Comments

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Public Information Machinery and the 1999 Referenda

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An apparently innocuous Bill passed into law on the nod earlier this year in order to facilitate the referenda held on 6 November this year. One of the main features of this enactment, the *Referendum Legislation Amendment Act* 1999 (Cth), is a provision designed to override temporarily s 11 of the *Referendum (Machinery Provisions) Act* 1984 (Cth). Although this measure received little publicity, it is significant for the changes it signals to the way the referendum mechanism is understood to operate in Australia.

Public information campaigns and referendum machinery provisions

Section 128 of the Commonwealth Constitution provides the formal requirements for altering the Constitution, including when a proposed law is to be submitted to the electors, and the electoral approval subsequently required for it to take effect. It delegates to the Parliament, however, the regulation of the manner in which a proposed law is to be submitted to the electors. This process includes not only the casting and counting of votes but also any processes by means of which the electors are notified of the content and desirability of the proposed alteration.

The first statute to deal with the regulation of referenda was the *Referendum (Constitution Alteration) Act* 1906 (Cth) (the 1906 Act). This Act made no provision for the publication of information about the substantive changes which would flow from a proposed alteration. It was only with the insertion of s 6A into this Act in 1912 that the machinery was developed to publish the now familiar pamphlet containing the official "yes" and "no" cases. It would seem that this reform was motivated by the belief of the Labor Prime Minister, Mr Fisher, that the proposals submitted to referendum in 1911 had not been carried due to public misinformation. Such misinformation could often not be satisfactorily addressed from the platform as many public men, it was thought, were themselves not fully informed of the issues. It was thus felt that, if a clear explanation were available, people's fears would be allayed and comprehension of the beneficial nature of the change would reduce the need to make a "safe choice" by voting against the change.[1]

The *Referendum (Machinery Provisions) Act* 1984 (Cth) (the Machinery Act) extended to the referendum process many of the reforms introduced into the electoral legislation by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth). To this end, it was thought that the most appropriate approach was to repeal the 1906 Act and subsequent amending Acts and replace these with a new Act.[2] Section 6A of the 1906 Act was preserved as s 11 of the *Machinery Act.* As such, the Electoral Commissioner is still required to print and distribute "yes" and "no" cases at public expense if such cases are written and approved by a majority of

[1] Lenaz-Hoare, "The History of the 'Yes/No' Case in Federal Referendums, and a Suggestion for the Future", *Report To Standing Committee* (Australian Constitutional Convention Constitutional Amendment Sub-Committee, 1984) 85, p 87.

[2] Australia, House of Representatives, *Debates* (9 May 1984), p 2118 (Second Reading Speech (Young)).

parliamentarians who voted for or against the Bill, as the case may be. However, a further restriction was placed on the Commonwealth by s 11(4). This was inserted as an amendment to the Bill in the Senate and prevents additional Commonwealth funds from being used in a partisan fashion by the government of the day to promote one side of the debate (usually the "yes" case).

Critique of section 11

Before turning to the effect of s 4 of the *Referendum Legislation Amendment Act* 1999 (Cth) (the Amendment Act) on s 11 of the Machinery Act, it is appropriate to consider briefly some of the criticisms that commentators have made of s 11. It is well to begin by remembering the reason for inserting s 6A in 1912. Originally, it was anticipated that the "yes" and "no" cases would be presented "in an impersonal, reasonable way", appealing "to the reason rather than the emotions or party sentiments", according to the Attorney-General of the day, Mr Hughes.[3] Similarly, the Prime Minister maintained that "the case will be put from both sides impersonally ... Let it be a document that the Parliament will be proud of, from which Australia will benefit".[4]

As Cheryl Saunders observes, the mechanism in s 11 — however useful it may once have been — has revealed itself to be increasingly unsatisfactory.[5] She suggests two factors that have contributed to this state of affairs. On the one hand, the rise of electronic media has meant less interest will be shown in a "drab" official referendum pamphlet and, on the other hand, the character of the arguments is no longer designed to inform, but rather to "win". Perhaps most interestingly, however, Saunders suggests that the mechanism is inherently flawed because it is not possible to anticipate how subsequent referendum campaigns should be run, as "the circumstances of each one may require different responses if the ultimate aim is to generate informed debate and decision".[6]

There is a body of opinion in favour of radically altering the existing machinery. Enid Campbell has argued that, although it is appropriate for the Electoral Commissioner to distribute the text of the amendments with information about the questions, ideally neither Commonwealth nor State funds should be used to advance any argument for or against the change.[7] Realising both the political and constitutional difficulty of legislating to prevent the "yes" and "no" cases from receiving public funding (notably the problem of the Commonwealth legislating to prohibit State expenditure), Campbell suggests a compromise would be for electors to be provided with a publicly funded non-partisan statement in addition to the "yes" and "no" cases published at public expense.[8] While we persist with the publication of the "yes" and "no" cases, Campbell signals the need to consider lifting the prohibition on Commonwealth expenditure in s 11(4), especially while the States remain free to spend as they please on federal referendum campaigns.[9]

If the two official cases alone are to be published, Dr Howard suggests that the cases could be vetted by a panel of professional lawyers to eliminate the grosser inaccuracies and irrelevancies in the cases prepared by the parliamentarians. Alternatively, he proposes a more drastic solution, which would see both the "yes" and "no" cases drafted by such a committee, thus eliminating the role of politicians entirely.[10]

Effect of the Amendment Act

The Machinery Act, and more particularly s 11 thereof, regulated the referenda on 6 November this year. Under s 4 of the Amendment Act, however, the operation of s 11(4) of the Machinery Act was suspended in relation to expenditure by the

[3] Australia, House of Representatives, *Debates* (16 December 1912), p 7154.

[4] Ibid, p 7156.

[5] Saunders, "Referendum Procedures", *Report To Standing Committee* (Australian Constitutional Convention Constitutional Amendment Sub-Committee, 1984) 111, pp 113-114.

[6] Ibid, p 114.

[7] Campbell, "Changing the Constitution – Past and Present" (1989) 17 MULR 1, p 12.

[8] Ibid, p 13: Professor Campbell cites the Australian Constitutional Convention's resolution in 1985 that material should be prepared by an independent person nominated through the Commonwealth parliamentary process; see *Proceedings of the Australian Constitutional Convention* (Australian Constitutional Convention, 1985), p 363.

[9] Ibid, p 17.

[10] Howard, *Australian Federal Constitutional Law* (3rd ed, Law Book Co, Sydney, 1985), p 582.

Commonwealth regarding the proposed laws to reconstitute the Commonwealth as a republic and to insert a preamble into the Constitution.

According to the explanatory memorandum, the purpose of overriding s 11(4) was to allow the government to expend a projected $19.5 million on an expanded public information program. In his Second Reading Speech the Attorney-General, Mr Williams, explained that the additional funds were required, not in order to achieve the mischief that s 11(4) was designed to avoid (that is, Commonwealth funds assisting one side of the debate), but rather to allow for an expanded public information program proposed by the Government.[11] This program comprised three distinct phases.

The first phase was to constitute a "plain English" public education program developed by the government on the advice of a neutral panel of experts. This would ensure that "balanced, factual information is made widely available to assist electors to understand the issues before they vote".[12] This was to be followed by the "campaign" phase, in which two rival committees would each spend some $7.5 million on national advertising campaigns in the four-week period leading up to referendum day. The membership of both committees was selected by the government from the 1998 Constitutional Convention delegates according to the vote they cast in the final ballot on the model endorsed by the Convention. The third phase would comprise the pamphlet published and distributed by the Australian Electoral Commission, containing the official "yes" and "no" cases written by the parliamentarians.

Although s 4 of the Amendment Act provides that the Act applies equally and exclusively to the proposed laws to establish a republic and to insert a preamble in the Constitution, the Attorney-General made it clear that the additional funding would in fact be provided only for the republic question. In his Second Reading Speech, the Attorney-General explained that the reference to the preamble question was inserted merely "to ensure that 'incidental' references to the preamble cannot of themselves result in breach of the Act".[13]

Relationship between the proposed law and the expanded information campaign

In order to understand why the government implemented such a radical departure from the established referendum information procedure, it is necessary to understand the government's approach to the referendum itself. Although the Commonwealth Government introduced the Constitution Alteration (Establishment of Republic) Bill, at no stage did it publicly endorse it. Of the two parties forming the Coalition Government, one was directly opposed to the proposed law and the other allowed an open or conscience vote on the matter. Furthermore, the Prime Minister and several other prominent members of the Cabinet publicly declared their opposition to the proposed law.

This resulted in the peculiar situation in which the government presented to the people a potential alteration to the Constitution of which it was not positively in favour. The justification for holding the referendum is to be found not in the government's desire for constitutional reform but in the endorsement the proposal received at the Constitutional Convention in 1998.

The 1998 Constitutional Convention, through the popular election of half the delegates, introduced into the process of constitutional reform in Australia a degree of public participation not known since the Federation conventions in the 1890s. The significance of the representative nature of this Convention should not be underestimated. Irrespective of whether or not the government endorsed the proposed law, it could advocate referring the law to the electors on the basis that the fruit of this specially convened convention should be submitted to the people.

But more importantly, the Convention justified elevating the debate above party politics and providing for the second phase in which both the cases for and against the change were to be prepared by Convention delegates. The basis for favouring Convention delegates over parliamentarians was the belief that they were more

[11] Australia, House of Representatives, *Debates* (11 March 1999), p 3762 (Williams).

[12] Ibid, p 3761.

[13] Ibid, p 3763.

readily identified with community attitudes rather than party political allegiances. The Attorney-General himself acknowledged this when he explained that:

> "[t]he government is conscious that the republic issue should not be one for politicians alone. The Convention delegates are a broadly representative group with a high public standing on the republic issue".[14]

By attempting to elevate the debate above party politics, the government could more readily avoid taking a stance for or against the proposed law. Seen in this context, it is apparent why the government introduced the new first and second phases, which sought to remove the debate from the party political context.

Towards a new approach

The three-phase public information program, which was facilitated by the Amendment Act, introduced several reforms. The first-phase represents a new approach to public information, allowing non-argumentative information, developed in consultation with a neutral panel of experts, to be presented to the public for the first time. The panel was chosen on the basis of "experience in the public presentation of civics issues as well as constitutional expertise" and given a budget of $4.5 million to develop materials "explaining the proposed republic model, the existing constitutional arrangements, the role of State constitutions and the referendum process" .[15]

The function of the neutral panel is similar to that of the Legislative Analyst during referendum campaigns under the Californian Government Code.[16] The role of the Legislative Analyst, according to s 88003 of the Code includes the preparation of material in clear and concise terms for inclusion in the pamphlet with the cases. The content of this material is to include fiscal analysis, appropriate background information, and the effect on existing law. Like the role of the first phase in the Australian referendum, the purpose is stated to be the provision, in an impartial manner, of the information needed by the average voter to understand the measure adequately.

However, the Californian Legislative Analyst is better placed to achieve this objective than the first-phase committee (which merely advised the Australian Government rather than directly prepared the materials) because the former's contribution is presented *with* the official cases rather than sometime *before* the cases are available to the elector. One is inclined to feel that the panel's contribution in this referendum was expected merely to lay the foundations in the electors' minds, upon which the two opposing sides may then compete. The "neutral" voice was prevented from correcting any misconception that arose during the second phase. This was founded, one assumes, on the assumption that active and vigorous participation in the final stages of the debate would have been inconsistent with impartiality. Had the Amendment Act included a provision for incorporating the new first phase material into the pamphlet published by the Australian Electoral Commission, the neutral voice would have had a far greater impact. The panel would then have been in a position to provide a statement which might have provided information capable of offsetting any misconceptions that may have arisen from the "yes" and "no" cases.

The second significant development that the Attorney-General's three-phased plan contained was the development of the two advertising committees. According to the committees' terms of reference:

> "[t]he function of each committee is to develop an advertising campaign for or against the proposed republic model which is to be put to the Australian people in a referendum in November 1999".[17]

[14] Ibid, p 3761.

[15] Daryl Williams and Senator Chris Ellison, "Expert Panel for the Public Education Programme for the Referendum on an Australian Republic" (Joint News Release, 20 April 1999).

[16] It is difficult to compare the new Australian approach with that of other federal states, as few require electoral participation in the process of constitutional amendment (cf Switzerland). For a more detailed analysis, see Commonwealth Attorney-General's Department, "Survey of Referendum Campaign Funding and Publicity Outside Australia" in *Report To Standing Committee* (Australian Constitutional Convention Constitutional Amendment Sub-Committee, 1984), p 94.

[17] "Guide For Advertising Campaign Committees For Yes and No Advertising Campaigns for the Referendum on the Republic", in Daryl Williams and Senator Chris Ellison, "Guidelines for Yes and No Advertising Campaign Committees for the Referendum on the Republic" (Joint News Release, 11 April 1999).

Each committee was at liberty to design its own campaign independently so long as it did not exceed $7.5 million and the proposed budgets and advertisements were approved by the Ministerial Council on Government Communications. Although the composition of the committees may have increased the contribution of a select group of non-politicians, there are grounds for believing that the second phase aggravated rather than reduced the adversarial nature of constitutional reform in Australia. The real problem is not who is involved in the public debate but how it is conducted. These committees only re-enforced the adversarial nature of constitutional reform rather than promoting reform by consensus, which would require a much longer information campaign first phase and a reduced second phase.

The new first phase was a welcome innovation to the referendum process, providing something of the impartial approach which it had originally been anticipated that s 6A would provide when it was introduced in 1912 but which has never lived up to this expectation. If the panel's function had been more active rather than advisory, and if it had been combined with the third phase pamphlet, the "yes/no" case pamphlet may have come closer to realising the original, and clearly desirable, objective.

Similarly, while it may have been desirable to move constitutional reform out of the realm of party politics, the second-phase campaign committees were not the way to achieve this. The government may not have intended to act in a partisan fashion by allowing increased public funding, but it has reinforced the adversarial nature of constitutional reform in Australia through the special provisions developed for this referendum by setting up two powerful rival committees and a considerably weaker neutral panel.

The third phase, which included no significant innovations in terms of the campaign (though the Amendment Act did include some permanent changes which increased the distribution of the "yes" and "no" cases), also revealed some scope for reform. The two cases did not complement each other well. If in future the first phase were to be merged with the third phase, the neutral panel could pose a series of questions for both sides to answer, allowing advocates of both sides to make a direct contribution to the pamphlet but ensuring that the contributions dovetailed. Such an approach would provide the elector with a concise statement by both sides on each issue.

By giving the reforms only a temporary effect, and limiting the application of the reforms to only one of two simultaneous referenda, an opportunity was missed to redefine the way proposed constitutional alterations are referred to the electors and discussed in the public forum. In the aftermath of the 1999 referenda, consideration should be given to the permanent amendment of the Machinery Act, but in a way that does not encourage an adversarial approach as was observed during the recent referendum campaign. While interest has naturally begun to wane, it is important that the problem be addressed because access to information is critical for an informed vote. As Cheryl Saunders has observed:

> "we're still on a learning curve ... We should review this process after the vote, because without a public education campaign, voters have no chance of getting reasonable information".[18]

[18] "Republic ad bypassed vetting body", *Sydney Morning Herald* (21 September 1999), p 7. The report addresses the extent to which the neutral panel was bypassed when approval was granted for the government's television advertisement.