



# **The Sir Earle Page Lectures**

**1998**

**Sir David Smith**

**"Australia already has an  
Australian Head of State"**



## **Sir Earle Page**

Sir Earle Page was one of the founders of the Country Party in Australia.

Sir Earle's family came from the Clarence Valley in northern NSW. He was educated at Sydney Boys School and read Medicine at the University of Sydney.

Following his education he returned to the Clarence Valley, where he helped pioneer new medical treatments and surgical practices.

During this period, he became involved in the movement which gave birth to the Country Party, and he was returned as the Member for Cowper in the House of Representatives in 1919.

Shortly after his election, Dr Page was elected as the first Leader of the Federal Parliamentary Country Party.

During his long parliamentary career of 42 years, he served as Prime Minister and Deputy Prime Minister of the Commonwealth, as well as in many different ministries.

Sir Earle served his country with distinction as a surgeon with the AIF during the First World War, and as the Australian Minister to the Imperial War Cabinet during the Second World War.

By the end of a long and distinguished career of national service, he was the Right Honourable Sir Earle Page, Knight Grand Cross of the Order of St Michael and St George, Companion of Honour, Bachelor of Medicine and Australian College of Surgeons, and Honorary Fellow of the Royal College of Surgeons and an Honorary Doctor of Sciences from the University of Sydney.

## **The Sir Earle Page Memorial Trust**

The Trust was established to honour the memory of the Rt Hon. Sir Earle Page, GCMG, CH, MB, ChM(Syd), FRACS, FRCS (Hon), DSc (Hon) in 1984.

The trust has held lectures at the University of Sydney and the Parliament of New South Wales on subjects of public interest. Our Guest Lecturers are chosen for their contributions to society as a whole and because the Trustees consider they have something worthwhile to say for posterity.

The previous lectures have been delivered by the following:

Professor Lauchlan Chipman, the Rt Hon. Ian Sinclair, MP, Former Senator John Stone, Mr John B Fairfax, Mr Robert V Gyles, QC, Mr Hugh M Morgan, the Hon Nick Greiner, Justice Michael Kirby, the Hon Sir Ninian Stephen, Dame Leonie Kramer and Sir Zelman Cowen and Chief Justice Murray Gleeson.

The National Party has long been regarded as the cement of conservative politics in this country. The lecture and the series held in memory of our founding leader, an icon, are evidence the National Party is a party of ideas on the practical side of politics.

## Trustees

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### Mr Stephen Kensey

Stephen Kensey was the foundation trustee of the organisation and provided the initial impetus to have the trust established. He was a skilled public debater and had a sharp pen when it was required.

Educated at Christian Brothers' College, Waverley, he attended The University of Sydney where he studied religion.

Later he was to work for state and federal National Party parliamentarians in a research capacity before branching into a role as a lobbyist. He died in 1993.

### Sir Adrian Solomons, BA, LLB, MLC

Sir Adrian was an influential man in the political arena, respected by parliamentarians from both sides of politics. He was a lawyer by profession, practising in Tamworth. He was one of the original trustees. He died in 1992.

### Mr John Baker, JP, BE, FLE Aust, Chartered Engineer

John Baker was involved in the National Party in NSW for decades in various capacities including Chairman of the Metropolitan Branch and a member of the Central Council, Central Executive and many committees.

He was educated at The University of Sydney and was an engineer by training. His interests were broad and he always enjoyed questioning issues. He died in 1993.

## Sir Earle Page Memorial Trust Objectives

- Provide Education
- Sponsor Scholarships
- Establish Essay Prizes
- Conduct Public Lectures
- Publish Records

## RECOGNITION OF NATIONAL PARTY HISTORY

The Sir Earle Page Memorial Trust was established in 1984 as a permanent recognition by members of the National Party (formerly the Country Party) of its own history and its intrinsic place in Australian history.

It was the inspiration of Mr Stephen Kensey who was determined that the National Party should never be forgotten as the cement of conservative politics. The trust was established as an autonomous but closely aligned organisation.

Inseparable from this purpose was the intention that the Trust should operate in such a way as to honour and commemorate the Party's foremost past leader, Sir Earle Page.

All political parties of any longevity must remember their origins in order to provide ballast against the tides of change implicit in population movements and attitudes in society as a whole. Not to do so implies a party's limited future. A sense of permanency is essential for party members to feel an attachment to the movement.

The National Party is unique in the English-speaking world in that a country and regionally-based party has not lasted elsewhere for the length of time the National Party has existed. One reason for this longevity has been its historical roots with which people can identify. This enables the party to distinguish itself from the Liberal Party and its predecessors as an alternative voice of conservatism throughout Australia.

One of the interesting features of national political debate has been the repetition of argument about how this country has been or is to be governed. This was exemplified by the tribute to Sir Earle Page delivered in 1992 by the Right Honourable Ian Sinclair.

Sir Earle Page, in his maiden speech, commented on issues as relevant today as in 1919. This might seem unusual but it should be remembered today by those from all political parties involved in the debate between economic rationalists and market interventionists.

The Sir Earle Page Memorial Trust chiefly concerns itself with publicising its annual lectures in both oral and written form. Its resources are limited but it does allow each speaker an unfettered opportunity to comment on issues as he or she wishes.

The trustees invite a guest lecturer each year to address the public on an issue of concern. The guest lecturer selects the subject matter and writes the speech. Later, the speech is published for posterity. In this way, a permanent record is kept of issues of concern to Australians.

The University of Sydney, Sir Earle Page's alma mater and Australia's premier tertiary institution, was chosen initially for delivery of the orations and lectures. Most have been given in St John's College because it is a fine, traditional institution. Later lectures have been delivered at the NSW Parliament House.

### **Editor**

The Sir Earle Page Lectures were edited by National Party Legislative Councillor, The Hon. Jenny Gardiner.

## **Thirteenth Annual Sir Earle Page Memorial Trust Lecture**

by

**Sir David Smith, KCVO, AO, BA (ANU)<sup>1</sup>**

Parliament House, Sydney  
14 October 1998

**"Australia already has an  
Australian Head of State"**

Sir Earle Page was still a member of the House of Representatives when, in December 1958, I first went to work as a Minister's Private Secretary in what we now know as Old Parliament House. I was thus able to observe this great Australian in his final years in Parliament, and to exchange greetings when we passed in the corridor. I remember him with respect and affection, and I share Justice Michael Kirby's regret, so ably expressed in his 1993 Sir Earle Page Memorial Lecture,<sup>2</sup> that we so easily forget the political and other leaders, such as Sir Earle, who contributed so much to the welfare of our democracy. I spent five busy and exciting years – two parliaments – working in Old Parliament House before returning to my department. My subsequent duties in the Department of the Interior and later in the Prime Minister's Department continued to take me back to Old Parliament House from time to time, and my duties as Official Secretary to five Governors-General brought me back for ceremonies inside and outside the building. Now in retirement, I am back there yet again as a part-time volunteer guide, attempting to impart to visitors the feelings which I have for Old Parliament House, and something of its significance in the nation's history.

Given my continuous association with Old Parliament House since 1958, it was with some emotion that I entered the old House of Representatives chamber to take my allotted seat on the green leather benches as a delegate to the Constitutional Convention. For the next two weeks the chamber was the venue for scenes and speeches as significant as many that had taken place there during its sixty-one years as a legislative chamber.

The Convention provided monarchist delegates with the opportunity to present the case for retaining our present constitutional arrangements and our present system of Government. Republican delegates were given the opportunity to try and decide what changes they wished to see made to our Constitution and what type of republic they wished this country to become. For all 152 delegates it was an opportunity to participate in an historic event held in a heritage building.

At the start the Convention had before it ten different republican models. These were eventually whittled down to four and, at the end of the two weeks the republicans had selected a model to pit against our present system, but they themselves were still as divided as ever. The final model, supported by only 48% of the delegates, is seriously flawed as an alternative system of government and many disappointed republican delegates have voted to work for its defeat at the 1999 constitutional referendum.

Tonight's lecture is the eightieth speech which I have given as part of my contribution to the monarchy/republic debate during the eight years that have elapsed since I retired. Whenever I have spoken I have tried to emphasise the role which the Governor-General occupies under our Constitution; a role which right from the beginning of our Federation, has been misunderstood, and which, right from the beginning of the push for the republic, has been misrepresented, more often than not out of sheer ignorance of its true significance. This constitutional blind spot about the role of the Governor-General may be found, not only where we might expect to find it in the vast

majority of Australians who do not understand their Constitution, but also where we might expect not to find it: in Australians who have a duty – indeed a professional duty – to know better. Let me give just three examples to illustrate my point.

In a speech in Parliament in 1997 the Opposition's shadow minister for education and spokesman on constitutional matters rejected the claim that the Governor-General was the constitutional Head of State on the grounds that when the Queen was in Australia the Governor-General lost his constitutional powers.<sup>3</sup> This is not true. The Queen cannot and does not exercise any of the Governor-General's constitutional powers, not even when she is in Australia.

My second example comes from a book released this year by a distinguished journalist and author of a number of books on the High Court, politics and Parliament, who repeated this canard, adding for good measure that the Governor-General has no official status whenever the Queen is present.<sup>4</sup> This is not true – it has never happened.

But why should we expect a politician or a journalist to know any better when even a former Chief Justice of the High Court can hold the same incorrect view and write the same nonsense in a calculated attempt to argue for a republic by diminishing and demeaning the office of Governor-General.<sup>5</sup> As I have shown in a recent speech<sup>6</sup> and in a recently published article,<sup>7</sup> and as I shall show again now, even former Chief Justice Sir Anthony Mason is quite wrong in his knowledge and understanding of this aspect of the Constitution.

Foremost among the reasons given for constitutional change is the claim that the republic will give us an Australian Head of State. This claim is as mischievous as it is dishonest. Its success is dependent on the notorious ignorance of the vast majority of Australians about their Constitution.<sup>8</sup> As the term "Head of State" is nowhere to be found in the Constitution, we must look to see who actually performs the duties of a head of state. We find that the Queen appoints the Governor-General on the advice of the Prime Minister, and the Governor-General performs all other constitutional duties.<sup>9</sup> The executive power of the Commonwealth is exercised by the Governor-General in his own right and not as a representative or surrogate of the Sovereign. Furthermore, the Governor-General does not surrender the executive power when the Sovereign is present, as would be the case if he were merely her delegate. Thus the Queen is our symbolic Head of State, the Governor-General is our constitutional Head of State, and we have had Australians in the office of Governor-General since Lord Casey's appointment in 1965. The truth is that Australia simply has two Heads of State, each with separate and different powers.

The claim that the Governor-General is our constitutional Head of State is not some bizarre theory dreamed up for the purposes of the current debate, for it has been so since the beginning of federation, though we did not realise it, and there is much supporting evidence.

A Canadian Governor-General, Lord Dufferin, described a Governor-General as a constitutional Head of State in a speech given in 1873.<sup>10</sup> Prime Minister Paul Keating, referred to the Governor-General as our Head of State in the very speech in which he announced in Parliament, on 7 June 1995, his Government's proposals for the republic.<sup>11</sup> Scholars such as Brian Galligan,<sup>12</sup> Professor of Political Science at the University of Melbourne, and Stuart Macintyre<sup>13</sup> the Ernest Scott Professor of History at the University of Melbourne and Chairman of the Keating appointed Civics Expert Group, also refer to the Governor-General as Head of State.

Even the media, so intent on pushing for the republic, use the description. After Governor-General Bill Hayden's speech to the Royal Australasian College of Physicians in 1995, *The Australian* published an edited version under the heading "The Governor-General has made one of the most controversial speeches ever delivered by an Australian Head of State".<sup>14</sup> The next day's editorial in the same newspaper said that "it is perfectly appropriate at this stage of our constitutional development that the Head of State address important issues of social policy".<sup>15</sup> More recently, the same newspaper referred to the present Governor-General, Sir William Dean, as Head of State.<sup>16</sup> And twenty years ago the opening sentence of an editorial in "The Canberra Times" was "We shall have today a new Governor-General, Sir Zelman Cowen, as our Head of State".<sup>17</sup>

Let me also cite the legal evidence that supports the view that the Governor-General is a constitutional Head of State. During 1900 Queen Victoria signed a number of constitutional documents relating to the future Commonwealth of Australia, including Letters Patent constituting the Office of Governor-General,<sup>18</sup> and Instructions to the Governor-General on the manner in which he was to perform certain of his constitutional duties.<sup>19</sup>

Two distinguished Australian constitutional scholars, A. Inglis Clark,<sup>20</sup> who had worked with Sir Samuel Griffith on his drafts of the Constitution, and who later became Senior Judge of the Supreme Court of Tasmania, and Sir Harrison Moore,<sup>21</sup> who had worked on the first draft of the Constitution that went to the 1897 Adelaide Convention, and who later became Professor of Law at the University of Melbourne, expressed the view that the Letters Patent and the Instructions were superfluous, or even of doubtful legality, on the grounds that the Governor-General's authority stemmed from the Australian Constitution and that not even the Sovereign could direct him in the performance of his constitutional duties. As Inglis Clark pointed out, the powers and functions of our Governor-General were set out in a manner that was peculiar to the Australian Constitution and which conferred upon our Governor-General a statutory position which the Imperial Parliament had not conferred upon any other Governor or Governor-General in any other part of the British Empire.<sup>22</sup>

British Ministers advising Queen Victoria failed to appreciate the unique features of the Australian Constitution and Australian Ministers failed to appreciate the significance of the Letters Patent and the Instructions which

Queen Victoria had issued to the Governor-General. No notice was taken of the views of Clark and Moore, neither in Britain nor in Australia, and between 1902 and 1920, King Edward VII and King George V were to issue further Instructions on the advice of British Ministers,<sup>23</sup> and in 1958 Queen Elizabeth II amended the Letters Patent and issued further Instructions on the advice of Australian Ministers.<sup>24</sup>

In 1916, during a Canadian case before the Privy Council,<sup>25</sup> and again in 1922, during the hearing of an application by the Australian State Governments for special leave to appeal to the Privy Council from the High Court's decision in the *Engineers' Case*,<sup>26</sup> Lord Haldane, Lord Chancellor of Great Britain and President of the Judicial Committee of the Privy Council, noted that our Constitution, unlike that of Canada, had put the Sovereign in the position of having parted with every shadow of active intervention in the affairs of the Commonwealth and handing them over to the Governor-General. Lord Haldane clearly shared the view of our Governor-General's powers which had been expressed earlier by Clark and Moore.

At the 1926 Imperial Conference, the Empire's Prime Ministers declared that Dominion Governors-General would no longer be the representatives of His Majesty's Government in Britain, that it was no longer in accordance with their constitutional positions for Governors-General to remain as the formal channel of communication between their own and the British Governments; and that henceforth a Governor-General would stand in the same constitutional relationship with his Dominion Government, and hold the same position in relation to the administration of public affairs in the Dominion, as did the King with the British Government and in relation to public affairs in Great Britain.<sup>27</sup>

The 1930 Imperial Conference decided that, henceforth, recommendations to the King for the appointment of a Governor-General would be made by the Prime Minister of the Dominion concerned, and not by British Ministers as had been the case until then. This decision further strengthened the constitutional role of Governors-General and their relationships with their respective Dominion Governments.<sup>28</sup>

In 1953, in the course of preparing for the 1954 Royal Visit to Australia, Prime Minister Menzies wanted to involve the Queen in some of the formal processes of Government, in addition to the inevitable public appearances and social occasions. But the Government's legal advisers suddenly discovered what had been apparent to Clark and Moore at the time of federation. The Commonwealth Solicitor-General, Sir Kenneth Bailey, advised Prime Minister Menzies that the Constitution placed constitutional powers, other than the power to appoint the Governor-General, in the hands of the Governor-General; that he exercised these constitutional powers in his own right, and not as a representative or surrogate of the Sovereign; and that the Governor-General's powers could not be exercised by the Sovereign, not even when she was in Australia.<sup>29</sup>

Nothing, could be done, except by constitutional amendment, to delegate the Governor-General's constitutional powers to the Sovereign, but by means of the Royal Powers Act 1953, Parliament delegated to the Queen, whenever she was personally present in Australia, the exercise of any of the Governor-General's statutory powers. The Act further provided that the Governor-General could continue to exercise his statutory powers while the Queen was in Australia, and in practice Governors-General have continued to do so.

In 1975 the Solicitor-General of Australia, Sir Maurice Byers, advised Prime Minister Whitlam that the Governor-General's constitutional powers could not properly be the subject of Royal Instructions, thus again echoing the views expressed at the time of federation by Clark and Moore, and confirming what Sir Kenneth Bailey had said in 1953, namely, that all constitutional powers and functions, except the power to appoint or remove the Governor-General, had been given to the Governor-General by the Constitution on 1 January 1901.<sup>30</sup>

The dismissal of the Whitlam Government later that year was to provide further support for the legal opinions which had been given over the previous seventy-four years. Writing after the event, Governor-General Sir John Kerr, a former Chief Justice of New South Wales, said: "I did not tell the Queen in advance that I intended to exercise these powers on 11 November. I did not ask her approval. The decisions I took were without the Queen's advance knowledge. The reason for this was that I believed, if dismissal action were to be taken, that it could be taken only by me and that it must be done on my sole responsibility. My view was that to inform Her Majesty in advance of what I intended to do, and when, would be to risk involving her in an Australian political and constitutional crisis in relation to which she had no legal powers; and I must not take such a risk"<sup>31</sup>.

After the Governor-General had withdrawn the Prime Minister's Commission, the Speaker of the House of Representatives wrote to the Queen to ask her to restore Whitlam to office as Prime Minister. In the reply from Buckingham Palace, Mr. Speaker was told: "As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and The Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching, events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act".<sup>32</sup> That reply confirmed, if confirmation were needed, that the Governor-General is indeed Australia's constitutional Head of State.

Even so, it took another nine years before the matter was finally resolved and the 1975 opinion of the Solicitor-General was acted upon. On 21 August 1984, on the advice of Prime Minister Hawke, the Queen revoked Queen Victoria's Letters Patent and Instructions to the Governor-General, and issued new

Letters Patent which, in the words of the Prime Minister, would "achieve the objective of modernising the administrative arrangements of the Office of Governor-General and, at the same time, clarify His Excellency's position under the Constitution".<sup>33</sup> Four years later, in its Final Report, the Hawke Government's Constitutional Commission said: "Although the Governor-General is the Queen's representative in Australia the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal Instruments relating to it".<sup>34</sup> The Constitutional Commission was itself advised on these matters by an Advisory Committee on Executive Government under the chairmanship of former Governor-General, Sir Zelman Cowen.<sup>35</sup>

If there should still be any doubt about the fact that the Governor-General is indeed our constitutional Head of State, let me clinch the argument by returning to Prime Minister Keating's statement to Parliament on the republic, and to the decisions of the republicans at the 1998 Constitutional Convention.

In order to avoid the problem of a powerful President, republicans used to argue that the reserve powers of the Crown, and the conventions associated with their use by the Governor-General, should be codified, but finally Keating had to tell Parliament that his Government had concluded that this was not possible, and that the powers of the Governor-General should be transferred to the President without alteration.<sup>36</sup> As for the Constitutional Convention, the argument about codification of the reserve powers was the cause of major division between the various republican groups, but in the end the Convention also found codification impossible and decided that the President should inherit all of the powers of the Governor-General.<sup>37</sup>

At last we see the delusion that lies behind the push for a republic. We are told that we lack an Australian Head of State and that we must become a republic in order to have one. But then we are told that the President should have exactly the same powers and exactly the same duties as the Governor-General has now — nothing would be added and nothing would be subtracted. One Australian would replace another Australian and go on doing exactly the same job. All that would be changed would be the title on the letter-head. If such a President would be an Australian Head of State, then that is precisely what the Governor-General is now.

Despite all I have said about the constitutional position of the Governor-General, the republicans still argue in the referendum campaign that removing the Queen from our Constitution and renaming the Governor-General as President will make a world of difference to our national sovereignty and our independence. The past utterances of leading republicans give us some idea of how they might seek to do this.

The media will weigh in with their support, just as they have hitherto. Paul Kelly, the then Editor-in-Chief of *The Australian*, told a constitutional seminar that the media would give prominent and priority coverage to constitutional change because "the media has a vested interest in change — change equates to news and news is the life-blood of the media".<sup>38</sup>

In other words, the media support constitutional change, not because it is good for Australia but because it is good for their business.

Peter Collins, at the time a New South Wales Minister of the Crown, said that he is a republican because he believes that the British Government still advises the Queen on Australian constitutional issues. This is simply not true, and ceased to be true two years before Collins was born.

Al Grassby, a former Commonwealth Minister of the Crown, claims that the monarchy was responsible for the recession of the late 1980s, for the one million Australians who were unemployed and for the business excesses of that period, and for the exodus from Australia of our top scientists.

Michael Lynch, General Manager of the Australia Council for the Arts, claims that the monarchy stifles artistic talent and prevents our artists from fully expressing themselves.

Janet Holmes a Court wants a new Flag and a new Constitution because an Asian Cabinet Minister told her that his country would help the Australian people in their struggle for independence from Britain.

Bill Ferris, former head of the Australian Trade Commission, claims that our present constitutional arrangements are harmful to the overseas promotion of our products and services, and that the republic will help us gain international recognition for our technology and our inventions, and will ensure that more venture capital will flow back into our newer industries.

Lindsay Fox, the trucking magnate, and other business leaders see the republic as an opportunity for Australia to "re-badge" and "re-brand" itself, thus reducing the nation, its history, its Constitution and its system of Government to the level of a new car or a packet of detergent.

Neville Wran, a former premier of New South Wales, believes that changing to a republic will boost jobs and invigorate Australia's spirit.

Sallyanne Atkinson is a republican because, as Australian Trade Commissioner to France, she found the French confused by the fact that the Queen of England was also Queen of Australia. I should have thought that the French would have been more confused by the fact that, following their bloody revolution of 1789 and the abolition of their Monarchy, they endured the Reign of Terror, an Empire under Emperor Napoleon, the restoration of the Monarchy, the Second French Empire, Republics One, Two, Three and Four, and the Vichy Government that collaborated with the Nazis during World War II, before President de Gaulle gave them their current Fifth Republic. The Trade Commissioner might more usefully have spent her time in Paris in telling the French something of the enduring stability of our constitutional arrangements.

Richard Woolcott, the former head of the Department of Foreign Affairs and Trade, and some of his departmental colleagues want constitutional change in order to simplify matters for our overseas diplomats when it comes to explaining our constitutional arrangements to foreign Heads of State and their



officials. Woolcott has mentioned particularly his own difficulties in explaining the 1975 Dismissal to former President Suharto of Indonesia as a reason for altering our Constitution. If our diplomats and trade representatives cannot understand, explain and defend our present system of Government they should get off its payroll.

With so many specious arguments being advanced for constitutional change, what hope has the ordinary Australian in understanding how the present system actually works? Most Australians don't know enough about our present system to enable them to put into proper context any proposals for change. The prospect of an ill-informed and misinformed electorate being asked to vote ... on a referendum alteration Bill is a worrying one indeed.

The Constitutional Convention may have increased public awareness of the existence of our Constitution, but it also showed just how unprepared the republicans really were on the question of the republic. Though they agree that they want to remove the Queen from our Constitution, they are utterly divided and confused over who or what to put in her place. The reality is that the Crown has a most important role in ensuring the continuity and the stability of our system of government. Behind it lie almost a thousand years of history and tradition which none of the several republican models on offer could hope to replicate. Indeed, after seven years of telling us that "It's inevitable", and after a two-week, \$40 million Convention, the republicans are still hopelessly divided over just what "It" actually is.

Under our present system of Government the constitutional Head of State is chosen by the Government of the day, is advised by the Government of the day, and may be removed by the Government of the day. All public office holders are either elected by the people, or appointed by those who have been elected by the people. Nothing could be more democratic, or more republican.

The role of the Crown in the appointment and removal processes ensures that the Governor-General's allegiance is to the entire nation and not just to those, whether in the community at large or in the Parliament, who voted him or her into office. In our democracy, election to a public office, as distinct from appointment, carries with it the notion of a mandate, with policies to pursue and supporters to be rewarded, and there is no place for such influences on the person who occupies the desk at Government House, Canberra. I have known Governors-General who have been deterred from acting or speaking in a particular way simply because they knew they had been appointed and not elected. It would be constitutional madness to surrender this very powerful restraint on what is potentially a very powerful position under our Constitution. The last thing this country needs is a captive constitutional Head of State - captive to party politicians and those who finance them.

In 1997, as republicans argued over the Keating/Turnbull republic (in which the President would be elected by Parliament), and a popular election republic (in which the President would be elected by the people), Richard McGarvie, former Judge of the Supreme Court of Victoria and former Governor of Victoria, entered the debate to reject both methods of electing a

President. "They may sound all right in theory. They sound innocuous but are really changes of drastic potential. In the living reality of the political culture and constitutional practice of this country they would immediately corrode and ultimately destroy our democracy".<sup>39</sup>

Mr McGarvie was to have a profound influence on the outcome of the Convention. As well as damning both methods of appointment then in contention, he also pointed out the defect in the Australian Republican Movement's model relating to the dismissal of a President. The requirement of a two-thirds majority of Parliament would make it virtually impossible to remove a President who was causing grief to the Government of the day. The Opposition would never support it.

Unfortunately, in their scramble to remedy this defect and to cobble together a few more votes for their model, the ARM have placed the President entirely at the mercy of the Prime Minister, who would be able to summarily dismiss the President, subject to later ratification by the House of Representatives only. The Senate would be involved in the appointment process but would be excluded from the removal process. So much for federalism. That State and Territory parliamentary delegates supported such a proposal is beyond belief.

In an attempt to placate those republicans who wanted, and still want, the people to be involved in the appointment process, the ARM has offered them a committee that would receive nominations from the community and compile a short list for consideration by the Prime Minister. This committee would operate in secret, nominations made to it would be secret, recommendations made by it would be secret, and the Prime Minister would not be bound by its advice anyway. Former Chief Justice of Australia, Sir Harry Gibbs, has rightly described this process as "a clumsy sham".<sup>40</sup>

In the concluding stages of the Convention, delegates were bombarded with a raft of amendments to the ARM model as Malcolm Turnbull sought to pick up extra votes from republicans who were opposed to his particular model. As each key element of the model was being settled by the Convention, last-minute amendments were circulated, and we had the spectacle of Malcolm Turnbull drafting amendments on the floor of the Chamber even as the final votes were being taken. Among Convention delegates, the significantly modified ARM model became known as the "camel", and the Treasurer, Peter Costello, referred to it as a hybrid on a hybrid and an unfinished compromise.<sup>41</sup> Costello revealed to the Convention how Malcolm Turnbull had come to him "like Nicodemus, by night to try and steal my vote ... and said 'Don't worry about any of that: the parliament can ignore it'".<sup>42</sup> So much for the Convention's model, cobbled together in just two weeks, and which we are to be asked to accept in place of our present Constitution, so carefully put together over two decades. No wonder it failed to satisfy even a bare majority of delegates.

Oddly enough, Malcolm Turnbull's final comment that "parliament can ignore it" seems to have struck a chord with Peter Costello. This newly declared republican, who refused to support the final compromise ARM model, was

reported as saying that he would urge Parliament to amend it when the referendum alteration Bill came before it. It was also pointed out that the Government would have scope to tinker with elements of the ARM Model when it was drafting the legislation to be put to the Parliament.<sup>43</sup>

For the Government to allow the Treasurer and the Attorney-General to produce their own version of what they think the Constitutional Convention should have come up with, or for Parliament to tolerate such action, would be a betrayal of the Convention and a repudiation of an undertaking given by the Prime Minister to put the Convention's republican model to the Australian people at a referendum – an undertaking which was given to the Convention immediately after the Convention's Chairman and Deputy Chairman had handed him the final communique.<sup>44</sup>

In describing the Convention model, Sir Harry Gibbs has said: "One rather gets the impression that some delegates to the Convention were less concerned to achieve excellence in the proposed constitutional model than to have a republic at any price. The model proposed by the Convention is so obviously defective that it must surely have little chance of success at a referendum. If, by some possibility, it were adopted, the result would be a disaster for Australia".<sup>45</sup>

Mr Richard McGarvie believes that the referendum will fail "because Australians are instinctively a wise people. They are well aware that they have the responsibility for maintaining for future generations one of the world's oldest and best democracies which Australians have built. A referendum campaign tends to be all-revealing. By the time they vote, people will realise how the model would damage essential elements of our democratic system ..."<sup>46</sup>

As we approach the referendum, it is time that the Australian Republican Movement came clean and told the people of Australia their real reasons for wanting to alter our Constitution. The Turnbull model will not give us independence from Britain, for we have that now.<sup>47</sup> It will not give us an Australian Head of State, for we have that now. It will not give us a republican form of Government, for we have that now. And it will not give us a better Constitution, for even the Australian Republican Movement's most ardent supporters are now telling us why their own model will not work, and are seeking, to change it.<sup>48</sup> "Nicodemus in the night" clearly has not been able to improve on what our Founding Fathers fashioned so carefully and so patiently. With the help of \$40 million of taxpayers' money, the Australian Republican Movement was given the chance to put up, and it failed. We must ensure that it fails [on 6 November, 1999] too!

1. Visiting Fellow, Faculty of Law, The Australian National University; a delegate to the 1998 Constitutional Convention; and Official Secretary to five Governors-General from 1973 to 1990.

2. The Hon Justice Michael Kirby, "Of Politics, Judges and Crown", *Thinking About Australia*, (The Sir Earle Page Memorial Trust, Sydney, 1994), pp. 75–85.
3. Mr Mark Latham, Member for Werriwa, *Parliamentary Debates*, Vol. H. of R. 215, 28 August, 1997, p. 7304.
4. David Solomon, *Coming of Age: Charter for a new Australia*, (University of Queensland Press, St. Lucia, 1998) p. 24.
5. Sir Anthony Mason, "The Republic and Australian Constitutional Development", a paper presented at an Australian National University Seminar, 11 May, 1998.
6. Sir David Smith, "A Funny Thing Happened on the Way to the Referendum", a paper presented at the Tenth Conference of The Samuel Griffith Society, Brisbane, 8 August, 1998.
7. Sir David Smith, "Former Chief Justice wrong and wrong again", *The Canberra Times*, 7 September, 1998.
8. See *Final Report of the Constitutional Commission*, (Australian Government Publishing Service, Canberra, 1988) p. 43; and *Whereas the people ... Report of the Civics Expert Group*, (Australian Government Publishing Service, Canberra, 1994), pp. 18–19. The former found that almost 50% of all Australians were unaware that Australia has a written Constitution, and that in the 18–24 year age group the level of ignorance rose to nearly 70%; the latter found that 82% of Australians know nothing about the content of the Constitution.
9. The relevant sections of the Constitution are:
  - "2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him."
  - "61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".
10. Lord Dufferin, then Governor-General of Canada, in a speech delivered at Halifax, Nova Scotia, in August 1873, described the Governor-General as "the head of a constitutional State, engaged in the administration of Parliamentary government." Quoted by John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, (Angus and Robertson, Sydney, 1901), p. 700, and by L.F. Crisp, *Australian National Government*, (Longman Cheshire Pty. Limited, Melbourne, 1978), p. 400.
11. *Parliamentary Debates*, Vol. H. of R. 201, 7 June 1995, pp. 1434–41.
12. Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, (Cambridge University Press, Cambridge, 1995) pp. 21–2 and 245–47.
13. Stuart Macintyre, "A Federal Commonwealth, An Australian Citizenship: a lecture in The Australian Senate Occasional lecture Series, 14 February 1997, p. 3. In the lecture, and in the text distributed at the time, Professor Macintyre referred to the events of November 1975 having revived criticism of "the extent of the reserve powers left with the head of state". In the subsequent published version of the lecture, the words "head of state" were replaced by the words

"Governor-General". See "The Constitution Makers", *Papers on Parliament*, Number 30, November 1997. (Department of the Senate, Canberra, 1997), p. 20. In making the alteration, Professor Macintyre provided further confirmation that, in the context of the Australian Constitution, the two expressions are interchangeable.

14. *The Australian*, 23 June 1995.
15. *The Weekend Australian*, 24–25 June 1995.
16. *The Australian*, 6 September, 1996.
17. *The Canberra Times*, 8 December 1977.
18. *Commonwealth Statutory Rules 1901–1956*, Volume V, pp. 5301–3.
19. *Ibid.*, pp. 5310–12.
20. A. Inglis Clark, *Studies in Australian Constitutional Law*, (Charles F. Maxwell (G. Partridge & Co.), Melbourne, 1901). pp. 54–7.
21. W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, (Charles F. Maxwell (G. Partridge & Co.), Melbourne, 1910), 2nd edition, p. 162.
22. A. Inglis Clark, *op. cit.*, pp. 52–3.
23. *Commonwealth Statutory Rules 1901–1965*, pp. 5312–4.
24. *Commonwealth Statutory Rules*, 1958, pp. 494–95.
25. [1916] 1 A.C. pp 586–87. Quoted in H.V. Evatt, *The King and his Dominion Governors*, (Frank Cass and Company Limited, London, 1967), p. 311.
26. Transcript of argument, pp.22–23. Quoted in Evatt, *ibid.*
27. Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs*, (George Allen & Unwin, Sydney, 1983) p. 168; and (Sir) Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967.
28. Cunneen, *op.cit.*, p. 179 and Cowen, *op. cit.*, pp. 197–8.
29. *Opinion of the Commonwealth Solicitor-General*, (Sir Kenneth Bailey) 25 November 1953.
30. *Opinion of the Solicitor-General of Australia* (Sir Maurice Byers), 5 September, 1975.
31. Sir John Kerr, *Matters for Judgement*, (The Macmillan Company of Australia Pty. Ltd, South Melbourne, 1978), pp. 330.
32. *Ibid.*, p. 374–5
33. Statement by the Prime Minister to the House of Representatives, *Parliamentary Debates*, Vol.H. of R. 138, 24 August, 1984, p. 380. The Prime Minister tabled a copy of the amended Letter Patent relating to the office of Governor-General, together with the text of statement relating to the document, but for some unknown reason did not read the statement to the House, nor did he seek leave to have it incorporated in Hansard. The statement was later issued by the Prime Minister's Press Office.
34. *Final Report of the Constitutional Commission*, p. 313.
35. *Report of the Advisory Committee on Executive Government*, June 1987.
36. *Parliamentary Debates*, Vol. H. of R. 201, 7 June, 1995, p. 1438.

37. *Final report of the Constitutional Commission*, p. 45.
38. Paul Kelly, in a speech to the Constitutional Centenary Foundation, 12 November, 1993.
39. Richard McGarvie, "Our Democracy in Peril: the safe way to a democratic republic", *The Australian*, 1 May 1997; and (1997) 101 *Victorian Bar News*, p. 31.
40. Sir Harry Gibbs, "Some thoughts on the Constitutional Convention", *The University of New South Wales Law Journal*, Volume 4, No. 2, June 1998, p. 16.
41. *Report of the Constitutional Convention*, Volume 4, p. 975.
42. *Ibid.*
43. Christopher Dore, "New republican Costello wants changes before he signs on", *The Australian*, 16 February 1998. See also Karen Middleton, "Vow to amend model before poll", *The West Australian*, 16 February 1998; and "Republicans hope to win Treasurer's support", *The Age* (Melbourne), 16 February 1998.
44. *Report of the Constitutional Convention*, Volume 4, pp. 997–9. For the text of the communique see Volume 1, pp. 42–50.
45. Gibbs, see note 40 above, pp. 16–17.
46. Richard McGarvie, "Resolving the Republic Issue by 2005", (1998) 105 *Victorian Bar News*, p. 18.
47. See *Final Report of the Constitutional Commission*, p. 75. One of the Commission's terms of reference required it to report on the revision of the Constitution to "adequately reflect Australia's status as an independent nation". The Commission reported that "at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament." The Commission concluded that "the development of Australian nationhood did not required any change to the Australian Constitution."
48. See, for example, the various articles in "The 1998 Constitutional Convention: An Experiment in Popular Reform", *The University of New South Wales Law Journal*, Volume 4, No. 2, June 1998.