

The Law and History of State and Territory Referendums

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Abstract

Australia's states and territories have together held more than 50 referendums since Federation in 1901. And yet, as the literature on federal referendums has continued to grow, scholars have largely overlooked the rich history of direct democracy at the sub-national level. This article addresses this gap by providing the first comprehensive review of the use and regulation of referendums by the states and two mainland territories. It draws attention to the immense variety of referendum votes on constitutional amendments and contentious policy issues. It also examines rules and practices on a range of matters, including initiation, the form of the question, the status of the result, voting and campaigning. Additionally, the article surveys the overall state and territory referendum record, including the frequency and approval rate of referendums, and compares it to the federal record. The analysis is informed by a referendum dataset compiled from primary sources by the author. The Appendix, which draws on this dataset, presents the first, single repository of accurate information on state and territory referendums, including dates, topics, results, informality and turnout.

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I Introduction

Australia's states and territories have together held more than 50 referendums since Federation in 1901. Voters have been invited to have their say on some of the most contentious matters of the day, including religious instruction in schools, alcohol policy and daylight saving. This diversity of topics has been matched by the immense variation, both across time and jurisdiction, in the rules and practices governing each poll. And yet, as the literature on federal referendums has continued to grow,¹ scholars have largely overlooked the rich history of direct democracy at the sub-national level.² Legal academics, political scientists and historians have written about some individual referendums, often as part of wider accounts of policy issues,³ and produced a few brief overviews of the field.⁴ However, the work of examining state and territory referendums collectively, for the purpose of understanding when and how they are deployed and their contribution to democratic decision-making, remains to be done. This article begins to address this gap by providing the first comprehensive review of the use and regulation of referendums by the states and two mainland territories.⁵

Close analysis of state and territory referendums is worthwhile for several reasons. First, it expands our understanding of Australian democracy. It reminds us that referendums, while infrequent, are a persistent presence in the nation's representative politics, deployed to ratify and inform a wide range of important

¹ See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

² Some publications that purport to provide a general study of Australian referendums ignore state and territory votes altogether: see, eg, Geoffrey de Q Walker, *Initiative and Referendum: The People's Law* (Centre for Independent Studies, Policy Monograph 10, 1987); Caroline Morris, 'Referendums in Oceania' in Matt Qvortrup (ed), *Referendums around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan, 2014) 218.

³ See, eg, Edward Watt, 'Secession in Western Australia' (1958) 3 *University Studies in Western Australian History* 43; Walter Phillips, 'Six O'Clock Swill': The Introduction of Early Closing of Hotel Bars in Australia' (1980) 19(75) *Australian Historical Studies* 250; Aynsley Kellow, 'The Dispute over the Franklin River and South West Wilderness Area in Tasmania, Australia' (1989) 29(1) *Natural Resources Journal* 129; David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008); Chris Pearce, 'History of Daylight Saving Time in Queensland' (2017) 23(6) *Queensland History Journal* 389; Lauren Samuelsson, "'Six O'clock is Late Enough": The 1947 New South Wales Liquor Referendum' (2018) 15(4) *History Australia* 744. Brief coverage of individual referendums can be found in books on state constitutional law and politics: see, eg, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004).

⁴ The most detailed account is Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11(2) *Public Law Review* 117, 119–22. Other brief treatments include Don Aitkin, 'Australia' in David Butler and Austin Ranney (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, 1978) 123, 124–5; Colin Hughes, 'Australia and New Zealand' in David Butler and Austin Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 154, 166–72; Williams and Hume (n 1) 7–8.

⁵ Australian Capital Territory ('ACT'); New South Wales ('NSW'); Northern Territory ('NT'); Queensland ('Qld'); South Australia ('SA'); Tasmania ('Tas'); Victoria ('Vic'); Western Australia ('WA'). Referendums held by external territories and local councils are beyond the scope of this article. On Norfolk Island, see Benjamin Franklen Gussen, 'Citizen-Initiated Referenda in Australia: Lessons from Norfolk Island' (2019) 21(1) *Loyola Journal of Public Interest Law* 135.

decisions. Second, it deepens our knowledge of direct democracy in Australia, providing a counterweight to the dominant accounts of federal constitutional referendums. Third, it enriches discussions about referendum design by illuminating diverse laws and practices. In particular, the state and territory experience is a relatively untapped resource in ongoing conversations about how to improve the conduct of federal referendums. Finally, referendums remain an important tool for state and territory governments, even if they have been used only occasionally in recent decades. Recent proposals for referendums on retail trading hours (SA), voluntary assisted dying (NSW) and an inquiry into electoral reform (WA) highlight the referendum's continuing relevance in contemporary democratic politics.⁶

One of the challenges of writing about state and territory referendums is the difficulty of establishing basic facts. It remains the case, as it was two decades ago, that '[d]etails of State and Territory referenda are sketchy and nowhere comprehensively compiled'.⁷ Most electoral commission and government websites publish some information on past referendums,⁸ but the data provided are often minimal and, in some instances, contradictory.⁹ The few nationwide lists compiled by scholars are incomplete.¹⁰ One referendum, the Federal Capital Territory (now ACT) 1928 poll on prohibition, is absent from both scholarly lists and electoral commission websites.¹¹

The necessary first step in this research project, therefore, was to build a dataset of state and territory referendums based on authoritative sources. The table

⁶ Referendum (Retail Trading) Bill 2021 (SA); Michael Koziol, "'If it's the Only Way': Support Builds for NSW Plebiscite on Assisted Dying', *The Sydney Morning Herald* (online, 27 December 2020) <<https://www.smh.com.au/national/nsw/if-it-s-the-only-way-support-builds-for-nsw-plebiscite-on-assisted-dying-20201225-p56q56.html>>; Ministerial Expert Committee on Electoral Reform, *Ministerial Expert Committee on Electoral Reform: Discussion Paper* (Discussion Paper, 2021) <<https://www.wa.gov.au/government/publications/ministerial-expert-committee-electoral-reform-discussion-paper>>.

⁷ Orr (n 4) 119.

⁸ Authorities in South Australia and Western Australia have published the most detailed data: Jasha Bowe, *South Australian Referenda* (Research Series, State Electoral Office (SA), June 2005); David Black (ed), *The Western Australian Parliamentary Handbook: Twenty-Fourth Edition* (Parliament of Western Australia, 2018) 377–89. By contrast, Victoria's official websites are silent on that State's referendums, as is the website of the New South Wales Electoral Commission (although some data is accessible via an archived website: Electoral Commission NSW, *Referendums and Polls* (Web Page, 24 December 2010) <https://web.archive.org/web/20110218173842/http://www.elections.nsw.gov.au/past_results/referendums_and_polls>).

⁹ For example, the Electoral Commission of Queensland ('ECQ'), Queensland Parliament and Queensland Government Gazette each provide different figures for the number of votes cast in favour of the abolition of the Queensland Legislative Council at the State's 1917 referendum: see ECQ, *Election Events* (Web Page, 2022) <<https://www.ecq.qld.gov.au/elections/election-events>>; Parliament of Queensland, 'Queensland Parliament Factsheet 6.2: Referendums', *Elections and Referendums* (Fact Sheet) <<https://www.parliament.qld.gov.au/Visit-and-learn/Education/Resources/6-Elections-and-Referendums>>; Queensland, *Queensland Government Gazette*, No 148, 10 October 1917, 1111–13. In such instances, I have adopted the figure published in the Gazette.

¹⁰ For example, Aitkin (n 4), writing in 1978, omits three of the referendums held by Queensland (1910, 1920 and 1923) and three held by Western Australia (1911, 1921 and 1925). Hughes's (n 4) 1994 overview neglects two of the same WA polls (1911, 1921), plus referendums held in NSW (1981, 1991) and the ACT (1978).

¹¹ Commonwealth, *Commonwealth of Australia Gazette*, No 95, 6 September 1928, 2546.

in the Appendix provides, for the first time, a single repository of accurate information on the dates, topics and results of state and territory referendums, along with data on informal voting and turnout. I have identified 56 referendums, a set that includes three state-wide local option polls and three territory referendums initiated by the Federal Government. In developing this resource, I have drawn exclusively on primary sources including the websites and published reports of parliaments and electoral commissions, government gazettes, Australian Bureau of Statistics yearbooks and records of parliamentary debates. All percentages have been calculated from raw numbers. Where gaps or discrepancies have arisen, I have sought to resolve these through correspondence with electoral authorities and parliamentary libraries. The data presented in the Appendix provides a foundation for meaningful comparison of referendum events, both across time and jurisdiction, and sits behind the analysis presented.

It is helpful to say something at the outset about terminology. It is customary in Australia to reserve the term ‘referendum’ for binding polls on proposed constitutional amendments, and to use ‘plebiscite’ to refer to non-binding votes on policy issues.¹² This approach lacks nuance; it struggles, for instance, to accommodate advisory votes on constitutional questions, and binding polls on policy matters. It is also confusing to international readers. In this article, I use ‘referendum’ as a general term for all popular vote processes and, beyond that, endeavour to be specific about the defining characteristics of individual polls. The chief distinction that I adopt, as explained below, is between optional and mandatory referendums.

The article continues in Part II with a brief discussion of colonial referendums conducted in the pre-Federation period. Parts III and IV turn to the years after Federation. They examine a set of distinctive issues with respect to the calling and conduct of optional and mandatory referendums: their initiation, the form of the question put to voters, and the status of the result. Parts V and VI address issues common to both types of referendums: namely, rules and practices in relation to voting and campaigning. Part VII surveys the overall referendum record, including the frequency and approval rate of state and territory referendums, and compares it to the federal record. The article concludes in Part VIII.

II Early Referendums

The idea of holding referendums was not initially a feature of the system of government that the colonies adopted during the 19th century and that was largely inherited from Britain.¹³ Each colony had a written constitution and a system of responsible government in which the Premier and Ministers were accountable to the legislature. The bicameral Parliaments comprised an elected Legislative Assembly and a Legislative Council whose members were either appointed or elected. The people’s main opportunity for influencing government decisions and laws came in

¹² Paul Kildea, ‘The Constitutional and Regulatory Dimensions of Plebiscites in Australia’ (2016) 27(4) *Public Law Review* 290, 292; Orr (n 4) 117.

¹³ John Hirst, *Australia’s Democracy: A Short History* (Allen & Unwin, 2002) chs 2–3.

the form of periodic elections, although most jurisdictions limited the franchise to men until after Federation.¹⁴

By the late 19th century, however, colonial governments had used the referendum to inform decisions on important and contentious matters. This early embrace of direct democracy followed Switzerland, whose Constitution provided for the referendum and the popular initiative; the latter allowed citizens to initiate popular votes to change the Constitution and reject bills of Parliament.¹⁵ It also coincided with increased interest in, and adoption of, direct democracy mechanisms in some American states during the 1890s.¹⁶

In the period 1898–1900, each of the six colonies held a referendum to approve a draft Bill establishing a federal constitution. The Corowa Conference of 1893 determined that popular involvement was crucial to the federation process and had resolved that each colony should submit the Bill to a vote.¹⁷ Following the clear popular verdict in favour of federation, the Imperial Parliament enacted the Bill into law.¹⁸ Of course, the new constitution itself made provision for the holding of referendums. The framers, influenced by the Swiss example, included a provision stating that any proposed amendments to the *Commonwealth Constitution* could not become law unless passed by Parliament and approved by a ‘double majority’ — that is, a national majority of voters plus a majority of voters in at least four of six states.¹⁹

Even before the federation referendums, though, the colonies were experimenting with direct democracy. In 1896, South Australia held a referendum on whether scriptural education should be introduced in state schools.²⁰ It was defeated by a wide margin. This was not only Australia’s first referendum, but also the first time that Australian women exercised the franchise. Three years later, South Australians were again called to the ballot box, this time to vote on the introduction of household suffrage for Legislative Council elections. This referendum, held on the same day as the Colony’s federation poll, returned an affirmative vote, but the result was not immediately implemented.²¹ At around the same time, the Victorian Parliament considered (but did not pass) its own Bill to hold a referendum on

¹⁴ Department of the Senate (Cth), ‘Women in the Senate’, *Senate Brief No 3* (October 2021) 7.

¹⁵ Alexander H Trechsel and Hanspeter Kriesi, ‘Switzerland: The Referendum and Initiative as a Centrepiece of the Political System’ in Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press, 1996) 185, 185–8.

¹⁶ Thomas E Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, 1989) 50–1.

¹⁷ Helen Irving, ‘When Quick Met Garran: The Corowa Plan’, *Papers on Parliament No 32* (Parliament of Australia, December 1998).

¹⁸ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

¹⁹ *Commonwealth Constitution* s 128.

²⁰ John Weste, ‘The 1896 Referendum on Scriptural Education in South Australian State Schools’ in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 3.

²¹ Coral Stanley, ‘The 1899 Amended Commonwealth Bill and Extension of the Legislative Council Franchise’ in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 20. The Council refused to support the change; household suffrage was not adopted until 1913: Hirst (n 13) 100.

scriptural education.²² And legislators in some colonies, frustrated at upper houses for obstructing legislation, introduced Bills that would have allowed referendums to resolve parliamentary deadlocks.²³ It was during this decade, too, that the Labor Party began to advocate for the use of the popular initiative.²⁴

By the time of Federation in 1901, then, the referendum was well understood by the colonies and increasingly accepted as a device to supplement representative and responsible government. This continued into the early decades of the 20th century, with numerous state governments holding or considering referendums on a range of issues, including the composition of Parliament, religious instruction in schools, and liquor regulation.

These early referendums were *optional*, in the sense that they were held at the discretion of the Government, in the absence of any legal requirement.²⁵ Their purpose was to ascertain public opinion on a divisive issue. In time, and particularly as some states altered their Constitutions to protect certain features from amendment, governments began holding referendums because they were legally required to do so. These *mandatory* referendums, unlike their optional counterparts, were a necessary stage in the law-making process — the proposed change could not become law unless approved by voters at the ballot box.

It is helpful to divide state and territory referendums into these two categories as each faces a set of distinctive issues in relation to how they are called and conducted. Those issues, examined in Parts III and IV, include their initiation, the form of the question put to voters and the status of the result. It should be noted that all sub-national referendums have been initiated by the Government and/or legislature. The states and territories have considered, but never adopted, citizen-initiated referendums.²⁶

III Optional Referendums

The vast majority of state and territory referendums have been optional. In this research, I have recorded 43 of the 56 sub-national referendums as falling into this category.

²² Lilian Tomn, 'The Referendum in Australia and New Zealand' (1897) 72 *The Contemporary Review* 242.

²³ *Ibid.*

²⁴ Walker (n 2) 20.

²⁵ Laurence Morel, 'Types of Referendums, Provisions and Practice at the National Level Worldwide' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge, 2018) 29; Maija Setälä, *Referendums and Democratic Government* (Palgrave Macmillan, 1999) 70–4.

²⁶ George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35(1) *Australian Journal of Political Science* 27, 29.

A *Initiation*

A state or territory legislature typically initiates an optional referendum by passing an enabling Bill. The Bill usually establishes a date or timeframe for the vote and sets out the question to be submitted to voters. In Queensland and the Northern Territory, the Legislative Assembly may initiate a referendum by resolution.²⁷ Each legislature has authority to legislate for optional referendums by virtue of its general legislative power to make laws with respect to its jurisdiction.²⁸

There are generally no stated limits on the sorts of topics that can be put to a vote, although the Northern Territory Government may only hold referendums on matters within its executive authority.²⁹ Governments have held optional polls on a wide range of subject matters, as summarised in Table 1 below.³⁰ Questions about liquor regulation, such as the introduction of 6pm closing for licensed premises, and prohibition, have been the most numerous. The vast majority of these were put in the first half of the 20th century, when alcohol policy was highly divisive and a common subject of referendums in Australia and other Western nations.³¹ In more recent times, daylight saving has emerged as the issue most often put to a popular vote.

A question arises as to why any government would hold a referendum when it could instead pursue reform through the ordinary legislative route.³² Generally speaking, states and territories have opted to put issues to the people for one of two reasons.³³ The first has been to remove contentious issues from the parliamentary agenda. This rationale has been central to decisions to call referendums on issues such as religious instruction in schools (eg, QLD 1910),³⁴ liquor licensing (eg, SA 1915)³⁵ and daylight saving (eg, QLD 1992).³⁶ On controversial issues like these, a referendum may be appealing to a government because it provides a circuit-breaker for entrenched disagreements within parties, or between the lower and upper houses, or because it shifts decision-making responsibility to the electorate.

²⁷ *Referendums Act 1997* (Qld) s 5(b); *Referendums Act 1998* (NT) s 5(1).

²⁸ *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 22(1); *Constitution Act 1902* (NSW) s 5; *Northern Territory (Self-Government) Act 1978* (NT) s 6; *Constitution of Queensland 2001* (Qld) s 8 and *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 5 with *Australian Constitutions Act 1850* (Imp) s 14; Tasmania by *Australian Constitutions Act 1850* (Imp) s 14; *Constitution Act 1975* (Vic) s 16; *Constitution Act 1889* (WA) s 2.

²⁹ *Referendums Act 1998* (NT) (n 27) s 4(1); *Northern Territory (Self-Government) Regulations 1978* (Cth) reg 4.

³⁰ Here I draw on categories outlined in David Butler and Austin Ranney, 'Practice' in David Butler and Austin Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (Macmillan, 1994)1, 2–3.

³¹ Phillips (n 3); Benoit Dostie and Ruth Dupré, 'Serial Referendums on Alcohol Prohibition: A New Zealand Referendum' (2016) 40(3) *Social Science History* 491.

³² See Laurence Morel, 'The Rise of "Politically Obligatory" Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30(5) *West European Politics* 1041, 1045–51.

³³ See also Hughes (n 4) 154; Orr (n 4) 120–1.

³⁴ Yvonne Perkins, 'Queensland's Bible in State Schools Referendum: A Case Study of Democracy' (BA Thesis, University of Sydney, 2010) 66.

³⁵ Phillips (n 3) 258.

³⁶ Pearce (n 3) 396.

The second reason has been to seek additional legitimacy for changes to fundamental rules or institutions. This has, for instance, motivated the calling of referendums on proposals to reduce the size of the New South Wales Legislative Assembly (1903),³⁷ secede Western Australia from the Commonwealth (1933),³⁸ and grant statehood to the Northern Territory (1998).³⁹ Judgments about the necessity of referendums sometimes vary across jurisdictions. South Australia is the only state to have held a popular vote on whether the salaries of parliamentarians should be increased (1911). That decision may have led to some regret: voters rejected the measure by a ratio of 2:1, and it was another decade before members received a pay increase.⁴⁰

Table 1: Optional referendums by subject matter

Category	Issues
Constitutional (4)	<ul style="list-style-type: none"> - Size of Legislative Assembly (1) - Members' pay (1) - Electoral system (1) - Constitutional convention (1)
Territorial (4)	<ul style="list-style-type: none"> - WA secession (1) - North-east NSW statehood (1) - ACT self-government (1) - NT statehood (1)
Social/moral (35)	<ul style="list-style-type: none"> - Liquor (18) - Daylight saving (7) - Religious education (4) - Retail trading (3) - Gambling (2) - Hydro-electric power (1)

The decisions to hold discretionary referendums have sometimes been highly contentious. Opposition parties, particularly in upper houses, have often scrutinised and challenged government justifications for holding a popular vote in the absence of a legal requirement. For instance, the Western Australian Government's first attempt to hold a vote on secession was blocked by the Legislative Council, and the vote was only able to proceed after the Government conceded to the Labor Opposition's demands for the ballot to include a second question on holding a constitutional convention.⁴¹ At other times, governments have set out to legislate,

³⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 September 1903, 2675 (John See): 'The Parliament cannot settle [the issue] because it has no authority'.

³⁸ Watt (n 3).

³⁹ Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Convention 1998' (1998) 9(3) *Public Law Review* 155, 155.

⁴⁰ *Payment of Members Act Amendment Act 1921* (SA) s 2(1).

⁴¹ Watt (n 3) 47–51.

but had a referendum forced upon them. In 1968, the Tasmanian Premier, Eric Reece, announced a plan to redevelop a Hobart hotel to include a casino and ruled out a referendum on the matter. He soon reversed that position, though, due to opposition both within Cabinet and the Legislative Council.⁴² Similarly, the Federal Government initially dismissed the idea of giving ACT voters a say on their electoral system, but Senate opposition, not to mention unhappiness in the territory itself, prompted it to change course.⁴³

B *Form of the Question*

The questions put to voters at optional referendums have taken a variety of different forms. The most common approach has been to present voters with a binary, Yes/No choice — as in New South Wales's 1976 poll, which asked 'Are you in favour of daylight saving?'.⁴⁴ Three referendums have invited electors to decide between two substantive proposals. The most recent of these 'dual option' polls was the Australian Capital Territory's 1992 electoral system referendum, which asked voters to choose between single member electorates and proportional representation (Hare-Clark). Finally, 12 referendums have been 'multi-option' polls that have prompted voters to choose between three or more policy alternatives. This design feature has been used most frequently for votes on alcohol policy. At South Australia's 1915 referendum, for example, voters were asked to choose between 6, 7, 8, 9, 10 and 11pm as their preferred closing time for licensed premises. At that referendum, voters were instructed to choose only one option, whereas at other multi-option polls electors have been required to record partial or full preferences.

For dual- and multi-option polls, the decision about what options to include in the question has sometimes been hotly debated. This is understandable, as the alternatives on the ballot paper define the parameters of voter choice. In 1903, for instance, New South Wales voters were presented with three options regarding the size of the Legislative Assembly — 125 (status quo), 100 and 90 — but some in Parliament argued for additional options (such as 150 and 25) to be added.⁴⁵ More problematically, the options given to Tasmanians at their 1981 referendum weakened the credibility of the vote. Electors were asked to choose between two locations on the Gordon River for the construction of a planned hydro-electricity dam, but were not given the option of voting against the construction of a dam altogether. In response, the Tasmanian Wilderness Society launched a campaign urging voters to write 'No Dams' on their ballot papers and to not otherwise record a preference. Overall, more than 33% of electors did so, contributing to a massive

⁴² Terry Newman, 'Tasmanian Referenda Since Federation' in Bryan Beaumont, Leslie Zines and Charles Fenton, *Report of the Royal Commission into the Constitution Act 1934 Tasmania* (Hobart, 1982) 165–6 (app T).

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1991, 1419 (David Simmons).

⁴⁴ *Daylight Saving (Referendum) Act 1976* (NSW) sch, form B.

⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1903, 4271 (JCL Fitzpatrick).

informal vote.⁴⁶ While one location (Gordon below Franklin) received far more votes than the other, its share only marginally exceeded the informal vote. As Hughes concluded: ‘The lesson learned was that a combination of compulsory voting with a formulation of a referendum question that ignores the wishes of a large part of the electorate will produce a messy result.’⁴⁷

C *Status of the Result*

Proposals put at optional referendums have generally been considered ‘carried’ where they have attracted a simple majority of votes.⁴⁸ Different thresholds have applied to local option polls and to some proposals to abolish liquor licenses. In Victoria and Western Australia, for instance, proposals to restrict licensing were required to achieve a super-majority of 60% *and* meet a turnout quorum of 30% of electors.⁴⁹ This approach was criticised by some legislators for being undemocratic, and has not been used for many decades.⁵⁰

The fact that an optional referendum proposal is carried does not necessarily mean that it will be implemented. The rules and practices have varied. For about two-fifths of optional referendums, the legislature has stipulated in the enabling law that certain consequences must follow a vote in favour of the proposed measure. Parliaments have used different formulations to do this. One approach, used on several occasions, has involved the Parliament enacting the proposed policy change, but making its commencement conditional on a Yes vote. Prior to Tasmania’s 1968 casino referendum, for instance, the State Parliament passed an Act that authorised the issuing of a hotel casino licence, and made the Act’s commencement contingent on public approval at the ballot box.⁵¹ This approach was also adopted at all four of Western Australia’s daylight saving referendums.⁵² For some other referendums, the legislature has simply sought to specify the legal consequences that should follow the vote. Thus, the determination of voters at the Australian Capital Territory prohibition poll was to have ‘full force and effect’ for at least five years and until a future poll was taken.⁵³ While such provisions cannot legally constrain future Parliaments, in practice governments and Parliaments have respected the popular verdict given at each of these referendums.

Most optional referendums, though, have been advisory, meaning that their results have not been legally binding on the Government or Parliament.⁵⁴ This status

⁴⁶ Tasmanian Parliamentary Library, ‘Referendums in Tasmania’ (Information Sheet, May 2002) <<https://www.parliament.tas.gov.au/tpl/InfoSheets/referendums.pdf>>.

⁴⁷ Hughes (n 4) 170.

⁴⁸ Enabling laws often provide that the proposal will pass if the number of Yes votes exceeds the number of No votes: eg, *Daylight Saving Act 2006* (WA) s 2(2). In some instances, the law is silent on the relevant threshold.

⁴⁹ *Licensing Act 1928* (Vic) ss 297(1)–(2); *Licensing Act 1911* (WA) s 78.

⁵⁰ See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 30 November 1922, 3311 (Edmund Greenwood).

⁵¹ *Wrest Point Casino Licence and Development Act 1968* (Tas) s 1(3).

⁵² See, eg, *Daylight Saving Act 2006* (WA) s 2.

⁵³ *Liquor Poll Ordinance 1928* (Cth) s 48.

⁵⁴ Morel, ‘Types of Referendums’ (n 25) 32–3.

tells us nothing about the importance of the vote; indeed, referendums on topics as diverse as 6pm closing, daylight saving and secession have all been advisory. Moreover, the state and territory experience broadly affirms the view that advisory referendums are *effectively* binding given that governments and legislators usually find it politically difficult to act contrary to popular wishes.⁵⁵

Three exceptions are worth noting. In two instances, a state has lacked constitutional authority to execute the referendum result. Following Western Australia's vote in favour of secession, the British Parliament rejected the State's petition to be recognised as an independent self-governing colony.⁵⁶ And, after Tasmanians voted to build the dam below the junction of the Gordon and Franklin Rivers, the Commonwealth legislated to prevent the dam's construction.⁵⁷ As to the third exception, in 1904 the Victorian Government chose to retain secular education after the electorate gave mixed signals on the issue. Confoundingly, majorities supported all three measures on the ballot paper: the continuation of secular education; scripture lessons in schools; and the use of certain prayers and hymns.⁵⁸

Taking a wider view, it is apparent that the force of some advisory results has diminished over time. In 2005, Western Australian voters opposed the extension of Perth's weekday and Sunday retail trading hours, but by 2012 the State Parliament had enacted those same changes into law.⁵⁹ Similarly, the Commonwealth granted self-government to the Australian Capital Territory in 1988, even though less than a third of Territorians had backed the idea a decade earlier.⁶⁰ These instances raise interesting questions, too large to explore here, about the circumstances in which politicians legislate contrary to advisory referendums and their justifications for doing so.

Before turning to mandatory referendums, it is worth saying something about the significance of these optional polls. Some were major events in themselves: Tasmania's 1981 dam referendum, for example, garnered national attention and helped mobilise a burgeoning conservation movement.⁶¹ Other polls are less storied, but nonetheless helped trigger significant social changes. During the First World War, voters in three states backed 6pm closing at licensed premises, a choice that created the conditions for the now infamous 'six o'clock swill'.⁶² And in 1968, Tasmanians approved the nation's first casino license. Still other polls are memorable for different reasons. In 1956, Victorians rejected a proposal to overturn 6pm closing and, as a result, tourists visiting Melbourne for the Olympics were prohibited from enjoying an evening drink in a public bar.⁶³ And, in 1928, a year

⁵⁵ Ibid 32; Michael Gallagher, 'Conclusion' in Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press, 1996) 226, 246.

⁵⁶ Watt (n 3) 81.

⁵⁷ *World Heritage Properties Conservation Act 1983* (Cth).

⁵⁸ 'The Religious Instruction Referendum', *Daily Telegraph* (Sydney), 14 June 1904, 4.

⁵⁹ Brett Heino, 'Trading Hours Deregulation in Tasmania and Western Australia: Large Retailer Dominance and Changing Models of Development' (2017) 27(2) *Labour and Industry* 95, 104.

⁶⁰ See Appendix.

⁶¹ Kellow (n 3).

⁶² Phillips (n 3).

⁶³ Grazyna Zajdow, 'Producing the Market for Alcohol: The Victorian Example' (2011) 35(1) *Journal of Australian Studies* 83, 88.

after Federal Parliament had begun sitting in Canberra, the Bruce Government called a referendum on relaxing local liquor laws to authorise the sale (and not just possession) of alcohol. Residents of the Federal Capital Territory voted in favour, freeing the newly arrived politicians to drink in licensed premises.

IV Mandatory Referendums

Of the 56 state and territory referendums, 13 have been mandatory. Most have concerned amendments to state Constitutions, while a small number have been held to resolve parliamentary deadlocks or approve new entrenchments. Additionally, a handful of states require the holding of referendums on sensitive policy issues.

A Constitutional Amendment

1 *Initiation*

The Constitutions of the five mainland states (NSW, Qld, SA, Vic, WA) provide that proposals to amend or repeal certain entrenched constitutional provisions cannot become law unless approved at a referendum.⁶⁴ The decision to entrench those provisions was made by the State Parliaments themselves at an earlier point in time. Under s 6 of the *Australia Act 1986* (Cth),⁶⁵ a state legislature can enact manner and form provisions that impose procedural constraints upon future law-making.⁶⁶ Section 6 also imposes an obligation on state legislatures to comply with those constraints when seeking to enact laws ‘respecting the constitution, powers or procedure of the Parliament of the State’.

In these five jurisdictions, a referendum is generally required to alter the structure or composition of the legislature, change the length of parliamentary terms, or dilute the legal requirement for a referendum. Beyond this, there is considerable variation. For example, in New South Wales, the rules on compulsory voting and judicial tenure are entrenched.⁶⁷ Victoria’s Constitution, meanwhile, stands out for entrenching certain executive offices, including the Auditor-General, Ombudsman and Electoral Commissioner.⁶⁸ In Queensland, the restoration of a second house

⁶⁴ *Constitution Act 1902* (NSW) (n 28) ss 7A–7B; *Constitution Act 1975* (Vic) (n 28) s 18(1B); *Constitution Act 1867* (Qld) (n 28) s 53; *Constitution Act Amendment Act 1934* (Qld) s 3; *Constitution of Queensland 2001* (Qld) (n 28) s 191; *Constitution Act 1934* (SA) (n 28) ss 10A, 88; *Constitution Act 1889* (WA) (n 28) s 73.

⁶⁵ Prior to 1986, this authority was granted by the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 5.

⁶⁶ The ability of state legislatures to enact restrictive manner and form provisions that bind future parliaments, and to do so through the vehicle of ordinary legislation, was first recognised by the High Court of Australia and the Privy Council respectively in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and *Attorney General for New South Wales v Trethowan* [1932] AC 526.

⁶⁷ *Constitution Act 1902* (NSW) (n 28) s 7B(1)(a).

⁶⁸ *Constitution Act 1975* (Vic) (n 28) ss 18(1B)(n)–(o).

(Legislative Council or other legislative body) may not occur unless it has been approved at a referendum.⁶⁹

The use of the referendum to ratify state constitutional amendments is a relatively recent phenomenon. New South Wales was the first state to entrench constitutional provisions by referendum, in 1929, and held the first constitutionally mandated poll, on Legislative Council reform, in 1933.⁷⁰ In total, there have been 10 mandated referendums on constitutional amendment, nine of which have occurred since 1978. New South Wales has conducted seven of these. It has held referendums to ratify, among other changes, provision for direct election of members of the Legislative Council (1978) and the extension and fixing of Legislative Assembly terms (1981, 1995). Queensland has held two referendums on parliamentary terms (1991, 2016), and South Australia has held one on the process for redistributing electoral boundaries (1991). Victoria and Western Australia, by contrast, have channelled constitutional change entirely through the ordinary parliamentary process.

A few factors help explain the rarity of referendums on constitutional amendment. First, State Parliaments can alter many parts of their Constitutions through the passage of ordinary legislation.⁷¹ Second, South Australia (1970), Western Australia (1978) and Victoria (2003) introduced referendum requirements relatively recently.⁷² Third, the presence of manner and form provisions has sometimes encouraged governments to think creatively to find an alternative, less onerous pathway to achieving their goal. In 2011, for instance, Western Australia sought to fix election dates for the Legislative Assembly. On receiving legal advice that it could not do this without holding a referendum, the Government instead opted to fix the dates for Legislative Council elections as that could be achieved by ordinary legislation. The Government took the view that a referendum was unnecessary and would be ‘an expensive exercise and one that would certainly not excite the interest of the public’.⁷³

Each Constitution articulates the requirement for a referendum in different terms. They nonetheless share a general approach, which is to preclude governments from seeking royal assent to certain proposed laws unless they have been passed by Parliament and approved by a majority of voters.⁷⁴ For example, s 53(1) of the *Constitution Act 1867* (Qld) provides that a Bill that ‘expressly or impliedly or in any way affects’ an entrenched provision ‘shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance

⁶⁹ *Constitution Act Amendment Act 1934* (Qld) (n 64) s 3.

⁷⁰ *Constitution (Legislative Council) Amendment Act 1929* (NSW).

⁷¹ *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457.

⁷² *Constitution Act Amendment Act 1969* (SA); *Acts Amendment (Constitution) Act 1978* (WA); *Constitution (Parliamentary Reform) Act 2003* (Vic). Queensland introduced entrenchment by referendum in 1934: *Constitution Act Amendment Act 1934* (Qld) (n 64).

⁷³ Western Australia, *Parliamentary Debates*, Legislative Council, 14 April 2011, 3062 (Norman Moore).

⁷⁴ In Western Australia, a Bill that alters an entrenched provision must be passed by an absolute majority of both houses of parliament: *Constitution Act 1889* (WA) (n 28) s 73(2)(f).

with this section'.⁷⁵ State Constitutions thus treat the referendum as part of the legislative process, rather than a standalone event, and the people are participants in that process. As Kirby P observed in relation to the operation of s 7A of the *Constitution Act 1902* (NSW), 'the electors constitute a law-making component additional to the Assembly, the Council and the Crown in the making of a valid Act of Parliament'.⁷⁶

It is not always clear when the enactment of a Bill will require a referendum. There may be a question as to whether the proposed law expressly or impliedly alters, amends or repeals an entrenched provision. In 2020, for instance, a member of the Western Australian Legislative Council argued that a referendum was necessary to enact a COVID Response Bill, as it enabled Executive Council meetings to be held by remote communications in a way that altered or affected entrenched provisions relating to the office of Governor.⁷⁷ It fell to the Legislative Council Deputy Chair to rule against the argument, and the Bill was presented for assent without a referendum.⁷⁸ Even in more straightforward circumstances, such as proposals to recognise Aboriginal and Torres Strait Islander peoples in State Constitutions, governments and legislatures may seek legal advice as to whether a referendum is necessary.⁷⁹

Further, a question may arise as to whether the proposed law can be characterised as one 'respecting the constitution, powers or procedure of the Parliament of the State'. If it cannot, any existing manner and form provisions — including those imposing referendum requirements — will not be binding via s 6 of the *Australia Act 1986* (Cth).⁸⁰ Bills that seek to alter the composition of a State Parliament, or amend or repeal a manner and form provision, are examples of laws that likely satisfy this description.⁸¹ However, a proposed law on the composition or functions of the executive and judicial branches may not. It is therefore doubtful whether a referendum is legally required to amend or repeal Victoria's entrenched provisions on the roles of the State Auditor-General and other executive officers, nor

⁷⁵ In Victoria, it is 'not lawful' to present for assent a Bill that alters an entrenched provision and has not been passed by the parliament and obtained majority approval at a referendum: *Constitution Act 1975* (Vic) (n 28) s 18(1B).

⁷⁶ *Bignold v Dickson* (1991) 23 NSWLR 683, 690 (Kirby P).

⁷⁷ Western Australia, *Parliamentary Debates*, Legislative Council, 8 September 2020, 5438–9 (Simon O'Brien).

⁷⁸ Western Australia, *Parliamentary Debates*, Legislative Council, 8 September 2020, 5439–40 (Martin Aldridge).

⁷⁹ See, eg, Western Australia Joint Select Committee on Aboriginal Constitutional Recognition, *Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (Report No 1, March 2015) [4.19]–[4.29].

⁸⁰ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 162. Whether manner and form provisions can be binding outside of s 6 of the *Australia Act 1986* (Cth) is open to debate. Recent High Court of Australia obiter dicta suggests some doubts about this possibility: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); 616–17 [214]–[215] (Kirby J) ('*Marquet*'). For discussion see Carney, 179–91.

⁸¹ Carney (n 80) 165.

to alter New South Wales provisions on judicial tenure.⁸² The need for referendums to change other entrenched rules, such as those relating to the election of members to Parliament, the qualifications of members,⁸³ the franchise and compulsory voting,⁸⁴ is also uncertain.

This scope for uncertainty around the legal necessity of a referendum distinguishes the state and federal spheres. At the Commonwealth level, a referendum must be held for the enactment of any ‘proposed law for the alteration’ of the *Commonwealth Constitution*.⁸⁵ This is far more stable as a criterion for calling a referendum. The uncertainty can present states with difficult choices: where doubt exists, is it best to be cautious and hold a referendum, or to proceed by ordinary legislation and risk a judicial challenge?

A 1981 referendum in New South Wales provides an interesting case study. In 1979, the State Parliament, by resolution, had established a scheme for the registration of members’ pecuniary interests. However, subsequent commentary by a parliamentary committee, and legal advice from the Crown Solicitor and senior counsel, indicated that the scheme altered the powers of the Legislative Council and, under the New South Wales *Constitution Act*, should have been put to a referendum.⁸⁶ Premier Neville Wran lamented this, blaming ‘the anachronistic and anomalous defects in the *Constitution Act* in relation to the powers of this Parliament’.⁸⁷ The Parliament terminated the scheme, Wran put the matter to a referendum, and voters approved it by a margin of more than 4:1.⁸⁸

2 *Form of the Question*

The form in which proposals for constitutional amendment have been put to voters has been relatively uniform compared to that for optional referendums. State laws prescribe rules on how the question should be worded: typically, they require that the ballot paper provide the short or long title of the Bill, and that voters indicate if they approve it.⁸⁹ In this fashion, all referendums on constitutional amendment have presented voters with a binary Yes/No choice. The state laws also regulate the timing of referendums of this kind; typically, the Bill must be put to voters within two months of its passage through Parliament.⁹⁰

⁸² Carolyn Evans, ‘Entrenching Constitutional Reform in Victoria’ (2003) 14(3) *Public Law Review* 133, 135; Twomey (n 3) 736.

⁸³ *Marquet* (n 80) 573 [77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁸⁴ Twomey (n 3) 279.

⁸⁵ *Commonwealth Constitution* (n 19) s 128.

⁸⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 November 1980, 3827 (Neville Wran). Additionally, vesting the Legislative Assembly with this power required legislation.

⁸⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 April 1981, 5711 (Neville Wran).

⁸⁸ Parliament of New South Wales, *Minutes of the Proceedings of the Legislative Council* (Minutes No 27, 27 November 1980) [12], [19].

⁸⁹ See, eg, *Electoral Act 2002* (Vic) sch 4.

⁹⁰ See, eg, *Constitution Act 1867* (Qld) (n 28) s 53(2).

These rules on question wording have not eliminated the potential for controversy. There remains an incentive for governments to craft the Bill title in a populist or emotive manner. An illustrative example was put to New South Wales voters in 1995: ‘A Bill to require the Parliament of New South Wales to serve full four year terms *and to prevent politicians calling early general elections* or changing these new constitutional rules without a further referendum?’ (emphasis added). Moreover, governments retain the ability to conflate issues by cramming multiple changes into a single Bill. Hence, at Queensland’s 2016 referendum, voters were asked to respond to a single question about the introduction of fixed, four-year terms, and were thus denied the opportunity to approve one, but not the other.⁹¹

3 *Status of the Result*

A proposal for constitutional amendment is carried where it attracts a simple majority of votes cast. In Queensland, for instance, an amendment ‘shall be presented to the Governor’ for royal assent ‘where a majority of electors approve’ it.⁹² The result of such a referendum is binding: a Yes vote triggers an act that will ordinarily lead to the enactment of the Bill, while a No vote leaves the status quo unaltered. A government could, conceivably, advise the Governor to withhold assent from a Bill that had been approved at a referendum, in which case the proposed law would not be enacted. This might arise, for example, where an opposition party is elected to government on the same day as the referendum and is against the proposed amendment becoming law. However, this scenario has not arisen to date, and it seems improbable that any government would seek to override the outcome of an otherwise binding popular vote on constitutional change.

B *Parliamentary Deadlock*

The New South Wales *Constitution Act* enables a referendum to be held to resolve deadlocks between the houses of Parliament. Section 5B of the *Constitution Act 1902* (NSW) provides that, in the event of persistent disagreement between the Legislative Assembly and Legislative Council about a Bill, the Legislative Assembly may resolve to submit that Bill to a referendum.⁹³ Just one referendum has been triggered by section 5B: in 1961 the Labor Party, in government but in minority in the upper house, utilised it to hold an unsuccessful referendum on its proposal to abolish the Legislative Council.⁹⁴

⁹¹ Graeme Orr and Samara Cassar, ‘When Referendums Go Wrong: Queensland’s 2016 Fixed, Four-Year Term Proposal’ (2016) 31(2) *Australasian Parliamentary Review* 161, 166.

⁹² *Constitution Act 1867* (Qld) (n 28) s 53(4).

⁹³ For a detailed analysis of *Constitution Act 1902* (NSW) (n 28) s 5B, see Twomey (n 3) 254–66.

⁹⁴ *Constitution Amendment (Legislative Council Abolition) Bill 1959* (NSW).

Queensland law previously provided for referendums to resolve parliamentary deadlocks.⁹⁵ Its 1917 poll on abolishing the Legislative Council, also unsuccessful, was initiated using that measure.⁹⁶

C *Entrenchment*

In the Australian Capital Territory, new entrenchments must be approved at a referendum. The *Australian Capital Territory (Self-Government) Act 1988* (Cth) stipulates that Bills that establish manner and form requirements (including referendums) for the enactment of certain laws must be submitted to the electors for their approval.⁹⁷ This provides for a form of ‘symmetric entrenchment’ in that any legislature that wishes to impose a restrictive procedure on its successors must first *itself* comply with that procedure.⁹⁸

The Australian Capital Territory has held one referendum of this kind. In 1995, a majority of electors approved the entrenchment of basic principles concerning the proportional representation (Hare-Clark) electoral system.⁹⁹ After that vote, the enactment of any law inconsistent with the electoral system’s general principles requires the approval of the Legislative Assembly plus a majority of electors at a referendum, *or* the approval of at least two-thirds of the members of the Legislative Assembly.¹⁰⁰

The Australian Capital Territory’s arrangements for entrenchment referendums are also notable for mandating a relatively high decision threshold. Under the *Australian Capital Territory (Self-Government) Act 1988* (Cth), the proposed measure must be approved by ‘a majority of electors’ as opposed to a majority of electors voting.¹⁰¹ This higher threshold reflects the importance of entrenchment provisions and a desire to confer special legitimacy upon them. In 1995, the question was carried after about two-thirds of voters approved the measure, equating to 55.7% of electors.¹⁰²

⁹⁵ *Parliamentary Bills Referendum Act 1908* (Qld).

⁹⁶ *Constitution Act Amendment Act 1915* (Qld). The Legislative Council was abolished in 1922 after the Queensland Parliament passed the *Constitution Act Amendment Act 1921* (Qld). The abolition of the upper house removed the need for a deadlock mechanism, although it was not formally repealed until 1968: *Acts Repeal Act 1968* (Qld) s 2.

⁹⁷ *Australian Capital Territory (Self-Government) Act 1988* (Cth) (n 28) s 26.

⁹⁸ Thomas Roszkowski and Jeffrey Goldsworthy, ‘Symmetric Entrenchment of Manner and Form Requirements’ (2012) 23(3) *Public Law Review* 216.

⁹⁹ *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT).

¹⁰⁰ *Ibid* s 5(2).

¹⁰¹ *Australian Capital Territory (Self-Government) Act 1988* (Cth) (n 28) s 26(3); *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT) (n 99) s 5(1)(b).

¹⁰² ‘Declaration of Result of Referendum’ in Australian Capital Territory, *Australian Capital Territory Gazette*, No S59, 16 March 1995, 2.

D *Sensitive Policy Issues*

Some states have legislated to require referendums for sensitive policy changes. In Tasmania, the Government is precluded from selling prescribed electricity generating plants, including Hydro Tasmania, without first obtaining majority public approval at a referendum.¹⁰³ The law stipulates that a Minister's consent to a sale is of no effect without public endorsement.¹⁰⁴ In Queensland, the law facilitates the holding of a referendum on the building of federal nuclear facilities. A 2007 Act requires the responsible Minister to 'take steps for the conduct of a plebiscite' if satisfied that the Commonwealth is considering the construction of a prohibited nuclear facility in Queensland.¹⁰⁵ The outcome would have no legal consequences; at most it would make it politically awkward for the Federal Government to proceed with its planned nuclear facility.¹⁰⁶ Three other state governments introduced Bills to enable referendums on federal nuclear plans, but failed to secure their passage through the upper house.¹⁰⁷

Some states have adopted or considered the use of referendums to ratify changes to local government. In Queensland, a Bill to end the system of local government may be presented for royal assent only if the proposal has been approved by a majority of voters at a referendum.¹⁰⁸ The provision that prescribes this procedure is not doubly entrenched, however, so it probably does not bind the Parliament. In New South Wales, non-government members have, at least twice, introduced Bills to preclude local council amalgamations unless they have been approved at a referendum.¹⁰⁹ In both instances, the Bill passed the Legislative Council, but was defeated in the Legislative Assembly.

V *Voting*

We turn now to issues common to both optional and mandatory referendums run by states and territories. This Part considers voting. It looks at the franchise, compulsory voting and the method for recording a vote. Part VI then addresses referendum campaigns.

¹⁰³ *Hydro-Electric Corporation Act 1995* (Tas) ss 7(6), (11), inserted by *Hydro-Electric Corporation and Electricity Companies Acts (Public Ownership) Amendment Act 2001* (Tas).

¹⁰⁴ *Hydro-Electric Corporation Act 1995* (Tas) (n 103) s 7(6).

¹⁰⁵ *Nuclear Facilities Prohibition Act 2007* (Qld) ss 21(1), (3).

¹⁰⁶ Tony Koch, 'Beattie will Ban Nuclear Facilities', *The Australian* (28 November 2006).

¹⁰⁷ *Nuclear Waste Storage Facility (Prohibition) (Referendum) Amendment Bill 2002* (SA) cl 15; *Nuclear Activities (Prohibitions) Amendment (Plebiscite) Bill 2007* (Vic) cl 14; *Nuclear Facilities Prohibition Bill 2007* (WA) cl 11.

¹⁰⁸ *Constitution of Queensland 2001* (Qld) (n 28) s 78(2).

¹⁰⁹ *Local Government Amendment (No Forced Amalgamations) Bill 2003* (NSW); *Local Government Amendment (Amalgamation Referendums) Bill 2017* (NSW).

A Franchise

A key question for state and territory referendums, as with elections, has been who is entitled to vote. Exclusions from the franchise have generally mirrored those that apply to elections. Women in New South Wales were granted the right to vote in 1902, opening the way for them to cast their first ballot at the State's 1903 referendum on the size of the Legislative Assembly.¹¹⁰ On the other hand, Victorian women, who were not included in the franchise until 1908, were unable to cast ballots at the 1904 poll on religious instruction in state schools.

Aboriginal and Torres Strait Islander peoples were disqualified from voting at Western Australian and Queensland elections until 1962 and 1965, respectively, and this also applied to referendums. First Nations peoples thus cast their first state referendum ballots in these jurisdictions in 1975 and 1991, respectively. Today, state and territory laws stipulate that the franchise for referendums is the same as that for elections.¹¹¹

For a few referendums, a question has arisen as to whether the proposed measure should be put to all electors in a state, or only to residents of a certain geographical region. This matter has tended to come up where the issue at hand has arguably been of special interest to a particular part of the state.

The geographical scope of the referendum franchise has arisen twice at referendums on retail trading hours. In 1970, only residents of defined urban areas were permitted to vote at South Australia's referendum on Friday night metropolitan trading.¹¹² The narrow franchise was justified on the basis that it was not 'fair or reasonable' to require country voters to weigh in on city shopping hours.¹¹³ The Referendum was defeated by a slim margin. By contrast, two questions about the extension of retail trading hours in the Perth metropolitan area were put to the entire Western Australia electorate in 2005. The Government considered it important that 'every citizen will have their say'.¹¹⁴ Most in Parliament accepted this view, although the independent member for the Pilbara region, Larry Graham, called it 'a stupidity and a nonsense' to ask regional and remote voters for their opinion on Perth shopping rules.¹¹⁵ In the event, the Metropolitan region, along with the South West and Agricultural regions, voted decisively against change; a marginal Yes vote was returned by electors in the Mining and Pastoral region.¹¹⁶

¹¹⁰ This State Referendum was held simultaneously with a Federal Election.

¹¹¹ See, eg. *Referendum Procedures Act 2004* (Tas) s 13. South Australia, the only jurisdiction without standing referendum laws, provides for the franchise in each enabling Bill.

¹¹² As defined in the *Referendum (Metropolitan Area Shop Trading Hours) Act 1970* (SA) s 2.

¹¹³ South Australia, *Parliamentary Debates*, Legislative Council, 25 August 1970, 951 (Alfred Kneebone).

¹¹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2004, 7837 (John Kobelke).

¹¹⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 8078 (Larry Graham).

¹¹⁶ Black (above n 8) 387–8.

In 1968, the Tasmanian Government also favoured a wider franchise. It opted to ask the entire State about the approval of a casino license for a Hobart hotel. Its justification was unclear, but may have had something to do with the fact that the casino promised to boost tourism across the State.¹¹⁷

The franchise for the 1967 referendum on the creation of a new state in north-east New South Wales was particularly controversial. The issue was of potential interest to all State voters, but the Government insisted that the narrow purpose of the poll was to ‘ascertain whether the people of the northeastern corner of New South Wales want a new State’.¹¹⁸ The chosen boundaries of the new state, which in turn determined who was entitled to vote on the matter,¹¹⁹ likely affected the Referendum outcome. The decision to include Newcastle angered residents of northern, rural regions who worried that their interests would be overridden by those of the coastal city.¹²⁰ In addition, many Newcastle residents were against the proposal and their participation depressed the Yes vote.¹²¹ Hughes argues that the Liberal majority in the Coalition Government, which feared the electoral repercussions of a new state, manipulated the franchise to ensure the Referendum’s defeat.¹²²

B *Compulsory Voting*

As with the franchise, rules on compulsory voting for referendums have generally tracked those for elections. Queensland was first to introduce compulsion, in 1915, and its 1917 referendum on abolishing the Legislative Council was the first held under compulsory voting rules.¹²³ The last state to establish mandatory voting was South Australia: in 1941 and 1985, respectively, for House of Assembly and Legislative Council elections. Today, the compulsory nature of voting is made explicit in all jurisdictions with referendum standing laws.¹²⁴

There have been occasional departures from ordinary election rules, in both directions. Western Australia did not introduce compulsion for elections until 1936, but it made voting mandatory at its 1933 secession referendum. The rationale was to ensure that the vote would deliver a definitive popular verdict on an important issue.¹²⁵ Curiously, voting remained voluntary for the state election held on the same day.

Conversely, the South Australian Legislative Council strongly resisted compulsion for the 1965 referendum on state lotteries. The Liberal and Country League argued that it would force people to vote on a ‘matter on which they may

¹¹⁷ Newman (n 42) 167.

¹¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1966, 3047 (Eric Willis).

¹¹⁹ *New State Referendum Act 1966* (NSW) sch 1.

¹²⁰ Anna Rienstra and George Williams, ‘Redrawing the Federation: Creating New States from Australia’s Existing States’ (2015) 37(3) *Sydney Law Review* 357, 377.

¹²¹ *Ibid.*

¹²² Hughes (n 4) 169.

¹²³ *Elections Acts Amendment Act 1915 1914* (Qld), 5 Geo V, c 29, s 18.

¹²⁴ See, eg, *Referendums Act 1983* (WA) s 18.

¹²⁵ *Secession Referendum Act 1932* (WA) s 5; Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1932, 1953 (James Mitchell).

have no opinion'.¹²⁶ The upper chamber ultimately accepted compulsion, but only after the Government altered the wording of the ballot question and agreed that electors with a conscientious objection to referendum voting would not be penalised.¹²⁷ The League also raised objections to the adoption of compulsory voting for the State's retail trading poll a few years later.¹²⁸

As one would expect, the average turnout at referendums has increased since the introduction of compulsory voting. The average turnout at compulsory and voluntary polls is 90.8% and 56.2%, respectively. All the same, some voluntary referendums have produced relatively high rates of electoral participation, reflecting strong interest in the issue and/or the simultaneous holding of a parliamentary election. For instance, referendums on hotel closing hours in Tasmania (1916) and South Australia (1915) attracted turnouts exceeding 70%. On the flip side, some compulsory referendums have seen relatively weak turnout. Just over four in five Queenslanders (82.8%) cast ballots on the 2016 proposal to introduce fixed, four-year terms for the Legislative Assembly, reflecting low voter engagement in the issue.

C Recording a Vote

The method for recording a valid referendum vote varies across the Federation. Electors in some jurisdictions are required to write 'Yes' or 'No' in the space provided on the ballot paper.¹²⁹ In New South Wales, voters place a tick opposite the square that reflects their choice.¹³⁰ For multi-option polls, the voting method is left to the enabling law. Where a person fails to record their preference in the prescribed way, electoral officials may still add their vote to the count if the voter's intention is clear.¹³¹

A recurring issue at state and territory referendums has been how to interpret ticks and crosses when those markings are not expressly permitted by the governing legislation. The most common approach is to interpret ticks as an indication of support for the proposal, but to treat crosses, which are more ambiguous, as informal.¹³² Some have argued that this puts referendum opponents at a disadvantage and, in a few instances, the issue has become a campaign flashpoint. In the lead up to Western Australia's 2009 daylight saving referendum, for example, *The West*

¹²⁶ South Australia, *Parliamentary Debates*, House of Assembly, 31 August 1965, 1357 (Robin Millhouse).

¹²⁷ *Referendum (State Lotteries) Act 1965* (SA) ss 14(11)–(12); Alex Hester, 'The 1965 Referendum on the Promotion and Conduct of Lotteries by the Government of the State' in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 50, 52–3.

¹²⁸ Guy Dickson, 'The 1970 Referendum on Metropolitan Shop Trading-Hours' in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 44, 46–7.

¹²⁹ See, eg, *Electoral Act 2002* (Vic) (n 89) s 177H.

¹³⁰ *Constitution Further Amendment (Referendum) Act 1930* (NSW) s 14.

¹³¹ See, eg, *ibid* s 21(1).

¹³² Western Australian Electoral Commission ('WAEC'), *2009 Western Australian Referendum on Daylight Saving* (Report, June 2010) 17–8.

Australian newspaper called the different treatment of ticks and crosses ‘absurd and illogical’, while a No campaign leader accused the Electoral Commission of ‘trying to manipulate the outcome’.¹³³ This prompted a sharp response from the Electoral Commissioner, who said that the approach was legally sound and would render only a small number of ballots informal.¹³⁴ The Referendum ultimately delivered a decisive No vote and a tiny informality rate, and the issue was forgotten.

The interpretation of ticks and crosses was also a focal point at Tasmania’s 1981 referendum. Electoral officials made the strict decision to treat all ballots marked with ticks and crosses, rather than the number ‘1’ as provided by the legislation, as informal.¹³⁵ This led to the rejection of a significant number of ballots, further inflating the already massive informal vote caused by the ‘No Dams’ protest.

Voting at a referendum is relatively simple and straightforward compared to election voting, which requires people to record preferences against lists of candidates. Having said that, the task becomes more challenging when multiple electoral events are held on the same day. Governments often favour holding simultaneous polls, pointing to cost-savings and voter convenience, but they can increase complexity by requiring voters to comply with multiple voting rules. The state and territory record suggests a correlation between simultaneous polls and informality: the median percentage of informal ballots recorded at standalone referendums is 2.3%, compared to 4.0% for those held with federal or state parliamentary elections.

Perhaps the most complex polling arrangements have occurred when state referendums have been held alongside federal electoral events. New South Wales’s 1903 referendum, for instance, was conducted on the same day as a Federal Election.¹³⁶ Voters were required to use *numbers* to record their referendum preferences, but *crosses* to choose candidates for the House of Representatives and Senate. This probably contributed to the 12.8% informal vote.¹³⁷ In 1910, Queensland electors voted at a State Referendum, a Federal Election *and* a Federal Referendum on the same day. The voting methods for each referendum were different: people were required to cross out the option (Yes/No) they did not want on the State ballot paper, but place a cross in a square opposite Yes/No on the federal ballot.¹³⁸ Again, this likely influenced the relatively high (5.5%) informality rate.

The record therefore suggests that the simultaneous holding of referendums and elections can impede the effective exercise of the franchise. Since 1922, Commonwealth law has precluded the conduct of state or territory referendums on

¹³³ ‘WA Short-Changed on Funding for Infrastructure’, *The West Australian* (Perth, 14 May 2009) 20; Jessica Strutt, ‘Storm Over Vote Rule on Ticks’, *The West Australian*, (Perth, 13 May 2009) 3.

¹³⁴ Warwick Gately, ‘Letter to the Editor of *The West Australian* Newspaper’ (14 May 2009), reproduced in WAEC (n 132) 112 (app 5).

¹³⁵ Orr (n 4) 129–30; Tasmanian Parliamentary Library (n 46).

¹³⁶ See also above n 110 and accompanying text.

¹³⁷ *Reduction of Members Referendum Act 1903* (NSW) s 8. A ballot paper on which no ‘figure’ had been recorded was treated as informal: s 11.

¹³⁸ *Religious Instruction in State Schools Referendum Act 1908* (Qld) sch; *Referendum (Constitution Alteration) 1906* (Cth) sch, form C.

the same day as a Federal Election without the permission of the Governor-General.¹³⁹ Such permission has been granted once, to facilitate the holding of the Northern Territory's Statehood Referendum alongside the 1998 Federal Election. It remains lawful for state and federal referendums to be held at the same time, although this has not occurred since 1911.

VI Campaigns

The nature and intensity of state and territory referendum campaigns have varied. The Government has generally led the Yes campaign, while the No case has often been put by the Opposition and/or minor parties. At multi-option polls, the Government has typically advocated for one of the policy alternatives. Some issues have attracted significant involvement from interest groups. For instance, churches and temperance organisations mounted fierce campaigns in favour of 6pm closing for hotel bars.¹⁴⁰ More recently, labour groups and Aboriginal Land Councils urged a No vote at the Northern Territory's 1998 Statehood Referendum, whereas Western Australia's large retailers and business associations ran a well-funded advertising campaign in favour of extended trading hours at the State's 2005 poll.¹⁴¹

State and territory laws regulate advertising for referendums, just as they do for elections. To foster transparency and accountability, an advertisement must include the name and address of the person who authorised it.¹⁴² Moreover, it is an offence to publish or distribute material that is likely to mislead a person in relation to the casting of their vote.¹⁴³ This rule has been interpreted narrowly to apply only to statements that might mislead a voter about the process of casting their vote, and not to misrepresentations of the substance of a referendum proposal.¹⁴⁴ South Australia regulated the content of referendum advertisements more directly at its 1991 poll on electoral redistributions. The enabling law made it an offence to publish an advertisement that contained 'a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'.¹⁴⁵ The Electoral Commission of South Australia has no record of any complaints being made during that campaign, which is not surprising given that advertising was minimal and both major parties supported a Yes vote.¹⁴⁶ In 2020, the Australian Capital Territory joined South Australia in making it an offence to publish a misleading statement of fact at elections and referendums.¹⁴⁷

The official arguments for and against a referendum proposal are one of the main sources of information for voters during a campaign. The preparation of such

¹³⁹ *Commonwealth Electoral Act 1918* (Cth) s 394.

¹⁴⁰ Phillips (n 3); Samuelsson (n 3).

¹⁴¹ Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Referendum 1998' (1999) 10(1) *Public Law Review* 3, 4; Heino (n 59) 103.

¹⁴² See, eg, *Referendums Act 1983* (WA) (n 124) s 48.

¹⁴³ *Ibid* s 46(1).

¹⁴⁴ *Evans v Crichton-Browne* (1981) 147 CLR 169, 204, 208.

¹⁴⁵ *Referendum (Electoral Redistribution) Act 1990* (SA) s 3(3), applying *Electoral Act 1985* (SA) s 113.

¹⁴⁶ Email from Electoral Commission of South Australia to Paul Kildea, 30 July 2021.

¹⁴⁷ *Electoral Act 1992* (ACT) s 297A; *Referendum (Machinery Provisions) Act 1994* (ACT) s 17.

arguments was introduced for federal referendums in 1912 and has been embraced by the states and territories. This is despite persistent criticism of the federal Yes/No pamphlet for failing to help voters improve their understanding of the issues.¹⁴⁸ Table 2 below sets out the approach taken in the seven jurisdictions that have standing rules about the dissemination of official arguments.¹⁴⁹

It is apparent that the federal model has been influential on how the states and territories have approached this aspect of referendum campaigns. State and territory laws and practices nonetheless depart from the Commonwealth approach in interesting ways. For instance, laws in Western Australia and Tasmania do not require the dissemination of a pamphlet, but provide instead that the official arguments must be brought to the notice of voters. Other jurisdictions expressly enable distribution via the internet and broadcast media.

While most jurisdictions entrust the preparation of arguments to Members of Parliament ('MPs'), some states contemplate a role for others. In Western Australia, the Electoral Commissioner may ask a 'body, corporate or incorporate' to prepare an argument for an optional referendum where MPs have not provided one.¹⁵⁰ This opens the way for universities and non-government organisations ('NGOs'), among others, to contribute. Notably, this approach was adopted by New South Wales in 1967 for its New State Referendum; a local political science department was tasked with preparing arguments for and against the proposal.¹⁵¹

Northern Territory law contemplates a role for electoral officials. The arguments are put together by politicians, but the Chief Electoral Officer can require amendments where of the opinion that they are 'grossly misleading or inaccurate'.¹⁵² Finally, in New South Wales, public servants customarily prepare a Yes/No case for complex referendum proposals, such as those involving constitutional amendment.¹⁵³ The case is 'usually vetted by relevant experts to ensure its fairness'.¹⁵⁴

¹⁴⁸ Williams and Hume (n 1) 260–3.

¹⁴⁹ *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1); *Electoral Act 2002* (Vic) (n 89) s 177C; *Referendums Act 1997* (Qld) (n 27) pt 3; *Referendums Act 1983* (WA) (n 124) s 9; *Referendums Regulation 1984* (WA) s 3; *Referendum Procedures Act 2004* (Tas) (n 111) s 12; *Referendum (Machinery Provisions) Act 1994* (ACT) (n 147) s 8; *Referendums Act 1998* (NT) (n 27) s 10.

¹⁵⁰ *Referendums Act 1983* (WA) (n 124) s 9(5).

¹⁵¹ *New State Referendum Act 1966* (NSW) (n 119) s 10; Hughes (n 4) 169. A similar approach was adopted for the state's 1969 poll on Sunday trading at hotels: *Liquor (Referendum) Act 1969* (NSW) s 10.

¹⁵² *Referendums Act 1998* (NT) (n 27) s 10(6).

¹⁵³ Twomey (n 3) 320.

¹⁵⁴ *Ibid.*

Table 2: Standing rules on distribution of referendum arguments

	CTH	VIC	QLD	WA	TAS	ACT	NT
Maximum length (words)	2000	2000	1000	2000	2000	2000	2000
Authorised by	members	members	members	members or invited body	members	members	members
Where required to be published	pamphlet posted to each elector	pamphlet posted to each elector	pamphlet posted to each elector; state-wide newspaper; ECQ website	posted to electors or otherwise brought to their notice	arguments to be brought to the notice of electors	pamphlet posted to each elector or household	pamphlet posted to each elector
Publication deadline	14 days	14 days	14 days	not specified	polling day	14 days	after arguments received
Optional publication	email	internet	–	–	–	–	various
Who is responsible for publication	Electoral Commissioner	Electoral Commission	Electoral Commission	Electoral Commissioner	Electoral Commissioner	Electoral Commissioner	Chief Electoral Officer

Note: There are no standing rules on the distribution of referendum arguments in NSW and SA.

Governments have other tools at their disposal to advance public education. One is the distribution of neutral information on the referendum proposal. At the Australian Capital Territory's 1995 Referendum on the entrenchment of Hare-Clark, for instance, the Electoral Commission circulated a detailed official pamphlet that included basic information on the background to the Referendum and the Territory's electoral system.¹⁵⁵ South Australian electoral authorities prepared neutral, explanatory information for the State's 1991 redistribution poll and published it in newspapers.¹⁵⁶ In Victoria and Queensland, however, there are statutory limits on government expenditure that mirror federal rules and likely impede their ability to disseminate neutral information.¹⁵⁷

The effectiveness of public education campaigns at state and territory referendums warrants further research. A recent study suggests that no single initiative is likely to optimise information on its own, and that adequate resourcing is an important factor.¹⁵⁸ Australia's most recent referendum, Queensland's 2016 poll on fixed, four-year terms for the Legislative Assembly, was, regrettably, an example of poor practice. The proposed reform was complex and bipartisan and, as such, the need for clear, balanced information was especially strong. Instead, the public was given insufficient time to learn about the issues and, notwithstanding the distribution of an official No case, the arguments against the proposal were not adequately ventilated.¹⁵⁹ Orr and Cassar argue that there was 'no serious attempt at preparing the ground with voter education'¹⁶⁰ and that the advocacy and information effort was 'weak and lop-sided'.¹⁶¹ That experience indicates that ongoing discussions about how best to inform Australians about referendum proposals are as relevant for the states and territories as they are for the Commonwealth.

VII The Referendum Record

Having looked in detail at the different types of state and territory referendums, and analysed their rules and practices, we are now in a position to examine the overall record of these referendums. This Part examines trends in the use and outcomes of sub-national referendums, paying particular attention to differences across time and jurisdiction. It concludes by comparing the state/territory and federal referendum records.

¹⁵⁵ ACT Government, *A Referendum to Entrench the ACT's Proportional Representation (Hare-Clark) Electoral System* (18 February 1995) <https://www.elections.act.gov.au/__data/assets/pdf_file/0004/831694/hareentrenchment.pdf>.

¹⁵⁶ See, eg, 'Facts You Should Know about the Referendum', *The Advertiser* (Adelaide, 5 February 1991) 16.

¹⁵⁷ *Electoral Act 2002* (Vic) (n 89) s 177C(4); *Referendums Act 1997* (Qld) (n 27) s 14.

¹⁵⁸ Alan Renwick, Michela Palese and Jess Sargent, 'Information in Referendum Campaigns: How Can It Be Improved?' (2020) 56(4) *Representation* 521, 533.

¹⁵⁹ Orr and Cassar (n 91) 166.

¹⁶⁰ *Ibid* 162.

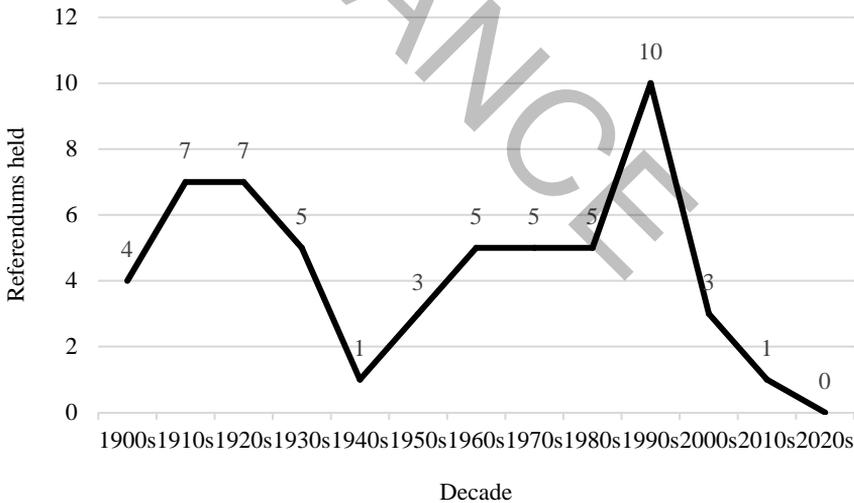
¹⁶¹ *Ibid* 166.

A Frequency

States and territories have together held 56 referendums. This means that, on average, a state or territory has held a referendum about once every two years, although their frequency has varied considerably over time (see Figure 1 below). The device was most popular at the beginning and end of the 20th century. The openness to direct democracy in the early decades after Federation has already been noted. The 1990s, meanwhile, saw renewed enthusiasm for various forms of participatory governance, including citizen-initiated referendums, and referendum proposals featured prominently in federal politics of the time.¹⁶²

The referendum has never been less popular among states and territories than it is now. The device has fallen into relative disuse, with only two held since 2005 and six jurisdictions yet to hold one this century. Governments have continued to advance constitutional reform and address contentious policy matters, but have opted to do so through the ordinary parliamentary process. It may be that state and territory politicians, like their federal counterparts, have become reluctant to wear the cost and unpredictability of referendums. The device has not been rejected entirely, however, as evidenced by occasional referendum proposals by both government and non-government parties.¹⁶³

Figure 1: Number of state/territory referendums held per decade, 1901–2021



¹⁶² Patrick Bishop and Glyn Davis, 'Developing Consent: Consultation, Participation and Governance' in Glyn Davis and Patrick Weller (eds), *Are You Being Served?: State, Citizens and Governance* (Allen & Unwin, 2001) 175; Walker (n 2) 20; Williams and Chin (n 26) 30–8.

¹⁶³ See, eg, Referendum (Retail Trading) Bill 2021 (SA); State Energy and Water Utilities Protection (Referendum) Bill 2014 (NSW).

B *Approval Rate*

In examining the state and territory record, an obvious point of interest is how often voters have approved referendum measures. To develop an answer, it is necessary to disregard the ‘multi-option’ and ‘dual option’ referendums, as for those polls it is not possible to say whether a particular proposal has been carried. This leaves us with 41 referendums in which electors were presented with a binary, Yes/No choice. Of these, 19 have been supported by voters: an approval rate of 46.3%.

The approval rate for binary, optional referendums is lower than that for mandatory polls. About a third (9 of 28) have been carried. This reflects the multiple defeats suffered by proposals for restrictive liquor licensing and daylight saving. Governments have found little success with optional referendums in recent times — the last to return a Yes vote was South Australia’s 1982 poll on daylight saving. By contrast, voters have proven willing to support proposals for constitutional change. Nine of the 12 mandatory referendums that proposed constitutional amendments have passed.¹⁶⁴ In New South Wales, 7 out of 8 proposals for constitutional amendment have been approved by voters, with the 1961 proposal to abolish the upper house the only such measure to be defeated.

Several referendums have passed by large margins. The two proposals to receive the highest Yes votes were those requiring NSW MPs to disclose certain pecuniary interests (1981; 86.0% Yes) and providing for the direct election of the NSW Legislative Council (1978; 84.8% Yes). Conversely, prohibition has fared worst with voters. It has suffered multiple clear defeats, and in 1950 incurred the largest No vote on record when 73.6% of Western Australian electors voted against it. The most marginal result was recorded at New South Wales’s 1954 dual option poll on hotel closing hours. In the State’s third trip to the ballot box on the issue, 50.3% of voters opted for 10pm closing and helped end almost four decades of early closing.

C *Timing*

In terms of timing, about one-third (19) of state and territory referendums have been held simultaneously with state parliamentary elections. Such timing has become more common in recent decades; since 1980, about half of sub-national referendums have been held with elections. The record shows that voters have tended to reject proposals presented at standalone referendums. Electors have approved about a quarter (7 of 26) of binary proposals put midway through a parliamentary term. By contrast, voters have endorsed four-fifths (12 of 15) of measures put on the same day as an election. It is possible that voters have viewed the standalone referendums as *de facto* votes on the performance of the Government, and thus an opportunity to voice their displeasure. Alternatively, the campaigns surrounding mid-term referendums may have been more intense and polarised. More research could help to identify and weight possible explanations.

¹⁶⁴ Here I include the two referendums on the abolition of the Legislative Council (QLD, 1917; NSW, 1961) that were triggered by parliamentary deadlock procedures.

D *Jurisdiction*

New South Wales has made most use of the referendum, having put 16 proposals, followed by Western Australia (12), Victoria and Queensland (7 each), South Australia (6), the Australian Capital Territory (4), Tasmania (3) and the Northern Territory (1). Victoria has been the most indifferent in modern times, having not held a referendum since 1956. As to results, voters in New South Wales have proven most willing to approve referendum measures. They have backed 8 of 12 binary proposals, including 7 in a row since 1976. Western Australian voters, meanwhile, have been the Federation's naysayers, rejecting 9 of 10 Yes/No propositions, including four attempts to introduce daylight saving. Victorians last voted 'Yes' in 1904.

E *Political Parties*

Labor and non-Labor parties have made equal use of the referendum device, with each putting 28 proposals to a vote. Non-Labor parties, though, have had more success. Of the 21 binary proposals they have submitted to voters, about half (11) have been approved, compared to two-fifths (8 of 20) for Labor governments. There are no obvious party differences in referendum use that might explain this relatively small difference in success rate. Governments from both sides of politics, for instance, have conducted polls on contentious social issues and put forward proposals for significant constitutional change.

F *State/Territory and Federal Records Compared*

When we place the state/territory and federal referendum records alongside each other, some interesting points of comparison emerge. In terms of the overall use of referendums, the Commonwealth has held slightly fewer. It has conducted 48 referendums since Federation: 44 mandatory polls on constitutional amendment, and four optional votes on conscription (twice), the national song and same-sex marriage.¹⁶⁵ As with the states, the federal use of direct democracy saw a peak in the first 20 years after Federation, and a significant decline in recent decades.¹⁶⁶

The records otherwise display important differences. The Federal Government has put many more constitutional amendments to the people, reflecting the *Commonwealth Constitution's* requirement that all textual alterations must be approved at a referendum. The states and territories, meanwhile, have been far more willing to hold optional polls to resolve contentious policy issues. That may reflect

¹⁶⁵ *Parliamentary Handbook of the Commonwealth of Australia 2020* (Parliamentary Library, Department of Parliamentary Services, 35th ed, 2020) pt 4. The same-sex marriage poll is arguably best classified as a survey: Paul Kildea, 'Australia's Same-Sex Marriage Survey: Evaluating a Unique Popular Vote Process' (2021) 46(2) *Monash University Law Review* 85, 90–3.

¹⁶⁶ Williams and Hume (n 1) 92.

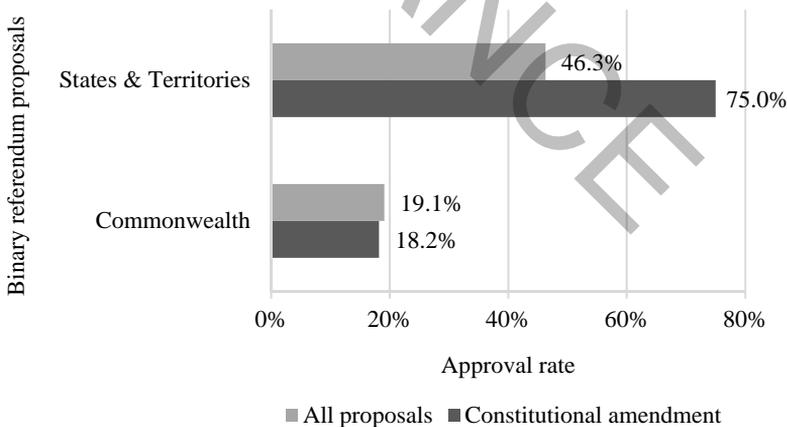
the fact that the states and territories, by their nature, have responsibility for many policy matters ‘about which Australians care most’.¹⁶⁷

Federal governments, in contrast to the states, have gradually moved towards holding referendums mid-term, rather than with elections. And whereas standalone state and territory referendums have tended to be defeated, at the federal level the approval rate is the same irrespective of timing.¹⁶⁸

Turning to political parties, Labor proposals have suffered defeats more often at both levels of government, but the approval rate is far lower for the federal Labor Party. Counting all binary referendums at the federal level, just one of Labor’s 26 proposals has been carried, compared to 8 of 21 non-Labor proposals.¹⁶⁹ Labor’s lower success rate, federally, can be partly explained by its numerous failed attempts, throughout the 20th century, to alter the *Commonwealth Constitution* to enhance Commonwealth powers.¹⁷⁰

It is the difference in overall approval rates, however, that is arguably the most notable point to emerge from a comparison of the two sets of referendum records (see Figure 2 below). As is well known, just 8 of 44 Federal proposals for constitutional amendment (18.2%) have been approved by voters. If we include the three optional referendums that put a binary choice to voters, that approval rate becomes 9 of 47 (19.1%). The state and territory approval rate is about 2.5 times greater (46.3%). The rate at which state voters have approved proposals for constitutional amendment is more than four times higher (75%).

Figure 2: Approval rate for binary referendum proposals



¹⁶⁷ Campbell Sharman, ‘State Politics’ in Brian Galligan and Winsome Roberts (eds), *Oxford Companion to Australian Politics* (Oxford University Press, 2007) 570, 570.

¹⁶⁸ Williams and Hume (n 1) 95–6.

¹⁶⁹ The 1977 national song poll, which presented voters with four options, is excluded from this calculation.

¹⁷⁰ Williams and Hume (n 1) 103–4.

A few factors help to explain this difference. State and territory referendums have generally only required a simple majority for approval, whereas amendments to the *Commonwealth Constitution* must surpass the 'double majority' threshold.¹⁷¹ In addition, many federal referendums raise questions about the balance of federal and state powers, and can mobilise opposition among state governments.¹⁷² Also relevant could be the intense national spotlight that federal referendums attract and the strong temptation for oppositions to run fierce 'No' campaigns.

Nonetheless, the outcomes of state and territory referendums challenge the oft-expressed notion that Australians are natural 'No' voters, whether that is due to status quo bias, ignorance, or some other reason.¹⁷³ The sub-national record shows that Australians are willing to vote 'Yes' to referendum questions, including those that propose constitutional change.

VIII Conclusion

This article has provided a comprehensive review of the use and regulation of referendums by Australia's states and two mainland territories. It has demonstrated that Australia's experience with direct democracy is richer and more extensive than what is covered in the vast literature on federal referendums. Sub-national governments have primarily used the referendum to help resolve disagreements over policy issues. Just as many Australians had their say on same-sex marriage in 2017, so have state residents voted on liquor regulation, daylight saving and other contentious matters. The states have deployed the referendum less frequently to ratify constitutional change, but it has nonetheless been a vehicle for significant reform. The states and territories have, moreover, experimented with a range of different design features, including multi-option questions, localised franchises, regulation of misleading statements and super-majority thresholds.

The experience of these largely forgotten referendums can potentially inform ongoing debates about how to improve the conduct of federal referendums. More broadly, it deepens our understanding of the role that the direct voice of the people plays in our parliamentary democracy. All the same, there is much about this experience that remains to be uncovered and explored. This article has pointed to some issues that warrant further attention, such as: the motivations that have prompted governments to hold referendums; the factors that have shaped how politicians have responded to referendum outcomes; the effectiveness of public education initiatives; and the reasons behind the high approval rate for state referendums on constitutional amendment.

The referendum has, during certain periods, been put to relatively frequent use to help settle important questions. Its use has declined in recent years, though, and the place of the referendum in future state and territory democratic politics is unclear. It is possible that the recent turning away from the referendum will become further entrenched. On the other hand, the occasional calls for popular votes on

¹⁷¹ *Commonwealth Constitution* (n 19) s 128.

¹⁷² Orr and Cassar (n 91) 164.

¹⁷³ For analysis along similar lines, see Orr (n 4) 119; Twomey (n 3) 320–1.

policy issues, and continuing interest in constitutional reform, suggest that direct democracy will remain in the picture. The referendum remains an important tool for state and territory governments. We should expect that its use will continue to evolve in response to new political circumstances.

ADVANCE

Appendix: State and Territory Referendums, 1901–2021

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
NSW	16.12.1903	Size of Legislative Assembly ('LA') To ascertain voter preferences on the size of the LA: 125, 100 or 90 members	90 members	72.9%	12.8%	47.2%	Progressive
	10.06.1916	Hotel closing hours To ascertain voter preferences on the closing hour for licensed premises: 6, 7, 8, 9, 10 or 11pm	6pm	62.4%	3.8%	55.9%	Labor
	01.09.1928	Prohibition To ascertain whether voters are in favour of prohibition with compensation	Defeated	28.5%	1.1%	88.3%	Nationalist–Country
	13.05.1933	Reform of Legislative Council ('LC') To amend the State Constitution to, inter alia, reduce and limit the number of members of the LC and to provide for indirect election of members	Carried	51.5%	1.3%	95.6%	United Australia Party–United Country Party

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
NSW (cont.)	15.02.1947	Hotel closing hours To ascertain voter preferences on the closing hour for licensed premises and clubs: 6, 9 or 10pm	6pm	62.4%	0.9%	91.8%	Labor
	13.11.1954	Hotel closing hours To ascertain voter preferences on the closing hour for licensed premises and clubs: 6pm or 10pm	10pm	50.3%	2.3%	92.1%	Labor
	29.04.1961	Abolition of Legislative Council To abolish the LC and require a referendum for its restoration	Defeated	42.4%	2.5%	92.2%	Labor
	29.04.1967	New state in north-east NSW To ascertain whether voters in north-east NSW are in favour of the establishment of a new state in north-east NSW	Defeated	45.8%	5.5%	92.4%	Liberal– Country
	29.11.1969	Sunday trading at licensed premises To ascertain whether voters favour the law being amended to permit licensed premises to trade generally on Sundays	Defeated	42.0%	4.3%	91.2%	Liberal– Country

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
NSW (cont.)	01.05.1976	Daylight saving To ascertain whether voters are in favour of daylight saving	Carried	68.4%	1.3%	93.2%	Liberal– Country
	17.06.1978	Reform of Legislative Council To amend the State Constitution to, inter alia, provide for direct election of LC members, reduce its size and set maximum terms of office	Carried	84.8%	2.6%	89.0%	Labor
	19.09.1981	Disclosure of pecuniary interests To approve amendments to the State Constitution to require MPs to disclose certain pecuniary interests	Carried	86.0%	5.1%	91.2%	Labor
	19.09.1981	Legislative Assembly terms To amend the State Constitution to extend the maximum period between LA elections from 3 years to 4 years	Carried	69.0%	3.5%	91.2%	Labor
	25.05.1991	Reform of Legislative Council To amend the State Constitution to, inter alia, reduce its size and reduce members' maximum term of office	Carried	57.7%	5.0%	93.6%	Liberal– National

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
NSW (cont.)	25.03.1995	Legislative Assembly terms To amend the State Constitution to fix a date for LA general elections	Carried	75.5%	9.8%	93.8%	Liberal– National
	25.03.1995	Judicial independence To amend the State Constitution to entrench a law providing for judicial tenure	Carried	65.9%	6.2%	93.8%	Liberal– National
VIC	01.06.1904	Keep public education secular To ascertain whether voters are in favour of education remaining secular	Carried	58.6%	3.9%	57.2%	Reform
	01.06.1904	Scripture lessons in schools To ascertain whether voters are in favour of religious instruction in state schools with parental consent	Carried	53.0%	4.0%	56.1%	Reform
	01.06.1904	Use of certain prayers and hymns To ascertain whether voters are in favour of the use in scripture lessons of certain prayers and hymns	Carried	53.2%	4.0%	56.1%	Reform

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
VIC (cont.)	21.10.1920	Sale of liquor, local option To ascertain voter preferences on the number of liquor licenses in their local district: continuance, reduction, none	Continuance ¹	52.9%	2.5%	62.5%	Nationalist
	29.03.1930	Abolition of liquor licenses To ascertain whether voters are in favour of the abolition of liquor licenses	Defeated	43.1%	0.6%	95.0%	Labor
	08.10.1938	Abolition of liquor licenses To ascertain whether voters are in favour of the abolition of liquor licenses	Defeated	33.8%	0.7%	95.4%	United Country
	24.03.1956	Hotel closing hours To ascertain whether voters are in favour of extending hotel weekday trading hours to 10pm	Defeated	39.7%	2.0%	93.5%	Liberal and Country Party

¹ Number of districts in which No-License was carried: 2.

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
QLD	13.04.1910	Religious instruction in state schools To ascertain whether voters are in favour of the introduction of religious instruction in state schools	Carried	56.7%	5.5%	49.7%	Ministerialist
	05.05.1917	Abolition of Legislative Council To abolish the LC and require a referendum for its restoration	Defeated	39.4%	1.0%	78.9%	Labor
	30.10.1920	Prohibition To ascertain whether voters are in favour of state management of liquor, prohibition, or continuance	Continuance	50.3%	3.2%	78.1%	Labor
	03.10.1923	Prohibition To ascertain whether voters are in favour of state management of liquor, prohibition, or continuance	Continuance	59.3%	3.2%	83.7%	Labor

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
QLD (cont.)	23.03.1991	Legislative Assembly terms To amend the State Constitution to extend the maximum LA term from 3 years to 4 years	Defeated	48.8%	1.4%	90.2% ¹¹	Labor
	22.02.1992	Daylight saving To ascertain whether voters in favour of daylight saving	Defeated	45.5%	0.4%	89.6%	Labor
	19.03.2016	Legislative Assembly terms To amend the State Constitution to provide for fixed, four-year terms for the LA	Carried	53.0%	2.9%	82.2%	Labor

¹¹ Polling day enrolment for this referendum has not been located. An approximate turnout figure has been calculated using enrolment data from the preceding 1989 State Election.

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
SA	26.04.1911	Members' salaries To ascertain whether voters are in favour of increasing the salaries of Members of Parliament to £300 p.a.	Defeated	32.5%	1.3%	61.9%	Labor
	27.03.1915	Hotel closing hours To ascertain voter preferences on closing times for bar rooms in licensed premises: 6, 7, 8, 9, 10 or 11pm	6pm	56.9%	1.0%	70.4%	Liberal Union
	20.11.1965	State lotteries To ascertain whether voters are in favour of promotion and conduct of lotteries by the State Government	Carried	70.8%	7.2%	92.5%	Labor
	19.09.1970	Retail trading hours To ascertain whether voters in certain districts are in favour of Friday night trading in metropolitan and Gawler shops	Defeated	48.2%	11.0%	89.2%	Labor
	06.11.1982	Daylight saving To ascertain whether voters are in favour of daylight saving	Carried	71.6%	2.1%	93.1%	Liberal

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
SA (cont.)	09.02.1991	Electoral boundaries To amend the State Constitution to effect changes to how electoral redistributions are undertaken	Carried	76.7%	4.0%	89.9%	Labor
WA	26.04.1911	Liquor licensing, local option To ascertain voter preferences, by district, on whether: – the number of liquor licenses should increase – new publicans' licenses should be held by the state – there should be state management in the district	No increase ^{III} Yes Yes	79.5% 65.3% 64.1%	n/a n/a n/a	15.6% 29.8% 30.0%	Ministerialist

^{III} Number of districts in favour of increase: 1; number in favour of no increase: 41.

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
WA (cont.)	30.04.1921	Liquor licensing, local option					Nationalist Coalition
		To ascertain voter preferences, by district, on whether:					
		– the number of liquor licenses should continue, increase, be reduced or whether no licenses be granted/renewed	Continuance ^{IV}	48.3%	8.3%	50.3%	
		– new publicans' licenses should be held by the state	Yes ^V	55.3%	35.9%	50.3%	
		– there should be state management in the district	Yes ^{VI}	53.7%	36.7%	50.3%	
	04.04.1925	Prohibition	Defeated	34.9%	0.6%	59.6%	Labor
		To ascertain whether voters are in favour of prohibition coming into force					
	08.04.1933	Secession – Yes/No	Carried	66.2%	3.6%	91.6%	Nationalist– Country
		To ascertain whether voters are in favour of withdrawing from the Federal Commonwealth					

^{IV} Number of districts in which Continuance was carried: 32; number in which Reduce was carried: 10; number in which No-License was carried: 0.

^V Number of districts in favour: 28; number opposed: 14.

^{VI} Number of districts in favour: 23; opposed: 19.

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
WA (cont.)	08.04.1933	Secession – Convention To ascertain whether voters are in favour of holding a convention of state representatives to consider options for constitutional alteration	Defeated	42.6%	4.6%	91.6%	Nationalist–Country
	09.12.1950	Prohibition To ascertain whether voters agree with the proposal that prohibition should come into force	Defeated	26.5%	2.5%	92.4%	Liberal–Country
	08.03.1975	Daylight saving To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	46.3%	1.0%	88.9%	Liberal–Country
	07.04.1984	Daylight saving To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	45.6%	0.6%	86.5%	Labor

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
WA (cont.)	04.04.1992	Daylight saving To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	46.9%	1.0%	86.2%	Labor
	26.02.2005	Retail trading hours To ascertain whether voters believe the WA community would benefit from weeknight retail trading in Perth	Defeated	41.3%	2.1%	89.7%	Labor
	26.02.2005	Retail trading hours To ascertain whether voters believe the WA community would benefit from Sunday retail trading in Perth	Defeated	38.6%	3.0%	89.7%	Labor
	16.05.2009	Daylight saving To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	45.4%	0.4%	85.6%	Liberal– National

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
TAS	25.03.1916	Hotel closing hours To ascertain voter preferences on closing times for hotels, public houses and clubs: 6, 7, 8, 9, 10 or 11pm	6pm	58.7%	7.7%	73.5%	Labor
	14.12.1968	Casino license for Wrest Point Hotel To ascertain whether voters are in favour of the granting of a casino licence to Wrest Point Hotel	Carried	53.0%	4.4%	92.7%	Labor
	12.12.1981	Construction of hydro-electricity dam To ascertain voter preferences on the location for construction of a hydro-electricity dam on the Gordon River	Below junction with Franklin River	85.6%	44.9%	92.0%	Labor
ACT	01.09.1928	Prohibition To ascertain voter preferences on liquor regulation: prohibition of possession; continuance (prohibition of sale); sale under public control; private sale	Private sale	50.7%	0.8%	93.9%	Nationalist–Country (Cth)

Jurisdiction	Date	Issue	Result	In favour	Informal	Turnout	Government
ACT (cont.)	25.11.1978	Self-government To ascertain voter preferences on ACT governance: self-government; locally elected legislative body; status quo	Status quo	63.7%	1.7%	85.5%	Liberal– National (Cth)
	15.02.1992	Electoral system To ascertain voter preferences on ACT electoral system: single member electorates or PR (Hare-Clark)	Hare-Clark	65.3%	5.6%	89.6%	Labor (Cth)
	18.02.1995	Electoral system To approve a law to entrench the principles of the Hare-Clark electoral system	Carried	65.0%	4.1%	89.3%	Labor
NT	03.10.1998	Statehood To ascertain whether voters agree that the NT should become a state	Defeated	48.1%	1.1%	89.5%	Country Liberal

Note: Votes in favour are expressed as a percentage of formal votes cast.