SOUTHEY MEMORIAL LECTURE 1988: CHANGING THE CONSTITUTION — PAST AND FUTURE

BY ENID CAMPBELL, OBE*

[*Since the Australian Federation came into being on 1 January 1901, forty-two proposals for alteration of the Constitution of the Commonwealth of Australia have been submitted to the electors, on eighteen separate occasions. Only eight of these proposals have been approved by the required electoral majorities. The author analyses the outcomes of the referendums on proposals to alter the Constitution and considers the lessons to be drawn therefrom. Attention is also given to the legislation governing the conduct of constitutional referendums and to suggestions as to how it might be improved.*]

Some twenty-one years ago, Professor Geoffrey Sawer, the leading Australian constitutional scholar of his generation, concluded the last chapter in one of his books on constitutional law — a chapter on amendment of the Australian federal Constitution — with this short observation: 'Constitutionally speaking, Australia is the frozen continent.'[1] Professor Sawer was referring to the fact that, while many attempts have been made to alter the Australian federal Constitution, in accordance with the procedure prescribed by that Constitution, very few of the proposed alterations have, when submitted to popular referendum, been approved by the requisite electoral majorities.

The procedure laid down in s. 128 for alteration of the Constitution is briefly this. First a Bill must be introduced in the federal Parliament. That Bill must then be passed by an absolute majority of each House of the Parliament, though provision is made whereby, if the Houses are deadlocked over the proposed amendment, the proposal may be submitted to referendum notwithstanding that it has been passed by only one House. Once the requisite parliamentary majorities have been obtained, the proposed amendment may be submitted to the electors. In most cases the proposal will be effective if approved by a majority of electors voting and also by a majority of electors voting in a majority of the States, that is, four out of the six States.[2]

Section 128 defines the relevant electorate as consisting of all persons who are qualified to vote at elections for members of the House of Representatives. By virtue of an amendment to the Constitution made in 1977, those persons include electors in the Territories which have representatives in the House.[3] Who is qualified to vote in elections for members of the House, and thus in referendums

* LL.B (Hons), B.Ec.(University of Tasmania), Ph.D.(Duke University). Sir Isaac Isaacs Professor of Law, Monash University.

1 Sawer, G., *Australian Federalism in the Courts* (1967) 208.

2 The penultimate paragraph of s. 128 prescribes different rules regarding the State majorities required in respect of an alteration to diminish the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or to alter the limits of a State or to affect the provisions of the Constitution in relation to these matters.

3 Constitution Alteration (Referendums) 1977.

pursuant to s. 128, is left to be determined by the Parliament.[4] It is likewise left to the Parliament to decide whether voting shall be compulsory. Voting at constitutional referendums has been compulsory since 1924.[5]

I turn now to the record of referendums on proposals for alteration of the federal Constitution. When Professor Sawer made his oft-quoted remark about Australia being, constitutionally, the frozen continent, referendums on proposals to alter the Constitution had been held on thirteen occasions, in relation to twenty-six proposals. Only five of those proposals had been approved by the requisite electoral majorities. As of October 1988, forty-two proposals for alteration of the Constitution had been submitted to the electors on eighteen separate occasions. Only eight (or less than one in five) of those proposals had been approved by the electors.[6] Of the eight proposals which were approved, only one was of any great significance. This was the proposal of 1928 to insert a new section in the Constitution — s. 105A — to enable the Commonwealth to make agreements with the States with respect to the public debts of the States, to authorise the federal Parliament to legislate to validate the Federal State Financial Agreement of 1927, and to give that agreement, and any variations of it, overriding constitutional force.

On the other hand the number of Bills to alter the Constitution which were introduced in the Parliament between the establishment of the federation and 1988 was at least three times as many as the number of proposals put to referendum. Some twenty of the Bills could have been submitted to referendum, having been approved by the prescribed parliamentary majorities, but were not submitted.[7]

There has thus been no want of effort on the part of federal governments, or of

4 Constitution ss. 30 and 51 (xxxvi).

5 Referendum (Constitution Alteration) Act 1906, s. 4 and Commonwealth Electoral Act 1918, s. 128A (inserted by Act No. 10 of 1924). See now Referendum (Machinery Provisions) Act 1984, s. 45.

6 See Appendix. The proposals which were approved by the requisite electoral majorities were proposals 1, 3, 16, 20, 26, 34, 35, and 36. The sections in the Constitution which have been altered, added or deleted as a result of referendums are ss. 13, 15, 51 (xxiiiA), 51 (xxvi), 72, 105, 105A, 127 and 128.

7 Seven proposals for alteration of the Constitution were passed by both Houses of the Parliament but writs for referendums were not issued. They were Constitution Alteration (Advisory Jurisdiction of High Court) 1983 (Hawke Government), Constitution Alteration (Interchange of Powers) 1983 (Hawke Government), Constitution Alteration (Parliament) 1965 (Menzies Government), Constitution Alteration (Parliamentary Terms) 1983 (Hawke Government), Constitution Alteration (Repeal of Section 127) 1965 (Menzies Government) and Constitution Alteration (Simultaneous Elections) 1983 (Hawke Government).

In seven other cases writs for referendums on proposals approved by both Houses were withdrawn pursuant to special legislation (Referendum (Constitution Alteration) Act No. 2 1915). The proposals in question were Constitution Alteration (Corporations), Constitution Alteration (Industrial Matters), Constitution Alteration (Nationalization of Monopolies), Constitution Alteration (Railway Disputes), Constitution Alteration (Senators' Terms of Service), Constitution Alteration (Trade and Commerce), and Constitution Alteration (Trusts).

On six occasions the Senate has requested the Governor-General to issue writs for referendums on proposals for alteration of the Constitution approved by it, but not by the House of Representatives, but on each occasion the request has been refused. Such requests were made in relation to Constitution Alteration (Corporations) 1914, Constitution Alteration (Industrial Matters) 1914, Constitution Alteration (Nationalization of Monopolies) 1914, Constitution Alteration (Railway Disputes) 1914, Constitution Alteration (Trade and Commerce) 1914, Constitution Alteration (Trusts) 1914. See Commonwealth of Australia, Department of the House of Representatives, *Bills Not Passed into Law and Bills which originally Lapsed but Subsequently Passed, Sessions 1902-02-1983-85* (1985) 17-24.

federal politicians generally, to secure what they believe to be desirable changes to the federal Constitution. To their endeavours one must add those of others who have participated in official inquiries concerned with review and revisions of the federal Constitution: the Royal Commission on the Constitution 1927-9;[8] a Convention of representatives of the federal and state Parliaments 1942;[9] a joint select committee of the federal Parliament 1956-9;[10] the Australian Constitutional Convention 1973-85;[11] and, more recently, the Constitutional Commission 1985-8.[12]

The general questions I wish to explore first are: Are there explanations for the relatively low rate of success of referendums for constitutional change which are other than speculative? And are there any lessons to be learned from the record of constitutional referendums?

To answer these questions, one needs to consider first the kinds of proposed amendments which have been submitted to referendum, which of them have been approved and which have not been approved.

Of the forty-two proposals submitted between 1906 and 1988, most — twenty-three in all — have fallen into the category of proposals to enlarge the legislative powers of the Commonwealth, principally in relation to economic matters and industrial employment. But only two proposals to extend federal legislative powers have been approved by the electors: the proposal in 1946 to extend the Commonwealth's powers in relation to the provision of social services, and the proposal in 1967 to enable the federal Parliament to legislate for aborigines.[13]

From these facts one might infer that most electors have generally been satisfied with the division of legislative powers ordained by the original Constitution and opposed to enlargement of federal legislative powers. But it also needs to be observed that federal governments have, over the last forty years, not sought constitutional amendments to enlarge federal legislative powers to anywhere near the same extent as they did up to the end of World War II. Whereas fifteen of the nineteen proposals submitted to referendum up to 1945 were aimed to increase these powers, only eight of the twenty-three proposals submitted to referendum after that time were to the same end.

[8] Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (1929).

[9] Commonwealth of Australia, *Convention of Representatives of the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth of Australia: Record of Proceedings (1942)*. See also *Conference of Commonwealth and State Ministers on Constitutional Matters held in Melbourne 16 to 28 Feb. 1934: Proceedings and Decisions of Conference* (Parl.Pap. 134 of 1935).

[10] Commonwealth of Australia, Parliament, *Report from the Joint Select Committee on Constitutional Review* (1959).

[11] Sessions of the Convention were held in Sydney in 1973, in Melbourne in 1975, in Hobart in 1976, in Perth in 1978, in Adelaide in 1983 and in Brisbane in 1985.

[12] The Commission was appointed by the federal Government in December 1985. It presented its first report to the Attorney-General on 28 April 1988 and its final report in early July 1988. On the background to the Commission see Thomson, J.A., 'Amending the Constitution: Another Attempt' [1986] *Australian Current Law*, Articles 36025.

[13] Constitution Alteration (Social Services) 1946 and Constitution Alteration (Aboriginals) 1967. The first of these alterations inserted s. 51 (xxiiiA), the second amended s. 51 (xxvi) which authorised the federal Parliament to make laws with respect to 'The people of any race, other than the aboriginal race in any State, for whom it is necessary to make special laws' by deletion of the words 'other than the aboriginal race in any State'. Section 127, which provided that 'in reckoning the numbers of people of the Commonwealth, aboriginal natives shall not be counted', was repealed.

The unsuccessful proposals which involved extension of federal legislative powers were proposals 4 to 15, 17 to 19, 21 to 24, 27 and 28 (see Appendix).

It would be tempting to conclude that federal governments have recognised the futility of seeking extensions of federal legislative powers by constitutional amendment. There is, however, another reason why amendments of this kind have not, in modern times, been sought to the same extent as in the earlier years of the federation. It is this: High Court interpretations and re-interpretations of the ambit of the powers given to the federal Parliament by the Constitution have generally tended to sustain federal legislation as being within the scope of those powers.[14] In other words, the High Court has, to a large extent, obviated the need for federal governments to procure formal changes of the Constitution in order to implement their policies by legislation. Indeed, it has been said that the changes to the Constitution which, on a realistic view, have been made to the Constitution by means of High Court interpretation of it, are, very largely, ones which, 'if they had been put to the Australian people in a referendum, would have been rejected'.[15]

I have already noted the change, over time, in the extent to which federal governments have sought amendments to augment federal legislative powers. When one compares the proposals submitted to referendum between 1906 and 1945 with those submitted after that date, one finds further evidence of shifts in concerns — or at least concerns worth putting to referendum.

Take, for example, machinery of government questions. Into this general category I would place questions to do with the structure and composition of, and interrelationships between institutions of government, both state and federal, and also questions concerning electors' rights.[16] Up to 1945, only one proposal of that kind had been submitted to referendum. It was the first proposal for amendment of the Constitution ever to be put to referendum — the Senate Elections proposal of 1906. The change it involved was of relatively minor character. It was to permit elections for senators to take place on the same day as elections for members of the House of Representatives. In contrast, of the twenty-three proposals for change submitted to referendum after 1945, eleven (or nearly 50%) were to do with machinery of government questions in the sense I have indicated.

Of those eleven, six concerned the Senate — the so-called States' House in the federal Parliament in which, constitutionally, the States are equally represented. Of those six questions affecting the Senate, only one was approved by the requisite electoral majorities.[17] Like the proposal approved in 1906, it was of a relatively minor character. It did no more than write into the Constitution what was believed to be a convention that, if a casual vacancy arose in the Senate, the person chosen by a State Parliament to fill the vacancy should be a person of the political party of the Senator whose seat had become vacant.[18]

[14] Notably legislation in exercise of federal powers with respect to finance (taxation, appropriations and grants to States), inter-State and overseas trade and commerce, corporations, industrial arbitration, defence and external affairs.

[15] Dawson, The Hon. Sir Daryl, 'The Constitution — Major Overhaul or Simple Tune-up?' (1984) 14 M.U.L.R. 353, 355.

[16] See Appendix. The proposals I classify as concerned with machinery of government include proposals 1, 29 to 31, 33 to 37 and 39 to 41.

[17] Constitution Alteration (Senate Casual Vacancies) 1977.

[18] On the events which precipitated the alteration see Sawer, G., *Federation under Strain* (1977) 135-9, 181-2, 192-5.

The other proposals for alteration of the Constitution which have been submitted to referendum since 1945 and which have borne upon the Senate have been, arguably, more fundamental in character. In one case, the object was to break the nexus between the size of the House of Representatives and the size of the Senate.[19] Three other proposals affected the terms of office of Senators.[20]

The remaining machinery of government proposals submitted to referendum since 1945 have included two whose primary object was to enshrine in the Constitution the principle commonly described as one-vote-one-value.

Some brief comments should be made on the timing of the constitutional referendums and on the number of proposals submitted to the electors at any one time. Section 128 of the Constitution provides that when a proposed alteration is passed by both Houses of the Parliament, a referendum on the proposal is to take place not less than two months but not more than six months after its passage.[21] The section does not prevent referendums being held concurrently with general elections for the federal Parliament, and on nine of the eighteen occasions on which referendums have been held, they have been held at the same time as general elections.[22] Majorities in favour of constitutional change were obtained on five of those nine occasions.[23]

I doubt whether any significance can be attached to that fact because in each case the successful amendment had bipartisan support, and because, in three cases, the proposals which were approved by the electors were conjoined with one or more other proposals which were not approved by the electors.[24]

Possibly more significance can be attached to the number of proposals submitted to referendum at any one time and the relative rates of success of those proposals. The maximum number of proposals submitted at any one time has been six (in 1913). On thirteen out of the eighteen occasions on which referendums have been held, the electors have been asked to vote on more than one proposal. On nine of these thirteen occasions, none of the proposals was approved;[25] in the other four cases there was only partial approval of the proposals.[26] This might seem to suggest that the greater the number of proposals presented to the electors at any one time, the greater the risk of a 'No' vote.

It does, however, need to be pointed out that a single proposal can include a

[19] Constitution Alteration (Parliament) 1967. The Constitution permits the federal Parliament to increase the size of the House of Representatives but stipulates that the number of members of that House 'shall be, as nearly as practicable, twice the number of the senators' (s. 24). It also guarantees that each original State shall have no less than six senators (s. 7) and have no less than five members in the House of Representatives (s. 24).

[20] Constitution Alteration (Simultaneous Elections) 1974; Constitution Alteration (Simultaneous Elections) 1977; Constitution Alteration (Parliamentary Terms) 1988. The Constitution presently prescribes, as a general rule, that senators shall hold office for six years, *i.e.* for twice the maximum term of members of the House of Representatives. The term of office of a senator may, however, be cut short by virtue of a dissolution of both Houses of the Parliament pursuant to s. 57 of the Constitution.

[21] Where a proposed alteration has been passed by one House and not passed by the other House, and the conditions prescribed by the second paragraph of s. 128 have been fulfilled, there is no limit as to the time within which the proposal may be submitted to the electors.

[22] In 1906, 1910, 1913, 1919, 1928, 1946, 1974, 1977 and 1984. See Appendix.

[23] In 1906, 1910, 1928, 1946 and 1977. See Appendix.

[24] See Appendix for results of referendums of 1910, 1946 and 1977.

[25] In 1911, 1913, 1919, 1926, 1937, 1973, 1974, 1984 and 1988. See Appendix.

[26] In 1910, 1946, 1967 and 1977. See Appendix.

variety of separable proposals. The proposals on legislative powers submitted in 1911, 1919 and 1926, the post war powers proposal of 1944 and the fourth proposal of 1988 — the proposal to make certain guarantees of individual rights binding on States and Territories — were all of that character. Recently, the High Court has confirmed that, constitutionally, there is nothing to prevent this course being adopted,[27] and that the Court will not interfere with the parliamentary assessment of what is appropriate for inclusion in the one proposal. The circumstances which led to the Court's being asked to rule on this matter do, however, suggest that a government should think twice about incorporating within a single bill separable proposals for change which will be presented to the electors on an all-or-nothing basis.[28]

I turn now to the factor which seems to be the most decisive in determining the outcomes of constitutional referendums, namely whether or not a proposal has bipartisan support in the federal Parliament. All of the eight proposals which have been approved by the requisite electoral majorities have received that support. On the other hand, bipartisan support has not been a guarantee of success at the polls. Five proposals have had that support but have failed at the polls.[29] These five included the nexus proposal of 1967 and the simultaneous election proposal of 1977, both of them being supported by the Labor Opposition. Thus, while bipartisan support in the federal Parliament seems to be a necessary condition for the success of proposed amendments at the polls, experience shows that it is not a sufficient condition. What may be required, in addition, is active support from state governments or, at least, no concerted or substantial opposition by them.

The remaining aspect of the record of referendums lost and won which merits attention is electoral reactions. Consider first the voting on a state-by-state basis. Of the eight proposals which were approved by the prescribed majorities, all but one obtained majorities in all the States.[30] The overall majorities ranged from 54.39% in the case of the social services amendment in 1946 to 90.77% in the case of the 1967 amendment concerning aborigines. The pattern of voting on a state-by-state basis does not reveal any consistent alignment of the more populous States either for or against proposed alterations. Indeed, over time, there have been some interesting changes in pattern. Down to 1944, the States which were most supportive of proposals for change were Queensland and Western Australia. Majorities were secured in those States at about three times the rate they were secured in New South Wales, Tasmania and Victoria. Since 1945, voters in New South Wales have proved to be very much stronger supporters of constitutional change than voters in the other States and there has

[27] *Boland v. Hughes* (1988) 83 A.L.R. 673.

[28] The issue raised in the case was the permissibility of a referendum on Constitution Alteration (Rights and Freedoms) 1988 which concerned trial by jury, just terms for acquisitions of property under State law or in Territories, and freedom of religion in the States and Territories.

[29] These were Constitution Alteration (Legislative Powers) 1919, Constitution Alteration (Nationalization of Monopolies) 1919, Constitution Alteration (Industry and Commerce) 1926, Constitution Alteration (Parliament) 1967, Constitution Alteration (Simultaneous Elections) 1977. In each case the Opposition party was the ALP.

[30] The exception was Constitution Alteration (State Debts) 1910 which was carried in all States except NSW.

been a marked decline in the support obtained in Queensland and Western Australia. Tasmania has continued to be the least supportive State.[31]

From time to time it has been suggested that s. 128 should be altered to enable the Constitution to be changed where a proposal is approved by an overall electoral majority and majorities in at least half the States. Such an alteration was recommended by the Joint Select Committee of 1959[32] and was proposed in one of the questions submitted to referendum in 1974.[33] In fact, a rule of this kind would have secured the passage of three additional amendments: the marketing and industrial employment proposals of 1946 and the simultaneous elections proposal of 1977. It is also worth noting that, were majorities in only half the States required, the addition of a seventh State, say the Northern Territory, would have the effect of reinstating the present rule which requires majorities in a majority of States.

The total failure of the referendums held on 3 September 1988 will, I am sure, spawn further analyses of referendums lost and won,[34] further consideration of the prospects, if any, for constitutional change via s. 128 and how those prospects might be improved, and perhaps even further examinations of s. 128 itself. The results of the 1988 referendum undoubtedly confirm the hypothesis that proposals for formal constitutional change are destined to fail unless they have bipartisan support. All four proposals submitted to the electors in 1988 were strongly opposed by the federal Opposition — also by at least one state Government, Queensland's. But there is much more about the 1988 referendum which is noteworthy and which raises questions for the future.

The first point to be made about the 1988 referendum is that it involved a set of four federal government proposals which were presented by that government as ones involving no accretion of power to the institutions of federal government, with the possible exception of the first proposal which had to do with the maximum term of the federal Parliament and terms of Senators. This, I think, was a fair description of the proposals. The second and fourth proposals, that is those dealing with fair and democratic elections, and with extension of constitutionally guaranteed rights and freedoms, would, had they been approved, imposed limitations on governmental powers, federal and state. They were presented — and, I suggest, justifiably so — in the name of protection of important individual interests against governments.

A second relevant feature of the 1988 referendum was the antecedents of the proposals on which the electors were asked to express a view. All but one of them — the first — were substantially ones emanating from the Constitutional Commission appointed by the federal Government and were in the form

31 Thirty-two proposals submitted to referendum have failed to secure majorities in Tasmania. On the other hand a majority of electors in the State supported the eight proposals which received the majorities required by s. 128 of the Constitution. A majority of Tasmanian electors supported only two proposals which failed to secure the requisite overall majorities — the Finance proposal of 1910 and the Powers to Deal with Communists and Communism proposal of 1951. See further Sharman, C., and Stuart, J., 'Patterns of State Voting in National Referendums' (1981) 16 (2) *Politics* 261.

32 Report, paras 1289-1309.

33 Constitution Alteration (Mode of Altering the Constitution) 1974.

34 References to analyses of prior referendums appear in Thomson, J.A., 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal Law Review* 323, 325 n. 7, 326 n. 8.

recommended by that Commission in its First Report.[35] There is little doubt in my mind that the Government hoped that the fact that most of its proposals were essentially the Commission's would assist in attracting electoral support for those proposals, particularly if reference was made, as it was, to the fact that the Commission's recommendations were informed by submissions actively sought from the community at large.

What, I believe, the Government failed to take sufficient account of was the fact that the credibility of the Commission, and its Advisory Committees — also appointed by the Government — had, from the very inception of the Commission, been assailed by the federal Opposition, to the point where the Commission had been nominated as a body which would be disbanded were the Opposition to be elected to office. Spokespersons for the Opposition repeatedly alleged that the Commission and its Advisory Committees had been 'stacked' with persons who could be relied on to produce recommendations supportive of ALP policies. Much was also made of the fact that the establishment of the Commission had effectively put into abeyance the review of the Constitution being undertaken by the Australian Constitutional Convention. The suggestion was that, constituted as it was by delegates from federal, state and territory legislatures and of local governments, the Convention was the more appropriate body to consider what changes to the Constitution should be made.

Some may think that the Government proceeded with undue haste in the passage of the four proposals in the Parliament and in the fixing of an early date for the ensuing referendum. The proposals were introduced in the House of Representatives in early May within days of the transmission of the First Report of the Constitutional Commission to the Attorney-General — a report presented at his request. There was thus little opportunity for careful consideration of the Commission's reasons for recommending what it did. The Government's Bills were passed in fairly short time and the referendum day set for 3 September.[36]

My own view, as a member of the Constitutional Commission, was that, having established the Commission to undertake a comprehensive review of the

[35] The recommendations in the First report, which included draft alterations to the Constitution, were incorporated in the Commission's final Report. The relevant recommendations are set out in Chapters 4, 5, 8 and 9 of the final Report.

[36] The four proposals were introduced in the House of Representatives on 10 May and were debated on 17 and 18 May. They were passed by the House, without amendment, on 18 May. The proposals were introduced in the Senate on 19 May and were debated there on 24, 25, 26 and 31 May and 1 June. Constitution Alteration (Fair Elections) was passed with amendments moved on behalf of the Government. These amendments were adopted by the House of Representatives on 3 June.

The voting in the Senate was as follows:

	For	*Against*
Constitution Alteration (Parliamentary Terms)	40	33
Constitution Alteration (Fair Elections)	40	33
Constitution Alteration (Local Government)	41	32
Constitution Alteration (Rights and Freedoms)	40	33

See *Hansard (HR)* 10 May 2385, 2388-9, 2390-1; 17 May 2443-97; 18 May 2505-29, 2546-69; 3 June 3271-3; *Hansard (Senate)* 19 May 2522-28; 20 May 2593; 23 May 2684-733; 24 May 2789-826; 25 May 2867-70, 2892-910; 26 May 2958-82, 3020-67, 3177-9, 3207-511, 3293; 1 June 3325-37.

Even after the passage of the proposals debate on them continued in the Parliament up to the eve of referendum day by way of discussion of matters of public importance. See *Hansard (HR)* 29 Aug. 483-94; 30 Aug. 578-9; *Hansard (Senate)* 23 Aug. 92-6; 25 Aug. 266-88; 29 Aug. 389-411, 475-95, 594-615; 1 Sept. 706-17.

Constitution as a whole, it would have been preferable for the Government to have awaited the presentation of the Commission's complete report in late June 1988 and to have taken no action in response to the Commission's recommendations for constitutional change until after the elapse of sufficient time for the report to be digested and discussed by interested persons and organisations in the community at large. That course of action might conceivably have led to bipartisan support for at least some of the Commission's recommendations or modifications of them. The course which the Government adopted and the subsequent defeat of its proposals at referendum is, I believe, likely to render the Commission's final report a document of little more than academic interest.[37]

The Government clearly under-estimated the strength of the opposition which could be, and was, mounted against its proposals. I do not propose to comment on the arguments which were advanced for opposing the four proposals. Some of the opposing arguments, I concede, expressed a legitimate point of view, but for most part the objections were, in my opinion, spurious and in some cases, grossly misrepresented the effect or likely effect of the proposed amendments. I have no doubt that the proponents of the No case succeeded in arousing suspicion in many people's minds that there was more to the proposals than met the eye.

Opinion polls conducted during the period leading up to referendum day indicated a progressive decline in support for the proposed amendments. But this is not unusual. What may have been unusual was the extent to which voters' intentions changed. A Newspoll survey conducted in mid May — before distribution of the official Yes/No cases — indicated fairly strong support for all four proposals — 66% for the first (Parliamentary Terms), 74% for the second (Fair Elections), 66% for the third (Local Government) and 72% for the fourth (Rights and Freedoms).[38] A second survey conducted between 19-21 August revealed a drop in the degree of support in the order of about 20%.[39] A third survey conducted on the eve of the referendum revealed a further swing against all four proposals — 9% in the case of the first and second proposals, 11% in the case of the third, and as much as 13% in the case of the fourth.[40] It thus was clear by September 2, the day before the referendum day, that, if the surveys

[37] Under the instrument of appointment, the Commission was directed to report on or before 30 June 1988, though the Commission was also instructed to 'make interim reports on matters under study at intervals to be determined in consultation with the Attorney-General . . .'. The Commission's first Report, dated 27 April 1988, was sent to the Attorney-General on 28 April (see final Report, paras 1.80-1.83). The Commission's final Report was presented to the Attorney-General in the first week of July 1988, in the form of page-proofs. That Report was not, however, tabled in the House of Representatives until 20 October 1988 and was not tabled in the Senate until 14 December 1988.

[38] *Weekend Australian* (Canberra), 3-4 Sept. 1988, 2.

[39] *Ibid.*

[40] *Ibid.* Similar results were obtained in the Morgan Gallup Polls. Those polled indicated their support for the four proposals as follows —

	July 30, 31 %	Aug. 6, 7 %	Aug. 20, 21 %
First proposal	66	61	52
Second proposal	73	69	55
Third proposal	60	59	50
Fourth proposal	74	71	55

(*Bulletin* (Sydney), 6 Sept. 1988, 21)

were accurate predictions, the proposals would be rejected by overwhelming majorities.

In the event, all four proposals were defeated nationally and in all States. This was not the first time proposals for constitutional change had failed to receive majorities in any of the States. Five others had suffered the same fate, among them the prices and incomes proposals of 1973 and the interchange of powers proposal of 1984. But with one exception, the 1988 proposals attracted the lowest majorities ever obtained in constitutional referendums.[41]

These results must raise serious doubts about the prospects of achieving change in the Constitution by formal amendment — at least where the proposals for change are not supported by the federal Opposition parties. Some may even question the suitability of the procedures prescribed by s. 128 of the Constitution as a means of procuring change. Those procedures must, I believe, be reconsidered. They are the subject of the last chapter in the Constitutional Commission's final report.[42] But of one thing I am convinced: the Australian electorate would not accept any amendment of s. 128 which denied them the final voice on proposals for constitutional change.[43] We must therefore acknowledge that popular referendums are, and will continue to be, an integral part of the process for formal amendment of the federal Constitution.

It seems to me that, in the light of our most recent experience, renewed attention needs to be given to the conduct of referendums. As I have already said, the Constitution does not regulate the manner in which referendums are held or control the conduct of referendum campaigns. These matters are left to be regulated by ordinary legislation.

This legislation can be changed. The question is whether it ought to be.

The current legislation is the Referendum (Machinery Provisions) Act 1984 (Cth) which supplanted the Referendum (Constitutional Alteration) Act 1906 (Cth). One aspect of it which has already attracted critical attention is that which allows for the distribution to the electors, at public expense, of the official Yes/No cases[44] and which at the same time restricts expenditure of federal government funds in support of, or in opposition to, proposals which are to be submitted to referendum.[45]

[41] See Appendix. The proposal which received the greatest support was Constitution (Fair Elections) — 37.1 per cent. Only two prior proposals received less support: Constitution Alteration (Marketing) 1937 — 36.2 per cent. and Constitution Alteration (Incomes) 1973 — 34.4 per cent.

[42] See *Report*, Chap. 13. The Commission recommended, inter alia, that the Constitution be altered to permit referendums to be initiated by State Parliaments as well as by the Houses of the federal Parliament, and to provide that a proposed law to amend the Constitution is passed if it is approved by an overall majority of electors and by electors in at least half of the States.

[43] Although the Constitution was enacted as an Act of the Parliament of the United Kingdom, it had previously been approved by electors in the federating colonies voting at referendums held pursuant to enabling colonial legislation on the question of whether they approved the proposed Federal Constitution Bill.

On the history of s. 128 of the Constitution see Quick, J. and Garran, R.R., *The Annotated Constitution of the Commonwealth of Australia* (1901), 135, 141, 147, 171, 180, 182-3, 217-8, 220, 986-8.

[44] See *e.g.* Howard, C., *Australian Federal Constitutional Law* (3rd ed. 1985) 581-3.

[45] Referendum (Machinery Provisions) Act 1984, s. 11(4). This sub-section prohibits the expenditure by the Commonwealth of money in respect of argument for or against a proposed alteration, except in relation to the printing and distribution of the official Yes/No cases, the provision by the Electoral Commission of other information relating to proposals, and parliamentary and public

Provision for government funding of the official Yes/No cases was first made in 1912. It was made at the instigation of the Fisher Labor Government following the defeat of its amending proposals the previous year. The Government believed that these proposals had been rejected largely because the electors had not been adequately informed about their objects and had been misled by those who had publicly opposed them.[46] According to the Attorney-General of the day, Mr W.M. Hughes, legislation to enable the distribution to the electors of the official Yes/No cases would ensure that the cases for and against would be put to electors 'in an impersonal, reasonable way', without 'imputation of motives' and by appeal 'to the reason rather than the emotions and party sentiments'.[47] Mr Fisher assured the House of Representatives: 'I have no doubt that the case will be put from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other. Let it [i.e. the Yes/No case sent to electors] be a document that the Parliament will be proud of, from which Australia will benefit.'[48] What wishful thinking!

Briefly, what the current legislative provisions on presentation and distribution of the official Yes/No cases provide is as follows.

A majority of those members of Parliament who voted for a proposed amendment may send to the Electoral Commissioner an argument in favour of the proposal, not exceeding 2000 words. The same facility is accorded to the members who voted against the proposal. Where more than one proposal is to be submitted to referendum, the arguments for and against any one proposal may exceed 2000 words, so long as the arguments for and against all proposals do not, on average, exceed 2000 words. On receipt of the arguments, the Electoral Commissioner is obliged to print and distribute to electors a pamphlet containing the arguments, plus a statement showing the textual alterations and additions proposed to be made to the Constitution.

Several points to be noted about these arrangements are —

(a) Preparation of the official Yes/No cases is not obligatory and in fact there have been three occasions on which Yes/No cases were not prepared (1919, 1926 and 1928).

(b) If neither a Yes case nor a No case is submitted, the electors will not necessarily receive copies of the text of the proposed amendments.

(c) Should a proposed amendment be passed unanimously by both Houses, there can be no official No case.

service salaries. The measure was initially moved by Senator Durack as an amendment to the Government's Referendum (Constitution Alteration) Amendment Bill of 1983, in response to a Government proposal to spend extra government funds (from the Advance to the Treasurer) on publicity in support of the referendums to be held on 25 Feb. 1984. *(Hansard (Senate)* 7 Dec. 1983, 3368-80). In the event, the amending Bill was not passed by the Senate and the referendums were not held.

Sub-s. (4) was subsequently re-introduced in the Senate by the Australian Democrats as an amendment to the Referendum (Machinery Provisions) Bill 1984 *(Hansard (Senate)* 7 June 1984.) See also *Reith v. Morling*, (1988) 83 A.L.R. 667.

46 The background to public funding of the Yes/No cases is described in appendices to Australian Constitutional Convention, Constitutional Amendment Sub-Committee, *Report to Standing Committee* (1984) 86-9, 94-5.

47 *Hansard (HR)* Dec. 1912, 7154.

48 *Ibid.* 7156.

(d) The No case can be presented even if only one member of Parliament has voted against it.
(e) In practice, the Electoral Commissioner distributes the Yes/No cases submitted to him in exactly the form desired by the proponents.[49]
(f) There is no requirement that the pamphlet distributed to electors should reveal the voting in Parliament on proposals to alter the Constitution.

There is, I believe, ample justification for supplying electors, in advance of a referendum, and at public expense, with copies of the text of proposed amendments on which they are required to vote, together with information about the precise questions which will appear on the ballot paper.

I agree that to supply the raw text of proposed amendments will often not enable most electors to understand the significance of the proposals or to make an informed decision. But I seriously doubt whether there is any justification for public funding of the distribution, through the office of the Electoral Commissioner, of arguments by political partisans.

The expectations of the Fisher Government that the Yes/No cases, and especially the No case, would be presented rationally and fairly were, plainly, unrealistic. Close analysis by disinterested observers of many of the No cases would, I am convinced, reveal numerous examples of statements which, objectively, could be shown to be wrong as regards likely legal and practical effects of proposed amendments. Although s. 122 of the legislation on constitutional referendums prohibits, under pain of criminal penalties, the printing, publication or distribution during a referendum period of material which is likely to mislead or deceive electors in relation to the casting of votes at a referendum, that section has never, to my knowledge, been invoked against any of the official Yes/No cases. Indeed, it is not even clear whether the section applies to these cases.

I have come round to the view that government funds, either federal or State, should not be available to prosecute arguments either for or against proposals for constitutional change which are to be the subject of referendums. Were the present regime (whereunder official Yes/No cases are funded from federal Government funds) to be abandoned, a question that would need to be considered is whether there should be legislative controls on campaign expenditures, in order to ensure rough equality as between the contestants. An ancillary question would be the extent to which, if at all, the federal Parliament can, constitutionally, enact legislation of that kind — especially legislation directed towards use of the funds of state governments and their appropriation by state Parliaments to support or oppose proposals for constitutional change which are to be submitted to referendum.

But assume for the moment that the present system whereby the official Yes/No cases are distributed to electors, at public expense, is maintained. Should there be further a legislative requirement that, when those cases are presented, there be supplied to the electors a third, non-partisan, statement as to the significance and effects of a proposed amendment?

[49] The role of the Electoral Commissioner does not seem to be generally understood. After the distribution of the official Yes/No cases in 1988 it emerged that a number of people believed that the Commissioner was responsible for the form in which the cases were presented.

This question was considered by the Constitutional Amendment Sub-Committee of the Australian Constitutional Convention in 1984[50] and, later, by the Convention itself. The Convention resolved in 1985, by 35 votes to 33[51] —

That whenever a referendum is held —

(a) Commonwealth funded informational material be circulated to all electors, that the issues be presented by an independent person or persons nominated through the Commonwealth parliamentary process and that the material be prepared in consultation with, and subject to the approval of, those Parliamentarians who voted for or against the proposal as the case may be; and

(b) outside the expenditure on the formal Yes/No cases, no expenditure should be incurred by the Commonwealth on the promotion of either side of a proposal for constitutional change.

This resolution adopted the recommendations of the Sub-Committee with the exception of a recommendation to the effect that 'it be a practice understood by all parties to the federal compact that States and Territories should not incur expenditure of public funds on the promotion of either case.'[52] Interestingly, the proposals attracted very little comment in the debates on the relevant agenda item.

Several points are worth noting about the Convention's resolution. The first is that it presupposes that federal funding of the official Yes/No cases should continue. Secondly it expressly rejects the proposition that federal Governments should be able to expend federal moneys on referendum campaigns, over and above those available for printing and distribution of the official Yes/No cases. To that extent the Convention repudiated the point of view which had been expressed by the federal Government in late 1983 and again in mid-1984 when it moved, unsuccessfully, for an amendment of the Referendum (Machinery Provisions) Bill 1984 (Cth) to provide for public funding of promotional material outside the official Yes/No cases, according to a formula which would take account of the relative support in the Parliament for proposals for constitutional change.[53]

The third aspect of the Convention's resolution that merits notice is that it is not specific as regards what person or body of persons might appropriately be chosen to prepare the additional informational material to be distributed to electors. In recommending that a non-partisan person or persons be responsible for preparing such material, the Constitutional Amendment Sub-Committee was

50 *Report to Standing Committee*, June 1984. The Standing Committee had referred the following questions to the Sub-Committee following the controversy in late 1983 over public funding for referendum campaigns (*supra* n. 45) —

(a) The funding and nature of separate advertising and promotional campaigns for referendum proposals both for and against;

(b) The supervision of expenditure for referendum proposals campaigns;

(c) Whether there should be any distinction between referendums supported by the Constitutional Conventions and those initiated by the Commonwealth, and

(d) How any public funding pursuant to (a) should be apportioned.

51 Australian Constitutional Convention, *Proceedings of the Australian Constitutional Convention* (1985) 363, 424.

52 *Ibid.* 390, 295, 313.

53 *Hansard (Senate)* 7 June 1984, 2729-38, 2762-74; *Hansard (HR)* 7 June 1984, 3157-9.

obviously influenced by a system which operates in California under which electors who are qualified to vote in constitutional referendums receive, before referendum day, a copy of each proposed measure, an official summary of the proposal by the State's Attorney-General, a copy of the provisions in the State's Constitution affected by the measure, arguments for and against the measure prepared by members of the legislature,[54] an analysis of the measure by the Legislative Analyst,[55] and a statement of the number of votes cast for and against the measure in the legislature.[56]

While I am encouraged by the knowledge that among the politicians[57] there is at least some support for the notion of having an independent body produce informational material to help the electors decide on how they will vote in constitutional referendums, I rather wonder whether, if the politicians ever came to deliberate seriously on who should be chosen to assume this responsibility, they would be able to come to any agreement. Even if there were to be provision for a publicly funded independent analysis of proposed alterations to the Constitution, there could certainly be no assurance that the analysis which was produced would not be assailed by the political partisans in the course of referendum campaigns.

This brings me to a further proposal which has been made regarding the conduct of constitutional referendums, namely that contained in the Referendum (Machinery Provisions) (Fair Questions) Amendment Bill introduced in the Senate on 24 August 1988, on behalf of the Opposition. This measure dealt with the form of the questions in constitutional referendums as they appear in the pamphlet containing the official Yes/No cases and on the ballot paper. At present these questions invite electors to indicate whether they approve or disapprove of a proposed alteration to the Constitution described by what is essentially the long title of the proposed alteration.[58] The Opposition claimed that the questions to be submitted to electors at the 1988 referendums were deceptive and misleading. Their Bill registered their concerns in this regard.

The long titles of the proposed alterations to the Constitution which were to be submitted to the electors on 3 September certainly did not, by themselves, convey to electors very much about the nature of the proposals, but very few long titles of proposals for alteration of the Constitution are likely to be adequate for this purpose.

54 The Yes case is prepared by the initiator of the proposal and up to two persons appointed by him, and the No case by one member from each House (appointed by the presiding officer) who voted against the measure. If a Yes or a No case has not been presented by a legislator by the due date, an elector may request permission from the Secretary of State to prepare a case for either side.

55 The Legislative Analyst is a statutory officer whose duty it is to prepare an impartial analysis of the measure, including an analysis of its financial impact. His analysis must be 'written in clear and concise terms which will be easily understood by the average voter' and must, wherever possible, 'avoid the use of technical terms.'

56 This account of the Californian system is drawn from Commonwealth Attorney-General's Department 'Survey of Referendum Funding and Publicity Outside Australia' in Australian Constitutional Convention, Constitutional Amendment Sub-Committee, *Report to Standing Committee* (1984) 103-7.

57 The Legal and Constitutional Committee of the Parliament of Victoria considered the recommendation of the Constitutional Amendment Sub-Committee of the Australian Constitutional Convention prior to the 1985 session of the Convention and recommended a system modelled on the Californian. See *First Report on the Australian Constitutional Convention* (1985) 47-8.

58 Referendum (Machinery Provisions) Act 1984 (Cth) s. 25.

What the Opposition proposed in its Bill to amend the Referendum (Machinery Provisions) (Fair Elections) Bill was as follows. The question to be set out in the ballot-paper for a referendum should 'be in a form, determined by the Electoral Commissioner, that adequately and accurately reflects the substantive measures contained in the proposed law' to alter the Constitution. Further 'in determining the questions to be set out on the ballot-paper the Electoral Commissioner' should have regard to three matters —

(a) the wording of the title of the proposed law;
(b) the content of the proposed law; and
(c) the need for voters, as far as practicable, to be in a position to make an informed decision on their support for or their opposition to the proposed law.

The Bill provided also for publication of a copy of the question, as determined by the Electoral Commissioner, in the Gazette, and for review of the Commissioner's determination by a presidential member of the federal Administrative Appeals Tribunal, on the application of a member of either House of the Parliament. Such an application would have to be made within seven days of the Gazette notification, and, if made, would have to be determined by the Tribunal within fourteen days. The Tribunal would be empowered to alter the Commissioner's determination.[59]

The Opposition's Bill was debated in the Senate on 25 August 1988 and was defeated by thirty-three votes against and thirty votes in favour.[60] Most Senators apparently considered it inappropriate for the responsibility of deciding the form of the questions to be submitted to electors at constitutional referendums to be taken out of the hands of parliamentarians and given to unelected officials.

An assumption which appears to underlie the Opposition's proposed change in the legislation governing referendums is that most electors do not look beyond the questions which are to appear in the ballot paper in deciding how they will vote. One can only speculate on whether such an assumption is well-founded. Ballot papers which set out referendum questions in the manner stipulated by the Opposition's amending Bill would inevitably end up as fairly lengthy documents and that could mean that the percentage of informal voting in referendums would increase.

It seems to me that, from a practical point of view, the questions which appear on the ballot paper will need to continue to be expressed in the customary short form. This is not, however, to say that electors should not be more fully informed on the nature of the questions on which they are required to vote. The issue is rather how they should be so informed, by whom and at whose expense.

As I have stated earlier,[61] I do not have any quarrel with the proposition that, prior to a referendum, electors should be provided, at public expense, with the full text of the proposed alterations to the Constitution on which they are required to vote.[62] On the other hand, I have to concede that there could be many

59 The Bill also provided for award of costs by the Tribunal.
60 *Hansard (Senate)* 25 Aug. 1988, 318-34.
61 *Supra* 12.
62 It can even be argued that a proposed law to alter the Constitution could not even be held to have been approved by electors unless its text has been submitted to them.

proposed alterations to the Constitution the meaning and effect of which would not be readily intelligible to the vast majority of electors upon inspection of the text of those proposed alterations, however hard the drafters have tried to express those proposed alterations in Plain English. But it is not impossible to contemplate a document, separate from the text of proposed alterations, which sets out to describe the intended effect of the alterations, without arguments for or against those alterations. The explanatory memoranda which now accompany most Bills introduced in the Parliament are documents of this kind and provide a useful model for the kind of informational material which might usefully be included in the pamphlet which electors now receive.

It has to be recognised that any suggestion that electors receive, in advance of a constitutional referendum, copies of explanatory memoranda, presents the same difficulties as those I mentioned earlier in relation to implementation of the Australian Constitutional Convention's resolution regarding presentation of information from an independent source.[63] Legislation on the matter would necessarily have to identify a person or body as being responsible for the production of the 'authentic' explanatory memorandum. It could be the person initiating the proposed alteration in the Parliament, but what if the proposal underwent amendment during the course of its passage in the Parliament?

Arguably, provision to the electors of explanatory memoranda of the kind I have described would already be permissible under the existing legislation governing conduct of referendums. The provision which controls expenditure by the Commonwealth only prohibits expenditure of money 'in respect of the presentation of the argument in favour of, or the argument against', a proposed alteration to the Constitution, except in relation to specified matters. The excepted matters include the preparation, printing and distribution of the official Yes/No cases and 'the provision by the Electoral Commission of other information relating to, or relating to the effect of', the proposed alteration.[64]

The legislation thus distinguishes between the presentation of arguments and the provision of information. On my reading of it, the legislation does not preclude the provision to electors, at federal government expense, of non-argumentative material explanatory of the effect of proposed changes to the Constitution.

At the same time it has to be recognised that the distinction between information and argument is not always clear-cut. This was clearly shown by the controversy which arose during the lead-up to the 1988 referendums over the legitimacy of expenditure of funds by the Commonwealth on proposed television advertisements to raise public awareness of what the impending referendum was about. In the end, the controversy was resolved only by litigation before the High Court.[65] A further question arose as to the permissibility of expenditure on publication of the Constitutional Commission's final report, prior to referendum

[63] *Supra* 14.

[64] Referendum (Machinery Provisions) Act 1984 (Cth) s. 11(4).

[65] *Reith v. Morling* (1988) 83 A.L.R. 667. The plaintiff in the case was the Shadow Attorney-General.

day.[66] I mention these two incidents merely because they illustrate that the scope of the restrictions which the legislation imposes on federal spending in connection with constitutional referendums is by no means certain. For example, while the High Court's ruling accepts that the legislation prohibits expenditure by the Commonwealth of additional funds to advance or oppose arguments appearing in the official Yes/No cases, it leaves open the question whether the legislation prevents expenditure by the Commonwealth of additional funds to present arguments not included in those cases, say additional arguments contained in a report presented to the Government or already advanced in parliamentary debates.[67]

Whatever one's personal views might be on how, if at all, the Constitution ought to be changed, our most recent experience should, at least, prompt reconsideration of the legislative framework governing constitutional referendums. We need to think again about the desirability of maintaining public funding of official Yes/No cases and the present system whereby those cases are distributed by the Electoral Commission in the brochure which includes the text of the proposed alterations, the form of the ballot paper and informational material compiled by the Commissioner. We need to think too about the justification, if any, for tying the hands of federal Governments, in the way the present legislation does, as regards the purposes for which public moneys are spent, having regard to the fact that the hands of State and Territory Governments are not tied in the same way. We need also to pay heed to the recommendation[68] of the Australian Constitutional Convention and consider ways and means of implementing its spirit.

Legislative regulation cannot, nor should it, eliminate political partisanship in referendum campaigns, but it can go some distance towards ensuring that those whose opinion about the content of the Constitution ultimately counts — the electors — are enabled to make rational and informed decisions, and that their imperfect knowledge and understanding of the Constitution and its significance, are not exploited for short-term, political party ends.

66 Contrary to the claim by the Shadow Attorney-General, copies of the report were not withheld from the public prior to referendum day because the Government accepted that the legislation might be infringed. Although the Attorney-General received the report after the passage of the proposed alterations of the Constitution, but before referendum day, copies of the report would not have been, and were not printed and available for distribution to the public until well after referendum day.

67 Dawson J. did, however, think that there was something to be said for a broad construction of sub-s. 11(4) of the Referendum (Machinery Provisions) Act 1984 (Cth) 'whereby it is taken as a reference to the argument for or the argument against in general and not as a reference to the particular arguments included in the pamphlet', *i.e.* the pamphlet setting out the Yes/No cases. 'Such a construction would', he suggested, 'give effect to an intention that Commonwealth government expenditure in relation to the cases for and against a proposed law should, subject to the exceptions . . ., be restricted to the preparation, printing and distribution of' the official Yes/No cases (*Reith v. Morling* (1988) 83 A.L.R. 667, 670-1).

68 *Supra* 13.

APPENDIX
Referendums on Alteration of the Constitution of the Commonwealth of Australia[a]

	Initiating Constitution Alteration	Date of referendum and party submitting	Nature of Amendment	In Favour	
				State	Percentage of formal voters
1	Senate Elections, 1906[c]	12 December 1906 (Non-Labor)[b]	To alter from January to July the date on which the term of Senator begins, and to provide for other matters connected with election of senators	All	82.7
2	Finance, 1909	13 April 1910 (Non-Labor)[b]	To vary the financial arrangements between the Commonwealth and the States, to provide for per capita payments to each State and special payments to Western Australia	QLD, Tas., W.A.	49
3	State Debts, 1909[c]	13 April 1910 (Non-Labor)[b]	To take over the public debts of the States whenever incurred	All except N.S.W.	54.9
4	Legislative Powers, 1910	26 April 1911 (ALP)	To deal with (a) trade and commerce, without any limitations; (b) the control and regulation of corporations of all kinds, except those formed solely for religious, charitable, scientific or artistic purposes; (c) labour and employment, including wages and conditions of labour and the settlement of industrial disputes generally; and (d) combinations and monopolies in relation to the production, manufacture, or supply of goods or services	W.A.	39.4
5	Monopolies, 1910	26 April 1911 (ALP)	To make laws for the Commonwealth to carry on, control or acquire a declared monopoly	W.A.	39.9
6	Trade and Commerce, 1912	31 May 1913 (ALP)[b]	As in (a) under (Legislative Powers) Referendum 1910, but excluding intrastate trade and commerce on State Railways	QLD, S.A., W.A.	49.4

	Initiating Constitution Alteration	Date of referendum and party submitting	Nature of Amendment	In Favour	
				State	Percentage of formal voters
7	Corporations, 1912	31 May 1913 (ALP)[b]	As in (b) under (Legislative Powers) Referendum 1910	QLD, S.A., W.A.	49.3
8	Industrial Matters, 1912	31 May 1913 (ALP)[b]	To make laws with respect to labour, employment, and unemployment, including the terms and conditions of labour, the rights and obligations of employers and employees, strikes and lockouts, the maintenance of industrial peace and the settlement of industrial disputes	QLD, S.A., W.A.	49.3
9	Railway Disputes, 1912	31 May 1913 (ALP)[b]	To make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes in relation to employment in the railway service of a State	QLD, S.A., W.A.	49.1
10	Trusts, 1912	31 May 1913(ALP)[b]	As in (d) under (Legislative Powers) Referendum 1910, but expressly including 'trusts'	QLD, S.A., W.A.	49.8
11	Nationalisation of Monopolies, 1912	31 May 1913 (ALP)[b]	As in Monopolies Referendum 1910, but excluding any industry or business carried on by a State	QLD, S.A., W.A.	49.3
12	Legislative Powers, 1919[c]	13 December 1919 (Non-Labor)[b]	To extend temporarily Commonwealth powers over trade and commerce, corporations, industrial matters and trusts	QLD, Vic., W.A.	49.7
13	Nationalisation of Monopolies, 1919[c]	13 December 1919 (Non-Labor)[c]	To extend temporarily the legislative powers of the Commonwealth in regard to the nationalisation of monopolies	QLD, Vic., W.A.	48.6
14	Industry and Commerce, 1926[c]	4 September 1926 (Non-Labor)	To make laws with respect to (a) corporations generally (with certain exceptions); (b) the prevention and settlement of all industrial disputes; (c) the establishment of authorities to regulate industrial matters; (d) investing State authorities with industrial powers; and (e) trusts and combines and industrial associations of employers and employees	N.S.W., QLD	42.8

	Initiating Constitution Alteration	Date of referendum and party submitting	Nature of Amendment	In Favour	
				State	Percentage of formal voters
15	Essential Services, 1926	4 September 1926 (Non-Labor)	To make laws for protecting the interests of the public in case of actual or probable interruption of any essential service	N.S.W., QLD	42.8
16	State Debts, 1928[c]	17 November 1928 (Non-Labor)[b]	To validate the Financial Agreement on State debts and Commonwealth and State borrowings	All	74.3
17	Aviation, 1936	6 March 1937 (Non-Labor)	To make laws with respect to air navigation and aircraft	QLD, Vic.	53.6
18	Marketing, 1936	6 March 1937 (Non-Labor)	To make Commonwealth laws on marketing free of Section 92 of the Constitution	None	36.2
19	Post-war Reconstruction and Democratic Rights, 1944	19 August 1944 (ALP)	To empower the Commonwealth, for a period of five years after the cessation of hostilities, to make laws with respect to (a) the reinstatement and advancement of members of the fighting forces, and the advancement of dependants of deceased members; (b) employment and unemployment; (c) organised marketing of commodities; (d) uniform company legislation; (e) trusts, combines and monopolies; (f) profiteering and prices; (g) production and distribution of goods (no law in respect of primary production to have effect in a State unless approved by that State and no law to discriminate between States or parts of States); (h) control of overseas exchange and investment, and regulation of the raising of money approved by the Australian Loan Council; (i) air transport; (j) uniformity of railway gauges; (k) national works (with the consent and cooperation with the States); (m) family allowances; and (n) the people of the aboriginal race. (The proposed law contained provisions to safeguard freedom of speech, expression and religion)	S.A., W.A.	46

20	Social Services, 1946[c]	28 September 1946 (ALP)[b]	To make laws for the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances	All	54.5

	Initiating Constitution Alteration	Date of referendum and party submitting	Nature of Amendment	In Favour	
				State	Percentage of formal voters
21	Organised Marketing of Primary Products, 1946	28 September 1946 (ALP)[b]	To make laws for the organised marketing of primary products, free of Section 92 of the Constitution	N.S.W, Vic., W.A.	50.6
22	Industrial Employment, 1946	28 September 1946 (ALP)[b]	To make laws on employment in industry, but not so as to authorise any form of industrial conscription	N.S.W, Vic., W.A.	50.3
23	Rents and Prices, 1947	29 May 1948 (ALP)	To make laws with respect to rents and prices	None	40.7
24	Powers to deal with Communists and Communism, 1951	22 September 1951 (Non-Labor)	To make such laws with respect to communists and communism as the Parliament considers necessary or expedient for the defence or security of the Commonwealth or for the execution or maintenance of the Constitution	QLD, Tas., W.A.	49.4
25	Parliament, 1967[c]	27 May 1967 (Non-Labor)	To remove need for proportionate increase in Senators whenever increasing numbers of Representatives	N.S.W.	40.3
26	Aboriginals, 1967[c]	27 May 1967 (Non-Labor)	To count Aboriginals in census as Australians and to empower Commonwealth to legislate for all of them	All	90.8
27	Prices, 1973	8 December 1973 (ALP)	To permit Commonwealth price control	None	43.8
28	Incomes, 1973	8 December 1973 (ALP)	To permit Commonwealth incomes control	None	34.4
29	Simultaneous Elections, 1974	18 May 1974 (ALP)[b]	To provide for synchronised House and Senate polls at all times	N.S.W.	48.3

30	Mode of Altering Constitution, 1974	18 May 1974 (ALP)[b]	To require only majorities in 3 States and majority of Australians to approve amendments; Territories' residents to vote in referenda	N.S.W.	48

	Initiating Constitution Alteration	Date of referendum and party submitting	Nature of Amendment	In Favour	
				State	Percentage of formal voters
31	Democratic Elections, 1974	18 May 1974 (ALP)[b]	To require memberships of House of Representatives and all State Houses to be directly elected by equal electorates	N.S.W.	47.2
32	Local Government Bodies, 1974	18 May 1974 (ALP)[b]	To give Local Government representation and borrowing rights in Loan Council	N.S.W.	46.2
33	Simultaneous Elections, 1977[c]	21 May 1977 (Non-Labor)[b]	To ensure Senate and House polls are synchronised	N.S.W.	62.2
34	Senate Casual Vacancies, 1977[c]	21 May 1977 (Non-Labor)[b]	To ensure so far as possible Senate casual vacancies are filled for balance of terms by persons of same Party as the Senators elected in the first instance	All	73.3
35	Referendums, 1977[c]	21 May 1977 (Non-Labor)[b]	Electors in Territories to have vote in constitutional referenda	All	77.7
36	Retirement of Judges, 1977[b]	21 May 1977 (Non-Labor)[b]	To provide for retiring ages for judges of Federal Courts	All	80.1
37	Terms of Senators, 1984	1 December 1984 (ALP)[b]	To provide for simultaneous elections for the Senate and House of Representatives	N.S.W., Vic.	50.6
38	Interchange of Powers, 1984	1 December 1984 (ALP)[b]	To enable the Commonwealth and the States voluntarily to refer powers to each other	None	47.1
39	Parliamentary Terms, 1988	3 September 1988 (ALP)	To provide for four-year maximum terms for members of both Houses of the Commonwealth Parliament	None	32.4
40	Fair Elections, 1988	3 September 1988 (ALP)	To provide for fair and democratic parliamentary elections throughout Australia	None	37.1
41	Local Government, 1988	3 September 1988 (ALP)	To recognise local government	None	33.1

42	Rights and Freedoms, 1988	3 September 1988 (ALP)	To extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any Government	None	30.3

NOTES

(a) Table based largely on table of referenda on proposed amendments in Crisp, L. F., *Australian National Government* (5th ed. 1983) 45-8. Statistics on voting in referendums down to 1984 are set out in Commonwealth of Australia, Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia* (23rd ed. 1986) 535-55.

(b) Referendum held concurrently with general elections for the federal Parliament.

(c) Proposal received bipartisan support in the federal Parliament.