# Aviation: Commonwealth or State control? A failed referendum

When the Constitution was being written in the 1890s, the Wright Brothers had not yet undertaken the first motorised flight. Understandably, there is nothing in the Constitution about flight. Although the defence power in section 51(vi) refers to the 'naval and military defence of the Commonwealth', it has been interpreted more broadly as accommodating an air force too. But other than for defence, who has power to legislate about aviation?

The Constitution gives the Commonwealth Parliament power in section 51(i) to make laws about interstate and overseas trade and commerce. This would allow laws that regulated overseas and interstate commercial aviation.

In addition, Australia entered into a treaty, the Paris Convention of 1919, about air navigation. The Commonwealth Parliament has power to implement treaties under section 51(xxix) of the Constitution. The territories power in section 122 of the Constitution would also support control of flights within the territories.

But this patchwork of powers was not comprehensive. It didn't, for example, cover commercial or private aviation within a State. The Commonwealth negotiated an agreement with the States that they would refer to the Commonwealth, under section 51(xxxvii) of the Constitution, the matter of aviation, so that the Commonwealth could legislate about it. Section 51(xxxvii) gives a mechanism by which the States can voluntarily permit the Commonwealth to legislate about a matter to ensure there is uniform legislation where it is needed.

*Henry Goya Henry the pirate of the skies, who challenged the Commonwealth's aviation powers.*
*Source: National Library of Australia*

*Goya Henry's scarlet plane*
*Source: National Library of Australia*

On the basis of this expected referral, the Commonwealth enacted the *Air Navigation Act 1920* (Cth), which included a broad power to make regulations 'for the control of air navigation in the Commonwealth'. But while State Premiers had agreed to the referral, most could not convince their Parliaments to follow through with it. Only Tasmania did so.

## Henry Goya Henry – The pirate of the skies

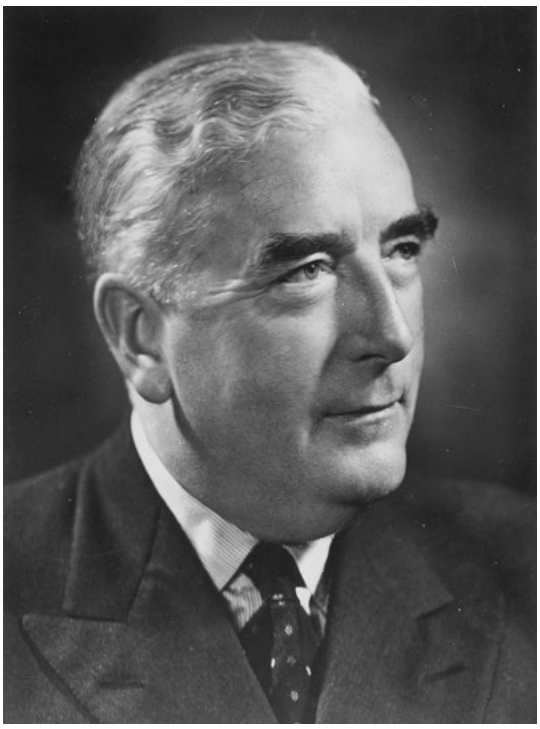
Henry Goya Henry was a pilot and a bit of a rebel. He had lost one of his legs in a plane crash at Manly. He flew a red plane with a skull and cross-bones on its tail, and was known as the one-legged pirate of the skies. His plane is now owned by the Powerhouse Museum in Sydney. Henry, true to his pirate image, did not like authority and refused to comply with Commonwealth laws for licensing aviation. When the Commonwealth suspended his pilot's licence, he got angry and asked himself what he could do that would most shock and annoy Commonwealth officials. So he flew his plane under the newly built Sydney Harbour Bridge, being the first person to do so.

Henry was prosecuted and then challenged the validity of the legislation in the High Court in 1936. He won. The problem was that the regulation-making power and the regulations were very broad and were not focused on giving effect to the terms of the treaty. So the external affairs power was not sufficient to support them in relation to internal flights within a State.

The Commonwealth argued that its power to regulate interstate and overseas aviation would be useless if it couldn't also regulate flights within a State, as planes all use the same airspace and could crash into each other. The High Court did not accept the argument. It said that the Constitution drew the difference between trade and commerce within a State and between States, and it was not for the Court to override the terms of the Constitution. The Chief Justice said that the problem would have to be resolved by political cooperation.

## The referendum

As the Commonwealth couldn't get all the States to refer to it their power over aviation, the next option was a referendum to add 'air navigation and aircraft' to its list of powers in section 51. So it held a referendum in 1937. The Commonwealth Attorney-General, Robert Menzies, thought that no one could object to this. He later said: 'if ever there was a matter that called for national treatment rather than local, it was civil aviation'. But Menzies did not succeed. Even though all the leaders of the main political parties in the Commonwealth Parliament supported the proposal, along with the Premiers of the three largest States, there was a small, but noisy, group of agitators who opposed it.



*Sir Robert Menzies: In 1937 when the aviation referendum was held he was the Commonwealth Attorney-General*
*Source: National Library of Australia*

They included the Premiers of three small States (one Liberal and two Labor) and the NSW Labor Opposition. They managed to raise enough doubts and concerns about the proposal to cause its defeat by a very small margin.

## The Yes/No cases

**The Yes Case:** On the 'Yes' side it was argued that there needed to be a uniform system of regulating aviation, as overseas, interstate and local aircraft all use the same airspace and need to be subject to the same rules. The appropriate level of government was therefore the Commonwealth. Aviation was not originally included in the Constitution only because it had not been established at the time the Constitution was written. The Premiers had previously accepted the need for uniform aviation laws, as had a Royal Commission on the Constitution in 1929.

**The No Case:** The 'No' side argued that the expansion of aviation would compete with and ruin the State railway systems. This would result in unemployed railway workers and would bankrupt country towns. The price of food would increase, because the cost of freight would be higher. The finances of every state government would be endangered.

Despite the fact that the 'No' argument seemed to be both highly exaggerated and unconnected with whether the Commonwealth or the States should regulate aviation within a State, it was still enough to poison support for the proposal.

## The result

The referendum failed, but by the thinnest of margins. It obtained an overall majority, but only obtained a majority in two States – Victoria and Queensland – rather than the necessary four States to achieve the double majority to pass. The results were as follows:

| | NSW | QLD | SA | TAS | VIC | WA | Total |
|---|---|---|---|---|---|---|---|
| For | 664,589 | 310,352 | 128,582 | 45,616 | 675,481 | 100,326 | 1,924,946 |
| Against | 741,821 | 191,251 | 191,831 | 71,518 | 362,112 | 110,529 | 1,669,062 |
| Informal* | 55,450 | 18,330 | 21,031 | 7,882 | 36,685 | 10,977 | 150,355 |

* 'Informal' (i.e blank or invalid votes) are not counted in determining majorities.

After its loss, the Commonwealth convinced all the States to legislate to adopt the Commonwealth regulations and apply them to aviation within the State. This created a uniform law. Since then, new treaties on aviation expanded the Commonwealth's power, as have broader interpretations of the trade and commerce and corporations powers and other powers, allowing the Commonwealth now to legislate with respect to aviation across Australia without the need for a fresh referendum. This shows how constitutional change can sometimes be achieved by a change in constitutional interpretation.

# Post World War II Reconstruction: The Commonwealth's attempt to expand its powers is rejected

The Commonwealth Parliament had long been frustrated by its limited powers with respect to industrial relations, trade and commerce within the States and other economic matters. But during World War II, the High Court interpreted the Commonwealth's defence power very widely, so that it could take control of economic matters, including industrial relations, that were necessary to support the war effort. Once the War was over, however, the defence power would shrink back to matters directly related to defence, reducing the Commonwealth's powers.

The Curtin Labor Government was concerned that it would have difficulty managing the economic transition from war to peace without extensive powers during that period.

The Commonwealth Attorney-General, Dr H V Evatt, proposed a constitutional amendment in 1942 that would radically and permanently expand Commonwealth legislative power. This sparked significant opposition. It was referred to a parliamentary committee, which was then turned into a special Convention of 24 delegates, comprised of 8 from the House of Representatives, 4 from the Senate and the Premier and Opposition Leader of each State.

*Dr H V Evatt, 1942*
*Source: State Library of NSW*

*Prime Minister John Curtin 1944, of the Australian Labor Party (ALP), encouraged a referendum Yes vote. "To abandon wartime controls on the declaration of peace would cause disorganisation to the social system and destroy the capacity of the system to meet the needs of the first disturbed years after the war".*

*Source: National Library of Australia*

The Convention agreed that rather than holding a referendum in the middle of a war, it would be better for the States to refer some powers to the Commonwealth, under section 51(xxxvii) of the Constitution, for a limited period of five years. But the Tasmanian Parliament refused to pass the bill and other State Parliaments added conditions or altered the powers to be granted.

## The proposed constitutional amendments

The Commonwealth then decided to go ahead with a referendum, but to keep the time limit so that the Commonwealth could only exercise these new powers for five years. Controversially, it decided to have a single question, which covered all 14 of these new powers.

The 14 powers were largely economic in nature. They included power to make laws about: jobs for returned members of the armed forces, employment and unemployment, companies, trusts, profiteering and prices, the production and distribution of goods, overseas investment and national works. But they also included other areas such as air transport, the uniformity of railway gauges, national health, family allowances and 'the people of the aboriginal race'. This was the first time the Commonwealth had attempted to gain power to legislate with respect to Aboriginal peoples, which it later achieved in 1967. It also later gained powers with respect to health and family allowances at the 1946 referendum.

The other really interesting thing about this proposed amendment is that it not only proposed to expand Commonwealth power, but also to limit power by introducing or expanding certain human rights. It stated that neither the Commonwealth nor a State 'may make any law for abridging the freedom of speech or of expression'. This picked up some words from the First Amendment to the United States Constitution. The proposed amendment also extended the freedom of religion in section 116 of the Constitution so that it would apply to the States as well. This proposal not only failed in 1944, but did so again in 1988.

## The Yes/No Case

On the 'Yes' side, the Commonwealth argued that it had responsibly exercised its expanded powers during wartime to save Australia from disaster, but that now it needed to 'win the peace'. It claimed it could be trusted to exercise such powers during the transitional period, moving from war to peace. It argued that otherwise there may be a depression that would be worse than the Great Depression of 1931-2.

*Arthur Fadden: 1944, Leader of the Country Party encouraged a referendum No Vote: "A Yes vote... would empower the Government to implement Labor's policy of socialisation. It could not place primary industry in a better position, nor could it avert a depression."*

*Source: National Library of Australia*

It also pointed to the economic slump that occurred in 1921, after World War I and the impact this had on returned soldiers, many of whom never recovered. It considered the powers were necessary to help returned members of the armed forces and to deal with mass unemployment. It focused in particular on how these powers could protect jobs, the livelihood of primary producers and 'housewives and mothers' from rocketing prices and high rents. It stressed that the powers would only apply for that five year period of post-war reconstruction.

The 'Yes' case justified the human rights protections by arguing that 'reactionary Governments with fascist tendencies might arise in times of crisis', so there was 'no possible harm' and 'great positive good' in raising them into constitutional guarantees. The 'No' case countered this by saying that the current Government had imposed serious restrictions on free speech in laws about censorship and sedition (ie inciting rebellion against the government) and had not agreed to remove them. Instead it offered the distraction of a high-sounding guarantee for a limited future period which 'experience in other countries shows to be worth exactly nothing'.

On the 'No' side there were objections to the large number of powers and protections being the subject of a single referendum question. The 'No' case cleverly seeded doubt in the minds of voters about some of them, and played on the horror of fascism that arose from the war, saying:

"The proposed powers are to last for five years after the war. You may think that some ought to last for ever and that some are too dangerous to be granted for five minutes. You may like those powers which really deal with the problems of reconstruction. You may detest those which would permit government by regulation and the rule of the petty dictators who now control our lives. You will certainly favour the doing of justice to those who have served us in war, the restoration of productive industry, good housing, the building up of a secure civil life. But it is certain that you do not want any form of dictatorship, whether of one man or of an army of officials. This is because you believe in Democracy, not in Fascism."

The 'No' case asked voters whether they thought that a happy productive future would be best assured by allowing Government Departments to run their lives. It also rejected the argument that expanded Commonwealth powers were needed to prevent a new depression, pointing out that the Great Depression occurred in a lot of non-federal countries that already had all the powers that were being proposed here. It suggested that centralised government power in Canberra could make a depression even worse.

## The Proposal

A proposal to give the Commonwealth the power to make laws with respect to 14 new matters for a period of five years. The new matters included: the rehabilitation of ex-servicemen, national health, family allowances and Indigenous Australians. The proposal sought also to give the Commonwealth power to protect various human rights, including freedom of speech and freedom of religion.

## Result

The referendum was held on 19 August 1944. It failed on both parts of the double majority. It failed overall and it failed in four of the six States. Post-war reconstruction proceeded without the additional powers.

| | NSW | Qld | SA | Tas | Vic | WA | Total |
|---|---|---|---|---|---|---|---|
| For | 759,211 | 216,262 | 196,294 | 53,386 | 597,848 | 140,399 | 1,963,400 |
| Against | 911,680 | 375,862 | 191,317 | 83,769 | 614,487 | 128,303 | 2,305,418 |
| Informal* | 23,228 | 7,444 | 4,832 | 2,256 | 15,236 | 3,637 | 56,633 |

* 'Informal' (i.e. blank or invalid votes) are not counted in determining majorities. Of votes cast by members of the armed forces, 218,452 were 'Yes' and 195,148 were 'No'.

Teacher Reference Document 99

AUSTRALIAN CONSTITUTION CENTRE

Unit 11: Changing the Constitution (referenda) – Year 9 - C & C Strand: Government & Democracy

Topic 9.1: Referendum: the process for Constitutional change

# Social Welfare Powers in the Australian Constitution: The people vote Yes in the 1946 referendum

When you attend a doctor or a pharmacy in Australia, the amount you pay for medical treatment or to receive certain medicines is far less than the actual cost. Have you ever wondered why this is so? Maybe you've heard about how expensive health care is in other countries.

The reason is because the Commonwealth Government provides a wide range of social welfare to Australians, including subsidising medical services and medicines.

The Commonwealth obtained these powers as a result of the successful 1946 referendum on social services, which inserted section 51(xxiiiA) into the Constitution. This section of the Constitution says:

51 The Parliament shall … have power to make laws … with respect to:

… (xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances …

*While the Constitution initially gave the Commonwealth power to make laws for old-age and invalid pensions, it did not extend to unemployment benefits or health benefits - until the 1946 referendum was passed.*

*Purchased IStock*

Successful referendums are rare in Australia. There have been 44 proposals to change the Constitution submitted to voters in a referendum, but only eight have been successful. The 1946 referendum on social services was especially rare, as it is one of only two successful proposals to expand the powers of the Parliament, even though 23 of the 44 proposals have tried to do this.

## Background

From the establishment of the Commonwealth in 1901, the Parliament could make laws providing for 'invalid and old-age pensions' under section 51(xxiii) of the Constitution. The Commonwealth Parliament first legislated to provide a national old-age and invalid pension scheme in 1908.

An early example of welfare provided by the Commonwealth that extended beyond 'invalid and old-age pensions' was the introduction in 1912 of a 'maternity allowance', a payment to mothers on the birth of a child. But it was in the early 1940s that the Commonwealth began to provide welfare to an even greater variety of social groups. A 'child endowment', being a payment to families with more than one child, was introduced in 1941. 'Widows' pensions' were then introduced in 1942. The introduction of benefits for the unemployed and those temporarily prevented from working due to sickness followed in 1944. In part, this reflected the reality of war - women were left widows when their husbands were killed in the war, leaving them struggling to raise young children, and men returned from war injured and unable to work.  Government help was needed.

Only some states had equivalents of these social welfare schemes. Some, like the sickness benefit, had no equivalent in any state. Most people believed these benefits were a good thing to have, so the legislation which supported these schemes was not challenged in court. However, it was clear that these benefits went beyond providing 'invalid and old-age pensions', and none of the other subjects which the Commonwealth Parliament could legislate on seemed relevant either.

In 1945, the Act which introduced the Pharmaceutical Benefits Scheme was challenged in the High Court by a group of doctors. The doctors argued that the Commonwealth Parliament did not have the power to pass the Act, because none of the subjects which are listed in the Constitution included providing pharmaceutical benefits to the people. The High Court agreed with the doctors' argument and ruled that the Act was unconstitutional.

The High Court did not say that all of the Commonwealth's other social services Acts were invalid. However, the High Court's reasoning in the Pharmaceutical Benefits Scheme Case meant that the other schemes could be challenged in the same way. Only those benefits which were 'invalid and old-age pensions' were safe from attack, because they were clearly within the subjects allocated to the Commonwealth by the Constitution.

While the Commonwealth continued to operate the other social welfare schemes, as they had not yet been held invalid, it knew that this was unsustainable in the long-term and that the Constitution needed to be changed to keep them going.

## The Official 'Yes' and 'No' Cases

In most referendums since 1912, an official pamphlet is distributed to every voter setting out the Yes and No cases for the referendum. The 1946 social services proposal is the only successful referendum where the voters received an official 'No' case. In every other successful referendum, there has either been no pamphlet provided at all, or no 'No' case has been included.

The arguments for the 'Yes' case included:

• The Commonwealth already provides many of the benefits which the proposal would permit.

• Voting 'Yes' would ensure that existing benefits will not be ruled invalid by the High Court in a future case by providing a clear basis for them in the Constitution.

• The Commonwealth will also be able to expand the existing provision of social services to pharmaceutical benefits, medical and dental services and to family allowances.

• It is only fair that these benefits are provided on a uniform national basis by the Commonwealth, rather than by the separate States in different ways.

The arguments for the 'No' case included:

• There is no need to grant these powers to the Commonwealth Parliament because:

- The High Court did not decide that the Commonwealth could not provide social services. It only decided that the pharmaceutical benefits scheme was invalid. The provision of other social services remains valid and has not been challenged.
- These benefits can be provided by the States. Also, the Commonwealth can support this by granting money to the States on the condition that it be used to provide benefits like these.

• These powers will give the Commonwealth control over people's daily lives and this is a step toward the centralisation of all government controls in Canberra.

## The Proposal

A proposal to make laws relating to the the provision of social services.

## The result

The referendum was held on 28 September 1946. It passed with the overall support of 54.39% of voters, and a majority of people in every State. The Governor-General gave royal assent to it on 19 December 1946.

How would you have voted? Why do you think so many people opposed the referendum? Were they worried that they'd have to pay higher taxes to fund these schemes? Should the Commonwealth or the States provide social welfare? What is the ongoing significance of this referendum to Australia as a nation and does it tell us anything about what Australians believe is important?

# Banning the Communist Party - a failed referendum

The Communist Party had been banned by the Menzies Government in 1940, but after Russia became an ally in World War II and the Communist Party swung its support in favour of the war, the Curtin Government removed the ban. After the war, the Cold War began and Communism became a major political issue in Australia, just as the 'iron curtain' descended on Europe. At the 1949 election campaign, Robert Menzies and the Liberal Party campaigned on a policy that included banning the Communist Party in Australia. He proposed that not only should it be banned, but its property should be seized and its members prohibited from being public servants or holding trade union offices.

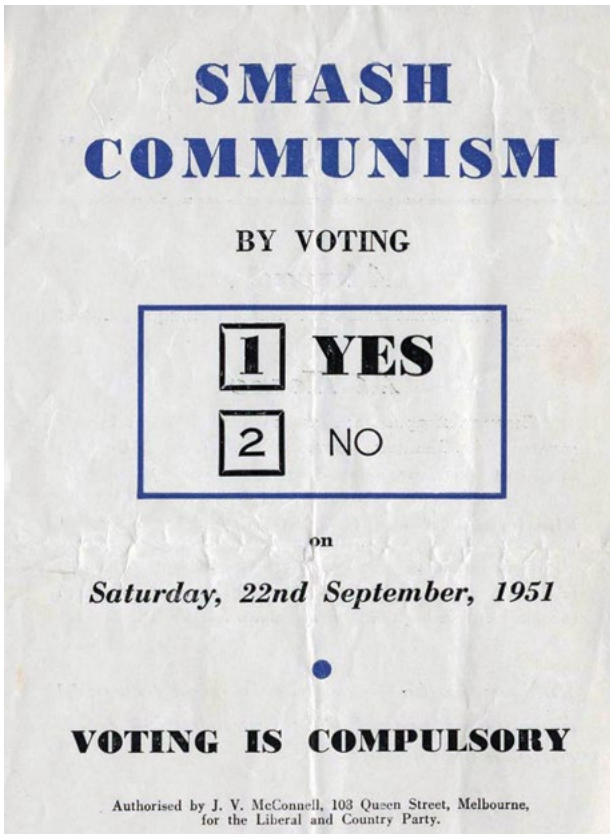
## The *Communist Party Dissolution Act 1950*

After winning the election and forming a government, Menzies introduced into Parliament the *Communist Party Dissolution Bill 1950*. The Bill declared the Australian Communist Party to be an unlawful association and dissolved it. It also allowed the Governor-General (acting on the advice of ministers in the Executive Council) to declare that other bodies that supported Communism or were comprised of Communists were unlawful associations, if the Governor-General was satisfied that they were prejudicial to the security and defence of Australia.

The Governor-General could also declare persons to be communists and 'likely to engage in acts prejudicial to the security of the Commonwealth or the execution of its laws.' If a person was declared a communist, he or she could not be employed as a Commonwealth public servant or hold any office in a trade union.

Court challenges to these declarations were limited to facts, such as a person's membership of an organisation, but not whether it was prejudicial to Australia's security. In some cases people were made to prove that they were not communists, reversing the usual burden of proof.

Opponents of the Bill, including academics and even some members of the Liberal Party, were concerned by the methods involved. They thought that if people were to be accused of things, they should be convicted in a fair process before a court, in which the burden was on the Commonwealth to prove their guilt, rather than being 'declared' by the Governor-General.




1951 Referendum pamphlet from the Liberal and Country Party
Source: ANU Archives

Chief Justice Latham's bench
Source: High Court of Australia

They were worried that using unfair methods to deal with Communists would actually undermine the strength of Australian democracy. Despite Opposition objections, the Bill eventually passed in October 1950.

## The High Court challenge

Its validity was immediately challenged in the High Court by the Australian Communist Party and a number of Unions. In a controversial move, the Deputy Leader of the Opposition and former High Court Justice, Dr H V Evatt, agreed to argue the case for the law's invalidity. He was successful. On 9 March 1951 the High Court struck down the *Communist Party Dissolution Act*, by a majority of 6 to 1 (with only the Chief Justice, Sir John Latham – who was a former Liberal Attorney-General – dissenting).

In *Australian Communist Party v Commonwealth*, a majority of the High Court considered that the Act was not supported by a Commonwealth legislative power. It was not enough to say that it was connected with defence, or for the Governor-General to declare such a connection. The validity of an Act could not be made to depend upon the opinion of the decision-maker that it was within a constitutional power. The connection with the defence power had to be established as a matter of fact, not opinion. The Government failed to satisfy a majority of the Court of such a connection.

Justice Dixon also raised concerns about the impact of the Act on civil liberties. He thought that 'only the supreme emergency of war itself' could extend the defence power in such a way that it affected 'the status, property and civil rights' of people who were named or otherwise identifiable under the Act. Even though Australia was at the time participating in the Korean War, this was not enough to trigger the expansion of the defence power to support such an extreme law.

Menzies then held a double dissolution election in 1951 (ie a special election where both Houses are completely dissolved), using the need to ban Communism as one of the key campaign issues. Again, he won. As he could not get all the States to agree to refer to the Commonwealth the power to make laws about Communism under section 51(xxxvii) of the Constitution, he decided to hold a referendum to amend the Constitution.

## The Yes/No cases

The proposed constitutional amendment would not only have given the Commonwealth Parliament power to make laws about Communists and Communism. It also expressly permitted Parliament to make a law in the form of the previous Act, including 'declaring' people to be Communists based upon opinion and then requiring people to prove that they were not Communists.


1951 Referendum pamphlet
Source: ANU Archives

The Yes Case in the referendum justified this by saying that Communists cleverly do their 'dirty work' underground so they cannot be convicted on the basis of publicly accessible evidence. They can only be detected by the security services (ie government spies) and those agents should not be forced into the witness box to give evidence.

The No Case responded that the question was not about whether you oppose Communism, but about whether you approve of measures that are unnecessary, unjust and totalitarian and could threaten all minority groups. It argued that totalitarianism should not be resorted to in order to destroy totalitarianism. It was critical of the 'vicious onus of proof clause' and depriving people of property without conviction by a court of any crime and without compensation. It saw these as the mark of a 'police state'.

## The referendum

Initially, opinion polls were strongly in favour of the referendum, with around 80% of people supporting the proposal. But as the campaign continued, this lead was whittled away. While people were still in favour of banning communism, they were concerned about the use of unfair methods for doing so. In the end, the 'fairness' argument overcame the 'fear' argument about Communism. The referendum failed. It did not achieve a majority overall, or a majority in four out of six States.

## The Results

| | NSW | Qld | SA | Tas | Vic | WA | Total |
|---|---|---|---|---|---|---|---|
| For | 865,838 | 373,156 | 198,971 | 78,154 | 636,819 | 164,989 | 2,317,927 |
| Against | 969,868 | 296,019 | 221,763 | 77,349 | 670,513 | 134,497 | 2,370,009 |
| Informal* | 25,441 | 6,741 | 6,519 | 3,093 | 18,692 | 6,167 | 66,653 |

* 'Informal' (i.e. blank or invalid votes) are not counted in determining majorities.

# Topic 9.1: Lesson Three

## Referendums and persuasion

AUSTRALIAN CONSTITUTION CENTRE

| Time/Lesson | Learning Goal |
|---|---|
| • 1 hour/ 1 Lesson | • To understand some of the factors that affect how people vote in referendums, including the natural biases that people hold.<br>• To be able to identify how arguments made in referendum campaigns can influence people in their voting decision.<br>• To be able to evaluate and critique the arguments made in a referendum campaign. |
| **Rationale** | **Success Criteria** |
| Thinking critically and being able to identify the biases that may affect reasoning are key skills that will aid students in giving an informed vote on referendums in the future. | Students understand the biases that might affect how they think and can critically evaluate arguments made for and against a referendum. |

### Teaching Reference Document

- TRD 97 - Aviation: Commonwealth or State control?
- TRD 98 - Post World War II Reconstruction
- TRD 99 - Social Welfare Powers in the Australian Constitution
- TRD 100 - Banning the Communist Party

### Resources

**WEBSITES**:
See the following web-sites on cognitive biases:

- https://en.wikipedia.org/wiki/List_of_cognitive_biases
- https://www.visualcapitalist.com/50-cognitive-biases-in-the-modern-world/ (infographic version)
- https://www.research-live.com/article/opinion/cognitive-biases-that-made-us-brexit/id/5009472 (cognitive biases that affected the Brexit referendum in the UK)

**RESOURCE**: See the attached dialogue that gives reasons for and against repealing the use of referendums as the means of amending the Commonwealth Constitution

### Tuning In

- **DISCUSSION**: We think of ourselves as rational beings who make independent decisions. But our reasoning could be often affected by unconscious biases. These could undermine the effectiveness of our reasoning in many areas of life. But one important one is referendums where those advocating for either side have a strong interest in making their arguments in a way that might manipulates us by exploiting our biases. How can we best resist being manipulated in this way? How can we ensure that we make genuinely independent and informed decisions based upon the best available facts?
- **REVISE**: TRD 92 - Referendum - successes and failure in Australia.

## Teacher Instruction

- Teacher asks students to research cognitive biases, using the internet resources listed above, or other online or library resources.
- Ask students to identify which cognitive biases are particularly relevant to voting in a referendum. These may include: groupthink, false consensus, the Dunning-Kruger effect (the less you know, the more confident you are, and vice-versa); confirmation bias (we tend to rely on information that confirms our perceptions); status quo bias (we prefer to keep what we have rather than to risk it with change); the framing effect (we draw different conclusions from the same evidence depending on how it is presented); pessimism bias (we overestimate the likelihood of bad outcomes); the illusory truth effect (we tend to believe something if it is easy to process or has been stated multiple times, regardless of whether it is accurate); rhyme as reason effect (we tend to believe rhyming statements are more truthful or insightful).
- Students break up into groups and choose one of the referendums from the above TRDs. Students research the arguments made for and against the referendum and try to identify how they relate to cognitive biases. (Eg, during the republic referendum, one slogan was 'Don't know - vote No', which employed the 'rhyme as reason effect'.) Each group writes up a report with its findings and presents it to the class.

## Group Independent Learning

**ANALYSIS**: Ask students to read the competing arguments in the attached dialogue about abolishing the referendum as the means of amending the Constitution. Ask students to mark with a highlighter which of each of the alternative arguments they find convincing and then explain why.

## Wrapping It Up

- **DISCUSSION**: Now that we are aware of different cognitive biases, how can be ensure that we are making the best informed decision that we can when voting for a referendum?
- What types of sources should be rely on? What sort of arguments should we be suspicious about? (Note the 'G.I. Joe Fallacy' that knowing about cognitive bias is enough to overcome it, and the 'blind spot bias' - that we see bias in others but not in ourselves.)

## Assessment Strategies

Observation of participation in discussion, group work reports and assessment of extension activities.

## Differentiation/Enrichment

- Prepare a class activity on a hypothetical referendum that proposes to abolish the referendum as a means of amending the Constitution and replace it with a Convention comprised of experts. Allocate half the class to advocate in favour of 'Yes' and half the class in favour of 'No'.
- Designate some students to prepare speeches for a debate as to why people should vote for/ against this referendum.
- Designate other students to prepare posters with slogans and pictures to convince voters to choose their allocated side in the referendum or design a television ad or social-media video.
- After the class has seen the ads and posters and heard the speeches, prepare ballot papers and hold a class referendum vote on the outcome.
- After the votes have been cast, but before the outcome is announced, ask students to identify what factor most influenced their vote. Was there anything that made them suspicious about one side from the way its arguments were presented? What was the most effective way of presenting an argument?

# Unit 9.1 - lesson 3, Resource 1

## Dialogue on removing the referendum as the way of achieving constitutional reform

| For getting rid of the referendum | For keeping the referendum |
|---|---|
| In Australia, at the State level, only certain important provisions need a referendum to be changed. Most constitutional provisions can be changed by ordinary legislation. This allows State Constitutions to be updated regularly when needed without delay or fuss. But the Commonwealth Constitution requires a referendum to amend every single provision – even the ones that are merely administrative in nature. This is crazy. It means we have a Constitution frozen in the 1890s which we can't easily update. | The big difference between the State and Commonwealth Constitutions is that a State Constitution governs one jurisdiction only, whereas the Commonwealth Constitution sets the rules for competing Commonwealth and State jurisdictions. It distributes powers between them, and separates power among different institutions. It is therefore really important that one level of government doesn't control changing it (because otherwise the Commonwealth Parliament could change it to take all power for itself!) The people are the ones who should decide how and when any change should be made. It is, after all, government of the people, by the people and for the people (even if that is an American phrase). |
| The referendum was deliberately chosen as the way to change the Constitution because it would be hard to pass. It was considered to be a 'conservative' method. The framers of the Constitution knew that the people would most likely reject change. That turned out to be true – only 8 out of 44 referenda have ever passed at the national level in Australia, and none since 1977. Our Constitution is frozen as a result. We need to be able to update it and move with the times. It would be better to allow a Constitutional Convention, comprised of experts, to make updates when it is necessary. | Yes, the Constitution is hard to change. But that's a good thing. Constitutions are supposed to give stability – not change to meet every new fad. When the people reject a referendum, it is most likely because the proposal was a bad idea, or hadn't been properly explained. If there is a strong case to update the Constitution, then the people will be convinced and say 'Yes'. But if it is just about politicians trying to grab extra power for themselves, the people will say 'No' and should be entitled to do so. |
| The constitutional control exercised by the people in a referendum is very limited. It is really a blocking role. They have no power to initiate change. What if the people would really like a change that takes some powers out of the hands of politicians? How would they get to vote on that in a referendum? They won't – because before the people get to decide at a referendum, the proposed change has to be passed by Parliament (or twice by one House). In practice, any change must first be approved by the Government, as the Governor-General (who acts on ministerial advice) will never put it to a referendum. The politicians, of course, will never make a change that doesn't suit them. That's why a constitutional convention is better, because it can consider all possible changes that would benefit the people, rather than Parliament and politicians. | It's true that Parliament does control what gets put to the people in a referendum, but this is a flaw in the preliminary procedure – not a criticism of the use of referendums themselves. There could be other ways of determining what gets put to the people in a referendum, such as citizens' initiated referendums where the people decide what they want to vote on. But ultimately, it is far more democratic if the final say-so is in the hands of the people, not some groups of elites in a constitutional convention. |

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| Constitutions are complicated things. The people don't have the knowledge or experience to make an informed decision as to whether to change the Constitution. It would be much better to leave the decision to experts in a constitutional convention who know what they are talking about. | True sovereignty comes from the will of the people. They are the basis of democracy. So it needs to be the people who decide on constitutional change. If people don't know enough, then we need to educate them, and they need to make the effort to find out. An educated population is a democratically empowered one, and will make the political system work better. |
| You keep talking about democracy, but the current referendum system that we have isn't really democratic is it? It says that to pass, a referendum must not only have the approval of a majority of voters across the country, but also a majority in four out of six States. That means that even if a majority of voters in Australia say 'Yes' in a referendum to a constitutional change, it can be blocked by a minority of voters in three small States. How is that democratic or fair? | Democracy is not just about majority rule. Sometimes it is also about protecting the rights of the minority, like laws that protect minorities against discrimination. In this case, it is about protecting the States with small populations from being ganged up on by the big States. It was part of the deal under which the small States agreed to join the federation, and we need to honour it. Just because a State has a small population, it doesn't mean it should be bullied or always lose when it comes to constitutional change. Besides, it's good to know that a constitutional change is supported across most of the country before it is made. |
| When a Constitution is hard to change, people are reluctant to make a change because it might lead to unintended consequences which can't be easily fixed in the future. If a Constitutional Convention makes the change, and it is interpreted in an unexpected and inappropriate way by a court, a Constitutional Convention could then make another change to fix the problem. This ensures that the courts don't have the last say, mistakes can be fixed and changes can be made without the same high-stakes risks as there are with a referendum. | If a court interprets a constitutional change in a way that the people disagree with, they can always vote for another change in a referendum. Courts are very reluctant to overturn the clear intent of the people in a referendum, as they recognise that the people have a democratic mandate, rather than the courts. What is necessary is that the intent of the people in making a constitutional change be made really clear, so that it can't be misunderstood in the future by a court when interpreting the Constitution. |
| Referenda are incredibly expensive to hold. The last one, held in 1999, cost over $66 million. The next one is likely to cost two to three times as much. That's a lot of money. This means referendums are rarely held and the Constitution is not updated, even when it is needed. | Elections are expensive too. But it is the price we pay for democracy. We can't put a commercial value on such a thing. The people should have their say, and we need to make sure it is done fairly and properly. I'd say it's priceless. |

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| Indigenous Australians have obtained constitutional recognition in each State Constitution without any great fuss or delay simply because this change could be made without a referendum. At the federal level, because a referendum is required for constitutional change, the process has been long and tortured, damaging reconciliation, and with no guaranteed successful outcome. If Indigenous constitutional recognition could have been achieved by a constitutional convention, it would have been done by now. | Yes, Indigenous Australians have been recognised in each State Constitution by changes made by ordinary legislation – but because no referendum was required, hardly anyone knows it happened. It does not have the same meaning or significance, because it does not carry the power of the positive votes of the Australian people. The 1967 referendum was so powerful, not because of the words it changed on the pages of the Constitution, but because it was an overwhelmingly positive act of acceptance of Aboriginal peoples by Australian voters. That is why a referendum has much deeper significance and greater effect than other forms of constitutional amendment. |
| By the way, the plural of referendum is referenda – not referendums. It comes from the Latin. | Actually, the Latin word is 'plebescitum'. The word 'referendum', while it draws on a different Latin root, was a 19th century Britain invention. Some people argue that as the word is a British invention, the plural should end in an 's' – so it is referendums. Actually, both referenda and referendums are accepted uses, so maybe we can at least agree on that and accept that both plurals are OK. |