Kevin Perkins

DARE TO DREAM

The Life and Times of a Proud Australian

Also by Kevin Perkins

THE LARWOOD STORY, with Harold Larwood
IN MY SHOES, with Elaine Fifield
MENZIES, LAST OF THE QUEEN'S MEN
THE GAMBLING MAN
THE HEART CAN WAIT
TJ THE MIDAS MAN
AGAINST ALL ODDS - GAI WATERHOUSE

Kevin Perkins has proved himself one of Australia's best journalists, writers and biographers.

Regarded by his colleagues as the reporters' reporter, he "covered the waterfront" as an investigative journalist and hard-hitting columnist on various Sydney metropolitan newspapers for almost 40 years - and as a news executive for 20 of those years.

Noted for his meticulous research and flair with stories of human interest, Perkins is the author of several best-selling books, including biographies of famous English bodyline bowler Harold Larwood, Prime Minister Sir Robert Menzies, gambler Big Bill Waterhouse, legendary trainer Tommy Smith and woman in a man's world, Gai Waterhouse.

First published 2001 by Golden Wattle Publishers
Level 6, 77 Castlereagh Street, Sydney
ABN 91 092 526 906

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National Library of Australia
Cataloguing-in-Publication Data

Perkins, Kevin
Dare to Dream - The Life and Times of a Proud Australian

ISBN 0 646 39467 3

Cover Design: Simon Leong Design, Sydney
Cover Photo: Emigrant Joseph John Alam, trudging off on his first day as a hawker in 1890 after being rejected by mine workers at Wallsend in the Hunter Valley of NSW

EPILOGUE

I sat over a cup of coffee with Tom Hayson and a migrant of European background one day, talking about the future Australia.

"I'll tell you why I came to live in this country," said the migrant.

He pulled out a 20-cent coin, tossed it in the air and slapped it on the table between us.

"There," he said, pointing to the head of Queen Elizabeth 11, "that's why. To me, it symbolises freedom and democracy.

"That's why I've made my home here, and I don't want to see the system change, through a republic, agitation in the streets or anything else. I want to see Australian democracy stay the way it is."

The migrant, an Australian citizen, was obviously sincere. I'd heard others say similar things. From that experience, it's reasonable to assume that many others among the four million migrants who were born outside Australia, also thought along similar lines when deciding to call Australia home.

The man's passion and conviction set me thinking. Precisely what was this *democracy* he talked about? And what were the dangers?

As a longtime working journalist and author, who has observed our democracy at work over the years, I've come to know many solicitors and barristers, regarding some as personal friends. I put it to them and did some research.

As a result I came away with some firm views which I consider worth throwing into the ring on the subject of Australia's future.

Our democratic society is based on the rule of law. And our basic law is contained in the Australian Constitution - the legal instrument which brought us together as a federation of States on January 1, 1901.[1]

The Federal Constitution is binding on the courts, judges, and people of every State and part of the Commonwealth, notwithstanding State laws.[2]

The High Court is the keeper of the Constitution, interpreting its meaning and enforcing its observance in a changing society.

The Federal Constitution defines and limits the power of the Commonwealth Parliament to alter that law - which I hope to show, is where potential dangers lie.

Our Federal Constitution was negotiated over 10 years of trials and tribulation in Australia by the Fathers of Federation between 1890 and

1900, to iron out competing differences before the then six Australian colonies could agree to unite under a written constitution.

The colonies were independent and self-governing, the only thing in common being the sovereignty of the Crown. That was the common bond, or glue, which bound them together in a vast continent.

After 10 years, without any participation by the UK, Australia drew up its own Constitution and agreement to federate in the relevant Act, and each colonial parliament passed the legislation. Then the people in each colony unanimously approved the proposal by referendum.

The draft bill for the Act, containing the Constitution and the federation agreement, was taken to London and, after a short period of negotiation, approved by the UK Government and the UK Parliament with only minor amendments.

That is believed to be the first time such individual action was taken by a group of colonies in the then British Empire. Australia is also the only nation whose Constitution went through such a democratic process.

It was aptly described as "The People's Bill" by leading conservative Adelaide barrister, Sir Josiah Symon, on January 17, 1900. A King's Counsel, he was later a Senator for South Australia in the first Federal Parliament. In a letter to the Earl of Selborne, Under Secretary of State for the Colonies, he said the Bill was unlike any other propsed legislation ever framed in an English community, in that it owed its existence to the people themselves.

"They chose a special Convention to frame the Federal Constitution and to bargain between the Federated Colonies, refusing to entrust this solemn task to any Parliament," Sir Josiah wrote. "They insisted on having the Bill sumitted at large to themselves for acceptance or rejection. So it became the People's Bill in a very literal sense - unalterable without their direct consent."

Our Federal Constitution is contained in the Act of the United Kingdom Parliament called the Commonwealth of Australia Constitution Act, 1900. For simplicity, I'll call it "the 1900 Act."

That constituted "Australia's sovereign act of national self-determination" - acknowledged by the Hon Murray Gleeson, Chief Justice of Australia, when he said in his (2000) Boyer lectures: "In the contemplation of the law, the Australian nation came into existence on 1 January, 1901, when the Commonwealth Constitution took legal effect."

To take the background a bit further - before coming to the punchline - Australia became an independent sovereign nation through that 1900 Act, proclaimed by Queen Victoria at Balmoral on September 17, 1900

(her successor, Queen Elizabeth 11, was declared Queen of Australia by an Act of our Federal Parliament).[3]

The six Australian colonies then became the six States of Australia, united under the Crown, in one federal commonwealth called The Commonwealth of Australia.

The 1900 Act is sometimes referred to in legal circles as the "Australian Federal Compact" because first, it expressly records and sanctions the agreement (inspired and forged in Australia) between the six colonies to unite in one indissoluble federal commonwealth under the Crown, and second, the agreement between the six colonies on the one hand and the UK on the other.[4]

The UK Parliament was the only power on earth that could legally bring this about. The Australian colonies acting on their own could not do it.

It's fair to say that to have the UK Parliament enact the 1900 Act was a small price to pay to peacefully create an independent federated Australia, armed with a Constitution drafted by Australians and designed to serve the needs of Australians for all time (subject to the power of alteration).

Due to the wisdom of our founding fathers, the 1900 Act entrenched the sovereignty, or ultimate power of the Australian people over our basic law and our various parliaments, Federal and State.

Under the Constitution, the *legal* sovereignty is vested in the Crown and effectively held in trust for the Australian people, and the *political* sovereignty is vested in the people.

That fact was reaffirmed recently by the Chief Justice of the High Court, the Honourable Murray Gleeson, AC, who said "the sovereignty of our nation lies with the people, both as a matter of legal principle and practical reality."[5]

In an ABC Boyer Lecture, the Chief Justice said it was the special duty of the High Court to uphold the words and meaning of the Constitution "precisely as framed."[6]

Under the 1900 Act, each of the unified States preserved their self-governing identity, while the Constitution provided for the government of Australia as a whole.

[Later events have removed the power of the UK Parliament to make laws affecting Australia.

The Australia Acts (Imperial and Commonwealth) were passed by the UK Parliament in 1986 at the request of all Australian Parliaments, in order to strengthen Australia's international position as an independent

sovereign nation. Under the Australia Act, the UK Parliament can never again pass laws relating to Australia, including our Constitution].

Back to the 1900 Act. It consists of several parts.

The first three paragraphs are the "preamble" to that Act. Briefly, it says the various States from 1901 onwards will "unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom..."

Then follow sections 1 to 8, referred to as "the covering clauses."

Section 9 of the 1900 Act embodies our Federal Constitution. That is divided into various chapters dealing with issues such as Parliament and its powers, the office of Governor-General, finance and trade, the States and so on.

It also sets out section 128, providing for the Constitution to be amended - by national referendum approved by a majority of the people of Australia, and also by a majority of people in four of the six States.

[Where an amendment affects certain key rights of the States, a majority in every affected State is also required].

That is the only way our Federal Constitution can be amended.

It's interesting to note that the fundamental democratic process of referendum (to ascertain the will of the people), does not exist in the UK or the US under the US Federal Constitution. To that extent, our Constitution can properly be claimed to be more democratic than theirs.

Australia adopted the "referendum" idea from Switzerland, where it still forms an important part of the Swiss Federal Constitution.

But, there's a catch. Section 128 does not authorise any amendment to anything except the schedule to the Act in section 9 (the Constitution).

You cannot use section 128 to amend the preamble or the covering clauses of the 1900 Act because the structure of the Act renders them incapable of being altered or repealed under Australian law. The power of alteration by referendum under Section 128 is confined to the Constitution itself, embodied in section 9 of that Act.

The people's right of referendum was considered so important that, when the UK Parliament passed the Statute of Westminster in 1931 to give all independent Dominions in the British Empire equal status with the UK, our Federal Parliament insisted on a special clause being inserted in the statute to protect the referendum aspect of the Australian Constitution.[7]

Clearly, any alternative process attempting to alter the Constitution would be illegal and unconstitutional - and in legal terms destroy the Federation, plunging Australia into constitutional crisis.

The sovereignty of the Crown is entrenched in the covering clauses 1 to 8 and the preamble of the 1900 Act, and as such, it is also entrenched in the Federal Constitution.

How do I know? Well, some of Australia's best legal brains since Federation have said so on the record.

Any proposed legislation to remove the Crown from the preamble and covering clauses to the 1900 Act, would create an immediate legal conflict between those provisions of that Act and the Federal Constitution (in section 9).

That was what the Federal Government's proposed constitutional alternations threatened to do in the 1999 referendum, if passed, by aiming to make Australia a republic.

The proposed legislation purported to remove all references in the Federal Constitution to the sovereign, or Queen, replacing them with "the President."

For one thing, the "republic law" would have destroyed the legal status of every Australian citizen in being subjects of the Queen of Australia.

But the preamble and covering clauses of the Act would have prevented this from taking legal effect, even if the referendum had succeeded.

Why? The proposed alterations would have been legally invalidated because they are inconsistent with the preamble and covering clauses, as well as the Federal Constitution, in the 1900 Act.

However, that constitutional conflict and dilemma has never been debated or explained to the Australian people.

Yet, based on some of our best legal authorities (quoted below), the 1999 republican legislation was unlawful and unconstitutional because, the constitutional authorities say, the Crown cannot be removed from the 1900 Act under existing Australian law.

That was the third major grab for power by an Australian Government.

The Scullin Labor Government in 1930 tried unsuccessfully to pass a bill called the "Constitution Alteration (Power of Amendment) Bill" to give Federal Parliament the right to alter the Constitution at will without going to a referendum.[8]

The second attempt was made by the Curtin Labor Government in 1944 in seeking to amend the Constitution to give Parliament the right to interpret laws without reference to the High Court, and the people rejected it at a national referendum.

The founding fathers of Federation, being wise old blokes, looked around the world at federal systems first, before deciding to deliberately

frame our Constitution to stop radical governments and power-greedy politicians from taking the law into their own hands.

The Commonwealth Royal Commission on the Federal Constitution in 1929, which held 198 sittings and examined 339 witnesses over a period of two years, considered in detail the extent to which the powers in the Constitution could be used to amend the covering clauses or the preamble to the 1900 Act.[9] The commissioners said it could not be done.

Owen Dixon, King's Counsel, later knighted and still recognised here and abroad as one of Australia's most eminent jurists ever (who became a Justice of the High Court in 1929 and Chief Justice in 1952), gave this evidence to the Royal Commission:

> *"The covering clauses prevent any complete and fundamental change in the parliamentary nature of our government. You could not get rid of the King as head of the Executive, or do anything of that sort...".*[10]

Dixon repeated that evidence to the Law Council of Australia in 1936, saying the sovereignty of the King in Parliament over the law, was *"indestructible."*[11]

The Commonwealth Solicitor-General, Sir Robert Garran, one of the founding fathers of the Constitution, said in evidence to the 1929 Royal Commission that we did not have power to amend the covering clauses, only the schedule to the Act (the Constitution itself).[12]

Sir Edward Mitchell, then a King's Counsel and leader of the Bar in Melbourne, told the same Royal Commission: "Those covering clauses, I think, are quite clearly incapable of alteration under the provisions of section 128 of the Constitution.

"Power to alter the Constitution does not commence until you get to the words 'The Constitution,' *after* the covering clauses."[13]

Speakers in Federal Parliament went further when the Scullin Government, in 1930, tried to gain power for the Federal Parliament to change the Constitution without a referendum.

Even the Federal Attorney-General, Frank Brennan, whose Government was trying to push it through, agreed with Sir Edward Mitchell by admitting in Parliament that the covering clauses could not be changed by a section 128 referendum. Mr Brennan said:

"Sir Edward Mitchell's opinion affirms several propositions. One is that section 128 of the Constitution extends only to the amendment of the Constitution itself, and not to the covering sections which constitute an Act of the Imperial legislature. That is certainly admitted; indeed, it may be accepted as a truism."[14]

Among other speakers to condemn the proposed constitutional alterations were the Opposition Leader and Member for Kooyong, John Latham (later knighted and who became Chief Justice of the High Court), and Senate Opposition Leader, Sir George Pearce. Both said it would destroy the federation and bring an end to the Constitution.

Latham said: "This is more radical than any other amendment that could be conceived. It really means the abolition of the Constitution.

"It is a proposal to confer unlimited power upon any party which may control this Parliament and to deprive the people of any voice in the matter by way of referendum.

"Parliament will have the power or right to govern the whole of Australia from Canberra.

"The inevitable result will be either that the States will be suddenly killed, or they will wither away as their functions are diminished and their powers and prestige decreased."[15]

Sir George Pearce, Senator for Western Australia, told Parliament the bill was the most extraordinary, audacious and revolutionary ever conceived. He said it would enable Parliament to alter the Constitution almost from day to day as it thought fit, without consulting the people.

It would centralise power in Canberra, cause absolute confusion, enable the Federal Government to take part of one State and add it to another, or carve up Australia in any way it liked. States would not have entered into a federation if they had known they would end up without a constitution.

Sir George made it clear that if the unconstitutional alteration was allowed, it would destroy the Commonwealth of Australia as a Federation and democracy as we knew it.[16]

The proposal in the 1999 republican referendum - to remove the sovereignty of the Crown by using section 128 of the Constitution - would have had much the same effect, if successful.

It was nothing less than a calculated attempt to override the 1900 Act - Australia's fundamental law and therefore, the Constitution.

However, as the quoted authorities say, it can't be done because the Crown's sovereignty is entrenched in the preamble and covering clauses of the 1900 Act and they cannot be abrogated by a section 128 referendum (or otherwise).

Okay, if both the Federal Government and the Opposition in 1930 were agreed that the preamble and covering clauses of the 1900 Act were untouchable by referendum, why was it suddenly considered proper and legal by referendum in 1999 to toss out the sovereignty entrenched by those clauses and the Federal Constitution?

The answer is I don't know. But I can speculate.

I'd say the hunger for power over the Australian Constitution by the present Federal Government and Opposition - with the conservative parties having a so-called "conscience vote" on the republican issue - is far greater than was that of the Scullin Government in 1930, despite the serious problems it faced over the Depression.

In the leadup to the 1999 republican referendum, the Commonwealth Parliament published a comprehensive bibliography of the major constitutional reviews to "assist community debate." But it excluded the recommendations and findings of the 1929 Royal Commission, which said the covering clauses of the 1900 Imperial Act could not be amended.

The reason given? The findings were considered "likely to be of diminished relevance."[17]

Yet, the High Court of Australia obviously thinks the 1929 Royal Commission findings are still relevant since, in 1999, it published a judgment in a highly important constitutional law case (Sue versus Hill) quoting verbatim directly from the 1929 Royal Commission Report.[18]

I invite you to draw your own conclusions on that.

All the constitutional jiggery pokery we have gone through in the last few years emanated from a speech in Parliament by then Prime Minister Paul Keating in June, 1995, when he championed a republic, equating it to having an Australian as Head of State.

Among other things, he said: "Sooner or later we must have an Australian as our Head of State. That one small step would make Australia a republic."

The Australian people have been deceived into believing that, as an independent sovereign nation, we cannot have our own Head of State unless we become a republic.

They have also been led to believe that the only way of having our own Head of State by law, is to amend the Federal Constitution.

So say members of the republican movement. Both claims are incorrect.

The 1900 Act (also containing the Federal Constitution), is completely silent on the so-called title of "Head of State of Australia."

This means such a title can be created by an Act of the Federal Parliament, provided it does not contain any provision inconsistent with the 1900 Act, including the sovereignty of the Crown.

Therefore, a short Act could validly declare for example, that the person holding office as Governor General, also holds the honorary title of "Head of State of Australia."

That new title could also be designated "President of Australia" - as long as the relevant Act expressly provides that nothing impinges on the powers, duties or functions of the Governor-General under the Federal Constitution, or affects the sovereignty of the Crown.

The Governor-General's position as representative of the Queen of Australia would be unaffected under the Federal Constitution .

We need not go as far as "President of Australia." The title "Head of State" might fill the bill. In any case, the Australian people should be consulted on this by a national plebiscite (not a referendum), as was done to select Australia's national song.

Such a question - within the law - to avoid confusion with other plebiscite questions finding their way into Australian newspapers, could be along the lines set out in the appendix at the end of this epilogue.

That would be much cheaper and less controversial than a referendum and could be held at the same time as a general election.

Interestingly, as an alternative, we would not need to appoint the Governor-General as Head of State. A law could be passed by a majority vote of both Houses of Federal Parliament appointing anyone they liked as Head of State, provided it did not affect the Constitution or sovereignty of the Crown.

It would not convert Australia to a republic.

But, at the stroke of the Governor-General's pen, it would remove the key element in the propaganda issued by the republican movement.

Such an Act would be truly a symbolic measure without changing the Constitution. After all, Federal Parliamentarians have already legislated to

give us a national flag, flower and song, so if a "Head of State" is considered important enough, the solution already lies in their hands.

The exercise of going through the constitutional convention and the 1999 referendum was estimated to have cost Australian taxpayers $800 million - just to make what we were told was a "symbolic" change to the Constitution - "one small step."

Who's kidding who?

The Australian people were led to believe they were voting on a purely symbolic change to our constitutional arrangements, which would have no underlying or substantial effect on the way our Constitution operates.

That was untrue.

The legal mechanism for purely "symbolic change," without destroying the Constitution, has always been available to Federal Parliament by conventional legislation.

As the law stands the Government and Federal Parliament have no legal or constitutional power to convert Australia to a republic, since that involves setting aside the 1900 Act and destroying the sovereignty of the Crown - impossible under the "rule of law."

So how did the Government intend to overcome the obstacle of the covering clauses and the preamble to the 1900 Imperial Act, which makes it clear you can't throw out the Crown and become a republic?

The only public discussion on this issue has been in the 1929 Royal Commission, which ruled it out completely. These historic facts weren't controversial then. Fashion may have changed, but the law hasn't.

And as Sir John Latham indicated in 1930, you can kiss goodbye to the Australian Federation if you try to change the Constitution without going to a referendum - and even then, you could not make the necessary changes to the preamble or covering clauses to the 1900 Act to remove the Crown.

Although it has never been spelled out in detail to the Australian people, the Federal Government now claims it can remove the preamble and covering clauses of the 1900 Act - something the 1929 Royal Commission and various constitutional experts of the time said could not be done.

The explanation of how this can allegedly be done was technically placed on the record, but you need to be a bit of a Sherlock Holmes to find it.

It was contained in an explanatory House of Representatives memo, circulated with the authority of Prime Minister John Howard, to the proposed 1999 bill to insert a preamble to the Constitution (one of the two proposed laws submitted to the 1999 national referendum and rejected by the people).

A paragraph in the memo claimed that if in the future it was considered desirable to change the preamble or covering clauses in the 1900 Act, "this could be done by the Commonwealth Parliament at the request of the States under the Australia Act 1986, or by a further contitutional referendum."

A similar phrase, circulated with the authority of the Federal Attorney-General Mr Daryl Williams, was contained in a revised Senate explanatory memo to the proposed bill to establish a republic (the second proposed law submitted to the 1999 referendum and also rejected).

If the 1999 referendum questions had been passed, both bills would then have been put before Parliament and no doubt enacted.

In simple terms the Federal Government, if requested by the States, believes it can remove the preamble and covering clauses to our Constitution through the Australia Act, 1986 - without a referendum.

That's not what the Attorney-General Lionel Bowen said when introducing the second reading of the "Australia Bill" to Parliament on November 13, 1985 and in his address in reply on November 25. First, he said **"nothing in the legislation will impair the position of the Queen as Queen of Australia."**

Then to Opposition concerns expressed about the Bill's effect on the Constitution, Mr Bowen said: **"Nothing can happen to the Constitution of Australia unless the people of Australia agree that it should happen."**

In other words, no changes can be made to the Constitution, through that Bill or any other, without the people approving it by referendum.

Well, it now emerges that the Federal Government claims to possess more power than the Scullin Government tried and failed to get in 1930 - namely, the power to amend the Constitution at will without reference to the people, removing the preamble and covering clauses.

By what magic wand has this been achieved? What battles have been fought, what constitutional conventions held, what Parliamentary debates played out to obtain this power without telling us?

Surely we would have heard about it if the politicians had been able to usurp the exclusive sovereignty or power of the people over their own Constitution and transferred it to Federal Parliament?

As they have not told us of these revolutionary developments, we can only assume that the politicians had a hidden agenda in the 1999 republican referendum, using it as a smokescreen to cover their true intentions ie, to grab power to alter the Consitution in the future without going to the people on the issue.

[In 1930 the Scullin Government sought only to alter the Constitution itself (section 9 of the 1900 Act) without a referendum, not the preamble and covering clauses 1 to 8. Indeed, Prime Minister Scullin admitted in Parliament on 14 March, 1930 that the Commonwealth had no power to amend clauses 1 to 8 of the 1900 Act.]

Constitutional lawyers to whom I have spoken recently insist it can't be done under Australian law, including the Australia Act 1986.

For one thing, they say that when the UK Parliament passed the Statute of Westminster Act in 1931 (basically giving Dominions equal status with the UK Parliament), our Commonwealth Parliament insisted on a clause in the Statute to preserve the Australian people's rights under the Constitution, including exclusive control by referendum over any changes. That was later written into our Statute of Westminster Adoption Act of 1942.

That clause overrides anything in the Australia Act. Appearing in the 1942 Act as clause 8, it is referred to in the Australia Act (section 5) under the heading "Commonwealth Constitution, Constitution Act and Statute of Westminster not affected."

So where is the Federal Government coming from?

The only way to throw out the Crown would be by revolution, or *coup d'état*. If that happened, the "rule of law" in Australia would be treated with ultimate contempt.

That would lead to anarchy, not necessarily riots in the streets, but an absence of law and effective government.

The Australian Constitution is substantially based on the American Constitution. The US Supreme Court has upheld the principle that the Union of the USA is complete, perpetual and indissoluble, with "no place for revocation or reconsideration except by revolution."[19]

Our founding fathers intended our Federation to be indissoluble too.

Indeed, the High Court of Australia handed down a judgment in 1907 (Baxter v The Commissioner of Taxation), in which Chief Justice Griffith and Justices O'Connor and Barton (previously our first Prime Minister) said: "The Constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages."

As a result of the wisdom of our founding fathers, it is one of the most successful national constitutions anywhere in the world (even against the US Constitution, the fragility of which was shown up in the delayed Presidential election of George W. Bush).

We are talking about things that could threaten the stability and integrity of the whole of the Commonwealth of Australia. It may be no exaggeration to say that if we allow politicians to grab power by tampering with the Federal Constitution, we could end up in the same position as the USA in 1861 - facing civil war as some States resorted to armed conflict in trying to withdraw from the Union.

A Federal Labor Government will no doubt try to put a "republic" in place. When that happens, there will be one almighty constitutional row in the High Court.

If the republican referendum had succeeded in 1999, the High Court would have faced a similar dilemma to that which confronted the Fiji Court of Appeal after the Speight rebellion of May 19, 2000 - what happens when a nation's constitution has been overthrown?

The Fiji Court of Appeal (constituted by a panel of judges from NSW, New Zealand and New Guinea), was called upon to determine whether Fiji's 1997 Constitution was still in force.

The Court ruled that it was, saying in its judgment that when a Constitution was purportedly overthrown but leaving the Court system intact, the Court had only two options.

One was to say that the usurping government had succeeded in permanently changing the previous legal order and the new order was legally valid; the other was to declare the usurpation invalid - and that is what the Fiji Court of Appeal found.[20]

Fiji remained in anarchy after the rebellion, with profound public uncertainty as to its Constitution and rightful Government. It was only due to great restraint by the population that, by 2001, wholesale civil war had not broken out.

When Australians voted in 1900 to unite their six colonies, they decided the exclusive power to change the Constitution should only be

done through the people by referendum, and not entrusted to any Parliament.

By taking that action, they unanimously adopted a constitutional instrument (the 1900 Act including the Federal Constitution), which provided that the proposed Federal Parliament would be one of strictly limited legislative power, ie, it would not have full sovereign power, as does the UK Parliament.

Just as our Federal Parliament is controlled by the 1900 Act and the Australian Constitution, so too is the US Congress (the equivalent of our Federal Parliament) subject and subordinate to the US Constitution. That control is one of the essential features in a federal system of *democracy*.

Those essential features are put in place to keep meddling politicians and other power mongers at bay. The features have been referred to often down the years, including being outlined in a speech in Federal Parliament in 1902 by Sir Alfred Deakin, then Commonwealth Attorney-General and soon to become our second Prime Minister.[21]

The famous British constitutional lawyer, A.V. Dicey, summed it up neatly in the 19th century when we were still separate colonies.

Abbreviated, he said that a federal constitution must be "written," it must also be "inflexible" or "inexpansive," and the law of the constitution "must either be legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies existing under that constitution."[22]

That's the way we went. The Australian people determined that the powers of their Federal Parliament would always be subject and subordinate to the terms of Australia's fundamental law, as set out in the 1900 Act - including that the sovereignty of the people be preserved under section 128 of the Constitution, making a successful referendum necessary to approve any change in the Constitution.

It was done to protect the rights of ordinary people like you and me, like Tom Hayson and everyone else.

That power, or reservation, has never been surrendered by the people of Australia, and never should be, knowingly or voluntarily.

It's a cause for vigilance when politicians want to snatch more power by changing our Constitution - especially when the Government doesn't fully explain its intentions or the consequences of proposed constitutional changes.

Fortunately, when Australians smell a rat, they vote no.

Finally, a few points that may "assist community debate" when the republican issue revisits us.

As a group, the founding fathers who drafted our Federal Constitution (the 1900 Act), represented Australia's most eminent constitutional lawyers.

They included Mr Andrew Inglis Clark (later a Justice of the Tasmanian Supreme Court), a recognised expert on the US Constitution who travelled to the USA and kept in touch with the leading American jurists and statesmen while serving on Australia's Constitution drafting committee.

Mr Clark, ironically a republican, believed the US founders had solved the fatal flaws of republican government by combining popular control with constitutional safeguards against abuses of power.

Our founding fathers incorporated into the 1900 Act the best features of the three leading Federal systems of government of the day - from the constitutions of the USA, Canada and the Swiss confederation.

When it was finally adopted, Australia could justifiably claim to have the world's most advanced democratic federal constitution.

In recommending a (federal) constitutional monarchy, as opposed to a republican system of government, the founding fathers did so with their eyes wide open, considering it in Australia's best interests

So Australia's Federal Constitution is based mainly on the US Constitution combined with the British system of constitutional monarchy, incorporating both "representative government" (where members of parliament are democratically elected) and "responsible government" (where the executive government is carried on by ministers responsible to parliament).

It should be remembered that the British system of government was forged in the fires of a lengthy civil war and revolution in the 17th century (in which King Charles 1 was publicly beheaded).

That was followed by 10 years of republican government under Oliver Cromwell, the Lord Protector of England - a system abandoned on Cromwell's death.

Recognised for its democratic foundations, the British system which we adopted, has therefore been developed over several hundred years.

Those foundations basically are the Crown, which represents every citizen in the land; the legislature, being Parliamentarians who make our laws; and the judiciary, who interpret and enforce the laws.

Like the surveyor's tripod, remove any one of those legs and the whole thing falls over.

Anyone who imagines Australia could be converted into a "republic" and still have a workable Constitution and system of government by removing references to the sovereign in our written Constitution and replacing them with "the President," demonstrates an ignorance of the Constitution (our fundamental law), including the unwritten conventions and civil rights of Australians that go with it.

In this context, the views of Mr Harry Evans, the Clerk of the Australian Senate, are worth noting.

He said in a Parliamentary paper in September, 1994,[23] that the problem with Australian republicanism was that it saw a republic as simply the absence of the monarchy, without understanding Australian constitutional history.

There were two popular misconceptions - first, that federalism was regarded as a "brake on efficiency" rather than a restraint on central government power, and second, the process of changing the constitution by referendum was "a tiresome barrier to reform."

Mr Evans said: "Constant propaganda along these lines may brainwash the public into thinking that these elements of the constitution must be jettisoned with the monarchy. There is a conspiracy to conceal the republican nature of these institutions and their value."

He added: "The danger of the republican movement is that it will result in centralised and unrestrained government."

Instead, he warned, further safeguards were needed against the centralisation and abuse of government power.

It may well be that, after a century, our Constition needs updating in part, that some time in the future Australians may wish to change to a republican form of government and remove the Crown.

But my point now is to alert people that these things should be done strictly according to the rule of law, not subject to the whim of a passing parade of politicians who do not put their cards on the table and seek power they were never intended to have.

I rest my cup. This mixed brew, served up by a concerned migrant sipping a cappuccino as he tossed a coin, needs to be well stirred before it settles

APPENDIX

AUTHOR'S PROPOSED PLEBISCITE QUESTION.

"Do you favour Australia's Federal Parliament (Canberra) using its existing legislative powers to enact a law to provide that the person holding office as Governor General of Australia shall also hold the new, purely symbolic and ceremonial title of:

"Head of State of Australia"

on condition that such new law (and title) shall operate and have full effect without in any way altering or affecting -

- our existing Federal Constitution;
- the (existing) powers, duties and responsibilities of Australia's Governor General, under the Federal Constitution;
- the constitutional and legal position of the Queen as Australia's Sovereign [holding the title of "Queen of Australia" (in accordence with the Royal Style and Titles Act, 1974 (Commonwealth of Australia)]?"

END NOTES TO EPILOGUE

1. Commonwealth of Australia Constitution Act 1900 (United Kingdom), (covering) section 5;

2. Gleeson M. "The Rule of Law and the Constitution" (p.8);

3. Royal Style and Titles Act, 1974 (Australia);

4. Baxter v Commissioner of Taxation (NSW) (1907) 4 CLR 1087 (at 1104-5);

5. Gleeson M. "The Rule of Law and the Constitution" (p.6) (quoting Sir Gerald Brennan, speech upon swearing in as Chief Justice of Australia);

6. Gleeson M. "The Rule of Law and the Constitution" (p.53);

7. Statute of Westminster 1931, s 8 (UK); Statute of Westminster Adoption Act 1942, (Aust);

8. House of Reps Hansard (14 March 1930; Mr Scullin, Prime Minister (at p.177);

9 Royal Comm on the Constitution 1929, Government Printer, Canberra (pp.16-17; 228);

10. Royal Comm on the Constitution, Minutes of evidence, Part 3, 13 Dec 1927, p.776, at p 794-5;

11. "Jesting Pilate" and other papers and addresses by Rt Hon Sir O. Dixon (at p.87);

12. Royal Comm on Constitution 1929. Evidence of Solicitor-General (Pt 1, p. 41 (at p.64);

13. Royal Comm on Constitution. Minutes of evidence, 12 Dec, 1927. Pt 3 (p.754);

14. House of Reps Hansard, 10 April 1930 (at p. 1146);

15. House of Reps Hansard, 10 April 1930 (p.507-515);

16. Senate Hansard 1 May, 1930 (at p.1288-1292);

17. "Constitutional Change - select sources on constitutional change in Australia 1901-97."House of Reps Standing Committee on Legal and Constitutional Affairs, Feb 1999 Canberra (p. 1);

18. Sue v Hill (1999) 199 CLR 462 (at 496);

19. Texas v White (1868), 7 Wallace 700; Boyd's Const Cases, p. 552; (at 556);

20. Australian Law Journal, May 2000, Vol 75, at p. 277-8;

21. House of Reps Hansard, 18 March 1902 (Judiciary Bill, 2 r), at p. 10966-7;

22. Federal Government, A.V.Dicey (1885), Vol 1, Law Quarterly Review p. 80 (at p. 83);

23. Papers on Parliament No. 24, Sept 1994. "Essays on Republicanism: Small r republicanism." Harry Evans - Dept of Senate, Parlament House, Canberra.