The tradition of judicial activism is central to our Common Law tradition and goes back a long way. Mr Justice Higgins' *Harvester Judgment* (1907) is a notable early example. H. V. Evatt, Lionel Murphy and Michael Kirby were also strong judicial activists.

In the 1930s the High Court interpreted the external affairs power (s. 51, xxix) broadly to enable the Commonwealth to legislate to implement treaties which covered areas not covered by the original grant of powers by the colonies/states at Federation. Thus aviation—rejected as a Commonweath power by Referendum in 1937—became appropriate for Commonwealth legislation where Australia was committed by international treaties, such as ICAO. During World War II, the High Court interpreted the defence power (s. 51, vi) as enabling Commonwealth power to expand significantly. The High Court upheld Commonwealth laws on radio and television by a generous interpretation of s. 51, v 'telegraphic, telephonic and other like services'. The Tasmanian Dams case in 1984 was a striking illustration of the validation of legislation based on a Treaty (the World Heritage Convention) which overrode State law.

The High Court under Sir Anthony Mason, Sir Gerard Brennan and Murray Gleeson has effected radical legal, political and social change in areas that the political process (including Referenda) would lack the will to achieve. Our High Court paralleled the US Supreme Court in the period after 1953 when Earl Warren was Chief Justice. The Mabo and Wik decisions forced radical legislative changes about native title and ended the legal fiction of *terra nullius*. Parliament would never have initiated such wide ranging changes and a Referendum would certainly have resulted in a 'No' vote.

Decisions by the Federal and High Courts in the MUA dispute with Patricks suggested a judicial commitment to the concept of countervailing power.

The High Court has ruled in a number of cases to uphold the principle of freedom of speech, including striking down Labor legislation restricting political advertising, and—in the Theophanous case—determining that politicians are fair game and may not have the defence against libel that other citizens enjoy.

In 1999 the High Court ruled that Heather Hill was ineligible to take her seat in the Senate because under s. 44 she owed allegiance to a foreign sovereign, viz. the Queen of Great Britain. The Hill case has barely been mentioned in the current Referendum debate. I doubt if declaring Great Britain as a foreign power could have been carried in a Referendum.

There are some issues where Parliamentarians appear to be at variance with community opinion. Two obvious examples are the death penalty and

euthanasia, followed by Aboriginal reconciliation and multiculturalism.

In Australia the death penalty is simply not on the mainstream political agenda, thirty-two years after the last hanging, despite evidence of strong community support. No major political figure supports it, and its few public advocates include Pauline Hanson, David Oldfield, John Stone and Jim Cameron, a quartet without much else in common.

This is an area of striking divergence between Australia and the US. The United States is now the only practising democracy which retains and uses the death penalty and which votes in the United Nations against resolutions deploring execution. No major politician in the US is now prepared to confront community feeling on the death penalty. Michael Dukakis and Mario Cuomo both paid a heavy price for their commitment to abolition.

With euthanasia, there is strong community support for the broad proposition of assisted passage for the terminally ill, and clear impatience with politicians who exercised a conscience vote to overturn the Northern Territory's legislation. Neither issue would seem appropriate for a Referendum where inevitably a very complex issue demands a simple, single answer, 'Yes' or 'No'.

Polling suggested that after Sir Ronald Wilson' s report *Bringing Them Home* (1997) was published, attitudes towards aborigines actually hardened.

The Referendum Problem

Referenda are very different from elections. In elections there is always a winner—a candidate, a Party, a Government, sometimes an independent. 'Don't knows' do not, and cannot win *elections*. But with a *Referendum*, voting 'Yes' or 'No' means very different things. 'Don't knows' can determine a Referendum result.

A 'Yes' vote generally means: 'I have thought about the issue and I agree with the proposed change'. It may also mean: 'My party, or leaders I admire, urge a "Yes" vote, and I follow their lead'.

In the current campaign, a 'No' vote could mean several different things:

* 'I have thought about the issue and I am a convinced Monarchist' (like John Howard)
* 'I have thought about the issue and I am a direct election Republican' (like Peter Reith and Phil Cleary)
* 'I haven't thought about the issues'
* 'I am confused'
* 'Normally I vote informal'.

S. 128 of the Constitution provides that to carry, a Referendum must win approval 'in a majority of the States and a majority of the electors voting'. Thus, even with a popular majority nationally, a proposition fails if, say, three States vote No. It has proved virtually impossible to win a Referendum when any significant interest group is opposed.

In March 1937 a Referendum was proposed to give the Commonwealth power to legislate with respect to air navigation and aircraft—a subject not covered in the powers of s. 51. The Referendum won a majority of the popular vote (1.924 m to 1.669 m) but won only two States. Victoria and Queensland voted Yes by large margins, while the other four States voted No. Yes lost narrowly in New South Wales but polled barely 40% in South Australia and Tasmania.

Two Referenda were put in May 1967. The first was to break the 2: I nexus between the number of Members in the House of Representatives and the Senate. (This would have enabled an increase in seats in the House). This was carried in New South Wales but lost nationally (2.298 m 'Yes', 3.412 m 'No').

The second was to delete the words 'other than the aboriginal race in any State', from s. 51, placitum xxvi and to allow Aborigines to be counted in the Census (deletion of s. 127). This was carried in all States, with a popular vote of 5.183 m 'Yes' and 0.527 m 'No'. In 1999 if this Referendum question were submitted again, I believe the result would be much closer.

In May 1974 Gough Whitlam's Government submitted four Referenda. These were:

* to provide for simultaneous elections for the Senate and House of Representatives (the last Senate election held on its own was in November 1970),
* to change s. 128 to provide that a Referendum would carry if a majority of voters and *half* the states voted 'Yes', and to give a vote in Referenda to citizens of Territories,
* to require States to adopt the principle of one vote = one value in elections, and
* to allow the Commonwealth to make direct provision for local government.

All four were defeated. New South Wales voted 'Yes' to all four, but there was a popular majority, overall, for 'No' of between 52–53%.

In May 1977, Malcolm Fraser's Government put up four Referendum propositions, all supported by the Labor Opposition. Three were carried:

* that casual vacancies in the Senate should be filled by nominees of the same Party,
* that electors in Territories should have the vote for Referenda, and
* that future appointees to Federal Courts should be retired at the age of 72.

The fourth was for simultaneous elections of Senate and House of Representatives. 'Yes' received a substantial majority of the popular vote (4.648 m to 2.822 m) but the proposition was defeated in three States, Queensland, Western Australia and Tasmania.

This Referendum was put up again in 1984, by the Hawke Government. 'Yes' won the popular vote by quite a narrow margin (4.473 m to 4.361 m), but carried only New South Wales and Victoria. So it lost.

In September 1988, the Hawke Government scored a notable 'own goal' when it put up four Referenda proposals, and lost all, after a dismal campaign—in same ways even worse than for the current Referendum. This was part of the Bicentennial euphoria. Peter Reith, with little support from his own colleagues, campaigned against all four propositions, and won. This made his national reputation.

The Referenda were for:

* four year maximum terms for Senators and Members of the House of (essentially a third replay of simultaneous elections),
* to require the States to have fair and democratic elections,
* to recognise the role of local government in the Constitution, and
* to provide Constitutional recognition of certain Rights and Freedoms, including trial by jury, freedom of religion, and ensuring fair terms for persons whose property is acquired by any government.

All were overwhelmingly lost. Not one State voted 'Yes'. The fourth Referendum suffered the heaviest defeat ('Yes' 2.892 m, 30.8%, to 'No' 6.503 m).

This suggests that proponents for a Bill of Rights, either US or Australian style, to be incorporated in the Constitution, would have their work cut out.

It should be emphasised that no Australian Referendum proposition having been defeated has ever been adopted in a subsequent Referendum. The nearest thing to an exception was the 1977 vote (with bipartisan support) to allow the Australian Capital Territory and Northern Territory to vote in Referenda—but this did not affect the operation of s. 128.

The Referenda of October 1916 and November 1917 over conscription for overseas service were not Constitutional Referenda. They were essentially plebiscites.

A prevailing myth in support of the 'second Referendum' thesis is that New South Wales only supported Federation after a second ballot. This is a half truth. George Reid's Government set a threshold vote of 80,000 for 'Yes' in the June 1898 Referendum. 'Yes' won 71,500 votes, to 66,000 for 'No'—but it was treated as a defeat. In a second ballot (June 1899), with the statutory minimum removed, 'Yes' won by 107,000 votes to 83,000.

The 1999 Referendum

There has been a very high level of confusion and cynicism in this Referendum campaign. If there is a high degree of misunderstanding, the 'No' case stands to benefit. Much of the confusion and misinformation has been deliberate.

Six major confusions have arisen in the current campaign. Were they accidental or planned?

One

The primary question—Should Australia become a Republic?—has been overwhelmed by the secondary question—How should the President be chosen? Putting the issue in a single, two-part question was a decision by John Howard, a determined foe of the Republican cause. This means that some ardent Republicans are planning to vote 'No' because they hope this will lead to a more radical model being proposed later. It takes real political skill to get people with diametrically opposed views to support a common cause—in this case a 'No' vote.

Two

If Australia votes 'No' on 6 November, will there be a second Referendum soon after proposing a directly elected President? This is extremely unlikely. In Australian history, no Constitutional Referendum once defeated has ever been carried in a later Referendum. If Peter Reith, Ted Mack and Phil Cleary think that John Howard will help them with a direct election Referendum, they are deluding themselves, and the voters.

Three

What role will be played by the President/Head of State in an Australian Republic? The Republic most Australians are familiar with is the United States. Many of our fellow citizens may believe that it is proposed that Australia should have a President with executive powers. If we were to have an executive President, I would support a direct election too. But this is not the case. The proposed model in the 6 November Referendum is for a person with the same role, functions and powers that the Governor-General has now. The Prime Minister is the leader of a party and thus a

partisan figure who claims a mandate, and may be cordially disliked by the people who voted against him. The Governor General is in a completely different position, as a consensus figure who represents and promotes national unity.

An Australian President in the 'Yes' case model would be expected to follow the precedent set by Sir Zelman Cowen, Sir Ninian Stephen and Sir William Deane as Governors-General. The English political economist Walter Bagehot (founder of *The Economist)* pointed to two distinct functions in the British system of government—'the dignified' and 'the efficient'. The Governor-General and State Governors are in the first role, Prime Ministers and Premiers in the second. (In the US, the President has both roles).

At the 'Australia Deliberates' meeting of 347 randomly chosen citizens, held in Canberra on 23–24 October, the most striking change in understanding was over the President' s proposed role. In the polling, carried out by Sol Leibowitz' NewsPoll, before the meeting, only 40 per cent understood that the President would have the same role as the Governor General. After two days that figure increased to 92 per cent, a rise of 52 per cent. This increase in understanding was the primary reason for the dramatic fall in support for the direct election model, from 50 per cent to 19 per cent.

Four

The direct election model would, if a preferential system were adopted, produce a President who could claim a mandate—the support of more than six million voters. This would make him/her inevitably a rival of the Prime Minister, especially if his mandate was more recent. This would, in effect, create a political model like a car with two steering wheels. It defies credulity that a popular figure who won a majority after a hard fought campaign, making him/her the only national figure in public life would then be satisfied with the role of umpire. There is also some community support for a President who plays an essentially iconic role, with no part in the machinery of government—as Archbishop Peter Hollingworth put it, 'a combination of Princess Diana, Mother Teresa, Nelson Mandela and William Deane'. The Irish model seemed/seems attractive because of the two women who have held the office, Mary Robinson and Mary McAleese. Direct elections only occur if the Dail fails to agree on a consensus candidate (as it did between 1975 and 1995).

Five

Would election of a President by a two-thirds majority of the Parliament be *more* or *less* likely than direct election to produce a political partisan?

A cynical view has been peddled that 'politicians would look after their own' and that Paul Keating could well be elected. (Why not Pauline Hanson?) It is difficult to imagine a situation where, say John Howard would propose Keating and Kim Beazley would support him. It is even harder to imagine Beazley proposing Bronwyn Bishop with Howard's support. No attempt was made by 'No' proponents to explain why both sides in politics would set out to wreck the process and damage themselves. Governors-General Cowen, Stephen and Deane would have been strong Presidential possibilities under the proposed model, but, they would never have involved themselves in a direct election. Apart from fund raising, they would have required endorsement by major parties, media proprietors and interest groups.

Six

The most important confusion is one promoted by the Prime Minister. He says, 'Don't change the *Constitution* because the existing *system* works so well'. This is a more sophisticated version of the mantra, 'If it ain't broke, don't fix it'. He perpetuates the myth that the system as we know it is expressed in the Constitution. It is not. Australia is a *de facto* Republic already and has been for many years. It is time to come out of the closet and declare ourselves for what we are.

The Constitution

The 1901 Constitution has *never* operated as written—even in 1901 it was an anachronism, as H. B. Higgins and others pointed out at the time. In that sense it has been broke for 98 years. The 1901 Constitution, on paper, provides for a top-down divine right monarchy. God puts power in the hands of the Queen (Queen Victoria, actually), who delegates it to her agent, the Governor General. She is described (section 1) as part of the Federal Parliament and retains the power to veto legislation (section 59), a power she lost in Britain in 1707.

The Constitution makes no reference to the essential features of our system which we have developed since 1901:

* that the Governor-General (formerly British, now always Australian) is a consensus, non executive figure and *de facto* Head of State;
* that a Prime Minister and Cabinet exercise executive (real) power;
* that Governments are formed after elections and operate according to the Westminster system with authority being determined by the Lower House;
* that Australia is a democratic state; or

* that minorities are given statutory recognition (as shown by the office of Opposition Leader).

Not one of these principles is to be found in our Constitution. Chapter II, The Executive Government makes it clear, in section 61: 'The executive power of the Commonwealth is vested in the Queen . . .'

There is little chance that John Howard or Kerry Jones would read out Chapter II of the Constitution in public and say: 'This is a fair description of how our system works, and I would not change a word'. I would gladly pay $1000 to any charity of their choice if either will do this.

The proposed change in the Referendum actually *entrenches* the existing system as it has evolved since 1901 and would make the first Constitutional reference to the Prime Minister and Opposition Leader. The biggest possible change would be if we actually applied the Constitution ('This jewel of a Constitution'—David Flint. 'The world's best Constitution'—Kerry Jones) as *written*. That really might frighten the horses.

If I had been asked to draft the Referendum question I would have used these words:

Do you favour an amendment to the Constitution which entrenches existing practice in which:

(i) the Head of State is an indirectly selected person who does not exercise executive power;

(ii) the House of Representatives, operating under the Westminster convention, determines after a general election which party or group of parties has a mandate to govern, and

(iii)a Prime Minister and Cabinet exercise executive power.

Monarchists argue, quite inconsistently, that the Queen's role is both *essential* and *irrelevant*. It is hard see how it can be both. I am amazed that Professor Allan Fels of the Australian Competition and Consumer Commission hasn't taken up the issue of deceptive packaging—'Constitutional Monarchy trading as the Commonwealth of Australia'. If these arguments were advanced in a company prospectus, the proponents might go to jail.

I have a rooted objection to those who say: 'We are already Republican in sentiment and practice. Just don't use the 'r' word'. This is hypocrisy of a high degree. I find a disturbing parallel between the extreme resistance to using the 's' word ('sorry') in the context of Aboriginal reconciliation and the 'r' word ('republic') in our political evolution. We can do it, but not say it.

Pessimists vs Optimists: The 'No' and 'Yes' cases

The Constitutional Monarch has been all but invisible in the 'No' campaign, which seems to have been hijacked, for practical purposes, by the direct election Republicans, who were clearly punching well above their weight. Their most frequent slogan, 'Say "No" to the politicians' Republic', suggested that even Monarchists were arguing that there ought to be an opportunity for voters to say 'Yes' to another model. This was also grossly misleading. But as Paul Keating wittily put it, for Monarchists this was 'the love that dares not speak its name'.

This is the 'empty room theory of Constitutional sovereignty' in which the best Head of State is an absentee one—but that psychologically, or mythically, Constitutional legitimacy is out there, not in here—and even agnostics warm to the ceremony of the Church of England in England.

Pauline Hanson is no longer in the Parliament but her influence remains strong. The 900,000 or so voters who shared her dislike of the political process will decide the Referendum. This lesson was not lost on Tony Abbot who picked up her attack on 'elites' and any kind of expertise with a vengeance. The No case is strongly Hansonite in style, with a deep appeal to battlers. The Hanson phenomenon was a major factor in de-railing the Republican cause in 1998 after ConCon created an illusory optimism.

It was ironic to hear Bill Hayden, former Governor General—demonstrating *The Power of One,* as Bryce Courtney put it—railing against elites to a support group including Dame Leonie, Sir David, Sir Harry, Sir James (bis), Prof. Flint and Bob Ellicott.

The major dichotomy in the Referendum debate has not been so much between Republicans and Monarchists but between *optimists* and *pessimists.* The pessimists concede that our great great grandfathers were right to set up the Commonwealth of Australia, even with a flawed document—but that we have learnt nothing from a century of experience. If we tried something new, we'd muck it up. In this view, our institutions are seen as being very fragile, hanging by a thread, and requiring external validation (the David Tacey view).

Optimists like me believe that Australia has a strong, robust democracy, in some respects better than the British model, with strong, robust institutions that will make the transition to a Republic without difficulty. Indeed, the change could generate an upsurge of national optimism and enthusiasm.

If it came to pass, which seems unlikely now, we would be an Australian Republic, not based on or drawn from any other nation's model. It would be unique and it would work because it essentially incorporates the Australian experience.

There is a unique feature of the 6 November Referendum on the Republic. This the first time that a Referendum has been put up by a Prime Minister who has campaigned against it. The decision to hold a Convention was first proposed by Alexander Downer, the then Liberal Leader, and taken up by John Howard in the 1996 election campaign. The wording of the proposition and the timing of the vote was very much in the Prime Minister's hands.

Generally, the 'Yes' said too little and the 'No' case said far too much. Appalling cases were put by both sides in the Australian Electoral Commission official Referendum pamphlet mailed out to all voters.

The 'Yes' case was embarrassingly feeble, with appeals to patriotism and 'our future', to 'stand tall' and 'stand on our own two feet'. Six assurances by the Attorney-General about the proposed model's safety are set out—one sentence per assurance, for example 'It would not change the number of public holidays'. It argues that safeguards in the model adopted at the Constitutional Convention would ensure that a politician would not be elected as President. As you can see, powerful stuff indeed! To call it feeble is actually to overpraise it.

The 'No' case, full of appeals to fear and often grossly misleading, ran to nine pages of text. The 'Yes' case, although more coherent, ran to only four pages. This means that five pages of the 'No' case did not have 'Yes' material on the opposite page—simply a small box enclosing the words 'This argument concluded on page 14'.

Participants in Australia Deliberates complained that the 'Yes' case had been very weakly put. The 'No' case used every page, and what it lacked in reasoned analysis it made up by the use of 14 vigorous populist slogans enclosed in boxes: 'Don't know?—Vote "NO"', 'No say!—No way!—Vote "NO"', 'A puppet for President!—Vote "NO"'.

The public education campaign, promised by the Government at ConCon, supposed to be impartial, was very late in the process and actually quite deceptive, creating the impression that the referendum would take us to a T junction and that we faced a choice between the existing system (described as Constitutional Monarchy) and something radically different. How far the confusion was deliberate or inadvertent should be a subject for future research.

Participants in Australia Deliberates and its working groups were not interested in opinions or advice—they wanted *facts*: 'Will the change to a Republic be expensive?', 'Will we retain the name Commonwealth of Australia?', 'Will it force us out of the Commonwealth?', 'Will it mean name changes to institutions?', 'Will it change the flag?', 'Will it end the common law tradition?', 'Will all our notes and coins be withdrawn?',

'What about Crown land?', 'Who is our Head of State now?', 'Will an Australian President have the same powers as a US President?', 'Will an Australian Republic retain the Westminster system?', 'Will only Australian born citizens be eligible to be President?', 'Will the election of a President by a two-thirds Parliamentary majority be more or less likely to produce a political President?'

The Australian Republican Movement certainly failed to put what seems to me the most compelling argument, namely that Australia is, and has been at least since the mid-1960s, a *de facto* Republic (or 'Crowned Republic', as Malcolm Mackerras puts it); in which the vestiges of Constitutional Monarchy are all but invisible; that we habitually confuse (sometimes deliberately so) the *system* and the *Constitution*: and that it is long overdue that we come out of the closet and turn the *de facto* situation into a *de jure* one.

The Problem with 'Yes'

I agreed with Margot Kingston' s analysis on Phillip Adams' *Late Night Live* (ABC Radio) that there were five major turn-offs in the 'Yes' campaign:

1. Celebrity endorsements

There were obvious dangers in using politicians—even retired ones—in press, television and radio advertisements, at a time of deep community alienation, when the whole political process is subject to widespread abuse. However endorsements by actors, swimmers, athletes, sports commentators and other famous names carried no weight at all—and probably contributed to a backlash.

2. Poor provision of information

Appeals to sentiment, or sentimental images such as 'Yes' scrawled in the sand, suggested a lack of intellectual rigour or substance in the 'Yes'case. It is true that few Australians are familiar with the Constitution, but they know when an argument is unconvincing.

3. The argument that becoming a Republic will help Australia's image internationally.

The fact that the Japanese, Indonesians or Singaporeans might take a different view of Australia is absolutely irrelevant to mainstream Australia. So is the argument that the change would raise our trade profile. The endorsement of big business leaders was also counterproductive with middle Australia. This raised the probably spurious question, 'What's in it for them?', as if the Republic was a political parallel of globalisation.

4. The endorsement of media proprietors.

The support of Rupert and Lachlan Murdoch, both US citizens, was quite damaging to the 'Yes' case. Strong media support generally undoubtedly strengthened the view that rich, powerful elites were trying to dominate. *The Australian* was seen to be one-sided in its republican promotion.

5. The 'It's Time' campaign was quite irrelevant to younger voters, although probably helpful in recapturing traditional Labor support.

1972 seems a long time ago. It was gratifying to see Gough Whitlam and Malcolm Fraser working for the same cause but 1975 is also very remote.

The 'No' case was appalling because of its resort to fear, denigration and half truths (if not outright deception), for example the advertisement asserting that '*This* Republic' would involve '69 changes [to the Constitution] . 'Untried. Untested. Unacceptable'. Of the changes, 27 are mere name changes, replacing Governor-General or Queen with President, and referring explicitly to the 'President *of the Senate*', where such distinction needed to be made. Abolition of the Queen's power to veto legislation (s. 59) is a major change, curiously overlooked in the 'No' case, as is the vesting of the executive power of the Commonwealth in the Queen (s. 61) or replacing the term 'subject of the Queen' by 'Australian citizen' (s. 117). Untried? Untested? Yes. But unacceptable?

Sections 59–63 set out the procedures for appointment and removal of the President. There are nine transitional provisions for establishing the Republic.

Where do we begin? Where do we end?

Searching for common ground?

Do we have common ground on the desirability of a republic? Not really. Polling suggests that something like 65 per cent of our fellow citizens would like Australia to declare itself as a Republic— but that somewhere between 30–40 per cent of that plurality are prepared to vote No to an indirectly elected Head of State (aka 'the politicians' Republic').

Do we have faith in the robustness of our political institutions?

I do, very much, and I deplore the demonising of the Parliament. The quality of Australia's moral, spiritual and political life will depend less in what is written in our Constitution and more on high and rising levels of community understanding and a quality of leadership and vision that is in deplorably short supply.

At ConCon many delegates urged the codification of a Bill of Rights, but past experience, especially 1988, suggested that its chances of adoption

by Referendum were extremely remote. Legislation was a better option. The current proposal for a Preamble, harmless and uninspiring in itself, will be hard pressed to succeed.

In practice there is not much correlation between what is written in foundation documents and what happens in practice. The French Declaration of the Rights of Man and Citizen was followed by the Reign of Terror. The US Constitution and its Bill of Rights did nothing for slaves—or women, and has an extremely harsh and discriminatory penal code now. The Soviet Constitution of 1935 was a model—guaranteeing democratic freedoms. In practice there was Stalinist repression. China also has a very liberal code—on paper.

In Australia, we have little on paper, but in practice the protection of human rights is reasonably good, except for Aborigines and Torres Strait Islanders, and despite significant state and territory variations.