IMAGINING AN AFFIRMATIONAL REPUBLIC

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This article explores the idea of an affirmational republic which, both structurally and symbolically, affirms rather than rejects Australia’s British history and heritage while equally celebrating the nation’s Indigenous inheritance and multicultural achievements. Part II explores the history of republican advocacy to unpack the common, predominantly symbolic, justifications for republican reform. It then elucidates dual, separate but connected, purposes – one small and practical and one big and symbolic – to show that each purpose may entail a different solution. Part III discerns lessons from the failed 1999 referendum, to help guide what an affirmational republic could involve. The proposed approach is developed further in Part IV. Addressing the practical purpose, I suggest the title ‘Governor-General’ could be retained (instead of ‘President’) and provide arguments against direct election. Addressing the symbolic purpose, I suggest an inspiring national Declaration could be better achieved extra-constitutionally, as the Referendum Council recommended in 2017.

I INTRODUCTION

In 2010, Aboriginal leader Noel Pearson argued that a republic would be meaningless without reconciliation.¹ This statement holds true today: it would be unjust to pursue a republic before first achieving Indigenous constitutional recognition through a First Nations constitutional voice, as called for by the Uluru Statement from the Heart.² Australia must resolve our domestic relationship with the First Nations before we can hope to resolve our relationship with Britain.³ That a republic cannot proceed without meaningful and substantive reconciliation is morally important, but Pearson also emphasised a reciprocal insight: in pursuing

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³ See also Mark McKenna, This Country: A Reconciled Republic? (University of New South Wales Press, 2004) 17 (‘A Reconciled Republic?’).
a republic, Australia should not simply reject British historical contributions. Pearson advocated the idea of an ‘affirmational’ Australian republic that affirms, rather than repudiates, Australia’s British institutional inheritance. Reflecting on the failed 1999 referendum, he argued that:

A principled, and inclusive argument for a Republic must win over many of those who have opposed a Republic [that has been] perceived as a break with our heritage … I believe that a stable majority of Australians would support the idea that our country should not repudiate its British heritage but affirm it, not only as a historical fact but as the basis for the continued development of our nation.4

Pearson therefore contended that:

There are not just two options: the existing situation versus a repudiational republic. In reality there are three models: the one in the middle is the affirmational republic that does not repudiate the [country’s] British heritage and indeed affirms the special place of the crown in our country.5

No one has fleshed out what such a middle way, affirmational republic might entail. Here I seek to fill that gap. I explore the idea of a republic which, both structurally and symbolically, affirms rather than repudiates Australia’s British history and heritage, while equally celebrating the nation’s ancient Indigenous inheritance and multicultural achievements.

While affirmation of British inheritance may seem oxymoronic for a reform project that aims to remove the monarchy, the lessons of the failed 1999 referendum indicate that an affirmational approach is strategically and politically important, and perhaps the only way to transcend and defuse the culture wars that have long hampered progress on nation-building issues. To win a referendum, a republic must unite the electorate rather than divide it. The republic therefore cannot only be a progressive cause; it must also speak to conservative concerns, including attitudes which may still value British traditions as a fundamental part of Australian identity.

The article proceeds in three Parts. Part II explores republican advocacy from the 1990s to today, to grapple with the notoriously elusive problem of purpose: why is republican reform needed? What problem does it seek to fix? It unpacks common, predominantly symbolic, justifications for republican reform, then shows that there are actually dual, separate but closely connected, purposes – one small and practical, the other one big and symbolic. For clarity, I suggest that symbolic drivers should be separated from practical drivers. Though conceptual overlap unavoidably remains, increased clarity on the dual purposes driving republican reform makes it easier to see that each problem may require a different solution.

The first problem is practical and much smaller than grand republican rhetoric usually suggests.6 Australia is already an independent nation, having evolved substantially from colonial beginnings to independent nationhood. Australia is already almost, but not quite, a republic.7 Under the Constitution, the Queen remains

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4 Pearson, ‘Reconciliation’ (n 1).
5 Ibid.
6 See also Brian Galligan, ‘Regularising the Australian Republic’ (1993) 28(4) Australian Journal of Political Science 56, 61 (‘Regularising’).
Australia’s head of state (though her role is practically diminished), and she still appoints and dismisses the Governor-General (our de facto head of state)\(^8\) on the advice of the Prime Minister. The last, small step of removing the (now minor) role of the Queen in Australia’s constitutional arrangements should be taken as a matter of constitutional closure – a final, formal tick off. This is necessary because Australia should not have to ask the British Queen to appoint and dismiss our Governor-General – the requirement is inefficient, impractical, and outdated for an independent nation. This is the small, practical problem that needs to be fixed.

The second problem is symbolic, and its resolution can be as ambitious and aspirational as our imaginations allow. Republican arguments suggest Australia should affirm and declare our national independence, maturity and unity, to rally Australians around shared symbols, narratives and values. This second symbolic purpose drove the misguided proposal for a new constitutional preamble, which failed alongside the republic question in 1999. Here I argue that a symbolic and unifying declaration of Australian history, aspirations and values would better be achieved extra-constitutionally.

Part III of the article discerns key lessons from the failed 1999 referendum, to guide future republican strategy and inform the imagined affirmational republic. Insights arising include the centrality of republican consensus, the importance of bipartisanship and the related need to pursue strategies that defuse, rather than inflame, contemporary culture wars.

Drawing on these insights, Part IV makes the case for a republic that, both structurally and symbolically, affirms rather than rejects Australia’s British institutional inheritance while equally celebrating the Indigenous and multicultural parts of Australia’s national story. Addressing the paradoxical practical problem of removing the Queen from Australia’s constitutional affairs in a way that nonetheless embraces British institutional traditions, I suggest the republican model should value constitutional continuity and stability by changing only that which needs to be changed to achieve the stated practical purpose. Presenting a refinement of minimalist structural approaches to republican reform, I further propose that not all the language and forms of Britain must be rejected. Given evident preferences for maintaining an apolitical head of state with much the same powers and role as the current Governor-General, I suggest the title ‘Governor-General’ could be retained (instead of ‘President’). I also provide arguments against pursuing direct election simply because it may be the most instinctively attractive option for the public.

Addressing the symbolic purpose, I suggest that an inspiring, unifying national Declaration can be achieved extra-constitutionally as was proposed by the Referendum Council in 2017.\(^9\) An extra-constitutional Declaration could poetically capture the nation’s history, aspirations, and values, equally affirming

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the Indigenous, British and multicultural strands to Australia’s national story – but without uncertain constitutional consequences. Its poetry could even affirm the special place of the Crown in Australian history. Reciprocally, the Declaration should build on substantive reforms for Indigenous constitutional recognition, including a First Nations constitutional voice (which should be achieved before any republic referendum), by celebrating Australia’s Indigenous history and heritage, as well as our multicultural diversity. The Declaration could be enacted by all Australian parliaments as the Referendum Council recommends, but also with the assent of the First Nations voice, imbuing it with enduring historic gravitas. This could be Australia’s ‘Declaration of Independence’, but with special reconciliatory significance. If not enacted alongside the referendum on a First Nations voice, this could be part of republican reform.

II UNDERSTANDING THE PURPOSE OF AN AUSTRALIAN REPUBLIC

Before delving into discussion about models, republicans must get clear on what they are trying to achieve. No coherent strategy can proceed without answering the preliminary question of purpose: what problem does a republic seek to fix? Unless a clear answer to the ‘why’ question can be articulated, agreement on the ‘how’ strategy will remain confused.

A A Predominantly Symbolic, Rather than Structural, Purpose?

An Australian republic means different things to different people. As a concept, it is notoriously “elastic and emotional”, largely because advocates consistently articulate a primarily symbolic, rather than structural, purpose. A survey of Australian republican advocacy from the 1990s to today reveals an argument about the suitability of current constitutional symbols, rather than the need for systemic or operational reform. As McKenna described, the debate of the 1990s seemed less about ‘altering the Constitution’ and more about ‘who should be the most appropriate symbol of its defence – an Australian president or a British monarch’. Hirst explained that ‘[o]ur dissatisfaction is not with the working of

11 See McKenna, The Captive Republic (n 7) 4–5.
14 As McKenna explains, republicans argued a republic would involve no systemic change: McKenna, A Reconciled Republic? (n 3) 25.
15 McKenna, The Captive Republic (n 7) 258.
our present Constitution. Our dissatisfaction is with the British monarchy as a symbol of the Australian nation. We need to deal with the Constitution only as a consequence of the removal of that symbol’.16

Republican justifications are thus usually couched in the need to symbolically declare an independent national identity17 through removing the largely symbolic role of the Queen from Australia’s constitutional arrangements.18 Why do republicans say that this is necessary? Advocates consistently rely on symbolic reasons: it would be a national declaration of patriotism,19 autonomy,20 maturity and modernity.21 Change is necessary because monarchical symbols have become outdated and irrelevant for Australia.22

The highly symbolic content of republican arguments is not unique in debates about constitutional reform. Constitutional referendums always carry symbolic power and amendments usually entail symbolic meanings.23 Constitutions reflect national identity, values, and symbols,24 regardless of whether they contain aspirational words.25 Yet republican justifications appear distinct in style to other constitutional reform campaigns, because the problem in need of resolution is consistently described by advocates as predominantly symbolic, rather than structural.26


17 See Winterton, Monarchy to Republic (n 8) 3.

18 See, eg, Benjamin T Jones, This Time: Australia’s Republican Past and Future (Schwartz Publishing, 2018) 128, 189 (‘This Time’); John Hirst, Sense and Nonsense in Australian History (Black Inc Agenda, 2009) 257–8 (‘Sense and Nonsense’).

19 Malcolm Turnbull, A Bigger Picture (Hardie Grant Books, 2020) 95 (‘Bigger Picture’).

20 Winterton, Monarchy to Republic (n 8) 3.

21 See Keating (n 13); Mark McKenna, ‘The Australian Republic: Still Captive after All These Years’ in John Warhurst and Malcolm Mackerras (eds), Constitutional Politics: The Republic Referendum and the Future (University of Queensland Press, 2002) 145, 158–9 (‘Australian Republic: Still Captive’).

22 See, eg, Greg Craven, ‘The Republican Debate and the True Course of Constitutional Conservatism’ (Conference Paper, Conference of the Samuel Griffith Society, 9–11 July 1999) (‘Constitutional Conservatism’); Jones, This Time (n 18) 128, 189; Malcolm Turnbull, ‘Foreword’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) ix (‘Foreword’); Keating (n 13) 2–3; Benjamin T Jones and Mark McKenna, ‘Rekindling the Fire: The Republic and Australia’s Future’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 1, 1, 6 (‘Rekindling’).


Accordingly, republicans regularly assert that their objective can be realised without much systemic change. As the 1993 Turnbull report argued, ‘a republic is achievable without threatening Australia’s cherished democratic traditions’.\(^\text{27}\) Paul Keating similarly emphasised that a republic was not a ‘radical undertaking’, but a small step involving ‘very limited implications for the design of Australia’s democracy’.\(^\text{28}\) Suri Ratnapala was therefore correct to observe that ‘a majority of leading republicans’ saw the aim of a republic as preserving ‘the current constitutional system while replacing the monarch with a locally selected and largely ceremonial President’.\(^\text{29}\) For Ratnapala, the republican movement had ‘turned its back on substantial constitutional reform’ in favour of ‘cosmetic republicanism which leaves the constitution pretty much as it is’.\(^\text{30}\) This characterisation is fair. As Mark McKenna notes, most republicans haveironically been ‘just as intent on preserving “British” institutions as Australian monarchists’.\(^\text{31}\)

Such observations reveal that there is more common ground between the polarities of the republican debate than is usually assumed, which similarly helps elucidate possible ‘middle way’ paths to an affirmational republic: in line with republican justifications, reforms should maintain the basic fabric of our inherited British institutions.

**B Unpacking the Symbolic Rhetoric**

**1 Australia Is Already Almost a Republic**

The symbolic framing of republican arguments becomes easier to comprehend when one considers how many important steps Australia has already taken towards legal and political independence.\(^\text{32}\) There is not much left to do to become a republic. The last step is updating remnant monarchical symbols\(^\text{33}\) and removing the small ways in which the Queen still signs off on our domestic constitutional affairs.
Many extra-constitutional symbols have already been updated. In 1977, Australia abandoned ‘God Save the Queen’ and chose ‘Advance Australia Fair’ for its new national anthem34 (though the Australian flag remains mostly unchanged since 1901 and still bears the Union Jack).35 Citizenship oaths have evolved to reflect Australia’s independent character.36 The nation’s cultural ties to Britain have diminished as we grow more ‘republican in sentiment’.37 As Turnbull describes, the monarchy has correspondingly become ‘less visible’ and ‘less significant’, so ‘[o]nly the words of the Constitution remain – as much a reminder of our inability to agree on change as they are of a colonial status now long past’.38 ‘Australia has [therefore] become republic-like’, Benjamin Jones argues, without constitutional amendment39 and without having a ‘republican moment’.40

Legally, too, Australia has taken important incremental steps towards independence. In 1931, the Statute of Westminster legally recognised the independence of the dominions.41 In 1942, Australia adopted the statute, ratifying the free and equal status of its government and Parliament,42 while the 1986 Australia Acts severed most remaining legal links with the United Kingdom.43 The Governor-General is now appointed by the Queen on the advice of Australia’s Prime Minister, instead of British ministers.44 The practical involvement of the monarch in Australian affairs has similarly diminished,45 while the functions of her domestic representatives have accordingly expanded46 and become Australianised.47

A republic may therefore be described as the final step in a ‘natural evolutionary track’ consolidating our independent national identity.48 Though under the

34 Jones, This Time (n 18) 72–4.
38 Turnbull, ‘Foreword’ (n 22) xv.
39 Ibid 16.
40 Jones, This Time (n 18) 15.
42 See Statute of Westminster Adoption Act 1942 (Cth) s 2(1).
43 Twomey, Australia Acts 1986 (n 41).
44 DR Elder and PE Fowler (eds), House of Representatives Practice (Department of the House of Representatives, 7th ed, 2018) 1–2; Turnbull, Bigger Picture (n 19) 96.
45 Keating (n 13) 2.
46 Saunders, ‘Beyond Minimalism’ (n 32) 75.
47 Galligan, ‘Regularising’ (n 6) 59; Boyce, The Queen’s Realms (n 8) 33, 45–6.
Constitution, the Queen remains Australia’s head of state, in practice, the monarch is the symbolic or ‘titular’ head of state, while the Governor-General is the de facto or ‘virtual’ head of state, as the Queen’s domestic representative. Australia has therefore been described as a ‘crowned republic’, ‘barely disguised’ by remnant ‘monarchic trappings’. This helps explain the predominantly symbolic rather than structural framing: all that is required for the republic to be revealed is for the veil to be lifted, adorning symbols updated, and Australia’s evolved national character finally expressed.

If Australia is already almost republic, then the scope of the required reform becomes smaller. As Brian Galligan argued in 1993:

[T]he real republican character of Australia’s constitutional system needs to be recognised. Once that is done, much of the current agitation by republican activists is undercut and the general apathy of most Australians explained. The real issues remain more modest, but nevertheless important, ones of switching formal symbols, sorting out the office of head of state and tidying up constitutional formulations.

What might such a tidying up involve? At minimum, it requires reform to remove the practical involvement of the British Queen in our domestic constitutional affairs. Taking seriously the idea that a republic should involve minimal structural disruption, this could be as simple as making the Governor-General our actual head of state, instead of just de facto, and ensuring he or she is appointed and removed by Australians in Australia, rather than by the Queen.

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49 Saunders, ‘Beyond Minimalism’ (n 32) 75.
53 Galligan, ‘Regularising’ (n 6) 56–9. See also Cowen, ‘Reflections’ (n 51) 15.
55 Galligan, ‘Regularising’ (n 6) 56. See also Cowen, ‘Reflections’ (n 51) 16.
2 The Predominantly Symbolic Role of the Queen

The symbolic framing of republican arguments is influenced by, and consistent with, the Queen’s primarily ceremonial role in Australia’s constitutional arrangements. As Greg Craven argued in 1999:

[T]he Monarchy is the only element of the Constitution which is fundamentally symbolic. It exists, not as some logically unavoidable practical component of Australian constitutionalism … but as a powerfully symbolic presence floating above (or perhaps across) the entire document … The real question is what we are entitled to demand of constitutional symbols, and whether the Monarchy can meet those just claims.57

The main republican argument for removing or changing this symbol is therefore cultural: the Queen has ‘lost her civic personality’58 and is now a too ‘remote and inadequate symbol’ to reflect the affections of contemporary Australians.59 As Richard Fidler colourfully argued, ‘[w]e are, after all, republicans precisely because the symbolism of the Crown – remote, undemocratic, aristocratic, sexist, sectarian and closed – is so completely wrong for a new world nation like Australia’.60 Republican reform is therefore needed for ‘national renewal’, because ‘[t]here is no true affinity between the Queen and the contemporary Australian Commonwealth she allegedly represents’.61 Instead, there is ‘ever-widening incompatibility’ exposing a ‘symbolic vacuum at the core of our system of executive government’.62

Such arguments critique the suitability of the Queen’s ‘ceremonial and personal’ role as ‘a focus of national unity’, as distinct from the Crown’s institutional role as constitutional guardian (performed through the Governor-General).63 Notably, however, the complaint of cultural disconnect is generally directed at the distant Queen, not her domestic representative, which begs the question as to whether a republican head of state can realistically fill the symbolic and cultural void. Despite her diminishing status, many Australians probably have more hope of naming the Queen than the Governor-General.64 Expecting an Australian head of state to act as a unifying ‘symbol of national identity’,65 maintaining the ‘derivative atmosphere of Royalty’

57 Craven, ‘Constitutional Conservatism’ (n 22).
58 John Hirst, ‘The Conservative Case for an Australian Republic’ (1991) 35(9) Quadrant 9, 9 (‘Conservative Case’). See also Jones, This Time (n 18) 128.
60 Fidler (n 37) 205 (emphasis omitted). On vanishing monarchical symbols, see also Boyce, The Queen’s Realms (n 8) 17–19.
61 Jones and McKenna, ‘Rekindling’ (n 22) 6.
63 George Winterton and David Flint, ‘The Election of an Australian President’ (Papers on Parliament No 28, Department of the Senate, November 1996) 12. Institutional functions will be discussed further below.
64 Boyce, The Queen’s Realms (n 8) 137–8.
65 Winterton, Monarchy to Republic (n 8) 11, 19.
once encouraged by Menzies, or embodying the kind of ceremonial mystique that Bagehot described, may be ill-fitting in the Australian republican context.

For Judith Brett, the weakness in Australian republicanism was that it could ‘appeal to no broadly accepted and emotionally rich symbols of the people or the nation which can match the Crown as a symbol of impersonal service, of leadership, beyond politics’. Indeed, the difficulty of replacing the ancient symbolism of the Crown in a republican head of state may be why republicans have searched elsewhere for symbolic fulfilment, looking to a constitutional preamble for expression of national identity and values. Ideas about direct election also seemed an attempt to imbue the republican head of state with greater popular charisma and legitimacy, perhaps seeking deeper symbolic clout for the role. Below I argue that both efforts at adding symbolic power to republican reforms are misguided.

While Brett underestimates the potential for developing a uniquely Australian national symbolism, the observation that Australia currently lacks the necessary unifying ‘symbolic capital’ seems fair: traditional symbols were forged in the image of white Australia. The contemporary challenge, therefore, is to articulate a national symbolism that reflects the totality of Australian cultural and historical contributions, without inflaming the culture wars that regularly derail efforts at consensus.

3 Modernisation, Maturation, Merit, and Multiculturalism

Punctuating the overarching theme of national independence, the recurring four ‘M’s’ of republican justifications entwine in symbolic arguments for republican reform: modernisation, maturation, merit, and multiculturalism. The modernisation argument contends that Australia must ‘cut the ties that bind us to an old idea of the world’, to ‘shed the Imperial garb of a time long gone and stand alone as a proud

66 Boyce, The Queen’s Realms (n 8) 7.
68 Brett (n 62) 27.
69 As ibid 18 explained:

Questions about the relative strength of symbolic support for Australia continuing as a monarchy as against becoming a republic are inevitably questions about how Australia imagines itself as a political community, both how it symbolises the basis of its national unity and how it understands what is distinctive about it as a nation among other nation states.

See also McKenna, A Reconciled Republic? (n 3) 119; Pearson, ‘Reconciliation’ (n 1); Mark McKenna, ‘First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99’ (Research Paper No 16, Parliament of Australia, 4 April 2000) (‘First Words’).
71 Brett (n 62) 28.
73 McKenna, The Captive Republic (n 7) 260 thus asks: ‘[h]ow does a multicultural society with predominantly European roots situated close to Asia manage to define itself?’.
75 Mark Tredinnick, ‘A Peaceable Revolution: The Republic We Have to Have’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 35.
The maturity argument asserts that a republic would be ‘us growing up’ and taking ‘responsibility for our own affairs’, moving from a ‘parent-child relationship’ with Britain, to a modern, mature relationship.

The merit argument highlights the incongruence of hereditary succession with Australian democracy, because it is ‘totally un-Australian to have any hereditary element in our system of government’. Former Attorney-General Michael Lavarch argued that monarchical hereditary rules breached human rights to gender equality and religious freedom, because succession favours male descendants and requires the monarch to belong to the Church of England. More recently, republicans called for an Australian head of state on the basis that all Australians should be able to aspire to hold the position. In 2020, the Australian Republican Movement (‘ARM’) ran an advertisement featuring a sleeping white baby, with the caption: ‘You’re hired!’ followed by, ‘Australians earn jobs with hard work and effort – we’re not born into them’. Twitter commentators promptly refuted the ‘myth of meritocracy’.

A republic is regularly equated with rejection of colonialism and embrace of multiculturalism and reconciliation. Echoing Keating, Wayne Swan argued that a republic would declare Australian independence in the Asia-Pacific region. Combining preceding arguments, Jones contends as follows:

Elizabeth II holds a symbolic and ceremonial position in Australia. So does it really matter, then, that she is not Australian, and merely an occasional visitor? Yes. If Kevin Rudd’s 2008 Apology to Indigenous Australians taught us anything, it is that symbols do matter. Symbols are powerful. … The message sent to the world in this dynamic Asian Century is that Australia still identifies as a small, white, colonial outpost, rather than as an independent, multicultural nation, an active member of the region, and the home of the oldest continuing cultures on Earth.

Others forcefully argue that maintaining the Queen retains a “colonialist” structure … inappropriate for a modern multicultural, independent and … progressive nation, or legitimises the ‘racist and xenophobic attitudes of white Australians’, which is why the monarchy, as ‘a symbol of our past and a tradition

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76 Benjamin T Jones, ‘The Meaning of a Republic’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 194, 206.

77 Senate Legal and Constitutional References Committee, Parliament of Australia, The Road to a Republic (Report, August 2004) 5 [2.12] (‘Road to Republic’).

78 Keating (n 13) 2.

79 Saunders, ‘Insights’ (n 31) 204; Winterton, Monarchy to Republic (n 8) 22–4.

80 Senate Legal and Constitutional References Committee, Road to Republic (n 77) 5 [2.14].


83 Wayne Swan, ‘Foreword’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) xvi, xvii–xviii.

84 Jones, This Time (n 18) 23 (emphasis omitted).

of whiteness, needs to be severed’. 86 For Thomas Keneally, too, a republic would signify that ‘we are no longer white-supremacists afflicted with delusion’. 87

Such rhetoric shows the breadth and passion of justifications and language justifying republican change. The latter examples also demonstrate how republican arguments have tended to identify their cause as predominantly ‘progressive’, in a way that may inadvertently exclude Australians of more conservative or middle-ground dispositions, or those who feel continuing attachments to Britain. The language sometimes succumbs to simplistic ideological dichotomies, positioning republicanism on one side of the culture wars.

C Australians Need to Understand the Small Practical Problem

The republican emphasis on symbolism and commitment to existing constitutional structures leads to a dilemma: it enabled monarchists to argue that genuine change is not needed nor wholeheartedly desired – even by republicans. As monarchist Lloyd Waddy contended: ‘[t]he “minimalist” myth, therefore, is the republicans’ confession that there is no real passion in the cause’. 88 Alleged lack of passion misstates the issue, however. The passion is there, but it yearns for a better symbolic articulation of the Australian nation more than for structural reform. This does not make a republic less important; but it makes its importance harder to convey to politicians and a public potentially more concerned with practical problems, 89 leading to ‘indifference and silence’ 90 and relegation of the republic to a second or third tier issue. 91 After all, if republicans say the Queen is already irrelevant, 92 why bother with reform? 93 It is unsurprising the ‘irrelevance of the Queen’ argument has been wielded by monarchists and republicans alike. 94 For Behrendt, the public reaction to tepid symbolism and ‘government business as usual’ was ‘a collective yawn’. 95

86 Erika K Smith, ‘The Australian Republic: Love It or Leave It!’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 82, 86 (‘Love It or Leave It’).

87 Thomas Keneally, ‘Reflections on the Old Australian Republican Movement’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 24, 33.

88 Lloyd Waddy, ‘Time To Put the Genie Back in the Bottle’, The Canberra Times (Canberra, 6 October 1993) 15, quoted in Brett (n 62) 17 (quote amended to reflect original source).

89 As Galligan explained, the fact that we are already almost a republic renders it ‘difficult to sustain the necessary enthusiasm of elites and people for making the change’: Galligan, ‘Regularising’ (n 6) 65. See also Jones and McKenna, ‘Rekindling’ (n 22) 3–4; John Warhurst, ‘The Trajectory of the Australian Republic Debate’ (Speech, Australian Senate, 6 March 2009) 2 (‘Trajectory’).

90 See Warhurst, ‘Trajectory’ (n 89) 2.

91 See ibid 12.

92 See ibid 12.

93 Wellings (n 33) 45. See also Brian Galligan, ‘Rethinking the Australian Republic: A Radical Alternative’ (2001) 3 University of Notre Dame Australia Law Review 45, 46 (‘Rethinking’).

94 See Cowen, ‘Reflections’ (n 51) 17.

95 Larissa Behrendt, ‘Beyond Symbolism: Indigenous Peoples in an Australian Republic’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 62, 62.
While some contend that symbolic arguments prolific in the 1990s should now be replaced by substantive democratic justifications, such justifications have not yet emerged or come to prominence. The dilemma thus remains: republicans need to inspire voters to remove the irrelevant anachronism – which would have predominantly symbolic but (depending on the model) probably minimal practical effect – however, this may be insufficient to justify constitutional reform and galvanise the polity. Conversely, going to the other extreme – towards more transformative constitutional reform – may not be the answer either. Firstly, republicans have largely not explained why more transformative change is needed, rather sticking to symbolic justifications premised on minimal structural disruption. Secondly, history demonstrates that proposals fundamentally altering Australia’s constitutional balance of powers – like the insertion of new rights guarantees, for example – have failed when put to referendum.

Successful referendum proposals have been modest yet practical in nature. The 1946 ‘social services’ referendum conferred upon the Commonwealth the power to legislate for welfare and social matters. The 1967 ‘Aboriginals’ referendum conferred upon the Commonwealth the power to legislate for Indigenous affairs and removed section 127 which prevented Indigenous people from being counted as part of the population. The remaining six successful referenda varied in nature but all resolved practical issues of government: the timing of Senate elections in 1906, state debts in 1909 and the further management of state debts in 1928, and the management of Senate vacancies, Territory voting in referenda and the


97 More recent advocacy still centres on symbolism: see, eg, Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) (‘Project Republic’); Jones, This Time (n 18); Warhurst, ‘Trajectory’ (n 89); Harris (n 13); Turnbull, Bigger Picture (n 19) 94–5.


99 Cf Ratnapala (n 29).


101 See Morris, First Nations Voice (n 26) 50.


103 Constitution Alteration (Social Services) 1946 (Cth). Note, however, the civil conscription qualification: Australian Constitution s 51(xxiiiA).

104 Constitution Alteration (Aboriginals) 1967 (Cth).

105 Constitution Alteration (Senate Elections) 1906 (Cth).

106 Constitution Alteration (State Debts) 1909 (Cth).

107 Constitution Alteration (State Debts) 1928 (Cth).

108 Constitution Alteration (Senate Casual Vacancies 1977 (Cth).

109 Constitution Alteration (Referendums) 1977 (Cth).
retirement age of judges in 1977.\textsuperscript{110} These “‘machinery’ amendments”\textsuperscript{111} resolved practical problems of government. No constitutional reform has been particularly structurally transformative, yet none has been wholly symbolic (though the 1967 referendum was sold as a highly symbolic reform).\textsuperscript{112} Instructively, the one wholly symbolic argument for reform, which included an attempt at injecting symbolic language into the Constitution, was the republic and preamble propositions, which both failed in 1999.

That Australians vote to fix practical problems fits with the largely practical and functional nature of the \textit{Australian Constitution}.\textsuperscript{113} The political challenge, therefore, is in properly explaining the modest, practical constitutional change necessary to remove the Queen from Australia’s constitutional arrangements, but also relaying why this minor updating of Australian constitutional machinery is worthwhile. Arguably, it cannot just be about symbolism. Australians also need to understand that there is a small, practical problem worth fixing.

\textbf{D Dual Purposes: Conceptually Separating the Symbolic from the Practical}

The symbolic framing of republican arguments also lends itself to confusion once advocates delve into technicalities of models. Confusion arises because the predominantly symbolic answer to the ‘why’ question usually does not explain the need for the small (but sometimes complicated) practical changes involved in answering the ‘how’ question. Rather than relying on wholly symbolic justifications, a better approach is to identify the dual, separate but connected, purposes driving republican reform. The first problem is practical, and smaller and potentially simpler than grand republican rhetoric usually suggests. The second problem is symbolic and can be as bold as our imaginations allow. For clarity, these dual purposes should be separated. Though conceptual overlap will inevitably remain, separation helps demonstrate that each driving purpose may require a different solution.

\textsuperscript{110} Constitution Alteration (Retirement of Judges) 1977 (Cth).


1 A Small, Practical Purpose: Australianising the Head of State

Under the Constitution, the British Queen is Australia’s head of state, but she is represented by the Australian Governor-General as the de facto head of state, who performs domestic institutional functions according to written and unwritten constitutional rules and conventions. The office of head of state in Australia is therefore divided, comprising both Australian and British faces. Its nature has also evolved – as noted, the Queen’s role in Australia over time has faded, while the functions of her domestic representatives have expanded and become Australianised. The Queen now supplies distant and diminishing historic symbolism, while the Governor-General does the domestic institutional work in service of the Australian Constitution.

As the de facto head of state, the Governor-General performs the important role of ‘constitutional umpire’. As Anne Twomey explains, the symbolism of the office is ‘given substance’ by the rarely exercised reserve powers, which ‘uphold and maintain the fundamental constitutional principles of the system of government that the head of state represents’. The most crucial feature of the Governor-General’s role, these reserve powers are used only exceptional circumstances and can be exercised contrary to the advice of responsible ministers. They can include power to appoint or dismiss a Prime Minister, or dissolve Parliament where there has been a loss of confidence. The Governor-General also has more regularly exercised operational functions, generally considered ‘mere formalities’.

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114 Winterton, ‘Head of State’ (n 51) 61–2.
117 David Hamer, Can Responsible Government Survive in Australia? (Department of the Senate, 2nd ed, 2004) 154 argues that we have two heads of state: ‘Canada, Australia and New Zealand have two heads of state, the Queen as the symbolic head of state and the Governor-General as the constitutional head of state’ (‘Responsible Government’). See also Sir David Smith’s arguments in Winterton, ‘Head of State’ (n 51) 60.
118 Galligan, ‘Regularising’ (n 6) 59; Boyce, The Queen’s Realms (n 8) 33, 45–6.
120 Twomey, Veiled Sceptre (n 51) 1.
122 See Twomey, Veiled Sceptre (n 51) ch 3.
125 Ibid 1.
or ‘rubber stamp’ functions,126 exercised on the advice of the government.127 These include giving assent to Bills128 and summoning or proroguing Parliament.129

In Australia, the Governor-General performs these institutional functions; the one obvious exception being the appointment and dismissal of the Governor-General,130 which is undertaken by the Queen on the advice of the Prime Minister.131 Arguably, then, all that is needed to fully Australianise the dual-faceted office of head of state is to singularise and patriate it by removing the Queen’s (merely formalistic) role in appointing and dismissing the Governor-General. The Governor-General’s role and functions could remain the same, but he or she would be appointed and dismissed by Australians. The Governor-General would then become Australia’s actual head of state, rather than just the de facto head, formalising the practical reality.

So understood, the practical problem a republic seeks to solve is small. As noted, Australia has evolved into an independent nation,132 hence the scope of the required constitutional reform is narrow.133 The final step to full independence lies in removing the now minor role of the Queen from Australia’s domestic constitutional arrangements. This would be a small but necessary constitutional closure: a final, formal tick off. It is necessary because the fact that the Constitution still requires the Australian government to ask the British Queen to appoint and dismiss our Australian Governor-General is inappropriate for an independent nation. Australia should not have to seek the British Queen’s approval for any domestic decisions: we should accordingly remove the bureaucratic requirement of the Queen’s assent to this domestic appointment. The present procedure is also arguably inefficient (particularly given the Queen’s tick-off is just a rubber stamp), requiring Letters Patent to be issued by Her Majesty, which must then be published in the official gazette of the Commonwealth.134 The appointment procedure should be simplified and patriated: this is the practical problem that needs to be solved. It is a simpler and smaller pitch, focussed on practicality, efficiency, and domestic responsibility over domestic matters. Yet given the Australian proclivity to vote ‘yes’ to constitutional reforms that solve practical problems of government, this approach may prove more persuasive. The problem is small enough to be fixable, but not so big as to require far-reaching transformation. Republicans need to explain the small, practical problem and why it is worth fixing.

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126 Hamer, Responsible Government (n 117) 157.
127 See Twomey, Veiled Sceptre (n 51) ch 2.
129 Ibid 5.
130 Winterton, ‘Head of State’ (n 51) 61.
131 Though, the Constitution confers her more powers: see Appleby, Reilly, and Grenfell (n 115) 175; Hamer, Responsible Government (n 117) 169.
132 Boyce, The Queen’s Realms (n 8) 24.
133 See Brian Galligan, ‘Regularising’ (n 6).
134 Elder and Fowler (n 44).
A Big, Symbolic Purpose: Declaring and Uniting the Australian Nation

The secondary problem is symbolic and its resolution can be as expansive and ambitious as our imaginations allow. A republic should affirm and declare our nation in a way that unites Australians. It should deal constructively with unresolved aspects of our past – including matters of reconciliation – while articulating shared values and aspirations. In 1999, John Howard put to the Australian people a symbolic preamble,135 alongside the republic referendum. Many Indigenous leaders opposed it,136 various legal scholars raised concerns,137 and most Australians voted ‘no’ – only 39.34% approved. This mistake should not be repeated: a new constitutional preamble is arguably not the best way to achieve a symbolic declaration of our country. The words would be whittled down to pointlessness in constitutional drafting discussions, because of concerns about legal implications. This was a problem identified in Indigenous constitutional recognition discussions, which is why the Referendum Council in 2017 recommended an ‘extra-constitutional Declaration’ instead.138

A Declaration outside the Constitution could more fulsomely articulate our national identity, values, and aspirations, poetically bringing together the three parts of our national story – the Indigenous, the British, and the multicultural. That would be more inspiring than an inevitably minimalistic and legally cautious constitutional preamble – which in 1999 came complete with a disingenuous ‘no legal effect’ clause.139 Enacted by all Australian parliaments with the assent of the First Nations, this could be Australia’s ‘Declaration of Independence’, but with special reconciliatory significance.140 This will be discussed further below.

III THREE LESSONS FROM THE FAILED 1999 REPUBLIC REFERENDUM

A republic requires constitutional change, which necessitates a referendum under section 128. That means a majority of voters in a majority of states, and a majority overall, must vote ‘yes’. It presents a difficult threshold: the Constitution has only been successfully amended eight times out of 44 attempts.141 The unique political challenges this entails were evident in 1999. Three key political lessons emerge from analysis of this referendum failure.

135 Constitution Alteration (Preamble) Bill 1999 (Cth).
136 See McKenna, ‘First Words’ (n 69).
139 Constitution Alteration (Preamble) Bill 1999 (Cth) s 125A.
140 Shireen Morris, ‘Declaration of Recognition’ (n 10).
141 For the track record, see ‘Referendum Results’ (n 102).
A Republicans Must Unite to Achieve Success

To muster support across the political spectrum, republicans must unite and co-operate. Despite the Constitutional Convention producing a compromise model (two-thirds parliamentary appointment), the campaign faltered because of lack of consensus among republicans. Key direct electionists formed an ‘unholy alliance’ with monarchists to run a republican ‘no’ case. The alliance had impact. Although ‘a large majority of the electorate were actually in favour of the introduction of a new system of government’, a significant number voted ‘no’ probably because they preferred direct election. The model was also attacked by structural minimalists. It was derided both by republicans who thought it was too radical, and republicans who thought it was not radical enough. The lesson is that, though some disagreement is inevitable, major public division among key advocates can be death in a referendum campaign.

The 1998 Constitutional Convention did not help: it evidently did not foster genuine solidarity or commitment to the chosen model. The process was adversarial and included monarchists which, as Jones observes, was like ‘a coach inviting opposing players to discuss team tactics before a grand final’. It did not allow republicans to organise their internal position and strategy.

Advocates must learn from this strategic error. In this respect, they can take cues from the First Nations dialogues conducted by the Referendum Council, which resulted in the Uluru Statement: the process enabled Indigenous advocates to organise and consolidate Indigenous consensus.

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143 Galligan, ‘Rethinking’ (n 93) 45.

144 See also Patmore, Choosing Republic (n 52) 25; Jones, This Time (n 18) 87; Hirst, Sense and Nonsense (n 18) 266; Fidler (n 37) 206–7; McKenna, ‘Australian Republic: Still Captive’ (n 21) 145.

145 Wellings (n 33) 47.

146 McAllister (n 27) 256. Yet, while the direct electionists argued that Australians should hold out for a direct election referendum down the track, the promise of a subsequent referendum on their favoured model turned out to be ‘mere vapour’ – after the referendum’s failure, they never pushed for a second try: Keneally (n 87) 31; Turnbull, Bigger Picture (n 19) 103.


148 McCarville, ‘Democracy in Peril’ (n 56).

149 Craven, ‘Constitutional Battlegrounds’ (n 142) 253–4.


151 Hirst, Sense and Nonsense (n 18) 260.

152 Jones, This Time (n 18) 85.

153 Although 7 of the 250 delegates dissented and walked out of the Uluru Convention, citing a preference for ‘sovereign treaties’, the majority position was powerful, and reflected views expressed at every dialogue
must similarly unite to achieve success, facilitated through a process enabling advocates to genuinely agree on a model, in light of legal, political, and strategic considerations. Dissenters then would need to get on board or acquiesce with principled silence after consensus is reached. It will not be possible to please everyone, but a ‘circular firing squad’, where every republican advocates a ‘no’ vote unless her preferred model is adopted, will ensure defeat.

In 2020, the ARM took steps in this direction, resolving to form consensus on the model amongst advocates instead of pursuing advisory public plebiscites.157 If it works, this will allow a more coherent republican campaign, though Labor policy is still to hold an indicative plebiscite before working out the model. Arguably, this just defers difficult questions. No campaign can be effective if advocates are unclear what they are arguing for.

B The Republic Must Be Progressive and Conservative

In deciding their preferred model, republicans must bear in mind that bipartisan support is generally considered a prerequisite for referendum success. This ingredient was missing in 1999. Saunders explained that the ‘[b]elief in political bipartisanship as a mechanism for securing constitutional change stems from the observation that referendums have failed in the past when they are opposed by one side of politics’. Saunders further observed that:


154 Jones, This Time (n 18) 76–7. See also Brian Galligan, ‘Rethinking’ (n 93) 47.

155 See David Donovan, ‘How to Achieve an Australian Republic’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 166, 169–72.


The strategy proposes the ARM adopt a clearly articulated proposal for constitutional reform by building on the common ground that already exists between supporters of a republic. A national consultation over the next 18–24 months will inform the development of the reform model and work to build consensus among supporters, the broader community and the Federal Parliament. Once that consensus has been achieved, the ARM will campaign for the model proposal to be taken directly to a referendum. The strategy supersedes the ARM’s previous position which sought to generate majority support for a republic and model through a series of advisory national plebiscite vote questions.


159 According to Kirby (n 51), a republic campaign needs to be ‘scrupulously bipartisan’ to build the necessary coalition of support. See also George Williams, ‘Mission Impossible? Achieving Social Justice through Constitutional Change’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2013) 94, 108.

160 Warhurst and Mackerras, ‘The 1990s and Beyond’ (n 142) 22.
As the Australian Labor Party can be relied upon to support most proposals for constitutional change which achieve passage through the Commonwealth Parliament, an ironic consequence is that most textual amendment has taken place when non-Labor parties are in government.\textsuperscript{161}

While Labor in opposition supported a republic in 1999, the Liberal government was split and the then Prime Minister John Howard was a monarchist.\textsuperscript{162} A referendum has never succeeded in Australia without solid prime ministerial support.\textsuperscript{163}

The republic was criticised as a progressive and elitist agenda.\textsuperscript{164} Part of the problem may have been that Keating ‘effectively claimed the republic for himself and for his party’.\textsuperscript{165} In 1999, more Labor supporters voted ‘yes’, Liberals were split, and more Nationals voted ‘no’. High-income, urban, educated Australians tended to vote ‘yes’ in higher numbers, while low-income, less-educated, rural and regional Australians were more likely to vote ‘no’.\textsuperscript{166} After the May 2019 election, this is a familiar fault line:\textsuperscript{167} the republic appealed most to post-materialist progressives.\textsuperscript{168} Notably, however, the cause was not always perceived this way. As McKenna explains, Australian republicanism has historically been promulgated from both the left and the right, bearing ‘as much relevance to the conservative traditions of Australian politics as they do to our radical and socialist traditions’.\textsuperscript{169}

To succeed in the future, republican arguments must reconnect with these diverse philosophical roots and find ways to speak to progressive and conservative values. By contrast, contemporary republicans have tended to come across as ideologically one-sided.\textsuperscript{170} As shown above, the advocacy tends to paint Australia as a ‘modern’, ‘multicultural’, ‘independent’, ‘progressive’,\textsuperscript{171} and ‘pluralistic’\textsuperscript{172} nation, in need of
constitutional ‘renovation’ and ‘liberation’\textsuperscript{173} in ‘the spirit of reform’.\textsuperscript{174} The language is coloured by a confident, open, optimistic,\textsuperscript{175} reformist zeal perhaps naturally appealing to progressives, but potentially less appealing to those with risk-averse and conservative dispositions,\textsuperscript{176} who may be more anxious about change and concerned to protect stability and continuity with the past.\textsuperscript{177} For the conservative, inherited institutions and traditions embody the wisdom of experience and should not be lightly disregarded.\textsuperscript{178} Yet as Keneally reflected on the 1999 campaign, republicans tended to ‘buoyant[ly] and exuberant[ly]’ dismiss monarchist ‘pleas for constitutional stability’, which was ‘not the best way to win a referendum’.\textsuperscript{179}

Republican arguments must more deeply grapple with conservative concerns, attachments and values if the cause is to resonate more broadly.\textsuperscript{180} A revised republican strategy should be progressive and conservative in making the case and proposing solutions. Symbolically, this means finding ways to deploy language, rhetoric, symbols, and values that appeal across the political spectrum. Structurally, it means finding ways to maintain constitutional stability and affirm the institutional value in what we have, while pursuing republican aims. This may be especially important given Australians are arguably ‘innately conservative’ on constitutional change.\textsuperscript{181} As Kirby J explains, ‘[c]onstitutionally speaking, Australia is, and has always been, a most cautious and conservative country’, which is perhaps why Australia’s Constitution ‘is one of the oldest continuously operating written constitutions in the world’.\textsuperscript{182}

\section*{C Transcending the Culture Wars}

Zelman Cowen predicted that ‘symbolic constitutional battles are usually more divisive and diverting than their proponents expect’.\textsuperscript{183} He turned out to be right. In Australia, debates about national symbols – be it a republic, flags, monuments, or the date we celebrate Australia\textsuperscript{184} – tend to ignite vicious culture wars.

\begin{thebibliography}{99}
\bibitem{173} Keneally (n 87) 33.
\bibitem{174} Mark McKenna, ‘The Search for a Meaningful Republic’ in Benjamin T Jones and Mark McKenna (eds), \textit{Project Republic: Plans and Arguments for a New Australia} (Black Inc, 2013) 10, 23.
\bibitem{175} Turnbull, \textit{Bigger Picture} (n 19) 94–5.
\bibitem{177} See description of conservative attitudes in Jones, \textit{This Time} (n 18) 122–4.
\bibitem{179} Keneally (n 87) 26–7. See also Morris, ‘Identity’ (n 48) 188.
\bibitem{180} James Curran, ‘Republican Reset: The Lessons of History and a Way Ahead’ in Benjamin T Jones and Mark McKenna (eds), \textit{Project Republic: Plans and Arguments for a New Australia} (Black Inc, 2013) 141, 150–1.
\bibitem{182} Kirby (n 51).
\bibitem{183} Cowen, ‘Reflections’ (n 51) 21.
\bibitem{184} Morris, ‘Meaning’ (n 74).
\end{thebibliography}
The republic has become a vehicle through which to seek diversification of Australian national symbols and severance from the distasteful legacy of the White Australia Policy. But some republican rhetorical flourishes in this regard are not conducive to consensus. Characterising Australia as ‘a small, white, colonial outpost’, clinging to a monarch who legitimises the ‘racist and xenophobic attitudes of white Australians’, for example, may not win many white votes in rural Australia. Similarly, calling for a republic as a way of demonstrating that ‘we are no longer white supremacists afflicted with delusion’ may turn some people off. Though Keating later sought to create a more unifying narrative, such framing positions Australian republicanism unhelpfully on one side of the culture wars. It enabled Tony Abbott, the then leader of Australians for Constitutional Monarchy, to capitalise by accusing republicans of promoting a ‘black armband’ view of Australian history. ‘[R]epublicans cite our ethnic diversity and multicultural achievements as the high points of Australian life – without mentioning the Anglo-Celtic heritage’, Abbott complained. Such comments express fear that inherited British traditions and institutions will be swept away by republican change. To win wide consensus, however, such concerns cannot be dismissed; they should be reconciled with republican aims. This means transcending our usual ideological tribalisms to defuse this polarising dynamic. Pearson’s insight that Australian affinities for Britain should be reconciled with republicanism is bolstered by evidence of voting patterns in 1999. Many direct electionists who voted ‘no’ were found to ‘mildly favour change, but not at the risk of undermining Australia’s traditional symbols of nationhood and … British heritage’, which confirms that Australians with republican leanings may nonetheless retain affections for Britain. In 1999, nativism and parochialism amongst direct electionist voters translated into a vote against republicanism. For

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185 McKenna, *The Captive Republic* (n 7) 260.
186 Jones, *This Time* (n 18) 15.
187 Smith, ‘Love It or Leave It’ (n 86) 90.
188 Keneally (n 87) 47.
189 James Curran similarly notes that ‘[Paul] Keating’s invocation of Henry Lawson’s division of the country into the “young green tree” of Australian nationalism and the “old dead tree” of British philistinism drew an arbitrary faultline across the country, and was hardly going to foster unity or mobilise the people’: Curran (n 180) 151.
194 Pearson, ‘Reconciliation’ (n 1).
195 McAllister (n 27) 265. See also Charnock (n 147) 280.
196 Lydon (n 12) 183.
197 As Charnock (n 147) 280 explains, assessing the differences between those direct electionists who voted ‘yes’ and those who voted ‘no’ in 1999:
David Charnock, this suggests ‘a protest vote, because prima facie one would have expected strong nativists to be most in support of having an Australian as head of state’. As Keating argued, appealing to nativist sentiment, a republic was not driven by lack of ‘respect for the British monarchy … or our British heritage’, but by recognition of ‘Australian heritage’ and commitment to ‘Australia’s future’. Despite such efforts at evoking nationalistic feeling, research suggests this message did not resonate enough with nativist voters.

Part of the reason may be that, for many, Australian nationalism is infused with Britishness. Kelly et al identified an ‘emotional current’ driving views about a republic in 1999: the relevant emotion was actually about Britain, not Australia. They explain that:

Hostility towards Britain was an important source of republican support; conversely, people who have warm, positive feelings about Britain were less keen on a republic. By contrast, positive feelings about Australia had no influence on republican attitudes.

The resonates with Pearson’s instinct that republican support included those ‘who oppose a repudiation of Australia’s British heritage’. The evidence shows that conservative and nativist voters were more likely to consider Australia’s British heritage as fundamental to Australia’s national identity.

It need not be ‘either-or’. Australia can become a republic and affirm our British inheritance. We can do this structurally and symbolically. Structurally, we should not reject all the institutional systems, language and forms of Britain, which are part of our institutional inheritance and could be incorporated into an Australian republic. Symbolically, we can affirm the equal importance of the Indigenous, British, and multicultural parts of Australia’s national identity through an inclusive Declaration of Australia.

The largest differences involve those who are more conservative on constitutional ties with Britain and the Queen and on symbols such as the flag. Such people are considerably more common among the direct electionists who voted ‘No’ than among those who voted ‘Yes’, and this seems to be one of the most significant factors differentiating the two groups of direct electionists.

198 Ibid 289.
199 Keating (n 13) 1. See also Turnbull, Bigger Picture (n 19) 95.
200 Keating (n 13) 2 (emphasis in original).
201 Wellings (n 33) 35; Boyce, The Queen’s Realms (n 8) 12–13.
203 See above n 1.
204 As McAllister (n 27) 265 explains, the ‘British connection has remained an important national symbol for many Australians, despite mounting evidence of the irrelevancy of the British monarchy to Australia’s system of government’. See also Wellings (n 33) 44.
205 As Michael English argued, ‘[i]t would be obtuse to attempt to erase the Queen from our constitutional history, and the Constitution itself should recognise, rather than reject, its imperial origins’: Michael English, ‘The Republican Succession: Two Heads (of State) Are Better than One’ (2004) 48(12) Quadrant 40, 41.
206 Morris, ‘Declaration of Recognition’ (n 10).
IV IMAGINING AN AFFIRMATIONAL REPUBLIC

This Part considers how an affirmational republic might be achieved. First, I consider how Australia might address the practical constitutional problem by removing involvement of Queen in the selection and dismissal of the Governor-General. Second, I consider how the symbolic purpose of an Australian republic might be fulfilled through an extra-constitutional Declaration.

A Addressing the Practical Constitutional Problem

A republic that affirms, rather than rejects, Australia’s British institutional traditions suggests a constitutionally conservative approach to constitutional reform. Craven argued in 1999 that:

the essential difference between the conservative and the innovator in an Australian constitutional context is that the constitutional conservative is determined to preserve, not the incidents and detail of the constitutional order, but its fundamental essence; while the innovator favours transforming change to its basic fabric.  

Distinct from Craven’s dichotomy between constitutional ‘innovator’ and ‘conservative’, however, a prudent constitutional reformer should strive to be both innovative and conservative as circumstances require. The reformer should seek to change what needs to be changed, to fix the problems they intend to solve. But in doing so, they should preserve what is worthy of protection. They should not pursue change for change’s sake. An affirmational republic suggests reform should be in keeping with the culture, history, and design of the Australian Constitution. It does not suggest transformative structural change; rather, it suggests implementation of the final, formal tick-off necessary to confirm Australia’s full independence, in a way that retains the basic fabric of Australia’s Constitution and our inherited British institutions.

I Valuing Constitutional Continuity and Stability

The case against disruptive structural change in the name of a republic is bolstered by the fact that the present system works relatively well. In comparative perspective, Australia is considered a healthy and stable constitutional democracy. Most Australians enjoy relative economic prosperity and respect for their rights.

207 Craven, ‘Constitutional Conservatism’ (n 22).
208 But see Fenna (n 32) 133–4.
Australia ranks highly in the Economic Intelligence Unit’s ‘Democracy Index’\(^{211}\) and compares well in Transparency International’s ‘Corruption Perceptions Index’.\(^{212}\) That said, Australia arguably faces risks of democratic decline.\(^{213}\) Trust in government has reached historic lows, satisfaction with democracy is at its lowest level since the 1970s,\(^{214}\) and there is increasing inequality and political polarisation.\(^{215}\) Australia is therefore not immune to the kind of constitutional decline experienced by other nations.

While signs of possible decline may suggest the system needs rejuvenation, it also highlights the need for caution and vigilance in protecting what works. There need to be compelling reasons justifying structural change, which have not been presented in relation to a republic. By contrast, Australia’s history is marked by frontier wars,\(^{216}\) genocide, and discrimination,\(^{217}\) which presents ongoing evidence of the urgent need for substantive reform to the relationship between Indigenous peoples and the state—hence persistent arguments for structurally reforming Indigenous constitutional recognition.\(^{218}\) Indigenous peoples are the one clear group who have not benefitted fairly from Australia’s prosperous democracy, which in a real sense was built on Indigenous losses.\(^{219}\) However, while a republic cannot proceed without reconciliation, republican aims appear different in scope and


\(^{214}\) Sarah Cameron and Ian McAllister, The 2019 Australian Federal Election: Results from the Australian Election Study (Research Report, Australian National University, December 2019) 3 <https://australianelec


\(^{219}\) As Brennan J described, Indigenous dispossession ‘underwrote the development of the nation’: Mabo v Queensland [No 2] (1992) 175 CLR 1, 69.
character to reconciliatory aims. As shown, a republic (though it necessitates minor updating of constitutional machinery) tends not to envisage substantive structural reform and is more focussed on symbolism, whereas Indigenous constitutional recognition demands substantive structural reform over mere symbolism.\(^{220}\) Given this framing by republicans, there appears little justification for seeking transformative structural change in the name of a republic. I therefore proceed on the basis that a republic can and should be achieved in a way that effects minimal structural disruption.

**2 Getting Clear on the Purpose of an Australian Head of State**

Before discussing methods of appointment or removal of an Australian head of state, clarity is needed on the purpose a republican head of state is to fulfil.\(^{221}\) Do we want the role to be fundamentally changed, or do we want the position to remain substantially the same as the current Governor-General – our de facto head of state?

In parliamentary systems like Australia, the political and ceremonial power of the executive are separated into two different offices. The Prime Minister and ministers wield political executive power, with the Prime Minister acting as the head of government. The Queen and Governor-General, as well as the state Governors, wield mostly ceremonial and symbolic power – though, as previously explained, the Governor-General also performs important institutional functions. This separation of the ‘dignified’ and the ‘efficient’ functions of government\(^{222}\) arguably prevents excessive accumulation of political power and symbolic prestige in one person or office,\(^{223}\) providing (some argue) a useful ‘check on the egomania of politicians’\(^{224}\).

Unlike the United States (‘US’) President, therefore, the Australian Governor-General is not supposed to wield political power. Neutrality is especially important given the Governor-General is also a ‘constitutional umpire’.\(^{225}\) The constitutional founders therefore considered election of this position inappropriate,\(^{226}\) because it may politicise the office and create conflict.\(^{227}\) The push for an elected Governor-

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\(^{220}\) See Morris and Pearson, ‘Indigenous Constitutional Recognition’ (n 26).

\(^{221}\) As Saunders, ‘Beyond Minimalism’ (n 32) 79 points out, too often ‘wrangling’ over models for selection of an Australian head of state has proceeded without adequate engagement on the nature of the office.

\(^{222}\) Bagehot, *English Constitution* (n 67) 7; Boyce, *The Queen’s Realms* (n 8) 2.


\(^{225}\) See above n 119.

\(^{226}\) *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1 April 1891, 572 (Sir John Downer) (‘April I Debate’).

General was accordingly defeated during the Constitutional Conventions.\footnote{228} Discussing the nature of the position, Alfred Deakin remarked that:

To make it an object of ambition you must change its character altogether, and make it an office like that of the President of the United States – a high executive office in which a man can carry out his ideas and give effect to his principles. If you do that, you must consider his election. We should insist upon it. If he becomes a personage in the political life of the country, his office must be elective. We cannot afford to have in our constitution any man exercising authority, unless he derives it from the people of Australia.\footnote{229}

Deakin’s conclusion was that ‘the governor-general exercises no such authority’.\footnote{230} The position was intended to be apolitical, neutral and largely ceremonial.

In the lead up to the 1999 referendum, the views of elites on this crucial question had not changed much since the 1800s. Most have opposed direct election of a head of state,\footnote{231} probably because of their knowledge of the Australian constitutional system and the nature of the office. As George Winterton explained in 1995, echoing Deakin:

The most appropriate method for choosing the head of state ... obviously depends upon the role to be performed by, and the powers conferred on, the office. Thus, a head of state with substantial executive power requires the legitimacy and popular mandate conferred by popular election as, for example, in the United States, Latin America and France. Conversely, a head of state exercising few independent powers except, perhaps, that of ultimate constitutional guardianship, requires above all political neutrality and bipartisan acceptance, and should not possess an independent popular ‘mandate’ for anything other than constitutional guardianship. Hence, popular election would not be ideal for such an officer, although Ireland demonstrates that it is not incompatible with a head of state with very limited powers.\footnote{232}

Similarly, many submissions to the 2002 Senate Inquiry favoured the Australian head of state maintaining the same powers as the current Governor-General\footnote{233} and fulfilling an apolitical, neutral and ceremonial role.\footnote{234} Neutrality and independence aligns with an understanding of the role of head of state as an unbiased ‘guardian’, ‘umpire’, ‘guarantor’ or ‘custodian’ of the Constitution.\footnote{235} Any kind of neutral umpire role is inconsistent with politicisation. I thus proceed on the basis that the weight of informed republican opinion seeks to keep the nature, role and powers of the Australian head of state substantially the same as the present Governor-General.

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\footnote{228} Anne Twomey and Rosemary Bell, ‘Methods of Choosing a Head of State’ (Background Paper No 12, Parliamentary Library, Parliament of Australia, 25 January 1998) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98bp12> (‘Choosing a Head of State’).

\footnote{229} April 1 Debate (n 226) 571.

\footnote{230} Ibid.

\footnote{231} Keating (n 13) 6; Cowen, ‘Reflections’ (n 51) 20; Helen Irving, ‘Amending the Constitution: Achieving a Democratic Republic’ in Benjamin T Jones and Mark McKenna (eds), Project Republic: Plans and Arguments for a New Australia (Black Inc, 2010) 155, 156 (‘Amending the Constitution’); Turnbull, Bigger Picture (n 19) 98–9.

\footnote{232} Winterton, ‘Republican Head of State’ (n 119) 135.

\footnote{233} Senate Legal and Constitutional References Committee, Road to Republic (n 77) 56; Turnbull, Bigger Picture (n 19) 97.

\footnote{234} Senate Legal and Constitutional References Committee, Road to Republic (n 77) 56, 80–1.

\footnote{235} Winterton, ‘Republican Head of State’ (n 119) 135–6; Patmore, Choosing Republic (n 52) 167–70; Patmore, ‘Guarantor’ (n 119) 183; Boyce, The Queen’s Realms (n 8) 118.
3 Interrogating the Instinctive Popularity of Direct Election

In light of the nature and role of the head of state, republicans will be faced with a strategic dilemma: direct election of an Australian head of state might be most instinctively popular with the public, but it also cuts against preferences for an apolitical umpire. It might be popular, but is it wise?

Ben Wellings argues that republicans erred in 1999 by sticking to a minimalist model (though it was not the most minimalist model) which stripped the republic of its populist appeal.\(^{236}\) Galligan agrees that the republic’s crippling features were minimalism and elitism – the elites preferred minimalism, whereas most of the public wanted direct election.\(^{237}\) Even Winterton, a previous proponent of minimalist approaches, after the 1999 defeat, conceded that direct election should be considered to respond to public preferences.\(^{238}\)

I respectfully offer a contrary opinion. There is no doubt direct election was most favoured by the public in 1999.\(^{239}\) Yet this may have been an instinctive, rather than informed, preference.\(^{240}\) It may have been prompted by use of the word ‘president’ in republican advocacy and explanations, which arguably raises expectations of direct election along the lines of the US,\(^{241}\) as well as a lack of detailed consideration of the constitutional implications.\(^{242}\) Conversely, the public were clear that they did not favour a US-style executive presidency,\(^{243}\) which may indicate a lack of public understanding.\(^{244}\) Deliberative polling suggests that, while support for a republic increases with information, support for direct election decreases once participants consider potential problems, including the risk that the head of state may become politicised.\(^{245}\) The popularity of direct election may therefore dwindle under scrutiny

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\(^{236}\) Wellings (n 33) 45.

\(^{237}\) Galligan, ‘Rethinking’ (n 93) 45.


\(^{239}\) Winterton, ‘Reserve Powers’ (n 51) 259; Winterton, ‘Resurrection’ (n 234) 209; McAllister (n 27) 256; Warhurst and Mackerras, ‘The 1990s and Beyond’ (n 160) 13; Kelley et al (n 202) 125, 129.

\(^{240}\) As Winterton (n 51) 260 suggested in 1993: ‘[T]he practicalities of popular election suggest that the public has not really thought the matter through, for there are also strong indications that many people would prefer a non-politician as head of state. … [P]opular election would almost guarantee the election of a politician’.

\(^{241}\) Irving, ‘Amending the Constitution’ (n 231) 157; McGarvie, ‘Democracy in Peril’ (n 56).

\(^{242}\) Winterton, ‘Republican Head of State’ (n 119) 142–3.


\(^{244}\) For general comments on the lack of public education in the leadup to 1999, see Senate Legal and Constitutional References Committee, Road to Republic (n 77) 14–18, 133–4. See also Boyce, The Queen’s Realms (n 8) 3, 117–18, 216.

and debate, in line with usual referendum patterns. It cannot simply be assumed that direct election will entail referendum success.

The resulting dilemma is described accurately by Kirby: though opinion polls indicated most Australians preferred direct election, such reform could render the office of head of state ‘fundamentally different from any in our present system’, thus increasing ‘chances of political instability’ and enlivening ‘popular distaste for radical change’ – factors which may ultimately reduce prospects of electoral success. The hesitance of most elites in adopting direct election is also part of the political landscape which must be negotiated. Parliament as the initiator is also the gatekeeper of constitutional change. In devising their strategy, republicans must therefore consider the concerns of parliamentarians who will need to initiate the reform. In 1999, most parliamentarians opposed direct election. This would likely remain so today.

As Malcolm Turnbull reflected in 2020, given that the head of state is a ‘non-political ceremonial’ position and ‘occasional impartial constitutional umpire’, a ‘rowdy political contest’ is not ideal. Though direct election of a ceremonial head of state seems to work in some countries, it is a feature arguably ill-suited to Australia’s constitutional culture – in our parliamentary system, even the Prime Minister is not directly elected. As Twomey explains, ‘[p]opular election of the head of state is a feature usually associated with a presidential system, where the head of state is also the head of government, and there is a complete separation of powers between the executive and the legislature’.

This does not seem to fit with an Australian republic that does not envisage disruptive structural change. Direct election would alter the basic fabric of Australia’s Constitution, which arguably risks creating internal competition and instability. Many have warned against investing an Australian head of state with a popularly
elected mandate,255 which could imbue the candidate with the ‘glow of legitimacy’,256 providing an even ‘greater electoral mandate than the Prime Minister’.257

Direct election of the head of state would mix ceremonial and political power in a way that may begin to shift the Australian system towards a more powerful presidentialism.258 For Juan Linz, ‘the basic characteristic of presidentialism is the full claim of the president, to democratic legitimacy’.259 This popular legitimacy, if combined with executive power, imbues an elected president with a ‘very different aura and self-image and creates very different popular expectations than those redounding to a prime minister with whatever popularity he might enjoy after receiving the same number of votes’.260 In a presidential system, both the parliament and the president enjoy democratic legitimacy due through popular election – “‘dual democratic legitimacy’”.261 This can result in tension which, according to Linz, creates conflict ripe for dramatic eruption. Linz argues that this style of government has proven unconducive to democratic stability,262 especially in Latin American countries. Though Australia enjoys a more stable political and constitutional culture than those countries, and measures could be implemented to ensure a directly elected president could not wield real political power, we should nonetheless be cautious of inadvertently creating ‘dual democratic legitimacy’ through direct election – even if this may not be the aim.

Ackerman similarly warns against the ‘cult of personality’ that can be encouraged in a popularly elected president. For Ackerman, there is:

something disturbing … about the kind of politics generated by an independently elected presidency … presidential systems do not merely allow strong leaders to rise above the fray of ordinary politics from time to time. They manufacture them on a regular basis, creating a platform upon which a single leader constantly struts high above the political plane inhabited by ordinary mortals. Is this really healthy?263

255 Winterton, Monarchy to Republic (n 8) 109.
256 Donald Horne et al, The Coming Republic (Sun Australia, 1992) 112.
257 McGarvie, ‘Safe Constitutional Change’ (n 209) 76. See also Keating (n 13) 5–6; Turnbull, Bigger Picture (n 19) 98–9.
258 As Linz articulated:

In parliamentary systems the only democratically legitimated institution is the parliament and the government deriving its authority from the confidence of the parliament … Presidential systems are based on the opposite principle. An executive with considerable powers in the constitution and generally with full control of the composition of his cabinet … is elected by the people (directly or by an electoral college elected for that purpose) … and is not dependent on a formal vote of confidence by the democratically elected representatives in parliament; the president is not only the holder of executive power but the symbolic head of state …

259 Ibid 6.
261 Ibid 6.
263 Ackerman (n 262) 657–60.
The US presidential system, Ackerman argues, encourages citizens to focus on the personality, popularity and charisma of the presidential candidate, rather than principles and policy. Australian political elections are already becoming more like popularity contests between personalities, rather than contests between policies – witness the 2019 election in which Scott Morrison, on some views, ran the ‘most presidential campaign run by a single party in Australian history’. Do Australians want to create another public personality and popularity contest in selection of their head of state – particularly given the neutral ‘umpire’ position this role is supposed to fulfil? As the first Part of this article demonstrated, republican advocacy does not seek far-reaching systemic reform. While the popularity of direct election is a strategic consideration, such instinctive popularity alone seems insufficient justification for a substantial change to Australia’s successful constitutional system.

4 Can We Keep the Governor-General?

In addition to retaining the basic structural fabric of Australia’s British institutional inheritance, an affirmational republic need not reject all the titles and forms of Britain. Perhaps we can keep the title, ‘Governor-General’. In an affirmational republic, the Governor-General could become Australia’s actual head of state, instead of just our de facto head of state, while leaving remaining constitutional machinery substantially the same. The Governor-General can be appropriately chosen by Australians in Australia, rather than by the British Queen. This seems the simplest way of solving the practical problem at hand.

Keeping the title ‘Governor-General’ may also assist in alleviating confusion about the appropriateness of direct election. In 1999, most Australians understandably wanted a directly elected President, but would they necessarily want a directly elected Governor-General? As noted above, republicans usually emphasise that they do not want a US-style executive presidency, and though the public in 1999 preferred direct election, there was no evidence the people favoured a presidency with real political power. Given this, the head of state should not be artificially dubbed a ‘President’, as this (especially to non-lawyers) arguably

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266 See also Craven, ‘Constitutional Conservatism’ (n 22).
267 Warhurst, ‘Myths Debunked’ (n 48) 137.
268 Winterton, Monarchy to Republic (n 8) 8.
269 Senate and Legal Constitutional References Committee, Road to Republic (n 77) 122–4; Winterton, ‘Reserve Powers’ (n 51) 249; Winterton, ‘Resurrection’ (n 238) 212–13. Though some have argued the opposite: see, eg, Senate and Legal Constitutional References Committee, Road to Republic (n 77) 121; Ratnapala (n 29); David Solomon, ‘Erect the Government’ in Michael Coper and George Williams (eds), Power, Parliament and the People (Federation Press, 1997) 49; David Solomon, ‘Parliament and Executive in a Republic’ (1994) 8(2) Legislative Studies 42; Colin Howard, The Constitution, Power and Politics (Fontana/Collins, 1980).
270 Ratnapala (n 29) 242; Winterton, ‘Reserve Powers’ (n 51) 249, 251; Winterton, ‘Power in Republican Australia’ (n 243) 42; Winterton, ‘Republican Head of State’ (n 119) 136.
implies a US-style presidency and could misleadingly create a public expectation of direct election, which was a common assumption in 1999. ‘President’ implies political power. Given the strong influence of American culture on Australia, when most Australians hear the word ‘President’, it is unsurprising we imagine a position like that filled by Donald Trump or Joe Biden.

So why confuse the issue? Rather than adopt the distracting title of ‘President’ for a position that aims to keep powers and functions essentially the same as the Governor-General, we could keep the title ‘Governor-General’ in an Australian republic, so long as he or she was chosen and removed by Australians, rather than the British Queen. As Hirst argued in 1991, ‘our present system of government can be kept along with the names “Commonwealth” and “Governor-General” because the “last step to the republic should be as small as those that have brought us to the brink”. This also aligns with an affirmational approach to Australia’s British heritage, because it avoids unnecessarily shedding remnant marks of Australia’s British history from our constitutional system. It is an open question as to whether people would feel the need to elect their Governor-General, whose title and role are more local and familiar. If experts and leaders properly explain the role and make clear their efforts to keep the selection process substantially the same (just removing the role of the Queen), perhaps direct election of the Governor-General would not be considered appropriate.

I do not here attempt to present a conclusive argument as to what model for appointing the Governor-General should be adopted, nor to solve complicated questions about codifying the reserve powers. However, I would make several brief observations. First, if it can be accepted that the practical purpose of republican reform is simply to remove the role of the Queen in appointing and removing the Governor-General, while keeping his or her powers and role substantially the same, then perhaps we should not seek to substantially alter the appointment and removal procedure. Currently, appointment and dismissal of the Governor-General is signed off by the Queen, on the advice of the Prime Minister. In practice, the Prime Minister makes such decisions. The Queen acts on this advice. Perhaps a republic can be achieved while changing the present procedure as little as possible. In other words, we should not automatically assume that allowing the Prime Minister or the government to directly appoint the Governor-General, instead of using the Queen as symbolic go-between, is unworkable. Winterton disagreed, however, arguing that this ‘[w]ould demean the office at its inception, and contradict the democratic and egalitarian motivation inevitably accompanying the establishment of a republic if the new head of state were merely the old appointive Governor-General under
a new name’. Yet, if the aim is to keep the present system largely the same, as republic arguments usually indicate, appointment by government should not be automatically dismissed without further consideration.

Similarly, it should not be assumed that a Governor-General appointed directly by the Prime Minister or government would be politically biased or beholden to the Prime Minister’s will. If the Governor-General enjoyed a set tenure, for example, they would be independent. After all, the government appoints High Court judges on the recommendation of the Attorney-General, and they are not usually accused of political bias aligned with the party that appointed them: they act independently. If we trust Australian governments to directly appoint judges, why would we not trust governments to appoint the Governor-General who, similar to a judge, is supposed to be a neutral ‘constitutional umpire’? If this is considered unsuitable, however, perhaps the Chief Justice of the High Court could rubber stamp the Governor-General’s appointment on the recommendation of the Prime Minister, replacing the British Queen as formalistic go-between. Further thought must be given as to how the existing appointment and removal system needs to be changed, and how changes may alter power dynamics. But given the intended small scope of this practical reform, the aim should be to remove the role of the Queen in the appointment and removal procedure with as little systemic disruption as possible.

If the Constitution were altered to remove the role of the Queen in appointing and dismissing the Governor-General, this would solve the practical problem in need of resolution. The Governor-General would then be our Australian head of state.

B Addressing the Symbolic Problem

The second issue is how to enact a symbolic declaration of national identity, values and unity. As McKenna argues, removing the Queen necessitates some kind of declaration of Australian sovereignty, independence and the creation of a ‘new foundational language’. Rather than a new constitutional preamble, which has been the most common suggestion in republican discussions, here I propose the Referendum Council’s recommendation for an extra-constitutional Declaration, which, as well as functioning as an antecedent to a constitutionally guaranteed First Nations voice in the Indigenous constitutional recognition discussion, could equally function as Australia’s extra-constitutional Declaration

277 Winterton, Monarchy to Republic (n 8) 108.
280 Note the criticism that Liberal-National governments have historically (and ironically) appointed the most progressive judges: Olivia Caisley and Nicola Berkovic, “Activism” Puts Focus on High Court Vacancies, The Australian (online, 20 February 2020) <https://www.thewhisky.com.au/nation/politics/activism-focuses-vacancies-high-court-vacancies/story/9c345e022d2950d638b5e3030d9c0e>.
281 McKenna, ‘The Search for a Meaningful Republic’ (n 174) 22.
282 Referendum Council, ‘Final Report’ (n 9) 2.
of our nation in the republic discussion. Such a Declaration could be Australia’s ‘Declaration of Independence’.

The 2017 recommendation for a symbolic ‘Declaration outside the Constitution’ was an innovative shift away from past approaches to symbolic recognition. It is distinctly different from the 1999 approach which proposed a new symbolic new preamble to the Constitution, which failed at referendum. This followed disagreement about whether the Constitution is the appropriate place for symbolic statements, and constitutional experts raising concerns about the incorporation of ambiguous words into what is essentially a structural rulebook. In the 1990s, Stephen Gageler and Mark Leeming urged caution regarding the insertion of values statements, noting that uncertain judicial use of the preamble in constitutional interpretation was increasing. Winterton warned of unintended consequences that may result from Indigenous recognition in a preamble, including unforeseen legal implications potentially ‘deleterious to Aboriginal rights’. Indeed, Howard’s inclusion of a ‘no legal effect’ clause in the 1999 preamble proposal was, as Julian Leeser points out, an implicit admission that the preamble would have legal effect and an attempt to circumvent this possibility. But a ‘no legal effect’ clause does not conclusively answer concerns about legal uncertainty. Leslie Zines suggested that such a clause may be legally ineffective, while others rightly observe it would render the recognition statements ‘disingenuous’.

Apart from the 1999 referendum, ‘no legal effect’ clauses have also been adopted in most state constitutions to confirm the recognition statements are not

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283 Ibid 2, 12, 103, 154.
284 Constitution Alteration (Preamble) Bill 1999 (Cth).
285 For this kind of description of the Australian Constitution, see Mason (n 113) 8.
287 Winterton, ‘Constitutional Preamble’ (n 137) 188.
288 The proposal included a new section 125A which stated that ‘the Preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law interpreting the Commonwealth or any part of the Commonwealth’: Explanatory Memorandum, Constitution Alteration (Preamble) Bill 1999 (Cth) 5.
290 Leslie Zines, ‘Preamble to a Republican Constitution’ (1999) 10(1) Public Law Review 67, 68. See also Webber (n 23) 269–70.
292 Eg, the Constitution Act 1975 (Vic) recognises Indigenous peoples in section 1A, and section 1A(3) provides: ‘The Parliament does not intend by this section – (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria’. The Constitution Act 1902 (NSW) recognises Indigenous peoples in section 2, and section 2(3) provides: ‘Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales’. The Constitution of Queensland 2001 (Qld) recognises Indigenous
intended to have operational impact. However, concerns about legal uncertainty on one hand and resulting insincerity of sentiment on the other raise serious strategic questions about the wisdom and efficacy of inserting symbolic statements into the Constitution. The common resort to ‘no legal effect’ clauses as an attempted way around the difficulty reflects paradoxical logic. It seems a contradictory and tokenistic way to assert our national values: why put something in a Constitution – a practical, working document – if it is not intended to have practical effect?

To address this problem, alongside its proposal for a constitutionally guaranteed First Nations voice following the Uluru Statement, the Referendum Council recommended that ‘an extra-constitutional Declaration be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians’. This Declaration would contain ‘inspiring and unifying words articulating Australia’s shared history, heritage and aspirations’, bringing together ‘the three parts of our Australian story: our ancient First Peoples’ heritage and culture, our British institutions, and our multicultural unity’. Being extra-constitutional, it would avoid the problem of unintended judicial interpretations of a new preamble, which may affect the operation of the whole Constitution. While some may argue that removing the symbolic language from the Constitution would rob the poetry of this special status, others have observed that Australia’s Constitution is a dull and ‘prosaic document expressed in lawyer’s language’ – arguably it is not the best place for inspiring, poetic language. Free from legalistic considerations, however, an extra-constitutional Declaration could more expansively and poetically declare the values, sentiments and aspirations desired, without worries about unintended constitutional consequences.

If not achieved alongside a First Nations constitutional voice as part of reforms for Indigenous constitutional recognition (which should be the first priority), such a Declaration could be part of an affirmational Australian republic. Like America’s
Declaration of Independence, the Australian Declaration need not be a document entailing enforceable rights and obligations. Nonetheless, the Declaration could be poetically and rhetorically expansive. It could richly affirm the importance of our British institutional inheritance – including the continuing historic significance of the British Crown – while equally celebrating the continent’s ancient Indigenous heritage and multicultural contributions, thus articulating an explicitly inclusive vision of Australian national identity that seeks to defuse and transcend the culture wars. As well as being assented to by all Australian parliaments, as the Referendum Council recommends, it could be assented to by the First Nations voice (if this institution were already in operation) adding to the document’s reconciliatory significance. If we wanted to think especially laterally, the Declaration could even secure the blessing of the Queen in addition to the blessing of the First Nations – her last formal farewell as the nation finalises its independence. That would be a moment of historic significance, potentially creating a symbolic affirmation of enduring reconciliatory power.

The resulting package for republican reform would thus have a neatness: minor practical reform inside the Constitution; inspiring and expansive symbolism outside the Constitution.

**V CONCLUSION**

Properly understood, there are dual driving purposes of republican reform. An affirmational Australian republic can address both purposes, but each may require a different solution.

The first problem is practical and the constitutional change required to formalise and finalise Australia’s independence is arguably small. Australia should not have to ask the British Queen to appoint our Australian Governor-General. We need to change the Constitution to ensure we can appoint the Governor-General ourselves in Australia. Republicans should determine the simplest way to remove the role of the British Queen in the appointment and dismissal of the Governor-General, while effecting minimal structural disruption. The second problem is symbolic, and its resolution can be as inspiring and aspirational as our imaginations allow. Australia lacks a unifying declaration of national values, history, aspirations and identity. We have yet to poetically articulate our national story in a way that defuses and transcends, rather than inflames, contemporary culture wars. But reformers should

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300 Damien Freeman and Julia Leeser, ‘The Australian Declaration of Recognition: Capturing the Nation’s Aspirations by Recognising Indigenous Australians’ (Monograph, Uphold and Recognise, April 2014) 5; Noel Pearson, ‘The Uluru Statement from the Heart’ (Lowitja O’Donoghue Oration, University of Adelaide, 29 May 2018) 7. Note, however, that while the Referendum Council report describes the Declaration as ‘symbolic’, its non-legal status is not specifically mentioned: see Referendum Council, ‘Final Report’ (n 9) 2.

301 Morris, ‘Declaration of Recognition’ (n 10). Note, I do not suggest that a Declaration should be sufficient in terms of Indigenous people’s claims for recognition. I only suggest that it could be a worthwhile addition to substantive constitutional recognition through a First Nations constitutional voice.
not seek to insert this symbolic declaration into a new constitutional preamble, as they did in 1999. We should not repeat past mistakes.

Addressing the practical purpose, this article proposed that a republic can be achieved in a way that structurally affirms rather than repudiates Australia’s British constitutional inheritance. The aim should be a minor updating of constitutional machinery to formalise and finalise Australia’s independence, while structurally affirming, rather than repudiating, Australia’s British institutional inheritance. Such an approach would be in keeping with republican advocacy, which usually asserts that a republic does not entail substantive structural transformation. First, we can remove the role of the British Queen in the appointment and dismissal of the Governor-General, while effecting minimal structural disruption to the institutions and procedures we have inherited. This would make the Governor-General our actual head of state, instead of just de facto. Second, in becoming a republic, we need not reject all the language and forms of Britain. The title ‘Governor-General’ can be retained – for this is the best descriptor of an office whose character republicans wish to keep fundamentally the same. Reformers should also be wary of the instinctive popularity of direct election, which may have been prompted by misleading use of the word ‘President’ in the 1990s.

Addressing the symbolic purpose, I propose that an extra-constitutional Declaration (if not achieved as part of Indigenous constitutional recognition alongside a First Nations constitutional voice – which should be the first priority) could more poetically and expansively articulate national values and aspirations, without the constraining legal consequences of a new constitutional preamble. Republicans should take up the Referendum Council’s 2017 recommendation for a Declaration outside the Constitution which equally affirms and celebrates the three parts of Australia’s national story – the Indigenous, the British and the multicultural. This would entail symbolic affirmation of Australia’s British inheritance, including the historic role of the Crown, to complement the structural affirmation. Assented by all Australian parliaments and the First Nations voice (if this institution is in operation), and perhaps even enacted with the final blessing of the Queen if this can be arranged, such a Declaration could be Australia’s ‘Declaration of Independence’, but with special reconciliatory significance.