# Referendums 1

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## 1. Introduction

The 2019 Federal election saw proposals the Commonwealth is unable to fulfil because of Australia’s system of Government established by the Constitution. Australian referendums on substantive Commonwealth powers might be needed to enable such promises to be kept.

Instead, Labor promised referendums on: Australia becoming a republic; Indigenous recognition; four-year Parliamentary terms. Other parties did not bother with referendum topics.[[1]](#endnote-1)

The re-elected Coalition Government recently signalled an intention for an Australian referendum on Indigenous recognition to be held within three years.[[2]](#endnote-2)

A charitable interpretation of the failure to propose referendums on substantive powers is wishful groupthink. Other explanations include democratic ignorance, myopia and absence of real leaders.

Several articles at the jadebeagle.com challenged proponents of Commonwealth roles for cities etc. to draft referendum proposals. Drafting would clarify what their wishes might be.

To progress that challenge, this article looks at some matters pertaining to Australian referendums.

A successful referendum changes the Australian Constitution. The Constitution largely determines the distribution of power within the Federation: between Commonwealth and States; within the Commonwealth among Parliament, Government and judiciary. A referendum allows the public to re-consider this distribution.

The objective case to support a referendum proposal has two essential elements: distribution of power needs to be changed; the proposal satisfies this need.

Power is exercised through legislation, administrative actions and court decisions. Alteration of power has indirect but durable and pervasive effects. Only rarely could a crisis justify such alteration and therefore a (urgent) referendum. Rather, justifications need to be in systemic deficiencies evidenced by patterns of poor behaviour or results across Australia over an extended period.

Others, notably Williams and Hume, concentrated on matters relevant to the success or failure of such referendums. While they noted the low success rate of referendums in Australia, they were optimistic for the prospects of better constructed, presented and more necessary proposals.[[3]](#endnote-3)

Rather than revisit that, this article offers thoughts on what subjects should be put to referendums.

Section 2 outlines ways to bring Commonwealth practice back to the spirit of Australian law.

Section 3 sets some background matters for referendums.

Section 4 proposes criteria to identify Commonwealth issues to be addressed by referendum.

Section 5 applies these criteria to: matters that have been under consideration for referendums; some extra-Constitutional Commonwealth practices.

The Appendices give background to section 5. Comments and corrections are welcome.

## 2. Bringing promises back to legality

### 2.1 Issues

The 2019 Federal election campaign saw all manner of promises for the Commonwealth Government to do this or that. The usual objection to such promises is they are local pork barrelling. Commonwealth attention and public monies are diverted from important national tasks to toilet block construction, sport facilities and pothole fixing. And the carpark at Woy Woy.

Leaving aside ‘merit’, since 2014 it has been clear most such promises cannot be dealt with lawfully by the Commonwealth or public monies, except via Constitution s.96 grants to the States. Even then Parliament, not the Government, determines these. Senate approval is needed to deliver promises.

Promises that ignore limits to Commonwealth powers should be considered ‘extra-Constitutional’. One example was the United Australia Party offer of lower regional taxes. This does not sit well with Constitution s.51(ii) which prohibits the Commonwealth levying different taxes in different places.[[4]](#endnote-4)

Another was Labor’s offer of Government wage payments to child-care workers. It did not say how this might be done. The ‘how’ is significant - the Commonwealth can’t just give money to people.[[5]](#endnote-5)

A third was the Prime Minister’s promise to provide $4.5m for a ‘tidal pool’ at Port Macquarie. This is none of the Commonwealth’s business. And the site of the pool is still unknown.[[6]](#endnote-6)

The overall picture is of candidates losing sight of Commonwealth purposes and processes. This does not bode well as it: distracts from Commonwealth responsibilities; inculcates irresponsibility and is conducive to corruption; works to denude Government and Parliament of proper advice.[[7]](#endnote-7)

### 2.2 Mechanisms

#### 2.2.1 Federalism reform

In 2013-14, the Abbott Government promised – but did not start to deliver – reform of the Federation. Around the same time, a partial ‘review’ of various Commonwealth activities was delivered in the National Commission of Audit. This review called for reform of the Federation yet was remarkable for its ignorance of current Constitutional issues (among other things).[[8]](#endnote-8)

More recent and lauded comments to the Australian public service review (Thodey) claimed an ongoing trend towards greater power for the Commonwealth Government. These seem to reflect an outdated view. While such a trend is popular (ly believed) among officials and politicians, recent decisions of the High Court suggest otherwise. Experts see a rebalancing of the Federation; of requirements for the Commonwealth - especially its Government – to follow proper process.[[9]](#endnote-9)

Claims of Commonwealth Government legality cannot be justified merely by convenience, practice, importance, national significance or even express State acquiescence. Rather, there are three mechanisms for bringing extra-Constitutional promises into legality.

#### 2.2.2 Constitution section 96

One mechanism is s.96 tied grants to the States – specific purpose payments. This is mentioned in the beagle’s submission to Thodey. To that we add a premonition from 1899 - that s.96 was:

*‘certain to cause jealousy, provincialism [and] logrolling and [to] debase federal politics’.[[10]](#endnote-10)*

It has been acknowledged as a Constitutional outlier since the 1950s. Chief Justice Dixon observed:

*‘Before the meaning of s.96 and the scope of the power it gives had been the subject of judicial decision no one seems to have been prepared to speak with any confidence as to its place in the constitutional plan and its intended operation.’*[[11]](#endnote-11)

Its use is now under some academic doubt. Chief Justice Dixon only allowed its (current) wide interpretation because of prior decisions – which he implicitly criticised.

There are claims the High Court is moving from literal to more purposive Constitutional interpretations and may consider intentions - via e.g. debates at the Constitutional Conventions - in deciding cases. The Court has also been more prepared to overturn some long-standing precedents.

Together with new capabilities of examining historical records, this may pose difficult questions for proponents of s.96 to validate otherwise extra-Constitutional Commonwealth funding.[[12]](#endnote-12)

The questions start with whether s.96 was merely intended to assure solvency of the States, particularly Queensland, while they adjusted to the loss of customs revenue after Federation.[[13]](#endnote-13)

#### 2.2.3 Referral of powers, referendums

In these circumstances, the most reliable methods for legitimising extra-Constitutional promises – and methods most consistent with the Constitution’s principles are: support from the State Parliaments via referrals of power; support from the public via referendums.

Referral of relevant powers from State Parliaments to the Commonwealth sit alongside co-operative or mirror legislation and State referendums. These involve co-operation between the Commonwealth and States, often through the Council of Australian Governments. They may be a matter for later.[[14]](#endnote-14)

The other mechanism, Australian referendums to relevantly enlarge Commonwealth and/or Government powers, is the subject of the present article.

## 3. Referendums

The purpose of an Australian referendum is to seek to change the Australian Constitution, which provides the framework for Australian laws and organisation of society. Apart from procedural matters, referendum proposals generally seek to relocate powers from States to the Commonwealth or within the Commonwealth and its institutions of Parliament, Executive and Judiciary. Very rarely they create new powers for government.[[15]](#endnote-15)

Amendments to the Constitution, like the rest of that document, are subject to interpretation by the High Court. Constitution s.128 governs amendments made by referendums.[[16]](#endnote-16)

Australian referendums involve a two-stage process. In the first stage, the proposal to be put to the electorate must be passed by the House of Representatives and the Senate.

The second stage involves putting the proposal to all voters in the States and Territories in the form of a question which admits a ‘yes’ or ‘no’ answer. For the proposal to be adopted, the question usually must be answered yes by a majority of electors nationwide and in a majority of States.[[17]](#endnote-17)

The referendum question need not spell out the details of the proposal. It is possible for the question to mislead (some) about the proposal. For example, a 1988 question as to ‘fair elections’ related to a proposal for a particular view of fairness; limiting the variance of the number of electors among Commonwealth electorates and among State electorates to a certain percentage.

The question is put to a vote via ballot papers. Several questions can be put at once, and the vote can take place alongside a Federal election.

Typically, there are campaigns for and against the question – yes and no. The Government usually supports the ‘yes’ case. There is an official pamphlet outlining the yes and no cases. The cases in the pamphlet are separately drafted by proponents and are not vetted for accuracy or truth.

Since Federation there have been forty-four referendum proposals, eight of which were carried.

Achievement of success is reputedly problematic. This has been variously ascribed to: a process which is designedly difficult; the electorate’s conservative, even suspicious, views about changes in political power; weak proposals; poor (framing of) questions. Former Prime Minister Turnbull, who has some experience in the field, claimed proposals can tolerate no more than tepid opposition.[[18]](#endnote-18)

Lack of voter interest can be an important factor. There is a telling ‘no’ slogan:

*Don’t know – vote ‘no’*.

Among rejected proposals: ability to make laws regarding communists; prices and incomes controls; recognition of local governments; interchange of Commonwealth and State powers; a right to trial by jury; fixed terms for Parliament.

The proposal enjoying the strongest support, in 1967, was to give the Commonwealth an ability to make laws for Aboriginal people and for those people to be included in national population counts.

The most recent successful proposals were in 1977. Since then, eight proposals have been put. [[19]](#endnote-19)

## 4. Criteria and proposals

### 4.1 Criteria

I propose four considerations in developing a proposal for an Australian referendum:

1. importance of the issue;
2. clarity of the proposal;
3. consequences of failure;
4. likelihood of success.

Importance relates to the degree to which society would be improved by changes to Commonwealth practices and laws. Examples of important matters are those in which the Commonwealth Government seeks to operate extra-Constitutionally, for example in transport infrastructure.

Clarity is whether a proposal would (has) properly inform the public about the consequences of the changes sought. It is not a view as to whether the proposal should be accepted. An example of lack of clarity is the 1999 republic proposal which was said to have the Parliament appointing a Head of State. While technically correct, in practice the Government would determine the Head of State because power of dismissal was to rest with the House of Representatives.

Consequence of failure relates to the impact on proponents of rejection of a proposal. This is particularly relevant to ‘symbolic’ matters. Some might see rejection of such proposals as disapproval of proponents and their underlying principles - not merely disagreeing to alter Commonwealth powers.

Likelihood of success relates to factors identified by Professor Williams and Hume. These are: bipartisan support; popular ownership; popular education; sound and sensible proposals; a modern process. The last relates to allowing the Commonwealth to advocate a proposal, an informative rather than argumentative official yes/no explanation and committees to put the yes and no cases.[[20]](#endnote-20)

These four considerations could be used to test the suitability of propositions for referendums.

### 4.2 Application of criteria, summary

The following table gives my indicative rating of several referendum topics using the criteria of section 2.2 above. Red text indicates a possible failure point.

**Table: Summary rating**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Topic** | **a. Importance** | **b. Clarity** | **c. Failure effect**  | **d. Success likelihood** |
| ***Fixed terms of Parliament*** | Low | Low | Neutral | Low |
| ***Republic #*** | Moderate | Low | Negative | Low |
| ***Indigenous*** ***Voice #*** ***Recognition #*** ***Rights*** | HighModerateLow | ModerateLowLow | NegativeLarge negativeNeutral | ModerateLowLow |
| ***Constitution preamble #*** | Low | Low | Neutral | Low |
| ***Local govt recognition*** | Low | Low | Neutral | Low |
| ***Regions, cities***  | High | Low | Positive | Low |
| ***Transport*** | High | Moderate | Positive | Low |

# denotes a symbolic matter.

The Table suggests only one of these matters certainly worth putting to referendum: Indigenous Voice. To do so a proper proposal needs to be drafted and support needs to be established.

Regions, cities and transport may also be worth putting to referendum. However, unlike the Indigenous Voice, failure of these at a referendum would lead to positive results.

## 5. Some referendum proposals

### 5.1 Fixed-terms of Parliament

There have been several Australian referendums on fixed terms of Parliament. All have put proposals that went beyond fixed-terms for Parliament: to have longer terms; to weaken the Senate.

There is doubt about the importance of increasing Federal political tenures. Given Governments’ political desires to link House of Representatives and Senate terms, a four-year term for the House equates with either a four or eight-year term of the Senate.

The case presented for fixed terms has been weak and less than candid. The aim or effect of reducing Senate power has not been mentioned by proponents. The matter therefore fails tests of importance and clarity. It is outlined in Appendix 1.

### 5.2 Republic

A republic would require at least a change of the Australian Federal Head of State.

The proposal put in the 1999 referendum was said to be symbolic. It supposedly was not intended to affect the machinery of government. For this reason, the proposal was for the Head of State – the President – to be elected by a two thirds majority of the Parliament.

However, within the proposal was a detail that altered the balance between Parliament the Executive - the President could be dismissed by the Government.

Whether a Government should be able to dismiss the Head of State is a contentious issue. Australia’s system of responsible government has the Executive – led by the Head of State – accounting to the Parliament. The case to alter this power balance - for Government-as-Executive to exert more control over Parliament - would need to be made.

Such a case would need to be formidable to overcome pre-existing concerns about Executive Government attempts to accrue more power through opaque or undemocratic means.

The matter fails the tests of importance and clarity. More details are in Appendix 2.

### 5.3 Indigenous matters

#### Background

Essential background includes: the Indigenous population is relatively small, perhaps comprising less than 3 percent of all Australians; over 500 Aboriginal clan-groups occupied various parts of Australia prior to British colonisation; colonisation greatly reduced but did not extinguish traditional rights; a variety of different approaches – mainly benevolent paternalism - have attempted to address chronic Aboriginal disadvantage but have failed; several times the Commonwealth has established then discontinued Aboriginal national representative bodies. More details are in Appendix 3.

#### 5.3.1 Voice

The concept is for the Voice to advise but not bind Parliament on legislation etc. that affects Indigenous Australians. The concept is said to have near-unanimous support by Indigenous leaders. It has been recommended by academics, a Constitutional Convention of Indigenous peoples (Uluru statement), a Referendum Council including a former Chief Justice of the High Court and by a bipartisan Joint Select Committee of Parliament. It has been misrepresented by the Government.

While the Convention and Council recommended the Voice be enshrined in the Constitution, the Joint Select Committee did not. Rather the Committee majority recommended a process of co-design of the Voice, then consideration of whether to create it by legislation or by referendum.

There have been Commonwealth Government Indigenous advisory bodies, including with elected representatives, for some of the last 50 years. The most recent was the Aboriginal and Torres Strait Islander Commission. The Voice might differ from these in not having roles such as funding.

One question is: would an Indigenous Voice set a precedent for other groups. Some religions, ethnic communities and sexual ‘orientations’ also claim disadvantage due to prejudice.

There are claims only a Constitutionally enshrined Voice would satisfy calls for Indigenous ‘recognition’. If correct, this raises three other questions.

First whether advocates lack trust in the Commonwealth to listen to Indigenous people. There may be good reasons for distrust. The Commonwealth has chopped and changed between ‘self-determination’ and ‘assimilation’. The Commonwealth also has set poor governance and budgets for Indigenous advisory bodies. However, such problems are not limited to Aboriginal affairs.

Second, especially if there is such distrust, and distaste for paternalism, there is a question of: why does a Voice needs to be initiated by government? Why don’t Aboriginal interests form the desired structures and roles - a de-facto Voice such as their National Congress – prior to formal recognition?

A third question arises from the claim a Voice is symbolically important for its existence in the Constitution. Is an implication: advocates are asking for sympathy or to promote Aboriginal self-esteem? If so, the risk is that rejection of such a proposal may be devastating to such self-esteem.

At this time, the Voice while important needs greater clarity.

#### 5.3.2 Recognition

Despite being much talked about, Indigenous recognition remains undefined. As is the case for the similarly undefined term ‘independent’, issues revolve around: recognition of what? To what effect?

The Referendum Council recommended recognition issues be handled outside the Constitution, implying recognition extends beyond, or is something other than, the Voice. There are many possibilities e.g. existence of groups; existence prior to British settlement; factual statements such as about the common-law and native title; sovereignty. They range from innocuous to irresponsible.

Being undefined they are unable to meet the criteria of importance or clarity at this time. However, the matter may be critical if recognition affects self-esteem and opportunities. If so, it is important for recognition concepts to be developed and explained in terms understandable to all Australians.

#### 5.3.3 Substantive rights

In Australia classes of rights arise from legislation and common-law. Alteration of rights is a matter for legislation, Parliament, which sometimes delegates powers to executive Governments.

The judiciary interprets legislation and determines the common law via deciding legal contests. Enunciation or clarification of ‘new’ or implied rights is frequently denounced as ‘judicial activism’.

The Constitution does not generally specify substantive - as distinct from procedural - rights. Australia does not have a bill of rights like the United States.

The Voice would not apparently deal with substantive rights – a point belatedly conceded by one conservative politician, not many others! - but would embody a procedural right.

An argument for the Constitution to go beyond this and specify certain substantive Aboriginal rights could aim at two different subjects. The first is codification of existing rights, such as over land to forestall legislative attempts to reduce these rights. The second is creation of new rights.

In both codification and extension by referendum, the authority of Parliament is impinged. Given Australian sovereignty is now assumed to rest with the people rather than the Crown, and given Parliament is the body charged with day to day determination of rights, it is difficult to imagine a compelling case for such a referendum.

### 5.4 Preamble

Preambles preface enactments - statute law. They are not operative provisions of law, but seek to explain the circumstances in which law was enacted.

Among the possible purposes of a Constitutional preamble: state the purpose of the Constitution; state who ‘we’ are; state how we wish to be seen e.g. values that unite us.

The Australian Constitution does not have a preamble. The (British) Constitution Act 1900 does. It follows the 19th century British formula for statutory preambles, outlining elements of the Constitution and why Britain approved it. Fundamental practices – such as the Prime Minister, Cabinet - are not in the preamble. Nor does the preamble relate to ‘values’ understood today.

A referendum on a particular new preamble accompanied the 1999 republic referendum.

Despite Prime Minister Howard opposing a republic, he argued a new preamble was important. Several official and many unofficial versions were drafted. The final official version was verbose, politically charged and short of substance. It was supposed to be ‘non-justiciable’.

There practically wasn’t any campaign either for or against the preamble proposal – rather the interest was in the republic question. The preamble question gained 39% support nationally. Among the explanations: apathy; a ‘republic neutral’ preamble; the ‘politicians’ preamble’.

Twomey (2010) reviewing the preamble referendum in the context of Indigenous recognition, raised concerns including: increasing international judicial activism; preamble matters not being reflected in operative provisions; disingenuity of pretending a change in a preamble is not intended to have an effect; (implicitly) the hypocrisy of ‘non-judicial’ disclaimers.

Some commentators claim the preamble referendum failed because of a faulty process and lack of public interest. An implication: a better process might increase prospects for success. However, the public popularity of drafting – and denigrating - proposals suggests contrasting agendas about values and about what a preamble should do. This reveals a fundamental problem: many see a preamble as a clandestine opportunity to change the (operation of the) Constitution.

Unless the preamble’s motive is overt it is impossible to argue it important. With agendas hidden by a lack of proposed changes to operative provisions, most preamble proposals lack clarity.

Australia’s civic conversation has become more fractured since the 1999 referendum. There are new causes and ‘values’. People take offence at what previously was regarded as innocuous, at the date of public holidays and at the national anthem.

Professor Williams’ concerns of scare campaigns wrecking referendum chances are probably higher now than at the time of his writing. In these circumstances there is little merit or hope for a preamble that intends to express ‘values’. The best chance for success is one limited to facts or matters dealt with by the Constitution. More details are in Appendix 4.

### 5.5 Local government

The likely purpose of recognising local governments is to allow the Commonwealth to provide them with public monies without the agreement of the relevant State.

At present the Commonwealth may provide public monies to (particular) local governments via s.96 conditional State grants. One effect of recognising local government would be to remove the requirements of s.96 for Commonwealth grants.

Two referendums have been held on this subject; in 1974 and 1988. Neither were carried.

In the early 2000s local government agitated for another referendum. The deal allowing Labor to form Government in 2010 included a promise to hold referendums on recognition of: local government; Indigenous Australians. Neither was held.

The local government proposal supposed to be put in 2013 has been described as inept. In March 2013 a Joint Select Committee majority recommended a referendum for ‘financial’ recognition of local government via amendment to s.96 as follows:

*‘Parliament may grant financial assistance to any State,* ***or to any local government body formed by a law of a State****, on such terms and conditions as the Parliament thinks fit’*

However, key assumptions of the Select Committee majority proved incorrect. The change of Prime Ministers later that year prevented the question being put at the 2013 election. More recently, long standing interpretations of s.96 have been questioned in ways that have implications for the effect of the above drafting.

Some commentary suggests the issue is likely to be raised again. The claimed benefit is validation of support for local government. While there may be local government pressure for this, the implied claim – invalidity of current support provided through and by States - lacks substance.

The issue of local government recognition is, by itself, unimportant. The proposals put to date have also lacked clarity. More details are in Appendix 5.

### 5.6 Regions, cities

Regional promises featured prominently in the recent election campaign, usually as gifts from the Commonwealth. However, as the Commonwealth lacks regional powers and is unable to offer zone-based taxation, its authority to fulfil many of these promises is doubtful.

One way of removing such questions would be a Commonwealth power for regions and/or cities. The referendum for this could be framed along the lines of the local government proposal.

In Australia, the term ‘region’ is often used to denote locations outside the five metropolitan areas. This creates some difficulties for a referendum on the topic: the definition to be given to ‘region’; a proposition aimed at supporting the legality of Commonwealth gifts to regions would rely on an electorate which mostly does not live there.

Such a change may have greatest chance of acceptance if its subject matter and location is limited and made specific. For example, for defined purposes (not mentioned by s.51) in Northern Australia. Such proposals may be welcome by regional ‘new States’ movements – referendum(s) on new States may be worth consideration.

However, in recent years, the presented view is that the greatest issues lie in metropolitan areas. A referendum for additional Commonwealth powers in cities would face many of the same issues as one for regions.

Despite decades of research and widespread urging for a greater ‘Commonwealth role in cities’ no proper proposition has been put as to how powers and responsibilities in cities might be defined.

Overcoming these hurdles by widening the proposal to regions and cities could fundamentally change Australia’s system of government. It would undermine one purpose of Federation – of minimising differences among political regions, States.

A regions or cities power has not been put to the electorate in a referendum.

The issue of Commonwealth involvement in regions and cities is important but not for reasons proponents put. Rather the present policy muddle is a negative influence. Those proposing a Commonwealth role should be given the responsibility of defining what that role might be in the form of a referendum proposal. Some discussion is in Appendix 6.

### 5.7 Transport and related infrastructure

Commonwealth activities in much of transport are similar to those in regions and cities – spasmodic, directionless and largely reliant on s.96 grants to States.

However, the topic of transport differs from regions and cities as the Commonwealth already has some powers to act in this field – e.g. for interstate and international trade and commerce.

The trade and commerce powers are central to a Federation, and at the time of Australia federating there was widespread appreciation of commercial problems caused by the colonies acting independently – railway break-of-gauge the most prominent example.

Yet the Commonwealth persistently fails to pursue trade and commerce responsibilities via transport. The failures are bi-partisan - neither party comprehends Commonwealths purposes. Rather, they consider transport to be the name on a barrel which contains large amounts of pork.

It is important for Commonwealth activities to be brought into line with its purposes, powers and responsibilities. However, expanding Commonwealth powers in transport prior to it dealing with existing responsibilities would be fraught. More details are in Appendix 7.

## 6. Conclusions

All but one of the referendums signalled at the recent Federal election were proposals for hoary old chestnuts rejected previously – for good reasons. The sole exception – Indigenous Voice – is worth putting to a referendum once important details and arguments are clarified.

However, the critical matter arising from the extra-Constitutionality of promises made at Federal elections was overlooked. A consequence of the thinking behind such promises is decay of Australian Governments. Suitable referendums could start to address this insidious problem.

Among obvious topics for such referendums – where powers, responsibilities and therefore policies of the Commonwealth and States are hopelessly confused – are transport and regions/cities. Referendums on those topics are warranted even - perhaps especially - if they are to fail.

There are other long-standing policy issues involving the Commonwealth and States which are consistent with failure of democratic and institutional accountability. Water and energy are prominent among these. The regions/cities issues indicate some State boundaries are problematic. These might be considered in a future article.

**29 July 2019**

1. <https://www.smh.com.au/federal-election-2019/voters-choice-a-fast-track-to-change-or-the-status-quo-20190510-p51m6t.html> [↑](#endnote-ref-1)
2. Stan Grant, *Ken Wyatt, man in the crosshairs of history*, Sydney Morning Herald, July 13-14 2019. [↑](#endnote-ref-2)
3. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-3)
4. See: <https://www.standard.net.au/story/6022930/united-australia-party-candidate-pledges-tax-breaks-for-south-west-residents/> [↑](#endnote-ref-4)
5. For the child care worker subsidy see: <https://www.smh.com.au/federal-election-2019/labor-s-childcare-wages-plan-to-cost-at-least-1-6-billion-a-year-20190501-p51j1n.html>.

For legality of payments see: Australian Government Solicitor, *High Court Reasons for the Pape Decision on the Tax Bonus Act*, 14 July 2009 at <https://www.ags.gov.au/publications/express-law/el101.pdf>. In particular, a majority of the High Court held a cash payment to Australians was valid because

*‘in the particular circumstances in which the Tax Bonus Act was enacted (being circumstances of global financial and economic crisis), the executive power supported the expenditure provided for in the Act, to provide an immediate fiscal stimulus to the national economy. The incidental power in s 51(xxxix) of the Constitution then supported the provisions of the Tax Bonus Act’.*  [↑](#endnote-ref-5)
6. See: <https://www.portnews.com.au/story/6115769/pm-makes-a-45-million-tidal-pool-promise/> [↑](#endnote-ref-6)
7. <https://www.thejadebeagle.com/submission-to-aps-review-2019.html> [↑](#endnote-ref-7)
8. The fate of Mr Abbott’s reform of the Federation is outlined at: David Donaldson, *Why we gave up on federalism reform (this time)*, May 2016, The Mandarin <https://www.themandarin.com.au/64341-happened-federalism-white-paper/>. Noteworthy is the critique of the cost-cutting motivation of Federalism reform by Professors Saunders and Crommelin:

*‘Each of the levels of government through which democracy is delivered in Australia derives its authority from the people, or a segment of them, to whom it is accountable at and between elections.*

*Accountability so understood relies on the elected parliaments of the Commonwealth and the states, in which public deliberation on significant decisions can take place and through which transparency can be secured. The matters for which each level of government is responsible and therefore accountable are set by the terms of the Australian Constitution, broadly reflecting the principle of subsidiarity. Government in accordance with the Constitution is a sine qua non of the rule of law. The Constitution can be changed, with approval at referendum, for which persuasive public justification of the rationale for change is required…….*

*The Australian Constitution mandates multilevel democracy. It allocates power among the different levels of government that take decisions on behalf of the people, by reference to considerations of subsidiarity. It provides mechanisms for intergovernmental cooperation that protect democratic accountability. And it suggests principles by reference to which some of the most vexed problems of fiscal federalism can be resolved.’*

Cheryl Saunders and Michael Crommelin, *Reforming Australian Federal Democracy*, Volume 74, Number 3, 2015

 <https://meanjin.com.au/essays/reforming-australian-federal-democracy/>

National Commission of Audit at: *Towards Responsible Government The Report of the National Commission of Audit,* February 2014, <https://www.ncoa.gov.au/sites/g/files/net4136/f/phase_one_report.pdf>. Also noteworthy is the report’s: misuse of the term ‘responsible Government’ in its heading; incorrect portrayal of Federal responsibility; misunderstanding of ‘subsidiarity’; failure to refer to High Court decisions in Pape and Williams (no.1) or the (then) case before the court – Williams (no.2); Secretariat not having among its 25 officials any from the Attorney Generals or line Departments. Some further curios are reported at <https://www.thejadebeagle.com/governance.html>.

 [↑](#endnote-ref-8)
9. Andrew Podger, AO, Submission to APS review, July 2018 at <https://contribute.apsreview.gov.au/submissions>. The relevant text is:

***‘Federalism directions.***

*The role of the Commonwealth also continues to evolve, affected by the maturing of the nation and by the same forces (including technological change) that are broadening the international agenda; moreover, the broadening international agenda is itself affecting the role of the Commonwealth. The role has steadily increased over the last 117 years and seems likely to continue to do so…..’*

Of note is that recent High Court decisions do not feature in this statement. These decisions have been covered extensively, for example: Glenn Ryall "Williams v. Commonwealth*—A Turning Point for Parliamentary Accountability and Federalism in Australia?*" <https://www.aph.gov.au/sitecore/content/Home/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop60/c07>

Chordia, Shipra; Lynch, Andrew; Williams, George --- "*Williams V Commonwealth [No 2]: Commonwealth Executive Power and Spending After Williams [No 2]*" [2015] MelbULawRw 22; (2015) 39(1) Melbourne University Law Review 306 <http://classic.austlii.edu.au/au/journals/MelbULawRw/2015/22.html> [↑](#endnote-ref-9)
10. The quote is from Greg Taylor, *ON THE ORIGIN OF SECTION 96 OF THE CONSTITUTION,* 2016, UNSW Law Journal Volume 39(4) 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874638> [↑](#endnote-ref-10)
11. Chief Justice Dixon:

*‘If s. 96 came before us for the first time for interpretation, the contention might be supported on the ground that the true scope and purpose of the power which s. 96 confers upon the Parliament of granting money and imposing terms and conditions did not admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief of assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power. But the course of judicial decision has put any such limited interpretation of s. 96 out of consideration’.*

Victoria v Commonwealth ("Second Uniform Tax case") [1957] HCA 54; (1957) 99 CLR 575 (23 August 1957) [↑](#endnote-ref-11)
12. Chordia, Shipra, *Section 96 of the Constitution: Developments in Methodology and Interpretation* [2015] UTasLawRw 13; (2015) 34(2) University of Tasmania Law Review 54 <http://classic.austlii.edu.au/au/journals/UTasLawRw/2015/13.html>

Chordia noted the High Court’s 1988 reversal of s.92 shambles in Cole v. Whitfield – via admitting material from Constitutional Convention debates for the first time. The Hon. Stephen Gagelar (2018) later observed the Mason court in that case:

*‘openly acknowledged that the new interpretation would not solve all problems but they said that it would permit the identification of the relevant questions and a belated acknowledgment of the implications of the long accepted perception that ‘although the decision [whether an impugned law infringes s 92] was one for a court of law the problems were likely to be largely political, social or economic’*

The Hon. Stephen Gagelar, *The Section 92 Revolution*, in James Stellios (ed) *Encounters with Constitutional Interpretation and Legal Education* (2018) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/GagelerJ_Stellios_Coper_Ch_01.pdf> [↑](#endnote-ref-12)
13. And in Appendix 7. Former High Court Chief Justice Robert French recently suggested there may be an additional channel for validity; through intergovernmental agreements coupled with the ‘nationhood’ power; the existence of such agreement perhaps signifying a nationhood issue provided the agreement did not otherwise infringe on Constitutional prohibitions:

*‘The entry into an intergovernmental agreement cannot of itself supply otherwise absent constitutional powers of the Commonwealth. However, the fact of the agreement may be an indication that at least the nationhood aspect of the executive power is in play.’*

French, Robert *"Executive and Legislative Power in the Implementation of Intergovernmental Agreements"* [2018] MelbULawRw 12; (2018) 41(3) Melbourne University Law Review 1383 at <http://www.austlii.edu.au/au/journals/MelbULawRw/2018/12.html> [↑](#endnote-ref-13)
14. French, Justice Robert *"The referral of state powers - cooperative federalism lives?"* (FCA) [2003] FedJSchol 3 at <http://www.austlii.edu.au/au/journals/FedJSchol/2003/3.html> [↑](#endnote-ref-14)
15. Referendum dates and results are at: <https://www.aec.gov.au/elections/referendums/Referendum_Dates_and_Results.htm>

  [↑](#endnote-ref-15)
16. <http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/s128.html> [↑](#endnote-ref-16)
17. A proposal that alters the proportionate representation or boundary of a State also needs a ‘yes’ vote from the majority in that State. [↑](#endnote-ref-17)
18. Mr Turnbull was head of the Australian Republican Movement at the time of the (rejected) republic referendum proposal. <https://www.smh.com.au/national/turnbull-warns-australian-voters-conservative-on-constitutional-change-20170527-gwegxt.html> [↑](#endnote-ref-18)
19. Prior to the referendum, the States could make laws related to Aboriginals and for their inclusion in State population counts. Thus this 1967 referendum did not create powers for laws to be made regarding Aboriginals – but to extend the power of lawmaking to the Commonwealth. [↑](#endnote-ref-19)
20. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-20)