republic, would be a 'new institution' that required to be an important and respected position.[314] Bill Hayden described his model as one that would allow the open participation of the people by allowing them to choose the candidates for direct election by way of petition.

[311] Encel, p. 4. Encel emphasises the difficulty in applying comparisons by making the contrast that while politics in Britain could be likened to a game of cricket, where the two political parties each take turns in government, Australia expresses a spirit more likened to a game of 'keepings-off', where you make up the rules up as you go.
[312] 1998 Constitutional Convention, Vol. 4, p. 826.
[313] 1998 Constitutional Convention, Vol. 4, p. 832.
[314] 1998 Constitutional Convention, Vol 4, p. 829. The suggestion by Geoffrey Gallop was to see the patriation of the Monarchy to Australia as establishing a new institution of an Australian Head of State, as opposed to the British Monarch as Australia's Head of State and an Australian representative, the Governor-General.

The eligibility requirements for the position of Head of State under these models were that a nominee would need to be an Australian citizen 'qualified to be a member of the Commonwealth Parliament and who has forsworn any allegiance, obedience or adherence to a foreign power'; 'provided that he or she is not a member the Commonwealth Parliament or a State or Territory Parliament at the time of nomination or a member of a political party during the term of office of Head of State'.[315] Essentially, the eligibility requirement would be an Australian citizen over twenty-one years of age, having lived in Australia for at least three years prior to an election being held[316], without being a politician or a member of a political party. Also, those people that failed to meet the requirements of s.44 of the Constitution would be considered ineligible.[317]

Under the Gallop model, the nomination process for the position of Head of State was to be a two-stage process. The first stage would be that nominations for the office of Head of State could be made by any Australian citizen qualified to be a Commonwealth parliamentarian, by the Senate or House of Representatives, by either House of a State or Territory Parliament, or by any local government body. The second stage of the nomination process would be the shortlisting of no fewer than three names produced by a joint sitting of both Houses of Commonwealth Parliament. This shortlist of candidates would be created by at least a two-thirds majority vote of the joint sitting, and at least one person on the list would be a man and at least one a women. These names would be put forward as candidates in the election of the office of Head of State by the voting public of Australia.

Under the Hayden model, any 'person who receives the endorsement of one per cent (1%) of voters, by way of petition, enrolled on all Federal Division rolls at the time of nominating should be nominated to stand for direct election'.[318] This method was in contrast to the process contained within Gallop's model, as Hayden's focus was on candidates being nominated outside of the Commonwealth Parliament, as opposed to Gallop's model where candidates were chosen from within.

[315] 1998 Constitutional Convention, Vol. 4, p. 826.
[316] Section 34 of the Commonwealth Constitution defines the qualifications for membership to the House of Representatives, whereas s.16 defines the qualifications of the Senate to be the same as those of the House of Representatives.
[317] Section 44 of the Commonwealth Constitution defines as ineligible five categories of people - those under the allegiance of a foreign power, those attainted by treason or convicted of a Commonwealth law or State law by imprisonment of one year or longer, those that are insolvent or an undischarged bankrupt, those that hold 'office of profit' under the Crown or who receive a pension payable during the pleasure of the Crown, those with any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member of Parliament or member of an incorporated company larger than twenty-five persons.
[318] 1998 Constitutional Convention, Vol. 4, p. 833.

Although it was proposed that this quota system would ensure candidates would be well known and would require candidates be supported by a national profile, it was also argued at the Convention that as a small-State candidate would have to obtain physical signatures from around 25% (in the case of Tasmania) of the State's eligible population[319], the nomination quota system would favour potential candidates from the larger States. Table 4.3 documents the significance of the quota percentage in relation to the size of population of the various States and highlights the expectation that a candidate would require a national level of support in order to run for election.

**TABLE 5.3 QUOTA FOR NOMINATION UNDER HAYDEN MODEL**

| State | Enrolment | Intra-State Quota as a Percentage to National Enrolment |
|---|---|---|
| New South Wales | 4146653 | 2.99% |
| Victoria | 3164843 | 3.92% |
| Queensland | 2228377 | 5.56% |
| Western Australia | 1176311 | 10.53% |
| South Australia | 1027392 | 12.06% |
| Tasmania | 327729 | 37.81% |
| Australian Capital Territory | 212586 | 58.29% |
| Northern Territory | 108149 | 114.58% |
| **National Total** | **12392040** | |
| ***Quota Required (1%)*** | ***123921*** | |

The appointment of the Head of State would be by the eligible people of Australia voting in a direct election by secret ballot. Gallop preferred a system of preferential voting where each elector was only allowed to choose two preferences out of three possible candidates in the ballot through a single transferable vote. Hayden, on the other hand, provided for the system of optional preferential voting. The Gallop model included the provision that the election process would be regulated so that campaign expenditure would be controlled and to provide advertising and campaign support through a single body authorised and funded by the Commonwealth Parliament. This would ensure

[319] 1998 Constitutional Convention, Vol. 4, p. 838. It was claimed by Mr. Moller that this represented a restatement of the 'big State versus small State' argument of the Federation debates, but in a contemporary 1999 context. The Hayden Model's 120,000 signatures is still a problem in that only 4 cases are noted since 1980 where a petition has reached the Commonwealth Parliament with over 120,000 signatures. The actual 1999 Referendum results showed that the number of signatures required would need to be over 123,920 individual Federal electors.

*'an equal playing field'* for all candidates.[320] Once elected, the Head of State would hold office for two consecutive terms of the House of Representatives (Gallop) or four years (Hayden). Neither models would allow a Head of State to serve more than two terms.

The Head of State could be dismissed, under the Gallop Model, by an absolute majority of the House of Representatives on the grounds of 'stated misbehaviour or incapacity or behaviour inconsistent with the terms of his or her appointment'.[321] Hayden's Model is slightly different, in that the grounds must be 'proven misbehaviour or incapacity', whereby dismissal for misconduct would be on a resolution moved by the Prime Minister (or his or her deputy) and supported by an absolute majority of a joint sitting of the Commonwealth Parliament (thus, including the Senate). In the Gallop Model, a casual vacancy in the office of Head of State would be filled by the appointment of a caretaker by an absolute majority of the House of Representatives who would hold office until the next election of the House of Representatives.

Under both models, the existing practice that non-reserve powers should be exercised only in accordance with Ministerial advice would be written into the Constitution. Also, existing 'reserve powers' would be partially codified as per the 1993 Republic Advisory Council report.[322] However, the Head of State could not force a dissolution of the Commonwealth Parliament, unless a High Court declaration was made that the Government was in contravention of the Constitution or an absolute majority of the House of Representatives requested such a dissolution themselves. Hayden's Model added the proviso that existing conventions would be specifically provided to continue by way of reference in any new Constitution and that the exercise of reserve powers by the Head of State were non-justiciable.

These models incorporated a direct-election mechanism to appoint a person into the position of the Head of State. The motive for these models was to produce a model that incorporated their perception of the aspiration of the Australian people to become more directly involved in the

[320] 1998 Constitutional Convention, Vol. 4, p. 829.
[321] 1998 Constitutional Convention, Vol. 4, p. 827.
[322] 1998 Constitutional Convention, Vol. 4, p. 827.

selection of their Head of State.[323] Gallop, for example, believed that as the Head of State would be a new Australian constitutional position, the people 'would want a direct say in this rather than have some other institution make the final decision'.[324] In making his summary, Gallop stressed the advantages of this approach in that it would provide an open nomination process and a direct-election mechanism that would leave the final choice up the electorate and that it would not allow a repeat of the 1975 dismissal to occur.[325]

The principal argument for these proposed models was that they would incorporate the involvement of the community in the selection of the Head of State through the direct-election mechanism. This, then, would support the claimed notion of a *'new politics'* and would allow greater participation in the political process to overcome the alleged cynicism purported to be held by the public in the existing system of government.[326] Another proposed advantage in these models was that they would include an improved dismissal clause which would address the issue of the Senate blocking Supply. The model included the 1993 Republic Advisory Committee Report option that the occasion on which a government would be put at risk would be where there is a clear contravention of the Constitution and a clear, proven illegality involved. This process would involve the consultation of, and a declaration from, the High Court. It was recommended that this clause could be improved further by allowing for the reconvening of Parliament if it was not sitting at the time of crisis. A further proposed advantage, under the Gallop Model, was that by regulating campaign finance, the power of money over the election process would be minimised. The inclusion of this feature would become a direct attempt to minimise the influence of money over the election process and would allow an equal opportunity for all the candidates to be assessed by the voting public.

The major issue raised with these models, though, is that, from a Madisonian perspective, the direct election mechanism of choosing a Head of State would divide the executive branch of government into two rival positions, rather than simply divide the executive from the legislative branch of government. In fact, the result of these models would be a divided and directly-elected executive operating with an executive Cabinet 'fused' within the legislative branch, namely the

[323] 1998 Constitutional Convention, Vol. 4, p. 830. It was claimed by Gallop that "It is a reflection of a deeply held view in our community that the people are the ultimate power in this land - a land which proclaims democratic traditions and credentials to be at the core of its system".
[324] 1998 Constitutional Convention, Vol. 4, p. 830.
[325] 1998 Constitutional Convention, Vol. 4, p. 868.
[326] 1998 Constitutional Convention, Vol. 4, p. 831. It was claimed by Peter Beattie that "You see, they are sick of political parties and politicians doing all the deals. They want new politics where they have a say".

Commonwealth Parliament. It was recognised at the Convention that although a direct-election model would be the most republican of all types of models, in the sense that the office would be directly dependent upon the vote of the electorate, it would cause the Head of State to acquire a strong personal mandate that would potentially be a destabilising influence upon parliamentary government.[327] For example, this was recognised by Bill Hayden during his introductory speech.[328] The mechanism of direct election confers political power through the legitimacy of public consent. As the Prime Minister's position would be said to be the main governmental political position, and the Head of State would be expected to be 'above partisan politics', then this combination would not be acceptable.

McGarvie also raised the issue concerning rival executive mandates, whereby the Head of State could be aligned with one party and the Prime Minister with another.[329] Conflict could well occur and cause a political crises. This would, according to McGarvie, be in breach of existing conventions regarding the political relationships of the Head of State and the Head of Government within the political environment within the Commonwealth Parliament.

Another issue raised concerning, specifically, the Gallop Model was its nomination procedure. This process of actually choosing the candidates for election would be left to the Commonwealth Parliament and would subsequently diminish any sense of community involvement, as the voting public would only be allowed to vote for candidates selected by Parliament. It was in this context that the nomination process of the Hayden model was proposed to be incorporated into the Gallop model, in order to make the Gallop model more consistent.[330] While the motivation for the nomination process was undoubtedly so as to put forward names of candidates who would have broad support, the process would not allow public involvement in choosing the candidates that the public favoured, rather than just those the Commonwealth Parliament favoured.[331] Hayden criticised the Gallop Model on this point, as he believed the political parties would control the process for their own self-interest.

[327] 1998 Constitutional Convention, Vol. 4, p. 685. It was recognised that a direct-election model was the most republican of all types of models, in that it "is why the people naturally vote in support of it".
[328] 1998 Constitutional Convention, Vol. 4, p. 835. It was claimed by Bill Hayden that "One of the things that always worried me about election processes such as this one, is that an elected president has a great deal of freedom and independence from the government, and that is undesirable".
[329] McGarvie, p. 104.
[330] 1998 Constitutional Convention, Vol. 4, p. 832.
[331] 1998 Constitutional Convention, Vol. 4, p. 831.

> *The trouble with a lot of us is that, when we get into parliament, we think that there is something special and indispensable about us and we are pulled up with a sharp jolt from time to time by the electorate. What is going to happen is that the political parties will end up carving up this process between them.*[332]

Another disadvantage of this model would be the linking of the term of office of the Head of State to the term of the House of Representatives. The concern was that one would not want a Head of State taking his or her term of office theoretically into account when deciding whether to dissolve Parliament or not. The potential risk is where, in a time of crisis, a Head of State would try to preserve office for longer by allowing the term of the Government, formed via House of Representative elections, to be delayed before such action as granting a dissolution of Parliament is taken.

A further disadvantage of both these direct-election models, as well as Turnbull's model, is that there is no 'balance' between the dismissing authority of the Head of State and the appointing authority of the Head of State. That is, the voting public appoints the Head of State but it is Parliament that carries out a dismissal. The constitutional balance is broken.[333] According to McGarvie, while this arrangement was suitable for judges, in reference to s.72 of the Constitution, it would not be acceptable for the office of Head of State. A complication to the dismissal mechanism was that as only an absolute majority of the House of Representatives (Gallop) or a joint sitting (Hayden) would be required to dismiss a Head of State. While there may well be a delay or a slowdown in the process to effect such a dismissal, the Head of State could simply sack the Prime Minister while negotiations were in progress and create potential havoc.[334] A further complication is how the dismissal mechanisms, under either model, would overcome the problem of a Prime Minister that has already been dismissed. If the dismissal procedure were dependent upon a motion put forward by the Prime Minister, what happens when there is no Prime Minister to put this motion

[332] 1998 Constitutional Convention, Vol. 4, p. 834.
[333] McGarvie, p. 109. This convention is broken in this case because the people elect a Head of State, but Parliament carries out a dismissal. McGarvie detected the same defect in the Turnbull model in that constitutional balance is not preserved.
[334] McGarvie, p. 104. An example of a slow process included the action orchestrated to dismiss Justice Lionel Murphy, who subsequently died before any final resolution was made.

forward? This, and other smaller concerns were raised, and accepted, as defects to be resolved at a later time.[335]

The advocacy of the mechanism of direct election is, argues Winterton, the most republican of mechanisms in the sense that it confers direct political legitimacy upon the directly-elected office by the consent of 'the people', or more correctly, a majority of eligible voters.

From a Madisonian perspective, however, the direct-election models require a division of the executive that would be inappropriate. The direct-election mechanism of choosing a Head of State would divide the executive branch of government into two rival positions, rather than simply divide the executive from the legislative branch of government as would be required in a Madisonian form. At the same time, these models would preserve the 'fusion' of the executive Cabinet to the legislative branch, within the lower house of the Commonwealth Parliament, as required by the Westminster system of responsible government. The conflict in values between the two 'packages' of responsible government and federalism would not be resolved.

## 5.4 Conclusion

All of the proposed models reviewed in this chapter fall short of an ideal Madisonian republican model that would resolve the conflict in key political values underlying the British Westminster system of responsible government and the American republican structure of federalism, inherent within Australia's system of government.

This is not to say that the models are without merit. McGarvie's model is a minimalist model that would patriate the function of the British Monarchy to Australia in the form of a Constitutional Council. While the position of Prime Minister is made stronger under this model, it was essentially based upon the premise that Australia's system of government is working well and does not require any other changes to be made. Turnbull's model, while centred on the Commonwealth Parliament, conforms to a more 'golden age' view of British parliamentary government.

[335] 1998 Constitutional Convention, Vol. 4, p. 837.

This contrasts with the manner in which parliamentary government has actually developed in Australia since Federation, especially with respect to the changes reviewed in section 4. The direct-election models introduced the aspect of 'consent' by the electorate, but divide the executive into two distinct and elected institutions, rather than ideally dividing the executive and legislative branches of government into two distinct bodies. The Gallop model leaves the mechanism for deciding actual candidates in the hands of the Commonwealth Parliament, while Hayden's model requires candidates to achieve cross-State support prior to an election.

If the models presented at the 1998 Convention are not adequate from the Madisonian perspective of this submission, is it possible to find a solution? The substance of this submission, as detailed in Chapter 2, is to propose a model that satisfies the continuing aspiration for an Australian republican form of government through a Madisonian framework of political values.

## 6. CONCLUSIONS AND IMPLICATIONS

This submission proposes that change is necessary to resolve the conflict in underlying political values with the Australian constitutional framework between the British Westminster-derived system responsible government and the American-derived republican structure of federalism.

***Question 26:*** *Should there be an initial plebiscite to decide whether Australia should become a republic, without deciding on a model for that republic?*

***Answer:*** *Yes.*

During the Federation debates of 1891, Winthrop Hackett was quite right to proclaim that either federalism would kill responsible government or that responsible government would kill federalism. The truth in that proclamation was, as it is still today, that the values underlying these respective notions of government are not compatible. There is no healthy tension in-built within Australia's system of government. The shifts and adjustments made since Federation, with the most obvious events felt in 1975, have not resolved conflict in political values expressed above.

Chapter 3 presented the two major political traditions that have shaped Australia's system of government through the construct of Federation. The chapter described the source of key political values within Australia's system of government, and provided a foundation for arguing that a consistent constitutional design is required. The first tradition to be reviewed was that of American republicanism, from which Australia's system of government draws the structure of federalism. Using Madison's arguments contained within *The Federalist*, a picture was drawn of the key values that denote what Lijphart would characterise as a consensual and federal approach to majoritarian democracy. The second tradition reviewed was that of the British Westminster system of responsible government, as described through the work of Walter Bagehot. Bagehot described the Westminster system as one of Cabinet Government, where the Cabinet acted as the 'buckle' that connected the Monarchy and the Parliament together, with the Prime Minister and Cabinet depending upon majority support from within the elected Lower House of Parliament, the House of Commons. Chapter 3 concluded by reviewing the construct of Australian Federation as a practical exercise in combining the six self-governing British Colonies together into one nation or *Commonwealth* though the structure of federalism.

***Question 27:*** *Should there be more than one plebiscite to seek views on broad models? If so, should the plebiscites be concurrent or separated?*

***Answer:*** *There should only be one initial plebiscite, followed by a popularly elected Convention process.*

Chapter 4 analysed the continuity and change within Australia's system of government since Federation, with an emphasis on whether there has been a diminution or exaggeration of the conflict in values inherent in our constitutional design. This chapter looked the position of the Governor-General, as the British Monarch's local representative, the House of Representatives and the Senate, as forming the Commonwealth Parliament. The concluding picture of this chapter was that the changes to the Senate in 1948 had altered Australia's system of government, in that the Senate came to express the 'consensual' values underpinning federalism, while the House of Representatives continued to display the values of the Westminster system with a 'fused' executive-legislative arrangement by nature of the federal Government being drawn from the lower house. The contrast between the two houses of Parliament was also, arguably, a reflection of the conflict in values between the two differing notions of government.

***Question 28:*** *Should voting for a plebiscite be voluntary or compulsory?*

***Answer:*** *The voting for this plebiscite should be compulsory and timed to coincide with a normal Federal parliamentary election to minimise cost.*

As discerned by Solomon, the recent republican debate has largely been a distraction from the real issues of inconsistency with Australia's system of government.[336] The 1998 Constitutional Convention and the resulting Commonwealth referendum in 1999 are evidence of this continuing conflict or tension. The four models reviewed in Chapter 5 included the McGarvie "minimalist" Model, the 'Bipartisan Appointment of the President' model championed by the Australian Republican Movement, and two direct-election models proposed by Geoffrey Gallop and Bill Hayden. The major contention of Chapter 5 was that, within a Madisonian view of constitutional design, all models fell short of a consistent approach. The defeat of the 1999 referendum on the issue of a republican model, centred on the Commonwealth Parliament, eliminated the option of the notion of the Westminster system of responsible government predominating. The most appropriate alternative, given the events of the recent debate, is to advance a republican model based upon a Madisonian view of government - a view predicated on the political values underlying the notion of federalism.

***Question 29:*** *What is the best way to formulate the details of an appropriate model for a republic? A convention? A parliamentary inquiry? A Constitutional Council of experts?*

***Answer:*** *The process of Federation shows that legitimacy will only come via a popularly elected convention meeting in all states and territories.*

Chapter 1 presented my proposed model for an Australian republic as a resolution to the question of how best to resolve the conflict in values between the British-derived Westminster system of

responsible government and the American-derived republican structure of federalism. This submission proposes the drawing out of the Prime Minister and Cabinet from the Commonwealth Parliament, and establishing the elective basis of the Prime Minister being via direct election, as opposed to being, at present, the majority party or coalition leader within the House of Representatives and the repatriation of the function of the British Monarchy to the Australian Senate.

***Question 30:*** *What is the preferred way for a process to move towards an Australian republic?*

***Answer:***
*1. An initial plebiscite.*

*2. If successful; an elected Convention;*

*3. A constitutional referendum.*

The Commonwealth Parliament, now without the Government of the day in its midst, would be free to function as law-maker without the dual responsibility of a parliamentary-based executive Cabinet Government. These adjustments would provide a more consistent and balanced constitutional design that would, I argued, resolve the conflict in underlying political values between responsible government and federalism. This would bring into being the prophetic picture painted before Federation by A.V. Dicey in 1885 when he pondered the potential of the British tradition of government to become one whereby there would be the removal of the Cabinet from the Parliament and that the elective basis of the Prime Minister would be by popular vote.[337]

A *'Madisonian'* form of republican government for Australia would:

- Formalise the operation of the Prime Minister and Cabinet within the written Constitution - rather than by convention;
- Produce a focus in a single executive in the position of the Prime Minister;
- Allow the Prime Minister to enlist specialists in the role of Ministers;
- Allow for parliamentary reform in the functioning of the legislative process;
- Allow for more independent functioning of Parliament and more effective budget scrutiny;
- Facilitate more effective involvement of all participants in the legislative process;
- Permit more effective time for members of Parliament to produce better legislation and to better represent local interests;
- Allow a move to a republican form of government without significant upheaval.

[336] Solomon (1994), p. 42.
[337] Dicey, p. 335.

Since the failure of the 1999 referendum, it has become clear that a better process should advance the issue of an Australian Republic, without the sense of being captured by vested interests. Within the context of the Committee's inquiry and the proposition that all just political power derives from the consent of the people, the process forward must be founded upon the consent of the people and not the consent of the Commonwealth Parliament. As was highlighted in Chapter 3, Galligan considered that the ratification of Commonwealth Constitution was founded upon popular sovereignty through the elected Conventions and the popular endorsement of the Constitution through the Colonial referendums.

Therefore, it is submitted that the process forward should consist of the steps proposed by Professor Greg Craven at the 2001 Corowa Conference (Proposal C of the Committee's Discussion Paper), excepting that the Senate's current inquiry would replace the multi-partisan Committee of the Commonwealth Parliament.

Therefore, the process forward should be:

- an initial national poll on the question of whether Australia should become a republic;
- the election of a Constitutional Convention to debate all such options;
- the Constitutional Convention to fully elaborate and document options with significant support, before further debate and consultation, leading to the adoption of one of those options as its draft in principle;
- extensive dialogue and consultation on the draft in principle before its final adoption as a draft bill by the Convention; and
- a referendum upon the draft bill adopted by the Convention.

As Professor Craven has submitted to the Second Corowa Conference in 2001 on the next steps to take in this process,

*"In essence, any process must be:*

*· Democratic, in the sense that it draws legitimacy from the wishes of the Australian people;*

*· Open, in the sense that it facilitates the expression of all viewpoints;*

*· Unhurried, in the sense that it allows sufficient time for discussion and debate of all important issues;*

*· Non-directive, in the sense that it does not anoint any particular model before full debate and consideration of all other possible models has occurred; and*

*· Effective, in the sense that it produces the best possible model in the form most likely to win approval at referendum."*[338]

With the implementation of my Madisonian republic for Australia, more than one hundred years after Federation, the political values underlying the republican structure of federalism would finally predominate in institutional form over those of the Westminster system of responsible government.

[338] Craven, G., Proposal 19 to the Corowa Peoples Conference 2001,located at *[http://www.corowaconference.com.au/The Peoples Conference/Conference 2001/Draft Proposal.htm]* as at 3 January, 2002.

## APPENDIX 1: ALTERATIONS TO THE CONSTITUTION

SUCCESSFUL AMENDMENTS TO THE COMMONWEALTH CONSTITUTION

| Act | Number and year | Date of Assent |
|---|---|---|
| Constitution Alteration (Senate Elections) 1906 | 1, 1907 | 3 Apr 1907 |
| Constitution Alteration (State Debts) 1909 | 3, 1910 | 6 Aug 1910 |
| Constitution Alteration (State Debts) 1928 | 1, 1929 | 13 Feb 1929 |
| Constitution Alteration (Social Services) 1946 | 81, 1946 | 19 Dec 1946 |
| Constitution Alteration (Aboriginals) 1967 | 55, 1967 | 10 Aug 1967 |
| Constitution Alteration (Senate Casual Vacancies) 1977 | 82, 1977 | 29 July 1977 |
| Constitution Alteration (Retirement of Judges) 1977 | 83, 1977 | 29 July 1977 |
| Constitution Alteration (Referendums) 1977 | 84, 1977 | 29 July 1977 |

A LIST OF ALL PROPOSED AMENDMENTS SINCE FEDERATION

**Referendum: 12 December 1906**

Senate Elections – The proposed alteration to s. 13 of the Constitution sought to change the Constitution to enable the six- year terms of Senators to commence on 1 July and end on 30 June, instead of commencing 1 January to 31 December.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 737599 | 286888 | 83.85 | 55261 | 16.15 |
| Victoria | Yes | 672054 | 282739 | 83.10 | 57487 | 16.90 |
| Queensland | Yes | 271109 | 81295 | 76.84 | 24502 | 23.16 |
| Western Australia | Yes | 145473 | 34736 | 78.93 | 9274 | 21.07 |
| South Australia | Yes | 193118 | 54297 | 86.99 | 8121 | 13.01 |
| Tasmania | Yes | 90209 | 34056 | 81.32 | 7825 | 18.68 |
| **Total** | **Yes** | **2109562** | **774011** | **82.65** | **162470** | **17.35** |

**Referendum: 13 April 1910**

Q1. Finance – The first proposed amendment was to s. 87 of the Constitution regarding implementation of an agreement to pay a fixed payment of surplus revenue to the States on a per capita basis, instead of 75% of net revenue.

| State | Result | Enrolled | Yes Votes | Yes % | No Votes | No % |
|---|---|---|---|---|---|---|
| New South Wales | No | 834662 | 227650 | 47.35 | 253107 | 52.65 |
| Victoria | No | 703699 | 200165 | 45.26 | 242119 | 54.74 |
| Queensland | Yes | 279031 | 87130 | 54.58 | 72516 | 45.42 |
| Western Australia | Yes | 134979 | 49050 | 61.74 | 30392 | 38.26 |
| South Australia | No | 207655 | 49352 | 49.06 | 51250 | 50.94 |
| Tasmania | Yes | 98456 | 32167 | 59.99 | 21454 | 40.01 |
| **Total** | **No** | **2258482** | **645514** | **49.04** | **670838** | **50.96** |

Q2. State Debts – The second proposed amendment, to section 105 of the Constitution, sought to give the Commonwealth unrestricted power to take over State debts in existence at establishment of the Commonwealth.

| State | Result | Enrolled | Yes Votes | Yes % | No Votes | No % |
|---|---|---|---|---|---|---|
| New South Wales | No | 834662 | 159275 | 33.34 | 318412 | 66.66 |
| Victoria | Yes | 703699 | 279392 | 64.59 | 153148 | 35.41 |
| Queensland | Yes | 279031 | 102705 | 64.57 | 56346 | 35.43 |
| Western Australia | Yes | 134979 | 57367 | 72.80 | 21437 | 27.20 |
| South Australia | Yes | 207655 | 72985 | 73.18 | 26742 | 26.82 |
| Tasmania | Yes | 98456 | 43329 | 80.97 | 10186 | 19.03 |
| **Total** | **Yes** | **2258482** | **715053** | **54.95** | **586271** | **45.05** |

**Referendum: 26 April 1911**

Q1. Legislative Powers – The first proposed amendment was to section 51 of the Constitution, proposing to extend the Commonwealth's powers relating to trade and commerce, corporation, labour and employment and combinations and monopolies.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 868194 | 135968 | 36.11 | 240605 | 63.89 |
| Victoria | No | 723377 | 170288 | 38.64 | 270390 | 61.36 |
| Queensland | No | 293003 | 69552 | 43.75 | 89420 | 56.25 |
| Western Australia | Yes | 138697 | 33043 | 54.86 | 27185 | 45.14 |
| South Australia | No | 216027 | 50358 | 38.07 | 81904 | 61.93 |
| Tasmania | No | 102326 | 24147 | 42.11 | 33200 | 57.89 |
| **Total** | **No** | **2341624** | **483356** | **39.42** | **742704** | **60.58** |

Q2. Monopolies – The second proposal was to insert a section 51A into the Constitution to give the Commonwealth the power to nationalise any industry declared the subject of a monopoly by both Houses of Parliament.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 868194 | 138237 | 36.72 | 238177 | 63.28 |
| Victoria | No | 723377 | 171453 | 38.95 | 268743 | 61.05 |
| Queensland | No | 293003 | 70259 | 44.26 | 88472 | 55.74 |
| Western Australia | Yes | 138697 | 33592 | 55.84 | 26561 | 44.16 |
| South Australia | No | 216027 | 50835 | 38.42 | 81479 | 61.58 |
| Tasmania | No | 102326 | 24292 | 42.43 | 32960 | 57.57 |
| **Total** | **No** | **2341624** | **488668** | **39.89** | **736392** | **60.11** |

**Referendum: 31 May 1913**

Q1. Trade and Commerce – The first proposed amendment to the Constitution sought to further the Commonwealth's powers relating to trade and commerce as per the referendum which was not carried in 1911.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 317848 | 46.93 | 359418 | 53.07 |
| Victoria | No | 830391 | 297290 | 49.12 | 307975 | 50.88 |
| Queensland | Yes | 363082 | 146187 | 54.34 | 122813 | 45.66 |
| Western Australia | Yes | 179784 | 66349 | 52.86 | 59181 | 47.14 |
| South Australia | Yes | 244026 | 96085 | 51.32 | 91144 | 48.68 |
| Tasmania | No | 106746 | 34660 | 45.16 | 42084 | 54.84 |
| **Total** | **No** | **2760216** | **958419** | **49.38** | **982615** | **50.62** |

Q2. Corporations – The second proposed amendment to the Constitution sought to further the Commonwealth's powers relating to corporations as per the referendum which was not carried in 1911.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 317668 | 46.79 | 361255 | 53.21 |
| Victoria | No | 830391 | 298479 | 49.14 | 308915 | 50.86 |
| Queensland | Yes | 363082 | 146936 | 54.31 | 123632 | 45.69 |
| Western Australia | Yes | 179784 | 66595 | 52.84 | 59445 | 47.16 |
| South Australia | Yes | 244026 | 96309 | 51.34 | 91273 | 48.66 |
| Tasmania | No | 106746 | 34724 | 45.08 | 42304 | 54.92 |
| **Total** | **No** | **2760216** | **960711** | **49.33** | **986824** | **50.67** |

Q3. Industrial Matters – The third proposed amendment to the Constitution sought to further the Commonwealth's powers relating to industrial matters as per the referendum which was not carried in 1911.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 318622 | 46.88 | 361044 | 53.12 |
| Victoria | No | 830391 | 297892 | 49.02 | 309804 | 50.98 |
| Queensland | Yes | 363082 | 147171 | 54.36 | 123554 | 45.64 |
| Western Australia | Yes | 179784 | 66451 | 52.71 | 59612 | 47.29 |
| South Australia | Yes | 244026 | 96626 | 51.40 | 91361 | 48.60 |
| Tasmania | No | 106746 | 34839 | 45.20 | 42236 | 54.80 |
| **Total** | **No** | **2760216** | **961601** | **49.33** | **987611** | **50.67** |

Q4. Railway Disputes – The fourth proposed amendment to the Constitution was a new proposal for the Commonwealth to be given jurisdiction over industrial relations in the State railway services.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 316928 | 46.70 | 361743 | 53.30 |
| Victoria | No | 830391 | 296255 | 48.79 | 310921 | 51.21 |
| Queensland | Yes | 363082 | 146521 | 54.19 | 123859 | 45.81 |
| Western Australia | Yes | 179784 | 65957 | 52.38 | 59965 | 47.62 |
| South Australia | Yes | 244026 | 96072 | 51.28 | 91262 | 48.72 |
| Tasmania | No | 106746 | 34625 | 45.01 | 42296 | 54.99 |
| **Total** | **No** | **2760216** | **956358** | **49.13** | **990046** | **50.87** |

Q5. Trusts – The fifth proposed amendment to the Constitution was to further the Commonwealth's powers relating to trusts as per the referendum which was not carried in 1911.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 319150 | 47.12 | 358155 | 52.88 |
| Victoria | No | 830391 | 301729 | 49.71 | 305268 | 50.29 |
| Queensland | Yes | 363082 | 147871 | 54.78 | 122088 | 45.22 |
| Western Australia | Yes | 179784 | 67342 | 53.59 | 58312 | 46.41 |
| South Australia | Yes | 244026 | 96400 | 51.67 | 90185 | 48.33 |
| Tasmania | No | 106746 | 34839 | 45.38 | 41935 | 54.62 |
| **Total** | **No** | **2760216** | **967331** | **49.78** | **975943** | **50.22** |

Q6. Nationalization of Monopolies – The sixth proposed amendment to the Constitution was to further the Commonwealth's powers relating to nationalisation of monopolies as per the referendum which was not carried in 1911.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1036187 | 301192 | 46.85 | 341724 | 53.15 |
| Victoria | No | 830391 | 287379 | 49.07 | 298326 | 50.93 |
| Queensland | Yes | 363082 | 139019 | 54.17 | 117609 | 45.83 |
| Western Australia | Yes | 179784 | 64988 | 53.19 | 57184 | 46.81 |
| South Australia | Yes | 244026 | 91411 | 51.26 | 86915 | 48.74 |
| Tasmania | No | 106746 | 33176 | 45.22 | 40189 | 54.78 |
| **Total** | **No** | **2760216** | **917165** | **49.33** | **941947** | **50.67** |

**Plebiscite: 28 October 1916**

Submission to the electors of the question prescribed by section 5 of the Military Service Referendum Act 1916.

| State | Result | Enrolled | Yes Votes | Yes % | No Votes | No % |
|---|---|---|---|---|---|---|
| New South Wales | No | 1055986 | 356805 | 42.92 | 474544 | 57.08 |
| Victoria | Yes | 824972 | 353930 | 51.88 | 328216 | 48.12 |
| Queensland | No | 366042 | 144200 | 47.71 | 158051 | 52.29 |
| Western Australia | Yes | 167602 | 94069 | 69.71 | 40884 | 30.29 |
| South Australia | No | 262781 | 87924 | 42.44 | 119236 | 57.56 |
| Tasmania | Yes | 107875 | 48493 | 56.17 | 37833 | 43.83 |
| Federal Territories | Yes | 4572 | 2136 | 62.73 | 1269 | 37.27 |
| **Total** | **No** | **2789830** | **1087557** | **48.39** | **1160033** | **51.61** |

**Plebiscite: 20 December 1917**

Submission to the electors of the question prescribed by the War Precautions (Military Service Referendum) Regulations 1917.

| State | Result | Enrolled | Yes Votes | Yes % | No Votes | No % |
|---|---|---|---|---|---|---|
| New South Wales | No | 1055883 | 341256 | 41.16 | 487774 | 58.84 |
| Victoria | No | 807331 | 329772 | 49.79 | 332490 | 50.21 |
| Queensland | No | 378378 | 132771 | 44.02 | 168875 | 55.98 |
| Western Australia | Yes | 162347 | 84116 | 64.39 | 46522 | 35.61 |
| South Australia | No | 261661 | 86663 | 44.90 | 106364 | 55.10 |
| Tasmania | Yes | 106803 | 38881 | 50.24 | 38502 | 49.76 |
| Federal Territories | Yes | 2855 | 2136 | 62.73 | 1269 | 37.27 |
| **Total** | **No** | **2775258** | **1015595** | **46.22** | **1181796** | **53.78** |

**Referendum: 13 December 1919**

Q1. Legislative Powers – The first proposed amendment to the Constitution sought to give the Commonwealth a temporary (three year maximum) extension of its powers relating to trade and commerce, corporations, industrial matters and trusts during the post- war reconstruction period.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1079439 | 259751 | 39.95 | 390450 | 60.05 |
| Victoria | Yes | 837408 | 369210 | 64.65 | 201869 | 35.35 |
| Queensland | Yes | 389200 | 175225 | 57.35 | 130299 | 42.65 |
| Western Australia | Yes | 163544 | 48142 | 51.75 | 44892 | 48.25 |
| South Australia | No | 268235 | 40520 | 25.28 | 119789 | 74.72 |
| Tasmania | No | 112036 | 18509 | 33.43 | 36861 | 66.57 |
| **Total** | **No** | **2849862** | **911357** | **49.65** | **924160** | **50.35** |

Q2. Nationalisation of Monopolies – The second proposal was to insert a section (51A) into the Constitution, giving the Commonwealth power to make laws to nationalise regarding monopolies.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1079439 | 227156 | 38.31 | 365847 | 61.69 |
| Victoria | Yes | 837408 | 324343 | 63.29 | 188129 | 36.71 |
| Queensland | Yes | 389200 | 162062 | 56.92 | 122650 | 43.08 |
| Western Australia | Yes | 163544 | 45285 | 53.99 | 38584 | 46.01 |
| South Australia | No | 268235 | 38503 | 25.54 | 112259 | 74.46 |
| Tasmania | No | 112036 | 16531 | 34.08 | 31982 | 65.92 |
| **Total** | **No** | **2849862** | **813880** | **48.64** | **859451** | **51.36** |

**Referendum: 4 September 1926**

Q1. Industry and Commerce – The first of these proposals sought to extend the Commonwealth's legislative powers in relation to the corporations power and power over trusts and combinations in restraint of trade, trade unions and employer associations. Like the referendums which put similar questions to the electorate in 1911, 1913 and 1919, these questions involved amendments to section 51.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 1241635 | 566973 | 51.53 | 533284 | 48.47 |
| Victoria | No | 968861 | 310261 | 36.23 | 546138 | 63.77 |
| Queensland | Yes | 440632 | 202691 | 52.10 | 186374 | 47.90 |
| Western Australia | No | 190286 | 46469 | 29.29 | 112185 | 70.71 |
| South Australia | No | 303054 | 78983 | 29.32 | 190396 | 70.68 |
| Tasmania | No | 110484 | 41711 | 44.86 | 51278 | 55.14 |
| **Total** | **No** | **3254952** | **1247088** | **43.50** | **1619655** | **56.50** |

Q2. Essential Services – The second proposal sought to add a new section 51 (va) the Commonwealth to take measures necessary to protect the public against and actual or probable interruption of essential services.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 1241635 | 545270 | 50.39 | 536734 | 49.61 |
| Victoria | No | 968861 | 296548 | 35.55 | 537560 | 64.45 |
| Queensland | Yes | 440632 | 188473 | 50.56 | 184320 | 49.44 |
| Western Australia | No | 190286 | 39566 | 25.90 | 113222 | 74.10 |
| South Australia | No | 303054 | 81966 | 31.32 | 179740 | 68.68 |
| Tasmania | No | 110484 | 43679 | 48.59 | 46217 | 51.41 |
| **Total** | **No** | **3254952** | **1195502** | **42.80** | **1597793** | **57.20** |

**1928 Referendum**

State Debts – The purpose of this referendum was to insert a new section (section 105A) into the Constitution to enable the Commonwealth to enter into financial agreements with the States. The section also enabled the Commonwealth to legislate to give effect to such agreements.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 1335660 | 754446 | 64.47 | 415846 | 35.53 |
| Victoria | Yes | 1006463 | 791425 | 87.78 | 110143 | 12.22 |
| Queensland | Yes | 465423 | 367257 | 88.60 | 47250 | 11.40 |
| Western Australia | Yes | 203146 | 96913 | 57.53 | 71552 | 42.47 |
| South Australia | Yes | 319584 | 164628 | 62.68 | 98017 | 37.32 |
| Tasmania | Yes | 114490 | 62722 | 66.89 | 31044 | 33.11 |
| **Total** | **Yes** | **3444766** | **2237391** | **74.30** | **773852** | **25.70** |

**Referendum: 6 March 1937**

Q1. Aviation – The first proposed amendment considered at this referendum was to insert a new power into section 51 enabling the Commonwealth to legislate with respect to ‘air navigation and aircraft’.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1550947 | 664589 | 47.25 | 741821 | 52.75 |
| Victoria | Yes | 1128492 | 675481 | 65.10 | 362112 | 34.90 |
| Queensland | Yes | 562240 | 310352 | 61.87 | 191251 | 38.13 |
| Western Australia | No | 247536 | 100326 | 47.58 | 110529 | 52.42 |
| South Australia | No | 358069 | 128582 | 40.13 | 191831 | 59.87 |
| Tasmania | No | 133444 | 45616 | 38.94 | 71518 | 61.06 |
| **Total** | **Yes** | **3980728** | **1924946** | **53.56** | **1669062** | **46.44** |

Q2. Marketing – The second proposal was to add a new section (92A) which intended to make any law of the parliament with respect to marketing exempt from the requirements of section 92 of the Constitution. This amendment was considered necessary in order to allow the Commonwealth to continue legislative schemes established in cooperation with the States which set marketing quotas for dried fruits.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1550947 | 456802 | 33.76 | 896457 | 66.24 |
| Victoria | No | 1128492 | 468337 | 46.58 | 537021 | 53.42 |
| Queensland | No | 562240 | 187685 | 38.78 | 296302 | 61.22 |
| Western Australia | No | 247536 | 57023 | 27.77 | 148308 | 72.23 |
| South Australia | No | 358069 | 65364 | 20.83 | 248502 | 79.17 |
| Tasmania | No | 133444 | 24597 | 21.88 | 87798 | 78.12 |
| **Total** | **No** | **3980728** | **1259808** | **36.26** | **2214388** | **63.74** |

**Referendum: 19 August 1944**

Post- War Reconstruction and Democratic Rights – This proposed amendment to the Constitution sought to insert a new section (60A) which would enable the Commonwealth to legislate on 14 different matters, such as rehabilitation of ex- servicemen, national health, family allowances and 'the people of Aboriginal race'. This same proposal also sought a number of powers that were sought in the 1911 referendum, such as corporations, trusts, monopolies. The proposal would also expressly guarantee freedom of speech and religion and create safeguards against the abuse of delegated legislative power.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | No | 1758166 | 759211 | 45.44 | 911680 | 54.56 |
| Victoria | No | 1266662 | 597848 | 49.31 | 614487 | 50.69 |
| Queensland | No | 633907 | 216262 | 36.52 | 375862 | 63.48 |
| Western Australia | Yes | 278722 | 140399 | 52.25 | 128303 | 47.75 |
| South Australia | Yes | 403133 | 196294 | 50.64 | 191317 | 49.36 |
| Tasmania | No | 143359 | 53386 | 38.92 | 83769 | 61.08 |
| **Total** | **No** | **4483949** | **1963400** | **45.99** | **2305418** | **54.01** |

**Referendum: 28 September 1946**

Q1. Social Services – The first proposal was to make amendments to the Constitution to provide power to the Federal Government to legislate for social services.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 1858749 | 897887 | 54.00 | 764723 | 46.00 |
| Victoria | Yes | 1345537 | 671967 | 55.98 | 528452 | 44.02 |
| Queensland | Yes | 660316 | 299205 | 51.26 | 284465 | 48.74 |
| Western Australia | Yes | 300337 | 164017 | 62.26 | 99412 | 37.74 |
| South Australia | Yes | 420361 | 197395 | 51.73 | 184172 | 48.27 |
| Tasmania | Yes | 154553 | 67463 | 50.58 | 65924 | 49.42 |
| **Total** | **Yes** | **4739853** | **2297934** | **54.39** | **1927148** | **45.61** |

Q2. Organised Marketing of Primary Products – The second proposal was to make amendments to the Constitution to provide power to the Federal Government to make laws relating to primary products unrestricted by section 92.

| | | | Yes | | No | |
|---|---|---|---|---|---|---|
| **State** | **Result** | **Enrolled** | **Votes** | **%** | **Votes** | **%** |
| New South Wales | Yes | 1858749 | 855233 | 51.83 | 794852 | 48.17 |
| Victoria | Yes | 1345537 | 624343 | 52.37 | 567860 | 47.63 |
| Queensland | No | 660316 | 251672 | 43.74 | 323678 | 56.26 |
| Western Australia | Yes | 300337 | 145781 | 56.21 | 113562 | 43.79 |
| South Australia | No | 420361 | 183674 | 48.74 | 193201 | 51.26 |
| Tasmania | No | 154553 | 55561 | 42.55 | 75018 | 57.45 |
| **Total** | **Yes** | **4739853** | **2116264** | **50.57** | **2068171** | **49.43** |

Q3. Industrial Employment – The third proposal was to alter section 51 of the Constitution to give the Federal Government power to legislate on terms and conditions of industrial employment.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 1858749 | 833822 | 51.72 | 778280 | 48.28 |
| Victoria | Yes | 1345537 | 609355 | 52.08 | 560773 | 47.92 |
| Queensland | No | 660316 | 243242 | 43.42 | 316970 | 56.58 |
| Western Australia | Yes | 300337 | 142186 | 55.74 | 112881 | 44.26 |
| South Australia | No | 420361 | 179153 | 48.20 | 192516 | 51.80 |
| Tasmania | No | 154553 | 52517 | 41.37 | 74440 | 58.63 |
| **Total** | **Yes** | **4739853** | **2060275** | **50.30** | **2035860** | **49.70** |

**Referendum: 29 May 1948**

Rent and Prices – This proposal sought to amend section 51 of the Constitution to give the Commonwealth a permanent power to continue to legislate rent and price controls.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 1880779 | 723183 | 41.66 | 1012639 | 58.34 |
| Victoria | No | 1351853 | 559331 | 44.63 | 693937 | 55.37 |
| Queensland | No | 669555 | 187955 | 30.80 | 422236 | 69.20 |
| Western Australia | No | 301223 | 105605 | 38.59 | 168088 | 61.41 |
| South Australia | No | 422809 | 167171 | 42.15 | 229438 | 57.85 |
| Tasmania | No | 157668 | 50437 | 35.45 | 91845 | 64.55 |
| **Total** | **No** | **4783887** | **1793682** | **40.66** | **2618183** | **59.34** |

**Referendum: 22 September 1951**

Power to deal with Communists and Communism – This proposal sought to add a new section (51A) to the Constitution to give the Commonwealth Parliament the power to make laws regarding Communists and Communism where this was necessary for the security of the Commonwealth.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 1944219 | 865838 | 47.17 | 969868 | 52.83 |
| Victoria | No | 1393556 | 636819 | 48.71 | 670513 | 51.29 |
| Queensland | Yes | 709328 | 373156 | 55.76 | 296019 | 44.24 |
| Western Australia | Yes | 319383 | 164989 | 55.09 | 134497 | 44.91 |
| South Australia | No | 442983 | 198971 | 47.29 | 221763 | 52.71 |
| Tasmania | Yes | 164868 | 78154 | 50.26 | 77349 | 49.74 |
| **Total** | **No** | **4974337** | **2317927** | **49.44** | **2370009** | **50.56** |

**Referendum: 27 May 1967**

Q1. Parliament – The first proposal was to amend section 24 and delete section 25 and section 26 of the Constitution in order that the House of Representatives member numbers could be increased without necessarily increasing the number of Senators.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2315828 | 1087694 | 51.01 | 1044458 | 48.99 |
| Victoria | No | 1734476 | 496826 | 30.87 | 1112506 | 69.13 |
| Queensland | No | 904808 | 370200 | 44.13 | 468673 | 55.87 |
| Western Australia | No | 437609 | 114841 | 29.05 | 280523 | 70.95 |
| South Australia | No | 590275 | 186344 | 33.91 | 363120 | 66.09 |
| Tasmania | No | 199589 | 42764 | 23.06 | 142660 | 76.94 |
| **Total** | **No** | **6182585** | **2298669** | **40.25** | **3411940** | **59.75** |

Q2. Aborigines – The second proposal was to remove grounds for the belief that the Constitution discriminated against people of the Aboriginal race. It proposed to remove the words 'other than the Aboriginal race in any state' from section 51(xxvi) of the Constitution and to delete section 127 which stated that 'aboriginal natives' were not to be counted in determining the population of the Commonwealth.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2315828 | 1949036 | 91.46 | 182010 | 8.54 |
| Victoria | Yes | 1734476 | 1525026 | 94.68 | 85611 | 5.32 |
| Queensland | Yes | 904808 | 748612 | 89.21 | 90587 | 10.79 |
| Western Australia | Yes | 437609 | 319823 | 80.95 | 75282 | 19.05 |
| South Australia | Yes | 590275 | 473440 | 86.26 | 75383 | 13.74 |
| Tasmania | Yes | 199589 | 167176 | 90.21 | 18134 | 9.79 |
| **Total** | **Yes** | **6182585** | **5183113** | **90.77** | **527007** | **9.23** |

**Referendum: 8 December 1973**

Q1. Prices – The first proposal was to add a new power to section 51 of the Constitution allowing the Federal Government to control prices.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 2827989 | 1257499 | 48.55 | 1332485 | 51.45 |
| Victoria | No | 2129494 | 891144 | 45.18 | 1081120 | 54.82 |
| Queensland | No | 1128417 | 402506 | 38.47 | 643770 | 61.53 |
| Western Australia | No | 588789 | 169605 | 31.90 | 362121 | 68.10 |
| South Australia | No | 737573 | 282754 | 41.16 | 404181 | 58.84 |
| Tasmania | No | 241207 | 85631 | 38.22 | 138416 | 61.78 |
| **Total** | **No** | **7653469** | **3089139** | **43.81** | **3962093** | **56.19** |

Q2. Incomes – The second proposal was also to add a new power to section 51 of the Constitution to empower the Federal Government to make laws with respect to incomes.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 2827989 | 1041429 | 40.31 | 1542217 | 59.69 |
| Victoria | No | 2129494 | 657756 | 33.44 | 1309302 | 66.56 |
| Queensland | No | 1128417 | 331163 | 31.70 | 713562 | 68.30 |
| Western Australia | No | 588789 | 133531 | 25.21 | 396199 | 74.79 |
| South Australia | No | 737573 | 193301 | 28.25 | 490943 | 71.75 |
| Tasmania | No | 241207 | 63135 | 28.31 | 159862 | 71.69 |
| **Total** | **No** | **7653469** | **2420315** | **34.42** | **4612085** | **65.58** |

**Referendum: 18 May 1974**

Q1. Simultaneous Elections – The first proposal to alter the Constitution was to make provision for elections for both houses of Parliament to be held on the same day. The two elections had been out of step with one another since 1961.

| State | Result | Electors Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2835558 | 1359485 | 51.06 | 1303117 | 48.94 |
| Victoria | No | 2161474 | 1001111 | 49.19 | 1033969 | 50.81 |
| Queensland | No | 1154762 | 481092 | 44.32 | 604444 | 55.68 |
| Western Australia | No | 612016 | 248860 | 44.07 | 315786 | 55.93 |
| South Australia | No | 750308 | 332369 | 47.14 | 372666 | 52.86 |
| Tasmania | No | 246596 | 96793 | 41.37 | 137156 | 58.63 |
| **Total** | **No** | **7760714** | **3519710** | **48.30** | **3767138** | **51.70** |

Q2. Mode of Altering the Constitution – The second proposal was to amend section 128 of the Constitution to allow eligible voters in the ACT and NT a vote in the referendum. This proposal also sought to allow amendments to the Constitution to be made if approved by both a majority of the voters nationally and a majority of voters in half of the States (instead of the current majority of States ruling).

| State | Result | Electors Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2835558 | 1367476 | 51.35 | 1295621 | 48.65 |
| Victoria | No | 2161474 | 1001753 | 49.22 | 1033486 | 50.78 |
| Queensland | No | 1154762 | 480926 | 44.29 | 604816 | 55.71 |
| Western Australia | No | 612016 | 240134 | 42.53 | 324435 | 57.47 |
| South Australia | No | 750308 | 311954 | 44.26 | 392891 | 55.74 |
| Tasmania | No | 246596 | 95264 | 40.72 | 138674 | 59.28 |
| **Total** | **No** | **7760714** | **3497507** | **47.99** | **3789923** | **52.01** |

Q3. Democratic Elections – The third proposal to alter the Constitution sought a change to population, rather than the number of electors, as the basis for determining the average size of electorates.

| State | Result | Electors Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2835558 | 1345983 | 50.55 | 1316837 | 49.45 |
| Victoria | No | 2161474 | 970903 | 47.71 | 1064023 | 52.29 |
| Queensland | No | 1154762 | 474337 | 43.70 | 611135 | 56.30 |
| Western Australia | No | 612016 | 241946 | 42.86 | 322587 | 57.14 |
| South Australia | No | 750308 | 310839 | 44.11 | 393857 | 55.89 |
| Tasmania | No | 246596 | 95463 | 40.81 | 138430 | 59.19 |
| **Total** | **No** | **7760714** | **3439471** | **47.20** | **3846869** | **52.80** |

Q4. Local Government Bodies – The fourth proposal sought to amend section 51 of the Constitution to give the Federal Government power to give financial assistance to lend and borrow money for any local government body.

| State | Result | Electors Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 2835558 | 1350274 | 50.79 | 1308039 | 49.21 |
| Victoria | No | 2161474 | 961664 | 47.38 | 1068120 | 52.62 |
| Queensland | No | 1154762 | 473465 | 43.68 | 610537 | 56.32 |
| Western Australia | No | 612016 | 229337 | 40.67 | 334529 | 59.33 |
| South Australia | No | 750308 | 298489 | 42.52 | 403479 | 57.48 |
| Tasmania | No | 246596 | 93495 | 40.03 | 140073 | 59.97 |
| **Total** | **No** | **7760714** | **3406724** | **46.85** | **3864777** | **53.15** |

**Referendum: 21 May 1977**

Q1. Simultaneous Elections – The first proposal to alter the Constitution was to make provision for elections for both houses of Parliament to be held on the same day. The two elections had been out of step with one another since 1961.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 3002241 | 1931775 | 70.71 | 800331 | 29.29 |
| Victoria | Yes | 2252439 | 1325708 | 65.00 | 713929 | 35.00 |
| Queensland | No | 1240738 | 534968 | 47.51 | 590942 | 52.49 |
| Western Australia | No | 682441 | 292344 | 48.47 | 310765 | 51.53 |
| South Australia | Yes | 799063 | 480827 | 65.99 | 247762 | 34.01 |
| Tasmania | No | 259620 | 82785 | 34.26 | 158818 | 65.74 |
| **Total** | **Yes** | **8236542** | **4648407** | **62.22** | **2822547** | **37.78** |

Q2. Senate Casual Vacancies – The second proposal was to insert a new section 15 into the Constitution to ensure that a casual senate vacancy was filled by a member of the same political party as the outgoing Senator.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 3002241 | 2230218 | 81.62 | 502171 | 18.38 |
| Victoria | Yes | 2252439 | 1552558 | 76.13 | 486798 | 23.87 |
| Queensland | Yes | 1240738 | 662732 | 58.86 | 463165 | 41.14 |
| Western Australia | Yes | 682441 | 344389 | 57.11 | 258655 | 42.89 |
| South Australia | Yes | 799063 | 557950 | 76.59 | 170536 | 23.41 |
| Tasmania | Yes | 259620 | 129924 | 53.78 | 111638 | 46.22 |
| **Total** | **Yes** | **8236542** | **5477771** | **73.32** | **1992963** | **26.68** |

Q3. Territory Voting in Referendums – The third proposal sought to amend section 128 of the Constitution to allow electors in Territories as well as electors in the States to vote at referendums.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 3002241 | 2292822 | 83.92 | 439247 | 16.08 |
| Victoria | Yes | 2252439 | 1647187 | 80.78 | 391855 | 19.22 |
| Queensland | Yes | 1240738 | 670820 | 59.58 | 455051 | 40.42 |
| Western Australia | Yes | 682441 | 437751 | 72.62 | 165049 | 27.38 |
| South Australia | Yes | 799063 | 606743 | 83.29 | 121770 | 16.71 |
| Tasmania | Yes | 259620 | 150346 | 62.25 | 91184 | 37.75 |
| **Total** | **Yes** | **8236542** | **5805669** | **77.72** | **1664156** | **22.28** |

Q4. Retirement of Judges – The fourth proposal sought to amend section 72 of the Constitution to make provision for judges of Federal Courts to retire at the age of 70.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 3002241 | 2316999 | 84.84 | 414070 | 15.16 |
| Victoria | Yes | 2252439 | 1659273 | 81.43 | 378505 | 18.57 |
| Queensland | Yes | 1240738 | 734183 | 65.24 | 391227 | 34.76 |
| Western Australia | Yes | 682441 | 472228 | 78.37 | 130307 | 21.63 |
| South Australia | Yes | 799063 | 622760 | 85.57 | 104987 | 14.43 |
| Tasmania | Yes | 259620 | 174951 | 72.46 | 66478 | 27.54 |
| **Total** | **Yes** | **8236542** | **5980394** | **80.10** | **1485574** | **19.90** |

**Referendum: 1 December 1984**

Q1. Terms of Senators – The first proposed amendment was to alter the Constitution to call for simultaneous elections of the two Houses of Parliament.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | Yes | 3424032 | 1621894 | 52.86 | 1446150 | 47.14 |
| Victoria | Yes | 2614383 | 1244451 | 53.20 | 1094760 | 46.80 |
| Queensland | No | 1555600 | 642768 | 45.65 | 765329 | 54.35 |
| Western Australia | No | 859623 | 358502 | 46.47 | 412996 | 53.53 |
| South Australia | No | 906278 | 398127 | 49.98 | 398463 | 50.02 |
| Tasmania | No | 290028 | 102762 | 39.29 | 158777 | 60.71 |
| Australian Capital Territory | Yes | 150416 | 76901 | 56.68 | 58764 | 43.32 |
| Northern Territory | Yes | 68857 | 28310 | 51.87 | 26265 | 48.13 |
| **Total** | **Yes** | **9869217** | **4473715** | **50.64** | **4361504** | **49.36** |

Q2. Interchange of Powers – The second proposal to change the Constitution sought approval for the Commonwealth and the States to refer powers to each other voluntarily.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 3424032 | 1475971 | 49.04 | 1533799 | 50.96 |
| Victoria | No | 2614383 | 1139565 | 49.86 | 1146136 | 50.14 |
| Queensland | No | 1555600 | 578674 | 41.69 | 809249 | 58.31 |
| Western Australia | No | 859623 | 336184 | 44.28 | 423022 | 55.72 |
| South Australia | No | 906278 | 355588 | 45.94 | 418433 | 54.06 |
| Tasmania | No | 290028 | 87933 | 34.65 | 165878 | 65.35 |
| Australian Capital Territory | Yes | 150416 | 74741 | 56.10 | 58487 | 43.90 |
| Northern Territory | No | 68857 | 25684 | 47.78 | 28066 | 52.22 |
| **Total** | **No** | **9869217** | **4074340** | **47.06** | **4583070** | **52.94** |

**Referendum: 3 September 1988**

Q1. Parliamentary Terms – The first proposal to alter the Constitution was to make provision for maximum terms of four years for members of both Houses of Parliament.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 3564856 | 1032621 | 31.66 | 2228503 | 68.34 |
| Victoria | No | 2697096 | 886223 | 36.20 | 1561907 | 63.80 |
| Queensland | No | 1693247 | 542414 | 35.16 | 1000124 | 64.84 |
| Western Australia | No | 926636 | 255553 | 30.67 | 577553 | 69.33 |
| South Australia | No | 938142 | 229938 | 26.76 | 629454 | 73.24 |
| Tasmania | No | 302324 | 70698 | 25.34 | 208297 | 74.66 |
| Australian Capital Territory | No | 166131 | 64458 | 43.62 | 83328 | 56.38 |
| Northern Territory | No | 74695 | 21092 | 38.13 | 34222 | 61.87 |
| **Total** | **No** | **10363127** | **3102997** | **32.92** | **6323388** | **67.08** |

Q2. Fair Elections – The second proposal was for amendments to the Constitution which would ensure fair and democratic parliamentary elections across Australia.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 3564856 | 1159713 | 35.57 | 2100604 | 64.43 |
| Victoria | No | 2697096 | 981678 | 40.12 | 1465186 | 59.88 |
| Queensland | No | 1693247 | 691492 | 44.83 | 850979 | 55.17 |
| Western Australia | No | 926636 | 266637 | 32.02 | 566145 | 67.98 |
| South Australia | No | 938142 | 263006 | 30.61 | 596102 | 69.39 |
| Tasmania | No | 302324 | 80608 | 28.89 | 198372 | 71.11 |
| Australian Capital Territory | Yes | 166131 | 76815 | 51.99 | 70937 | 48.01 |
| Northern Territory | No | 74695 | 23763 | 42.99 | 31512 | 57.01 |
| **Total** | **No** | **10363127** | **3543712** | **37.60** | **5879837** | **62.40** |

Q3. Local Government – The third proposal sought to add a new section (119A) to the Constitution recognising local government.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 3564856 | 1033364 | 31.70 | 2226529 | 68.30 |
| Victoria | No | 2697096 | 882094 | 36.06 | 1564116 | 63.94 |
| Queensland | No | 1693247 | 590868 | 38.31 | 951332 | 61.69 |
| Western Australia | No | 926636 | 247829 | 29.76 | 584863 | 70.24 |
| South Australia | No | 938142 | 256421 | 29.85 | 602499 | 70.15 |
| Tasmania | No | 302324 | 76707 | 27.50 | 202214 | 72.50 |
| Australian Capital Territory | No | 166131 | 58755 | 39.78 | 88945 | 60.22 |
| Northern Territory | No | 74695 | 21449 | 38.80 | 33826 | 61.20 |
| **Total** | **No** | **10363127** | **3167487** | **33.62** | **6254324** | **66.38** |

Q4. Rights and Freedoms – The fourth proposal sought to alter section 88 and section 116 and add a new section (115A) to the Constitution to extend the right to trial by jury, to extend freedom of religion and to ensure fair terms for people whose property is acquired by any government.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 3564856 | 965045 | 29.65 | 2289645 | 70.35 |
| Victoria | No | 2697096 | 816011 | 33.42 | 1625762 | 66.58 |
| Queensland | No | 1693247 | 506710 | 32.90 | 1033645 | 67.10 |
| Western Australia | No | 926636 | 233916 | 28.14 | 597320 | 71.86 |
| South Australia | No | 938142 | 223038 | 26.01 | 634438 | 73.99 |
| Tasmania | No | 302324 | 70987 | 25.49 | 207486 | 74.51 |
| Australian Capital Territory | No | 166131 | 60064 | 40.71 | 87460 | 59.29 |
| Northern Territory | No | 74695 | 20503 | 37.14 | 34699 | 62.86 |
| **Total** | **No** | **10363127** | **2896274** | **30.79** | **6510455** | **69.21** |

**Referendum: 6 November 1999**

Q1. Establishment of Republic – To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor- General being replaced by a President appointed by a two- thirds majority of the members of the Commonwealth Parliament.

| State | Result | Enrolled | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 4146653 | 1817380 | 46.43 | 2096562 | 53.57 |
| Victoria | No | 3164843 | 1489536 | 49.84 | 1499138 | 50.16 |
| Queensland | No | 2228377 | 784060 | 37.44 | 1309992 | 62.56 |
| Western Australia | No | 1176311 | 458306 | 41.48 | 646520 | 58.52 |
| South Australia | No | 1027392 | 425869 | 43.57 | 551575 | 56.43 |
| Tasmania | No | 327729 | 126271 | 40.37 | 186513 | 59.63 |
| Australian Capital Territory | Yes | 212586 | 127211 | 63.27 | 73850 | 36.73 |
| Northern Territory | No | 108149 | 44391 | 48.77 | 46637 | 51.23 |
| **National Total** | ***No*** | **12392040** | **5273024** | **45.13** | **6410787** | **54.87** |

Q2. Preamble – To alter the Constitution to insert a preamble.

| State | Result | Enrolment | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| New South Wales | No | 4146653 | 1647378 | 42.14 | 2261960 | 57.86 |
| Victoria | No | 3164843 | 1268044 | 42.46 | 1718331 | 57.54 |
| Queensland | No | 2228377 | 686644 | 32.81 | 1405841 | 67.19 |
| Western Australia | No | 1176311 | 383477 | 34.73 | 720542 | 65.27 |
| South Australia | No | 1027392 | 371965 | 38.10 | 604245 | 61.90 |
| Tasmania | No | 327729 | 111415 | 35.67 | 200906 | 64.33 |
| Australian Capital Territory | No | 212586 | 87629 | 43.61 | 113293 | 56.39 |
| Northern Territory | No | 108149 | 35011 | 38.52 | 55880 | 61.48 |
| **National Total** | ***No*** | **12392040** | **4591563** | **39.34** | **7080998** | **60.66** |

## APPENDIX 2 OVERVIEW OF CONSTITUTIONAL CHANGES

# Introduction

In previous models for an Australian republic, it has been assumed that the focus of change should be office of the Governor-General. This model assumes the focus of the debate concerning an Australian republic should in fact be the office of the Prime Minister.

The primary feature of this model is the establishment of the Prime Minister as a directly elected Head of Government, forming and leading an Executive Cabinet, separated from the Parliament and exercising executive power vested by the Commonwealth Constitution in an appointed and non-political Governor-General as Australia's Head of State.

In this way, Australia's existing political institutions are preserved yet adjusted to establish an Australian republic.

By creating what is going to be a partisan, direct election process, it is only appropriate to focus this mechanism upon the political office of Prime Minister, rather than the non-political office of the Governor-General.

## Eligibility

Every Australian citizen qualified to be a member of the Commonwealth Parliament would be eligible for the office of Prime Minister.

## Nomination

A nominee must have the support of a registered political party.

## Election

The people of Australia voting directly by secret ballot, utilizing optional preferential voting, acting as one electorate.

## Tenure

Fixed four year term of office. Open for re-election.

## Removal

The Prime Minister may be removed from office by the Governor-General, but only with the concurrence of a specific motion of impeachment passed by the Commonwealth Parliament.

## Casual Vacancy

A casual vacancy in the office of Prime Minister shall be filled by the nominated Deputy Prime Minister. If no Deputy Prime Minister is available (though death or incapacity), then the line of succession is the President of the Senate followed by the Speaker of the House of Representatives, requiring the successor to resign from the Commonwealth Parliament. A casual vacancy shall be filled until the next general elections are held.

## Governor-General

Five-year term. Powers same as current Governor-General's but Reserve Powers (eg. to dismiss a Prime Minister) written down in detail. Can only be dismissed by the Prime Minister with the concurrence of the Senate.

## Non-Reserve Powers

The existing practice that non-reserve powers should be exercised only in accordance with the advice of the Government shall be stated in the Constitution. A Presidential Oath shall emphasize the President's duty to act impartially and without favor to any political Interest or faction.

## Reserve Powers

Existing reserve powers shall effectively be codified due to the new process of appointing and dismissing a Prime Minister and the mechanism of fixed term elections.

## The People

People elect the Prime Minister by secret preferential vote and separately to elect the Members of Parliament at simultaneous elections.

# Advantages and Disadvantages of Proposed Model


- Direct popular election of the Prime Minister.
- This model preserves our existing institutions of government while adjusting them to a more conformable arrangement to support an Australian republic.
- This is the most openly democratic method of appointing a Government and of electing political representatives to Parliament under a republic. This political process would become an expression or a symbol of the people's sovereignty in our system of government.
- Any popularly elected Prime Minister would enjoy great prestige and be able to claim a powerful political mandate. This is especially relevant when looking at the power to nominate a Governor-General.
- The Prime Minister would be able to appoint specialists in the role of Cabinet Ministers, rather than depending upon elected party representatives.
- In some respects it would be less of a leap into the dark than other direct election models as this style of government has had the advantage of having been given a trial run of more than 200 years in the United States, a country with very strong cultural and historical similarities to Australia.


- Parliamentary procedures would need to be modified to allow for the separation of the Cabinet from the Commonwealth Parliament.
- The political power of the parliamentary party organizations would be somewhat diminished as the position of the Prime Minister would no longer be determined by the *'party situation'* within the House of Representatives after each parliamentary election.
- While the nomination of the Head of State is confined to the discretion of the Prime Minister, this would be offset by the mechanism of direct election for the position of Prime Minister.

## A *'Madisonian'* Model (People directly elect the Prime Minister)

In this model I have used the approach of preserving the office of Governor-General to be an appointed Australian as non-Executive Head of State, while incorporating a directly elected Prime Minister as Executive Head of Government.

In this way, Parliament remains the elected body to deliberate upon and debate proposed legislation, while the Executive Government is formed by a directly elected Prime Minister with a personal mandate from the Commonwealth electorate.

In this model, the reserve powers are effectively codified as the powers of the Governor-General can only be exercised with the concurrence of other Constitutional institutions, such as the **Senate**.

***s. 59 Executive Power.***
*(1) The executive power of the Commonwealth of Australia is vested in the Governor-General as Head of State, and is exercisable by the Prime Minister, as Head of Government.*

*(2) The executive power of the Commonwealth extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth, on behalf of the people of the Commonwealth.*

*(3) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be appointed and summoned by the Governor-General and sworn in as Executive Councillors upon the advice of the Prime Minister, and shall hold office while duly authorized by the Governor-General.*

*(4) The Governor-General shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State, except when effecting successful motions of impeachment in accordance with s.61(9).*

This section defines the relationship between the Governor-General and the Government of the day, where the Governor-General is formally established as Australia's non-political Head of State and the Prime Minister as Australia's Head of Government.

***s. 60 The Governor-General***
*(1) The Prime Minister shall nominate, and, by and with its advice and consent, the Senate shall appoint the Governor-General.*

*(2) The qualifications of a Governor-General shall, subject to this section, be those prescribed by this Constitution, or by the Parliament, as the qualifications for a member of the House of Representatives, with the minimum requirement being an Australian citizen who has foresworn any allegiance, obedience or adherence to a foreign power.*

*(2A) A person who is a member of either House of Parliament of the Commonwealth or of a State, or a member of the legislature for a territory to which s.122 refers, or who is a member of a political party, shall be incapable of being chosen or of holding the office of Governor-General.*

*(3) Each person chosen as Governor-General shall, before the term of office begins, make and subscribe before the most senior Justice of the High Court an oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

*(4) The term of office of a Governor-General begins at the end of the term of office of the previous Governor-General. But if the office of Governor-General falls vacant, or the term of office of the outgoing Governor-General ends, before the day on which the incoming Governor-General makes the oath or affirmation of office, the incoming Governor-General's term of office begins on the day after that day.*

*(5) The Governor-General holds office for five years but if, at the end of the term, a new Governor-General does not take office, the office of Governor-General does not thereby fall vacant and the outgoing Governor-General continues as Governor-General until the term of office of the next Governor-General begins.*

*(6) A person may not serve more than two terms as Governor-General.*

*(7) The Governor-General may resign by signed notice delivered to the Prime Minister.*

*(8) The Governor-General shall receive such remuneration as the Parliament fixes. The remuneration of a Governor-General payable during a term of office shall not be altered during that term of office.*

*(9) The removal of the Governor-General shall be effected by a majority vote of the Senate, upon written application to the President of the Senate by either the Prime Minister on the grounds of proved misbehavior or incapacity, or by the most senior Justice of the High Court for failure to effect motions of impeachment in accordance with s. 61(9).*

***s. 61 The Prime Minister***

*(1) There shall be a Prime Minister directly chosen by the people of the Commonwealth, voting as one electorate, to be the Head of Government of the Commonwealth. The Prime Minister shall be chosen for a term of four years.*

*(2) The qualifications of an elector of the Prime Minister shall be the same as those prescribed by this Constitution, or by the Parliament, as the qualifications for an elector of members of the House of Representatives; but in the choosing of the Prime Minister each elector shall vote only once.*

*(2A) The Parliament may make laws regulating the conduct of elections of the Prime Minister, but so that such laws shall be uniform throughout the Commonwealth. In the absence of other provision the laws relating to elections of members of the House of Representatives shall, as nearly as practicable, but subject to this Constitution, apply to elections of the Prime Minister.*

*(2B) Any question respecting the qualifications of the Governor-General, the Prime Minister, or a Minister of State, or respecting a vacancy in any of the aforesaid offices, and any question of a disputed election of the office of Prime Minister, shall be determined by the High Court.*

*(3) Any person may be a candidate for Prime Minister if at the time of nomination that person is qualified to be, or capable of being chosen as, a member of the House of Representatives.*

*(4) A candidate for the office of Prime Minister shall be nominated by a registered political party.*

*(5) The Prime Minister shall be a member of the Federal Executive Council and shall be one of the Ministers of State and shall submit a Cabinet to the Governor-General for appointment within 90 days of taking office.*

*(6) The Prime Minister shall hold office, subject to this Constitution, while enjoying majority support of the people of the Commonwealth at regular elections, or until death or incapacity through illness or by being removed from office in accordance with subsection(8).*

*(7) The Prime Minister shall receive such remuneration as the Parliament fixes. The remuneration of a Prime Minister payable during a term of office shall not be altered during that term of office.*

*(8) The removal process of the Prime Minister shall be initiated by a motion of impeachment by a majority vote of the House of Representatives, and ratified by a two-thirds majority vote of the Senate.*

*(9) The removal of the Prime Minister shall be effected by the Governor-General in accordance with a motion of impeachment passed in accordance with subsection(8).*

*(10) A casual vacancy in the office of Prime Minister shall be filled by the nominated Deputy Prime Minister. If no Deputy Prime Minister is available (though death or incapacity), then the line of succession is the President of the Senate followed by the Speaker of the House of Representatives, requiring the successor to resign from the Commonwealth Parliament. A casual vacancy shall be filled until the next scheduled elections are held.*

It would be expected that the political consequences of an impeachment process, if not leading to actual removal, would most likely be electoral defeat of the Prime Minister at the next general election.

**s.62 Appointment of Ministers**

*(1) Ministers of State shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister and after being ratified by the Senate.*

*(2) Ministers of State are prohibited from being members of either House of Parliament of the Commonwealth or of a State, or a member of a legislature for a territory for which s.122 refers.*

*(3) One of the Ministers of State may be denominated Deputy Prime Minister.*

*(4) Subject to this section, the Governor-General shall only remove a Minister from office in accordance with the advice of the Prime Minister.*

*(5) Upon the vacancy of the office of the Prime Minister, the Governor-General shall appoint the Deputy Prime Minister as acting Prime Minister until the next Prime Ministerial elections, or if there is no Deputy Prime Minister, then the President of the Senate and, if required, then the Speaker of the House of Assembly. If either the President of the Senate or the Speaker of the House of Assembly were required to succeed as acting Prime Minister, they would be required to resign from the Commonwealth Parliament before taking office.*

*(6) In this section "Minister" does not include the Prime Minister.*

**63 Acting Governor-General and deputies**

*(1) Subject to this Constitution, the longest serving State Governor available shall act as Governor-General if the office of Governor-General falls vacant, for any period, or part of a period, during which the Governor-General is incapacitated.*

*(2) The provisions of this Constitution relating to the Governor-General shall extend and apply to any person acting as Governor-General or his deputy.*

*(3) Subject to this Constitution, the Governor-General may appoint any person, or any persons jointly or severally, to be the Governor-General's deputy or deputies, and in that capacity to exercise during the pleasure of the Governor-General (including while the Governor-General is absent from Australia) such powers and functions of the Governor-General as the Governor-General thinks fit to assign to such deputy or deputies.*

*(4) The appointment of such deputy or deputies shall not affect the exercise by the Governor-General personally (including while the Governor-General is absent from Australia) of any power or function.*

*(5) A person shall not exercise powers or functions as the acting Governor-General unless, in respect of that occasion of acting as Governor-General, the person has made and subscribed, before the most senior Justice of the High Court, the Governor-General's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

*(6) A person shall not exercise powers or functions as the Governor-General's deputy unless, since being appointed as the Governor-General's deputy, the person has made and subscribed, before the most senior Justice of the High Court, the Governor-General's oath or affirmation of office in the form set forth in Schedule 1 to this Constitution.*

*(7) An acting Governor-General, or a person exercising powers or functions as the Governor-General's deputy, shall receive such allowances as the Parliament fixes.*

There will also be a new Oath (or Affirmation) for the Governor-General.

*Under God, I swear that I will be loyal to the Commonwealth of Australia and the Australian people, whose rights and liberties I respect and whose laws I will uphold. I swear I will serve the Australian people impartially according to law without fear or favour and in particular without favour to any political party or interest.*

*I solemnly and sincerely affirm that I will be loyal to the Commonwealth of Australia and the Australian people, whose rights and liberties I respect and whose laws I will uphold, and that I will serve the Australian people impartially according to law without fear or favour and in particular without favour to any political party or interest.*

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