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The Politics of Constitutional Amendment

The process by which the Australian Constitution is amended is complex and probably little understood by the general community. This paper is an attempt to explain the politics involved in efforts to amend the Constitution. It concludes that more efforts are likely to fail than to succeed.

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Executive Summary

In November 1999 Australian voters participated in two referenda on the questions of whether Australia should become a republic and whether a new preamble should be added to the Commonwealth Constitution. Voters received a government-sponsored booklet spelling out the proposed changes to the words of the Constitution, and including 2000—word arguments on the YES and NO cases. These were the 43rd and 44th constitutional referenda since the first in 1906 and, like most attempts, these two failed. Over the years, only eight amendments have been made: single changes in 1906, 1910, 1928, 1946 and 1967; and three changes in 1977. On five occasions a national majority has been gained, though not a majority of States, causing the proposed alteration to fail.

Section 128, the constitutional provision which provides for referenda emerged from the Convention negotiations of the 1890s as a classical political compromise. In drawing up mechanisms for initiating referenda proposals and ratifying the outcomes, s. 128 gave something to the States as well as to the Commonwealth, and to the people as well as to the politicians.

There have been a number of significant amendments of the Constitution. The 1910 and 1928 cases provided a means for the Commonwealth to ease the burden of State debts, with the latter also providing constitutional backing for the Financial Agreement and the Loan Council. Many Australians have benefited from the social services amendment of 1946, while Australia's indigenous population regards the Aboriginals referendum of 1967 as a major landmark in their relationship with the Australian political system. The issue of the replacement of Senators was one of the major points of political contention during 1974–5 and two years later an amendment attempted to remedy this problem. In the same year, residents of Australia's Territories gained the vote in constitutional referenda.

Although constitutional referenda are important occasions of political activity, remarkably little research has been undertaken on Australians' voting behaviour at such times. However, referenda have been much written about and commented upon and this paper discusses some of the views that have been propounded about Australia's voting record in them particularly since the 1999 referenda which produced an unusually large number of studies.

Many critics of our constitutional referenda have been concerned by what they see as the relatively poor record of constitutional change in this country. Some believe that achievement of the 'double majority' is too difficult, while others criticise official support for the handing out of NO cases. There is a common claim concerning voter ignorance and conservatism which is said to account for so many negative votes.

By contrast, others suggest that voters are well aware of what is involved, citing different patterns to the returns as evidence. Amendments perceived to weaken the federal system have generally been given short shrift, whereas attempts to repair the perennially-flawed finance chapter have been received sympathetically. Proposed changes to the Senate are

likely to be repelled but matters dealing with Australian society are usually considered closely. It has been claimed that such varying outcomes are a reminder that voters go to a referendum polling place possessing some consciousness of Australian history and politics which influences the way they vote. Other evidence for this has been the fact that particular results have often indicated a voter awareness of what was involved—the vastly different results in the two instances in 1967 for instance. Australian voters have been cautious, and conservative at times, but they have shown their willingness to accept change when persuaded that such change is sensible or right.

Whatever one's view of constitutional referenda, there seems general agreement among commentators that the major parties have treated the electorate with disdain in the years since the first referendum in 1906. Not the least of the criticisms of the parties has been the inconsistency in their stance on constitutional amendment. Most notably this has involved supporting issues while in government, which are then opposed when submitted by their opponents.

But the parties have erred in more fundamental ways. They have often tried to do too much at one time, they have sometimes been less than earnest in putting YES cases, and they have sometimes ignored the political times which have made some questions unlikely to be accepted. They have also been unable to avoid opportunistic, short-term responses that have put the embarrassment of their opponents ahead of a careful consideration of the issues under discussion. The parties have also overlooked strong community views on particular questions, and they have often antagonised the Premiers, who have participated in quite a number of NO campaigns. Overall, then, the history of Australian constitutional referenda has been one of controversy, with many observers criticising the voters, but others directing their criticism at the parties.

Introduction

The process by which the Australian Constitution is amended is complex and probably little understood by the general community. This paper is an attempt to explain the process of constitutional amendment that is found in s.128 of the Constitution and supporting legislation.

The paper follows an earlier Department of the Parliamentary Library publication, by Scott Bennett and Sean Brennan, which was partly a discussion of the politics of constitutional amendment (by Bennett) and partly a discussion of the constitutional aspects of s.128, and ways in which the rigidities of the section might be circumvented (by Brennan).¹ It was noted in that earlier paper that 'although a great deal has been written and spoken about Australian constitutional referenda, remarkably little research has been conducted into Australians' voting behaviour on these occasions'.² Interestingly, this cannot now be said about the two referenda in November 1999, and ideas and conclusions from the findings of scholars published since then have been incorporated into this text by

Bennett. In the interests of space, Brennan's legal discussion has been removed, though interested readers are referred to the 1999 paper.

The paper is divided into five sections:

- the amendment process
- statistical and other details of the 44 referenda
- problems posed by s.128
- the politics of constitutional amendment, and
- the voters.

Amending the Constitution

As democratic exercises, referendums are paradoxical. Referendums seek to replace representative democracy by enabling citizens to decide issues directly, instead of indirectly through competing elites. However, like elections, referendums are initiated and controlled by elites, many of whom are unelected and unrepresentative of citizen attitudes and preferences. By forcing relatively uninformed voters to give simple answers to complex constitutional or policy questions, referendums invite elites to make claims that are often more simplistic and deliberately misleading than those they employ in elections.³

The Constitutional Provisions

The Commonwealth Parliament initiates constitutional amendments. Section 128 of the [Australian Constitution](#) requires that a proposal to amend the Constitution must first take the form of a Bill submitted to the Commonwealth Parliament. Between two and six months after it leaves the Parliament, the proposal 'shall be submitted' in a referendum to the voters in the various States and Territories.

For an amendment to be ratified, the so-called 'double majority' is required. There must be a majority of voters saying YES in a majority of the States (i.e. at least four of the six), but there must also be a nation-wide affirmative vote. Territory votes are included in the national total, but not in any State figure (for the wording of s. 128 see Appendix).

The YES and NO Cases

Parliament prescribes the manner in which referendum votes are taken. In most referenda since the *Referendum (Constitution Alteration) Act 1912 (No. 2)*, each elector has received a pamphlet containing arguments in favour and arguments against any proposal upon which the elector is voting. Normally, these arguments must be no more than two thousand words in length, and must be authorised by a majority of those parliamentary members who voted for or against the proposed law. When more than one referendum is held on the same day, a particular argument may be more than two thousand words, provided the average of YES or NO arguments is not greater than two thousand words.⁴

In some cases, NO arguments are not produced. In 1967, for instance, arguments for and against the *Parliament* alteration were produced, but only a YES argument in relation to the *Aboriginals* amendment. The *Referendum (Machinery Provisions) Act 1984* (s. 11) states that such arguments as are produced must be submitted to each voter, 'not later than 14 days before the voting day for the referendum'.

Typically, the YES cases are usually led by the sponsoring government, while the NO cases are argued by informal groups of individuals often combining their efforts with the Opposition of the day. A marked departure from this norm was seen in the *Establishment of Republic* referendum in 1999. Unusually, the cases were managed by two advertising

campaign committees appointed by the Government, with the YES committee chaired by Malcolm Turnbull, of the Australian Republican Movement, and the NO committee by Kerry Jones, of Australians for Constitutional Monarchy. The Howard Government's role was limited to ensuring that each committee's proposals met the 'basic standards' set for 'the activities to be covered by the public funding', as well as accounting for the use of the funds. The two publicly-funded committees were, therefore, 'responsible for the conduct of the campaign'.⁵ Governments and Oppositions have not previously been prepared to hand over so much control to others.

The Ballot Paper

From the first ballot in 1906, the style of question was uniform for many years, voters being asked 'Do you approve of a proposed law for the alteration of the Constitution entitled [here the title of the proposed law was inserted]'. For example:

Do you approve of the proposed law for the alteration of the constitution entitled 'Constitution Alteration (Powers to deal with Communists and Communism) 1951'? [1951]

Do you approve of the proposed law for the alteration of the constitution entitled 'An Act to alter the Constitution so that the Number of Members of the House of Representatives may be increased without necessarily increasing the Number of Senators'? [1967]

Do you approve of the proposed law for the alteration of the constitution entitled 'An Act to alter the Constitution so as to enable the Australian Parliament to Control Prices'? [1973]

In recent years, however, there has been occasional tinkering with the style and wording of the question. For the 1974 referenda, for example, the ballot paper read:

Proposed law entitled—

'An Act to alter the Constitution so as to ensure that Senate Elections are held at the same time as House of Representatives Elections'

Do you approve the proposed law? [1974]

For the four referenda in 1988, the instructions read:

A proposed law: To alter the Constitution to recognise local government.

Do you approve the proposed alteration? [1988]

In 1999 the format was again slightly different:

A PROPOSED LAW: To alter the Constitution to insert a preamble.

DO YOU APPROVE THIS PROPOSED ALTERATION?

Referenda Facts and Figures

There have been 44 attempts to amend the Constitution, of which eight have been successful (Table 1):⁶

Table 1: Constitutional Referenda 1906–1999

Note: Successful amendments to Constitution in bold.

No	Year	Proposal	Government submitting	States approving	YES votes (per cent)
1	1906	Senate elections	Protectionist	6	82.7
2	1910	State debts	Fusion	5 (all except NSW)	54.9
3		Finance	Fusion	3 (Qld, WA, Tas)	49.0
4	1911	Trade and Commerce	ALP	1 (WA)	39.4
5		Nationalisation of monopolies	ALP	1 (WA)	39.9
6	1913	Trade & commerce	ALP	3 (Qld, WA, SA)	49.4
7		Corporations	ALP	3 (Qld, WA, SA)	49.3
8		Industrial matters	ALP	3 (Qld, WA, SA)	49.3
9		Trusts	ALP	3 (Qld, WA, SA)	49.8
10		Nationalisation of Monopolies	ALP	3 (Qld, WA, SA)	49.3
11		Railway disputes	ALP	3 (Qld, WA, SA)	49.1
12	1919	Legislative powers	Nationalist	3 (Vic, Qld, WA)	49.7
13		Nationalisation of Monopolies	Nationalist	3 (Vic, Qld, WA)	48.6
14	1926	Industry and Commerce	Nat-CP	2 (NSW, Qld)	43.5
15		Essential services	Nat-CP	2 (NSW, Qld)	42.8
16	1928	State debts	Nat-CP	6	74.3
17	1937	Aviation	UAP	2 (Vic, Qld)	53.6
18		Marketing	UAP	0	36.3
19	1944	Post-war reconstruction and democratic rights	ALP	2 (WA, SA)	46.0
20	1946	Social services	ALP	6	54.4
21		Marketing	ALP	3 (NSW, Vic, WA)	50.6
22		Industrial employment	ALP	3 (NSW, Vic, WA)	50.3
23	1948	Rents and prices	ALP	0	40.7
24	1951	Communists and communism	Lib-CP	3 (Qld, WA, Tas)	49.4
25	1967	Parliament	Lib-CP	1 (NSW)	40.3
26		Aboriginals	Lib-CP	6	90.8
27	1973	Prices	ALP	0	43.8
28		Incomes	ALP	0	34.4
29	1974	Simultaneous elections	ALP	1 (NSW)	48.3
30		Mode of altering the Constitution	ALP	1 (NSW)	48.0
31		Democratic elections	ALP	1 (NSW)	47.3
32		Local government bodies	ALP	1 (NSW)	46.8
33	1977	Simultaneous elections	Lib-NP	3 (NSW, Vic, SA)	62.2
34		Senate Casual vacancies	Lib-NP	6	73.3
35		Referendums	Lib-NP	6	77.7
36		Retirement of judges	Lib-NP	6	80.1
37	1984	Terms of Senators	ALP	2 (NSW, Vic)	50.6
38		Interchange of powers	ALP	0	47.1
39	1988	Parliamentary terms	ALP	0	32.9
40		Fair elections	ALP	0	37.6
41		Local government	ALP	0	33.6
42		Rights and freedoms	ALP	0	30.8
43	1999	Establishment of republic	Lib-NP	0	45.1
44		Preamble	Lib-NP	0	39.3

Some amendment proposals have dealt with a single issue. The *Senate Elections* (1906) question, for example, was whether the commencement date for Senators' terms should be altered, while the *Marketing* (1937) question sought to remove the restrictions imposed on the Commonwealth Parliament by s.92 of the Constitution.

Others, by contrast, have involved a number of issues. *Trade and commerce* (1911) sought to extend the Commonwealth Parliament's powers over trade and commerce, the control of corporations, labour and employment and combinations and monopolies. *Rents and Prices* (1948) sought to give the Commonwealth Parliament ongoing power to make laws with regard to both rents and prices. In both the 1911 and 1948 cases a single YES or NO for or against the entire package was all that the voter could register—the voter could not support or reject parts of each question (see below, pp. 14–15).

As can be seen in Table 1, there have been eight amendments to the Constitution: single changes in 1906, 1910, 1928, 1946, and 1967, and three changes in 1977 (for details, see pp. 8–13).

Six of the successful referenda have been carried comfortably. The *State Debts* (1910) and *Social Services* (1946) amendments had the narrowest margins, at 54.9 per cent and 54.4 per cent, respectively. Five of the questions that received 50 per cent of the total vote or better, failed to get a majority of States in favour. In nine other cases the national YES vote was in the range of 49.0 to 49.8 per cent (Table 2):

Table 2: YES Votes—range of votes

YES votes (%)	No. of referenda	Comments
		Highest YES figure: <i>Aboriginals</i> (1967) 90.8 per cent
60+	7	Highest unsuccessful vote: <i>Simultaneous Elections</i> (1977) 62.2 per cent (failed to get majority of States)
55–59	—	
		Failed to get majority of States:
		<i>Aviation</i> (1937) 53.6 per cent
		<i>Marketing</i> (1946) 50.6 per cent
50–54	6	<i>Industrial Employment</i> (1946) 50.3 per cent
		<i>Terms of Senators</i> (1984) 50.6 per cent
45–49 per cent	17	Nine referenda produced YES votes between 49 and 49.8 per cent.
40–44 per cent	5	

Table 1 shows that referenda have been held on 19 separate occasions. On five of these, voters have had to vote in just a single referendum. On the other 14 occasions, multiple

referenda have been held, with the six questions in 1913 being the largest number considered on the same day (Table 3):

Table 3: Number of Referenda Per Polling Day

Number of referenda held on same day	Years
1	1906, 1928, 1944, 1948, 1951
2	1910, 1911, 1919, 1926, 1937, 1967, 1973, 1984, 1999
3	1946
4	1974, 1977, 1988
5	–
6	1913

Four of the 22 referenda held at the same time as a Commonwealth election were passed (1906, 1910, 1928, 1946); four of the 22 held at times other than a Commonwealth election were passed (1967, three in 1977).

Results in the States

There have been markedly different results in the State voting returns (Table 4):

Table 4: Referenda Tallies, by State

	YES	NO
WA	23	21
Qld	21	23
NSW	18	26
SA	16	28
Vic	15	29
Tas	10	34

Table 4 does not reveal the changes in State voting patterns that have occurred since 1906:

- *New South Wales* had, until 1946, voted overwhelmingly against amendments to the Constitution, approving only three and rejecting 16. However, this State has been the only State to return a majority of YES votes since then (14 YES–11 NO).
- *Victoria* has had a very consistent performance. In the first 21 referenda the State voted YES on eight occasions, and in the next 23 referenda voted YES on seven occasions.
- *Queensland* was very supportive of amendment attempts between 1906 and 1967 (18 YES–8 NO), but since 1973 has been disinclined to alter the Constitution (3 YES–15 NO).
- *Western Australia's* story is similar to that of Queensland. Between 1906 and 1967 the State's tally was 20 YES–6 NO (13–0 during 1906–19), but this State has also returned a 3 YES–15 NO figure since 1973.

- *South Australia's* record was even up to 1946 (11 YES, 11 NO), but its voters have been strongly opposed to constitutional change since (5 YES–17 NO).
- *Tasmania* approved the first three referenda, but since then has voted 7 YES–34 NO, making it the State least inclined to support such referenda.

Seven of the eight successful referenda have carried in each State; the 1910 *State Debts* change was not carried in New South Wales. At the other end of the scale, on eleven occasions there have been no YES majorities in any State (Table 5):

Table 5: Number of States in Favour

Number of States in favour of an amendment	Total
0	11*
1	7
2	5
3	13
4	0
5	1
6	7

* 1937, 1948, 1973 (2), 1984, 1988 (4), 1999 (2)

Note: in eight referenda since the Territories were given the right to vote in occasioning constitutional referenda, on four occasions ACT residents have given an affirmative vote and on one occasion the voters in the Northern Territory have said YES.

The Eight Amendments

What were the eight successful amendments? What impact have they had upon Australian society? Despite the lack of enthusiasm of many commentators—according to Professor Jack Richardson, s.128 has 'failed to achieve much purpose'⁷—it is possible to detect important national consequences that have flowed from the passage of at least six of the eight amendments.

Amendment 1: *Senate elections* (1906)

This amendment altered s. 13 of the Constitution.

The Constitution provided for Senate terms to begin on 1 January. By 1906 it was felt to be unlikely that Senate terms would generally coincide with House of Representatives terms, and that a change to 1 July would make simultaneous elections more likely. Odgers' *Australian Senate Practice* later noted that the main reason for the change was to enable simultaneous elections to be held in March.⁸ The amendment was uncontroversial, dealing as it did with the mechanical matter of how to rotate Senate terms, causing R. G. Menzies to observe later that, 'as the average voter ... does not care how frequently a Senator

rotates, the amendment was carried'.⁹ All States were in favour, with a YES vote of 82.7 per cent being registered.

Ironically, although the amendment has not hindered the holding of simultaneous elections, it was 77 years before the first such election was actually held in March. The amendment has had one unintended consequence. Because two-thirds of Commonwealth elections have been held in the months of September–December, there have been numerous instances of incoming Senators being required to wait many months before taking their seats. Those elected on 3 October 1998, for instance, were required to wait 270 days before doing so.

Amendment 2: State Debts (1910)

This amendment inserted s. 105A of the Constitution.

Guaranteeing the future financial good health of the States was a matter of great importance to the Constitution-writers, and they worked hard to produce a workable Finance and Trade chapter (Chapter IV). Two important sections were s.87, which required the return of surplus tariff funds to the States, and s.105, which provided for the Commonwealth to take over State debts that existed at the time of Federation. By the end of the first decade it was clear that Chapter IV had serious flaws, and in 1910 attempts were made to amend these two sections of the Constitution. The State Debts proposal dealt with a perceived need to expand the operation of s.105 to allow the Commonwealth to take over State debts whenever they were incurred.

This amendment was carried by a YES vote of 54.9 per cent, with only New South Wales in opposition. According to the historian of the Loan Council, this indicated that the nation had 'decisively favoured a scheme on the basis of s. 105 to relieve the States of some of their financial burden'.¹⁰ Although it was over a decade before the power was used, this amendment was important in giving greater potential flexibility to Chapter IV of the Constitution.¹¹

Amendment 3: State Debts (1928)

This amendment inserted s. 105A into the Constitution.

The financial relations between Commonwealth and States worsened during the 1920s. A financial settlement between the governments in 1910 had introduced what were called *per capita* grants, whereby each State received annual grants from the Commonwealth of £1.25 per head of its population. By the mid-1920s, inflation had made serious inroads into this sum but no new formula had been found.

In 1927 the Commonwealth and States signed the Financial Agreement. Apart from establishing a more generous grants regime, this provided for Commonwealth assistance in State debt reduction and, most importantly, it established the Loan Council. Henceforth

all governmental borrowing, except for purposes of defence, was to be under Loan Council control. Due to doubts concerning the constitutionality of this new body, it was agreed that a constitutional amendment would be put to the people. When this was done on 17 November 1928, 74.3 per cent of the voters supported the change.

The Loan Council, described as 'a unique institution among federations',¹² attracted overseas attention from the moment of its birth:

if Australia has made a unique contribution to federal finance it lies in its harmonisation of public borrowing by an institutional device [i.e. the Loan Council] which offers a solution for a host of related federal problems—the co-ordination of public investment, economic planning, tax conflicts, and so on.¹³

There is no doubt about the enormous impact that this body has had on Commonwealth–State financial relations, particularly in helping the Commonwealth Government to oversee the national economy.

Amendment 4: Social Services (1946)

This amendment inserted s. 51 (xxiiiA) into the Constitution.

Prior to 1946, the payment of such social service benefits as were authorised by Commonwealth legislation relied on the spending power (s. 81). The *Pharmaceutical Benefits Case* (1945)¹⁴ underscored doubts about the constitutionality of this procedure, doubts which raised the possibility of various social services being invalidated. The Chifley Labor Government and the Opposition agreed that the constitutionality of such services should be confirmed by means of constitutional amendment.

The amendment proposal, which was put with two other questions, sought to give power to the Commonwealth to provide for 'maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances'. According to British political scientist A. H. Birch, a YES vote was a foregone conclusion, for voters 'would otherwise have faced the risk of losing the many social benefits which were already provided'.¹⁵ Despite this, the proposed amendment and the two other 1946 proposals (*Marketing* and *Industrial Employment*) met some opposition based on a disinclination to see the Commonwealth gaining any more power, but the social services amendment was carried narrowly, with 54.4 per cent voting YES. All States voted for the change.

Although this amendment recognised a development whereby the Commonwealth had become the prime mover in the area of social services, it was important in that it gave the Commonwealth power in the area of medical and dental services which it did not have before.¹⁶ Writing in 1984, prominent health administrator Sidney Sax described the amendment as being 'of great significance', enabling the Commonwealth to legislate for

the administration of many welfare schemes and potentially allowing for the provision of medical and dental services and hospital care. Sax has surmised that the Commonwealth's reach is now potentially so extensive that in the future the national government 'might well be able to establish its own hospitals in the states'. Further, the word 'benefits' in the amendment has authorised 'not only the payments of money, but benefits in kind or by way of services'. This was seen to be particularly important during the Labor Government of 1972–75 in enabling that government to make changes in health services.¹⁷ At the same time, the High Court has indicated clear limits to this power over social welfare and it has been noted that the Whitlam Government's social welfare programme was put together with a 'keen awareness' of the limits.¹⁸

Education administration has also been affected by this change. Although s. 96 has been the main instrument of Commonwealth activity in education, it has been noted of s. 51 (xxiiiA) that 'it would appear to give the Commonwealth very far-reaching powers with regard to education within the States'.¹⁹ This amendment thus increased the potential strength of the cards in the Commonwealth's hands in this area of policy-making.

Amendment 5: *Aboriginals* (1967)

This amendment altered s. 51 (xxvi) of the Constitution and deleted s. 127.

Until 1967 the Constitution specifically denied the Commonwealth the power to enact special legislation for Aboriginal people in the States or to include them in national censuses. For many years, these provisions had been regarded as an affront to Aboriginal people, as well as a barrier to effective policy-making and administration. An attempt to alter this situation had failed with the defeat of the *Powers* referendum of 1944.

The 1967 alteration sought to remove these barriers from the Constitution. Despite being held at the same time as the controversial—and unsuccessful—*Parliament* referendum that dealt with the relationship between the size of the two Houses of Parliament (the nexus), the *Aboriginals* amendment was carried with the highest YES vote to date, 90.8 per cent. This vote was said to have reflected a general community view that this was 'a chance to make some sort of amends'.²⁰

Although the Commonwealth did little in this policy area for the first five years after the amendment was passed, in time the constitutional alteration came to be seen as extremely important for Aboriginal people. Eventually there was a realisation that direct Commonwealth participation in this policy area meant much higher levels of government spending being directed towards Aboriginal affairs, as well as the possibility of overarching national legislation, such as the *Native Title Act 1993*.²¹ A recent judgement is that the referendum was 'vitally necessary to the process of change', especially as it:

bestowed upon the Whitlam and subsequent governments the moral authority required to expand the Commonwealth's role in Aboriginal affairs and implement a major programme of reform.²²

Amendment 6: Senate Casual Vacancies (1977)

This amendment altered s. 15 of the Constitution.

Four amendments recommended by the Australian Constitutional Convention were put to the people in 1977. The *Senate Casual Vacancies* proposal arose out of the 1975 controversy over the appointment of non-party Senators Cleaver Bunton (NSW) and Albert Field (Qld) to fill Senate seats formerly held by ALP Senators. The change aimed at ensuring that a replacement Senator would be required to be a member of the party of which the previous Senator was a member at the time of his or her election. Essentially, the purpose of the amendment was to preserve the party balance from one Senate election to the next, and to that end it also abolished Senate by-elections. It received 73.3 per cent of the vote. This is the only reference to parties in the Constitution.

Despite the clear intention of the amendment's supporters to ensure that the party balance in the Senate should not be altered by a casual vacancy, the aftermath indicates that the best of intentions can be thwarted. Following the resignation of a Tasmanian ALP Senator in April 1987, the nominee of the party, John Devereux, was rejected by a tied vote in the Tasmanian Parliament. As Liberal Tasmanian Minister for Forests, Ray Groom, put it, 'we can choose only a person who is a member of the same party [as the departed Senator] ... but we are not bound to accept the nomination of the party concerned'.²³ Tasmania therefore had only 11 Senators between 2 April and the double dissolution election of 11 July 1987.

Amendment 7: Referendums (1977)

This amendment altered s. 128 of the Constitution.

At the time of Federation the very few people who lived in the Northern Territory voted as residents of South Australia. Territorians could therefore vote in constitutional referenda. When the Territory was surrendered to the Commonwealth in 1911, however, its citizens lost the vote in such referenda, due to the failure to refer to Territory voters in s. 128. Residents of the Australian Capital Territory were similarly restricted in the years after the establishment of that Territory. In 1967 demonstrations against this restriction upon civil rights occurred in Alice Springs, as Territorians expressed their resentment at not being able to vote in the *Aboriginals* referendum.

In 1974 the Whitlam Government attempted to amend s. 128 in a double-pronged proposal. Territorial voting rights in referenda were sought, but the Government also proposed that constitutional amendments could be carried with just half of the States—instead of a majority of States—voting in favour. Only New South Wales supported the proposal, but it is likely that had the Territories section been a separate question, it would have been ratified.

In 1977 the question of Territory votes was relatively uncontroversial, being carried in every State, gaining a national YES vote of 77.7 per cent, though Queensland and Tasmania had quite large NO votes with 40.4 per cent and 37.8 per cent respectively. It has been claimed that the high approval rate was a reminder of Australia's honourable record of electoral reform—that the amendment had 'Australian political tradition behind it'.²⁴ While University of New South Wales academic John Paul dismissed the change as the granting of a 'hollow privilege', the *Canberra Times* argued that people in both Territories should be grateful, 'for the universal acknowledgment that their natural right to vote in future referendums will now be given the force of law'.²⁵

Amendment 8: Retirement of Judges (1977)

This amendment altered s. 72 of the Constitution.

In October 1976 the Senate Standing Committee on Constitutional and Legal Affairs recommended a retiring age for all federal judges. This recommendation was based on:

- a perceived need 'to maintain vigorous and dynamic courts'
- a need to open up avenues for 'able legal practitioners' to achieve judicial positions
- a growing community belief in a compulsory retiring age for judges, and
- avoiding 'the unfortunate necessity' of removing a judge made unfit for office by declining health.²⁶

In the same year the committee's view was accepted by the Australian Constitutional Convention.²⁷

The amendment introduced in the following year sought to provide for a retiring age of seventy for all federal court judges, including those on the High Court—though not judges appointed before the approval of the referendum. The issue was not controversial, despite Sir Robert Menzies' description of the change as 'superficial and ill-considered'.²⁸ Over 80 per cent of voters supported the amendment:

It appears that in Australia, age provokes a reaction of vacation rather than reverence, and the electorate saw no reason to make an exception of High Court judges.²⁹

Systemic Difficulties in Changing the Constitution

The Constitutional Provisions

Some writers have criticised the constitutional and legislative arrangements for the holding of constitutional referenda.³⁰ The 'double majority' has been said to create too high a hurdle. If the double majority had required just half the States—as proposed in an 1974

amendment attempt—three more amendments would have succeeded—*Marketing* (1946), *Industrial Employment* (1946) and *Simultaneous Elections* (1977). If only a national majority had been necessary the *Aviation* attempt of 1937 would also have succeeded. The *Term of Senators* (1984) attempt would have been unnecessary, as simultaneous elections would have been introduced in 1977.

Against this, however, it seems that a more significant factor has been the difficulty in securing 50 per cent of the national vote for the YES case. It has been pointed out that almost 60 per cent of the proposed changes stood a good chance of passage, but on no less than nine occasions the national vote has been in the range 49.0 to 49.8 per cent, while seven votes have been in the 45–48 per cent range, a possible consequence of so many being opposed by the Opposition of the day.³¹ With more efforts to achieve bipartisan support, it is possible that more campaigns would have been able to secure a national YES majority, and thus the double majority would probably have also been achieved in more cases. The double majority, of itself, has not had a major effect upon constitutional referenda results, but five more successes might have been achieved had it not existed.

Some critics of the system have focussed on the 'party political character of constitutional change', which is said to be the direct consequence of an amendment procedure which allows only the Commonwealth Parliament to initiate proposals. Jeffrey Goldsworthy of Monash University has suggested that this partisanship could be lessened if the States had a formal role in the amendment process.³²

Referendum Legislation

Other writers have criticised the legislation put in place to conduct constitutional referenda. Some have focussed on the sending of both the YES and the NO arguments to the voters. Richardson has suggested that the printing of the two cases, of equal length, in the same pamphlet, gives the NO case a status that it might not have if the votes in Parliament are taken as a guide. He noted that an amendment proposal passed by the Parliament is the legal expression of the will of the people, yet this provision does not recognise that legal fact.³³

Professors Colin Howard and Cheryl Saunders have asked whether the totals of the votes in the two houses of Parliament ought to be included in the information sent to voters, to make clear the strength of parliamentary support for any measure.³⁴ Many politicians have complained about this, yet have been prepared to take advantage of the wording of the legislation.

Colin Howard has also commented critically about the lack of criteria required to write the two cases. He has noted that the YES case has usually been presented simply, bearing some close resemblance to what is being proposed. The NO case, on the other hand, often seems designed to confuse, and 'is usually a totally unreliable guide to what the amendment is all about'.³⁵ The *Post-War Reconstruction and Democratic Rights* (1944) referendum, for example, which was designed to give the Commonwealth temporary

powers to aid in postwar reconstruction, degenerated into a discussion of the isolation of the national capital, run by public servants 'who were unsympathetic to the needs of the general public, and who were ignorant, uninterested and inefficient in their dealings with people'.³⁶

There has also been discussion about the use of compulsory voting in constitutional referenda—something that was introduced in 1915 for such referenda before it was introduced for Commonwealth elections. Writing in 1965 Professor L. F. Crisp spoke of compulsory voting having:

loaded the chances heavily against a 'Yes' vote in that it coerces to the polls many uninterested and ignorant electors who would not otherwise have bothered to come...³⁷.

Crisp's view has become part of the commonly-cited factors accounting for constitutional referenda defeat.³⁸ Professor Ian McAllister's work has shown that in the *Establishment of Republic* (1999) referendum, many people who might not have otherwise voted cast a ballot because of the compulsion to do so. According to McAllister, if they had not voted the referendum may have been approved.³⁹

Government Clumsiness

An important factor in accounting for constitutional referenda defeats has been the repeated examples of governments handling the process awkwardly—what John Uhr has called 'the defective approach of initiating governments'.⁴⁰ The most common example has been the practice of asking too much in the single question. For example:

- *Trade and Commerce* (1911)

This was a multi-part referendum which sought to extend the Commonwealth Parliament's powers over trade and commerce, the control of corporations, labour and employment and combinations and monopolies. All of the proposed changes were contained within one question, so that voters could only vote YES or NO to the entire package.

- *Industry and Commerce* (1926)

This attempt to amend the Constitution listed most of the matters covered in the 1911 case. Voter rejection seemed likely, however, as the power to make laws with respect to trade unions and employer associations was added to an already controversial list.

- *Post-war reconstruction and democratic rights* (1944)

The 'Fourteen Powers' or 'Fourteen Points' Referendum, sought to give the Commonwealth Parliament legislative power, for a period of five years, in many areas. These included the rehabilitation of ex-servicemen, national health, family allowances and 'the people of Aboriginal race' as well as, in some form, many of the matters on

which powers to legislate had been sought in 1911 (i.e. corporations, trusts, combines and monopolies). There were also to be inserted constitutional guarantees of freedom of speech and religion and safeguards against the abuse of delegated legislative power. Voters were required to vote YES or NO to the entire parcel of powers, rather than separately for each of the fourteen, many of which were very controversial. In a bitter battle over such controversial matters as the regulation of employment, the organised marketing of commodities, or the control of companies, it was no surprise that the relatively non-controversial power to make laws for Aboriginal people was swamped in the rush to reject the proposed amendment. This was a matter of great frustration to Aboriginal people and their supporters.⁴¹

- *Parliamentary terms* (1988)

There is a great deal of support for increasing the maximum House of Representatives term to four years, something that this referendum sought to introduce.⁴² However, the Hawke Government also decided to tack onto this question the reduction of a normal Senate term from a six-year fixed term to a four-year fixed term, as well as the introduction of simultaneous elections for the Houses. Once again it was not possible for the voter to support only one of the questions being dealt with.

Political Aspects of Constitutional Change

The Parties and the Constitution

A referendum is an exercise in participatory democracy and the temptations of partisan advantage can be hard to resist at campaign time. With both major Australian parties, ideological and political considerations have tended to outweigh any chance of a proper and careful consideration of the place of the Constitution in the Australian system of government.

An important factor in the constitutional amendment story has therefore been the different approaches of the two major protagonists, the Liberal Party and its predecessors, and the Australian Labor Party.

The Labor Urge to Reform

The Labor Party's lukewarm attitude to the Constitution has been particularly significant in the politics of constitutional amendment.

Labor people were uncertain of the Constitution even before it became law. Federalism was seen as a barrier to social change, hindering central governmental intervention, and making uniform solutions to social problems difficult to achieve. Many would have preferred the creation of a unitary system.⁴³ As this seemed unlikely to occur, for many decades after Federation Labor politicians called for a marked increase in Commonwealth Government powers:

Australia has reached a stage in which the states have the residual powers but cannot undertake the task, while the Federal Parliament which can do the job effectively does not possess sufficient or adequate powers.⁴⁴

From the first years of Federation, then, Labor politicians saw constitutional repair as an important priority, and ALP governments have rarely been prepared to leave the Constitution as they found it. The Fisher Government made eight attempts, in April 1911 and May 1913, the Curtin and Chifley Governments sponsored five attempts between 1944 and 1948, and the Whitlam and Hawke Governments proposed 12 amendments between 1973 and 1988. Labor has been in power for about one-third of the time since 1901, yet has sponsored 57 per cent of the constitutional referenda that have been held.

Significantly, Labor efforts to amend the Constitution have generally sought to bring about major changes, especially in altering the federal balance created by the Founders. This has enabled their opponents to portray the party as Constitution-wreckers:

Referendum proposals which are identified exclusively as Labor Party initiatives seem certain to encounter vocal opposition and probable rejection. Just as Labor has aroused strong political passions in other areas of government (leading to many supply threats and two dismissals), so in this area it is Labor referendum initiatives that have met sharp opposition ...⁴⁵

The consequence of this has been Labor's near-failure to institute constitutional change: just a single success in 25 attempts (four per cent), compared with the conservative parties' successes in seven of 19 attempts (36 per cent). The latter figure has presumably been aided by a general Labor preparedness to support non-Labor proposals.

Many people have shared the frustrations of Crisp when he lamented the dashing of many people's hopes of 'necessary progressive amendment' over the years.⁴⁶ Many have blamed the voters:

Labor politicians and theorists seem to be at a loss to understand why the electorate, which endorses their policies from time to time [in an election] does not also accede to their requests for more constitutional power.⁴⁷

A major part of the constitutional referenda story, then, has been Labor's determination to change the Constitution, clashing with a popular resistance to the further centralisation of legislative power (albeit sometimes by very narrow margins).

Liberal Protection of the Constitution

By contrast, the Liberal Party has projected itself as the protector of a fundamental document that 'has maintained our liberties, national unity in war and depression, the federation and our national independence'.⁴⁸ Accordingly, there has been a Liberal determination to preserve the federal system, the British connection and the basic principles of responsible government:

... responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights.⁴⁹

Liberals have usually been opposed to Labor's efforts to amend the Constitution, particularly if such efforts threatened what Menzies called 'the nature and significance of federalism as the dominant factor in the Constitution'.⁵⁰

Politically, the conservative parties have long realised that protection of the Constitution could be used as 'a useful stick with which to beat the socialists'.⁵¹ This view has produced a tendency to warn of the threat posed by Labor to the very nature of government in Australia. In 1912 Alfred Deakin attacked Labor plans to grant more power to the Commonwealth by means of six referenda:

Our Constitution has been in operation long enough to satisfy the people that under it their opportunities for action are ample, and that it affords scope for the exercise of the simpler, as well as the more complex, functions of government. But the amendments before us mean the absolute supremacy of the Federal Houses; the establishment of a unitary form of government; they mean, in the long run, party strife and partisan legislation...⁵²

During the 1940s Menzies spoke of Labor's 'contempt for the basic Constitutional instrument', and portrayed the *Rents and Prices* (1948) proposal as one part of Labor's plan of complete socialisation of government and the undermining of the Australian way of life.⁵³ Labor attempts to alter the Constitution have also been described by their opponents as a 'grab' for power. As former Liberal MP, Peter Shack, put it when criticising the 1988 proposals, 'The hidden agenda ... is a grab for power by the Federal Government for more power to interfere with our democratic rights, the rights of State and Local Governments and with our rights as individuals'.⁵⁴

Such a tough approach was seen particularly in the Liberal Party's response to the Whitlam Government's reforming urge. At that time the Liberals described the Constitution as an historical compact and charter which formed a fundamental law that ought not lightly be altered.⁵⁵ This was not to say that it could not be altered, but changes ought not be rushed, a failing claimed to be common on the Labor side.⁵⁶

This attitude to the Constitution has also seen a conservative party reluctance over the years to propose constitutional amendments. Most notably, during Menzies' record term as Prime Minister, only the security-related issue of *Communists and Communism* (1951) was proposed. Prime Minister Howard's flagging in 2003 of a proposed alteration to the Constitution involving the Senate therefore surprised many observers who believed he shared Menzies' reluctance to tamper with the Constitution.⁵⁷

The Tactics of Referenda Battles

Party tactics have been based largely on an assumed high level of voter ignorance of constitutional matters. This can be illustrated in various ways.

Short-Term Views

At various times the parties have seemed to assume that voters have no memories of previous amendment attempts. In regard to Commonwealth control over monopolies, for instance, despite having tried to gain this power in 1911 and 1913, Labor opposed a similar attempt by their Nationalist opponents in 1919. Similarly, Labor attempted to gain power to legislate in respect of trusts in 1913, but opposed their opponents' 1919 attempt, despite the provision that the new power was to remain in force for a maximum of three years.

A more recent example occurred in relation to the different efforts to introduce simultaneous elections for the House of Representatives and the Senate. In 1974 the Coalition opposed Labor's attempt to do so, claiming that the Government's real plan was the weakening and eventual abolition of the upper house. Despite this, the Fraser Government attempted to introduce simultaneous elections in 1977, earning accusations of hypocrisy from within its own ranks. With this second attempt also being defeated, Labor tried again in 1984, and once again the Coalition opposed the attempt.

Similarly, John Howard's raising of the question of Senate 'obstruction' seemed to fly in the face of previous Liberal determination to protect the Senate from Labor 'wreckers'—though it was in keeping with Senator Helen Coonan's concerns to change the Senate voting system in order to exclude minor parties.⁵⁸

Exaggerated Claims

The assumption of voter ignorance has led to a general opportunism and the seeking of short-term victories over opponents, rather than a careful consideration of the questions under discussion. Former South Australian MLA Robin Millhouse has lamented that 'it's a sad fact that not enough of us [politicians] care sufficiently about constitutional reform to avoid party politics'.⁵⁹ This means that a great deal of exaggeration and distortion is standard fare, leading academic Don Aitkin to complain that 'the intellectual level of referendum debates is often appalling'.⁶⁰

In 1937, for instance, opponents of the Commonwealth having power to make laws with regard to aviation predicted that the proposal would wreck state railway systems and spoke of a substantial increase in the price of food. In 1948, the Country Party leader alleged that centralised price control would be used to destroy private enterprise and establish a socialist state.⁶¹ In 1967 the Coalition Government's effort to remove the nexus between the House and the Senate was motivated by a desire to avoid establishing new Senate seats (which could only be done in multiples of six) when population increases dictated small additions to the House of Representatives. Despite this, the NO case relied largely on the populist cry of 'no more politicians'. In 1988 Liberal Senator Richard Alston reportedly warned that the passage of the *Rights and Freedoms* amendment could see the banning of corporal punishment in schools written into the Constitution.⁶² In 1999, Liberal MP Tony Abbott spoke of 'ethnic cleansing' in regard to British migrants' right to vote, while the NO

case campaign director asserted that an Australian republic was comparable with Nazi Germany.⁶³

Avoiding Voter 'Confusion'

Another way in which parties have indicated their poor view of voters' constitutional knowledge and their ability to make choices has been in their calls for uniform votes when more than one issue has been presented for ratification. This tactic has been used especially on the Coalition side. In 1974, 1988 and 1999, for instance, it was felt better to call for a uniform NO vote for the questions being submitted, rather than have voters 'confused' by a mix of YES and NO recommendations.⁶⁴ In 1973 many in the Coalition were in favour of the Commonwealth having power over incomes but not over prices. It was believed to be safer, however, to make the call NO for both issues, again to avoid 'confusing' voters.

Trying To Do Too Much

Parties have also indicated their poor view of the voters by attempting too much at the one time. In 1911 and 1913 the ALP put eight questions—six of which were submitted in 1913—leading H. V. Evatt to suggest that it was 'chiefly due to its asking too much that the Labour [*sic*] Ministry failed to pass [any of these] amendments'. None of the amendments was ratified, though the six 1913 proposals only failed narrowly, with all achieving a 49 per cent vote as well as the votes of three States, so Evatt may well have been correct in his assessment.⁶⁵

In a similar way, we have seen earlier how the *Mode of altering the Constitution* referendum of 1974 lumped together the provision for the watering-down of the 'double majority' requirement with the granting of the vote in referenda to Territory voters. If one disliked the former, then one was forced to vote against the principle of fairness that was encapsulated in the latter. In 1988 the *Parliamentary Terms* referendum effectively dealt with five separate matters: a longer term for the House, a shorter term for the Senate, ending the continuous nature of Senate terms, Senate terms to be no longer fixed and compulsory simultaneous elections for both houses. It could be said that it was party impatience coming to the fore on this—too much was being attempted at the one time.

'Referenda' That Are Not Held

The threat of a constitutional referendum may well suit a government's political purpose as much as actually holding such a ballot. In some cases a move will be made with the introduction of amendment legislation into the Parliament, even though its eventual defeat is certain. In others, a threat to push along the path towards a particular amendment may be seen as an attempt by a Prime Minister to influence events even when it seems clear that a formal constitutional amendment may never be put to the people.

In 1930 the Scullin Labor Government proposed to amend s.128 so that Parliament alone could amend the Constitution—the Prime Minister claimed he was seeking to ask voters 'to strike off the fetters that bind the National Parliament'.⁶⁶ Despite an apparent determination to proceed, Scullin was also prepared to reassure State Labor leaders that he would not do so precipitately. In fact, in due course he let the matter quietly lapse as it had been believed that he would.⁶⁷ Over fifty years later the Hawke Labor Government pushed ahead with a proposal to introduce fixed terms for the House of Representatives despite being well aware that the Senate would reject such a proposal. When introducing the measure in the Senate, Senator Gareth Evans acknowledged that it was easy to dismiss Labor's proposal 'as essentially some kind of academic pipe-dream'.⁶⁸ The legislation eventually failed to make it through the Senate, as Evans expected, but it had allowed the Government to give publicity to the issue.

A slightly different case was the Fisher Government's proposal to reintroduce the six referenda that had been rejected in 1913, all of which sought to give more power to the Commonwealth Parliament. Introduced by Attorney-General W. M. Hughes and pushed to the stage where the polling date had actually been set, Hughes (by now Prime Minister) eventually backed away from the plan with a promise from the Premiers to hand over the powers he had sought for the duration of the war and for one year thereafter. As Fitzhardinge noted in his biography of Hughes, it suited the Prime Minister 'well enough' to back away at this stage rather than risk a damaging defeat in the actual referenda.⁶⁹

Other Political Factors

Apart from the impact of the federal party battle upon referendum campaigns, other political factors have affected attempts to amend the Constitution.

Leadership

There have been some referenda in which it has been claimed that the leadership of particular individuals has been important in explaining the outcome—typically a defeat of a particular amendment proposal. In 1951 the leadership of the NO case in the *Communists and Communism* campaign fell to new Labor leader, H. V. Evatt, a development that some of his party were uncomfortable with. The margin by which the proposal failed was narrow, and some wondered if the strong fight led by Evatt had played an important role in its defeat. Even the hostile *Bulletin* acknowledged the strength of his efforts:

Immediately the referendum was launched he took the initiative in the fight; he held it to the end, vigorously campaigning in every State, and by sheer personal earnestness and force making the other side's effort in general look careless and lethargic.⁷⁰

In the *Establishment of Republic* (1999) case, it has been suggested by Professor Clive Bean that the efforts of Kerry Jones, of the Australians for Constitutional Democracy, strengthened the NO case, whereas those of Malcolm Turnbull weakened the YES case.

Bean's work suggests that the combination of the two leadership effects may have cost the YES vote about 1.5 per cent, 'not an inconsequential slice of the margin'.⁷¹ A rather more subtle example was that of John Howard whose government sponsored the 1999 amendment legislation through the Parliament, yet who, according to Higley and McAllister, then 'used his position to undermine' its chances.⁷² Although many prime ministers have seen their hopes dashed in constitutional referenda, there is little doubt that the opposition of a prime minister would doom any attempt to amend the Constitution.

Strong Dissident Political Voices

Apart from party leaders, loud and persistent opposition can be important in defeating constitutional referenda—as constitutional historian Helen Irving has noted, bipartisan support for an amendment proposal is not enough to get it through.⁷³ There have been a number of examples illustrating her point. *Industry and Commerce* (1926) and *Parliament* (1967) each had firm major party support, yet they were both defeated, largely because of loud opposition from people determined to defeat each proposal. In the latter case, it was largely the work of two dissident Liberal Senators, Ian Wood (Qld) and Reg Wright (Tas), that overcame the 'nexus' proposal, despite the support of Prime Minister Holt, Country Party leader McEwen and Labor Opposition Leader Whitlam. Even if the Labor Party decided to support Prime Minister Howard in his 2003 suggestion of Senate reform, history suggests that opposition from parties and groups such as the Australian Democrats, the Greens and One Nation (let alone dissident Liberals concerned to protect the Founders' design) would be enough to defeat such a plan.⁷⁴

Political Context

For some referenda, it has been claimed that their defeat may have been due in part to their sponsorship in an inappropriate political context. Paul Hasluck has wondered if the *Post-War Reconstruction and Democratic Rights* (1944) referendum defeat was influenced by waning popular support for wartime controls and a concern about 'too much bureaucracy'.⁷⁵ Professor Robert Parker has noted that the firm rejection of the *Rents and Prices* (1948) attempt may also have been due to an increased unhappiness with such controls. This had become an important political issue, with the Liberal and Country Parties calling for the lifting of such controls. Parker believes that an attempt by the Commonwealth to gain control over rents and prices, 'clashed too roughly with current attitudes towards "controls" ', and was probably doomed from the start for this reason.⁷⁶

Similarly, Victorian Parliamentary Counsel, J. C. Finemore, criticised the Whitlam Government's sponsoring of the *Simultaneous Elections* (1974) proposal 'at a time when there was a life and death battle between the House of Representatives and the Senate'. He believed that this ensured the short-term political aspects of the measure would predominate over any intrinsic merit that it might have had.⁷⁷

State Activity

Parker also wondered about the variation in State votes in referenda. He suggested that differences in State political culture may account for such variations. He concluded that there must be different perspectives in the different States, suggesting that the reason for such differences must, in part, 'be sought somewhere in State politics'.⁷⁸ In illustration of this, American scholar Aaron Wildavsky has shown how the Coalition Government's sponsorship of the *Industry and Commerce* and *Essential Services* referenda in 1926 was undermined by State branches of the Nationalist and Country Parties, which opposed the further weakening of State governments.⁷⁹

Premier John Allan (CP), of Victoria, was one important opponent of the 1926 changes, a reminder that State Premiers have often been instrumental in leading opposition forces to amendment proposals. This has been the case even when changes are proposed by their own party, as in Allan's case. In 1944, the Labor Premiers of New South Wales (McKell) and Tasmania (Cosgrove) led determined opposition to the *Post-War Reconstruction and Democratic Rights* amendment proposed by the Curtin Government (ALP). Thirty-three years later, Queensland Premier Joh Bjelke-Petersen (NP) and Western Australian Premier Charles Court (LP) led the successful fight against the Fraser Government's effort to introduce simultaneous elections. Such cases seem to confirm Parker's claim concerning the importance of State governments in many referendum defeats.⁸⁰

When looking at the 1999 referenda, Mr Justice Kirby has drawn attention to what he called the 'small State error'. He suggests that a major factor in the defeat of these two referenda was the strong disinclination of the smaller States to support them.⁸¹ We can extend this to previous cases. As noted above (see p. 7), Tasmania has said YES to only 10 of the 44 amendment attempts, and the States of Queensland, Western Australia and South Australia have not looked very favourably on referenda over the last 50 years.

Extra-Parliamentary Activity

Support for, and opposition to, constitutional referenda is not necessarily limited to political party members. Wildavsky has made the point that on some occasions the explanation for a particular defeat can only be fully appreciated if the activity of other political bodies is understood. In 1926, for example, the fact that all three major parties supported the *Industry and Commerce* proposal in Parliament left unanswered the question as to why the proposal was defeated. Wildavsky's analysis noted the importance of many economic groups in the campaign and he came to the conclusion that:

The results of the 1926 referendum suggest that group sentiment, while certainly not infallible, was a far more reliable indicator of voting behaviour than Party alignment.⁸²

In a similar way, so many extra-parliamentary groups took a stand on the proposals of 1911, 1913 and 1919, that one cannot maintain that party activity was all-important in explaining the outcomes.⁸³ The defeat of the *Post-war reconstruction and democratic*

rights referendum in 1944 was probably influenced by the vigour of the campaign by the Constitutional League aided by other bodies such as the Citizens Vote No League (SA) and the Save Our State League, Freedom League and the Liberty Defence League (all WA).⁸⁴ A number of writers have made clear the importance of Aboriginal and other groups in pushing the *Aboriginals* referendum of 1967.⁸⁵

More recent examples of the impact of particular interests come from the Whitlam and Hawke Governments. In 1973 Bob Hawke as president of the ACTU led the union fight against the Whitlam Labor Government's *Incomes* referendum, an effort that was believed to have been important in explaining the very poor YES vote that was cast (34.4 per cent). In 1988, the *Rights and Freedoms* amendment—and in particular the religious freedom section—was strongly opposed by many church representatives and by independent schools, both fearful of the future of state aid to such schools. The Hawke Labor Government, apparently confident that the proposal would be praised by the electorate, was said to be stunned at the severity of the defeat.⁸⁶ The 69.2 per cent NO vote for this amendment is the highest negative figure returned in a constitutional referendum. The defeat of the 1999 *Establishment of Republic* referendum was very much influenced by the work of Australians for Constitutional Monarchy, a body formed in 1992 to 'defend the Australian Constitution, the role of the Crown in it, and the preservation of our constitutional head of state'.⁸⁷

The Voters

Interestingly, although a great deal has been said about Australian constitutional referenda, remarkably little research has been conducted into Australians' voting behaviour on these occasions—only the 1999 pair of referenda have been studied in any depth.⁸⁸ What follows, then, is a brief discussion of the most commonly cited factors that might help us understand the outcomes of s. 128 referenda, but with a marked absence of behavioural data. Among the commentators, the debate is split between those who believe the results reflect Australians' general awareness and good sense about constitutional matters, opposed by those who speak of voter ignorance and unnecessarily cautious voting behaviour. The truth may lie somewhere between these two points of view.

What can be said about the voters' responses to all of these pressures upon them at constitutional amendment time?

Ignorance?

Crisp is one writer who has criticised the voters for their 'ignorance' and their 'conservatism':

... objective assessment of constitutional problems as such is an abstract, complex, technical business for which the average citizen is usually ill-equipped and disinclined, while the problems may be so complicated as to be ill-suited to a simple and satisfying 'Yes' or 'No' vote. The temptation, therefore, is to 'play safe' and 'let things be'.⁸⁹

This view portrays the voters as puzzled by the wording of referenda, often confused by the complexity of the issue under discussion, and unable to make sense of the loud arguments and counter-arguments that swirl about them. Is it any wonder, asks Aitkin, that many 'shrug their shoulders and vote no'?⁹⁰

Opinion poll figures suggest that ignorance and uncertainty were important in 1999. Polling by ANOP uncovered an underlying 'ignorance of system of government, particularly about low profile and less newsworthy aspects—head of state, GG's role, the constitution'. ANOP noted that such a lack of knowledge meant that it was difficult for many people to comprehend 'the nature and extent of change under a republic'—and this applied even when an accurate description was given them.⁹¹ The fact that in 2003 some commentators quickly labelled John Howard's proposed change to the Senate as the 'wrong' change, leaves the way open to similar public confusion and rejection of any attempt to bring about such an amendment.⁹²

For writers with a different perspective, such criticisms tell us more about the views of those who see the Constitution as out-of-date and in need of major reform, than of the voters they criticise. For Professor Mark Cooray, it indicates that the constitutional reformists possess an elitist perspective—'that they, and they alone, know what is best', and that voters are well able to judge things for themselves.⁹³ This point was seen to have been very much a feature in the outcome of the two referenda in 1999 when there was a view that the republic issue, in particular, was simply a fad of the 'chardonnay-swilling elites'.⁹⁴

Discriminating Judgement?

The Australian Constitution is undoubtedly a complex document about which there are conflicting views, and presumably there are some voters who behave as Crisp and Aitkin have claimed. Having said this, the experience of certain referenda suggests that it may be simplistic—as well as patronising—to state that most voters do not understand what they are passing judgment upon. There have been several examples that have suggested an ability in voters to discriminate between questions being asked:

- *State Debts* (1910, 1928)

It has been argued that these referenda showed that people 'understood the intention' of these 'adjustments to fiscal relations'. In 1910 they voted clearly in favour of widening the Commonwealth's power to assist the States, and 18 years later they again voted solidly on the same theme. Gilbert has asserted that voters may not have known the detail but were well aware of the principles behind the two changes.⁹⁵

- *Social Services* (1946)

We have seen that most proposals to increase the power of the Commonwealth have been rejected. In regard to the *Social Services* referendum, however, voters seem to

have been able to ascertain that the proposed amendment had more to do with social matters than with Commonwealth power. Professor Jack Richardson is one who has criticised the 'impressively conservative' referendum voting record of Australians, yet he also noted that voters were alert enough to support this amendment because it offered Australians some financial benefits.⁹⁶

- *Parliament, Aboriginals* (both 1967)

It has been suggested that the Holt Government held these two referenda on the same day in the hope that voters' support for the one, would rub off on the other.⁹⁷ If this was the government's thinking, then it must have been disappointed. As already noted, the Aborigines referendum produced the largest YES vote on record (90.8 per cent), whereas the 40.3 per cent for the nexus alteration was the fourth-lowest YES vote to that time. Clearly, voters were able to distinguish between the two questions.

- *Establishment of Republic* (1999)

McAllister has been able to establish that voters were well enough informed of the republic issue to be categorised into four identifiable groups in the 1999 referendum. His work suggests that 31 per cent of voters were republicans who voted YES though preferring a directly elected head of state. About one-fifth of voters also voted YES but supported Parliament choosing the head of state. Of the NO voters, about one-quarter of the electorate was made up of those favouring direct election of the head of state, and 24 per cent were out-and-out monarchists.⁹⁸

A Federal Document

It may be misleading to consider only the total YES and NO results across the 44 national votes. If the 44 cases are analysed a different picture emerges.

The Constitution is a federal document, drawn up by regional politicians determined to protect the position of the States in their federal scheme. Voters in the Federation referenda were spoken to incessantly about the need to protect the place of their colony in the future union, and in the years since, Premiers have often warned voters of the need to protect their State's rights from Commonwealth incursion. Voters have often been asked to show support for their State, most notably in regard to constitutional amendments proposing to increase central government power. Their response has been spectacular—all 17 attempts to increase Commonwealth economic power have been rejected, as have four others dealing with non-economic powers. Two referenda suggesting Commonwealth involvement with local government (1974, 1988) have also failed. Constitutional amendment can thus be difficult if it strays outside the federal parameters that seem to apply as much today as they did in the late 1890s.

In their criticism of voter performance, writers such as Crisp have especially focused on the 17 economic powers referenda, for they see national legislation and the setting of

national benchmarks as essential to the development of the nation. This is particularly the case in a nation with a constitution that has been seen by former Prime Minister Whitlam and others as 'a political structure that is outdated, reactionary and resistant to change'.⁹⁹

If we look at different categories of amendment, however, the picture alters. There have been other questions dealing with the federal system, not just the type seeking to give more power to the Commonwealth. Two of three referenda trying to tidy up Commonwealth–State financial relations have been passed (1910, 1928), though a proposal to alter arrangements for the interchange of powers was defeated (1984). The only amendments seeking to increase Commonwealth power that have been passed were not typical of such questions. If we classify the *Social Services* (1946) and *Aboriginals* (1967) referenda as 'social', then we note that, together with the *Judges* (1977) example that dealt with retirement ages, three of five such 'social' referenda have been carried. The two that missed out were *Communism* (1951) and *Rights and Freedoms* (1988).

The other major type of alteration has dealt with what might be called 'machinery' amendments. In 1999, of course, the biggest 'machinery' amendment of them all, proposing to establish an Australian republic, was trounced. Just one of four dealing with electoral or referenda arrangements has passed—that giving Territorians the right to vote in constitutional referenda, though the issue of 'fairness' distorts this. The Senate has been the focus of seven attempts, six of them occurring in the past three decades. The *Senate elections* amendment (1906) and the *Senate Casual Vacancies* amendment (1977), were both passed comfortably. By contrast, five proposals that seemed to have been designed 'to reduce the unpredictability of the Senate in the affairs of the Government' (1967, 1974, 1977, 1984, 1988) have been defeated.¹⁰⁰ It is likely that the upper house will remain free from constitutional change in the future.

In summary, amendments perceived to weaken the federal system—such as perceived attacks on the Senate—are likely to receive short shrift, whereas attempts to repair the perennially-flawed finance chapter have been received sympathetically. Questions dealing with societal relations are considered closely. Finemore may have been close to the mark when he spoke of voters going to the referendum polling place 'with some consciousness of Australian history and politics'.¹⁰¹

Regional Factors

According to Professor Denis Altman, of Latrobe University, 'the greatest single obstacle to constitutional change in Australia is the conservative nature of the society itself'.¹⁰² Such claims are common but they remain to be proven. It may be equally accurate to describe Australia's record in constitutional amendment as being merely a reflection of various Commonwealth Governments being out of step with public sentiment in a large, federated country, for the variations in the geographical spread of votes can at times be very marked. Voter awareness can be assumed in referendum votes that suggest different perceptions have been held in different parts of the nation. Examples include:

- *Surplus Revenue* (1910)

The votes in this referendum suggested that voters appreciated the amendment's impact was likely to differ from State to State. The four smallest States were to benefit from the amendment, and it was probably significant that their combined YES vote was 55.4 per cent. New South Wales and Victoria, though, were to provide the funds to help the States cope with the expiration of s. 87, and their voters rejected the measure with a combined NO vote of 53.7 per cent. The final national YES tally was three States and a 49 per cent vote.

- *Communists and Communism* (1951)

This referendum was narrowly lost, with three States voting YES and an affirmative vote of 49.4 per cent. Writing shortly after the poll, former Country Party leader, Sir Earle Page noted that it was the vote of Sydney that denied the YES campaigners their victory: 'Can the vote of Sydney be allowed to crucify Australia's economic life and imperil the national safety?'¹⁰³ Page was correct in his assumption that there was a regional variation in voting in New South Wales, but was perhaps a little severe on Sydney voters, for it was in the five Hunter and Illawarra electorates that the opposition was most marked (Table 6):

Table 6: Margin for NO, 1951

	Margin (votes)	NO %
Australia (121 electorates)	52 082	50.6
Sydney (26 electorates)	58 012	52.8
Hunter and Illawarra (5 electorates)	70 433	66.9

- *Aboriginals* (1967)

Regional factors were clearly evident in the voting on this proposed amendment, for the NO votes were largest in those States with the largest Aboriginal populations. Within these States, the voters living nearest the largest populations of Aboriginal people tended to return high NO votes. Such voters probably rejected the call to give Aboriginal people their civil rights, and although they seem to have remained silent during the campaign, their votes indicating their feelings of resentment of the proposed change.¹⁰⁴

- *Simultaneous Elections* (1974, 1977), *Terms of Senators* (1984)

Tasmanians have long spoken of the importance of the Senate for the smaller States, and its voters have invariably opposed questions that seemed to threaten the place of the upper house. In the three referenda that dealt with simultaneous elections, the Tasmanian NO vote was far higher than in the other States. In 1977, for instance,

although the national NO vote was just 37.8 per cent, the NO vote in the island State was a massive 65.7 per cent.

- *Fair Elections* (1988)

The federal Coalition parties opposed this amendment, which would have required equality of electorates in State as well as Commonwealth elections (though not for the Senate). Despite this, the Queensland division of the Liberal Party, which had experienced many difficult years under the Bjelke-Petersen malapportionment operating in that State, was very sympathetic to the change. Although all States rejected the proposal, the 44.8 per cent Queensland YES vote was clearly the highest State return and was well ahead of the national total of 37.6 per cent.

- *Establishment of Republic* (1999)

As in the *Aboriginals* referendum, the republic referendum revealed a clear difference between different regions as noted by Michael Kirby.¹⁰⁵ Figures produced by Gerard Newman of the Parliamentary Library indicate this quite graphically:¹⁰⁶

Table 7: Location of YES votes, *Establishment of Republic* (1999)

Metropolitan divisions	50.7
Provincial divisions	40.4
Rural divisions	36.2

Voter Satisfaction?

Referendum returns may have also reflected a general acceptance of the political system, and a suspicion of efforts to alter it.

Table 8: State YES Votes

Referendum years	States voting YES (%)
1906–13	51.5
1919–37	42.9
1944–99	32.7

Table 8 indicates that in the eleven referenda that were held before 1914, we find that in the 66 separate State votes there were 34 (51.5 per cent) that were YES votes. In the seven between-wars referenda, the YES tally fell to 42.9 per cent of the State tallies. In the 24 referenda held since 1944, fewer than one-third (32.7 per cent) of the State totals have registered YES votes. Looking at this in a different way, in the first 22 referenda (1906–46) an average of three States voted in support of the each amendment. By contrast, the second 22 (1948–99) produced an average of just 1.7 States in favour of each change. In

the last eight referenda to be held (1984–99), only two of 48 State votes have been affirmative. Some see this as voter conservatism; equally it may represent voter satisfaction with the Australian political system coupled with a growing cynicism with politicians.

In Conclusion

In his seminal *Law of the Constitution*, A. V. Dicey stated that if a national constitution was written so as to be changeable by amendment, then it should be 'capable of being changed only by some authority above and beyond the ordinary legislative bodies'.¹⁰⁷ For a majority of Australia's Constitution-writers of the 1890s, including Dr John Cockburn of South Australia, this meant involving citizens in national referenda: 'On any question so vital as the amendment of the constitution the people have a right to be consulted directly'. Not all agreed. Queensland's Sir Samuel Griffith asserted that 'millions of people are not capable of discussing [constitutional] matters in detail', and stated his preference to have amendments approved by conventions of politicians.¹⁰⁸

The history of Australia's efforts at constitutional amendment suggests that, although 'millions of people' might not have discussed the various constitutional amendments 'in detail', their voting record has indicated an adequate awareness of the relevant constitutional principles involved in the 44 referenda. Australian voters have been cautious, and conservative at times, but they have shown their willingness to accept change when persuaded that such change is sensible or right. Social issues, for instance, always seem to have a reasonable chance of being accepted, as have amendments designed to tidy up anomalous machinery matters.

On the other hand, Australians will not alter aspects of the federal system of government if they perceive its basic structure to be under threat, nor will they seek to weaken the position of the Senate in any way. They need a lot of convincing to tamper with the work of the Constitution's founders.

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Appendix: s.128 of the Commonwealth Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approved the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, 'Territory' means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.