

What is a referendum?

ANTAR



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A referendum is a 'yes' or 'no' vote by which the Australian people give their consent to make changes to the Constitution. The original drafters of the Australian Constitution envisioned the founding document as one that should 'not be lightly interfered with' or 'hastily altered'.¹ At the same time, they conceived of the Constitution as a living document that could 'keep pace with the social and commercial development of the people'.² Referendums are the only way to change the Australian Constitution, with the understanding that this 'people power' can be used – at least in theory – to keep the Constitution up to date with contemporary best practice as well as popular values.³ As we will see, this appropriate and often elusive balance between stability and flexibility⁴ has not been struck for various reasons, not least of which is the colonial history and racist underpinnings of the Australian Constitution itself.

Section 128 of the Constitution embodies a democratic ideal of consent of the people, stating that changes to the Constitution must be approved by 'the people' via a referendum and cannot be made by a government or Parliament alone. While some countries allow a referendum to be initiated by the people, in Australia the decision to hold a referendum lies with the Federal Parliament. Section 128 also states that a majority of Australian voters and a majority of voters in a majority of States (that is, in at least four out of the six States) must approve any proposed amendment. This is known as a double majority.⁵

The decisions made by referendum are binding; which is to say, they have legal force. If a referendum is successful, the changes must then be made to the Constitution.

¹ Official Record of the Debates of the Australasian Federal Convention, Melbourne, 9 February 1898, 745.

² Official Record, 759.

³ George Williams and David Hume, 'People Power: The History and Future of the Referendum in Australia' (2010), vii

⁴ Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions'. Adelaide Law Review Vol. 38, No. 1 (2017), 56.

⁵ Referendum Council, '[Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples](#)', (October 2016), 3.

In Australia, referendums to change a constitution are often distinguished from plebiscites, which can be understood as non-binding votes of the people on a subject of national significance but which do not affect the Constitution. Voting in referendums is compulsory for all persons holding Australian citizenship.

Changes to the Constitution in Australia are notoriously difficult to make. Since 1901, 19 referendums have proposed 44 changes to the Constitution; only eight changes have been agreed to.⁶



What is the Constitution?

In order to understand why referendums in Australia have the potential to be such significant occasions, it is important to understand the document they aim to reform.

⁶ The Australian Institute of Aboriginal and Torres Strait Islander Studies, '[The 1967 Referendum](#)'

The Australian Constitution, which was passed by the British Parliament in 1900 and took effect on 1 January 1901, is the legal and political foundational document of the country we now know as Australia. It is, in other words, the Australian government's 'rulebook'.

From the beginning of British invasion in 1770 to the late 1800s, six British colonies – New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania – were established on the lands we now call Australia and run using their own parliaments. Ultimately, however, they were still subject to the lawmaking power of the British Parliament. During the 1890s, representatives from these colonies met at a series of constitutional conventions to debate whether they should unite and form a Federation. The first Australasian Federation Conference was held in Naarm (Melbourne) in February 1890, where leading politicians from the six Australian colonies and New Zealand expressed the idea of developing 'an early union under the crown'.⁷ One year later, the six colonies and New Zealand sent forty-six delegates to the National Australasian Convention of 1891 where they worked to develop a draft constitution which they could take back to their legislatures for review.

The Australasian Federal Convention met in three further sessions in 1897 and early 1898 where the delegates modified the draft produced in 1891. Debates took place over a number of weeks. The final draft of the Constitution was approved by a vote of the people who were eligible to take part in referendums held in each colony between June 1899 and July 1900.⁸ Indeed, eligibility to vote was a narrow and exclusionary exercise, with Aboriginal and Torres Strait Islanders not allowed to vote in Queensland or Western Australia unless they owned property, women excluded from voting except in South Australia and Western Australia, and those in receipt of public assistance excluded in all colonies.⁹

The British Parliament passed the Commonwealth of Australia Constitution Bill in July 1900 which outlined that as of 1 January 1901, the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would unite as the

⁷ Parliament of Australia, '[Records of the Australasian Federal Conventions of the 1890s](#)'.

⁸ Parliamentary Education Office, '[The Australian Constitution in focus](#)'.

⁹ Australian Electoral Commission, '[The Referendums 1898-1900](#)'.

Commonwealth of Australia. Western Australia agreed to join the other colonies in a referendum held on 31 July 1900, two weeks after the Act was passed.¹⁰

Importantly, First Nations peoples were not invited to or included in any of the constitutional conventions and thus did not have a role in the drafting or review of the Constitution. Even as the Constitution came into force in 1901, Aboriginal and Torres Strait Islander peoples were being forced onto reserves and missions under racial segregation acts known as 'Protection' legislation.¹¹

The Constitution was designed and intended to be a living document. Andrew Inglis Clark, a former Tasmanian Attorney-General and a convention member who assisted in drafting the basic framework for the Constitution, stated in 1901 that the Constitution should be understood:

“...not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document”.¹²

In addition to setting out practical arrangements such as the power relationships between the Commonwealth and the States, it is also considered by many to be a symbolic document. It identifies and safeguards a number of values that were important to those who drafted it, such as religious freedom and representative government.

Unfortunately, our Constitution also reflects another value that was a strong motivating force to its drafters: racism.

¹⁰ 'The Australian Constitution in focus'

¹¹ The Uluru Statement, ['History'](#).

¹² Williams and Hume, 'People Power', 4.

During the constitutional conventions in the 1890s, the colonies were beginning to understand the need for a national authority as a matter of practical necessity to provide for common needs and protect the continent against what they understood to be external threat. Uniting in a Federation offered the colonies the chance to establish a new nation defined in racial terms, an intention that was at the heart of the federalist movement.¹³

On 23 December 1901, not quite a year after the Constitution came into force, the Immigration Restriction Act came into law. It was among the first pieces of legislation introduced to the newly formed federal parliament, and was specifically designed to limit non-British migration to Australia. It represented the formal establishment of the White Australia policy, a policy explicitly underpinned by the value of white supremacy that was not dismantled until 1973.¹⁴ Restricting the immigration of non-Europeans was considered 'a matter of life and death to the purity of our race and the future of our nation'.¹⁵

It is difficult to overstate the extent to which the belief in the superiority of Whiteness and the resulting racial discrimination underscored both the motivation for the colonies to federate and the drafting of the Constitution in Australia. Alfred Deakin, the second Prime Minister of the newly formed Commonwealth, remarked in 1903: "A white Australia is not a surface, but it is a reasoned policy which goes down to the roots of national life, and by which the whole of our social, industrial, and political organisations is governed".¹⁶

The Constitution and First Nations peoples

As Professor Patrick Dodson, a Yawuru man, has observed, the Constitution of 1901 was also drafted 'in the spirit of terra nullius'.¹⁷

¹³ Timothy Kendall, '[Within China's Orbit? China through the eyes of the Australian Parliament](#)'. Parliament of Australia (2008)

¹⁴ National Museum of Australia, '[White Australia Policy](#)'

¹⁵ William McMillan, 'Immigration Restriction Bill', House of Representatives, Debates, 6 September 1901, p. 4629.

¹⁶ Alfred Deakin, '[Election Speech](#)' Delivered at Ballarat, Vic, October 29th, 1903

¹⁷ Patrick Dodson, 'Welcoming Speech', Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993, quoted in Bain Attwood and Andrew Markus, 'The 1967 Referendum: Race, Power and the Australian Constitution' (2nd edn, 2007), 146–7.

Terra Nullius is a latin word meaning literally, **'land belonging to no one'**. Estimates suggest that around 1 million First Nations peoples lived on the continent when the British arrived. However, British colonisation proceeded on the basis that First Nations peoples had no rights to their land. The concept of terra nullius was only officially discarded in 1992 in the Mabo High Court decision.¹⁸

Aboriginal and Torres Strait Islander peoples were excluded from the discussions, canvassing, letters and convention debates widely held throughout the 1890s as a process of determining the founding document of this 'new' nation, Australia. This nation, imagined to be situated on vacant and ungoverned land,¹⁹ was in fact being built on First Nations ancestral lands and territories – a fact that was not reflected in the drafting of the Constitution. The document itself did not, and still does not, directly acknowledge or mention the First Peoples of these lands, except for two references designed to exclude them – Section 51, the 'race power', and Section 127 (see 1967 Referendum factsheet for more on these!).

It is not just a matter of the historical wrongs of First Nations exclusion from the drafting and wording of the Constitution. The Australian Constitution as it exists now continues to explicitly allow for the adoption of racially discriminatory laws in Sections 25 and 51 (xxvi).

“The Constitution failed to protect Indigenous Australians from the unfair mistreatment of the past. We were explicitly excluded from the Constitution on the basis that we were an inferior so-called race. Reform for constitutional recognition therefore needs to address the history of discrimination that our people have suffered under the Constitution and ensure that this past will not be repeated”.²⁰

If we accept that the Constitution is not only the rulebook for how the country is governed but a foundational symbolic document reflecting the values and identity of the nation, this lack of involvement from and recognition of First Nations peoples

¹⁸ Dr Harry Hobbs, ANTAR Factsheet 'Sovereignty' (2022), 2.

¹⁹ Australian Human Rights Commission, '[Social Justice Report](#)' (2010), 29.

²⁰ Noel Pearson, Cape York Institute '[Submission to the Joint Select Committee: Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples](#)' (October 2014), 4.

is a shameful and glaring omission. Understanding that constitutional reform is the most solemn and binding form of legal protection available in Australia,²¹ we can begin to understand the gravity of this process to the First peoples on whose lands the Commonwealth of Australia was formed.

“By recognising Indigenous people, we put that foundation into the Constitution, Indigenous people exist, we overcome the hangover of terra nullius and the Constitution then it is absolutely clear that we do, in fact, exist in the nation state ... It has to do with the legacy that we all leave to our children”.²²

The Path to a Referendum

While securing the people’s vote through a referendum is the most significant step in making changes to the Constitution, it is not the only one. There are five main steps leading up to a referendum:

■ **Step 1: A bill is passed by Parliament**

First, a bill that sets out the proposed changes to the Constitution is presented to both the House of Representatives and the Senate. This bill must be passed by an absolute majority (that is, half or more of all members) of each House of the Parliament, or under certain conditions, a law be passed by a majority of either House twice within three months. The bill can be passed in its original form or with agreed amendments.

■ **Step 2: ‘Yes’ and ‘No’ case committees are formed**

Next, after a proposed constitutional amendment is passed by parliament, ‘yes’ and ‘no’ case committees are formed by the MPs and senators who voted for or against the bill. A majority of MPs who voted for it may prepare a written Yes case of up to

²¹ Peter Dawson, ‘On Self Determination and Constitutional Recognition’ (2015), 4.

²² Professor Marcia Langton. ABC Radio National, ‘Behind the Gap: constitutional recognition for Australia’s first peoples’, RN Drive (18 February 2015)

2,000 words. If any members voted against it in parliament, they can prepare the official No case. If no one has voted against the proposal, a 'no' committee may not be formed.²³

■ **Step 3: A writ is issued by the Governor-General**

The Governor-General issues a formal written order, known as a 'writ', which commands an electoral officer to hold an election of referendum. A writ includes a copy of the Bill that contains the exact wording of the referendum questions. The writ also contains the dates to hold the referendum or election and the latest day for the return of the writ. The referendum must be scheduled for a Saturday and cannot be less than 33 days nor more than 58 days after the issue of the writ.²⁴

■ **Step 4: Information is provided to voters**

The 'case' committees are required to send their written arguments for voting 'yes' and 'no' to the Australian Electoral Commission (AEC). These written arguments are authorised by a majority of parliamentary members who voted for or against the Referendum Bill, respectively.²⁵

Historically, the AEC has posted a printed Yes/No pamphlet to all voters which includes:

- a) a clear and impartial statement explaining the proposed changes to the Constitution; and
- b) cases prepared by the 'yes' and 'no' committees setting out arguments for and against the changes.

As of 23 March 2023, the Referendum (Machinery Provisions) Amendment Bill 2022 was passed in both Houses. The Bill's purpose is to modernise the nation's referendum rules and bring them into line with election laws. The Bill initially proposed several changes to the Referendum Act, one of which was to scrap the legal requirement for a Yes/No pamphlet to be delivered to households and instead allow for the use of digital technology (television, email, social media) to allow for

²³ Referendum Council, '[Get the Facts](#)'.

²⁴ National Archives of Australia, 'Referendum for 'Constitution Alteration (Aboriginals) 1967' - writ

²⁵ Parliament of Australia, 'Constitutional referendums in Australia: a quick guide' (2022)

distribution of the 'Yes' and 'No' arguments.²⁶ Ultimately, the Yes/No pamphlet has been retained as a channel of official information for the referendum.

Step 5: Australians vote

On polling day, the voting process is similar to that used for federal elections. Polling places are set up at schools and other public buildings. Each voter's name is marked off the electoral roll and they are given a ballot paper.

There can be one or several proposed changes on a referendum ballot paper. If voters agree with a proposed change, they indicate 'yes' in the square on the ballot paper. If they do not agree with a proposed change, they indicate 'no'.

Once the vote has been counted and if a 'Yes' vote has received double majority, it must receive royal assent by the Governor-General before changes are officially made. This assent is largely a formality.

A Time for Change: Yes/No

After two proposals to make changes to the Australian Constitution were voted down at referendums in 1911, the Government at the time reasoned that this failure of public consent to necessary changes must be due to misinformation and misrepresentation. That is, that the Australian people had been given false or misleading information on the proposed issues, and that the Opposition had played a role in this misguidance of the public.

In 1912, following the Referendum results, the Commonwealth Parliament passed an amendment to the *Referendum Act 1906* to authorise public funding of an information pamphlet. It was decided that the Government would mail a printed document to every elector (that is, a person who has the right to vote) prior to a referendum. This Yes/No pamphlet, as it became known, was to provide the arguments for and against the proposed change as well as the text of the Constitution identifying the proposed changes.²⁷

²⁶ Australian Government, Attorney General. '[Next steps toward Voice referendum](#)' [media release] (1 Dec 2022)

²⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, '[A Time for Change: Yes/No? Inquiry into the Machinery of Referendums](#)', (2009), vi.

After the 1999 referendum on whether Australia should become a Republic, many felt it had become clear that the Australian referendum process did not involve citizens in a way that educated the public and provided a feeling of ownership. Many people found it hard to find accurate, reliable information with referendum campaigns often marred by partisanship, deception and misrepresentation as both sides competed for tactical advantage.²⁸

In a 2009 report from the House of Representatives inquiry into the Machinery of Referendums, the Standing Committee on Legal and Constitutional Affairs determined that the Yes/No pamphlet as the sole document offered by the Government prior to a referendum did not adequately provide sufficient information to allow electors to make an informed decision at a referendum.²⁹ The Committee recommended a suite of changes to the Machinery of Referendums Act aimed at expanding the ways in which relevant information about the referendum could be communicated to the people in order to combat misinformation. Furthermore, it was hoped that allowing additional material beyond the Yes/No pamphlet to be disseminated would result in deeper public understanding and knowledge of both the Constitution and of any proposed future changes to it.

Likewise, a 2021 Inquiry into constitutional reform and referendums found a need for increased public literacy about Australia's Constitution. They recommended that the Australian Government develop and implement a public awareness and education program on the Constitution, constitutional framework and Australia's democratic system, including consultation with First Nations and culturally and linguistically diverse communities in the development of such programs.³⁰ Further, the Committee gave voice to a concern that the 'Yes/No' structure of the pamphlet encourages Australians to 'divide into two camps – to be either for or against a proposal' in adversarial ways.³¹

Interestingly, in New South Wales state referendums, the information pamphlets that are sent to voters prior to a referendum are prepared and written by public

²⁸ Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010), 23.

²⁹ 'A Time for Change', vii.

³⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, '[Inquiry into constitutional reform and referendums](#)' (2021), x.

³¹ 'Inquiry into constitutional reforms', 55.

servants, not politicians. The public servants are required to write these reports in a factually accurate and impartial manner, and the reports are then sent to acknowledged experts for review. While the success rate of Federal referendums is 18 percent, in NSW it is 85 percent.³²

In early 2023, \$9.5 million in funding was approved to fund public civics education and awareness programs, community initiatives and other activities to raise public awareness of, and community engagement with, a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution through an Aboriginal and Torres Strait Islander Voice.³³ The \$9.5m is slated to be spent on upgrading the National Indigenous Australians Agency's Aboriginal and Torres Strait Islander Voice website, including providing information in 30 languages, as well as boosting First Nations media to deliver civics education and information on the referendum in First Nations communities across Australia.³⁴

The Referendum (Machinery Provisions) Amendment Bill 2022 that passed the Senate in late March 2023 also approved a neutral civics education campaign which will circulate basic information on the Constitution, Australia's system of government and the referendum process. The education campaign will remain neutral on the Voice proposal and will not address the arguments for or against a proposed law for the alteration of the Constitution.³⁵

Towards a Voice

In the lead up to this year's referendum on the Aboriginal and Torres Strait Islander Voice to Parliament, it is crucial to understand the history and context of how referendums function in Australia, the relationship between referendums and making important changes to the Australian Constitution, as well as the complex

³² Anne Twomey, 'The Constitution of New South Wales' (2004), 320.

³³ Australian Government, 'Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 1) Regulations 2023'.

³⁴ Paul Karp, '[Labor approves \\$9.5m for 'facts of the voice' but says it is not funding de-facto yes campaign](#)', The Guardian (6 March 2023).

³⁵ Paul Kildea, '[The referendum rules have been decided. What does this mean for the Voice?](#)' UNSW. 24 March 2023.

structural ways in which they have both succeeded and failed to produce a living, breathing 'rulebook' for the way Australia as a nation both recognises its past and moves toward an elevated future.

In particular, it is critical to understand the explicitly colonial underpinnings of both the referendum and the Australian Constitution, as well as the exclusion, silencing and marginalisation of First Nations peoples in the constitutional foundations and processes of building the Australian 'nation'.

One hundred and twenty two years ago, First Nations peoples in this country were not recognised as members of the constitutional 'people'. This exclusion, persisting today in different forms, is a kind of 'psychological terra nullius'³⁶ that continues to affect the constitutional identity of the nation.

³⁶ Larissa Behrendt, "[What Did the 'Yes' Vote Achieve? Forty Years after the 1967 Referendum](#)" Senate Occasional Lecture Series at Parliament House, Canberra (29 June 2007)

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With thanks:

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**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**

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