

Making Sense of the Referendum*

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Introduction

This is the second of three presentations that I am making today on the referendum. The other two are part of the great experiment in public participation beginning today in Old Parliament House. This experiment goes by the somewhat grand title of *Australia Deliberates*. It is sponsored by the *Australian* newspaper and ABC TV and run by a non-profit organisation new to Australian opinion polling called ‘Issues Deliberation Australia’. The model on which this exercise draws is the brainchild of the Centre for Deliberative Polling in the United States, under the direction of democratic theorist James Fishkin, who wants to give citizens opportunities to debate politics reasonably, unlike so many of their elected representatives. Happily for me, the Australian National University is also involved as a sponsor.

This new form of opinion polling reflects a fresh approach to opinion gathering, which is to get together a large sample of around 350 Australians and to walk them through the options on offer and to listen to the people as attentively as possible. The heart of the matter is the structured give and take between the body of 350 and the referendum activists, so that the sample can have time to consider the deeper implications of the alternatives. It is qualitative research into community attitudes done on a grand scale. The weekend will provide an opportunity for those in the sample to stand back from their daily responsibilities and talk through the issues, taking note of the input of the key players—but also of outside experts, such as Sir Ninian Stephen and his group of neutral experts already advising the government, who can provide a reality check on the claims of the main contestants.

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Australia Deliberates will go live to national television and bring back memories of ‘ConCon’, the people’s convention, held also in Old Parliament House in February 1998. Rest assured that you can follow the developments and watch through ABC TV how our sample citizenry, a kind of people’s parliament, work their way through to a fully deliberated and considered view of the options. At the end the group will vote, registering Yes or No to the two referendum questions. Now the final view might change from the initially recorded views; and part of the object of the exercise is to document such changes as deliberation matures. The past experience of such deliberative polls is that opinions and inclinations move, as the participants think through the details of the policy options in their dreamland of deliberation. Their conclusions might well preview the final count in two weeks time. Indeed, in one model of a perfect world, their conclusions might be a substitute for the sort of unproductive public debate usually associated with Australian referendums. We might say that their considered views represent what Australian voters as a whole would arrive at if—and it is a big if—they had access to all the relevant information and a chance to deliberate at such length.

My two other presentations today are directly on the substance of this 1999 referendum, where I have been invited to speak on behalf of the Yes case. I want this Senate Lecture to rise above the partisan fray and to focus on process as distinct from the substance of the referendum. And in many ways, the distinctive process of this referendum is highlighted by *Australia Deliberates*. This is ‘ConCon’ without the politicians, or at least with the politicians armed with their voice but not a vote. Only the sample citizenry get a chance to vote at the end of the proceedings. The large interest in this experiment, particularly among the 350 participants, suggests that *Australia Deliberates* seems to answer the community’s appetite for more and better information—and an environment conducive to genuine political deliberation.

I want first to review the Australian framework for managing referendums, and to put the 1999 referendum in context: as not just the referendum to end the century, or even to end the millennium, but the referendum to end all referendums, at least as we in Australia have traditionally conducted them. My theme is that the 1999 referendum will break the mould of Australian referendum practice and that future referendums will be more open and participative—but also less predictable and manageable by elected representatives than those of the past.

So be warned: I take issue with the conventional wisdom among referendum experts that we are yet again facing a wrecked referendum—collision between voter misunderstanding and partisan misrepresentation. My story is one of hope and of the promise of more open community deliberation arising from this referendum.

Preliminary disclosure

First an important disclosure: I should acknowledge my publicly stated position on this referendum. Earlier this year I edited and contributed to a book called *The Australian Republic: the Case for Yes*.¹ The book draws on papers presented originally in February this year at the first anniversary conference to celebrate the 1998 ‘ConCon’, which is the source of the two referendum questions now before us.

¹ The Federation Press, Sydney, 1999.

I want to stress that the contributors to the conference and the book include many direct-electionists, including Australian Capital Territory Chief Minister Kate Carnell. Quite a few contributors to the book (e.g. Tim Costello, Dorothy McRae-McMahon) have gone on to form the 'Yes ... and More' group which, while properly acknowledging the great contribution of the Australian Republican Movement (ARM) to Australian republicanism, seeks to go beyond the limitations of the minimalist model. Not everyone is convinced that all direct-electionists are sincere or genuine republicans. Such suspicions have always been around during referendums. Indeed, at the time of the pre-Federation referendums to accept the draft Constitution, some clever opponents of Federation pledged their undying commitment to unification and abolition of the states, simply as a scare tactic to hold the tide against Federation. They lost out, but the spoiler strategy is ever-present at referendum time.

So for the sake of fairness, I make it clear that I already do have a publicly stated position which is pro-republican, pro-Yes, and not necessarily opposed to the drive for direct-election of the President. My task today is different: to examine aspects of the referendum process and to warn you against accepting the conventional wisdom that the problem with referendums is the negativity of the people. Critics charge that Australian voters and the Australian voting system are biased against change. The critics are wrong. The real reason for Australia's record of conservatism at referendums (with a rejection rate of 80%) is not that the people are apathetic or ignorant but that they resent governments that *presume* they are apathetic or ignorant. The record of referendum failure reflects more on the lack of direction of governments proposing referendums than on the limitations of voters.

Grounds for hope

I am convinced that the process of getting to the referendum vote is just as important as the substance of the end-result. To me, one of the most valuable results of any Australian referendum is the referral process itself, the process of community deliberation that begins, for most referendums, with the reference from Parliament and occupies the uncertain mind of the electorate through to the final vote. Recent New Zealand experience with referendums over the introduction of proportional representation shows that even in the face of bipartisan agreement among the major parties *not to support* reform proposals, voters can overcome that cold neutrality with their own hot enthusiasm.²

Let me explain why I am very hopeful about the 1999 referendum. I'm not thinking so much about the merits of the outcome as the merits of the process itself. I see the 1999 referendum as the one that will help break the mould of our traditional approach to constitutional referendums. The very messiness of the process before and after last year's 'ConCon' makes this referendum special. This messiness has upset the tidy plans of both the Yes and No camps. To me, messiness means business: not business as usual but the business of democracy which every referendum ought to celebrate. Whatever its defects, the 1998 'ConCon' was a spur to civic engagement and that itself is a very substantial change to democracy in Australia. The experts will tell you that Australian voters are disengaged from the hard grind of constitutional change, and that Australia

² Richard Mulgan, 'Defeating Defeatism', in John Uhr (ed.) *The Australian Republic*, op. cit., p. 180.

has a sad reputation as the ‘frozen continent’ when it comes to popular endorsement of constitutional change. Nothing much has changed in one hundred years of Federation, they say: only eight formal changes in nearly one hundred years. This view is frequently heard within the Labor Party. This is not surprising, since Labor has only ever secured one referendum success, in 1946, from its twenty-four attempts since Federation. Despite this record, I think this reputation for lazy ignorance is mistaken. If voters detect this prejudice among reform proponents then we can expect something of a backlash against the republic.

Australians are in fact great innovators, with a reputation as early adopters of technological products and commercial innovations. And of course many political innovations have taken their place in the international institutions of effective democracy: think only of ‘the Australian (i.e. secret) ballot’, of compulsory enrolment of voters and then later compulsory voting, or of the Senate system of proportional representation, or indeed the Senate lectures, with the remarkable legacy of over thirty-three volumes of *Papers on Parliament* containing ten years of Senate lectures, with this being the ninety-seventh lecture.

Those who allege that the public can not deliberate competently should remember that the public can certainly discriminate, in the sense of pick and choose among two or more referendum questions, approving some while rejecting others. This targeting takes some real effort in decision-making, i.e. real deliberation. Since Federation, there have been thirteen occasions (this will be the fourteenth time) when voters have faced two or more referendum questions. The record shows that there is always a difference in the levels of Yes and No across the different questions. The classic case is 1967 which saw the largest recorded Yes vote, 90% in support of giving the Commonwealth power over Aboriginal affairs, by the same voters who at the same referendum gave just 40% support for a proposal to abolish the constitutional nexus between the size of the House of Representatives and the Senate. Similar differences were recorded in 1977 and before that in 1946: both important cases when voters approved some but not all proposals put to them. The Prime Minister, John Howard, is one of those who hopes that the same may well be the case in 1999.

I think the real reason why Australian voters have in the past overwhelmingly voted against proposals for constitutional change can not be reduced to the fear of change or lack of interest in change. The real reason is that Australian voters are suspicious, and rightly so, of governments that presume that voters are change-resistant and are incapable of making an intelligent assessment of the merits of government proposals for change. Australian voters want to know more, not less, about proposals for change. The traditional civic disengagement in past referendums makes some sense when seen in the context of distrustful governments which have not had much confidence in the electorate’s civic capacity to make sound judgments on constitutional change. Governments get it wrong. At most referendums, governments shy away from providing much-needed information for fear that voters will only get confused and vote against change, staying with the devil that they know. To cite one eminent referendum authority:

The failure of constitutional reform in Australia ... is not the product of an impossible procedural requirement in section 128, but a failure of political persuasion, of education of Australians

about their Constitution ... and of a party system that fails to punish misleading anti-referendum campaigns conducted without real reference to the merits of particular proposals.³

This referendum will be a watershed because it will change the way we do referendums. In the past, the role for the people was meant to be a passive one as determined by governments. But as this referendum has already demonstrated, the Australian electorate wants a more active role. Voters want their voice heard. This does not necessarily mean that the people want to rise up *en masse* as noisy players in public policy debate. The professionals who study public opinion, particularly qualitative investigators like Hugh Mackay, suggest that what voters mean when they protest that ‘government is not listening’ is not simply that they want their turn at the microphone. One of their messages is that they want governments to start to talk more openly in their presence about the wider range of policy options that voters suspect governments are reluctant to debate publicly.

The persistent demand for direct election is revealing. The conventional wisdom from the political elites is that this hankering for direct election is further proof that voters are confused and probably incapable of focusing on the issues at hand. I disagree. I think that voters are focusing on what really matters, which is where they fit in, or where they should fit in. This is not the occasion for me to canvas the merits of direct election. Professor Brian Galligan has done that excellently.⁴ I interpret the persistently high popular support for direct election as evidence that the people are yet to be convinced that either of the two camps has risen to their responsibilities as providers of public argument. Let me put forward a minimalist position on popular support for direct election: that voters are inclined to an Australian republic but they are gripping on to direct election as a hostage or bargaining chip, which they will not release until the political elites open up the republic to the public. Whether that is through direct election of the President or some form of special purpose electoral college in place of the proposed nominating committee is an open question.

Deliberative deficits

Australia faces something of a democratic deficit: I call it our *deliberative deficit*. I want to show that this deliberative deficit goes back a long way in our political system. Our system of parliamentary government is compatible with deliberative democracy but it does not always deliver deliberative democracy—sometimes not even democracy! In computer language, the political system has something like a ‘default position’ of traditional preferences to which it retreats unless overridden by sustained public pressure. This default position tolerates but is far from friendly to community participation. Opening up the deliberative process to public participation takes considerable public effort. The system ‘defaults back’ to its traditional preferences whenever public pressure eases off.

³ James Crawford, ‘Amendment of the Constitution’, in Gregory Craven (ed.), *Australian Federation*, Melbourne University Press, Carlton, Vic., 1992, p. 192. See also R. Miles, ‘Australia’s constitutional referendum: a shield, not a sword’, *Representation*, vol. 35, no. 4, pp. 237–48.

⁴ B. Galligan, ‘The Australian Republic: a defence of popular sense’, *Quadrant*, October 1999, pp. 46–52; cf R.S. Parker, *The People and the Constitution*, Monograph No 1, Australian Institute of Political Science, Sydney, 1949.

The aim of a deliberative democracy is not really consensus, although more often than not consensus will emerge as a valuable outcome of a deliberative process. The real aim is to encourage public dialogue, including the airing of public disagreements, as a precondition of effective government decision-making.⁵ The aim is to protect the rights of all citizens, including minorities and dissidents, to participate and be heard in the halls of government. Think of this focus on the argumentative side of democratic politics as a defence of *civil disagreement*, a few steps shy of *civil disobedience*. Civil disagreement is one of the very important forms of political deliberation. The rules for public deliberation should encourage the give and take of open argument, even while protecting the restraints of civility. A deliberative democracy tolerates civil disagreement because it knows that good decision-making in government should be anchored in a process of shared deliberation with open discussion of options and alternatives. Civil disagreement is debate without the name-calling and imputation of motives that has characterised this referendum—with all its ‘twisting and turning’, to quote the disapproval of former deputy Prime Minister Tim Fischer when distancing himself from the disappointing antics of his own No side.⁶

So what’s the link to the referendum? To my mind, the 1999 referendum provides an unusual opportunity to reconsider the design of deliberative democracy in Australia. I can do this by abstracting from the particulars of the Yes/No contest and by reviewing the general place of referendums in Australian democracy.

Australia’s distinctiveness

The first element in standing back is to realise just how distinctive Australia is in having national referendums to change the Constitution. The Australian Constitution provides that the Constitution can be formally altered or amended only through popular approval of any proposed changes at a national referendum. The Constitution can be *informally* changed through the slow evolution of what are called constitutional ‘conventions’ or shared understandings relating, for example, to the powers of the Governor-General or of the Senate. Another avenue of informal change is through calculated government (or parliamentary) decisions to turn a blind eye to certain provisions in the hope that they can be regarded as outmoded or exhausted provisions or as ‘dead letters’. But the main point is that *formal* constitutional change can not proceed without the express approval of the Australian people.

Few other democracies have such a prominent and direct role for the people in the process of constitutional change. The United States for instance requires proposed amendments to arise either through a two-thirds vote in each House of Congress or through the initiation of two-thirds of state legislatures. Ratification is by approval of three-fourths of the states, either through their legislatures or by special conventions (where the people can play their modest part as electors) but not by the people through direct determination of the outcome. The recently repatriated Constitution Act of Canada provides for amendment by resolution of national and provincial parliaments: first through a resolution from the two Houses of the national parliament, then

⁵ See John Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Cambridge University Press, Melbourne, 1998.

⁶ *Australian*, 20 October 1999.

supported by resolution of the parliaments of two-thirds of the Canadian provinces. (I note in passing that amendment to the office of the Queen or the Governor-General requires the unanimous consent of all provinces.) But the main message is clear: approval of constitutional change is a matter for elected politicians—not the people as a whole.

Look at the contrast with Australia. For a start, Australian governments are compelled to obtain popular approval. And because of compulsory voting, voters are compelled to go to the polls: Australia is again distinctive in its very high voter turnout at referendums compared with other democracies. Section 128 of the Constitution provides a very demanding test of popular approval. A successful referendum requires the famous ‘double majority’ test: a *national majority* of voters plus a *federal majority* of states (i.e. four of the six states). This second or ‘federal majority’ was loosely modelled on Switzerland, a pioneering federation where formal constitutional change required popular approval at a national referendum plus the approval of a majority of cantons.

Think what a special opportunity the 1999 referendum provides. We know, for instance, that Prime Minister Howard is opposed to the republic, so that a Yes vote could not be interpreted as ratifying the Prime Minister’s preference; just as a No vote for the proposed preamble could not be seen as ratifying the Prime Minister’s preference. The term ‘ratification’ does not do justice to the power at the disposal of the people. What goes for the Prime Minister goes for Parliament generally: this referendum shows just how limited is the conventional wisdom which holds that the practice of referendums is reactive rather than proactive—simply ratifying proposed laws that have already won support within the elite of elected representatives. The 1999 vote might turn around the conventional wisdom because we could see the Prime Minister in effect having to ratify a popular vote in support of a republic, or having to shelve his personal support for a preamble on the basis of popular rejection of his model preamble.

The referendum framework: foundation and scaffolding

But all these fascinating pressures for change rub up against the traditional system for managing referendums, with its in-built deliberative deficit. To my mind, there are structural defects in the way we run referendums. Some of these defects are flaws in the constitutional foundations and others are limitations in the ordinary rules which Parliament has adopted for the machinery of referendums. I want to highlight aspects of the deliberative deficit as it exists in both the constitutional foundations and in the scaffolding erected for the machinery of referendums.

Let’s start with the constitutional foundations. The last words of the Australian Constitution are those detailing the rules for referendums. In the records of the 1890s constitutional conventions one repeatedly finds our constitutional framers declaring that this final provision dealing with constitutional change was one of the most challenging tasks of constitution-making. As was said by Isaac Isaacs at the Constitutional Convention in Melbourne in 1898: this provision is ‘one of the most important—in many respects the most important—in the bill’ (i.e. the draft Constitution). Or again by Isaacs: ‘We may make mistakes in other parts; this is our means of correcting those mistakes.’⁷

The eventual provisions of section 128 did not emerge without hard struggle: the right for referendum had to be fought for, against well-argued opposition in defence of the rights of elected representatives, either in Parliament or in special conventions, to decide things on behalf of the community. To appreciate just how special is this right to referendum, let me take you back in time to the 1890s constitutional conventions and illustrate the range of objections to the practice of referendum, and the rather edgy accommodation that underpins this crucial provision of the Australian Constitution.

The friends of referendums had to overturn at least three deeply-held prejudices against referendums which illustrate the default position of our political system. I stress that the system is open to deliberative democracy, but that in the absence of repeated public pressure the system defaults back to its position of diminished interest in community deliberation, thereby displaying the deliberative deficit.

Referendums will undermine responsible government

There was universal acceptance of the need for some sort of change mechanism but the initial preference was for something along the American lines with indirect participation through elected conventions. What is worth noting is the depth of opposition and resistance to the idea of popular referendum, even from such eminent framers as Edmund Barton, Australia's first Prime Minister, who stated that the principle of referendums 'tends to eat away at the foundations of responsible government.' Indeed, Barton feared that the rise of referendums threatened 'rendering responsible government a myth'.⁸ This is a classic expression of the diminished expectation for popular participation and community deliberation held at the beginning of Australia's constitution-writing decade. This very traditional view was that responsible government conferred power and responsibility on the government of the day, and the political role of the people, or at least those lucky enough to be invited to share in the franchise, was to stand back and watch between elections.

There were champions of wider public deliberation who worked hard to reduce the deliberative deficit of the emerging national political system. The progressive view was put early by Alfred Deakin, who warned the opponents of referendums that Australian parliaments were 'adopting the principle of the popular vote more and more into the present framework of representative and responsible government.' The referendum practice can be 'an assistance to Parliament if they desire to obtain distinctly and without the introduction of foreign matter the verdict of the people on any particular question.'⁹ Note this emphasis on turning directly to the people 'without the introduction of foreign matter'. Deakin appreciated that the success of referendums depended on the ability of Parliament to keep the arena of public debate free from 'foreign matter', particularly the sorts of misleading irrelevancies frequently found in parliamentary debate (e.g. personal imputations about the hidden motives of opponents that have recently disgusted Tim Fischer).

⁷ *Official Record of the Debates of the Australasian Federal Convention*, 9 February 1898, pp. 716, 719.

⁸ *ibid.*, p. 751.

⁹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 April 1891, p. 896.

Right from the start, referendum proponents like Deakin feared that referendums would work only if elected representatives gave the people an effective opportunity to deliberate and arrive at what he interestingly called their ‘verdict’. Just as a jury’s verdict is preceded by an impartial process of cross-examination of disputed evidence, so too the people’s verdict at a referendum should be preceded by some sort of impartial process of weighing the pros and cons of each proposal. Deliberation literally means weighing up options, as on a set of scales.¹⁰ As I shall now illustrate, many of our constitutional framers conceded that referendums were a fact of life but they doubted that the electorate had the intellectual capacity to play an active as distinct from a passive part, simply stamping their approval on policies already agreed on within Parliament. Those who warmly supported the principle of referendum began to search for new ways in which Australian citizens could be assisted to participate positively: by protecting public deliberation from the sorts of debating practices common in Parliament and also by providing citizens with impartial information on the core arguments of the Yes and No case surrounding referendum proposals.

Referendums will undermine the role of Parliament

A second aspect of the deliberative deficit is the belief that Parliament should restrain the impulse to referendum through rules designed to keep matters alive within Parliament until they are ready for popular ratification. In this conservative view, referendums should be seen as passive ratifications of the results of parliamentary deliberation and not as opportunities for the community to reopen the policy deliberation. In contradiction, proponents of referendums argued that Parliament should have few restraints and should certainly not restrain the referendum impulse until a parliamentary consensus has emerged. Proponents did not want to confine referendums to policy preferences already determined by elected members, and so they resisted the imposition of barriers which would confine referendums to formal ratifications of policy preferences already settled within Parliament.

An example of this aspect of the deliberative deficit was the framers’ debate over the size of the parliamentary majority that should be required for the passage of a referendum proposal: should it be a simple majority or some sort of super-majority? Proponents of referendums wanted an ordinary majority; opponents of referendum wanted a super-majority to check the impulse for rash referendums.

The framers made two fateful decisions that opened up the possibility for wider public deliberation. First, they ensured that the Constitution did not put the bar too high, certainly not as high as the US Constitution’s requirement that a proposed amendment must obtain a two-thirds majority in each House of Congress. The Australian Constitution requires that a proposed change normally requires an absolute majority in each House. But our framers made a second fateful decision. The Constitution also permits either House to initiate a referendum if the two Houses of Parliament are deadlocked over three months. Under such conditions, the initiating House may request the Governor-General to submit a referendum question to the people. At first glance this looks very similar to the provision in section 57 of the Constitution which regulates the procedure for resolving deadlocks over ordinary legislation which leads to double dissolutions. But there is one very important difference: unlike the case in section 57

¹⁰ Uhr, *Deliberative Democracy in Australia*, op. cit., pp. 12, 22, 93–94.

which really only deals with the rights of a government when facing an obstructive Senate, here it is the case that section 128 protects the right of the Senate to go to the people.

What would happen if the Senate did not pass a government's referendum proposals? This was a real possibility in 1999 given the determination of the Opposition parties to prevent the passage of Prime Minister Howard's original Preamble. The only time that the Senate has tried to put a referendum over the protest of the House of Representatives was in 1914 when the conservative Cook government ensured that the Governor-General declined the kind offer from the Opposition or Labor Party-controlled Senate. And the only time that the House of Representatives proceeded to hold a referendum on a proposal that had been refused by the Senate was in 1974 when the Whitlam government unsuccessfully tried to get voters to approve changes which would have broken the famous nexus in the Constitution regulating the relative size of the two Houses.¹¹

There is a remarkable alignment between promoters of the referendum like Isaacs and Deakin, who also demonstrate their support for other forms of popular legislative control like the citizens' initiative and the right of the states as a group to initiate referendums. Indeed, conservatives demanded to know whether the right of an initiating House to seek a referendum was really a back-door form of the initiative. The conventional wisdom of the time, and perhaps of our time as well, was nicely stated by O'Connor who protested: 'This proposal strikes at the very root of our system of government, wherein the people admit that they have not the experience, the intelligence, or the time to govern themselves.'¹² O'Connor went on to become a prominent justice of the High Court but at this earlier time in his career we find him getting the attention and support of his peers with his explanation of to whom he was attributing the deliberative deficiencies: 'I will not say to the ignorant but to the less enlightened electors'—less enlightened compared to the few who are, if not the elect, then at least the elected.

The dual majorities are deadlocks on democracy

A third aspect of the deliberative deficit in our constitutional foundations for referendums is the thinness of support for the dual majorities approach to securing a referendum majority. As I mentioned earlier, approval of a referendum proposal requires the dual majority test: obtaining a national majority, which is a majority of votes on an Australia-wide basis; and also what was originally termed a federal majority, which is a majority of the votes in a majority of the states. My comments on this dual majority requirement will be comparatively brief, as this aspect has attracted extensive commentary in the referendum literature, and in the Australian analysis of the institutions of federalism.¹³ What has not been acknowledged is the original design for deliberation that informs the choice of the dual majorities.

¹¹ G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament, 1901–1988*, Melbourne University Press, Melbourne, p. 243.

¹² *Official Record of the Debates of the Australasian Federal Convention*, 9 February 1898, p. 746.

¹³ See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976 (originally published 1901), pp. 985–995.

Looking more generally at this federal dimension to referendums, one can see the provision for the double majority in negative terms: as a sign of the power of states' rights to block national majorities. My own view is that one should look more positively and see the double majority requirement through the eyes of the original framers, as a rule designed 'to encourage public discussion' and as a safeguard to ensure the 'maturity of thought in the consideration and settlement of proposals leading to organic changes.'¹⁴ Thus again we see the role of referendums in facilitating deliberative democracy outside the usual framework of parliamentary rule.

Thus far five referendum proposals have won a majority of national votes but failed to secure a majority of states. It is certainly possible that this second requirement could itself be altered through a referendum, as the Whitlam government unsuccessfully attempted to do in 1974, when it sought to reduce the number of states requiring a popular majority from four to three—half rather than a majority of states. If the majority was reduced from four to three, then three additional referendum questions would have been carried: two for Labor in 1946 and one for the Coalition in 1977.¹⁵

But what counts for a majority at the state level? It is a majority of those voting, which before the introduction of compulsory voting could have resulted in a minority of those entitled to vote. But there was an even murkier problem. What happens when two of the original states (South Australia and Western Australia) have women's suffrage? Does that give those two states some sort of unfair advantage over the others, a kind of double-dipping system which might give them disproportionate influence when it comes to counting a national majority? (A contemporary version might be a protest over the rights of territory voters to participate in referendums, on the ground that our votes might give an unfair boost to a national majority, even though we are not strictly part of the federal compact.) The same framers who finally accepted the requirement for a majority of States lost their nerve over women's rights. On the dark side of the Constitution we find included in the referendum provision one of the document's few explicit references to women's rights.¹⁶ Don't go searching just yet: the words used are not quite so direct, which is understandable when we discover this as yet another instance of the deliberative deficit.

Our constitutional framers knew that at some time after Federation, the national Parliament would adopt a uniform national electoral law for elections and referendums. But while they were prepared to allow the two progressive states to permit women to vote at elections for members of the House and the Senate, they held the line (or lost their nerve) when it came to referendums. The framers included in the third paragraph of section 128 a provision that is still there but now (I hope) a dead letter, which defines the constitutional situation until such time as Parliament enacts a national uniform suffrage. This arrangement holds that in any state with 'adult suffrage', votes for and against a referendum proposal shall be cut by one half, to bring them into line with the

¹⁴ *ibid.*, p. 988.

¹⁵ Scott Bennett, *Constitutional Referenda in Australia*. Research Paper No. 2, Commonwealth Parliamentary Library, Canberra, 1999, p. 18.

¹⁶ See section 128, paragraph four.

electorate of the other lesser states. Instead of providing for constitutional protection of adult suffrage, the constitutional framers bent the other way to protect the rights of those states without adult suffrage. Not that much harm came of this provision: uniform franchise for elections and referendums was guaranteed in 1902, well before the holding of the first referendum in 1906.

Deficit reductions: four attempts to reform referendums

So much for weakness in the foundations: now for the instability in the scaffolding. The deliberation deficit does not stop with the adoption of the Constitution. It is also evident in the rules for running referendums that Parliament has developed over the years since Parliament first made rules for the administration of referendums in 1906.

Parliament tried four times over a decade from 1906 to 1915 to erect scaffolding which would give voters every opportunity to make an informed choice at referendums. In 1906 (unsuccessfully) and again 1912 (successfully), Parliament debated the merits of an information pamphlet canvassing referendum arguments. Parliament knew that public deliberation must of necessity focus on the contending arguments and not simply the slogans of today or the background issues of yesterday. But Parliament could find no solution to the problem of editing the contending arguments into a state fit for public consumption. What makes for political nutrition? What forms of political argument or what forums for argumentation are healthy for a democracy? It did not take long for the friends of referendums to see that much of the parliamentary wrangling over referendums is unpalatable; some of it is indigestible; and a bit even poisonous—debilitating our democratic capacities.

The adoption of the Yes/No pamphlet illustrates the larger sweep of issues at work in Australian referendum practice. The friends of referendums were bold and ambitious: they wanted to bring voters into direct contact with the core arguments in constitutional contention. I emphasise that this term ‘argument’ is the very term that found its way into the referendum law.¹⁷ How can legislators ensure that voters are provided with genuine ‘arguments’—credible reasoning as distinct from clever but specious rhetoric? Parliament initially searched for some convenient external authority, such as a High Court judge, who might edit and credential the contending cases. When that option collapsed, they turned to authorities closer to Parliament, such as the parliamentary Clerks or the Chief Electoral Officer. And when that option collapsed, they finally dropped the search for external authority and turned directly to the authors of each case, the internal authorities, allowing the Yes and No partisans to resort to whatever form of ‘argument’ they thought appropriate.

There were two more steps Parliament took in 1915 which completed the original referendum scaffolding: the first was an unsuccessful final attempt to bring order and rationality to the Yes/No pamphlet; and the second was the fascinating and successful innovation of compulsory voting, a novel safeguard against voter misunderstanding and partisan misrepresentation. Think of this adoption of compulsory voting as an abandonment of the *supply focus* (trying to supply appropriate materials to help voters) and the adoption of a *demand focus* (trying to put in place incentives to stimulate demand among voters to get them interested in finding for themselves information

¹⁷ See the current provision in *Referendum (Machinery Provisions) Act 1984*, section 11.

relevant to their referendum responsibilities). By 1915, the system as we now know it was pretty much in place.

Let me now walk you through the construction of this referendum scaffolding in more detail. It is a wonderful case-study of a democracy attempting to promote argument in place of mere contention.

The first attempt: the 1906 legislation

Right before the first shot was fired in the original referendum campaign, the initiating government was anticipating, quite correctly, that one of the basic issues was going to be the credibility of competing statements about the likely effect of any set of proposed changes. The Deakin government's aim, again altogether correct, was to inform the electorate with impartial advice about what would change under any given referendum: impartial here meaning free from party-political wrangling involving all sorts of allegations about the partisan purposes of disputed policy proposals. As Attorney-General Isaacs put it during the 1906 debate: 'Our object is to insure that when a change of the Constitution is proposed, the people shall have the matter placed before them in the full light of day, and with the best knowledge as to what they are being asked to do'. The issue was not a dispute over whether proposed changes might or might not be constitutional but over the appropriate means 'to insure that the people shall understand what they are being asked to do.' Isaacs held that the aim of the government was to ensure 'that an unprejudiced and unbiased statement shall be placed before the people.'¹⁸

The provision was rejected. There were good reasons to go slow with this attempt at 'designer democracy' but there were also poor reasons for this rejection of reason in politics. The aim was to provide voters with direct access to the core arguments for and against referendum proposals. The best instincts of the opponents sensed that democratic politics can not and maybe should not be purified of partisanship; the best instincts of the reformers sensed that democracy at its best is a contest of arguments—and remember that the original legislation wrote into law that the aim was to help voters understand the contending 'arguments'.¹⁹ Perhaps one lesson from the initial defeat of the search for a pamphlet of impartial argument should have been that a better solution would be to think of *forums of argumentation* (some sort of specially convened deliberative assembly, anticipating *Australia Deliberates* if you will) rather than *forms of argument* in the black letters of a pamphlet.

Those who favoured the court or a justice made the strongest arguments to the effect that 'Surely the people are entitled to the very fullest information with regard to these very important questions' by resort to an authority 'entirely beyond the reach of party considerations' (Mr McColl). The opposite was put by those who argued that the people 'may be allowed to judge for themselves of the effect of proposed alterations' (Mr Mahon).²⁰ One common view held by elected members was that it is unrealistic to expect too much fine reasoning from electors who could not be expected to contemplate what Mr Glynn called 'all sorts of Chinese puzzles' that one finds in constitutional

¹⁸ CPD (*Commonwealth Parliamentary Debates*), 4 September 1906, pp. 3890–3892.

¹⁹ *Referendum (Constitution Alteration) Act No. 2, 1912*, section 2.

²⁰ See CPD, 4 September 1906, pp. 3886, 3895–3896.

dispute: ‘As a rule, electors have a very poor idea of the elaborate arguments which have been employed in the Legislature ... If they were compelled to listen to the pros and cons advanced in this House, they would probably be more confused than when they entered it. Instead they arrive at conclusions in a rough and ready way upon general principles.’²¹ The message here is to leave well enough alone: let the voters make sense in their own terms. Of course what this implied was that voters would have to make do with the information as provided by the political parties, on the assumption (as one obvious partisan put it) that any proposal ‘must be so simple that it can be left to the various political parties to explain what is meant.’²²

What better options could Parliament have considered? Where could they have turned to provide electors with advice about the textual integrity of proposed constitutional changes? Three emerged in debate: one internal—in the Attorney-General of the day; one external—in the High Court as a whole; and finally a turn to independent professionalism—the two chief parliamentary Clerks. All three were discussed and discounted: the Attorney-General, then as now, faced a gulf of credibility given that he was normally the chief legal adviser to a government proposing a referendum; the High Court would jeopardise its own integrity if it played the part of expositor to the executive; and so too the parliamentary Clerks might well lose their party-political independence if they were drawn into partisan controversy.

As was stated in a later debate in 1915 over the same issue, members feared that it was not appropriate to involve the parliamentary Clerks in partisan dispute resolution, or to ‘embroil them in party strife’. The Clerks were described by one pious supporter as ‘gentlemen who keep their political opinions to themselves; I suppose that not even their intimate friends know their views on political subjects.’²³

The second attempt: the 1912 legislation

It took the Parliament the experience of three referendums (1906, 1910, 1911) and another six years before it amended the referendum legislation to include within it the provision for distribution of the Yes and No pamphlet to all electors. The origins of the official pamphlet have been discovered in the records of the 1912 Hobart annual conference of the Parliamentary Labor Party, where the party agreed that the experience of the failed 1911 referendum could be explained by the twin evils of popular misunderstanding and partisan misrepresentation.²⁴

The 1912 changes were introduced by Attorney-General Billy Hughes who went to great lengths to explain the innovation of providing electors with two statements of no more than 2000 words containing the Yes and No cases. These cases were prepared and authorised by a majority of those members of Parliament who voted for and against the

²¹ *ibid.*, p. 3886.

²² *ibid.*, Mr Edwards at p. 3890.

²³ Sir Robert Best, *CPD*, 8 September 1915, p. 6704.

²⁴ L. Lenaz-Koare, ‘The History of the Yes/No Case in Federal Referendums’, in Report, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, in *Proceedings of the Australian Constitutional Convention, vol 2, Standing Committee Reports*, Brisbane, 1985, Appendix 5, pp. 85-91.

proposed changes. The pamphlet was also designed to contain a statement showing the textual alterations and additions proposed to be made to the Constitution. Hughes defended this innovation as providing electors with ‘the plain facts of the case, as set forth by each side’.²⁵

From the Opposition benches, Deakin lent support and reflected on the experience of earlier referendums with their ‘wide sway of mistaken opinions’ resulting in the situation that ‘a very large section remained very imperfectly informed.’ It was ‘our duty to them’, stated Deakin, to assist electors ‘form an independent judgment.’ The 2000 words are not burdensome for ‘any person who is really interested in the fate and future of this country’. In his view, the contents would not duplicate parliamentary debate since ‘there are to be no personal reflections or imputations’, with the arguments entirely addressed to ‘the merits of each question’.²⁶ This important qualification never made it into the legislation. Behind this rejection was a sentiment summed up by Senator Rae who confessed that voters were ‘utterly befogged as to how they ought to vote’; hence it was important not to ‘befog the electors with a lot of parliamentary and technical phraseology’. How best to reach out to the ordinary voter? Senator Rae’s answer was to use ‘the language of a bullock-driver or drover [rather] than ... the language of a parliamentarian’.²⁷ The consensus, then as now, was that the pamphlet would in the words of one modest supporter, Mr McWilliams, ‘do very little good and very little harm.’²⁸

The third attempt: the 1915 legislation

Billy Hughes never rested. 1915 saw the important but unsuccessful attempt by him to amend this pamphlet provision to insure that the presentation of the contending arguments ‘shall not deal with any matter which does not deal solely with those merits of the proposed law.’²⁹ As Mr Groom complained from the Opposition benches:

... it means that those who oppose the alteration will have to make out a case dealing solely with its merits. Therefore, they will have to cogitate and think out what are the merits of the proposal, and, having done that, make out their case against those merits. That is not fair.³⁰

The government proposed to amend the legislation to establish a Board to vet the arguments coming from the two sets of parliamentary groups. The Board would comprise the Chief Electoral Officer, and the two parliamentary Clerks. Hughes feared that the existing provisions were too open and loose because the term ‘argument’ is itself too loose: something of ‘a generic term applicable to some very wild and

²⁵ *CPD*, 16 December 1912, pp. 7153–7154.

²⁶ *ibid.*, p. 7155.

²⁷ *CPD*, 20 December 1912, p. 7593.

²⁸ *CPD*, 16 December 1912, p. 7159.

²⁹ *CPD*, 8 September 1915, p. 6691.

³⁰ *ibid.*, p. 6701.

irrelevant outbursts'. Hughes was at his idealistic best, declaring: 'The electors are entitled to be told the facts and to be approached as reasonable beings in a reasonable way'.³¹ Cook for the Opposition successfully talked the government down, protesting that the 'rigid technicalities' in the amendment amounted to a gag on parliamentary speech. What he meant was what another member said: that the proposal amounted to a 'little bit of Prussianism'. Others like Mr Glynn claimed that it was the duty of the Minister responsible for the electoral administration to ensure that the argument did not contain what one member described as 'vulgar abuse'.³²

And so it came to pass that the official pamphlet emerged as we now know it: at best a great opportunity for *Australia Post*; at worst a missed opportunity to repair the deliberative deficit. Referendum scholars have traditionally held that 'the balance of advantage is with the proponents of the "No" case.'³³ The onus is on the Yes case to turn things around, and the official pamphlet provides an opportunity for the No case to confuse rather than clarify.

There have been referendums where the No case has been absent (most recently in 1967 in relation to the case for Commonwealth power over Aboriginal affairs). Indeed, at three early referendums Parliament in its wisdom suspended the operation of the whole pamphlet provisions: 1919, 1926 and 1928—two losses followed by the first win since 1910. The view at these times was that the expenditure of public money was not worth the exercise and one suspects that parliamentarians reckoned that each side could do better when left to its own devices, especially when referendums are held at the time of general elections, when the parties struggle for the very highest stakes.

Finally, a victory of sorts

After three attempts to bring reason to bear in referendum politics, Billy Hughes had one last try at bringing reason to referendums. The Hughes government in August 1915 devised a novel approach that completes our review of the scaffolding of the deliberative design behind Australian national referendums. The usual story is that compulsory voting was introduced by the Bruce government in 1924 to try to restore the levels of voter turnout that had dropped alarmingly after the end of the Great War. The truth is that the first experiment in compulsory voting dates from August 1915 and it began its life in the Senate, designed solely for the referendum intended for later that year but never held.³⁴ Thus the novel provision quietly expired and was never really put to the test.

The conventional wisdom about the introduction of compulsory voting is that it was introduced to make life easier for the political parties. I accept that many aspects of our electoral system have evolved precisely for this reason. Think only of the adoption of public funding of political parties. It is important to recognise that in its very first

³¹ *ibid.*, p. 6692.

³² *ibid.*, pp. 6693, 6698–6699.

³³ L. Webb, *Communism and Democracy in Australia: a Survey of the 1951 Referendum*, Cheshire, Melbourne, 1954, p. 52.

³⁴ See *Compulsory Voting Act 1915* and *CPD*, 13 August 1915, pp. 5753–5755; 25 August 1915, pp. 6047–6070.

national phase, compulsory voting was designed to repair the deliberative deficit. The idea was simple: if citizens knew that voting at national constitutional referendums was a legal duty, then perhaps they would pay greater attention to the debate over the merits of the proposals. The stated idea behind the proposal for enforced civic responsibility was put in terms by Senator Russell when introducing the bill:

The majority are able to discuss football records, and make an accurate calculation of the time in which 6 furlongs can be done at Flemington, but, in many cases, those men have not had their attention sufficiently directed to the affairs of their country to be persuaded to exercise their franchise.³⁵

Critics have suggested that this is a device designed not so much to bolster public deliberation as to lift the approval rating which would suit reformist parties like Labor. There is a supposition that Labor voters have traditionally been among a majority of those who have failed to turn out when elections have not been compulsory. While this might be true, it is still the case that compulsory voting might simply reinforce the conventional bias against constitutional reform by ensuring that the legions of reactive Australian voters turn out to register their disapproval. For years, referendum critics have believed that there is a link between compulsory voting and No voting. One bit of evidence that should confirm this would be a high incidence of informal voting, but this is not in fact the case.³⁶

The best that can be said for this approach is as follows. Referendums are ‘too important to be decided by a minority of the people’, as was put by Senator O’Keefe. In his view, compulsion also is good because ‘it will encourage the electors to find out what the referenda really mean.’ In earlier times ‘large numbers did not vote because they did not understand the issue ... did not quite understand what the questions really meant’.³⁷ But the worst that can be said is just as revealing. Critics of the proposal like Senator Millen countered that Australia would be ‘compelling persons to give a judgment, which may affect important decisions, on matters which they have not studied, and in which they take so little interest that, if let alone, they would not record their judgment....’³⁸ Compulsion alone would not generate voter diligence: as Senator Bakhap put it, compulsion ‘will not insure the predominance of intellect in the council of a nation’s affairs. It does not follow that everybody will cast a philosophic and intelligent vote.’³⁹ But compulsory voting stayed and was, as its critics feared, soon extended to voting at parliamentary elections.

Requisites of referendums

I have presented this review of the foundations and scaffolding of our rules for referendums not to depress you but to help shake you loose from the defective

³⁵ *CPD*, 13 August 1915, p. 5755.

³⁶ R. Mulgan, *op. cit.*, pp. 177–178.

³⁷ *CPD*, 25 August 1915, pp. 6063–6064.

³⁸ *ibid.*, p. 6048.

³⁹ *ibid.*, p. 6067.

traditional framework. Just think how unusual is this 1999 referendum against the background of our traditional approach. Let me line up my reasons for hope with this review of the deliberative deficit revealed in the historical foundations and displayed each decade since 1906.

I think that the 1999 referendum will make great strides in overcoming the reputation for negativism attached to Australian constitutional referendums. Just compare the strength of the process this time round with the state of things at the last referendum, which was a decade ago in 1988, during that great year of celebrating 200 years of the arrival of the First Fleet. Last time round, a federal government put four referendum questions to the people and all four went down, generating historically low popular support. I suspect that most of you are like me and can't really remember what the four proposals were or indeed how you voted. Remember that the Hawke Labor government had been re-elected in 1987 for an unprecedented third term, and that 1988 was a very special year of national celebration of white settlement. But despite all that, many voters—including many Labor voters—turned their back on the 'gang of four' proposals, despite their voter-friendly appearance. Who could say No to 'fair elections', or 'rights and freedoms'? Well, more than two-thirds of us did say No, a record rebuff for *any* government at *any* referendum.

Let me itemise ten grounds of hope that the 1999 referendum will break away from the traditional restraints on deliberative democracy.

1. Consider this contrast with the 1988 experience. Last time round, the trigger for the referendum was the 1988 Final Report of the Constitutional Commission, an expert advisory body convened by Bob Hawke in 1985 and chaired by Sir Maurice Byers. It was a classic gathering of 'the experts' experts', and it produced a marvellous Report, one which the government picked over and found enough evidence for their 'gang of four' referendum proposals. What they did *not* pick out were some of the recommendations about referendums: including the recommendation that state parliaments should be allowed to initiate constitutional referendums (paragraph 13.1) and that the Governor-General should be freed from the manipulating pressure of executive governments so that she or he will put referendums sponsored by one House but opposed by the other, making a living reality of the deadlock provision now in section 128.⁴⁰
2. Just think of the contrast to this referendum, when the trigger was the 1998 'ConCon', also just an advisory body but much more in line with a council of community representatives, even though only half were popularly elected. The 1999 referendum which arose from 'ConCon' has been correctly described as 'a type of defacto popular initiative'.⁴¹ We will see more of 'ConCon', and it is encouraging to remember that the 1988 'ConCon' resolutions included reference to the need for greater reliance on popular election for future 'ConCons', and that the agenda of future reform

⁴⁰ *Final Report of the Constitutional Commission, 1988: Volume Two*, AGPS, Canberra, pp. 851–852.

⁴¹ R. Mulgan, *op. cit.*, p. 180.

should include changes to the system for constitutional change, as one of many ‘ways to better involve the people in the political process.’⁴²

3. The timing of this referendum is also encouraging. It does not coincide with a general election where the fates of governments rest in the balance: nine of eighteen referendum outings have been at elections. Referendums have a greater tendency to generate Yes votes when held separately from general elections; but at such referendums there is also a tendency for voters to stray from their traditional party loyalties.⁴³ The outcome of the 1999 referendum will have no direct effect on which particular parties are in government and Opposition, and so has the potential to encourage a less partisan policy debate than the political nastiness normally evident at election time.
4. Also reassuring is the free vote guaranteed by the Prime Minister to his coalition members: free from party direction, that is, but not free from intra-party bickering, as we have repeatedly seen. This deviation away from traditional forms of partisanship has reduced the usual form of referendum partisanship from a government versus Opposition struggle to a form that might make the process of change more palatable to the people.⁴⁴
5. Also unusual and encouraging has been the March 1999 release of draft versions of the proposed changes to the Constitution.⁴⁵ One would like to think that the release of drafts of the referendum proposals indicates a willingness of the government to listen to the community and to widen community involvement in the deliberative processes of government.
6. Also unusual and reassuring was the establishment of the parliamentary inquiry into the referendum proposals. This committee, chaired with distinction by Liberal backbencher, Mr Charles, took evidence around Australia and its records and Report are a welcome sign that Parliament wants to deal itself back in as a proactive contributor to the whole process.⁴⁶ The committee took mountains of public evidence on the head of state options and produced a report that substantially altered the precise terms of the republic question being put at the referendum. Like many who gave evidence, I was impressed with the good will of the select committee and its chair to do their part to help reduce the deliberative deficit.
7. Another good thing about the 1999 referendum is that Parliament has amended the referendum law to overcome the severe limitations on public expenditure. The Commonwealth law has restrained the federal government

⁴² ‘Communique of the Constitutional Convention’, in Uhr, *The Australian Republic*, op. cit., pp. 191–196.

⁴³ R. Miles, op. cit., pp. 244–245.

⁴⁴ R Mulgan op. cit., pp. 181–182.

⁴⁵ Extracts are included in Uhr, *The Australian Republic*, op. cit., p. 196–202.

⁴⁶ Joint Select Committee on the Republic Referendum, *Advisory Report*, August 1999.

but has never limited non-government expenditure by private individuals or groups or even by state governments. At this referendum, in a once-only experiment, the law has been amended to permit the government to spend substantially more than any earlier referendum, and so generate a higher level of reliable information for the public.⁴⁷ The main beneficiaries have been the government-appointed Yes and No committees, each given \$7.5 million. This is welcome because the traditional reliance on the official pamphlet is past its use-by date: these official cases are far from educational and are, as Professor Joan Rydon has commented, ‘political propaganda and are often badly written and constructed with a minimum of honesty or logic.’⁴⁸ The pamphlet alone cannot be expected to stay the hand of partisan manipulation, given what Prime Minister Menzies once called ‘the amount of sheer hard lying that goes on’ during referendums.⁴⁹

8. The good news was not meant to stop there: the same amendment to the referendum law also allowed the government to establish, with a budget of \$4.5 million, an expert’s group chaired by Sir Ninian Stephen to direct a ‘neutral public education campaign that will support the referendum on the republic’—meaning that they will support the process of public deliberation that leads up to the casting of ballots. The 1985 Report of the working party of the Australian Constitutional Convention canvassed all the usual suspects capable of providing a ‘neutral’ publication of the merits of referendum issues: the Electoral Commission, a judge, and ‘an independent panel of experts’, the final option of which has finally come to pass in 1999.⁵⁰ The importance of this injection of impartial material is underlined when we appreciate the limitations in referendum law designed to prohibit material that is ‘likely to mislead or deceive’ electors. The High Court has affirmed that these type of anti-deception measures in Australian electoral and referendum law are quite narrow in their scope: the provisions prohibit only deception bearing on the placement of a formal vote in the ballot box, and are not designed to regulate political speech or attempts, however misleading, to form the judgment of electors.⁵¹ Thus Parliament has passed a law which tolerates misleading and deceptive statements so long as they are designed to form minds and not spoil ballots. This shows just how important it is that there be some public authority which can inject some balance into the public debate, to protect the community, and truth, against misleading and deceptive contributions from referendum partisans.

⁴⁷ *Referendum Legislation Amendment Act 1999*, section 4.

⁴⁸ Joan Rydon, ‘Referendums in Australia’, *Reference Australia*, Australian Reference Publications No. 5, Melbourne, February 1990, p. 36.

⁴⁹ Quoted by J. Richardson, ‘Reform of the Constitution’, in G. Evans (ed.), *Labor and the Constitution 1972-1975*, Heinemann, Melbourne, 1977, p. 85.

⁵⁰ Report, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, in *Proceedings of the Australian Constitutional Convention, Volume Two, Standing Committee Reports*, Brisbane, 1985.

⁵¹ *Evans v Crichton-Browne*, 1981, 147 CLR 169.

9. There is yet another significant difference this time round. One of the greatest resources available at this referendum is not the ample amounts of money being fed into the national and government-appointed Yes and No committees, or the valuable work of the Australian Election Commission in making available to the public so much useful material on the proposed changes. And it is not the remarkably busy websites of the two main camps: the Australian Republican Movement and Australians for a Constitutional Monarch. No, I am referring to the Constitutional Centenary Foundation (CCF) established in 1991 as a publicly-funded think tank to educate and inform Australians about the many issues surrounding the centenary of Federation, including but by no means confined to the issue of a change to an Australian republic. The balance exemplified by the CCF is suggested by the involvement of its patron, Sir Ninian Stephen and its presiding spirits, Professor Cheryl Saunders and Marian Schoen. Many of you will remember that special supplement of the *Weekend Australian* of 9–10 October dealing with the 1999 referendum. This was a good example of the excellent public information made available, in part because it made such prominent use of the CCF as an impartial source when evaluating the credibility of the Yes and No case.

10. My final ground for hope is the one I began with: the *Australia Deliberates* meeting at Old Parliament House. Australian Federation grew out of widespread civic engagement. Few if any of the forty-two referendum proposals thus far have engaged the people in the same way. In part this sense of disengagement reflects the pessimism of Australian politicians who have not held voters in high regard. The 1999 referendum has given voters the opportunity to return the compliment. The republic is in part the issue and in part the accident site for this clash between ‘them’ and ‘us’. Recent elections at federal and state level have revealed historically high levels of popular distrust of ‘the system’ and of those responsible for managing ‘the system’. Referendums are about popular control, so it is no surprise that large sections of the mobilised public are gathering around the option of a directly-elected or popularly controlled President. Speaking personally, I think that the direct election option has yet to face the test of sustained public investigation. It emerges as an alternative to the ‘ConCon’ model but as yet it lacks any of the detailed specification of the model being put to the people in two weeks.

Conclusion

This defect in detail is not as surprising as the very existence of the sustained support for direct election. Maybe the two are related and support for direct election will begin to fade as people see the potential power of big money and big centres of population, and the potential vulnerability of minority groups and the smaller states. But I repeat my theme that this resurgence of interest in forms of popular control over ‘the system’ might tell us more about the changing process of referendums than the substance of presidents or preambles.

The big lesson of this referendum is that it has done more than any other single event to turn around our deliberative deficit. More still needs to be done. And among the most

promising first steps are those of Old Parliament House, which later today will facilitate the arrival of the 350 ‘representative Australians’ to the *Australia Deliberates* weekend. This experiment in deliberative democracy will help to throw light on what is missing in our referendum routines, where political debate gets weighed down with the posturing of personalities, equally adept at name-calling and the imputation of hidden motives. But *Australia Deliberates* can act as a circuit breaker. By allowing the delegates, in the standard phrase, to come to considered judgement, it will help to demonstrate that popular capacity is deeper and richer than ‘the system’ fears.

So I conclude with the recommendation that we pay attention to the detailed workings of *Australia Deliberates* because its promoters believe the results will represent what the average Australian would think about an Australian Republic if they had the opportunity to deliberate thoroughly. Would that all citizens had the same opportunity.



Question — We have this rosy view that we’re going through a more deliberative process, but the fact is that we’re being *forced* to vote on a proposal that came out of a half-appointed lobby (not fully elected, like the 1890s); a lobby that was managed and was factionalised and seemed to take on all those unfortunate characteristics that used to go on in that gloomy Old Parliament House. Isn’t that a failure of deliberation right at the start of this whole process?

John Uhr — Yes. What I was suggesting was that the turning of the tide comes from us recognising—obviously, finally—the inadequacy of the system we now have, including the inadequacies to which you have drawn attention. But one has to nudge the system in one way or another.

Some people say that to vote No is the most positive inducement you can have to warn the system that you will no longer tolerate the sort of shallow-minded reformism that it’s engaged in. I take another view, which is to vote Yes. Nudge the sort of ‘ConCon’ agenda. Give the system a chance to recognise that there’s support for the symbolic changes attached to finally defining the head of state as an Australian citizen, to coincide with the centenary of Federation. Admit that substantially that’s not going to change unemployment, it’s not going to change the bus timetable in the ACT, it’s not even necessarily going to improve the state of our governmental system more broadly, but it certainly pushes the ConCon-type agenda, which itself has some momentum going. Vote No, and the risk is that you’re just throwing sand in the gears of that momentum and there could be a loss of momentum, maybe even a dead stop.

Question — You didn’t mention the question of polling and its influence on people. I know that’s a convoluted and difficult matter, but I believe a lot of people are affected by published polls. In that connection, do you know if this deliberative affair in Old Parliament House will have its deliberations published, and whether that might or might not be a good thing? I’m not questioning the deliberation as such, but if a result comes out, you can imagine the feeding frenzy of the media on that matter.

John Uhr — I think that's a very important question. There is a risk of over-reach in taking a sample; inviting people to Old Parliament House, polling their views before they enter—before they step on those steps—then polling their views and demonstrating the change. It is a danger of over-reach that could go either way, dramatically indicating that, after two days of intensive exposure to the referendum activities plus lots of neutral material, there's a kind of chill of confusion setting in. And the Australian community is then invited to ponder the lessons—that 350 of us have entered that building and come out feeling even more confused. On the other hand it could go the other way—that the 350 come out and there's a demonstration that, once confronted with an opportunity, not so much to hear, but to talk through with other ordinary citizens, they actually dramatically increase their interest. The symbolism might take on the kind of vital quality that we didn't realise—that the Constitution as it now stands has no definition of who is the head of state. That we didn't realise there is actually uncertainty as to whether it was the Queen or the Governor-General, and that that's been made clear, and that now they're gung-ho. Yes, if that's all it's about—that it really is minimalism—let's go for it.

So, at issue is a kind of danger of an exaggeration either way. And then of course there's the other issue to which you rightly allude—should the rest of us then be herded by that result? If that group turns one way or the other, does that mean that we then cede all rights to make up our own mind and say, 'well, they're a bigger group than us, they've had a better opportunity, this Centre for Deliberative Polling has the experience of having run these all around the world, it's bound to be a fair and good result, and we'll let that result stand?'

You can imagine a kind of misguided form of deliberative democracy seizing upon that experiment and saying 'yeah, if we actually want to have genuine deliberative democracy, what we have to do is make the democracy more deliberative—how can we do that? Oh, this cumbersome compulsory voting that went in at the beginning to try to force voters to recognise they had obligations of citizenship, we should just bypass that. We should work out some way of sampling the community, invite them to come together, rub them up against the experts and give them a chance to actually work it through for themselves and the rest of us can say that they represent us.'

In a way we do that with a lot of normal law and legislation. We allow Parliament to determine for us. But the crucial difference of course with this sort of sampling group is that somehow you trust the social science, that it somehow chose people in whom we can place our confidence. I have a few doubts and reservations about the selection side of it all.

Question — Is the selection process made public?

John Uhr — I'd have to get the people from *Australia Deliberates* to address the integrity of their own processes. There's a firm called Issues Deliberation Australia, which somehow satisfied itself that it had organised a list which has the names of a randomly sampled group of Australians, which had no bias whatever in the random sampling, and it then contacted the people and said 'here's your big chance.'

I'm not sure how big the list was, but the list of respondents is now over three hundred, and it's a fascinating experiment. But one wouldn't want to invest too heavily in it as a

replacement for everything that's good in our democracy. It just highlights the deficiencies.

Question — Would you like to explain the situation of the territories?

John Uhr — One of the few changes to the referendum provision in the Constitution was one that the rest of Australia made for the people of the territories. We didn't have a chance to make the change in 1977, to give us also the right to participate in referendums. Not as the constituent body of any particular state—because, by definition, those of us in the ACT and the Northern Territory don't belong to a state—so our vote counts as part of the national majority. But from 1906, at the time of the first referendum, to 1977, we watched—well, we weren't there in 1906—but we watched and took a keen observer's interest in the outcome. Then Australia kindly said that we could participate from 1977, and since then we have had our own obligations to take care of.

Question — We realise that the monarch doesn't have to be an Australian head of state, and neither does the Governor-General. If the No vote got up, and in order to have a Governor-General that was required to be an Australian citizen—would that have to go to referendum, or could that be legislated?

John Uhr — It could go either way. If you wanted it formally forever entrenched in the Constitution, it would have to go to a referendum, but it wouldn't be beyond the possibility of Parliament passing a law or resolution affirming the importance of always choosing an Australian. At the moment, you can't find any reference to a head of state in the text of the Constitution, because it's not there. You certainly find recognition of the Queen and the Governor-General. The Queen's certainly not required to be an Australian citizen, and neither is the Governor-General. That's part of the moral energy that seems to be behind the Yes side of the case.

One of the saddest features of the referendum provision as it now stands is a recognition that women don't have to count—or, in fact, that they can count half as much as the rest of us. There's a compromise in the provision in the Constitution that says that at the time of Federation, South Australia and Western Australia were the only two states that had universal adult franchise guaranteeing women the right to vote. And there was a fear amongst these stout-hearted friends of democracy, called our framers, that, if we had a referendum and these two states suddenly voted at a referendum, and if the women voted as well as the men, those two states would have a disproportionate influence. And they actually wrote into the provision—in another classic illustration of our deliberative deficit—that, in the event that that happens, before we've adopted any universal franchise we should ensure that the votes of those people participating in South Australia and Western Australia are cut in half, to equal their stakehold with the other States. So they lost their nerve on that one.

Question — Why did we have to substitute 'President'? Why couldn't we just have remained with the comfortable, familiar 'Governor-General'? I think that so many people who have struggled, without knowing a lot about what has gone on, would have been content if that had remained familiar. If one says 'President', one thinks about America.

John Uhr — I think you're absolutely right that part of the chill and nervousness that people have about the change is attached directly to that one name. There are a range of other possibilities we could have come up with, one of which was the retention of the current title.

Question — I thought it might have been illegal to retain it, that it would perhaps have to relate to an independent Commonwealth country. As we're all saying, if something is good, why change it?

John Uhr — Absolutely.

Question — I was watching *The Panel* a few weeks ago, and one of the issues that was raised was: what is a republic? I actually went to the dictionary, and got no help from it whatsoever. Is there actually an accepted definition of what a republic is, and are we using that for this referendum?

John Uhr — The dictionary normally says 'the absence of monarchy', and it's most succinctly defined by the absence of a monarch. A republic is a place where there is no established hereditary monarch ruling. Somebody else or some other group rule, either a representative body elected by the people, or maybe just a group of people unelected, but not calling themselves a monarchy. The negative definition is easy, but then there are a huge range of possibilities.

My colleague, Mark McKenna, author of the book *Republicanism in Australia*, spent 300 pages or so detailing the various models of a republic that have been entertained in Australian history. They all really turn, at their best, on some concept of popular sovereignty, where, whatever mechanism we throw up—and it could even be an elective monarchy—at least owes its source of authority back to us. But classically, a monarchy is something that comes down from the heavens. Or it might be tolerated over time—'divine right of kings', literally.

What a republic ought to be is another system that has its authorising principle arising out of popular sovereignty—that the people are really the owners of the system.

Question — Could you argue, from some perspective, that we already have a republic?

John Uhr — I have. There are twenty of us in this room who have done that as political scientists. We have said that, in effect, Australia is either a 'crowned republic'—to use one of the corny titles—or, 'in effect a republic'. We have said that we've got almost everything that would pass the minimal conditions test, and that the outstanding oddity is the fact that, if you open the Constitution, it doesn't read like that, and that the minimalist purpose behind this referendum is to repair the oddity, without affecting any of the substance.

Question — Compulsory voting—there is no such thing. The only compulsion is to go to the polling booth, have your name marked off, and go and sit down.

John Uhr — You're quite right, and at the time it was introduced for referendums, the opponents of compulsory voting said, 'this won't work—the people will never be on top of referendum proposals—they will have to turn up at the ballot box and they will have

to put something in the ballot box, but you'll never know what they are putting in the ballot box. A lot of them won't care—they'll have their name maked off the roll.' So our system at least was wise enough to recognise that.

But the defenders of compulsory voting really did have an idealistic expectation that, in the absence of trying to find any other way of providing an impartial set of materials that would help electors determine the merits of the question, maybe they could do it by just putting the fear of breach of criminal law at the forefront of their minds. And that could force them to actually search around and come to some satisfactory notion in their own mind as to what the merits are on which they are voting.

Question — Coercion?

John Uhr — Yes, it's a form of coercion, absolutely.

