

*People Power:
The History and Future of
the Referendum in Australia*
By **George Williams and
David Hume**

UNSW Press, Sydney 2010
\$34.95, 303 pages
ISBN 9781742232157

Despite its ambitious title, this work by a prominent legal academic and a practising Sydney lawyer deals only with referendums on altering the Commonwealth Constitution. Noting that voters have accepted eight of the 44 amendment proposals, the authors see the referendum record as ‘dismal,’ but concede that the federal Constitution has been amended with about the same frequency as the US Constitution. The authors recommend changes to the machinery of amendment aimed at procuring voter assent to ‘reforms’ needed to make our ‘dysfunctional’ Constitution ‘more effective.’

Considering their resonant disdain for the founding instrument of one of the world’s most peaceful, prosperous and progressive nations, the authors are strikingly reticent about explaining just what our Constitution’s defects might be, other than declaring it ‘long, [and] verbose.’ In fact, at 128 sections and some 45 pages, it is by modern standards a miracle of lucid conciseness, as a comparison with the EU Constitution (the Lisbon Treaty) shows.

The authors do not spell out the kinds of changes they believe are necessary to make the

Constitution ‘more effective,’ but they note that most amendment proposals have been aimed at widening the powers of the federal legislature and executive (and the bill of rights proposals would extend the powers of the federal judiciary). The authors clearly imply that their definition of ‘reform’ means moving towards more centralised rule.

To them, a referendum is a ‘success’ if the voters approve an amendment but a failure if they don’t. But if people power means anything, a No vote is a decision, not a failure. The authors also condemn the ‘ideological aversion’ of federalists to centralised rule, but overlook their own ideological predilection in favour of it.

Indeed, nowhere do the authors concede that a rational case for decentralised, competitive federalism even exists. Yet Canada, Germany and Switzerland provide examples in support. China did not emerge as an economic superpower until it became a de facto federation, and a highly devolved one at that, with even some defence functions being left to the provinces.

Federalism’s advantages include the possibility of diversity and experiment, the right of choice and exit, the greater scope for popular participation in government, greater stability, fail-safe architecture, and the potential for competition and greater efficiency in government. To the extent that Australia’s performance falls short in any

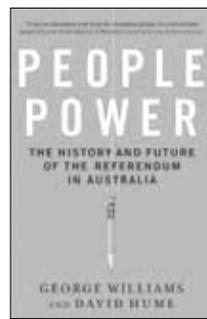
category, greater concentration of power is not necessarily the solution. Ask any academic what Canberra-imposed centralisation has done to Australia’s universities.

After a useful step-by-step explanation of the legal requirements and procedural stages of the constitutional alteration process, the book analyses eight selected referendum campaigns, the most recent being the 1999 republic ballot. That was defeated, the authors justifiably say, because it was aimed at building consensus among the political classes, not at the people’s wishes.

Only 9% of Australians wanted the monarchy, but John Howard outmanoeuvred the people by proposing selection of the president by parliamentary vote rather than the direct popular election model that the voters overwhelmingly preferred. As the authors point out, he need not have done so, as the parliamentary model did not secure an absolute majority of convention votes. He could also have offered a multiple-choice ballot.

Howard went further and added more features to the parliamentary model, including empowering the prime minister unilaterally to dismiss the president, which further guaranteed rejection at the polls.

The voters were led to believe that a No vote would not foreclose the possibility of a second referendum on a different republic model, but once the result was announced Howard declared the issue settled. The authors argue that Howard’s manipulation of the republic referendum illustrates the need



for greater public ownership of the process.

The book notes that the Commonwealth's failure since 1973 to seek new powers for itself by referendum has only partly stemmed from the voters' 'bad record' of foiling such attempts. A more important reason is that Canberra has been able to rely on the High Court to 'interpret' the Constitution in a manner diametrically opposite to its plain intention, reversing the relative positions of the Commonwealth and the states.

Indeed, for most of the time since the 1920 *Engineers' Case*, the court, that 'keystone of the federal arch' as the Founders called it, has worked to dismantle the federal system it was created to uphold. To do so, it has discarded every relevant principle of legal and constitutional interpretation when it suited, ignored whole sections when it suited (e.g. sections 107, 114), given others absurdly wide meanings (e.g. sections 51(xxix), 90, 96), and created entirely new Commonwealth powers out of thin air (e.g. the 'nationhood' power). The only principle consistently applied is that in important federal powers cases, Canberra always wins.

This judicial usurpation of the people's power so as to effect what the book concedes to be 'radical change' cheers the authors considerably, but they add a caveat:

While judges deserve credit for many changes ... there are dangers in leaving constitutional reform solely to them

... There are important limits to what the judiciary can achieve: many of the most important reforms [such as recognition of the Aboriginal people] are beyond them ... (pp. 21–22).

The authors thus fall back on the section 128 amendment process, which they see as hamstrung by the 'deep Australian cynicism of the political class.' But for Thomas Jefferson and other prominent constitutionalists, a distrust of power, especially power concentrated in a central government, was the proper attitude in any polity that intended to survive. Jefferson supported federalism (as well as the separation of powers) precisely to avoid that concentration. What Williams and Hume lament as mere 'cynicism' may instead be an experiential constitutional wisdom about concentrated power.

The authors recommend the establishment of a constitutional review commission, of constitutional conventions every decade, a referendum panel to 'educate' the people, and other measures to help in 'getting to Yes' by enhancing public ownership to the process.

But in the end, they want the political class to stay in charge. Their commissions and conventions would only be able to make recommendations to Parliament.

The authors also dismiss in a few factually dubious paragraphs the system of citizen-initiated

referendums (CIR) as used in Switzerland, the world's only true democracy, in 27 of the US states, and in other countries on every continent except Australia. Queensland came close to adopting CIR in 1914 and Tasmania and Queensland in 1989. A widely representative South Australian constitutional convention recommended its introduction in 2003.

Since 1848, the Swiss have successfully used CIR to amend their federal Constitution, and about half the US states alter their constitutions in the same way. If the authors were serious about 'people power,' one would have expected a more thorough and balanced evaluation of the CIR option.

The book is clearly written in non-technical (if somewhat over-capitalised) language, with footnotes to satisfy the lawyer and the scholar. The undeclared bias toward the centralist agenda is regrettable, but the thorough treatment of the relevant law and practice is most useful. It is the most comprehensive work on the section 128 constitutional referendum process published to date.

Reviewed by Geoffrey de Q. Walker

History. Fifty million years ago the Australian continent broke away from the great southern landmass of Gondwanaland, which comprised South America, Africa, India, Australia and Antarctica. Apart from a period during the last Ice Age when the sea level was 100 metres lower than it is today, Australia existed in isolation. This resulted in the evolution of vegetation and wildlife which is substantially unique. It was thought that the Aboriginal population may have lived in Australia for 50,000 years. However, recent evidence from the Kimberley region of Western Australia suggests much older hu... Estimates of the historical size of the population range up to 750,000 people. It was agreed that there would be a referendum on the issue. The 1967 Referendum was a landmark achievement for Indigenous Australians. Following decades of Indigenous and non-Indigenous activism, over 90% of all Australians voted in favour of amending two sections of the Australian Constitution: Section 51 (xxvi) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws. Section 127 In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted. People Power and millions of other books are available for Amazon Kindle. Learn more. Share. He is the author or coauthor of numerous books, including A Bill of Rights for Australia, A Charter of Rights for Australia, and The Oxford Companion to the High Court of Australia, and is a columnist for the Sydney Morning Herald. David Hume is a solicitor at Freehills and a visiting fellow at the University of New South Wales. Read more. Product details. Paperback: 312 pages. Publisher: University of New South Wales Press (November 1, 2010).