

History of the Yes/No pamphlet

- 2.1 The *Referendum (Constitution Alteration) Act* (Cth) ('Referendum Act') was enacted in 1906 and provided the mechanism through which a proposed amendment to the Constitution was submitted to the electors. However, this original Act did not provide for the submission of arguments for and against the proposed change. This provision was not incorporated in the Act until 1912.¹
- 2.2 During the three preceding referendums (1906, 1910 and 1911), and prior to the additional legislation in 1912, there had been no provision for government funding of the official Yes/No arguments. The 1912 amendment was introduced by the Fisher Government, which believed their proposals for change had been rejected by voters who were inadequately informed of the issues, and who had been misled by those who opposed the changes.²
- 2.3 The Government inserted section 6A into the Referendum Act which authorised public funding of the 2 000 word arguments.³ At the time the arguments were seen as an effective way of providing voters with basic facts about proposed changes to the Constitution. Prime Minister Andrew Fisher assured the House of Representatives that he had 'no doubt that the

1 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 86.

2 Enid Campbell, Southey Memorial Lecture 1988, 'Changing the Constitution - Past and Future', *University of Melbourne Law Review*, Vol. 17, June 1989, p. 11.

3 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', Appendix 5, *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 87.

case will be put from both sides impersonally and free from any suggestions of bias or misleading'.⁴

- 2.4 Attorney-General of the day, the Hon William Hughes MP, envisaged that the arguments would be put in an 'impersonal, reasonable and judicial way', and would appeal to 'reason rather than to the emotions and party sentiment'.⁵

The use of the Yes/No pamphlet since 1912

- 2.5 While the legislation sets out the procedures for the Yes/No arguments, there is no obligation for parliamentarians to actually prepare them. There have been three instances where Yes/No arguments were not prepared: 1919, 1926 and 1928.
- 2.6 One these three occasions, the reasons given for not providing the arguments were respectively:
- it was determined there was insufficient time to write, prepare and post the pamphlets as the Government wished to hold the referendum in conjunction with an early election. The Parliamentarians argued their case in conjunction with the election campaigns;⁶
 - a provision rendering section 6A inoperative for the referendum was introduced as the supporters of the proposal were so divided that the provision of a Yes case was deemed impracticable; and⁷
 - bipartisan support for the proposal, and support from the states resulted in an agreement that no Yes/No arguments were required.⁸
- 2.7 The Yes/No pamphlets were distributed for the referendum in 1937 and in every subsequent referendum.⁹ However, there have been occasions where

4 Enid Campbell, Southey Memorial Lecture 1988, 'Changing the Constitution- Past and Future', *University of Melbourne Law Review*, Vol. 17, June 1989, p. 11.

5 William Hughes, Commonwealth Attorney-General, House of Representatives Hansard, 16 December 1912, p. 7154

6 Lynette Lenaz-Hoare 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', in *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 90

7 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117.

8 Cheryl Saunders, 'Referendum Procedures,' in *Australian Constitutional Convention 1984: Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, Appendix 7, pp 111-117.

only a Yes argument was distributed to electors. This has occurred when a proposed amendment received unanimous support by both Houses, as was the case in one of the two proposals put to referendum in 1967, and three of the four proposals put in 1977. (The substance of these proposals is outlined in chapter 3.) The machinery of referendums legislation specifies that an argument against the proposed change is to be authorised by a majority of members of the Parliament who vote against the proposed law. Where no member votes against the proposed law, there can be no official No case.

2.8 The processes outlined in the 1912 amendment to the Referendum Act have remained largely unchanged, despite the opportunity being presented when the legislation was revisited in 1984. Except for the limitation on Government expenditure, the *Referendums (Machinery Provisions) Act 1984* ('Machinery of Referendums Act') did not significantly change the substance of section 6A, which was reintroduced into the new Act as section 11.

2.9 However discussion surrounding the introduction of the Machinery of Referendums Act did address the sufficiency of the material provided to electors prior to a referendum. In 1984, Attorney-General the Hon Senator Gareth Evans stated:

It should be squarely acknowledged that the official Yes/No pamphlet is no longer adequate - if indeed it ever was-as a means of conveying information ... The last occasion on which the Yes/No pamphlet appears to have been relatively informative and moderate in its presentation was back in 1913.¹⁰

2.10 When the Machinery of Referendums Act was introduced in 1984, section 11(4)(b) was included to provide for the distribution of impartial information relating to the proposed change. The Attorney-General stated that the function for conveying such information should rest with an impartial body, and identified the AEC as the obvious choice. The Attorney-General intended that there should be some capacity to present 'neutralised' information to attempt to redress some of the 'strident propaganda which has traditionally made constitutional referendums so irrational a feature of Australian political life'.¹¹ The adoption of this

9 Lynette Lenaz- Hoare, 'The History of the "Yes/No" Case in Federal Referendums, and a Suggestion for the Future', in *Australian Constitutional Convention 1984, Constitutional Amendment Sub-Committee, Report to Standing Committee*, June 1984, p. 90

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

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

proposal resulted in section 11(4)(b), which enables the Commonwealth to spend money in relation to 'the provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law'.

- 2.11 Although this provision would allow the AEC to produce material in addition to the Yes/No pamphlet, it has rarely been used to distribute impartial contextual material to electors. This is largely because of the uncertainty associated with the term 'impartial'. For example, the High Court ruled that a series of government advertisements scheduled to run prior to the 1988 referendum were in breach of section 11(4) of the Machinery of Referendums Act as the advertisements were considered to be an argument *for* the constitutional amendment.¹² (Further discussion of *Reith v Morling* is provided in chapter 3.)
- 2.12 The absence of additional background material was again addressed by Attorney-General, the Hon Daryl Williams MP, in the second reading speech for the 1999 amendment to the Machinery of Referendums Act:
- In order to make an informed decision, the Australian people must have access to relevant information about our system of government and the proposal for change. The government believes that public funding should be made available to support a vigorous and engaging public presentation of the arguments for and against change.¹³
- 2.13 As highlighted in 1984 and 1999, there have been several criticisms directed at the processes associated with the Yes/No arguments and the absence of sufficient material to enable the Australian people to make an informed decision. As well, a number of parliamentary inquiries have considered or touched on the current processes and their adequacy in changing the Constitution. (For an overview of previous inquiries, refer to Appendix F.)

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

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