

Referenda, Plebiscites and Sundry Parliamentary Impedimenta*

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Introduction

Referenda and plebiscites perhaps have never been more a subject of interest in Australia than at present. Much of that interest arises in a republican context. Looking back, Australia's greatest referendum since Federation — and greatest failed referendum in its history — was for a parliamentary election republic in 1999. Looking forward, both the prime torch-bearers for a republic — the Australian Republican Movement¹ and the Australian Labor Party² — are proposing plebiscites as a means of pursuing a republic. Even beyond the republican issue, one of the most popular responses received by the Committee appointed by the Prime Minister to investigate changes to the provisions of the Commonwealth Constitution concerning deadlocks between the Houses was that disputed laws should be put to a popular vote.

The approach adopted here will be, first, to define briefly the relevant terms; second, to consider the suggested advantages of referenda and plebiscites, especially as instruments of constitutional and quasi-constitutional policy; third, to pose their very real disadvantages; and, finally, to consider as a highly relevant case study the current proposed use of plebiscites in connection with the resolution of the republican issue.

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¹ See e.g. Australian Republican Movement, Discussion Paper, *The Process — What Do You Think?* (2003)

² See e.g. K. Beazley, 'How may the People be Heard — Planning for a new Republic Referendum — Process and Content' (2001) 3 *University of Notre Dame Australia Law Review* 1.

‘Referenda’ and ‘Plebiscites’

In strict dictionary terms, there is no particular magic in either word: each can be stretched to cover a wide range of popular polls, on an almost infinite number of subjects, with varying legal consequences. Nevertheless, in an Australian environment, the notion of a “referendum” is inextricably linked with the federally structured vote for the amendment of the Commonwealth Constitution mandated by section 128 of that document. This is despite the fact that some State Constitutions also mandate a referendum for a certain limited range of amendments.³

The key feature of all such referenda, and most notably that prescribed by section 128, is that they all are legally determinative. In other words, given a successful vote, the referendum result operates to change the relevant Constitution of its own force and without further governmental action or discretion, save only for the mechanical giving of the Royal Assent.

This is the most obvious contextual distinction between the Australian referendum and any potential Australian plebiscite.⁴ Whereas referenda change the law, plebiscites merely indicate that the people would like the law to be changed in a certain direction, it then being the responsibility of government to implement (or face the consequences of evading) that preference. In this sense, where referenda are legally determinative, plebiscites are merely consultative, whatever moral or political force they may possess. A classic illustration of this distinction is comprised in the proposed republican plebiscites, where the Australian people first would be asked whether they want a republic, and then what sort of republic they would prefer. In neither case will their answer change a word of the Constitution, though it may well set in place a process of change.

There are two other obvious differences between Australian plebiscites and referenda. First, Australian usage confines the term “referendum” to constitutional polls, whereas plebiscites potentially may be employed for wider objects, as when one was used in connection with the choice of an Australian national song. Nevertheless, both will be considered primarily in a constitutional context in this paper. Second, at a national level, whereas a referendum is intrinsically federal in character, with a dual majority requirement that a proposal receive both a national majority and a majority of votes in a majority of States, no such requirement necessarily inheres in a more informal plebiscite, which could be conducted as a simple national poll.

³ E.g. section 50, *Constitution Act 1889* (WA), which protects the office of State Governor.

⁴ See e.g. Senate Legal and Constitutional Committee, *The Road to a Republic* (2004) 25–6 (hereafter Senate Committee Report).

Advantages of referenda and plebiscites

Referenda

To begin with referenda, the section 128 referendum is a central feature of the Australian Constitution, and is defensible on its own terms as special case.

It is far from clear that the Australian Founders fully appreciated the wider implications of including the referendum process within the Constitution, and especially the difficulties that it would pose for attempted constitutional reform. This said, given that the Australian Constitution, most unusually, was created through an initial, popular, federal referendum process, and thus represents a constitutional settlement deriving its legitimacy from a massive act of popular consent, it is extremely difficult to envisage any other means by which it plausibly might be amended.⁵ In other words, the referendum process for the amendment of the Constitution derives virtually inevitably from the circumstances of its creation, and goes to the very heart of the Australian federation. While the practical difficulties it poses will be considered presently, there is not a great deal of point analysing its positives beyond noting that it is practically and culturally infeasible, and its dispensation inconceivable.

Plebiscites

Plebiscites are not a fixed feature of the Australian constitutional landscape, and their suggested advantages can be more profitably and dispassionately assessed. These advantages have been strongly asserted by many republicans in their attempt to advance the republican cause beyond the train wreck of 1999, a disaster they ascribe largely to public indifference and disengagement.

First, the lead argument in favour of plebiscites,⁶ in a constitutional or any other context, is that they are fundamentally democratic. So far as this proposition goes, it is hard to argue with: notwithstanding the fulminations of monarchists like Professor Flint,⁷ it is hard to escape the conclusion that a popular plebiscite is, by definition, a democratic exercise. This does not necessarily mean it is an exercise in quality democracy.

Second, plebiscites are not only democratic, they are directly democratic. Whereas parliaments are only derivatively democratic as comprising the people's representatives, plebiscites involve the expression of the popular will by the people and without the need for obfuscating legislative intermediaries. As such, their supporters argue that they represent a superior, purer brand of democracy.

⁵ See generally Greg Craven, *Conversations with the Constitution* (2004) 223–34.

⁶ There is a detailed analysis of conceptual arguments both in favour of and against plebiscites in the specific context of an Australian republic in Senate Committee Report, 24–39.

⁷ See e.g. Senate Committee Report, 25

Third, plebiscites have the potential to directly engage the people in government. Where parliamentary processes are things done to the people by their representatives, plebiscites represent nothing less than the people making decisions for themselves. Within the context of a plebiscite, the people become a part of their own government.

Fourth, popular engagement in government means popular education in government. A populace that is directly involved in the resolution of vital communal issues should be a populace that comes to understand better not only the particular issues involved, but also the wider processes of government themselves.

Fifth, a population that has gone from being an idle spectator of its own government to a direct participant in that process is far more likely to feel confidence in and attachment to its constitutional structures. In an age when citizens routinely deride parliaments and politicians as self-interested irrelevances, this is no mean dividend.

Finally, plebiscites seem to be a highly plausible means of resolving legislative and constitutional deadlocks. Where the ordinary political or constitutional process has ground to a halt in a mire of day-to-day recriminations, what could be more reasonable than to take the matter to the people for resolution?

Once again, all these suggested advantages of plebiscites are strongly advanced by many republicans in the lead-up to the next, inevitable referendum on the question of Australia's head of state.

Critique of Referenda and Plebiscites

Referenda

Australian constitutional referenda, for all their historic inevitability and federal logic, undeniably have imposed serious limitations upon the process of constitutional amendment. Most obviously and notoriously, constitutional change is extremely difficult in Australia: of forty-four proposals since Federation, only eight have succeeded. Of course, this is not to say that thirty-six splendid proposals have gone down to the pit. Many failed referenda either richly deserved defeat, or were at least of questionable value.⁸

More objectively troubling than its comparatively low success rate has been the internal political dynamics of the referendum mechanism. These dynamics have been at least as responsible for the prevalent failure of referenda as their own quality. The first factor here is that our highly partisan system of parliamentary government almost guarantees that referenda are fought along party lines, especially

⁸ See, e.g. Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (1998) 1183–8.

if put (for reasons of economy) during an election campaign. Thus, if a government proposes something, the opposition will consider itself almost duty-bound to resist it. As the mathematics of referenda ensures that any proposal opposed by one of the major parties is doomed to electoral defeat, this means that most referenda of any real significance will be doomed before they are begun.

Even more serious has been the ease with which a No case can sway the electorate. Possessing a perfectly functional Constitution, the basic position of the Australian people on referendum questions has been: when in doubt, vote No. The practical effect of this has been that, like a criminal barrister defending his client by confusing the jury, proponents of a No vote have merely to sow epic confusion to guarantee a measure's defeat. As constitutional propositions and confusion walk hand-in-hand in the popular mind, this is a far from difficult task.⁹

Things might be different were it possible readily to "educate" the people on constitutional matters, as hopeful reformers often propose. Yet there is no obvious means by which twenty million Australians may be brought from a standing start to rapid constitutional literacy. This factor is particularly potent, given the further reality that most Australians simply are not interested in issues of constitutional reform, and despite the enthusiasms of their betters, will resist all attempts to impose such an enthusiasm upon them.

All in all therefore, and for better or worse, our regime of constitutional referenda means that there will be relatively few formal amendments to our Constitution, and almost no large amendments. On one level, this is a deeply conservative result. On another, it tends to promote less formal (and less legitimate) means of constitutional variation, through such avenues as High Court interpretation. None of this ever is likely to change.

Plebiscites

Turning to plebiscites, these have many disadvantages, both in a constitutional and non-constitutional context, though they sometimes are hard to discern against the rosy background of direct democracy.¹⁰

Perhaps the first is that they have the obvious potential to be deeply destructive of our standard psychology of representative democracy. By positing the plebiscite as a better, purer, surer form of democracy, proponents to the same degree subtly undermine the claims of representative democracy and parliamentary government to genuine democratic status. At a time when parliament's stocks are low indeed, this is dangerous.

⁹ See Craven, above n. 5, 232–3.

¹⁰ Again, see generally the consideration of plebiscites in the Senate Committee Report, 24–39.

A further inherent difficulty with plebiscites, flowing from their non-dispositive character, is that they tend to promote a shallow, lackadaisical consideration of the issue to which they relate. Just as the low success rate of referenda in Australia is significantly attributable to the fact that the electorate knows all too well that it will get precisely what it votes for, so a population who understands that a vote at plebiscite is nothing more than a strong hint to government, and subject to a variety of further, refining steps, is likely to treat the process with a good deal less caution and deliberation.¹¹

This has the effect that, all things being equal, plebiscites will operate advantageously in respect of certain types of proposals. These will be measures possessing strong surface appeal, but which also involve underlying difficulties which are not immediately apparent. The relatively shallow consideration involved in a plebiscite will readily attach to the attractive shell of the proposal, without penetrating into the difficulties below. For this reason, proposals that would stand no chance at a full referendum may well pass a plebiscite.

It should be clearly understood that these tendencies will be particularly intense in the context of multi-option plebiscite. In the case of a referendum, which by definition involves a single proposal, attention and criticism is directed exclusively towards the measure in question. It has nowhere to hide, and must succeed or fail in the full glare of public debate, a glare focussed by the fact that a positive vote will effect immediate constitutional change.

In the case of a multi-option plebiscite, not only will public consideration be discounted in the usual way for a non-dispositive poll, but that consideration will be divided between the one, two, three or four proposals on offer, each receiving far less attention and criticism than would have been the case had it been put alone. Once again, the tendency will be to advantage shallow, flawed, proposals with much to shout about and more to hide.

All of this means that plebiscites, most problematically in a constitutional context, are seriously open to abuse. In particular, the proponent of some amendment to the Commonwealth Constitution that is deeply flawed but possessed of significant surface appeal may be enormously tempted to 'appeal to the people' by plebiscite before the referendum process is even begun. By so doing, it might prove possible to 'ock in' the desired proposal as the popular choice at a point before it has been exposed to the intense criticism typical of a referenda campaign, or indeed, of a deliberative process like a constitutional convention. Where a proposal has competitors, such tactics may be particularly effective in ensuring that it is the one chosen to go to referendum.

Finally, in all these senses, plebiscites (and especially constitutional plebiscites) have the potential to be deeply anti-deliberative. By eliciting from the population a

¹¹ See e.g. extract of evidence, G. Craven, Senate Committee Report, 29

premature answer based upon a shallow discussion of the relevant issues, they can be employed to lock-in a particular policy option, politically proof from revision regardless of the difficulties that may later emerge. In a non-constitutional context, this might mean that a measure, once approved at plebiscite, was effectively immune from meaningful parliamentary improvement and scrutiny. In the constitutional sphere, a measure might thus be freed from the scrutiny of parliament, or some specially constituted body, such as a constitutional convention. Once again, this type of gambit will be most attractive to the author of an appealing but flawed proposal.

Case Study — Republican Plebiscite Proposals

The background to the current plebiscite proposals lies in the conclusions drawn by many republicans concerning the failure of 1999. The two most important are, first, that the referendum failed because it did not engage the people; and second, that it failed because it did not offer the people the model they wanted, namely, direct election.¹² To those subscribing to these (highly dubious) truths, the challenge is seen as being to ensure that direct election is anointed as the next republican referendum model, thereby ensuring popular engagement (and referendum success) through granting to the people their dearest constitutional wish.

There are two difficulties with this programme. First, political and other constitutional elites are bitterly opposed to direct election, on the grounds that it will create competing poles of constitutional power between Prime Minister and President, and so wreck the Constitution. These elites are powerful and highly articulate, and will have strong influence in the parliaments, parliamentary committees and constitutional conventions that normally might be expected to deliberate on and choose a republican model. Indeed, they may well be powerful enough to scupper direct election before it is even endorsed as a model, as occurred at the 1998 Constitutional Convention.¹³

This leads to the second problem. Very much at variance with existing constitutional arrangements, direct election is a big model with big issues and big potential problems. In forums like parliament and a convention, these issues and problems will be lovingly picked over and exposed by direct election's opponents. The problem thus is that under a standard process of major constitutional reform — say, an information campaign, followed by a convention, followed by a bill — direct election will sustain heavy and almost certainly fatal casualties, succumbing to some more conservative model before it even is put to the people. How, then, to get it to the launching pad of referendum?

¹² See generally, Brian Galligan, 'A Radical Alternative — An Executive Presidency: Can we abolish the Governor-General?' (2001) 3 *University of Notre Dame Australia Law Review* 45.

¹³ The leading expression of such view probably is contained in Richard McGarvie, *Democracy: Choosing Australia's Republic* (1999).

The answer now provided by the Australian Labor Party and those ascendant elements of the Australian Republican Movement favouring direct election of a president, centres on the use of a series of plebiscites to by-pass the obstinate constitutional elites and their tiresome scrutiny. The specific proposal thus is for the two plebiscites, the first on the general question of whether Australia should become a republic, the second providing a choice between a number of republican models. It is not yet clear whether these plebiscites will be held sequentially or at the same time, or whether there will be a third plebiscite on the name of any republican head of state (president or governor-general). What is quite clear, for reasons that presently will emerge, is that the second, multi-option plebiscite is programmed to produce a direct election outcome.

What is one to make of this raft of plebiscites? The first at least arguably has some utility, in the sense that it would provide some indication of the general direction in which Australians want to go, and of whether future republican agitation is justified. It certainly provides the opportunity for a clear expression of republican opinion (or otherwise), free of the “Not this republic” distractions that bedevilled the 1999 referendum. In this sense, it might be regarded more as a ground-clearing exercise than anything else, and it certainly privileges no particular republican outcome.¹⁴

On the other hand, there may well be a sizeable number of Australians who will find it impossible to answer the generic question of whether Australia should be a republic unless that question is attached to a specific model. It is precisely for this reason that some republicans would like both plebiscites to be put simultaneously, on the grounds that the second would lend specificity to the first.

It is, in fact, the second multi-option plebiscite that is deeply troubling, largely for the reasons rehearsed generally in relation to plebiscites earlier in this paper. The first thing to note about this plebiscite is its programmed outcome: direct election. The reasons underlying this conclusion are so obvious, and the outcome itself so patently intended, that it is surprising that anyone should go to the trouble of disputing them.

Thus, the second plebiscite will offer Australians a choice between around four republican models, one of which will be parliamentary election, while at least one other (but more probably two) will comprise a variant of direct election. Given that it is difficult enough to persuade the Australian people to focus intensely upon a single proposal at referendum, their inclination to undertake a detailed and sustained analysis of no less than four competing republican models at the same time cannot seriously be asserted.

The inevitable result therefore will be that in the swirling contest of a multi-choice plebiscite, the option with the greatest degree of immediate popular appeal must win

¹⁴ As accepted by the Senate Legal and Constitutional Committee: see Senate Committee Report, 137–8.

over its less winsome, more complexly argued opponents. Moreover, the fact that such an option contains serious difficulties should not prove an impediment. Lone referendum options are exposed to undivided public scrutiny, but the room for detailed analysis in a four-cornered plebiscite contest is minimal.

Which republican option has immediate popular appeal, while coincidentally raising fundamental constitutional issues? The answer is direct election, whose opinion poll good looks will carry it through the plebiscite, while the intrinsic shallowness of that exercise, with its non-dispositive character and limited capacity to expose difficulties, will ensure that the enormous problems of direct election receive minimal ventilation. A multi-option republican plebiscite produces direct election as hens lay eggs.¹⁵

This, of course, is enormously important to direct election republicans, given that the next step of the plan is a constitutional convention at which, instead of a variety of models being debated, only the proposal endorsed at plebiscite can be discussed. Thus, the intended outcome of the plebiscite proposal is to ensure that, after the plebiscite, only 'approved' republican discussion can contribute to the formulation of a referendum model.

The apparent object of this is two-fold. First, it will prevent the exposure of the difficulties of direct election at the anticipated constitutional convention. That will be a constructive event, presumably peopled exclusively with constructive delegates. Second, the process will place maximum pressure on conservative republicans, bitterly opposed to direct election, to accept its victory and work towards its least atrocious accomplishment. The alternative would involve dealing themselves out of the republican game altogether. So understood, the plebiscite is not an exercise in democratic engagement, but a cynical attempt to close discussion down through a pre-emptive and deliberately ill-informed public vote, at a point before the public has had an opportunity to become aware of the deficiencies of the anointed model.

Ironically, the whole effort will be in vain. Once the direct election model emerges to referendum, it will be met by the full fury of its natural opponents, the republican cohort of which presumably will be particularly enraged that it has been cynically excluded from the entire process. At this point, all the complications of direct election lovingly will be made manifest as part of the usual referendum *danse macabre*. Anyone who believes that the inviolable rules of referendum politics will be suspended simply because a large proportion of the Australian people at some increasingly distant point in the past gave non-binding approval to the model in question is seriously deluded. Just as the complications of direct election are generous, so its shredding in the mincer of a referendum will be thorough.

¹⁵ See extract of evidence of G. Craven, Senate Committee Report, 29.

In short, the proposed multi-option republican plebiscite is a good example of the deficiencies of that species. It comprises an intrinsically shallow assessment of constitutional policy options, which is highly manipulable in the production of a desired outcome. It works to discourage serious deliberation, and consciously privileges an outcome whose surface popular appeal can be employed to cover its deep underlying deficiencies. The whole process is designed, not to broaden debate, but to lock in a desired outcome with as little inconvenient criticism as possible.

Conclusion

Constitutional referenda are a fact of Australian constitutional life. Whatever their deep limitations, they match our present federal, popular reality with the same reality that founded the Constitution. Plebiscites, and especially constitutional plebiscites, are altogether different. As the proposed republican plebiscite illustrates, they are all too readily employed to produce programmed outcomes by deeply flawed means. ▲