House of Representatives

Standing Committee on Legal and Constitutional Affairs

Inquiry into the Machinery of Referendums

I thank the Committee for the opportunity to make this submission. My expertise is in the law of politics, particularly the regulation of elections, parties and political finance, in which I have been researching and writing for around 13 years.

My submission focuses on two recommendations, which are more substantive than mere machinery recommendations. The reasoning for these recommendations is fleshed out in two articles which I attach:

(1) 'The Conduct of Referenda and Plebiscites in Australia: a Legal Perspective' (2000) 11(2) *Public Law Review* 117-132.

(2) 'Electoral Reform as a Tonic for Referenda and Federalism: a Response to Professor Craven' (2005) 20 (No 2) *Australasian Parliamentary Review* 83-94.

I also raise a third issue for the committee's interest, the potential of 'preferenda'. That is, preferential voting at referenda and plebiscites.

Recommendation One: That voting at referenda be voluntary, not compulsory.

Referenda at federal level involve constitutional questions: that is, reform of the written Constitution. It is presumptuous and unfair to assume that *every* elector will have an opinion, let alone an informed opinion, on such questions. (In contrast, referenda and plebiscites at State level often involve social issues, like alcohol licensing and more recently recycled water, daylight saving and trading hours).

Voluntary voting at constitutional referenda, I believe, would lead to more rational referenda outcomes.

I hasten to add I am *not* seeking to undermine the principle of compulsory voting for elections. I support that principle - as do the policies of our political parties and community consensus. The decisions electors make at elections are categorically different to the decisions they make at constitutional referenda. At elections, each citizen is effectively asked 'Are you (or the things you care about) worse off than three years ago?' and 'Do you trust the opposition leadership more than the current leadership?' These are questions that all citizens have an equally important share and voice in, and even the politically disengaged have an instinctual response to those questions.

Constitutional referenda are on a completely different plane. They are largely questions of apportioning legislative or other power in a federation, or questions about rights or structures to guide or inhibit government. They are intensely legal and institutional questions and, invariably, are very particularistic ones. Everyone should be *encouraged* to be informed and care about such issues, but it is irrational to expect every citizen to feel connected to let alone to master such issues.

As a result, we have a clear problem in Australia of constitutional referenda facing lazy and sometimes disingenuous 'if you don't understand the question, just vote "no"' campaigns.

I also hasten to add I am not arguing for some re-writing of the constitutional inhibitions against amending the written Constitution. The double majority provision was intentionally built into section 128. Voluntary or compulsory voting, however, is left entirely to Parliament. Compulsory voting was not trialled until 1915 (Queensland) and 1917-1924 (at Commonwealth level). Thus, all early referenda were by voluntary voting. The 'Founding Fathers' did not think that compulsory voting was necessary to legitimate referenda results. Indeed, the drafts of the Constitution in the 1890s were adopted by ... voluntary voting.

It may be objected that referenda are often staged at election times. If so, whilst voting at such referenda would be voluntary, many electors, required to attend the polls to vote in the election, will feel they might as well vote in the referenda. But in principle, they will be able to opt not to vote. On the other hand, with voluntary referenda, Parliament might be more inclined to stage referenda outside election times. Cost aside, this is probably a good thing. The Republic and 1988 'mini Bill of Rights' referenda debates were probably enhanced because the issues were not mixed up with the intensely partisan atmosphere of an election campaign.

My argument is developed further in the *Australasian Parliamentary Review* piece mentioned above, at pp 86-90.

Recommendation Two: That any consideration of referenda finance law be rolled into, or delayed until the resolution of, the Green Paper/political finance process currently underway. However one issue should be considered by this Committee now: the disparity between forbidding Commonwealth money to be spent promoting a referenda proposal and the absence of any limits on States (or Territories) campaigning at Commonwealth referenda.

As a matter of principle, it is difficult to justify permitting one branch of government (ie States) to campaign on Commonwealth referenda, yet limit the Commonwealth itself to an ultra-even handed approach of equally funding a 'yes' and 'no' case. Under the current *Referendum (Machinery Provisions) Act*, Commonwealth money – outside the 'yes' and 'no' cases - can only be spent on advertising the fact of the referendum and educating electors in basic issues such as the voting system and the question to be posed at the referendum. We are in an era of increasing use of government advertising on contentious issues, by State governments particularly. We also know, from overseas experience, that wealthy third parties can become involved in referenda campaigning.

I am not advocating opening the Commonwealth coffers. Rather, there are two solutions.

(a) Placing a similar restriction on States and Territories as applies to the Commonwealth: ie no expenditure of public money on a referendum campaign, outside the formal 'yes' and 'no' cases. If necessary, State and Territory interests could be incorporated by allowing their Attorneys-General to be consulted on the arguments/issues that go into the 'yes' and 'no' campaigns.

(b) Placing a general cap on the amount that anybody or body can spend campaigning on a referendum question. The cap would have to be set at a reasonable level, to avoid infringing the implied freedom of political communication. But in terms of parity of arms, there is no reason for the cap to be higher than some reasonable share of the amount budgeted for the 'yes' and 'no' cases. There is a clear public interest in keeping the 'yes' and 'no' cases at the centre of referenda campaigns: it seeks to keep focus on the issues in the campaign rather than on partisan or other interests. This is not to seek to deny 'third parties' (lobby groups etc) the ability to campaign for or against a referendum question (at some level it may be useful in boosting

interest, understanding and hence informed turnout). But 'third parties' have no inalienable right to spend to a level that swamps the 'yes' and 'no' cases.
In ad hoc circumstances, of course, Parliament could amend the law to permit a higher level of campaigning (as was permitted for the 'yes' and 'no' cases at the 1999 Republican referendum).

The United Kingdom law on this is salutary. It is contained in the *Political Parties, Elections and Referendum Act 2000* (UK). For both elections and referenda, there are expenditure limits (higher for parties than third parties). Specifically for referenda, there is *no* room for expenditure of public moneys on advocacy. In particular, this prohibition on government funded referenda campaigns covers the national, regional and local governments (see sections 125 and 160). Referenda finance regulation internationally is explained in detail in a forthcoming collection, by K Gilland Lutz and S Hug (eds) *Financing Referendum Campaigns* (Palgrave, due for publication ~October 2009). This book includes a chapter on the UK by Navraj Ghaleigh, 'Sledgehammers and nuts? Regulating Referendums in the UK'.

Preferenda

I attach an article which may interest the Committee: 'Preferenda: the Constitutionality of Multiple Option Referenda' (2001) 3(4) *Constitutional Law and Policy Review* 68-72. It discusses the value of running referenda as 'preferenda'. The fatal flaw in the Republican referendum was artificially limiting options to 'status quo' vs 'parliamentary appointment of head of state'. There was a third popular option, 'direct election' that should have been in the mix.

In such circumstances, resolution and consensus is impeded, not advanced, by limiting referenda options to just two. Electors are well acquainted with preferential voting at Australian elections, indeed it legitimates majoritarian government. Preferenda have been used at both levels in Australia (eg the 1923 alcohol licensing/prohibition vote in Queensland and the 1977 National Song plebiscite). At a constitutional level, I understand a preferendum was used in Newfoundland, and is on the drawing board for a proposed Scottish independence/further devolution referendum.

So, in principle, the 'preferenda' should be on the menu. However ,as the article discusses, depending on which questions ran third in which states, a constitutional 'preferenda' may be less, rather than more likely to pass.

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