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Submission to the Standing Committee on Legal and Constitutional Affairs  
Inquiry into the Machinery of Referendums

James Emmerig  
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Submission No 027

## Summary

This submission argues that it is currently too difficult to amend the Constitution. It attributes the high rate of rejection of proposed amendments at referendum to the poor level of information available regarding those proposals. Specific changes to the current referendum machinery are suggested.

## Where is the problem located?

Amending the Constitution today is more difficult than the Constitution's framers intended it to be. The Australasian Federation Conference 1898 revealed an intention "not to make an alteration of the Constitution too easy,"<sup>1</sup> without rendering it as "practically unchangeable"<sup>2</sup> as the United States Constitution. H. B. Higgins stated this clearly: "It is more difficult to make an amendment of the Constitution in America than it will be here."<sup>3</sup> But this has not developed in practise. In the period since federation, 8 amendments have been successful here, compared to 12 amendments in America. However, Australia has failed to carry 36 amendments at referendum in that time, whereas only 3 amendments proposed to the US States were not ratified.<sup>4</sup>

This suggests that the referendum process prescribed by parliament is the biggest roadblock to constitutional change in Australia. The mechanisms of s128 are not the problem. But some writers have attributed the Australian people's reluctance to support amendments at referendum to the "conservative nature of [Australian] society itself",<sup>5</sup> and past commissions and commentaries have

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<sup>1</sup> "Transcript of the 1898 Australasian Federation Conference", Third Session (9 February 1898), Parliamentary Library, at 723 (Braddon).

<sup>2</sup> Ibid. at 719 (Isaacs, quoting Smith).

<sup>3</sup> Id. at 720.

<sup>4</sup> Michael Lynch, "The Other Amendments" *LLJ* (2001) at 307.

<sup>5</sup> Altman, quoted in Bennett, Scott. "The Politics of Constitutional Amendment", *Parliamentary Research Paper* 11, (2003) at 18.

instead focused on changing the manner of proposing amendments under s128. These tend to involve a consideration of allowing referendums to be initiated by the electors or States.<sup>6</sup> But the disproportionately higher number of failed proposals than carried amendments suggests that allowing more proposals would have little effect. On this basis, such reforms would not be effective. Instead, changes should focus on the poor level of information surrounding referendums,<sup>7</sup> which appears to be a strong cause of conservative voting.

### **How is information currently distributed?**

The Commonwealth has legislated that the method of submitting proposed constitutional amendments to the electors is through a referendum. The procedures are set out in the *Referendum (Machinery Provisions) Act 1984* (Cth). Under the current system per s11(1)-(2), the Electoral Commissioner distributes pamphlets to the electors containing the arguments for and against the proposed law and the proposed changes to the text of the constitution. This should occur at least 14 days prior to the referendum. Each argument should be limited to 2000 words and is jointly written and authorized by a majority of the members of Parliament who supported the argument.

### **Does the information available affect referendum results?**

Amendments are more likely to be unsupported at referendum when poor information regarding the effect of proposed amendments produces the “voter ignorance” effect.<sup>8</sup> Writers have suggested that multiple-amendment ballots “confuse the voters,”<sup>9</sup> and electors’ confusion or ignorance regarding proposals encourages conservative voting. As a result, provocative slogans such as “[t]hose who don’t know - should vote ‘NO’ - because that is the only safe way to go”<sup>10</sup> (which proved effective at the 1999 Republic Referendum) may mislead while giving the illusion of clarity. Only on controversial issues publicised beyond referendum booklets, in the media and elsewhere, do voters have access to

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<sup>6</sup> Australian Constitutional Commission, *Final Report of Constitutional Commission: Summary*, AGPS (1988) at 75.

<sup>7</sup> Bennett at 20.

<sup>8</sup> *Ibid.* at 25.

<sup>9</sup> Bowler, Shaun & Donovan, Todd. *Demanding Choices: Opinion, Voting, and Direct Democracy* (2000) at 19.

<sup>10</sup> Australian Electoral Commission, “Yes/No Referendum Pamphlet” (1999) at 9, 27, 31, 35, 37.

information that might effectively help voters to evaluate the arguments for and against amendment.<sup>11</sup>

The extent to which proposals are affected by the quality of information and discussion available varies depending on the nature of the proposals. Some matters have proved particularly susceptible to conservative arguments which make use of “voter ignorance” to cloud the information available. Proposals to extend Commonwealth powers are one example. Only two of 20 proposals to extend Commonwealth power have ever passed.<sup>12</sup> The States have effectively combated such amendments with warnings against centralizing powers in Canberra, or removing States’ constitutional rights.<sup>13</sup> Further, where large-scale governmental changes are proposed, fear-inducing arguments such as “Keep the status quo” and “If it ain’t broke, don’t fix it” have proved effective, most recently at the 1999 Referendum.<sup>14</sup> Issues that divide political parties are also less likely to carry since bipartisan argument over proposals reduces the clarity of information available to electors. George Williams has commented that while bipartisanship “does not guarantee a yes vote ... no referendum has ever been passed without it.”<sup>15</sup>

### **What changes should be made to referendum procedures?**

The *Referendum (Machinery Provisions) Act 1984* (Cth) must be altered to improve the dissemination of information at referendums. This may reduce “voter ignorance” and conservative voting tendencies. Section 11(1) could be altered to provide electors with clearer, more accessible information about amendments and encourage a higher standard of debate. The changes, to give an example, could be as follows:

- Within four weeks of a proposed law’s passage through Parliament, the 2000 word arguments for and against amendment should be forwarded not to the Electoral Commissioner, but to the Commonwealth Solicitor General.<sup>16</sup>

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<sup>11</sup> Standing Committee on Legal and Constitutional Affairs, “History of Australian Referendums”, *Constitutional Change* (1997) at 63.

<sup>12</sup> Social Services (1946), Aboriginals (1967).

<sup>13</sup> Which is, incidentally, a “quite illegitimate” argument: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 227 (Mason J).

<sup>14</sup> “Yes/No Referendum Pamphlet” (1999) at 15.

<sup>15</sup> Williams, George. “Four Rules for Reform”, *Canberra Times* (27 September 2008).

<sup>16</sup> Although some other suitable, politically independent body could equally be used.

- The Commonwealth Solicitor General would then be required to provide the Electoral Commissioner with a 500 word précis of each argument. These should be as objective and unbiased as practicable, consisting of the key points and merits.
- Each précis would be published in the Referendum pamphlet alongside the proposed constitutional alterations. The original 2000 word arguments would not be printed.

These changes would aim to provide electors with a more succinct and rational appraisal of the arguments for and against the amendment. Arguments at 500 words in length are more likely to be read, may counteract voter apathy and reduce the electors' reliance on slogans.<sup>17</sup> The Commonwealth Solicitor General may also publish longer versions of each argument online for perusal by interested electors. A special televised debate between members of Parliament supporting either argument could also help raise the quality and accessibility of discussion.

## **Conclusion**

Since federation, only 8 of 44 constitutional amendments have carried at referendum. The electors' reluctance to amend reflects a shift to conservative voting when the arguments for and against the amendment are not clear. The submission of proposals to the electors must involve clearer information. The Commonwealth's referendum machinery should be altered to more closely reflect the framers' intentions regarding s128 amendments.

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<sup>17</sup> The 1999 Referendum Pamphlet was 71 pages long and largely comprised of provocative slogans.