

Current provisions

Introduction

- 3.1 The *Referendum (Machinery Provisions) Act 1984* (Cth) ('Machinery of Referendums Act') provides the framework for the conduct of referendums. Section 11 of the Machinery of Referendums Act sets out how the Australian Government can engage with electors prior to a referendum. At present, section 11 effectively limits the Australian Government to the distribution to electors of arguments for and against the proposed change to the Constitution. Known as the Yes/No pamphlet, this includes the arguments for and against the proposed change (the Yes/No arguments) and a statement showing the textual alterations and additions proposed to be made to the Constitution.
- 3.2 As specified in the Machinery of Referendums Act, the Yes/No arguments are authorised respectively by the majority of those members of Parliament who voted for and against the proposed amendment. These Members may send to the Electoral Commissioner their arguments for and against the proposal. Each argument must not exceed 2 000 words, however where there is more than one proposal at the same referendum, the average of the Yes/No arguments must not exceed 2 000 words.
- 3.3 The Electoral Commissioner must post to each elector a pamphlet containing the arguments as well as a statement showing the textual alterations and additions proposed to be made to the Constitution no later than 14 days before the voting day for the referendum.

- 3.4 Section 11(4) prohibits the expenditure by the Commonwealth of money in respect of arguments for or against a proposed alteration, except in relation to the printing and distribution of the official Yes/No cases.
- 3.5 This chapter considers the operation of section 11 in more detail, focusing on the unanimous passage of a constitution amendment bill, the optional nature of the Yes/No pamphlet, the equal status of the Yes/No arguments and the limitation on Government expenditure. The chapter also considers the effectiveness of the provisions and compares the processes used for the 1999 referendum.

Unanimous passage of the amendment bill

- 3.6 Section 128 of the Constitution requires that the law proposing to change the Constitution be passed by an absolute majority of each House of Parliament. The members of Parliament who voted for or against the Constitution amendment bill are responsible for the authorisation of the Yes/No arguments. However, this means that where the Constitution amendment bill is passed unanimously, that is where no member of Parliament voted against it, there will be no official No case distributed. This happened in referendums in 1967 and 1977.
- 3.7 The 1967 referendum put two proposals to the electorate. The first related to increasing the number of Members without necessarily increasing the number of Senators. The second related to Aboriginal people being counted in the reckoning of the population. As the Act relating to the Aboriginal proposal was passed unanimously by both Houses of Parliament, a No case was not submitted.
- 3.8 The 1977 referendum put four proposals to the electorate. The first again sought to amend the Constitution to ensure that Senate elections are held at the same time as House of Representative elections and both Yes and No cases were prepared. The second proposal related to filling casual vacancies in the Senate, the third proposal related to allowing electors in the territories to vote at referendums and the fourth proposal related to the retirement age of federal court judges. In relation to the last three proposals, a No case was not submitted.
- 3.9 Colin Howard, who has written widely on the Constitution, highlighted the democratic importance of having both a Yes and a No case:

It is also one of the fundamentals of democracy that more than one point of view is possible about anything. If the elector is to make a

choice between alternatives by voting for the one preferred, it is reasonable that he or she should have an opportunity to hear and consider what can be urged both for and against the proposed change.¹

- 3.10 Julian Leaser suggested that that giving parliamentarians a free vote on constitutional matters would enable electors, organisations and groups to lobby the Government for a No vote:

I would like to see a free vote in the parties on all constitutional questions because then, as a community organisation that was wanting to advocate a no vote, you would be able to put that case to parliamentarians. If parliamentarians were not going to be convinced of that then there is little point, I would have thought, if you could not convince any parliamentarians, of actually writing a no case.²

- 3.11 However Rod Cameron argued that as referendum proposals are unlikely to succeed without bipartisan support, there should be no official No case:

Ideally, it would be just selling a 'yes' case, because you are not going to have a referendum unless both sides agree. If you are selling both sides, your aim is to inform and educate the community as to the issues involved.³

- 3.12 The Yes/No argument is premised on the concept of a debate. Presumably, this is to allow both sides to make their case but also to provide the electors with a thorough consideration of the issues. If it is accepted that most proposals to change the Constitution will have supporters and detractors, both within and outside Parliament, then the importance of having both an official Yes and No argument is clear.

Yes/No case optional

- 3.13 The authorisation of Yes/No arguments is optional. Parliamentarians are not obliged to authorise a Yes/No argument in relation to a referendum and there have been three instances where no Yes/No pamphlet was distributed: in 1919, 1926 and 1928.

1 Colin Howard, *Australia's Constitution*, Ringwood Victoria: Penguin, 1985, p. 132.

2 Julian Leaser, *Transcript of Evidence*, 14 October 2009, p. 9.

3 Rod Cameron, *Transcript of Evidence*, 29 October 2009, p. 1.

- 3.14 In 1919, the referendum was held at the same time as the federal election and legislation passed by Parliament expressly stated that section 6A of the *Referendum (Constitution Alteration) Act 1906*, which provided for the distribution of the Yes/No pamphlet, would not apply to a referendum held at the same time as the 1919 federal election. As a result, there was no Yes/No pamphlet distributed for the 1919 referendum.
- 3.15 For both the 1926 and 1928 referendums, legislation passed by Parliament expressly stated that section 6A of the *Referendum (Constitution Alteration) Act 1906* (Cth), which provided for the distribution of the Yes/No pamphlet, would not apply to these referendums.
- 3.16 Cheryl Saunders has noted the reasons for the decision not to distribute Yes/No pamphlets on these three occasions:

Section 6A remained in the Act but its operation was temporarily abrogated for each of the referendums of 1919, 1926 and 1928. The main reason given in 1919 was that there was no time to prepare the pamphlets. In 1926 the supporters of the proposals were so divided in the reasons for their support that it was considered impracticable to prepare a Yes case. In 1928, most significantly, it was accepted that the Yes/No cases were unnecessary because both major parties and the States had agreed to the proposals.⁴

- 3.17 Distribution of the proposed textual changes to the Constitution is dependent on the authorisation of Yes/No arguments. Where the Yes/No arguments are not authorised, electors miss out twice: they do not receive the arguments for and against the proposed change and they also do not receive the proposed textual alterations to the Constitution.
- 3.18 In practice, the Yes/No pamphlet has been the only official information available to electors prior to a referendum. Electors who rely on this material to make an informed decision at a referendum will be disadvantaged in situations in which it may be not be politically expedient or in which there may not be enough time for the Parliament to authorise the Yes/No pamphlet.

4 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117. For a more detailed account, see Lynette Lenaz-Hoare, 'The History of the Yes/No Case in Federal Referendums, and a Suggestion for the Future', Appendix 5, *Report to Standing Committee*, Australian Constitutional Convention Sub-Committee 1984, p. 89.

‘Equal’ status of the Yes and No arguments

- 3.19 The Yes and No arguments are presented equally in the pamphlet sent to electors, regardless of the votes they received in Parliament. Cheryl Saunders states that:

The section authorizes equal treatment for the Yes and No cases whatever the size of the opposition to the proposal. The views of a single dissident thus receive the same weight in the official documentation as those of all the other members of the Parliament.⁵

- 3.20 This may be important as some commentators have suggested that given the double majority required for constitutional change, it might be helpful for electors to know exactly how many Parliamentarians support and oppose the proposal:

Since the majority required in Australia for a constitutional amendment is exceedingly high, in practical terms the task for the opponents is to convey the impression that opposition is much more widespread than is really the case and thereby to influence as many doubters as possible.⁶

- 3.21 The provision of relevant and factual information would be helpful to electors because the more useful information they receive, the more able they are to make an informed vote.

Limitation on Government expenditure

- 3.22 The current Machinery of Referendums Act restricts Commonwealth spending to the distribution of the Yes/No pamphlet and ‘other information relating to, or relating to the effect of, the proposed law’. Section 11(4) of the Machinery of Referendums Act is extracted here in full:

5 Cheryl Saunders, ‘Referendum Procedures,’ in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, p. 113

6 Colin Howard and Cheryl Saunders, ‘Constitutional Amendment and Constitutional Reform in Australia’ in R.L. Mathews (ed), *Public Policies in Two Federal Countries: Canada and Australia*, Centre for Research on Federal Financial relation, Australian National University, Canberra, 1982, p. 75.

(4) The Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law except in relation to:

(a) the preparation, printing and posting, in accordance with this section, of the pamphlets referred to in this section;

(aa) the preparation, by or on behalf of the Electoral Commission, of translations into other languages of material contained in those pamphlets;

(ab) the preparation, by or on behalf of the Electoral Commission, of presentations of material contained in those pamphlets in forms suitable for the visually impaired;

(ac) the distribution or publication, by or on behalf of the Electoral Commission, of those pamphlets, translations or presentations (including publication on the Internet);

(b) the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law; or

(c) the salaries and allowances of members of the Parliament, of members of the staff of members of the Parliament or of persons who are appointed or engaged under the *Public Service Act 1999*.

3.23 In the second reading speech for the *Referendum Legislation Amendment Bill 1999*, the Attorney-General said that the limit on expenditure in the Machinery of Referendums Act:

[A]rose out of a concern at the time to establish a statutory prohibition against the Government of the day funding partisan involvement in campaigns surrounding a referendum proposal. Specifically, the concern was that a Government might support one case only.⁷

3.24 In fact, the limitation on Government expenditure was a result of a 1983 proposal to spend, in addition to the \$5 million for the Yes/No pamphlet, a further \$1.25m on the promotion of the Yes case alone:

In the Senate, Senator Gareth Evans gave three reasons why the Government wanted extra money for the "Yes" case – they are briefly: –

7 Mr Daryl Williams MP, Attorney-General, House of Representatives Hansard, Thursday 11 March 1999, p. 3761.

1. The "No" case has the general advantage when the complexity of the proposals and the degree of voter apathy on matters which were seen as not having a direct effect, were taken into account.
 2. The Premiers of two States had indicated that they would use public funds to argue the "No" case, and the Federal Government would need the extra funds for the "Yes" case.
 3. The proposals have, the overall support of the Constitutional Convention and bi-partisan cross-party support in the Parliament.⁸
- 3.25 Section 11(4)(b), which permits the AEC to provide information relating to, or relating to the effect of the proposed law, may provide some scope for the distribution of material in addition to the Yes/No pamphlet. The subsection was originally inserted to ensure that the limitation on Government expenditure did not override the function the AEC would otherwise have in promoting public awareness of electoral matters, including referendums, under the *Commonwealth Electoral Act 1918*.⁹
- 3.26 When the current Machinery of Referendums Act was introduced in 1984, the Attorney-General, the Hon Senator Gareth Evans, pointed out that:
- ‘Impartial information’ of course means an explanation of what a particular proposal does. It does not mean arguments for or against a proposal.¹⁰
- 3.27 However, the decision of the High Court in *Reith v Morling* suggests that the class of material prohibited under the Machinery of Referendums Act is potentially quite broad (see text box following).¹¹ This is at least a partial explanation for the 1999 introduction of legislative amendments to the Machinery of Referendums Act. In the second reading speech, the Attorney-General, the Hon Daryl Williams MP, stated that:
- The Attorney-General's Department has indicated that subsection 11(4) of the referendum act, as it stands, may prevent public funding for the campaign phase of the information activities. The department has also said that the subsection arguably prevents Commonwealth expenditure on educational material which may

8 Lynette Lenaz-Hoare, ‘The History of the Yes/No Case in Federal Referendums, and a Suggestion for the Future’, Appendix 5, *Report to Standing Committee*, Australian Constitutional Convention Sub-Committee 1984, p. 85.

9 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765

10 Senator Gareth Evans, Commonwealth Attorney-General, Senate Hansard, Thursday 7 June 1984, p. 2765

11 *Reith v Morling* (1988) 83 ALR 667.

be said to include any argument for or against the proposed law. Many kinds of educational material could conceivably come within the scope of such a prohibition. The class of educational material that may be regarded – in one sense or another – as an argument for or against change is potentially too broad.¹²

12 Mr Daryl Williams MP, Attorney-General, House of Representatives Hansard, Thursday 11 March 1999, p. 3761.

***Reith v Morling* (1988) 83 ALR 667**

In August 1988, approximately a month before Australian electors were due to vote on four proposals to change the Constitution, the High Court was asked to stop a series of Government advertisements from being broadcast. Peter Reith, the Shadow Attorney-General and a Member of the House of Representatives, argued that the advertisements contained arguments in favour of the questions soon to be posed to voters at the forthcoming referendum.

Under section 11(4) of the *Referendum (Machinery Provisions) Act 1984*, the Government must not spend money promoting arguments either for or against the proposed constitutional change except in relation to the Yes/No pamphlets, the salaries and allowances of Parliamentarians and other public servants, and the 'provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law.'

Peter Reith specifically objected to the following commentary in one advertisement:

Over two years ago, the Constitutional Commission representing a cross-section of Australians began a review.

They held public meetings in each State and accepted over 4000 submissions. Their recommendations form the basis for three of the four proposed amendments on which you'll be asked to say yes or no in the September 3 Referendum.

He also objected to the following commentary in the second advertisement:

Just as our Federal Parliament has outgrown its old home and moved to this magnificent new Parliament House, you have the opportunity on September 3 to review our Constitution.

Justice Dawson of the High Court found that Commonwealth expenditure on the two advertisements containing the above passages would be in breach of section 11(4) of the *Referendum (Machinery Provisions) Act 1984*.

3.28 More discussion on the suggestions for alternative funding can be found in chapter 4 of this report. It is important to note that there is support for the current limitation on expenditure 'to ensure total transparency and also not to place a political imbalance on the referendum question using taxpayers' money'.¹³ However, the effect of the limitation on expenditure is that the Government is not able to engage in further education or information campaigns other than the Yes/No pamphlet without legislative amendment, such as occurred with the 1999 referendum. The 1999 referendum campaign is discussed in more detail below.

1999 referendum

3.29 Australia's most recent referendum was held in 1999. Two proposals were put to voters: the first concerned the republic and the second proposed a preamble for the Constitution.

3.30 Prior to the 1999 referendum, the Parliament passed legislation to amend the Machinery of Referendums Act to allow the Commonwealth to spend additional money in connection with the two referendum proposals.¹⁴ The additional funds were required for an expanded public information program.

3.31 The first phase of the information program comprised a 'plain English' public education kit.¹⁵ A panel was chosen on the basis of their 'experience in the public presentation of civics issues as well as constitutional expertise' and allocated \$4.5 million to provide information needed by voters to understand the proposal. This included information on the current system of government, referendum processes, and background information on the referendum questions themselves.¹⁶

3.32 The second phase was the campaign phase for which \$15 million was available to be divided equally between two rival committees and to be

13 Nick Hobson, *Submission 1*, p. 1.

14 The *Referendum Legislation Amendment Act 1999* made both temporary and permanent amendments to the Machinery of Referendums Act.

15 The panel was chaired by Sir Ninian Stephen and also included Professor Geoffrey Blainey, Dr Colin Howard QC, Professor Cheryl Saunders and Dr John Hirst.

16 Professor John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants', *Research Paper 25 1998-99*, Parliament of Australia, Parliamentary Library, 29 June 1999.

expended on national advertising for their respective campaigns, including management of the Yes/No arguments. The two committees were appointed by the Government based on attendees at the 1998 Constitutional Convention and membership was intended to increase the participation of non-politicians. The Government's role was limited to ensuring that each committee's proposals meet the 'basic standards' set for 'the activities to be covered by the public funding', as well as accounting for the use of the funds.¹⁷ The Attorney-General, the Hon Daryl Williams MP, and Special Minister of State, the Hon Senator Chris Ellison, noted that:

Public funding for the committees will allow robust public debate on the arguments for and against change. As with the provision of public funding in election campaigns, the purpose is to ensure that the alternative views can be presented directly to the voters.¹⁸

- 3.33 The final phase was conducted by the AEC and included any advertising associated with the process of voting, including the distribution of the official Yes/No pamphlet to voters. As a result of the amendment to the legislation, wider distribution of the Yes/No pamphlet was available, including through the internet.
- 3.34 According to the AEC, the production and delivery of the individually addressed multi-page pamphlet to every Australian elector was one of the major logistical challenges of the 1999 referendum. The total cost of producing and distributing the pamphlets was \$16 858 million. The AEC estimates that the production and delivery cost today would be around \$25 million.¹⁹
- 3.35 The increased funding allocated to the 1999 referendum to provide for both educational material and further campaign advertising illustrates the significant difference between what is necessary for an effective referendum and what is provided for in the Machinery of Referendums Act. The processes and campaigns introduced for the 1999 referendum suggest that the current provisions are not working, and specifically, that the Yes/No pamphlet alone is insufficient to educate and engage the public.

17 Attorney-General, the Hon Daryl Williams MP, and Special Minister of State, the Hon Senator Chris Ellison, 'Guidelines for the YES and NO advertising campaign committees for the referendum on the republic', Joint News Release, 11 April 1999.

18 Attorney-General Daryl Williams, Referendum Legislation Amendment Bill 1999, Second Reading Speech, 11 March 1999, p. 3761

19 Australian Electoral Commission, *Submission 24*, p. 17.

Are the current provisions adequate?

- 3.36 Chapter 3 has discussed the operation of section 11 of the Machinery of Referendums Act with some consideration of the areas that warrant further discussion. Before moving on to the more detailed discussion of alternatives and suggestions for change in chapter 4, it is appropriate to ask if the current framework established under section 11 of the Machinery of Referendums Act is adequate.
- 3.37 A number of submitters addressed this issue and proposed that first, the purpose or intention of the provisions should be identified.²⁰ Most agreed that at its simplest, the purpose of the Yes/No pamphlet is to provide electors with enough information on the arguments for and against the proposed change to the Constitution to enable them to cast an informed vote.
- 3.38 The discussion in chapter 2 of this report indicates that this was the intention of the original drafters in 1912. Similarly, it was the intention of the drafters of the Machinery of Referendums Act in 1984 when they decided to carry over the provision into the new legislation and it is still the intention of the legislation today. Colin Howard, writing in 1985, described its role in the following terms:
- Its purpose is clearly to try to ensure that when people vote on an amendment they will know what they are voting about. This is important because most constitutional issues need to be interpreted to some extent to make them comprehensible to the great majority of people, who are neither lawyers nor politicians.²¹
- 3.39 Jennifer Williams similarly suggested that the purpose of the provision is clear: ‘clarifying complex and contested issues to critically inform a voter’s choice’.²²
- 3.40 The submission from Gilbert + Tobin Centre of Public Law at the University of New South Wales identified four goals against which the effectiveness and efficiency of the Machinery of Referendums Act provisions should be assessed. These are:
- fair and efficient: The Act should establish a fair and efficient process for the conduct of referendums...;

20 See for instance Jennifer Williams, *Submission 31*, p. 1; Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2; Cheryl Saunders, *Transcript of Evidence*, 5 November 2009, p. 10.

21 Colin Howard, *Australia’s Constitution*, Ringwood Victoria: Penguin, 1985, p. 132.

22 Jennifer Williams, *Submission 31*, p. 1.

- deliberation: The Act should open up space for community debate and deliberation about constitutional change...;
- popular participation: The Act should enable an environment in which as many Australians as possible have an opportunity to make a meaningful contribution to debate about constitutional change...; and
- education: The Act should seek to further constitutional education.²³

3.41 The submissions received during the Committee's inquiry indicate that although many people think the provisions could be improved, some support the current arrangements. For instance, Reverend Robert Willson told the Committee that:

I am very happy with the present provisions for presenting the YES/NO case in a Referendum. I believe that it is valuable to those considering how to vote.²⁴

3.42 Similarly, Robert Vose's submission expressed his satisfaction with the current provisions:

I am writing to express my support for current provisions in the Referendum (Machinery Provisions) Act 1984 with regard to the terms of reference of this Inquiry. I am not convinced of the need for a radical change in the way that the Yes and No cases for a particular referendum question are communicated to the voting public. I think the legislation works well as it is.²⁵

3.43 However, discussion at the public hearings and many of the submissions received by the Committee focussed on the inadequacy of section 11 which, in effect, provides that the Yes/No arguments are the *sole* means by which the Government can communicate arguments to electors on a referendum proposal. Howard Nathan summarised the issue at the roundtable in Sydney on 14 October 2009:

I think the dilemma common to everybody can be stated thus: everybody has the same principle, namely, we want an informed vote on a constitutional process. The next issue is how to obtain that and whether the yes/no material process through the parliament is the way to do it. It seems to me that the objective is

23 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2.

24 Robert Willson, *Submission 4*, p. 1.

25 Robert Vose, *Submission 12*, p. 1.

common to everybody, but the process of getting there is one which opens up some area of perhaps disputation.²⁶

- 3.44 Similarly, Cheryl Saunders pointed out that an informed vote is dependent on how much information or assistance is given to electors to help understand a complex document: the Constitution.²⁷ As to whether the Yes/No pamphlet provides sufficient information or assistance to help electors make an informed vote, many submitters argued that the Yes/No pamphlet is not enough.
- 3.45 The Gilbert + Tobin Centre of Public Law at the University of New South Wales identified a number of reasons why the Yes/No pamphlet is failing to meet its objective:
- First, it does not succeed in aiding voter understanding of reform proposals ... the pamphlet tends to obscure basic facts about the proposed change...
- Secondly, the distribution of a printed information pamphlet is both out-of-date and ineffective as a communication strategy in contemporary Australia.²⁸
- 3.46 It is apparent from the Committee's inquiry that many submitters were concerned with the quality of the argument provided in the Yes/No pamphlet, noting that this was compounded by the fact that the Yes/No pamphlet is generally the only official information provided to electors prior to a referendum.
- 3.47 James Emmerig noted that it is only on controversial referendum topics that electors have access to 'information that might effectively help [them] to evaluate the arguments for and against amendment' where this is provide by greater media coverage and more widespread community debate. However, he also pointed out that the quality of alternative information and discussion varies and depends on the nature of the proposal.²⁹
- 3.48 The Committee received considerable evidence on this issue. In particular, many of the submissions identified specific problems with the current arrangements, including the quality of the Yes/No arguments, the format and presentation of the Yes/No arguments and the limited means of dissemination provided for by the Machinery of Referendums Act. These
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26 Howard Nathan, *Transcript of Evidence*, 14 October 2009, p. 6.

27 Cheryl Saunders, University of Melbourne, *Transcript of Evidence*, 5 November 2009, p. 10.

28 Gilbert + Tobin Centre of Public Law, *Submission 23*, p. 2

29 James Emmerig, *Submission 27*, pp 2-3.

critiques, and alternative practices, are discussed in more detail in chapter 4.

