CHANGING CONSTITUTIONS THROUGH CONSTITUENT ASSEMBLIES:

an analysis of

representation, interest, consensus, and partisanship

at the


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Sydney, July 2007

A thesis submitted for the degree of Doctor of Philosophy at the
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Changing constitutions through constituent assemblies

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July 2007

Declaration

This thesis is submitted for examination for the degree of Doctor of Philosophy at the Australian National University. This work is my own and it has not been submitted before for any degree, diploma, or license at the Australian National University or any other university, except as described below.

Some of the ideas in this thesis were presented by me in a conference paper which I delivered while I was completing research for the thesis:


The thesis also draws on data that I gathered and analysed for my honours thesis:


When I reproduce material from the honours thesis in this thesis, I cite it appropriately.

To the best of my knowledge and belief, this thesis contains no material previously published or written by any other person unless it is duly cited in the text.

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Abstract

This thesis evaluates whether including constituents directly in negotiating proposals for formal constitutional change at constituent assemblies could improve the rate of formal change in Australia and Canada.

Some analysts argue that there is little or no need for formal constitutional change, whilst others argue that the lack of it highlights the need to find new ways to debate proposed amendments. In the 1990s, the Australian and Canadian federal governments departed from usual practice and convened constituent assemblies (or mini constituent assemblies) to debate the merits of a republic for Australia, and proposals for constitutional reform in Canada that became the Charlottetown Accord. This thesis is a case study of those assemblies: the Australian Constitutional Convention 1998, and the Canadian Renewal of Canada Conferences 1992.

The first chapter establishes that the rate of formal constitutional change in Australia and Canada is relatively low, and that informal constitutional change is not equivalent to amending the text of a constitution. Analysis of the literature about why proposals put to referenda are rarely ratified in Australia shows that there are no compelling answers to this question, and that relatively little attention is given to examining the process used to negotiate formal constitutional change.

The second chapter examines literature about the value of constituent assemblies. This review shows that authors disagree about whether, compared to parliamentarians convening alone, constituent assemblies are more representative of constituents, more likely to generate public interest, more likely to reach consensus, and less likely to behave in a partisan way. This thesis addresses these four questions. As a first step, the terms ‘constituent assembly’, ‘representative’, ‘interest’, ‘consensus’, and ‘partisanship’ are defined in a testable form.

The third to sixth chapters examine the assemblies in context of a detailed analysis of the processes of formal constitutional change in Australia and Canada since federation. The research shows that the assemblies were superior for representation,
public interest, and consensus. For the Australian case, analysis of the formal ballots shows that parliamentary delegates behaved in a less partisan way than did non-parliamentary delegates – parliamentarians were more likely to change their votes. This finding is qualified by analysis of the assembly debates and other publications, which suggests that some parliamentarians did not act in accordance with their preferences in the early ballots. The question of partisanship is not answered for the Canadian case because an official record of delegates’ preferences was not created and retained.

The research also suggests that future studies of constituent assemblies should explore the question of how responsive governments are to recommendations made by assemblies. The Australian and Canadian assemblies delivered on their promise of representativeness, public interest, and consensus, but governments were not responsive to some critical recommendations. Preliminary analysis suggests that this may in large part explain why Australian and Canadian voters did not approve a republic or the Charlottetown Accord when they went to the polls.
# Table of contents

**CHAPTER ONE – FORMAL CONSTITUTIONAL CHANGE**
- THE NEED FOR FORMAL CONSTITUTIONAL CHANGE ........................................... 1
- WHAT IS A ‘REASONABLE’ RATE OF CHANGE? .................................................. 3
- AUSTRALIA AND CANADA ................................................................................. 7
  - History and institutions ................................................................................. 8
  - Rules for amending the constitution............................................................. 10
  - Amendment in practice – Australia 1998-99 and Canada 1990-92 ................. 12
- WHY PROPOSALS ARE NOT RATIFIED ............................................................. 13
  - Timing ............................................................................................................ 13
  - Content .......................................................................................................... 15
    - Centralism versus federalism ....................................................................... 15
    - Bundled questions ....................................................................................... 16
    - Simultaneous questions .............................................................................. 17
  - Participants .................................................................................................... 19
    - Politicians – bipartisanship ........................................................................ 19
    - Politicians – motives .................................................................................... 20
    - Constituents – knowledge .......................................................................... 22
    - Vocal minorities and interveners ............................................................... 24
  - Process ........................................................................................................... 26
  - Summary ....................................................................................................... 29
- THE IMPORTANCE OF PROCESS ....................................................................... 30

**CHAPTER TWO – CONSTITUENT ASSEMBLIES**
- CONSTITUENT ASSEMBLIES DEFINED ............................................................. 34
- IDEALS VS. REALITIES ...................................................................................... 39
- THE VALUE OF CONSTITUENT ASSEMBLIES .................................................. 41
  - Advocates ..................................................................................................... 41
  - Commentary .................................................................................................. 50
  - Opponents ..................................................................................................... 51
  - Discussion ..................................................................................................... 56
- THE TWO CASE STUDIES .................................................................................. 59
- THE FOUR THESIS QUESTIONS ....................................................................... 59
- KEY CONCEPTS DEFINED ................................................................................ 60
  - Representativeness ........................................................................................ 60
  - Public Interest ................................................................................................. 63
  - Consensus ....................................................................................................... 64
  - Partisanship .................................................................................................... 66

**CHAPTER THREE – AUSTRALIA**
- FEDERATION ..................................................................................................... 69
  - Discussion ...................................................................................................... 74
    - The importance of Henry Parkes ............................................................... 74
    - Was federation a ‘popular’ process? ............................................................. 76
- CHANGING THE CONSTITUTION 1901-1999 .................................................... 84
  - Rules for amending the constitution............................................................. 85
  - Constitutional change in practice ................................................................. 86
    - Ratification ................................................................................................. 86
    - Initiation and negotiation ......................................................................... 88
      - Broad inquiries convened by the federal parliament ......................... 89
      - Specific inquiries convened by the federal parliament ...................... 95
- CONCLUSIONS .................................................................................................. 106
Tables and figures

Australia

Table 3.1: Corowa and Bathurst federation conference participants ......................... 80
Table 3.2: Landmarks on the road to federation, 1889-1900 ........................................ 83
Table 3.3: Results for the republic and preamble referenda ...................................... 105
Table 3.4: Inquiry recommendations put to referendum .............................................. 107
Table 3.5: Landmarks in the process of constitutional change, 1901-1999 ..................... 110
Table 4.1: Assembly working groups ................................................................. 117
Table 4.2: The preamble put to referendum and the assembly’s recommendations ......... 118
Table 4.3: Formal ballots and voting options ......................................................... 121
Table 4.4: Assembly ballots and flow of votes ....................................................... 122
Table 4.5: Representation of place of residence ....................................................... 124
Table 4.6: Representation of gender, age, education, aboriginality, and place of birth .... 127
Table 4.7: Representation of preferences ............................................................... 129
Table 4.8: Support for ballot options by ballot and delegate group ................................ 134
Table 4.9: Partisans by delegate group and constitutional preference ......................... 139
Table 4.10: Parliamentary support for the Turnbull model by party ........................... 139
Figure 3.1: Federation timeline 1890-1900 ............................................................. 71
Figure 3.2: Frequency of inquiries and referenda 1901-1999 ..................................... 87
Figure 4.1: Constitutional preference continuum ..................................................... 121
Figure 4.2: Representation of place of residence by state and delegate group ............ 126
Figure 4.3: Variation in support for the Turnbull republic model by state ................... 131
Figure 4.4: Consensus by ballot and delegate group ............................................... 136
Figure 4.5: Republic opinion polls 1966-2006 ........................................................ 148

Canada

Table 5.1: Direct amendment of the Canadian constitution 1867-1999 ....................... 159
Table 5.2: Other constitutional changes, 1867-1949 ................................................ 165
Table 5.3: Results for the Charlottetown plebiscite .................................................. 189
Table 6.1: Assembly delegates by selection category ............................................... 194
Table 6.2: Geographic representation at the assemblies ............................................. 199
Table 6.3: Geographic representation – assemblies, SJC, and first ministers ............ 200
Table 6.4: Representation of gender ........................................................................ 201
Table 6.5: Estimate of visitors attending the assemblies ............................................. 208
Table 6.6: Consensus for the assemblies, SJC, and first ministers ................................. 212
Table 6.7: Agreements reached by assemblies, SJC, and first ministers ...................... 219
Figure 1.1: Satisfaction with the Charlottetown process and support for the Accord .... 29
Figure 5.2: Canada circa 1740 ................................................................................. 178
Figure 5.3: Public consultations about the constitution, 1990-1992 ............................ 178
Figure 5.4: Spicer Commission, public participation by province and territory ............ 180
Figure 5.5: Charlottetown Accord Yes vote by province ........................................... 189
Figure 6.1: Use of time at the assemblies by activity ............................................... 195
Figure 6.2: Geographic representation – assemblies, SJC and first ministers .......... 200
Figure 6.3: Representation of gender ...................................................................... 202
Figure 6.4: Voter turnout for federal elections and plebiscites, 1867-2006 ................ 207
Abbreviations

ABS Australian Bureau of Statistics
ACC Australian Constitutional Convention, 1973-1985
ACP Australian Country Party
ACT Australian Capital Territory
ALP Australian Labor Party
ARM Australian Republican Movement
ATSIC Aboriginal and Torres Strait Islander Commission
BC British Columbia
CCS Constitutional Conferences Secretariat, Canada
Democrats Australian Democrats (political party)
JCCR Joint Committee on Constitutional Review, Australia
JSCRR Joint Select Committee on the Republic Referendum
MMC First ministers’ meetings on the constitution, Canada
NAC National Australasian Convention, 1897-98
NAFC National Australasian Federation Conference, 1891
NDP New Democratic Party, Canada
NSW New South Wales
NT Northern Territory
NWT Northwest Territories
PM&C Department of Prime Minister and Cabinet, Australia
PR Proportional representation electoral system
Qld Queensland
RAC Republic Advisory Committee, Australia 1993
RSP Randomly selected participants at the Canadian assemblies
SA South Australia
SJC Special Joint Committee, of parliament
Tas Tasmania
UAP United Australia Party
WA Western Australia
CHAPTER ONE – FORMAL CONSTITUTIONAL CHANGE

A constitution provides foundation rules for the government of groups. A national constitution provides “the basic framework for political life within a state”, a “system of laws, rules and fundamental principles according to which a nation ... [is] governed”, and a “stable framework for political life” (respectively Federal-Provincial Relations Office 1990, 1; CCH Australia 1996, 38; Hurley 1996, 4). Put simply and elegantly for Canada, a written constitution is “a document that formalizes the legal relationship between the public and the state” (Abella, Fortier and Lougheed 1992, 2).

The foundation rules for a nation may be expressed in one or more documents, informal agreements, and judicial interpretation of laws. While all of these need to be understood to appreciate how a nation is governed, the formal rules are “those rules which are incorporated in a legal document which has been given the status of supreme law” (Emy and Hughes 1991, 267). Constitutional law is supreme in the sense that it prevails over all other laws, a point made clear in s 52(1) of the Constitution Act 1982, as follows: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

Even though constitutions are pre- eminent law, they need to be amended from time to time to reflect changes in attitudes and beliefs, to counter the unintended consequences of existing provisions, or for greater certainty to entrench parliamentary or judicial decisions (Lutz 1995, 242). Procedures for amending constitutions need to accommodate conflicting demand for stability and change, and they tend to be relatively demanding. Lutz’ analysis of amendment procedures in 30 nations produced a continuum of difficulty ranging from “parliamentary supremacy” (the normal legislative process), to “legislative complexity” such as super-majority ballots, “legislative complexity plus state approval”, and “legislative complexity plus a referendum” (1995, 263-264). As would be expected, he found that constitutions with less demanding amendment rules were amended more frequently (1995, 260-261). Where durable constitutions were amended infrequently, Lutz concluded that governments probably relied more heavily on other ways to achieve constitutional change, such as judicial

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1 The phrase ‘informal agreements’ is used rather than ‘constitutional conventions’ to avoid confusion with conferences such as Australia’s 1998 Constitutional Convention, which are the subject of this thesis.
interpretation and informal agreements (1995, 260-61, 266). This can lead to uncertainty, and a less stable political environment.

The Australian and Canadian constitutions are relatively durable, both nations have experienced considerable difficulty in achieving formal constitutional change, and both nations rely to some extent on judicial interpretation and informal agreements. But as Sharman wrote:

At the very minimum, limited government requires clarity in the specification of basic constitutional rules but, as they now stand, the Canadian and Australian constitutions are at best palimpsests [erasable slates]. This lack of specificity can only operate to the advantage of those groups who operate the institutions of executive government (1990, 226).

Neither nation could be described as politically unstable now, but it is a logical possibility. According to Watts:

Experience in federations elsewhere … indicates that the repeated refusal to resolve basic problems [like the ‘structural’ reforms attempted in Canada] may accentuate internal grievances and frustrations cumulatively to the point where eventually disintegration may become unavoidable.

[In Canada] the incremental approach is not likely to move sufficiently quickly to meet the urgent concerns … nonconstitutional adjustment cannot provide the … assurance of constitutional safeguards that formal constitutional amendments would.

Does the failure of the 1991-2 attempt at constitutional reform represent the end of the tradition of elite accommodation … if so, is there any viable alternative process for constitutional change? … Some have advocated a constituent assembly process but … rarely have they been successful except in postrevolutionary situations where the establishment of a new political structure is unavoidable. Does the lack of a viable alternative process for major constitutional change mean then that like some other federations Canada is locked into a basically unalterable status quo … If so this is likely to induce resort to extra-constitutional means to achieve major change. What the failure of the 1990-92 constitutional review process has done, therefore, is to face Canadians now with the need to consider what process, if any, can be developed for dealing effectively with the as yet unresolved structural problems of Canada (Watts 1999, 12, 13, 15 respectively).

By this account the lack of formal constitutional change can cause “disintegration”. If the elite accommodation method is no longer acceptable in Canada, then incremental change is not fast enough, and informal agreements are not an adequate substitute. Given that constituent assemblies rarely succeed except in “postrevolutionary situations”, what process options remain?

This thesis is a comparative study of how Australia and Canada tried unsuccessfully to implement major constitutional change in the 1990s. Proposals for a republic in Australia and the Charlottetown Accord in Canada were defeated at the polls, despite extensive public consultation, and early indications that these proposals would pass. Public consultation included extensive information campaigns and media coverage, and opportunities for parliamentarians and non-parliamentarians to debate the merits of the proposals at constituent assemblies, or mini constituent assemblies (see
page 38 for a discussion on whether these cases are constituent assemblies)\(^2\). This thesis assesses the value of constituent assemblies as a means to achieving formal constitutional change.

This chapter lays the groundwork for the thesis. The first and second sections discuss the need for formal change, and the rate of change in Australia and Canada, and the third section demonstrates that the Australian and Canadian cases are comparable for this thesis. The fourth and longest section examines a diverse range of explanations for why attempts to amend the constitution rarely succeed in Australia, and applies these explanations to the republic and Charlottetown cases. The fifth and final section demonstrates the need for the present research.

**THE NEED FOR FORMAL CONSTITUTIONAL CHANGE**

By some accounts, formal constitutional change is relatively unimportant in Australia and Canada. Russell claimed that in Australia and Canada “judicial interpretation of the Constitution and informal intergovernmental agreements did far more to change the operation of federalism than formal constitutional amendments” (1988, 8). Russell also wrote that he favoured putting proposals for constitutional reform to referenda in Canada because “as a constitutional conservative I also like the practical results of the referendum process – at least in Australia where the people reject nearly all proposals for change” (1991a, 68). Across the Pacific, Galligan agreed with Russell on the need for formal change, adding with respect to Australia: “perhaps more curious is the unreflective reformist mindset that persists in advocating or expecting constitutional reform even though there is not much apparent need for change” (1995, 118, 120-132). In 1957, Gough Whitlam (federal Labor parliamentarian 1952-1978, prime minister 1972-1975) wrote that the constitution was an obstacle to Labor achieving its policy goals (1977 [1957], 16). Twenty years later he concluded that formal constitutional change was important, and obtaining it was “surpassingly difficult”, but much could be achieved through judicial interpretation and inter-government agreement (Whitlam 1977, 2-3).

A political framework does change without changing the text of a constitution. Sawer concluded in 1973:

> In Australia, if enough of the people want something badly enough, and for long enough, and it can be achieved through governmental action, they are likely to get what they want, and to do so without formal amendment of the Federal Constitution (1973, 213).

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\(^2\) A ‘see page’ reference refers to a page in this thesis.
Russell wrote that in Canada, all that was necessary for many reforms was “political will”. He doubted, nevertheless, that Canadians would be relieved easily of their exhaustion with attempts at formal change: “It will be no more easy for politicians to break from these practices than for the intelligentsia to abandon its predilection for constitutional solutions to every national problem” (1993b, 37). Galligan concluded “progressive elites and federal governments should stop pestering the Australian people with referendum proposals that are unnecessary” (1995, 132).

If formal change is not necessary, then why do governments try so frequently to achieve it? Why, for example, did Australian governments initiate unsuccessful referenda in 1974, 1977, 1984, and 1988 to change the timing and frequency of federal elections, and why did Canadian governments undertake fourteen rounds of negotiations between 1927 and 1982 to add a local amending formula to the constitution? Why were these changes not achieved through “governmental action”? Governments continue to propose formal constitutional change because the alternatives – informal agreement, judicial interpretation, and ordinary legislation – are limited in their effect.

Informal agreements are an important part of a nation’s constitutional rules. According to Sir Ivor Jennings, they are “the flesh which clothes the dry bones of the law” (in Marshall and Moodie 1971, 18). For example, the Australian and Canadian constitutions do not define the office of prime minister or responsible government, but through a combination of constitutional provisions and informal agreements, the prime minister is the leader of the party or coalition with a majority in the house of representatives, and between elections this party or coalition governs unless it loses the confidence of the lower house.

Events in Australia in 1975 show how governments can lose office even though they have a majority in the lower house. On 11 November 1975, the governor-general John Kerr dismissed Labor prime minister Gough Whitlam and the government, citing as his authority section 64 of the constitution (letter to the prime minister reproduced in Kerr 1978, 359-360). Section 64 of the constitution reads:

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen’s Ministers of State for the Commonwealth.
Kerr explained in a statement of reasons attached to the letter of dismissal:

The decisions I have made were made after I was satisfied that Mr Whitlam could not obtain supply. … There have been public discussions about whether there is a convention deriving from the principles of responsible government that the Senate must never under any circumstances exercise the power to reject an appropriation bill. The Constitution must prevail over any convention because, in determining the question how far the conventions of responsible government have been grafted on to the federal compact, the Constitution itself must in the end control the situation (reproduced in Kerr 1978, 360-364, emphasis added).

An intense debate followed about the status of informal agreements, and whether such agreements or the text of the constitution should prevail (see esp. Whitlam’s rebuttals in Whitlam 1979).

According to Reid, disputes about the application of informal agreements in 1975 were “political rhetoric” that blocked constructive debate about why particular practices should or should not occur (1977, 245). Sharman argued that governments were not likely to entrench informal agreements because informal agreements were valued for their flexibility (1990, 219-220). The point for this thesis is that informal agreements are not a substitute for formal change because they lack the legal force of constitutional text.

Judicial interpretation also alters the political framework. For example, in Australian Capital Television v. Commonwealth of Australia (1992) 108 ALR 557, the High Court read into the constitution the right to freedom of political communication. The court also ruled in Commonwealth v. State of Tasmania (1983) 46 ALR 625 that the federal government could use its external affairs powers to stop the Tasmanian state government constructing the Gordon below Franklin dam, which in effect changed the federal/state division of powers. The scope for interpretation is limited, however, because rulings can be overturned, and courts need to justify their decisions so they cannot find provisions that are not there. For example, the Australian federal parliament could not legislate for Aboriginal and Torres Strait Islander peoples or count them in the census until ss 51 (xxvi) and 127 of the constitution were changed in 1967.  

Legislation is the third means to achieve constitutional change without changing the text of a constitution. For example, the Canadian parliament weakened its role in formal constitutional change by passing the Act Respecting Constitutional Amendments

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3 The first peoples of Australia and Canada are referred to in this thesis using different words, depending on the context. ‘Aboriginal and Torres Strait Islanders’ is used for Australia’s first nations, in accordance with their preferences (Department of Communications 2002, 57). ‘Aboriginal peoples’ is used for the Indian, Inuit, and Métis peoples of Canada, which is consistent with the Constitution Act, 1982 s 35. When referring to the first peoples of both Australia and Canada, ‘indigenous peoples’ is used, as suggested by the Australian government Style Guide (Department of Communications 2002, 58).
SC 1996 c 1, with the consent of both houses. This act provides that the federal government will not initiate certain constitutional amendments without the prior consent of the governments of Ontario, Québec, British Columbia, and at least two Atlantic and two Prairie provinces representing a majority of their populations. By contrast, Part V of the Constitution Act 1982 provides that either house of the federal parliament, or a provincial legislature can initiate such amendments. The 1996 federal act is not equivalent to formal constitutional change, however, because it can be repealed relatively easily.

The three informal means to achieve constitutional change are relatively impermanent compared to formal change. Ronald Watts – an advocate of incremental and informal constitutional change – put it this way: “non-constitutional adjustment cannot provide the symbolic significance and the assurance of constitutional safeguards that formal constitutional amendments would” (1999, 13). Hence, governments in Australia and Canada continue to initiate formal amendments. For example, the belief that the federal tier should provide national welfare schemes led to amendments in Australia in 1946 and in Canada in 1940, 1951, and 1960, and changes in attitudes towards indigenous peoples were recognised by constitutional amendments of different magnitudes in Australia in 1967 and Canada in 1982. These and other amendments demonstrate a capacity for achieving formal change in both countries, but how much change is enough?

**WHAT IS A ‘REASONABLE’ RATE OF CHANGE?**

Lutz’ quantitative analysis of formal constitutional change in 30 nations concluded that a “reasonable amendment rate” (RAR) was 1.0-1.25 amendments per annum (1995, 260-261). Australia has changed its constitution eight times since 1901. Within a range of 0.00 to 7.00, Australia ranked sixth lowest at 0.09, just below France and the USA, and just above Spain and Denmark. The study did not include Canada, but there is little doubt that Canada’s amendment rate is relatively low. As Alan Cairns put it:

> The historical evidence is depressing – the Fulton-Favreau amending formula of the mid-sixties, the Victoria Charter of 1971, Bill C-60 of the late seventies, and the four unsuccessful aboriginal constitutional conferences of the mid-eighties all join Meech Lake in testifying to the resilience of the discredited old order that so many would like to leave behind. Thus, defeat of reform efforts is the basic pattern (1991a, 15).

Opinion varies on how many times the Canadian constitution has been amended. Later in this thesis I will argue that 26 formal amendments were made between 1867 and 1999. Using this number in Lutz’ formula, Canada’s amendment rate is 0.20 – higher
than Australia, but well below Lutz’ RAR.

Lutz’ method bears closer examination (1995, 243, 252, 260, 266). First, an amendment rate (AR) was calculated by dividing the number of amendments enacted by the age of the constitution in years. Next, Lutz grouped the cases by AR on an ordinal scale from 0 to 2.0+ in increments of 0.25, and an average AR was calculated for each group. The AR for two groups with the longest standing constitutions (average 90 and 100 years for state constitutions) was said then to be “reasonable”. This method produced an RAR for US state constitutions of 0.76-1.0, and an RAR for national constitutions of 1.0-1.25. The method suggests that durability was Lutz’ primary value, even though he wrote, “we hope to illuminate this question empirically rather than in an a priori manner” (1995, 243). It is unsettling that amendment rates were “reasonable” for just two of 30 nations (Argentina and Norway), but the method demonstrates nevertheless that amendment rates for Australia and Canada are relatively low.

Russell’s more qualitative comparison of Australia and Canada concluded that Canada amended its constitution more frequently than Australia did prior to 1982, but Australian amendments were more substantial (1988, 7-8). He highlighted Australia’s 1928 state debt amendment, which strengthened federal financial control over the states, and the 1946 amendment, which granted welfare powers to the federal tier. Even so, Australian reformers may well envy Canada’s 1982 Charter of Rights and Freedoms, while Canadian reformers may well envy Australia’s ‘triple-E’ senate, which has been in place since federation, because Canadian senators are appointed by the federal government, and they may remain in office until age 75.\(^4\) Proposals did not proceed in 1992 for an elected senate, with an equal number of senators per province that was effective in that it could veto house bills (hence triple-E).

The historical record of repeated attempts to change the Australian and Canadian constitutions demonstrates a recurrent perception of the need for change. It also suggests the expenditure of considerable resources in the pursuit of formal change, and frustration when it is not achieved.

**AUSTRALIA AND CANADA**

This section shows that Australia and Canada are comparable for this thesis, despite their many differences.

\(^4\) A bill to change senators’ tenure to eight years was introduced into the senate on 30 May 2006, and read for the second time on 20 February 2007. It will not proceed to the third reading stage until the Supreme Court rules on its “constitutionality” (Parliament of Canada 2007).
History and institutions

Australia and Canada adopted written constitutions of a similar type at about the same time. The British North America Act 1867 (UK) 30 & 31 Vict, c 3 and the Commonwealth of Australia Constitution Act 1900 (UK) 63 & 64 Vict, c 12, s 9 established federal, constitutional monarchies with Westminster-style parliamentary governments (the Canadian constitution 1867 and the Australian constitution respectively). In both cases, federation united European colonies in large, resource-rich lands that were occupied by indigenous peoples.

The federation process proceeded differently in Australia and Canada. Australia’s six states agreed to federate at the same time, and they remain the only states today. The Canadian federation began with the union of the Canada, Nova Scotia, and New Brunswick colonies as the provinces of Ontario, Québec, Nova Scotia, and New Brunswick in 1867, and expanded gradually to ten provinces and three territories by 1999. The federal government negotiated the addition of provinces and territories bilaterally – all of the existing provinces and territories did not participate formally in the decision.

Both countries comprise first nations (indigenous peoples) and second nations (mainly Europeans). In Canada, however, there is a third cleavage between peoples of English and French origin. Many of Canada’s recent constitutional debates are associated with attempts to accommodate francophone Québec, and Québec’s recurrent threat to secede. There are equivalents in Australia, such as the secession referendum in Western Australian in 1933, and the new state referendum in New England in 1967, but these initiatives turned more on economics than culture, and they were less enduring.

The formal and informal constitutional rules are similar in many respects. A governor-general (or governor general) represents the same monarch, and may exercise similar reserve powers. The prime minister is the leader of the majority party or coalition in the lower house of a bicameral federal parliament, powers are divided between the federal and state/provincial tiers, and the states and provinces have their own constitutions, assemblies, and governors (or lieutenant governors).

Australia and Canada followed a similar path toward independence from Britain. For example, the Statute of Westminster 1931 (UK) 22 Geo 5, c 4 provided that Britain would not legislate for Australia (enacted 1942) or Canada (enacted 1931) unless requested to do so, appeals to the British Privy Council were ended in all but theory in
Australia (1986), and in Canada (1949), and a distinct national citizenship was introduced in Australia (1949) and Canada (1947). Australia’s republic debate, however, has not occurred on the same scale in Canada.

There are nevertheless many differences. Whilst the Australian and Canadian federal governments appoint members of the federal judiciary, the Canadian federal government also appoints provincial judges. Attendance at the polls is compulsory in Australia, but voluntary in Canada. Lower house seats are single member constituencies in both cases, but Australia uses the majority (preferential) formula while Canada uses the plurality (first-past-the-post) system. Australian voters elect senators for six-year terms using a system of proportional representation (since 1949), while the Canadian federal government appoints its senators, who may continue in office to age 75 years.

The Canadian senate has a suspensive veto over house legislation, while the Australian senate may reject or amend all legislation except money bills. This means that the Canadian senate can delay but not block most proposals to amend the constitution. This difference is not as significant as it may first appear, however, because four Australian proposals for constitutional change were put to referenda in 1974 without senate approval. The Australian constitution provides that the Governor-General may issues writs for a referendum that is approved by one house only (s 128, para 2).

The division of powers is also different. Residual powers that accrue to the federal tier in Canada accrue to the state tier in Australia. This does not, however, mean that Canadian provinces are weak compared to Australian states. In 1982, Britain enacted the Constitution Act 1982 as Schedule B to the Canada Act 1982 (UK) c 11 (the Canadian constitution 1982), which included a Charter of Rights and Freedoms. Section 33 of the constitution 1982 provides that the provinces can pass legislation that is inconsistent with the Charter by invoking the notwithstanding clause. By contrast, Section 109 of the Australian constitution provides that when federal and state legislation is inconsistent, federal legislation prevails. Most importantly for this thesis, the Canadian constitution provides a formal role for provincial governments and legislatures in amending the constitution, while there is no formal role for states and territories in amending the Australian constitution.

The Canadian Charter of Rights and Freedoms has no equal in Australia. The Australian constitution makes explicit four rights: acquisition of property by the
commonwealth on just terms (s 51(xxxi)), trial by jury for indictable offences (s 80), protection from religious regulation and discrimination (s 116), and protection from discrimination by state of residence (s 117). By contrast, Canada’s Charter of Rights and Freedoms entrenches freedom of religion, speech, movement and association, the right to vote, freedom from arbitrary detention and discrimination, due process under the law, and the right to use either English or French in certain public institutions (part I of the 1982 constitution). It also recognises a number of rights-bearing groups such as Aboriginal peoples, women, and language minorities, which, according to Cairns, facilitated their participation in debating constitutional change (1991b, 84).

Rules for amending the constitution

The Australian constitution provides for its amendment by reference, by inter-government agreement, and by referenda.

Section 51(xxxxvii) provides that a state parliament can vary the division of powers by referring one or more of its powers to the federal government. This relatively rapid and inexpensive mechanism has been used 38 times in 100 years (Department of the Parliamentary Library Australia 2001, 7-8). In 1996, for example, the Victorian government referred its industrial relations powers to the Commonwealth.

Section 51(xxxxviii) provides that federal and state parliaments can by unanimous agreement “do anything for Australia which only the United Kingdom could do at the time of federation”, which arguably includes changing the constitution without a referendum. The section was used to transfer powers over offshore areas from the commonwealth to the states via the Coastal Waters (State Powers) Act 1980 (Cth), and to sever legal links with Britain by passage of the Australia Act 1986 (Cth).

The two section 51 provisions have not, however, been used to change the text of the constitution, perhaps because parliaments that did so would risk an electoral backlash, as it would deny electors’ constitutional power under s 128 to veto formal change. In discussing the further possibility that s 15 of the Australia Act could be used to change constitutional text without a referendum, Bennett and Brennan concluded that parliaments that did so would be “thumbing their nose at the popular sovereignty embodied in the referendum provision” (1999, 27).

The text of the Australian constitution has changed only when electors voting at referenda approved amendments that were proposed by the federal parliament, as
described in detail in the third chapter. Section 128 of the constitution provides for its
amendment where a bill is passed by the senate or the house and approved at referenda
by a majority of electors and a majority of electors in a majority of states. Section 128
para 5 further provides that amendments which affect the proportionate representation of
states in the federal parliament, or the territorial boundaries of states, must be approved
also by a majority of electors in the states affected by that amendment.

Canada’s amendment rules are more complex, and they have changed
considerably over time. According to Smith, Canada’s amendment formula is “surely
one of the most complicated to be found in any constitution in the world” (1991, 71).
From 1867 to 1949, Britain enacted amendments as requested by the Canadian federal
government. From 1895, federal governments consulted parliament before proceeding
to Westminster, but some amendments were made without consulting the provinces.
From 1949, section 91(1) of the 1867 constitution provided that the federal legislature
could enact some amendments without consulting either Britain or the provinces.
Britain’s role ended in 1982 when its legislature passed the 1982 constitution, which
now provides that amendments must be approved by the federal government or
parliament, and one or more provincial governments, depending on the subject of the
amendment. Governments dominate the Canadian rules, and there is no formal role for
constituents.

The Australian and Canadian amendment rules have in common a relatively weak
role for the senate. In Australia, s 128, para 2 of the constitution provides that proposals
can be put to referendum with the approval of the senate alone, but this has not
occurred. Rather, the governor-general acts in accordance with the wishes of the federal
government on this subject (Bennett and Brennan 1999, 10, 12). The governor-general
did not issue writs for referenda proposals that were passed by the senate alone in 1914,
and by both houses in 1965 and 1983. By contrast, the governor-general did grant writs
for four referenda in 1974 which were approved by the house only (Constitutional
Commission 1988, 1116). The Canadian senate can veto amendments concerning the
federal executive, the house of commons, or the senate that are not specified elsewhere
in the rules, but in all other cases it has a suspensive veto only.

The rules for amending the Australian and Canadian constitutions provide a
dominant role for governments, and a restricted role for the senate. The Australian rules

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5 All of the Canadian provincial and territorial legislatures are unicameral.
include constituents but not state legislatures, while the Canadian rules include provincial governments but not constituents. Despite these differences, practice converged in the 1990s.

**Amendment in practice – Australia 1998-99 and Canada 1990-92**

The proposals for new preamble and a republic in Australia and the Charlottetown Accord in Canada were similar in subject scope, process, and outcome. In subject scope, both proposals were major amendments that dealt with foundation issues. The Australian amendments proposed to replace the monarch and governor-general with a president chosen by federal parliamentarians, and to add a preamble to the constitution. Canada’s Charlottetown Accord included a new Canada Clause, and amendments affecting the supreme court, senate, house of representatives, Aboriginal self-government, the division of powers, federal-provincial financial relations, language and culture, recognition of Québec as a distinct society, and the amending formula itself (Governments of Canada 1992c).

The process used to debate the proposals provided direct roles for federal and sub-national legislatures, and constituents. In Australia, the 1998 Constitutional Convention brought together federal, state and territory legislators, and constituents to debate the merits of a republic. This was only the third time since federation that state politicians were included directly in the process – they were included as delegates to the 1942 Constitutional Convention, and the 1973-85 Australian Constitutional Convention. The five Renewal of Canada conferences in 1992 brought together federal, provincial, and territory legislators, constituents, and representatives of Aboriginal peoples to discuss federal proposals for amending the constitution. In the same year Canadians were asked for the first time to express their constitutional preferences at a national plebiscite. National plebiscites were held in 1898 on prohibition, and in 1942 on conscription, but neither of these initiatives proposed formal constitutional change. There was no legal need to involve Canadian constituents in the ratification process in 1992, but there was a political imperative to do so because some provinces had provided for plebiscites and the public expected to be involved (Meekison 1993, 56; Hurley 1996, 119-120; Johnston, Blais, Gidengil et al. 1996, 258-260).

Diverse techniques were used to facilitate public debates. The Australian federal government added a constituent assembly and sponsored campaign committees to the
usual tools of parliamentary inquiries and information programs. Canadian
governments initiated parliamentary and non-parliamentary inquiries, call centres,
information programs, and five constituent assemblies.

Voters rejected both proposals, by similarly wide margins. Just 45% approved the
republic and Charlottetown proposals, and 39% supported the Australian preamble
(AEC 2001; Elections Canada 1997, 3-4; Directeur Général des Élections du Québec
1992). Electors in all of Australia’s six states rejected the republic model that was put
to referendum; it was approved only by one of the two mainland territories. The
Canadian Accord was rejected by six of the ten provinces, and by one of the two
territories. In Australia, a majority preferred a republic in principle, but republicans
disagreed about the appointment and dismissal procedures for a republican head of state.
In Canada, pivotal issues were senate reform, and amendments proposed to
accommodate Québec.

WHY PROPOSALS ARE NOT RATIFIED

Australia has long found it difficult to achieve major constitutional change, so
much so that in 1967 Sawer concluded “Constitutionally speaking, Australian [sic] is
the frozen continent” (1967, 208). More than thirty years on, the prospects for formal
amendment still look bleak – the electorate has approved just eight of the 44 proposals
put to referenda since federation. This has produced an extensive literature, but as yet
no compelling argument about why referenda do not pass (McMillan 1991, 68; Saunders
1994, 53). That literature is outlined below, and applied to the republic and
Charlottetown cases. The review is arranged thematically under four headings: timing,
content, participants, and process.

Timing

Some authors concluded that proposals put to referenda are not ratified in
Australia because initiators believe mistakenly that particular times are more conducive
to reform. For example, the Hawke Labor government thought that referenda were
more likely to succeed at the time of Australia’s 1988 bicentenary (Galligan 1989, 119;
Galligan 1995, 124; Emy and Hughes 1991, 292). It was thought also that the republic
initiatives were more likely to succeed if they coincided with the 2001 bicentenary of
federation (Hughes 1994, 164; Carnell 1999, 11). The Yes vote was decidedly low for
the four referenda in 1988 (mean 34%), and the two referenda in 1999 (mean 42%).
Whilst the results may have been even worse at less propitious times, these cases
suggest that it is unwise to rely on national anniversaries to propel proposals for constitutional reform across the line.

A number of prominent analysts concluded that participants are only motivated to agree to comprehensive reforms if there is a crisis.

Only a defence peril or economic catastrophe of great proportions is likely to change this constitutional system, and one would not wish for such events (Sawer, Geoffrey 1967, 208).

I can see constitutional change occurring in Australia only as a result of a major upheaval brought about by war or, more likely, a worsening of the current economic crisis. It was, after all, such circumstances that led to the marked increase in central government powers in both the US in the 30s and Australia in the 40s, and that saw the replacement of the Fourth French Republic by the Fifth in 1958 (Altman 1979, 111).

Australia's record of formal constitutional change ... is modest indeed. But that is only to be expected given the absence of revolution, conquest and political dictatorship, as well as regionally based ethnic and linguistic communities, and the fact that the Australian Constitution was a fully democratic instrument of government from the start (Galligan 1989, 122; see also Galligan 1995, 122).

No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup. A country must have a sense that its back is to the wall for its leaders and its people to have the will to accommodate their differences (Russell 1993a, 106).

While “it seems to be a near-universal rule that constitutions are written in times of crisis and turbulence”, there are exceptions such as Sweden in 1974 and perhaps Poland in 1997 (Elster 2006, 185). Australia’s new constitution was ratified in 1899-1900 without a crisis, though some did argue that the depression of the 1890s was the trigger. Further, Jean Chrétien wrote (as Minister of Justice) that Canada’s 1867 constitution was not made in crisis conditions (1981, 5).

The crisis argument is also paradoxical – to wait for a crisis may be to wait too long. Late in 1991, Monahan, Covello, and Batty argued against convening a constituent assembly in Canada because “The first difficulty is that there has not (yet) been any breakdown in the existing legal order” (1992, 45). Resnick concluded that if English-speaking Canada lacked the will to accommodate Québec’s constitutional demands until Québec seceded, there would no longer be a need to pursue those constitutional reforms (1997, 118-121). Watts reinforced the point when he wrote:

Experience in federations elsewhere that have disintegrated indicates that the repeated refusal to resolve basic problems may accentuate internal grievances and frustrations cumulatively to the point where eventually disintegration may become unavoidable (1993, 11).

Moreover, crisis conditions tend to induce “threat based bargaining”, rather than consensus formation through constructive deliberation about constitutional change (Elster 1995, 394).
Content

It is argued that Australian initiatives are not ratified because they propose to increase federal powers, because too many issues are included in one question (bundling), or because more than one question is put to the vote at the same time.

Centralism versus federalism

There is a broad consensus that Australian proposals to increase federal powers do not pass (Crisp 1978, 44; Galligan 1995, 129; Thompson 1997, 92; Faulkner and Orr 2000, 26). In 1967, however, the highest Yes vote in history (90.77%) allowed the federal government to legislate for Aboriginal and Torres Strait Islander peoples, and count them in the census.

Bennett and Brennan’s more fine-grained analysis of Australian referenda distinguished three amendment categories: “machinery” amendments, amendments that increase federal economic powers, and amendments that increase federal social powers (1999, esp. 19-20). Application of these categories to referenda results showed that while electors do tend to reject proposals that increase federal economic powers, they tend to approve proposals that increase federal social powers. For example, constituents approved the 1946 amendment, which empowered the federal tier to provide welfare.

The official No case statement for Australia’s republic referendum did argue that the proposal would concentrate power at the federal tier by giving federal politicians sole power to appoint and dismiss a president (AEC 1999, 11, 13, 15, 25), but this does not equate with the centralism argument. It was not claimed that federal powers would increase at the expense of the states. It was argued instead that the proposal increased the power of politicians over electors – the model “gives power solely to politicians”, and is “undemocratic ... denies the people’s basic democratic right to vote on who represents them as president” (AEC 1999, 11, 15).

Nor does the centralism argument apply to the Canadian case because the Charlottetown Accord proposed to increase provincial powers (analysis of Governments of Canada 1992c). The provinces would, for example, nominate supreme court judges and senators, be represented equally in the senate, be entitled to compensation when opting out of federal programs, and exercise power over culture and language, labour market development and training, mining, and forestry. Further, Aboriginal peoples would be recognised as having an “inherent right to self-government”, including a formal right to participate in some inter-government negotiations. The Charlottetown
Accord would thus curtail, rather than expand, federal powers.

**Bundled questions**

Some authors argued that referenda were less likely to pass in Australia if more than one issue was included in a single question (Crisp 1978, 50-51; Sharman 1988, 11; Hughes 1994, 160-162). The negative effect of bundling is demonstrated in results for referenda held in 1974 and 1977. In 1974, the electorate voted down a bill to grant constituents in two mainland territories the right to vote in referenda, but in 1977 the amendment was approved. The ballot papers read as follows.

Proposed law entitled – ...

[1974:] An Act to *facilitate alterations to the Constitution and* to allow Electors in Territories, as well as Electors in the States, to vote at Referendums on Proposed Laws to alter the Constitution. (AEC 1974, 23)

[1977:] An Act to *alter the Constitution so as* to allow electors in Territories, as well as Electors in the States, to vote at Referendums on proposed Laws to alter the Constitution. (AEC 1977, 24)

Both bills proposed to grant territorians the right to vote in referenda, but the earlier bill proposed also to lower the threshold for the passage of referenda from “a majority of states” to “not less than one-half of the states” (AEC 1974, 22; AEC 1977, 23). The national Yes vote rose from 47% to 78% in 1977 when the question included one amendment rather than two.

Further afield, it was claimed that inclusion of two subjects in the French referendum of 1969 “brought about de Gaulle’s decline” (Alderson 1975, 82-83). The question put was: “Do you approve the Bill ... concerning the creation of regions and the renovation of the Senate?” De Gaulle saw the referendum as a vote of confidence in him, and refused the prime minister’s request for separate questions. The referendum did not pass.

When Australian voters were asked to agree to extend federal powers over more than one subject area in single questions that were put in 1911, 1919, and 1926, these proposals did not pass, which supports the proposition that bundled questions do not pass. However, these same proposals were put to referenda again in 1913 as five separate questions, and again none was approved. While it may be the case that bundling decreases the chance of success, it does not seem from this evidence that putting amendments as separate questions necessarily improves the chance of success.

Content bundling was not at issue for the republic amendment. While the republic bill did propose 69 text changes (Faulkner and Orr 2000, 26), these amendments were
focused narrowly on the minimum changes required to replace the monarch and governor-general with a president.

The Charlottetown Accord was, however, an extreme case of content bundling. The Accord was wide ranging in subject scope, as described earlier. It was also wide ranging in that it tried to give something to everyone. While many Québécois felt it gave them too little, many outside Québec felt it gave them too much (Watts 1993, 6; Russell 1993a, 226). The leaders of the First Nations supported the Accord, but their constituents were divided – some thought it offered too much, while others thought it offered too little (Watts 1993, 6). In the end, it “was simply too much” (Johnston et al. 1996, 10, 279). For Brock, it was comprehensive to a fault – it was an incoherent package (1993, 30). Bob Rae, then premier of Ontario, concluded as follows.

So it was that after an enormously complex and time-consuming process ... buoyed by polls and quietly jubilant in our self-congratulation, we agreed, with scarcely a dissent, to send this all to the judgment of the people, confident that in the end they would be well pleased with our efforts. How wrong we were. I thought that there was something in Charlottetown for everybody. I had failed to understand that there was something for somebody else to get mad at (1997, 220-221).

The Accord “contained something designed to please almost everybody, but in the process managed also to offend almost everyone to some degree” (LeDuc and Pammett 1995, 15). It was easy for opponents to find something to campaign against.

**Simultaneous questions**

It is argued that Australian referenda are less likely to be ratified when more than one question is put at the same time (Crisp 1978, 50-51; Hughes 1994, 160-162; Faulkner and Orr 2000, 25). Of the 44 questions put on 19 occasions, eight passed, yielding a success rate of 18%. Thirty-three of the 36 questions that did not pass (92%) were put with other questions, which suggests that simultaneous questions are a problem, except that six of the eight questions that did pass in 1910, 1946, 1967, and 1977 (75%) were put with other questions that did not. When two questions were put on the same day in 1967, the result was 90.8% Yes for one, and 40.3% Yes for the other.

The simultaneous questions argument does not apply to Canada because the Charlottetown Accord was put as one question: “Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?” (Elections Canada 1992a, 7). In Australia, two questions were put:

[Republic question:] A PROPOSED LAW: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament. DO YOU APPROVE THIS PROPOSED ALTERATION?
An unnamed politician claimed in the official referenda pamphlet that the second question was put to reduce the chance of success:

Previous referendums show that multiple questions are more likely to lead to the proposed changes being voted down. ... The proposed Preamble question is designed to divert attention from the most important [republic question] ... the Prime Minister has used his position to frustrate the Republican cause (AEC 1999, 33).

Kim Beazley, then leader of the opposition, said in January 1999 “I am a bit in favour of doing it one at a time” (as cited by McGregor and Henderson 1999, 2). Peter Costello, Coalition treasurer, put it much more strongly when he said “My judgment is that the greater the number of issues that are put into the referendum, the greater the number of opponents there will be” (as cited by Grattan and Peatling 1999, 8). Malcolm Turnbull, chair of the Australian Republican Movement, also opposed the second preamble question, but for different reasons. He said “The one thing I’m even more pessimistic about, than the republic vote going down, is us putting up a preamble which recognises the Aboriginal history of this country and the people rejecting it – that could be catastrophic for this country” (as cited by Dodson 1999, 6). A report in a different newspaper claimed Turnbull also said on the same day that if there were bipartisan support for a second question, “then we should do it now” (as cited by Grattan 1999, 6).

It is conceivable that putting the second preamble question reduced support for the republic question, but the results show that electors distinguished between the questions; nationally, the Yes vote varied by 6% (45% republic, and 39% preamble). By state and territory, the difference ranged from 4% for New South Wales to 20% for the Australian Capital Territory. McAllister’s analysis of AEC data found a strong correlation between the two results (r=0.95), but his analysis of survey data at an individual level found that 29% of the respondents said they voted differently on the two questions. He concluded “[v]oters clearly distinguished between the two proposals” (2001, 254).

Content was, nonetheless, crucial. McAllister rated “the various positive and negative aspects of the proposed changes” as the second most important factor in deciding the outcome after “attitudes to the link with Britain” (2001, 263), and a Herald/AC Nielsen poll just two weeks before the vote showed that only 5% of those who intended to vote No were motivated by a desire to retain the Queen as Australia’s head of state (in Winterton 2001, 4). Winterton concluded soon after the assembly adjourned “[t]he Convention’s failings are largely attributable to two factors:
insufficient attention was devoted to the details of the republican model, and the ARM conceded too much to the Prime Minister and other supporters of the McGarvie model in a futile attempt to secure their support” (1998a, 7). About three years later, Winterton attributed the referendum outcome to the content of the proposal – even though a clear majority of constituents preferred a republic, many republicans voted No because they wanted a directly elected president, or because they were not persuaded that the model proposed was better than the status quo (2001, 2-4).

**Participants**

When proposals are not ratified at referenda, this is frequently attributed to the behaviour and personal qualities of parliamentarians and electors.

**Politicians – bipartisanship**

The strongest theme in the literature is that Australian proposals for constitutional change are not ratified at referenda because the two major parties do not agree (Crisp 1978, 44; McMillan, Evans and Storey 1983, 349, 374; Lumb 1986, 28; Lee 1988, 535; Winterton 1994, 11; Hughes 1994, 160-61; Galligan 1995, 128; Craven 2003). Analysis of referenda outcomes does show all proposals that passed were supported by both major parties, but other proposals were not ratified despite bipartisanship support. For example, the 1967 nexus question did not pass even though it was supported by Liberal prime minister Harold Holt, his National Party deputy John McEwen, and Labor opposition leader Gough Whitlam (AEC 1967, 2-10).

In Australia, a coalition government put the republic question to referendum in 1999, even though the Liberal prime minister and many of his colleagues opposed it. Whilst the Labor opposition had officially supported the idea of a republic since 1991, its representatives were divided over how a president should be chosen. For example, the federal Labor leader Kim Beazley supported the model put to referendum, but at the 1998 assembly, three state Labor leaders (Jim Bacon, Geoffrey Gallop and Peter Beattie) supported alternative direct election models, as did federal Liberal minister Peter Reith. The divisions were thus inter-party, and intra-party. The 1999 referenda did not pass, which lends support to the bipartisanship argument.

In Canada in 1992, the Charlottetown Accord was approved by the federal Progressive Conservative government, all of the provincial governments representing Progressive Conservatives, Liberals, New Democrats, and the Parti Libéral du Québec, the leaders of the two territories, and the leaders of four First Nations groups.
It did not, however, pass public scrutiny, despite multi-partisan support.

Bipartisan agreement may be necessary for the passage of referenda and plebiscites, but it is not sufficient (Thompson 1997, 92). As Senator John Faulkner wrote in 2003, “While a minimum requirement for constitutional change will be agreement on any referendum question by both the Government and the Opposition, I am only too aware that any such agreement is no guarantee of success” (2003, 6).

Politicians – motives

It cannot be assumed that when proposals are put to referendum, the sole aim is to achieve constitutional change. According to Butler and Ranney, referenda can limit the power of parliamentarians, and prevent them acting as representatives, but they can also be used by parliamentarians to avoid making decisions; parliamentarians will use referenda when it suits them to do so, even if they have previously argued against referenda using a Burkean defence (1994, 260). According to Galligan, motives for initiating referenda include “party ideology, executive whimsy, leadership vision, political posturing, symbolic politics, national need or a clever government strategy to embarrass the opposition parties” (1995, 114). Canadian analysts concluded that there were at least seven motives for holding referenda and plebiscites, namely: legitimating contentious proposals; de-legitimating proposals to block reforms; justifying a change in policy or a failure to deliver on a promise; resolving intra-party differences; showing that another’s claim of majority support is wrong (‘Calling a bluff’); showing that one’s own claim of majority support is right; and ‘dodging a bullet’ by dissociating an issue from the party’s public profile (Johnston et al. 1996, 254-255).

This wide range of motives for putting proposals to a public vote highlights the need for caution when using the words ‘success’ and ‘failure’ to describe outcomes. If the motive is legitimation, justification, or demonstrating majority support, then a majority Yes vote is a success. If the motive is de-legitimation or calling a bluff, then from the initiators’ point of view, a public vote does not ‘succeed’ unless it fails to pass. If the aim is to resolve intra-party differences, or to dissociate an issue from a party, then the outcome matters little. What matters is that the vote serves as a circuit breaker for party room disagreements, or it deflects attention away from a party’s policy.

The Australian republic proposal was put to constituents by the Coalition government despite the prime minister’s support for the status quo, and deep divisions
within the ranks of Coalition MPs about whether or not Australia should become a republic. When the 1999 referenda did not pass, it may nevertheless have satisfied four motives. First, the subject was de-legitimised – it could be claimed now that the people had said, in a democratic process, that they did not want a republic. Second, while intra-party differences might continue in private, publicly there was closure. Third, given that a Labor government initiated the republic debate in 1993, the government could claim to have called the opposition’s bluff. Finally, the Coalition government certainly dodged a bullet as public rejection of the republic model reduced the risk that the government would lose electoral support because of its anti-republic stance. To the extent that these arguments are valid, the 1999 referendum was a success, at least for the government.

Motives for putting the Charlottetown Accord to the vote were diverse across the federal and provincial tiers. According to Johnston et al., “the sequence from Meech Lake to Charlottetown embodied every tactical move ever seen in referendum history, in Canada or elsewhere” (1996, 258). This is not surprising given the involvement of all tiers of government, interest groups, and the public in the long journey from the demise of the Meech Lake Accord in 1990 to the Charlottetown plebiscite in 1992. A narrower focus suggests the federal government’s aim was legitimation, and dodging a bullet.

The Mulroney Conservative government’s Meech Lake initiative lapsed when provincial assemblies did not ratify it in time, which generated considerable public frustration and anger. If the Charlottetown Accord met a similar fate, then the same Conservative government – already unpopular – would pay a high price for any public perception that it had again failed to resolve the constitutional debate through inter-government negotiations. The provinces had set the precedent for public ratification of constitutional issues: Québec put the question of secession to electors in 1980, and announced in 1991 that another vote would be held in 1992; British Columbia legislated for public ratification in 1990 and Alberta and Newfoundland followed suit in June 1992 (Hurley 1996, 119-120, 160). As Johnston et al. put it, “Would the other 75 percent [of the Canadian electorate] accept not getting to vote on it as well?” (1996, 259). The Federal Referendum Act, which provided for national and provincial plebiscites on constitutional change, was adopted on 23 June 1992.

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If constituents approved the Accord, then the government could claim success. If they did not, then the bullet was avoided because constituents, rather than politicians, had taken that decision. Further, if Charlottetown was an unwise reform, then “Voters may even have saved the political class from itself ... voters cut the constitutional Gordian knot” (Johnston et al. 1996, 4).

Constituents – knowledge

It is argued frequently that Australian proposals are not ratified because constituents are uninformed about the constitution (Bennett and Brennan 1999, 3, 28). Research in the 1990s did show that 87% of 2,504 respondents knew little or nothing about the constitution (Civics Expert Group 1994, corrigendum 143), but a limited knowledge of the constitution does not necessarily mean that voters are uninformed about specific proposals. The Australian Electoral Commission found that electors who had read the official Yes/No case statements for the 1988 referenda were more likely to vote No (Hughes 1994, 162-164). Bennett and Brennan found that referenda results indicated electors were discriminating, and consistent in their judgements over time (1999, 19-20). They concluded “it may be simplistic – as well as patronising – to claim that most voters do not understand what they are passing judgment upon”. Galligan disagreed with “elites” who argue that the electorate is “ignorant or stupid for rejecting referendum proposals” and chose instead to take a position that “respects the will of the people and argues that the pattern of mainly negative outcomes is far from unreasonable” (Galligan 1995, 111).

It was nevertheless claimed that the republic proposal was not ratified because voters did not, could not, or would not appreciate the merits of the ‘bipartisan’ republic model. Joan Kirner, past Premier of Victoria, attributed the outcome of the republic referendum in part to the fact that voters knew little about the constitution (Kirner 2000). Malcolm Turnbull said, as chairman of the Australian Republican Movement, “there is no point kidding ourselves – the biggest differentiator of yes or no was knowledge” (as cited by McGregor 1999c). George Williams claimed that the electorate’s disengagement and ignorance were demonstrated by the success of two arguments: ‘Don’t vote for a politician’s republic’, and ‘Don’t know? – vote no’ (1999, 15). A Cameron poll in 1999 concluded that the tendency to vote Yes increased with formal education and income (in Steketee 1999, 13-14).
By contrast, Irving questioned claims that the republic proposal was not ratified for want of knowledge in the electorate, as follows.

The value of such a finding remains to be explored, since it does not in itself reveal why people with lower levels of education reject constitutional change of the type proposed in the 1999 republic referendum. And it leaves unexplained the preamble result, with, for example, both ACT electorates, where high concentrations of tertiary educated voters are to be found, rejecting the preamble (Irving 2007, 113).

George Winterton – a member of the Republic Advisory Committee and delegate to the 1998 Convention – concluded against the knowledge argument, as follows.

There is little evidence that voter ignorance, regarding either the Australian government in general or the details of the model in particular, contributed substantially to the referendum outcome. The difference in voting patterns between federal electorates can be attributed more plausibly to the level of alienation from the political and economic power structures of Australian society than to levels of education (2001).

Shanahan made a similar point soon after the vote, and went further to pinpoint the primary source for alienation:

The fault in blaming the lack of education for voters saying no is that, although it has a correlation to the electorates, it is not the dominant factor. Rather than being the cause for a no vote, it is just an indicator for the real reason ... Job security, income and feeling part of the political process are the indicators to look for, not some misplaced view that Australia would be a republic overnight if everyone was given a university degree (Shanahan 1999a).

McAllister’s quantitative analysis found that while Yes voters were more likely to have tertiary qualifications and to know more about the referendum content, knowledge and education were less reliable predictors of voting intentions than were attitudes to Australia’s links with Britain, personal evaluations of the merits of the republic proposal, and interventions by the main interest group leaders (2001, 263).

My case study of 1998 Convention failed to confirm claims that knowledge was, especially for those who supported direct election of a president, a predictor for republic preferences (Kreibig 1998). Knowledge was measured as years of formal education, and years elected to local, state, or federal government (Kreibig 1998, 24). Biographies were compiled for the delegates, and constitutional preferences were identified from the formal convention ballots, the convention debates, and other sources. Analysis of biographical data and constitutional preferences showed that constitutional monarchists had about the same amount of post-secondary education as republicans (4.0 years and 4.2 years respectively), and they had more political experience (8 years and 6 years respectively); constitutional monarchists were more likely to have political experience in local government, while republicans were more likely to have political experience in state government (1998, 50, 57-58). Compared to republicans who opposed direct election, delegates who favoured it had more formal education, and slightly more formal
political experience (1998, 51). Overall, this study showed that there was no statistically significant association between knowledge and constitutional preferences.

Canadian studies provide little support for the argument that a lack of education and knowledge determined their negative outcome. Research conducted soon after the plebiscite found that “knowledge did not make a voter happier with the Charlottetown Accord” (Johnston, Blais, Gidengil et al. 1993, 39). A more extensive analysis of the same data, published three years later, reported that university educated voters were only slightly more likely to vote Yes, and that they were only a little more knowledgeable about the Accord; a lack of knowledge did not cause the majority No vote, instead “poorly informed voters just dragged an overall negative result further down” (Johnston et al. 1996, 280-284). Finally, LeDuc and Pammett’s analysis using different data found that support for the Accord was higher for groups at the bottom and top of the education scale (1995, 24-26).

Opinion is divided about whether electors demonstrate “general awareness and good sense ... or ignorance” (Bennett and Brennan 1999, 21). However, the evidence examined in this section supports McMillan’s claim that when initiatives do not pass, proponents are likely to cite ignorance and apathy, while opponents are likely to praise the electorate’s wisdom (1991, 71).

Vocal minorities and interveners

It is claimed that a small but active minority can defeat reforms. Machiavelli warned long ago:

> Those who by valorous ways become princes, like these men, acquire a principality with difficulty, but they keep it with ease. The difficulties they have in acquiring it arise in part from the new rules and methods which they are forced to introduce to establish their government and its security. And it ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new. This coolness arises partly from fear of the opponents, who have the laws on their side, and partly from the incredulity of men, who do not readily believe in new things until they have had a long experience of them. Thus it happens that whenever those who are hostile have the opportunity to attack they do it like partisans, whilst the others defend lukewarmly, in such wise that the prince is endangered along with them (Machiavelli 1993 [1513], 43-44 ch. 6).

Altman, an Australian analyst, concluded “in any liberal political system it is always easier for entrenched minorities to prevent change than it is for even larger majorities to bring about change” (1979, 105). McMillan claimed that even when Australian proposals have bipartisan support, opposition was to be expected from interest groups that are likely to use the “weapon ... of exaggeration and distortion” in their campaigns
The republic and Charlottetown campaigns were contested fiercely. In Australia, opinion was so divided that all of the major interest groups were minorities. Interest groups included the Australian Republican Movement which supported a Yes vote, Australians for Constitutional Monarchy and the Australian Monarchist League which opposed a republic of any kind, and Real Republic, A Just Republic, the Ted Mack group, and Clem Jones’ Queensland Constitutional Republic Team which would not support a republic unless the president was directly elected.

According to McAllister, the leaders of the two main interest groups – Malcolm Turnbull for the ARM and Kerry Jones for ACM – exerted more influence on voters than did the prime minister or leader of the opposition. According to Irving, however, it may emerge from analysis of the 1999 referendum campaign that the fear of appearing grand and ‘visionary’, and the resulting decision to promote only a minimalist republican model, itself contributed significantly to failure. Why change a Constitution when there appears to be no compelling reason (2007, 115)

She concluded that the campaign itself was “the most likely single explanation” for the negative outcome of the 1999 referendum (2007, 113). She cited as evidence successful referenda that were visionary – the 1898-1900 referenda on federation, and the 1967 referendum on Aboriginal and Torres Strait Islanders (Irving 2007, 115).

In Canada, active and vocal opponents included political parties such as Reform (renamed Canadian Alliance in 2000), interest groups such as the Assembly of First Nations, and prominent individuals. Best known for its impact is Pierre Trudeau’s ‘Maison Egg Roll’ speech. On October 1, about three weeks before the vote, Mr Trudeau delivered a scathing attack on the Charlottetown Accord, arguing that it would weaken the federal government, dilute individual Charter rights, hurt minorities, and increase provincial inequalities (Trudeau 1992, 14, 16-19, 25-28, 32-33). According to Johnson et al., surveys and polls show that the impact was immediate, strong, and negative: over the following five days, knowledge of Trudeau’s opposition increased by about 20% to 70%, and support for the Accord dropped in parallel to about 40% (1996, 127-129). Henry’s analysis of Angus Reid polling in October 1992 shows that other political leaders were also influential, not always as intended (1993, 6-8). Pollsters asked 3,577 people:

For each of the following [12] individuals, I’d like to know whether their overall performance, or the positions they have put forward, during the course of the referendum campaign has made you: more likely to want to vote ‘Yes’, more likely to want to vote ‘No’, or have they had no impact on you at all (in Henry 1993, 6).

In Newfoundland, 58% said that Clyde Wells influenced them to vote Yes, but in British
Columbia, 59% said Mike Harcourt had no effect. Québec respondents were influenced to vote No by Jacques Parizeau and Lucien Bouchard (43% and 37% respectively), and they were influenced to vote Yes by Robert Bourassa (26%). Nationally, the scores for “No Impact” were 50% or more for Preston Manning, Audrey McLaughlin, Jean Chrétien, Ovide Mercredi, and Joe Clark. Nationally, 40% said Pierre Trudeau inclined them to vote No, and 34% said Brian Mulroney inclined them to vote No, which was not his intention.

Proposals for comprehensive constitutional reform need to weather the storm of a robust debate, which will inevitably provide opportunities for vocal minorities and interveners to air their views – not always with the intended effect.

Process

The process of formal constitutional change includes the techniques or mechanisms used to initiate reforms, negotiate the detailed content, and ratify the proposals for reform. The last stage tends to attract the most attention in Australia because it is then that analysts seek to explain the outcomes.

In Australia, Lumb attributed the referenda record to “the rigidity of the amendment requirements” (1986, 753), and Aitkin claimed that it was too difficult to win double-majority support (1978, 129-130). In Canada, Cairns argued that the practice of seeking federal, provincial, and public approval for formal constitutional change made the process “almost unworkable” (1997, 48). Yet lowering the threshold for enactment would not make a great difference. For Australia, if majorities were required nationally and in three states rather than four, the success rate for past referenda would only increase from 19% to 26% (Bennett and Brennan 1999, 18). If referenda passed by national majority alone, the success rate would increase a further 5%, from 19% to 31% (Thompson 1997, 92). The republic and preamble referenda would not pass in either case. For Canada, the bar would need to be set very low for the Charlottetown Accord to pass public scrutiny – it was approved by four of ten provinces and one of the two territories. If Canada dispensed with the need for public approval, history shows that it is not necessarily easy to obtain the consent of first ministers (the prime minister and premiers), or their provincial and territorial legislatures.

Thresholds for ratification are not likely to change in Australia or Canada. An Australian proposal to lower the threshold from four to three states was put to referendum in 1974, but it did not pass. The public role in Canada is not likely to
change because some provinces require a public vote, and because the Accord process raised expectations about public involvement in future. Whilst amendments affecting single provinces will continue to proceed by bilateral government agreement, it is likely that future proposals to change the Charter or national institutions would be put to a public vote. Each time proposals for formal constitutional change are put to constituents, parliaments are highly likely to attempt to influence their preferences.

The Australian federal parliament has used a variety of mechanisms to engage the public in constitutional debates. Information was distributed to households for most referenda held since 1913 (HSCLCA 1997, 59; Saunders 2000, 12). Governments and parliaments also instigated commissions of inquiry, parliamentary committees, conferences, and conventions that included federal and state parliamentarians, and non-parliamentarians. While these activities could generate considerable public interest, this did not necessarily translate to success at the polls. For instance, the 1985-88 Constitutional Commission received 4,000 “written and oral submissions” (Warhurst 1995, 42-43), yet the four referenda questions put in 1988 did not pass. The connection between the Commission’s work and the questions put was, however, tenuous (McMillan 1991, 68): the subjects were the same, but the amendments were different.

McMillan, Evans and Storey’s review of methods used in Australia concluded in favour of a constitutional convention because the method was supported by parliamentarians and the public, it encouraged community interest, “provided a consensus-creating environment”, and was associated with a higher success rate at referenda (1983, 345-371). These authors argued that for all its flaws, “no other method is likely to be more successful in initiating [Australian] proposals” (1983, 354). They recommended that up to 112 delegates representing federal, state, and local government, and electors (71% appointed and 21% directly elected), should meet once or twice a year for five years, and the federal parliament should put to referendum any proposal supported by two-thirds of the delegates (1983, 369-370).

The 1998 Australian Constitutional Convention satisfied some of McMillan et al.’s requirements. While there were more delegates than recommended and a higher portion was directly elected, delegates did represent federal, state and territory parliaments, local government (indirectly), community interests, and the electorate. The convention sat for two weeks rather than five years, but the agenda was limited also. Extensive media coverage appeared to stimulate public interest, as evidenced by 1,058
official submissions. An overwhelming majority of delegates supported a republic in principle, and a near majority supported the model that was put to referendum, but the republic referendum was lost in all states, and nationally.

Saunders criticised the convention on a number of fronts (1998, 10-11). She argued that the agenda and hasty preparations for the election and the convention generated cynicism and suspicion, as did the non-compulsory postal ballot used to elect half the delegates, and the lack of “transparent criteria” for choosing community representatives. Further, the speed with which the convention was organised did not allow for adequate preparation. Some delegates resisted the restricted agenda, and claimed that there was insufficient notice of procedural matters (PM&C 1998b, and pers. comm. 1998).

The Canadian government sponsored many opportunities for public participation in the Charlottetown debate, largely in response to arguments that the Meech Lake Accord lapsed in 1990 for want of meaningful public involvement (Brock 1991; Russell 1993a, 140-145, 156-157; Watts 1993, 9-10; Hurley 1996, 113-114; Cairns 1997, 60). These included four parliamentary inquiries and committees, and five constituent assemblies. This generated “massive public input … [it was] a veritable orgy of participation” (Cairns 1997, 61); public participation was “unprecedented … [and greater than] in any country during this century” (Watts 1993, 5). According to Hurley, the period from June 23, 1990, to March 12, 1992, was marked by the most extensive and multiple consultations of the Canadian People ever undertaken. … The referendum expanded the process of constitutional change to the broadest level of public participation ever in Canadian history (1996, 123, 130-131, author’s emphasis).

Even so, constituents did not ratify the Accord. According to Brock, the Charlottetown processes were more open and inclusive than for Meech Lake, but there was too much consultation, and governments were not responsive to public input (1993, 30, 32).

The impact of the process of formal constitutional change on the outcome does not attract a great deal of attention in the literature, but there are exceptions. In 1991, just after Canada’s Meech Lake Accord lapsed, Alan Cairns wrote: “Our recent constitutional history confirms that constitutional process and constitutional outcome are closely linked” (1991a, 15). Soon after the Charlottetown Accord plebiscite in 1992, Johnston et al. asked 2,533 Canadians how satisfied they were with the Charlottetown process. My analysis of the data from that survey question and the plebiscite results by province showed a positive correlation between the two variables ($r=0.84$), and that satisfaction with the process and approval of the Accord tended to decrease east-to-west
across the nation. Both findings are illustrated in figure 1.1 below. The $R^2$ value adjacent to each trendline indicates its reliability. Given that an $R^2$ value of 1.0 indicates perfect reliability, the east-west vote trend is much more reliable than the east-west process trend ($R^2=0.68$ and $R^2=0.49$ respectively).

Satisfaction with the process ranged from 32% in Québec to 67% in Newfoundland, while the Yes vote ranged from 79% for Prince Edward Island to 32% for British Columbia. The difference between the two measures ranged from 1% or less for Manitoba and Alberta to 19% for Prince Edward Island.

![Charlottetown Accord, satisfaction with the process, and the Yes vote](image)

**Figure 1.1: Satisfaction with the Charlottetown process and support for the Accord**

(Source: analysis of data from Johnston, Blais, Gidengil et al. 1992-93; Elections Canada 1997 3-4; Directeur Général des Élections du Québec 1992)

Correlation between the two variables does not necessarily mean that one caused the other, but it does justify further examination of an apparent link between process and outcome.

**Summary**

While the lack of bi-partisan support may partly explain why the Australian

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7 I am grateful to Neil Nevitte and Richard Johnston for helping me to access and use this data.
republic proposal was not ratified, a majority of Canadians who turned out for the plebiscite on the Charlottetown Accord voted No, despite multi-partisan support. More important in both cases was the content of the proposals. A majority of Australians opposed the republic model that was put to referendum either because they preferred constitutional monarchy, or because they wanted a republican president to be directly elected. The Canadian proposal was so comprehensive that it was not difficult for voters to find something they were unhappy about. Prominent among these points of disagreement were the guarantee to Québec of 25% of the house of commons seats regardless of its population, the failure to deliver a directly elected senate, dissatisfaction with an equal senate, and provisions made to accommodate Québec and the Aboriginal peoples. Vocal minorities and interveners were active in both campaigns, but as noted earlier, this is to be expected in a democratic community. The debate continues about whether electors knew enough about the proposals.

The lack of success in achieving formal constitutional change is rarely attributed to the process used to engage constituents in the negotiation stage. This may be because analysts believe that amending constitutions is necessarily an “elite” process. That would explain why the subject of process is not a strong theme in the literature. Improving the process could, however, improve public knowledge of the proposals, mediate the impact of vocal minorities and interveners, highlight areas of disagreement in time to modify or abandon proposals before the ratification stage, and improve the amendment rate.

THE IMPORTANCE OF PROCESS

The issue of process is worth investigating because if the same processes are used when constitutional disagreements recur, then this invites the same negative outcomes. Many Australians continue to prefer a republic in principle to constitutional monarchy, and this change cannot be achieved without formal constitutional change. Issues yet to be resolved in Canada include the status of Québec and the Aboriginal peoples in the federation, federal institutions, financial relations, and the values which unite Canadians (Watts 1993, 4, 12-13). According to Cook, the “Canadian leadership still has the assignment to present Canadians with a proper constitution” (1994, 23).

In their empirical study of constitutional change processes in Australia, McMillan et al. argued that constitutional change required a “popular and political momentum for change”, an effective initiating mechanism, and broad agreement in favour of change.
(McMillan et al. 1983, 374). Warhurst added “It is not clear whether each of these preconditions is equally necessary nor how the three relate to one another” (1995, 48). The present research holds that an effective mechanism for negotiating formal constitutional change – one that includes the public – is required to bridge the gap between initiation and ratification.

It is not necessarily a problem that a great many initiatives for change are not put to voters. This might demonstrate that initiation and negotiation processes filtered out reform proposals that would not be ratified. A problem is indicated, however, when initiatives are rejected during ratification. At the very least, this involves the expenditure of considerable effort, time, and money for little return. As Saunders pointed out:

> While views inevitably differ on the merits of the proposals that have not been approved, the referendum record represents a failure, if only in its waste of money and time. Even more seriously, the experience has created a defeatist national attitude towards constitutional review and the possibility of constitutional change (2000, 5).

Unproductive debates can also accentuate or even create divisions; for example, an Angus Reid poll in Canada on 15 October 1992 reported that half of the 3,477 respondents said the plebiscite accentuated “regional and linguistic differences” (in Henry 1993, 11). Further, when politicians agree about major constitutional change and the electorate does not ratify it, this signals that representatives and constituents disagree about the foundation rules. According to Saunders, “In a system of representative government, the existence of such a gap merits inquiry and appropriate remedial action”; the solution is not to do away with public involvement in ratifying constitutional change, but to find better ways for parliaments and electors to work together (2000, 25, 4).

Galligan highlighted the “disjuncture between initiation and ratification” in Australia (1995, 112). Referenda are “controlled” in that the government of the day decides whether and when referenda are held, and content is “pro-hegemonic” in that proposed amendments are likely to serve the interests of the government of the day (Galligan 1995, 113-114, citing Lijphart 1984). Warhurst claimed that governments and parliaments would continue to dominate constitutional reform processes because:

> Constitution making and constitution changing is at heart an elite rather than a mass activity, driven by the same forces – Commonwealth and state governments and political parties – as drive other policies in our society (1995, 48).

Initiation and negotiation may well be an “elite process”, but ratification in Australia is
“a mass activity” because s 128 of the constitution allows voters to veto formal constitutional change. The Canadian constitution does not empower its voters in this way, but the precedent has been set for mass participation in debating and approving major amendments. As Saunders put it, the task now is to find ways to forge a closer partnership between parliamentarians and voters.

The Spicer Commission concluded after conducting extensive public consultations about Canada’s constitution that governments needed to develop new ways to consult constituents, and politicians needed to “greatly increase grassroots consultations in developing ideas, policies and programs” (1991d, 13). Soon after attempts to amend Canada’s constitution through the Meech Lake Accord lapsed in June 1990, Simeon concluded:

> I do believe that the constitutional debate that is now upon us will no longer focus on incremental change within the existing federal system. ... We must consider all options. We must break the mould. We must seek new ways of identifying issues and new language for discussing them (Simeon 1991, 1).

At about the same time, Cairns concluded that public participation in the Canadian debates had to involve more than tallying the preferences of active interest group members because that “does not satisfy the representational requirements of a legitimate process” (1991a, 28-29). Reflecting some years later on decades of struggle to amend the Canadian constitution, he concluded:

> We have travelled from the elitist practices of executive federalism in constitutional matters to an awkward relationship between intergovernmental bargaining and public participation via referendum ... We have not, however, found a way to bring these two processes into a workable relationship that can generate constitutional change... *We keep learning what process to avoid* (Cairns 1997, 51, 61, emphasis added).

Across the Pacific, the Constitutional Centenary Foundation concluded: “the explanation may lie in the way in which proposals for change are developed and explained, rather than in the amending procedure itself” (CCF circa 1996, 9).

This raises the question of how parliamentarians and constituents should debate constitutional change in future (Saunders 1989, 32; Brock 1991; Cairns 1991a, 27, 28-29; Russell 1991b, 68-69; Saunders 1994, 56, 60, 63; Warhurst 1995, 40, 45, 48; CCF circa 1996, 9; Cairns 1997, 51; Resnick 1997, 120; Winterton 1998b, 107; Saunders 1998, 10-11; McKenna 2000, 11; Saunders 2000, 28). At the end of the nineteenth century in Australia, delegates representing disparate and competitive colonies agreed at an elected constituent assembly to unite under a federal constitution. Saunders concluded:
It is not yet clear what the best mechanism might be. Our pre-federation history suggests a directly
elected convention. Post-federation, every other form of constitutional review has been tried and
failed. On the other hand, an elected convention would be a major enterprise: even more difficult,
probably, than before (1994).

In 1997, Resnick concluded:

Whether we like it or not, there is a transparency to constitutional politics [in Canada] that was not
there before. The genie has been let out of the bottle: there are attentive publics on all sides and
constitutional hawks who will not allow any simple compromise to slip through unopposed. …
After the failures of constitutional elitism and intergovernmental negotiation during recent decades,
we may need a radically different way of addressing our problems. Any viable approach would
need to encompass the democratic legitimacy that Alan Cairns referred to in his chapter, or what I
am tempted to call the more Rousseauean notion of popular sovereignty that has entered Canadian
political life ever since the Quebec referendum of 1980. … The most common of these is some
form of constitutional or constituent assembly, usually elected by the population as a whole, with a
specific mandate to come up with a new constitution (1997, 114, 120).

Where Resnick wrote that Canada needed to adopt processes that had “democratic
legitimacy”, Russell wrote that replacing executive federalism with more public
participation in Canadian constitutional debates was “a democratic mutation”:

during the constitutional politics of the 1980s, we Canadians made our predicament more
intractable by undergoing a democratic mutation in our constitutional culture. This has caused us
to repudiate the elitist nature of the traditional negotiating process used by the first ministers to
work the rigid rules built into the Constitution Act, 1982. Eager as we Canadians now are to do our
constitutional politics democratically we must recognize that, given our deep divisions, negotiating
a popular accord will be ever so much more difficult than rejecting an elitist accord (Russell
1991b, 141-142).

Immediately before the Australian assembly convened in 1998, Winterton (an appointed
delegate) concluded:

Australia has tried government-appointed commissions, parliamentary committees and
parliamentary Conventions, all to no avail in the sense of actual constitutional alteration. The
tripartite February 1998 Convention may well represent, to borrow President Lincoln’s aphorism in
his Annual Message to Congress of 1 December 1862, the ‘last best hope’ for Australian

However, the 1999 republic referendum did not pass even though a constituent assembly
debated proposals for a republic in 1998, and Canada’s Charlottetown Accord did not
pass when it was put to a public vote in 1992, even though five constituent assemblies
debated federal proposals for constitutional change eight months earlier.

This thesis evaluates whether including constituents directly in negotiating
proposals for formal constitutional change at constituent assemblies could improve the
rate of formal change in Australia and Canada. It does so by a detailed examination of
the 1998 Australian Constitutional Convention and the 1992 Renewal of Canada
Conferences. The next chapter reviews opinions about the value of constituent
assemblies, and defines key terms in a testable form.
CHAPTER TWO – CONSTITUENT ASSEMBLIES

Governments dominated the process of formal constitutional change in Australia and Canada for most of the twentieth century, and they experienced considerable difficulty in achieving it. Some analysts argue that governments need to adopt a more inclusive process for debating constitutional change. In the 1990s, Australian and Canadian governments initiated constituent assemblies to debate major reforms, but even then, electors did not ratify the amendments that were put to them. At the end of the first day of Canada’s 1992 assembly, Joe Clark (federal minister for constitutional affairs) said “If conferences could settle constitutions, we would have solved all our problems long ago” (as cited by Flaherty 1992).

What lessons can be drawn from the Australian and Canadian constituent assemblies? Was it a foregone conclusion that the assembly method would not succeed, or was something lacking in the execution? Should Australia and Canada try to achieve constitutional change through constituent assemblies again, or should they not? This chapter reviews opinions about the value of constituent assemblies as a means to achieving constitutional change. Later chapters examine the Australian and Canadian assemblies and evaluate them using four questions that arise from this chapter.

It was difficult to review the literature on constituent assemblies because there is no consensus about what the term ‘constituent assembly’ means (Fafard and Reid 1991, v), and because there is a limited amount of theoretical literature on the subject (Elster 1995, 364). While it is easy to locate case studies for assemblies across time and space, for example, France 1789-91, Germany 1848, 1919, and 1949, Australia 1897-98, India 1946-49, Newfoundland 1946-47, Namibia 1989-90, South Africa 1994, Australia 1998, and Venezuela 1999, it is difficult to find literature about constituent assemblies per se.

CONSTITUENT ASSEMBLIES DEFINED

According to McMenemy – a Canadian academic – a constituent assembly is “[a] group of people with the power to establish or amend a constitution or at least recommend changes to authoritative bodies” (2001, 64, emphasis added). Even though this definition is broad enough to include any group authorised by government to recommend constitutional change, McMenemy wrote that the Charlottetown Accord process did not include a constituent assembly. In doing so, he did not recognise 19 groups convened by Canadian governments between 1990 and 1992 to debate proposals for constitutional change, and the five Renewal of Canada conferences that are the
subject of this thesis.

A decade earlier, the Canadian Federal-Provincial Relations Office defined constituent assemblies more precisely as:

specially selected bodies representative of society (in the case of unitary societies) or the constituent units of a federation chosen to meet on an exceptional basis to devise a full constitution or amendments to the constitution or to approve a constitution or a constitutional amendment (1990, 18, emphasis added).

This definition is more precise in that it specifies assemblies are representative, special-purpose groups. The definition would exclude, for example, legislatures making constitutions alone without a specific mandate because they are not “specially selected”, and groups like commissions and committees that are too small to be representative, except in the Burkan sense. This definition lacks precision because by including the phrase “or to approve” it does not distinguish a plebiscite or a referendum where representative constituents, selected through franchise rules, meet “on an exceptional basis” to “approve a constitution or a constitutional amendment”. The authors applied the definition loosely when they wrote that Canada’s three federation conferences “resembled constituent assemblies”, and the Australian Constitutional Convention 1973-1985 was an “informal constituent assembly”, because the delegates to these meetings were not representative (Federal-Provincial Relations Office 1990, 19).

A year later in Canada, the Beaudoin-Edwards Special Joint Committee of the Senate and the House of Commons defined constituent assemblies broadly as “bodies convened for the purpose of writing constitutions or, much less commonly, of developing amendments to existing constitutions” (Beaudoin-Edwards SJC 1991, 43-51). The committee noted that people making submissions tended to distinguish between “constituent assemblies” comprising members of the public, and “constitutional conventions” comprising parliamentarians.

Patrick Fafard and Darrel Reid’s analysis of cases from the 1700s to the early 1990s distinguished between groups that make constitutions by how delegates were chosen, and sometimes by the nature of their work (1991, 5-6, 11-17). This yielded five types of constituent assemblies:

1. “directly-elected constituent assembly” elected by the public, often to make new constitutions (Newfoundland 1946 and Namibia 1989-90, and the directly elected Australian assembly of 1897-98 which the authors classify in error as type 2);
2. “indirectly-elected constituent assembly” or “constitutional convention” elected by legislatures to make or amend constitutions (USA 1787, Australia 1891, India 1946-49, Pakistan 1947-56, Germany 1948, and Australia 1973-85);

3. “constitutional conference” selected in a less formal way to represent governments and parties in discussions, often as part of a de-colonisation process (Canada 1864-66, West Indies 1947-57, Malaya 1948, Rhodesia and Nyasaland 1951-53, Nigeria 1953, 1954, 1957, and 1958, and Malaysia 1963);

4. “representative legislative committee” of legislators elected by legislatures (Switzerland 1848); and


The authors note that directly elected constituent assemblies (type 1) are “extremely rare in practice” (Fafard and Reid 1991, 44). By contrast, the definitions provided for types 3 and 5 allow the inclusion of any group, provided it is appointed by government.

Jon Elster (2006, 182-183) distinguished four types of assemblies according to whether they have a mandate, and who the delegates are:

1. “constitutional conventions” elected specifically to write constitutions, for example, USA 1787, France 1791, Norway 1814, India 1946, and Germany 1949;

2. “mandated constituent legislatures”, which were elected to govern and to write a constitution, for example, France 1945;

3. “self-created constituent legislatures”, which were elected to govern, then took it upon themselves to produce a constitution, for example, Hungary 1989-90; and

4. “self-created legislating assemblies” that were elected to write constitutions, then assumed for themselves a legislative role, for example, Frankfurt 1848, France 1871, Columbia 1991, and Venezuela 1999.

Types 1, 2, and 4 have a mandate to write a constitution, but type 3 does not. In all types except the first, delegates are legislators, or they assume legislative roles.

According to Elster, constitutions are usually made by legislatures because it is the “path of least resistance” (2006, 197). The task of making a constitution is assigned to the legislature because it exists, or it is about to be created.

There is no agreed definition for constituent assemblies, in part because authors use the word ‘constituent’ differently. For some authors, assemblies are constituent in
the sense that they are empowered by government to debate constitutional matters – they are empowered to constitute a nation. For other authors, assemblies are constituent in the sense that their delegates include constituents. The word constituent does indeed mean either a group “having the power to frame or alter a (political) constitution”, or “one of those who elects another as their representative; an elector” (SOED 1970).

For this thesis, a constituent assembly is: (1) a special-purpose group authorised by government to debate and recommend constitutional change; where (2) all delegates are empowered to act as equal participants at the assembly; and (3) at least half of the delegates are chosen by constituents, rather than by serving politicians.

The first criterion of the definition is not contentious because the assembly is not authorised to ratify formal constitutional change. It is important, nonetheless, because it distinguishes an assembly convened by government from conferences convened by others, for example the Australia Deliberates forum held 22-24 October 1999, just prior to the republic referendum. The second criterion is not contentious because the authors reviewed in this chapter probably assumed that assembly delegates would convene as equals. No author said otherwise.

The third criterion is important because it excludes groups of parliamentarians or non-parliamentarians appointed by governments or legislatures to debate formal constitutional change alone, because it affords a stronger role to constituents than is customary in Australia and Canada, and because most authors reviewed later in this chapter did not specify this condition – most are silent on how delegates would be selected for a constituent assembly. Further, three of the five definitions just reviewed do not specify a direct role for constituents in constituent assemblies (McMenemy 2001; Federal-Provincial Relations Office 1990; Beaudoin-Edwards SJC 1991). By contrast, Fafard and Reid allow that delegates can be:

1. elected directly by constituents;
2. elected indirectly by legislatures;
3. selected in a less formal way to represent governments and parties;
4. legislators elected directly by legislatures;
5. notables and experts appointed by governments or legislatures.

Elster allows that delegates can be elected to:

1. an assembly;
2. a mandated assembly which also governs;
3. a legislature which assumes the assembly role without a mandate; or
4. an assembly which assumes the role of the legislature without a mandate to do so.
For Elster, constituent assemblies are always elected.

Are the Australian Constitutional Convention and the Renewal of Canada Conferences constituent assemblies? Governments appointed half of the delegates to the Australian Constitutional Convention (40 parliamentarians and 36 community representatives), and constituents elected the other half directly. For the five Renewal of Canada Conferences, governments nominated certain parliamentarians as delegates, and specified criteria for selecting the other delegates. The final composition was, on average, 38% experts and interest groups, 35% ‘ordinary Canadians’ (including 17% selected randomly from a structured sample), and 27% parliamentarians.

Both cases are constituent assemblies according to Fafard and Reid’s definition: the Australian case is a combination of types 1, 3, and 5, and the Canadian case is a combination of types 3 and 5. Elster allows the inclusion of parliamentarians (type 2 or 3, depending on whether there was a mandate), and delegates directly elected by constituents (type 1), but appointed non-parliamentarians simply do not fit into any of his categories. This means that 76% of the Australian delegates meet Elster’s definition, but the figure for Canada is only 27%. Fitting the two case studies into Elster’s definition may turn on whether governments were mandated to negotiate formal constitutional change, to choose delegates, and to authorise others to choose delegates on their behalf.

Two prominent Canadian academics, self-described as constitutional conservatives, referred to the Renewal of Canada conferences using the phrase “mini constituent assemblies”, as follows.

*The mini constituent assemblies* were more conciliatory than the premiers and proved a success … [The delegates] were Canadians with an extraordinary interest in matters constitutional. Many came with well-formed positions but in a more accommodating mood than the citizens who had been invited in the previous round only to kick at the Meech accord from the outside. Discussing constitutional issues in close encounters with Canadians from all parts of the country is far more conducive to compromise than ‘spilling out your guts’ at the microphone before a home-town crowd. … The recommended changes [in the Beaudoin-Dobbie Special Joint Committee report], for the most part followed the general contours of the discussions in the five public conferences. That fact had the potential to give the committee’s recommendations an extra measure of political legitimacy (Russell 1993a, 177, 181, emphasis added).

*The conferences served almost as mini-constituent assemblies*. Despite their limitations, their contribution to the process exceeded all expectations. They helped to identify in broad terms the extent and limits of likely public support for the proposed changes. But perhaps their greatest contribution was to change the political climate of the country through the emphasis upon reconciliation and accommodation which emerged from these conferences (Watts 1999, 6, emphasis added).
Neither author said how he defined constituent assemblies, or what he meant by “mini”. According to these authors, the conferences were not “mini” in the contribution they made to the constitutional debates. They were, however, “mini” in terms of their brief duration – each conference convened for no more than three days – and four of the five conferences were “mini” because they considered only some of the proposals for constitutional change.

The cases selected for this thesis may be ‘mini constituent assemblies’, rather than constituent assemblies. They are nonetheless landmarks in the evolution of procedures for amending the constitution in Australia and Canada. For the first time since federation, parliamentarians, experts, and ‘ordinary citizens’ convened together to debate formal constitutional change. The questions raised in this chapter about the value of constituent assemblies are relevant to them. The answers may help to find a way for parliamentarians and constituents to work together to achieve formal constitutional change, without the need for a crisis.

**IDEALS VS. REALITIES**

Writing between 1995 and 2005 about constituent assemblies around the world, Elster reached a number of conclusions about ideal conditions for making constitutions. According to Elster, making constitutions is a process of collective decision-making governed by constraints and motives, in which preferences are aggregated, transformed, and sometimes misrepresented (1995, 373-393). Constraints are imposed “upstream” when initiators decide how delegates are selected, their roles, the agenda, time limits, and procedures. “Downstream”, delegates constrain themselves by anticipating the preferences of those who can veto their work. Motives that bear on the assembly include personal, group, and institutional interests, sudden or permanent passions, and reason. Constitutional preferences are aggregated individually or by delegation, and thresholds for consensus vary. While preferences may be transformed by discussion, they may also be misrepresented in bargaining and grandstanding, or by fear of military or civil consequences. In ideal conditions,

- constitutions are developed by special assemblies rather than legislatures (1995, 395; 1997, 137; 1998, 117; 2004; 2006, 182);
- legislatures do not ratify constitutions alone (1995, 395; 1997, 137; 1998, 117);
• experts play a minor role only (1995, 395; 1997, 138), “because solutions tend to be more stable if dictated by political rather than technical considerations, and lawyers are less likely to compromise to obtain consensus” (1995, 395);
• delegates are elected using a proportional representation system which produces more diverse representation of opinions and interests (1995, 395; 1997, 138; 1998, 117; 2004; 2006, 186-187);
• assemblies are unicameral (1995, 395; 1997, 138);
• assemblies convene for a limited time to circumvent “delaying tactics” (1995, 395; 1997, 138);
• assemblies convene away from cities and the military to limit the potential for violence and fear of it (1995, 395; 1997, 138; 1998, 117);
• allowance is made for both public and private discussions to limit grandstanding and bargaining respectively (1995, 395; 1997, 138; 1998, 117; 2004; 2006, 189-191); and
• to limit the effect of self-interest, new constitutions are not implemented immediately (1995, 395; 1997, 138; 1998, 117), but delayed for “say, twenty years ... creating an artificial veil of ignorance ... [to] force each framer to put himself ‘in everybody's place’” (1998, 117).

Elster conceded that it was not realistic to exclude legislatures or delay implementing a new constitution (1998, 117). It is also likely he would concede that not all conditions are relevant to Australia and Canada, such as the need to convene away from cities and the military to avoid actual or potential violence, but most of them are relevant.

Assemblies in Australia and Canada in the 1990s met many of Elster’s conditions. Special-purpose unicameral assemblies convened for a limited time, legislatures did not intend to ratify amendments alone, and the proceedings included public and private discussions. A proportional representation electoral system was used in Australia to select half the delegates, but none of the Canadian delegates was directly elected. The assemblies did not meet away from capitals and the military, but as noted earlier, Elster may not apply that condition to Australia and Canada. As to whether experts played a minor role, this would depend on how Elster defines “minor”. It can only be said that while experts were included, they were in a minority. Despite meeting many of Elster’s ideal conditions, the reforms that were debated at the Australian and Canadian assemblies were not implemented.
THE VALUE OF CONSTITUENT ASSEMBLIES

Literature that evaluates constituent assemblies per se is surprisingly sparse. According to Jon Elster, there is no “single book or even an article that considers the process of constitution-making, in its full generality, as a distinctive object of positive analysis” (1995, 364). Whilst there is no body of theoretical literature about constituent assemblies, there are some official reports that deal with the subject, and a sprinkling of evaluations by academics and participants. These works are discussed below, grouped together under three headings – advocates, commentary, and opponents.

Advocates

Edward McWhinney distinguished four vehicles for making or changing constitutions, noting that initiators know that outcomes are influenced by the methods they choose.

1. “Expert commissions” appointed by governments (for example, USSR 1977, Switzerland 1974, UK 1969-73, and Canada 1977-79), which could be structured to produce predictable results, and tended to be “politically suspect” (1981, 27-28).

2. Legislatures – a “flexible” method that was compatible with representative government, and appropriate for minor or technical amendments (1981, 29-31).

3. Inter-government agreement – common in federal systems such as Canada and Australia, and a method that could cause constitutional “rigidity” where legislatures or constituents did not ratify amendments (1981, 31-33).

4. Elected constituent assemblies, a method that “represents the culmination of the constitutional thinking of the Age of Enlightenment” (1981, 33).

McWhinney’s analysis of constituent assemblies reached three conclusions: the assembly method was to be recommended if there were broad consensus in the community on constitutional issues, or sufficient time to develop consensus; when assemblies convene during a crisis, it is easier for experts to judge the public mood and draft constitutions to match that context; and assemblies are likely to produce constitutions that are practical and durable (1981, 33-34).

Elster concluded that assemblies were better than legislatures convening alone, albeit “the superiority of conventions [constituent assemblies] is not blindingly overwhelming” (2006, 197). Writing between 1995 and 2006, he supported his conclusions with an evaluation of more than 20 cases across three centuries.
According to Elster, assemblies tend to be more representative and more deliberative, and they produce constitutions that are perceived to be more legitimate. They tend to be more representative of constituents’ interests than legislatures because they can be elected using a proportional representation system, which encourages diversity (2006, 186-187, 189). By contrast, legislatures are usually elected using a system like first-past-the-post because it is more likely to yield a majority government which is stable, and in this sense efficient. Assemblies tend to be more deliberative than legislatures because reason is more likely to prevail over private interests and passion, and parties and governments are less likely to dominate (2006, 185-186, 189-193). This is partly because legislatures are usually required to convene in public, whilst assemblies can use an ideal mix of public and private discussions, which limits the bargaining associated with private discussions, and the grandstanding and rhetoric associated with public discussions (2006, 189-191).

Finally, constitutions produced by assemblies are perceived to have greater legitimacy, and they tend to be more stable (2006, 185-186).

Elster acknowledged that a convention might compete for power with the legislature, as was the case in Columbia and Venezuela in the 1990s. In both cases, the president appointed the conventions, and with the president’s support the conventions assumed all or part of the legislature’s functions (Elster 2006, 184). Elster noted, however, that these cases do not provide a basis for concluding against constitutional conventions because “the flaws of the existing legislature were so obvious that steps were taken to bypass it”, and “the experience of two unstable Latin American countries” does not provide a basis for arguing against constitutional conventions (2006, 196-197).

In 1920, the Australian house of representatives debated a bill for a constituent assembly. Constituents had rejected proposals for conscription put to them at plebiscites in 1916 and 1917, and they rejected a proposal to increase federal powers at a referendum in 1919. In this context, Nationalist prime minister William (Billy) Hughes announced on 15 April 1920 that his government would introduce a bill for an elected constitutional convention to “frame a new Constitution”, in the current session (Australian House of Representatives 1920, 15 April 1920, 1235-1237).

The prime minister claimed electors were more likely to approve amendments proposed by an assembly than those proposed by parliament. At this early stage, there

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8 I recognise that legislatures and assemblies will have private discussions, regardless of rules or customs.
was more support than opposition from the Australian Labor Party (ALP) and the Australian Country Party (ACP). Members said that an assembly would be less partisan (Tudor ALP, Rogers Nationalist, Jowett ACP, and Bowden Nationalist, in Australian House of Representatives 1920, 15 April, 1237-1244). Jowett (ACP) elaborated the point, as follows.

The great cause of the lack of confidence shown by the people of Australia in proposed alterations submitted to referenda in the past has been the fact that each proposal has emanated from a party House and as the result of the party system … there is no means by which that confidence can be gained except by having the members of it elected directly by the people themselves (Australian House of Representatives 1920, 15 April, 1243).

Earle Page (ACP) agreed that electors were more likely to support recommendations made by an assembly, suggested that each state should be represented by 10 members, and urged the use of a proportional representation election system to improve representation (Australian House of Representatives 1920, 15 April 1920, 1237, 1240). By contrast, Blakely (ALP) opposed PR on the basis that it would reduce turnout because it was a more complicated system, and Fenton (ALP) argued that convening an assembly would incur unnecessary expense, and “display our incompetence to carry out the work for which we were elected” (Australian House of Representatives 1920, 15 April, 1241-1243, 1246).

Hughes did not table his bill until 22 November 1921 – 17 months later. The Constitutional Convention Bill proposed that the assembly convene for up to four months with the brief of “proposing such alteration to the constitution as it thinks fit”. The 111 delegates would comprise: 18 chosen by the federal parliament (12 house, 6 senate), three chosen by each of the six state parliaments, and 75 directly elected with the preferential system used for the house of representatives (representation by population, not PR). The assembly would report its recommendations to the Governor-General within four months of its first session, the Governor-General would present the report to parliament within 14 sitting days, and the prime minister would introduce legislation for amending the constitution within 15 sitting days of receiving the report.

The bill was read for a second time on 1 December 1921, nine days later, but there was virtually no debate (Australian House of Representatives 1921, 1 December, 13472-9). Hughes explained the need for constitutional change at length, the difficulties experienced in achieving it, and the general support of his proposal by federal and state parliamentarians, interest groups, and the press. He said he was prepared to make the assembly entirely elected, and to reduce the number of delegates to 75, but he would not
agree to equal representation of each state because it would be “undemocratic”.

On 5 December 1921, Earle Page (ACP) gave notice of amendments to the bill. He proposed that the assembly comprise 72 delegates – 12 elected for each of the six states using the Tasmanian PR system – and delegates would be paid three guineas per day, plus expenses. Two three-person committees would be appointed to advise the Governor-General on assembly costs, and on duplication of activities between the federal and state governments. Two days later, Hughes withdrew the bill, saying “There is no prospect of the bill being passed into law” (Australian House of Representatives 1921, 7 December, 14260). He said he would propose amendments in the next session, and consider suggestions made by others, but this did not occur. The sticking points appear to have been equal representation of the states, and using a PR electoral system. A year later the Nationalist Party lost its house majority, but continued to govern in coalition with ACP under the leadership of prime minister Stanley Bruce.

Robert Garran favoured constituent assemblies for Australia because voters were more likely to approve amendments proposed by them (1958, 206-12). Normatively, he argued that if constituents could veto constitutional change, then they should have a stronger role in formulating amendments.

In Australia, it is the people who put the seal of assent on the Constitution, and it seems to me that the best chance of getting assents to a systematic plan of amendment is to go back to the people (Garran 1958, 210).

Empirically, he concluded that the difficulty Australia experienced in achieving formal constitutional change was “the practice hitherto adopted in operating it”, not the demanding amending formula. He wrote:

I believe that a constitutional revision, framed and proposed to Parliament by a convention elected by the people for that purpose, would have a far better chance of acceptance at a subsequent referendum than any amendment framed and introduced by the Government of the day (1958, 211).

This conclusion was based on his experience at the federation assembly, and as an observer and sometime participant in attempts to change the constitution over the next fifty years. What was needed, according to Garran, was a method that reduced the opportunity for parties to manipulate the process for their own ends.

Garran recommended that the federal parliament legislate to convene a special-purpose “constituent convention”. He disputed the opinion allegedly propounded by Sir John Latham (as federal Attorney-General) that parliament did not have the power to do so, and cited a US precedent (Garran 1958, 209-212). Such legislation should include in advance the entire amending process, from the convention to the referendum, as was
done for federation. All delegates should be elected, and seats should be distributed to the states in proportion to the political composition of an hypothetical joint sitting of federal parliament. If the election process deterred qualified notables, then these persons could be appointed as non-voting experts. The convention’s brief should be flexible but limited so as not to “create unnecessary alarm”. Finally, the entire process should be publicised widely to generate public interest.

Garran argued that electors would believe assembly recommendations had greater “weight and authority” than those proposed by the government of the day because an assembly was less likely to be driven by party politics (1958, 212). When recommendations made by an assembly were put to referendum, they were less likely to be “shied at by electors” who did not support the government (Garran 1958, 209).

John Uhr (2002, 180-181, 189-190) agreed with Garran that if the public can veto constitutional change, they should be involved in negotiating it. He added that the assembly mechanism could overcome the “deception and misrepresentation” which was to be expected in constitutional debates, and cited as evidence for this point the 1998 Australian Constitutional Convention, the 1998 Women’s Constitutional Convention, and the 1999 Australia Deliberates conference.9 These arguments were part of a comprehensive plan to reform the way Australia attempts constitutional change.

Uhr proposed more funding for public information campaigns, a permanent “all-party [federal parliamentary] committee on referendums and constitutional change”, and a commission to oversee the process. The commission would be “broadly representative” of parties, public opinion, gender, and regions, and it would oversee funding, information campaigns, Yes/No committees, plebiscites, constituent assemblies, and referenda. While conceding that it was not possible to respond to every improper practice, he argued his reforms – including constituent assemblies – would help to limit the impact of misrepresentation on constitutional debates (2002, 194).

Cheryl Saunders also cited Garran, within her argument that an assembly was commendable for its potential to engage electors (1998). She had earlier suggested an elected convention to debate an Australian republic (1994, 63), and subsequently criticised the 1998 Convention process. Her criticism emphasised the inadequate amount of time allowed, constraints placed on the debate, and the way delegates were

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9 The Women’s Constitutional Convention, and the 1999 Australia Deliberates conference, were unofficial gatherings; they were not convened by government or parliament.
selected (1998, 10-11). Reflecting on her experience leading the Constitutional Centenary Foundation for ten years, Saunders argued that there were two ways in which Australia might become a republic: a respected and trusted leader could champion the cause, or the federal government could legislate a comprehensive plan (2002, 209-211). Such a plan could include progressive public consultation, perhaps through plebiscites and a constituent assembly. If an assembly were convened, then the entire process should be legislated in advance and costs should be controlled. Delegates should be representative of the population, and have the “flexibility to negotiate”. Sufficient time should be allocated not only for delegates to complete their immediate task, but to allow for interaction between delegates and voters, and for voters to develop a “sense of ownership” of the process (2002, 209-211, 214-215). Saunders’ recommendations turned on the propositions that the current system as driven by parliamentarians was “discredited”, and that the Australian public needed to know more about their constitution (2002, 208, 206).

The Constitutional Centenary Foundation argued for a constituent assembly in Australia mainly because it would generate more public interest (CCF 1993, 1). CCF suggested than an assembly should comprise 60-80 persons who were “broadly representative”: the assembly should reflect the geographic distribution of constituents, it should include indigenous peoples, and it should not include a “significant” number of serving politicians and active party members (CCF 1993, 3-4).

Peter Bayne argued that the assembly method should be tried by Australia’s Northern Territory because it could generate interest and consensus, and operate independently of governments (1988, 120-123). He compared the Northern Territory’s long quest for statehood to Alaska’s struggle to become a state by negotiating with the US federal government, and attributed Alaska’s final success to the assembly of 1956. Statehood was proposed in 1916, but very little progress was made until the late 1940s when the Alaska legislature convened a bipartisan non-parliamentary committee. Negotiations with the US continued to be unproductive, so in 1955, Alaska legislated for an assembly whose brief it was to draft a constitution. The idea of an assembly was dismissed earlier because it was thought it would cause unnecessary delays. All of the assembly’s 55 delegates were directly elected in a poll that was not run on party lines, and they were representative of the non-indigenous population. They convened away from the seat of government for 75 days (including a two-week recess), used a mix of
public and private discussions, and produced a constitution that was approved by all but one delegate. The assembly generated “considerable” public interest. When the constitution was put to referendum, the Yes vote was 85%, and Alaska became the forty-ninth state of the USA on 3 January 1959.

JV Clyne and Roger Gibbins (1981) recommended the assembly method for Canada at the time when the federal government was proceeding to enact major amendments unilaterally. These authors provided a long list of advantages and disadvantages for assemblies, as follows. Constituent assemblies could be superior because:

- delegates are more diverse and more representative;
- the assembly has a clear mandate;
- delegates can concentrate on the task at hand, free of party politics and bargaining;
- delegates are more likely to raise fresh ideas;
- public participation is higher;
- the constitutions produced by assemblies are more likely to reflect public preferences, not just those of the government; and
- voters are more committed to constitutions produced by assemblies (1981, 10-15).

On the negative side for Canada at that time:

- the idea of convening an assembly is radical, and if it did not succeed, the consequences would be severe;
- first ministers would not agree to convene an assembly because it has long been their prerogative to initiate and approve formal constitutional change;
- an assembly would lack authority unless it was approved by all first ministers;
- unlike the first ministers, assembly delegates are not accountable at subsequent elections;
- an assembly may not be able to deal with the complexity of current arrangements;
- decisions made by majorities at an assembly may disadvantage minorities, and neglect provincial concerns; and
- subsequent attempts to ratify assembly proposals by referenda could accentuate divisions (1981, 18-24).

Clyne and Gibbin concluded on balance that Canada should hold an assembly “as a way out of the endless indecision of constitutional stalemate … to force the hands of the first ministers, or for them to allow the appearance of their hands being forced” (1981, 36).
Clyne and Gibbin (1981, 38-41) recommended direct election of 110 assembly delegates using a proportional representation system. Delegates would convene in private for six months, submit their recommendations to the federal and provincial legislatures, reconvene three months later to refine its proposals, then put them to electors at a referendum held within a year of the assembly’s first session. The referendum campaign would be limited to 30 days, and official Yes and No groups would receive public funding. The assembly’s proposals would be implemented if a national majority, plus majorities in eight of the 11 provinces and territories voted Yes (counting the Yukon and Northwest territories as one unit). If electors did not ratify the proposals, the assembly would reconvene for six months, then put a revised package to the vote. If it did not pass a second time, the assembly would be dissolved.

Lorne Nystrom and Lynn Hunter, federal NDP parliamentarians, advocated a constituent assembly for Canada in 1991 in their minority report to the Beaudoin-Edwards Special Joint Committee (1991, 74-76). They argued that a constituent assembly should be convened because it would be more legitimate, more representative, and more credible than the “tradition of elite accommodation”, and it would allow constituents to engage in discussion and have some impact on the outcomes. They noted that 158 submissions made to the committee supported the idea of a constituent assembly while just 23 opposed it, and polls reported that a “significant majority” of Canadians favoured the idea. The alternative was for constituents to simply vote Yes or No at a plebiscite or referendum, or to make submissions to hearings that were ignored. Nystrom and Hunter’s ideal assembly would comprise parliamentarians and non-parliamentarians in equal measure, with equitable representation of women, Aboriginal and Torres Strait Islanders, regions, disabled persons, language minorities, racial-ethnic minorities, and others whose opinions are usually under-represented. The assembly would hold hearings across the country, and recommend amendments to legislatures for ratification under the existing amendment rules.

About two years after Australia’s republic referendum was defeated, George Winterton published the following four-step plan for resurrecting the Australian republic debate.

1. A joint parliamentary committee prepares legislation for a republic plebiscite, including detailed outlines of republic options, with input from state parliamentarians as required.
2. Constituents indicate at a plebiscite whether they prefer a republic or constitutional monarchy, and indicate their preferences in rank order for a number of republic models (see also Winterton 1998b, 102 for a similar recommendation made just before the 1998 assembly convened). The question passes if a double majority votes Yes. The preferred model is the one supported by a national majority, and preferences are distributed only if no model secures a majority on first preferences.¹⁰

3. A constituent assembly ("constitutional convention") convenes to draft legislation for the preferred republic. Constituents elect two-thirds of the delegates, and one-third are parliamentarians. The agenda provides for adjournments to allow for public discussion and feedback.

4. The federal government puts the assembly’s recommendations to referenda, with minimum alteration (Winterton 2001, 22-25).

Winterton noted that a joint parliamentary committee could complete step 3, but favoured a constituent assembly because it would “ensure greater public input into the essential process of constructing the detailed model” (2001, 24). His views are noteworthy because he was a member of Labor’s 1993 Republic Advisory Committee, and he was appointed by the Coalition government to attend the 1998 assembly. At the assembly, he supported the model that was put to referenda (Kreibig 1998, 102).

Philip Resnick supported the idea of a constituent assembly for Canada if Québec voted to secede, or to prevent a third vote on secession in Québec. He wrote:

Would an assembly … prove successful in cutting the Gordian knot? … No one can say for sure. But given the checkered history of constitutional discussions in this country over the past 25 years; given the near melt-down of Canada last October [when the result for Québec’s second vote on sovereignty was 50.58% No]; given the diminishing returns of the process of consociational elitism by which we have been debating constitutional matters until now; why not give the Constituent Assembly proposal a try? (1996, 51).

He advised that an assembly should not be initiated unless the public, interest groups, and federal and provincial politicians were in favour of it (1997, 52). Earlier he warned that in the long-term, the results were mixed, for example, outcomes were better for India in 1946-49 and Brazil in the 1980s than they were for France in 1789-95 and 1945-46, and Germany in 1919 (1996, 50).

Resnick proposed that an elected assembly which was representative of opinions,

¹⁰ On 26 September 2001, Senator Natasha Stott Despoja introduced the Republic (Consultation of the People) Bill 2001 which proposed a plebiscite on a republic. It reached the second reading stage that day, but died on the notice paper in 2002. Under this proposal, voters would answer Yes or No to two questions: “1. Do you want Australia to become a republic? [and] 2. If most Australians decide they want a republic, do you want the opportunity to choose from different republic models?”.
parties, groups, interests, and regions convene for 12 to 18 months. He wrote that delegates should be elected using a proportional representation system, but he also wrote that the assembly should include representatives of the political parties (1996, 50-51). This may mean that some seats would be reserved for governments, parliaments, and/or parties. The assembly’s agenda would be “open-ended”, amendments proposed by the assembly would be put to referenda, and passage of them would be conditional on achieving national and regional (rather than provincial) majorities (1996, 51-52).

According to Resnick, “a bold gamble may be the only way ahead” in Canada, and for politicians, an assembly may be “a way of getting the constitutional albatross off their backs ... as the more lucid among them may well come to recognize” (1996, 51, 52). A year later, he suggested again that a constituent assembly should be convened for Canada, but doubted that this would happen unless there was a “sense of crisis”, which could be triggered by a majority vote for sovereignty in Québec, “some new twist or turn in the endless language debate in Quebec”, or “growing feistiness in Western Canada” (Resnick 1997, 120-121, 115).

**Commentary**

Soon after the Meech Lake Accord lapsed, a discussion paper issued by the Federal-Provincial Relations Office raised three options for amending the Canadian constitution: inter-government agreement (the current “legislative model”); referenda to approve amendments; and constituent assemblies to negotiate change (1990, 10-30). The paper concluded that something more than inter-government agreement was required. Given the common complaint about exclusion of the public from the Meech Lake debate, “Hearings at an early stage, perhaps on principles before any agreement on form and substance is ‘locked in,’ appear to be preferable” (1990, 12). The authors argued that the Australian case showed that the use of referenda could be compatible with representative government, but it also showed that inter-government agreement was still required for passage of amendments, and that holding referenda did not necessarily increase public participation (1990, 15-16).

In discussing the constituent assembly option, the report cited meetings in Charlottetown, Québec, and London that led to Canadian federation in 1867, and the Australian Constitutional Convention of 1973-85 (Federal-Provincial Relations Office 1990, 19-30). With few exceptions, legislatures selected legislators as delegates to the Canadian and Australian conferences, but this still satisfied the authors’ definition of
constituent assemblies (see page 35). The report concluded that such meetings could provide an opportunity for specialist consultations free of the political imperatives that influence members of parliament, and foster inter-government agreement, but it would not increase public participation. Without increased public interest and participation, outcomes were not likely to change. Further, before Canada convened an assembly there were many complex issues to resolve, such as how to choose delegates, whether to represent provinces equally or by population, the threshold for consensus, and the weight that the assembly’s recommendations would carry in legislatures.

**Opponents**

The Beaudoin-Edwards Special Joint Committee of the Canadian parliament recommended against constituent assemblies or constitutional conventions in Canada, despite overwhelming support for the idea. Submissions in favour of assemblies argued that they were more representative, more legitimate, and less partisan, and that they would encourage participation and consensus (Beaudoin-Edwards SJC 1991, 44-45). By contrast, opponents claimed that it would be difficult to form truly representative assemblies, elected delegates would be partisan “elites” who would neither encourage public participation nor be accountable, assemblies were no more likely to reach agreement than were parliamentarians, the process would be time consuming, and a new mechanism was not needed because first ministers had demonstrated they were able to amend the constitution (1991, 45-46).

The Committee concluded that while it was no longer acceptable for first ministers to negotiate constitutional change behind closed doors, the assembly mechanism was not viable because an assembly would be no more representative than were members of parliament, participation would not increase beyond electing delegates, and elected delegates would not be accountable at subsequent elections (1991, 47-51). Further, delegates who were elected on party tickets would be partisan, while those elected for their position on the issues would not have a mandate to compromise. A majority of the committee concluded that a special-purpose elected assembly offered no advantages. Rather than hold an assembly, the majority view was that governments should convene a federal joint parliamentary committee whose membership was “of sufficient number to be representative of the Canadian population” (Beaudoin-Edwards SJC 1991, 50-51). Governments should also consult the public – particularly Aboriginal groups and minorities – early enough to allow proposals to be amended
Janet Ajzenstat, a Canadian academic, opposed constituent assemblies for Canada on theoretical and practical grounds. Calling on liberal democratic theory, but not citing it, she asserted that the public should not be involved in major constitutional debates because constitutional law should be beyond the reach of day-to-day politicking, otherwise constitutional rules could be manipulated “by the players while they are on the ice” (1994, 112-3). In other words, people who are bound by constitutional rules should not decide what the rules are. The term ‘participants’ seems to exclude parliamentarians who also ‘skate on the ice’. Empirically, she argued that public participation in Canada’s debates had increased since the 1982 Charter of Rights and Freedoms entrenched rights for certain groups, which had produced an increased number of constitutional demands that were increasingly difficult to reconcile, and a consequent decline of confidence in government (1994, 118-119).

Ajzenstat dismissed the idea that representative constituent assemblies might mediate the influence of groups, citing as evidence a meeting of twelve delegates that was organised by Maclean’s magazine and Harvard University academics in 1991 (1994, 123). She did not mention the Renewal of Canada Conferences sponsored by governments early in the following year – conferences that two academics referred to using the phrase mini constituent assemblies (Russell 1993a, 177; Watts 1999, 6).

Peter Russell supported the idea of a constituent assembly for Canada. He argued that constituent assemblies were “more democratic”, and amendments approved by assemblies were more likely to be passed by legislatures. He cited as evidence assemblies in the United States, Canada, and Australia in the 1780s, 1860s, and 1890s respectively (1991b, 150). Canadian legislatures would decide how delegates were selected, the assembly would convene for up to two months, and adjourn and meet privately as required. Voting rights would attach to each federal and provincial delegation rather than to individuals, and the outcome would not be binding on legislatures (1991b, 152-153).

Russell did not, however, support the idea of direct public participation at assemblies. Rather, members of the public would be involved in discussions before the assembly convened to add “legitimacy” to the process, and ratify amendments if this was necessary to resolve deadlocks (1991b, 149-150). Whilst he did not explain in the 1991 article why the public should be excluded from assemblies, in later discussions
(pers. comm. 1 November 2001) he asserted that negotiating constitutional change was necessarily an “elite process” – this was an “iron law”. Further, parliamentarians should not be excluded from assemblies because they had given so much to public life, and had made so many personal sacrifices.

Fafard and Reid also opposed the use of constituent assemblies to resolve Canada’s contemporary constitutional debates (1991). The authors drew on a large number of cases ranging from Canada and Australia in the nineteenth century to Malaysia in 1963. They concluded that even though it was a more inclusive process and many Canadians supported the idea, an assembly was unlikely to succeed in Canada. Assemblies tended to be “highly partisan affairs” that were not productive unless there was a sense of crisis and broad community consensus about constitutional change before assemblies convened (1991, 45-47). They argued that convening an assembly in Canada without those preconditions would invite further frustration with the process of constitutional change. The call for more public participation could instead be satisfied by referenda, which would avoid the risk of a power struggle between an assembly and the legislatures.

Shortly before Canada convened its assemblies, Monahan, Covello, and Batty advised against doing so because there was no broad consensus about constitutional change, and there was no crisis to motivate delegates to reach a consensus (1992, 45-46, 51). Both factors were preconditions for success, according to their analysis of constituent assemblies (broadly defined) in Spain, Australia, Germany, and Newfoundland, which is summarised below.

The Spanish assembly of 1977-79 comprised all 600 members of the Cortes, empowered by King Juan Carlos to draft a new constitution for public ratification (Monahan et al. 1992, 13-19). The death of Francisco Franco had triggered a crisis – a “political vacuum” – which needed to be filled, and there was a general consensus that the new form of government should be democratic. The Cortes completed its task in about 16 months using a mix of public and private discussions. Small, closed meetings in May and October 1978 were crucial to reaching consensus on the draft. Constituents ratified the constitution on 6 December 1978.

According to Monahan et al., state governments initiated the Australian Constitutional Convention because they wanted to reform provisions for revenue sharing (1992, 19-26). It comprised 110 representatives from the federal, state, and
territory parliaments, and local government, it convened six times between 1972 [sic] and 1985, six [sic] of its recommendations were put to referenda, and three “relatively minor proposals” passed.\textsuperscript{11} The assembly “failed” because it “became just another opportunity for partisan disagreement”, it was not triggered by a crisis, it had an “interminable lifespan”, and there was no public support for constitutional change (Monahan \textit{et al.} 1992, 25-26). The last conclusion is curious, given that the public approved three amendments (of eight amendments approved at referenda since 1901). Calling these three amendments “relatively minor proposals” is also curious, given that one amendment enfranchised electors in the two mainland territories to vote at referenda, and another entrenched the informal agreement that senate vacancies are filled by a person of the same party as the elected senator. If this provision had been in place earlier, the parliament may not have been deadlocked on the supply bill, and the Governor-General may not have dismissed the prime minister in 1975.

The Allies initiated the German Parliamentary Council of 1948-49 to draft a new constitution to fill the vacuum left by the defeat of Hitler’s government (Monahan \textit{et al.} 1992, 26-32). Its 70 delegates were 65 people chosen by länder governments, and five delegates from the Soviet zone as non-voting observers. The council convened in the last quarter of 1948, but by January 1949 it was struggling to reach agreement. The final consensus was forged in “[a]n informal and secretive process” by just five delegates and three experts. This constitution was approved by the council, länder diets, and Western Allies, and came into force on 23 May 1949.

The Newfoundland assembly of 1946-1947 was initiated by Britain, which administered Newfoundland after self-government was suspended in 1934 for financial reasons (Library and Archives Canada 2007c). According to Monahan \textit{et al.}, 45 delegates were selected in a first-past-the-post election to recommend a new form of government to put to constituents (1992, 32-38). The assembly convened on 11 September 1946, and provided its report to Britain 16 months later. A majority preferred “a return to responsible government [under Britain] and an economic association with the U.S.”, but Britain forbade consideration of independence for Newfoundland, or negotiating with the United States on any subjects, even trade. In February 1948, the assembly recommended that constituents be permitted to choose

\textsuperscript{11} According to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Australian Constitutional Convention convened for the first time in 1973, and five of its recommendations were put to referenda (HSCLCA 1997, 3, 134).
between self-government and continued administration by Britain, but not union with Canada. According to Monahan et al., Britain added the union option and constituents adopted it, which “demonstrates the fact that public sentiment diverged from the dominant view in the convention” (1992, 37-38). According to resources provided by Library and Archives Canada (2007c), two referenda were held. When constituents voted on 3 June 1948, the result was 44.6% for responsible government, 41.1% for union with Canada, and 14.3% for British administration – no option attracted a majority. On 22 July 1948, a slim majority voted for union (52.3%) rather than a return to responsible government.

Monahan et al. concluded from their analysis of these four cases that a constituent assembly was worthwhile: if it was triggered by a crisis at a time when there was broad consensus in the community about constitutional change; the assembly was “elected” not “appointed” (authors’ emphasis); it was “dominated by organized political parties and their leaders”; and the agenda included private deliberations (1992, 51-52). The authors did not say how party dominance could be obtained when constituents elected all of the delegates. Nor did they say how such an assembly of politicians could avoid the outcome they cite for the Australian case – “just another opportunity for partisan disagreement” (Monahan et al. 1992, 25).

McMillan, Evans, and Storey supported special-purpose conventions for initiating constitutional change in Australia, provided that most delegates were federal and state parliamentarians (1983, 364-370). They proposed that a convention of up to 112 members meet once or twice a year for five years, and that the federal parliament put to referenda any proposals supported by two-thirds of the delegates (1983, 369-370). Electors would choose about one-third of the delegates using a proportional representation electoral system, and the remainder would be chosen by and from federal, state, and territory legislatures, and local government.
In reaching this conclusion, McMillan et al. made the following general points, and attributed them to others who they did not name.

- Parliamentarians would be more likely to have the political skill and time required to reach consensus on constitutional change.
- Proposals for constitutional reform would not succeed unless parliamentarians approved of them, so they needed to be involved in the process.
- A parliamentary convention would be less expensive than an assembly.
- Electors were less deferential now to “opinion leaders” than they were when the federation assembly was held.
- An assembly would not increase interest or public participation because “Australia is not a popular democracy ... however romantic the idea of a popular Convention may seem, it will no more excite the interest, imagination or participation of the people than other political events do now” (McMillan et al. 1983, 354-358).

It is not possible to research these arguments further because the authors did not provide citations for them, and could not do so when this thesis was written (McMillan, pers. comm. 2004). This is understandable, perhaps, as the book is more than 20 years old.

The Australian Constitutional Commission issued a discussion paper in 1987 in which it invited submissions on alternative methods that could be used to initiate, negotiate, and ratify formal constitutional change in Australia, including constituent assemblies (1987, 19-20). In its final report, the Commission noted it received “very few submissions” on this topic, and went on to recommend against “a standing convention or commission” that was empowered to initiate constitutional change (1988, 861-864). The Commission conceded that such a body might generate fresh ideas, increase participation, debate issues more thoroughly, and produce proposals for change that were more likely to be approved by voters, but concluded that it would be more expensive than the Commission’s preferred option of allowing state parliaments to initiate amendments, and it would “bypass the democratically elected parliament”.

**Discussion**

Authors who hold opposed views usually emphasise different points to support their positions, but this is not the case here. With few exceptions, authors make contradictory claims on the same points, as summarised below.

- Advocates claimed that constituent assemblies were more representative of the electorate than were parliamentarians convening alone, whilst opponents claimed
they were not (Clyne and Gibbins 1981; Nystrom and Hunter 1991; Elster 2006; cf. Beaudoin-Edwards SJC 1991). In the Australian parliament in 1920, one advocate said that a PR electoral system should be used to increase representativeness (Country Party MP Earle Page in Australian House of Representatives 1920, 15 April, 1238), while another said that doing so would reduce turnout because it was a more complicated system (Labor MP Arthur Blakely in Australian House of Representatives 1920, 15 April, 1243).


- Advocates and one commentary claimed that constituent assemblies could encourage consensus or be less partisan, whilst opponents claim this is not the case (Labor MP Frank Tudor and Nationalist MPs Eric Bowden and Edmund Jowett in Australian House of Representatives 1920, 15 April, 1237, 1243-1244; Garran 1958; Clyne and Gibbins 1981; Federal-Provincial Relations Office 1990; Bayne 1988; Elster 2006; cf. Fafard and Reid 1991; Beaudoin-Edwards SJC 1991; Monahan et al. 1992). Two opponents added that as participation increased in Canada, so did the number of irreconcilable demands (Ajzenstat 1994; Monahan et al. 1992, 46-47).

- One advocate concluded that delegates at constituent assemblies were less likely to have any immediate personal interest in the outcome, and they were less likely to privilege the legislature in the new constitution, whilst two opponents argued against assemblies (in part) because they were not accountable to constituents after the assembly was dissolved (Elster 2006; cf. Clyne and Gibbins 1981; Beaudoin-Edwards SJC 1991).

In addition, advocates argued:

- if the public could veto constitutional change, then they should participate in negotiating it (Garran 1958; Saunders 1998; Uhr 2002);

- constituent assemblies made constitutions that were more practical and durable, or more stable, or electors perceived them to be more legitimate (McWhinney 1981; Elster 2006; Clyne and Gibbins 1981; Nystrom and Hunter 1991);
• voters were more likely to approve amendments made by assemblies (Nationalist prime minister Billy Hughes and Country Party MP Earle Page in Australian House of Representatives 1920, 15 April, 1235 and 1238 respectively; Garran 1958; and by inference from their claim that assemblies are more ‘credible’, Nystrom and Hunter 1991);
• public participation at assemblies was more substantive than making submissions to inquiries, or voting at plebiscites and referenda (Nystrom and Hunter 1991); and
• the assembly mechanism allowed for greater control of deception and misrepresentation (Uhr 2002).

According to three Australian and Canadian advocates, the constituent assembly method should be tried in Australia and Canada because other methods have failed (for Australia, Saunders 1994; and for Canada Resnick 1996; and Clyne and Gibbins 1981). Three opponents claimed that it would be more expensive to convene a constituent assembly (Labor MP James Fenton in Australian House of Representatives 1920, 15 April, 1246; Constitutional Commission 1988; Monahan et al. 1992).

This review does not include opinions about constituent assemblies that are not sustained or supported with evidence or argument. For example, two papers presented by Robertson and Scott at the After Meech Lake Conference in November 1990 put a case for and against convening a constituent assembly in Canada, as follows.

This proposal [for a constituent assembly] is advanced as a start for my own thinking about what should be done. It is in no sense a fully fleshed out concept. … most of all it is founded on the proposition that Meech Lake failed not merely because Canadians are cynical about politicians or dislike backroom brokering, but because Canadians themselves are not obliged to directly address the hard choices that constitution making in a country like Canada requires. For me the most compelling argument in support of Meech Lake was that it represented the best that we Canadians could do in the year 1990 in addressing an important national problem. I was convinced that this was so, but most Canadians were not. As I say, I am not at all certain that a convention of the type I propose will reproduce a better result or a fuller consensus, but I am certain that it will achieve some level of satisfaction that the public interest is being protected and the sense in the Canadian public mind that the proposals at hand are the best we as a nation can do (Scott, Ian 1991, 256-257).

I have grave doubts about approaching our problem by means of a national constitutional convention that would throw our doors open to all sorts of intellectually ingenious schemes of theoretical possibility. Confederation was a nearly miraculous achievement. It has produced enormous benefits for Canadians. We should, I think, view with caution any method of arriving at constitutional change that would vest the task in some new and untried agency, whether elected or not. We are not revolutionary France nor are we the postrevolutionary Thirteen Colonies, rejecting a past seen as vile and repressive and setting up something totally new. We are a country with a history of great accomplishment trying to retain as much as we can of the benefits that 123 years of political experience and economic development have given us. In short, we should build on what we have and not throw it away without any guarantee we can substitute something better (Robertson, Gordon 1991, 233).

These examples are noteworthy for novelty and passion respectively. Scott, a member
of the Ontario legislature, supported the idea of an assembly in part because constituents
would be less cynical about politicians and their work after they discovered how
difficult it is to negotiate formal constitutional change.

**THE TWO CASE STUDIES**

The Australian Constitutional Convention 1998 and the Renewal of Canada Conferences 1992 were similar in that they were special-purpose groups empowered by
government to debate and recommend constitutional change, delegates included non-
parliamentarians chosen by non-parliamentarians, those delegates participated as equals
in decision-making, and serving parliamentarians were not a majority. Further, the
assemblies were debating constitutional change of a similar order, the deliberations were
publicised widely, and constitutional amendments were put to a public vote.

The assemblies were different in some respects. First, whilst federal governments
initiated the assemblies, delegates were chosen using different methods. In Australia
about half of the delegates was appointed by governments and parties, half was elected
by constituents, and one parliamentary delegate was chosen by random selection
(PM&C 1998a, 17). By contrast, none of the Canadian delegates was elected. On
average, 27% of the delegates to the five conferences were ex-officio members (mainly
parliamentarians) who were nominated by governments, 38% were experts and
members of interest groups, and 35% were individuals who were chosen as “‘ordinary
Canadians’”. About half of the individual delegates were chosen by random selection
from a structured list of qualified volunteers (Harrison 1992, 10, 23-26).

The second difference is the number of delegates. The Australian convention
comprised 152 delegates meeting as one assembly, whilst the five Canadian conferences
comprised a total of more than 1,100 delegates at five assemblies. Lastly, whilst the
most or all of proceedings were public in both cases, there is no written transcript or
official record of voting at the Canadian conferences. This means that the primary
sources cannot be subjected to the same kind of analysis. There are nevertheless
sufficient data to test many of the claims about the value of constituent assemblies.

**THE FOUR THESIS QUESTIONS**

The four questions for this thesis are whether the Australian and Canadian
assemblies were superior in terms of: (1) representation, (2) interest, (3) consensus, and
(4) partisanship, compared to parliamentarians negotiating formal constitutional change
alone.
Representativeness, interest, consensus, and partisanship are key concepts that need to be defined here because most of the authors reviewed in this chapter did not define what they meant by these terms, and those that did suggested different definitions. For example, Elster argued that constituent assemblies elected using a PR electoral system would be more representative – they would “promote free and unconstrained deliberation among all concerned parties with a large variety of interests represented … a variety of opinion” (Elster 2004, 6-7, emphasis added). By contrast, the Beaudoin-Edwards Special Joint Committee of the Senate and the House of Commons concluded that an assembly would not be more representative because:

No white middle-aged man can claim to represent, politically, all white middle-aged men, because white middle-aged men disagree strongly among themselves over almost any conceivable political issues. The same applies to other groups, whether they are based on gender, ethnicity, occupation, income level or any other sociological category (Beaudoin-Edwards SJC 1991, 47-48, emphasis added).

Elster and Beaudoin-Edwards both defined representative in terms of groups: for Elster the variables were interests and opinions about constitutional change, whilst for the Beaudoin-Edwards SJC, the variables were personal characteristics such as gender. These authors reached diametrically opposed opinions about representativeness, using different conceptions of what the word meant.

**KEY CONCEPTS DEFINED**

It is not surprising that most of the authors reviewed in this chapter did not define the key concepts that were at the heart of their arguments about the value of constituent assemblies. Each of the four terms is an important concept within the study of politics, and each term is difficult to define. In this section, other literature is used to explore the difficulties, then definitions are adopted, and the selection of those definitions is justified. The definitions are not presented here as authoritative. Rather, they are presented as valid and reliable foundations for the thesis.

**Representativeness**

Hanna Pitkin (1967) mapped four conceptions of representation, which she called formalistic, symbolic, descriptive, and acting-for. According to Pitkin’s analysis:

- the formalistic view holds that a person is a representative if s/he is authorised to take decisions on behalf of constituents, and constituents are bound by their decisions, a view associated with the work of Thomas Hobbes;
- the symbolic view holds that a person is a representative if constituents believe the person represents them, as may be the case with a monarch or a governor-general;
the descriptive view holds that representativeness is measured by how well representatives mirror the personal characteristics of their constituents; and

the acting-for view holds that a person is representative if s/he acts in the interest of, or on behalf of, their constituents.

Pitkin concluded that each concept of representation was inadequate because on its own it did not address some important aspect of representation. Formal and symbolic views were inadequate because they did not describe what representatives did. The descriptive view “may well be chimeral, and therefore dangerous” (1967, 86) because resemblance was not a sound qualification: there was an endless range of characteristics that could be represented, an emphasis on descriptive diversity would reduce a legislature’s ability to reach agreement, and “[i]n the realm of action, the representative’s characteristics are relevant only insofar as they affect what he does” (1967, 142).

According to Pitkin, the acting-for view was superior in that it dealt with the representative’s activities, but authors within this school of thought differed about whether representatives act “instead of … in the interests of … as a subordinate, on instructions, in accordance with the wishes of another” (1967, 139). Despite this deficiency, Pitkin favoured the acting-for school, concluding “If ‘to represent’ as an activity is to have a substantive meaning, it must be ‘to act in the interest of’ or ‘to act according to the wishes of,’ or some such phrase” (1967, 208).

Pitkin arranged the four concepts of representation in an hierarchy that revealed her preferences, as follows. An ideal representative was a person who acted in our interest in public affairs. If differences were irreconcilable, then we chose people who were descriptively like us to put our case. Failing that, someone we believed in stood for us, symbolically. As a last resort, we accepted representatives who were formally authorised in that role, in which case, “We can continue to obey, although we feel abused, or continue to remove a series of accountable representatives from office, although none of them serves our interest” (1967, 213).

In a conference paper delivered in 1997, Przeworski defined representation exclusively in terms of Pitkin’s acting-in-the-interest-of ideal (1997, 1). He provided four answers to his question of why a representative would choose to act in the interest of constituents, as follows.

1. Representatives are “public spirited … [and] remain uncorrupted by power”;
2. constituents choose “good candidates”;

3. constituents threaten to oust representatives that do not serve their interests; or
4. checks and balances within the institutions of government ensure that they do.

These questions demonstrate that the acting-for conception has little relevance to this thesis. Items 1 and 2 cannot be decided without making value judgments about the representatives, and items 3 and 4 have limited relevance to delegates who do not stand for re-election, or remain in office for an extended period.

Pitkin’s four conceptions are not mutually exclusive. All types of representatives may be formally authorised, constituents may feel symbolic attachment to any type of representative, a descriptive representative may mirror constituents’ opinions, and an acting-for representative may mirror constituents’ other personal characteristics. The common ground between descriptive and acting-for representation is evident in Beaudoin-Edwards SJC report, referred to earlier in this chapter. In recommending against constituent assemblies, the committee addressed at length the many claims that assemblies improved representation, as follows.

One of the central arguments in favour of constituent assemblies is that they could be composed so as to contain a cross-section of Canadian society, and would thus provide better representation than other mechanisms. ... Our concern with this approach is that it assumes that political representation must involve sociological representation: that only members of any particular group can speak for that group. ... The only person who can represent an individual, politically, is a person who broadly shares the political values and policy commitments of that individual. ... We do not say, here, that sociology is irrelevant to politics. It is a reasonable supposition that people whose values are significantly formed by their experiences as ethnic minorities, people in poverty, or members of other interests groups will, on the whole, find their most compelling representatives among others who have shared those experiences. This means that a process of political representation dominated by members of any particular social, economic or other particular interest may appropriately be viewed with suspicion. It does not mean, however, that political representation can be, as it were, constructed artificially through some magic combination of socio-economic, ethnic, gender, vocational and other representatives. Ways need to be found to ensure that their voices are heard, and that they receive adequate responses, when the particular interests of minorities are at stake in constitutional change (Beaudoin-Edwards SJC 1991, 47-48).

The authors conceded that political values, experience, and identity were linked, and that “[t]he only person who can represent an individual, politically, is a person who broadly shares the political values and policy commitments of that individual”, but they rejected a new assembly process that could facilitate the inclusion of persons who ‘mirror’ the constitutional preferences of those they represent.

Nearly thirty years after Pitkin, Anne Phillips published a staunch defence of descriptive representation, and coined the phrase “the politics of presence”. Phillips argued that the slippery slope argument about the need to represent an endless range of characteristics was misleading. The point was not to mirror the community, but to identify and address systematic exclusion and disadvantage, and to ensure that those
voices were heard when representatives debated public policy. There was no guarantee, of course, that a person who resembles another would act like them.

If we were to be strict in our definitions, we would have to say that representatives only ‘really’ represent their constituents on the issues that were explicitly debated in the course of the election campaign. On everything else, the representatives have to fall back on their own judgment or their own prejudice. ... Whether these candidates are male or female, black or white, recent or long-ago migrants, can then become of major significance (Phillips 1995, 43).

For Phillips, “It is more a question of challenging existing exclusions, and opening up opportunities for different issues or concerns to be developed” (1995, 55). As Marian Sawer put it in 1999, “All mirrors distort and the point is not to remove all distortions, only those that produce undesirable effects in terms of representation and responsiveness” (1999, 98). Personal (descriptive) characteristics matter because opinions are formed at least in part by identities and experiences.

For this thesis, representativeness is measured using both the descriptive and acting-for conceptions of representation. The formalistic conception is not used because it is meaningless here – all delegates to the Australian and Canadian assemblies were authorised directly or indirectly to represent constituents, and constituents were in some sense bound by delegates’ decisions. The symbolic conception is not used because that conception is more amenable to use where just one person such as a monarch or a governor-general represents the community, and data are not available to determine whether constituents identified emotionally with the delegates who represented them.

Descriptive characteristics are included in the analysis according to their relevance, and whether data are available. Relevant characteristics include the geographic distribution of delegates by place of residence (because the results of referenda and plebiscites are tallied by state and province), and variables that are claimed to correlate with constitutional preferences – place of birth, age, gender, and formal education. The spread of constitutional preferences among delegates and constituents are also compared, which incorporates ‘acting according to the wishes of’ school. The ‘acting in the interest of’ concept of representation (the Burkean model) is not used because the writer would need to make value judgments about which constitutional option best served constituents’ interests.

**Public Interest**

How can we know if an assembly generated more public interest? In the Australian case, how can we claim there is much interest at all, when many Australians do not know they have a constitution, and many think the constitution includes a bill of
rights? The 1996 Australian Election Study Survey, for example, found that 29% agreed with the statement “The constitution can only be changed by the High Court” (McAllister 2002, 94). This is an extraordinary finding given that just eight years earlier, 94% of Australian electors attended the polls to cast their votes on four proposals to amend the constitution.

The Australian Constitutional Referendum Survey 1999 was designed, in part, to gauge interest in the 1998-99 constitutional debate. This survey, conducted immediately after the referenda were held, asked 3,431 people seven questions to measure their interest in the republic debate, and in politics in general. The questions were:

- Generally speaking, how much interest do you usually have in what’s going on in politics?
- In the weeks leading up to the polling day, how much attention did you pay to reports about the referendum in newspapers ...
- ... did you follow the referendum news on television ...
- And did you follow the referendum campaign news on the radio?
- And how much interest would you say you took in the referendum campaign overall?
- And over the last few weeks how much would you say you have discussed the referendum with family, friends or others?
- Would you say you cared a good deal about the outcome of the referendum ...

(Gow, Bean and McAllister 2000, 2-6).

Analysis of the answers to these questions showed that respondents were slightly less interested in the referenda campaign than they were in politics generally (78% and 81% respectively answered ‘a good deal’ or ‘some’), most respondents followed media coverage, or discussed the referendum with others (range 52% for radio, to 78% for discussion with others), and 71% ‘cared a good deal’ about the outcomes of the referenda (Gow et al. 2000, 206). The survey does not answer the question posed in this thesis, however, because it was not designed to measure public interest in the republic assembly compared to other constitutional inquiries. The study is useful, nonetheless, for suggesting reported behaviour as a measure of interest rather than other proxy measures, such as media coverage and the participation of interest groups.

For this thesis, interest is measured by the number of public submissions made to the assemblies, and public attendance at assembly sessions. These data are compared to similar data for constitutional conferences where parliamentarians or their nominees convened alone; other relevant data are considered as appropriate.

**Consensus**

Literally, the word consensus means unanimity – “[g]eneral concord of different organs of the body in effecting a given purpose … Agreement in opinion” (SOED 1970, 374). A more recent edition of the same dictionary defined the word less rigorously to
mean “agreement or unity of opinion, etc; the majority view, a collective opinion” (SOED 2002, 491). It is difficult to find a definition in specialist politics dictionaries, but under an entry for consensus, Jaensch and Teichmann wrote:

The theories of consensus and its close relative, pluralism, assume that all competing interests and groups are in principle reconcilable, whereas more recent research and observation (not to mention common sense) suggests that they may not be, and that attempts to satisfy all groups’ claims can produce a degree of systemic overload leading to immobilism (Jaensch and Teichmann 1992, 57).

They did not define the word consensus directly, but they did suggest that consensus was unanimity, and added that the pursuit of it could cause serious problems because bargaining, for example, was required to reach unanimity.

Jane Mansbridge covered the subject differently in Beyond Adversary Democracy (1980, 31-33), where she defined consensus to mean:

a form of decision making in which, after discussion, one or more members of the assembly sum up prevailing sentiment, and if no objections are voiced, this becomes agreed-on policy (1980, 32).

She noted “[t]he decision rule of consensus also baffles most people who think in adversary terms”. According to Mansbridge, a consensual process does not include formal voting or techniques like bargaining, which could lead to Jaensch and Teichmann’s “systemic overload”. Rather,

[groups that are accustomed to using consensus find it hard to recognize and to legitimate conflicts of interest by allowing bargains, distributing benefits proportionately, taking turns, or making decisions by majority rule(Mansbridge 1980, 33).

The Australian assembly did not function under “the decision rule of consensus”, but it did frequently reach agreement in the manner described by Mansbridge. On many occasions delegates agreed to adjourn or to adopt particular procedures, and they did so without voting or bargaining – one or more people made a suggestion, there was no disagreement, so the suggestion was adopted. By contrast, the formal decisions were made by casting votes (undoubtedly with a fair measure of background bargaining), and the assembly did not agree unanimously to any proposition that was put to them in a formal ballot.

For this thesis, the question is whether the Australian and Canadian assemblies were better able to reach consensus about constitutional change than would have been the case if parliamentarians convened alone. This is a relative question, which can be answered using the following method.

If every member of a group supported or opposed a proposition, then it reached consensus, as defined by Mansbridge. If no group achieved this outcome, then the group that was better able to reach consensus is the group where the highest proportion
of members agreed to support or oppose a proposition. If, for example, a proposition was put to three groups, and the Yes vote was 65% for group A, 60% for group B, and 58% for group C, then the group that was better able to reach consensus is group A, because more of its members were of one mind. If the Yes vote was 70% for group A, 60% for group B, and 10% for group C, then group C is better able to reach consensus because more of its members were of one mind – 90% voted No.

The word consensus is used in this thesis so as not to lose sight of the possibility that parliamentarians and constituents could reach unanimous agreement on constitutional rules that bind them. As noted by Bayne above, 98% of delegates to the Alaskan assembly, and 85% of the voters, agreed on their constitution in 1956. Closer to home, 91% of Australian voters agreed to change the constitution in 1967 to count ‘aboriginals’ in the census and to allow the federal government to legislate for them. More recently, 88% of the delegates to the 1998 Australian Constitutional Convention agreed that a republic proposal should be put to referendum (PM&C 1998b, 992-994), and when the Constitution Alteration (Establishment of a Republic) Bill 1999 passed the lower house on 9 August 1999, the Yes vote was 94%. At the Renewal of Canada Conferences in 1992, delegates “with almost no exception” opposed federal proposals to entrench a requirement for the Bank of Canada to preserve price stability (Government of Canada 1992, M17). The Beaudoin-Dobbie SJC also disagreed with the proposal, and the first ministers did not pursue it. In 1992, all of Canada’s first ministers agreed to 54 proposals about constitutional change (analysis of Governments of Canada 1992a; and Governments of Canada 1992c).

Partisanship

The Shorter Oxford English Dictionary on Historical Principles defined the word partisan as follows:

\textit{n.} An adherent or supporter of a party, person, or cause; \textit{esp.} a zealous supporter; a prejudiced, unreasoning, or fanatical adherent. …

\textit{adj.} Of, pertaining to, or characteristic of a partisan; supporting a party, \textit{esp.} zealously; prejudiced, one-sided (SOED 2002, 2108).

An earlier edition of the same work dated the first use of the term “partisan politics” to 1882 (SOED 1970, 1439), but the term is rarely defined in specialist politics dictionaries. It is not defined in two Australian politics dictionaries that are common sources for tertiary students (Jaensch and Teichmann 1992; and Robertson, David 1985). Even in specialist academic journals, the word is used without any attempt to define it. Authors of an article titled “On Measuring Partisanship in Roll-Call voting:
The U.S. House of Representatives, 1877-1999” did not define the word partisanship, but the way they used the phrases “party influence” and “party pressure” suggested this was what they meant by partisanship (Cox and Poole 2002).

Fortunately, Magill’s dictionary of social sciences terms included an entry for partisanship, where it is defined to mean “Behaviour of politicians in support of the principles or interests of their own political party” (Magill 1995, 2215 vol 5). Riemer discussed representation 40 years ago using a typology which classified parliamentarians as “trustees”, “delegates”, “partisans”, or “politicos” (1967, 1-7), and observed then that writers meant different things when they used these words. According to Riemer, authors could mean: trustees acted according to what they thought best served constituents’ interests, or they were “conceited, unresponsive, phoney aristocrat[s]”; delegates voted according to the majority opinion of their constituents, or they were “fearful, spineless lackey[s] of the multitude”; partisans followed the party line, or they were “cowardly, party rubber-stamp[s]”; politicos adopted one of the three other types to suit the circumstances, or they were “wishy-washy, cynical Machiavellian[s]” (Riemer 1967, 1-2). As was the case for Magill, the core of these interpretations was party loyalty.

The differences between the definitions in the SOED, Magill, and Riemer highlight the slipperiness of the word, and perhaps why the authors reviewed in this chapter did not define what they meant by it. According to one definition in the SOED, a partisan is a person who is biased, unyielding, and even bigoted, whilst according to Magill and the classification scheme in Riemer, a partisan is a person who follows or supports a political party. Both usages are current. Who is to judge whether a person is following others, or following their own convictions. Naturally enough, people join groups that share their views.

For this thesis, definitions from Magill and Riemer are adapted to define a partisan to be a person who does not waver from a constitutional option. The thesis question then becomes whether the non-parliamentary delegates at the assemblies changed their constitutional preferences more or less often than did the parliamentary delegates.

The rider about judging whether a delegate is a follower applies, along with an

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12 When the word delegate is used in this thesis for people who convened to debate constitutional change, neither of these meaning is intended. La Nauze noted that officially, members of the 1891 National Australian Federation Convention were “delegates” (as they were in 1998), whilst members of the 1897-98 National Australasian Convention were “representatives”, but the terms were used “indifferently” (1972, vii). I chose “delegate” to simplify discussion of representation and representativeness.
acknowledgement that it may not be valid to apply a definition centred on party politics to delegates who do not participants in constitutional debates as members of political parties. Arguably, the definition is applicable to the Australian case because 26% of the delegates were serving parliamentarians with party allegiances (excluding one independent), and 50% were directly elected using campaign statements that declared their views on Australia becoming a republic. That does, however, leave out 24% of the members (the community representatives appointed by the federal government) whose party or known position on the constitution was not necessarily a factor in the decision to choose them as delegates. While it may not be valid to measure their partisanship using a definition derived from an analysis of party politics, the definition proposed above is adopted for want of an alternative. The issue does not arise for the Canadian case, because the question about partisanship could not be answered.

The next four chapters discuss the process of federation, and constitutional change in Australia and Canada since federation (chapters three and five), and evaluate the use of the constituent assembly method to debate proposals for an Australian republic in 1998, and the Charlottetown Accord in 1992 (chapters four and six).

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13 I am indebted to David Adams for making this point.
CHAPTER THREE – AUSTRALIA

This chapter examines the process of formal constitutional change in Australia from the federation conference of 1890 to the republic referendum of 1999. It provides context for the 1998 assembly, most particularly for the use of the constituent assembly method to achieve federation, and the extent to which the public was involved in debating formal constitutional change.

The first section outlines landmark events in the process of federation from 1890 to 1900, then evaluates some different opinions about the importance of public participation in the debates. The second section outlines the rules for changing Australia’s constitution, and Australia’s many attempts to achieve change. The number of constitutional referenda that were held is covered briefly, but explanations for why so many proposals were not ratified are not covered because this subject was examined in the first chapter.

The third section examines the frequency and outcomes for 14 federal constitutional inquiries in detail. The question here is whether inquiries are an effective way to achieve formal constitutional change. An analysis of the association between these inquiries and the 44 questions put to referenda shows that when questions are put to referenda as recommended by an inquiry, they are twice as likely to pass, compared to amendments that are not recommended by inquiries. It is acknowledged, however, that this conclusion may be unreliable because it is based on 14 cases only.

FEDERATION

The Commonwealth of Australia was created by an act of the British Parliament. The Commonwealth of Australia Constitution Act 1900 (UK) was passed by the British parliament on 5 July 1900, received royal assent on 9 July 1900, and was proclaimed on 17 September 1900. On 1 January 1901, the ninth clause of that Act came into force as Australia’s constitution, uniting six self-governing British colonies under a federal umbrella. This formal legal outline may suggest that federation was a British affair, but this was not the case. The Australian constitution was almost entirely home-grown – it was the product of an “earthy process” (Crisp 1978, 5). Further, the Australian journey to federation through initiation, negotiation, and ratification was long, and procedurally diverse (see figure 3.1 at page 71).

For as many as fifty years, colonial parliamentarians, legal experts, notables, and British subjects debated the merits of federation. According to Crisp, an early sign that
federation was coming was the British Privy Council’s recommendation in 1849 that inter-colonial trade should be free of differential tariffs; another was the formation of the Federal Council of Australasia in 1885 (1978, 3, 5-7). The council was a federal style body, but the colonies were not bound to participate, and some did not. The council also lacked financial and executive powers, and its legislative powers were limited (Parkes 1890, 3; Quick and Garran 1976, 111-112; La Nauze 1972, 2-4). La Nauze described the council as “no more than a kind of stamping-machine”, responsive to colonial wishes, and subject to Britain’s legislative veto (1972, 3). Crisp concluded that the council was “shadowy, never fully representative, and consequently ineffectual ... [a] whited sepulchre which held its last (eighth) biennial session in 1899 and sank into oblivion” (1978, 6-7). La Nauze maintained the council was important, nonetheless, but it suffered by comparison with the federation which was formed just two years after the last council meeting (1972, 3-4).

Henry Parkes, five times premier of New South Wales, advocated federation at the 1867 inter-colonial conference (Quick and Garran 1976, 103-104; Headon 1998b, 23). According to Crisp, the time Parkes spent in Canada between 1882 and 1884 may have influenced his decision (1978, 7), but Garran claimed the link was tenuous (1958, 90). There is, nevertheless, some evidence that events in Canada did influence the Australian founders. In 1889 Charles Kingston, premier of South Australia, cited the Québec meeting of 1864 to support his argument that an enlarged Federal Council was an appropriate forum for negotiating a federal division of powers (La Nauze 1972, 5). In the same year, Parkes wrote to Duncan Gillies, premier of Victoria: “The scheme of federal government, it is assumed, would necessarily follow close upon the type of the Dominion Government of Canada” (Quick and Garran 1976, 118-119).

On 24 October 1889, Parkes told his constituents at Tenterfield in New South Wales that a parliamentary convention should debate federation. He called for

> a convention of leading men from all the colonies, delegates appointed by the authority of Parliament ... to devise the constitution which would be necessary for bringing into existence a federal government with a federal parliament ... a parliament of two houses, a house of commons and a senate ... [whilst leaving colonial governments] just as effective as now in all local matters (Sydney Morning Herald 1889).

14 Parkes’ version of the speech (1890, 1-6) differs from the one that is published in the Herald (and reproduced in Halliday 1999). While Parkes wrote “Some of the reports of these speeches were very imperfect ... No attempt has been made to supply these deficiencies” (1890, vii), the Herald version includes a more strident criticism of the Federal Council and the NSW Parliament, a defence of free trade, and a promise of electoral reform that are not found in his version. Text cited here appears in all versions.
In 1901 Quick and Garran called this address a “famous speech” (1976, 118). Garran made a similar claim more than fifty years later when he wrote “some sort of a report [of the speech] was flashed over Australia, and ... it rang like a trumpet-call” (1958, 91).

The mechanisms used to achieve federation were diverse – they covered the full spectrum from unilateralism at Westminster, to multi-lateral negotiations between colonial parliamentarians, to binding referenda (see figure 3.1 below, and table 3.2 on page 83). Between 1890 and 1900, colonial parliamentarians and constituents gathered to debate the issue formally on at least nine occasions, and constituents turned out for ten referenda to deliver their judgement on two draft constitutions, but Australia did not become a federation until 1901, five years after Parkes died.

An early landmark in the journey to federation was the 1890 Federation Conference, which convened at Melbourne from 6 February. Its delegates were 13 premiers and ministers – two each from New South Wales, New Zealand, Queensland, South Australia, Tasmania, and Victoria, and one from Western Australia. The conference resolved to consider union, and to hold a constitutional convention.

Next, the 1891 National Australasian Federation Convention (NAFC) convened in Sydney from 2 March to 9 April, with Henry Parkes in the chair. Its delegates were 45 legislators, seven from each of New South Wales, Queensland, South Australia,
Tasmania, Victoria, and Western Australia, and three from New Zealand; this was the last time that New Zealand participated in Australia’s federation debates. NAFC produced a draft constitution, the Commonwealth Bill of 1891. Soon after, the bill was “set aside” for six years due to a lack of public interest and political will, changes in the political composition of legislatures, and faltering leadership from New South Wales (La Nauze 1972, 87-90; Quick and Garran 1976, 143-159). Even so, Parkes’ leadership at NAFC earned him the title ‘Father of Federation’, according to Garran (1958, 91).

Unprecedented public participation provided the spur for inter-government negotiations, which continued for the remainder of the journey. In 1893, two years after NAFC, the New South Wales and Victorian Federation Leagues invited representatives of civic groups and local government to meet at the New South Wales border town of Corowa to debate federation for two days. Some 72 members of federation interest groups, commercial interest groups, and local government accepted the invitation (see table 3.1). As Quick and Garran explained it, harsh economic times stimulated public interest in federation: “the people began to wake up to the fact that the ‘fad of Federation’ with which politicians and Parliaments had been dallying so long, meant the salvation of Australia” (1976, 150). Perhaps people hoped that financial cooperation across a new federation would lift the colonial economies out of depression – through free trade and uniform customs, for example. The delegates at Corowa resolved in 1893 that an elected constituent assembly should be held, and that a draft constitution should be put to referenda. Delegates also drafted enabling legislation for the colonial parliaments. Quick and Garran claimed that Corowa’s forward plan for federation was crucial to the achievement of federation. Most of the colonial leaders had agreed at the 1895 Premiers’ Conference to hold an elected constituent assembly and a referendum, but it was some time before practical steps were taken to implement that decision.

In the meantime, a second unofficial conference convened at Bathurst in New South Wales in 1896. The People’s Federal Convention comprised 211 delegates who were invited to participate by extra-parliamentary groups. The convention agreed that the 1891 draft constitution should be adopted as a starting point for assembly debates.

Official preparations for the National Australasian Convention (NAC) – the constituent assembly – began in earnest in 1897. Four governments kept to the original agreement and called elections for ten seats each, while Queensland decided not to send delegates, and the Western Australian legislature chose its ten delegates directly.
According to Crisp, Queensland did not participate because it was preoccupied with disagreements about the influx of “non-white” migrants, and the Queensland parliament did not agree on who the delegates should be (1978, 8-9). The Western Australian parliament appointed its delegates because it (or at least the colony’s “ruling classes”) was concerned about the influence of newly arrived colonists on an election result; the population of Western Australia had almost quadrupled between 1890 and 1900, and many of these new arrivals were known to be relatively radical (Crisp 1978, 9-10).

Competition for seats at the 1897 assembly was not strong by today’s standards, with fewer than four people standing for each vacancy. The New South Wales election was the most competitive with five candidates on average for each vacancy, while the Victorian election was the least competitive with about three candidates for each vacancy; by contrast, there were about eight candidates for each seat at the 1998 assembly. All but six of the 50 candidates elected to NAC were serving parliamentarians, though non-parliamentarians did stand for election.¹⁵

The NAC convened for about 17 weeks in three sessions that were held between 22 March 1897 and 17 March 1898. The first session convened at Adelaide – less than three weeks after the election – and adjourned some six weeks later, having resolved that the colonies should federate. The second session convened at Sydney on 2 September for about three weeks of further debate, negotiation, and redrafting of the 1891 draft constitution. The third and final session convened at Melbourne on 20 January 1898, agreed on a draft constitution some eight weeks later, and adjourned for the last time on 17 March 1898. This assembly used an open process, compared to the inter-government meetings that preceded it in 1890, 1891, and 1895. All three sessions of NAC were open to the public and the media.

The 1898 draft was put to referenda in four colonies in June 1898, when it passed in three colonies but did not pass in New South Wales. Even though the result for the New South Wales was 71,595 Yes (52%) and 66,228 No (48%), the Yes vote fell short of the threshold of 80,000 votes required in that colony (Scott, Ernest 1953). After the 1899 Premiers’ Conference amended the second draft to better suit New South Wales and Queensland (Quick and Garran 1976, 220), the third draft was put to referenda in

¹⁵ The exceptions were James Walker and Bernard Wise (NSW), Josiah Symon, Patrick McMahon Glynn, and James Henderson (South Australia), and John Quick (Victoria).
five colonies during 1899, and it passed. Western Australia did not put the proposal to referendum at this stage.

Unilateralism was the hallmark of the final stage of the journey. In accordance with a resolution of the 1900 premiers’ conference, six delegates representing the six colonial parliaments (including Western Australia and Queensland) carried the 1899 draft to Westminster for approval. Approval was granted, but only after it was amended, despite protests from the colonial delegation (Quick and Garran 1976, 228-249; La Nauze 1972, 248-269). Westminster insisted, for example, that the Australian constitution must include a right of appeal to the British Privy Council, and on this they prevailed, via section 74. It was to be another 86 years before the Australian and British parliaments passed the Australia Acts of 1986, which made the Australian High Court the final court of appeal against judgments delivered by state and territory courts (ss 11, 16). State supreme courts could still apply to the High Court for leave to appeal against judgments delivered by superior courts about inter-state or federal-state powers (“inter se” matters), but according to Saunders, “The High Court has made it clear that certificates will no longer be given” (1997, 82-84).

Enabling legislation was passed by the British parliament on 5 July 1900, and received royal assent on 9 July. Western Australia – Australia’s reluctant founding colony – held its referendum on 31 July and voters approved the constitution. This was just before the constitution was proclaimed in September, but not soon enough to include Western Australia in the preamble.

**Discussion**

Federation was achieved through a mix of inter-government agreement, public participation, and supra-national intervention, but which particular people and events were critical to success? Was it Henry Parkes’ “famous speech” at Tenterfield in 1889, or was it the unprecedented public participation in the debate? The importance of public participation is particularly relevant to this thesis because federation was achieved through a constituent assembly.

**The importance of Henry Parkes**

Historical accounts differ about the importance of both Henry Parkes and public participation. Some authors claim Henry Parkes was the “Father of Federation” (National Library of Australia c. 2001; but not Parliamentary Library 2001). In 1893 Parkes was described by a contemporary as “one of the most consistent supporters of the
[federal] movement in Australia” (Wilson 1893, 5). Critics dispute this claim, however, arguing that public knowledge of his 1889 Tenterfield oration was limited, and that his support for federation was erratic. The media did give scant attention to the speech, except for comprehensive coverage in *The Sydney Morning Herald* (Sydney Morning Herald 1889, 8). According to Shaw and Fredman, it is unlikely that the speech inspired much interest in federation beyond the New South Wales colony (Shaw 1990, 6-8; Fredman 1963, 62).

Parkes’ commitment to federation was intermittent and self-interested, according to his critics. Blainey wrote “He liked to elevate federation as his first priority only when it suited his own political agenda in Sydney” (2000). While acknowledging the importance of Parkes’ correspondence with premiers in 1889, Shaw claimed that the lack of progress on federation in the early 1890s was due in large part to Parkes’ inaction when he was premier, and more generally to his “singularly intermittent” interest (1990, 5, 8, 10). In October 1891 Parkes resigned his seat in the New South Wales assembly without securing the passage of enabling legislation through the assembly, even though he had chaired NAFC, provided a draft constitution to it, and concluded that the negotiated outcome was “a wise, temperate, and successful compromise” (Quick and Garran 1976, 123-126, 141). La Nauze defended Parkes’ inaction, attributing it to his tenuous hold on power at the time (1972, 89). He governed from June to October 1891 only with the support of Labor members who were elected for the first time in the colony that year. Martin claimed he feared that opponents would make much of his spending time on the federation issue rather than on other pressing matters (c. 2000); indeed, as New South Wales premier in 1889, Parkes declared that local government was his first priority (Shaw 1990, 5). This does not explain, however, why he declined an invitation to lead a delegation to Corowa in 1893 (Fredman 1963, 63), and why he “stood aloof” in the same year when the Australasian Federation League was formed, saying that the idea was his (Quick and Garran 1976, 152). By 1895 Parkes had returned to the New South Wales assembly, and proposed federation again, though not as premier (Quick and Garran 1976, 158).
This evidence supports the conclusion reached here that Parkes’ role in federation was not pivotal, and that his commitment to federation was erratic. As Crisp wrote so colourfully:

He did not, however, now climb the nearby New England mountains and return with the 128 Sections of the Commonwealth constitution rounded and polished upon tablets clutched in his arms. Instead, the political leaders of the Colonies and others less eminent sweated for a decade in their drafting and in the campaigns for their adoption (1978, 7 emphasis added).

As Blainey put it, “Parkes, at his best, was the grandfather of federation – no more – and at times he was the saboteur of federation” (2000).

If there were a need to single out an individual whose work was pivotal in achieving federation, then a prime candidates would be John Quick. In 1893, he established the Bendigo Federation League and served as its president, attended the 1893 Corowa conference and there suggested a constituent assembly and referenda, drafted enabling legislation for the colonial legislatures, attended the 1896 convention, and was elected to the 1897-98 assembly; he was awarded a knighthood in 1901 was “awarded a knighthood for his services to federation and in particular as originator of the procedure adopted for the enabling legislation for federation, which he had initiated at the Corowa conference” (Stephen 2004, 72-75). In 1901 he published with Robert Garran The Annotated Constitution of the Australian Commonwealth, a comprehensive guide to the debates and the outcomes (Quick and Garran 1976).

Was federation a ‘popular’ process?

Authors differ also on whether federation was a ‘popular’ process, and about the importance of public participation to achieving federation. The question is highly relevant to this thesis because many of the arguments about the value of constituent assemblies, reviewed in the second chapter, turn on whether increasing public participation in the process of formal constitutional change would have a positive or negative effect.

Was federation a ‘popular’ process, and what does ‘popular’ mean? The word ‘popular’ is used in some of the discussions about the federation processes, but it is not defined directly (for example, Quick and Garran 1976, 150; Macintyre 1998b, 76; Hirst 1998, 80-82; McMillan et al. 1983, 355-356). The authors’ contexts, and the common meanings of the word are sufficient, nevertheless, to infer a definition. ‘Popular’ derives from the Latin popularis and populus, meaning “the people” and hence in law “Affecting, concerning, or open to all or any of the people; public; esp. in action” (SOED 1970, 1545-1546). Authors who use the word when they discuss constitutional
change often distinguish popular processes from parliamentary, government, and intergovernment processes, which suggests that ‘popular’ processes are those where the participants are members of the public rather than serving parliamentarians. Recent historical reviews confirm this interpretation. De Garis attributed the term ‘popular movement’ to Quick and Garran’s 1901 *Annotated Constitution*, and interpreted it to mean “the initiative [for federation] was taken by the people as opposed to politicians” (de Garis 1993, 101-102). Irving elaborated:

But the idea that ‘the people’ meant ‘not the politicians’ was not simply an obvious antonym ... in this time against the background of growing claims for participation and demands for broader political rights ... ‘People’ is a shorthand way of saying that certain processes must take place, processes inviting, indeed, requiring public debate, processes which cannot proceed on the parliament’s initiative alone, without evidence of consent outside political elites (1997, 7, 9).

According to Irving, then, public participation was essential to achieving federation.

Writing just after federation, Quick and Garran claimed that some of the changes made to the constitution between 1891 and 1898 were due to “the more complete popular impulse of the later stages of the federal movement” (1976, 135, 150-165, 255-260). In 1972, La Nauze drew on Quick and Garran heavily, writing “The historical sections of [Quick and Garran’s] work ... are still the best formal summaries” of federation processes (1972, v), but he did not refer to Corowa in his book, and referred to Bathurst only indirectly (1972, 95). While the historical accounts of federation in both works are of equivalent length (Quick and Garran 261 pages, La Nauze 288 pages), Quick and Garran devoted some 20 of the pages of their book to the popular movement (7.66%), but La Nauze barely mentioned it (less than 0.03%). He did not index or name the Corowa conference at all, referring to it only briefly on page 90, as follows.

In July of that year [1893] a plan for reviving the active consideration of a constitution was propounded by a Victorian lawyer, John Quick, and others may have had similar ideas.

The Bathurst conference is indexed to page 95, where he wrote:

Pamphleteers, statisticians, the great Sir Samuel Griffith himself, most recently the unofficial ‘People’s’ Federal Convention meeting in November 1896 at Bathurst in New South Wales, had discussed the difficulties of devising a scheme for the equitable distribution of the ‘surplus’ revenue of a Commonwealth to which the sole power of imposing custos duties would pass.

These cursory references suggest that he gave little or no weight to public participation in the federation debates, beyond voting at referenda. To be fair, he did write in his preface “My second purpose is to provide such aid as I can to the future author of a much-needed general history of the ‘federal movement’ [emphasis added]”, but earlier on the same page he wrote that the book was “about the making and the makers of the Constitution” (La Nauze 1972, v, emphasis added). The first quotation justifies a
minimum coverage of Corowa and Bathurst in the expectation that others would fill the gap, but the second quotation requires at least some cover of the Corowa and Bathurst conferences.

Other authors claim that the 1895 Premiers’ Conference was “the pivotal event” in the 1890s, not the Corowa or Bathurst conferences (de Garis 1993, 107), and that the Bathurst conference was not significant because the premiers had already decided to hold an elected convention, and put the constitution to referendum (Macintyre 1998b, 78). The premiers had indeed taken that decision, but they did not implement it until after the Bathurst conference – a delay of some 22 months.

Without the unofficial Corowa Conference, federation may have stalled for longer than four years following the 1891 Federation Convention. Indeed, the 1891 draft constitution had lapsed when the New South Wales and Victorian Federation Leagues initiated the Corowa Conference in 1893. In 1895, the issue of an elected constitutional convention was back on the table at the premiers’ conference. The premiers resolved to hold an elected convention, but did little or nothing to fulfil that promise until the newly formed Bathurst Federation League convened the 1896 conference, and reminded parliamentarians again about public interest in federation (Australasian Federation League 1897, 14). Less than four months after the Bathurst conference, convention elections were held, and the first session of the National Australasian Convention convened. The sequence of events suggests that public participation provided the necessary impetus for the federation journey.

Quick and Garran attributed some of the text of the constitution to public participation (1976, 135, 287). Irving linked the final form of section 41 (the franchise), section 113 (state regulation of liquor), the preamble, and the oath of office to the participation of women in the debates (1996, 15-16). By contrast, 50 years after federation Garran credited women with only a traditional wifely role when he wrote:

*Perhaps, in dealing with the Fathers, it would not be amiss to say a word or two about the Mothers of Federation who kept the home fires burning while their husbands were engaged with the attractions of this new venture. They had a rather thin time (Garran 1958, 197).*

Women were, in fact, active as individuals, and as members of groups in the late 1890s.

Women were active on both sides of the federation debate (Irving 1995, 68-74; Irving 1996, 5-8). They campaigned for female suffrage, control of alcohol and opium, and recognition of God in the constitution. They signed petitions, wrote letters to the press, attended public meetings, and voted in South Australia and Western Australia.
Maybanke Wolstenholme campaigned for federation through the Women's Federal League, which she formed in 1898; opposite her were the anti-federalist orators Rose Scott and Belle Golding representing the Womanhood Suffrage League. According to Irving, an intensive pro-federation campaign waged by the Hay Women’s Federal League before the second New South Wales referendum may have tipped the scales toward federation. Women in two states also voted, and one stood for office. Women could vote and stand for election to the South Australian legislature from 1894, and the federal parliament from 1902, but women were not so empowered for the remaining five state legislatures until 1923 (Cass and Rubenstein 1996, 119).

Women were also prominent as individuals. Catherine Helen Spence stood for election as a South Australian delegate to the 1897 assembly unsuccessfully, although she won more than 7,000 votes (Cass and Rubenstein 1996, 117). She argued that her campaign was frustrated by Kingston’s claim that her candidature was unconstitutional, and other jibes such as James Hutchison’s call for her name to be removed from the “10 best men” list (Spence 1997 [1910], 81).

Critics of the popular process thesis also argue that parliamentarians engineered public support, and participants were not representative of the wider community. According to Macintyre, the Corowa and Bathurst conferences “[stand] in the received history of Australian federation as an expression of the popular movement for federation” (1998b, 77), but both were orchestrated by leading parliamentarians, and “stage-managed” to achieve desired goals (Macintyre 1994, 10; Macintyre 1998a, 10; also Headon 1998b, 26-27; for evidence, see de Garis 1993, 103-105). This claim is supported to a point by the evidence, because parliamentarians did lead the formation of the two main pro-federal interest groups – the Australian Natives Association, and the Australasian Federation League (Wilson 1893, 3-4; Quick and Garran 1976, 151-152). However, analysis of the Corowa and Bathurst conference proceedings shows that only eight delegates attended both meetings (Corowa Conference 1893, 6-7; Australasian Federation League 1897, 6-11). If the conferences were “stage managed”, one would expect that at least some individuals would attend both meetings, and that more than 10 people from the Victorian colony would attend the Bathurst conference.

Parliamentarians were a minority at both gatherings – they comprised 8% at Corowa, and 9% at Bathurst.

Bannon argued that Bathurst delegates were not representative of the population;
“the ‘people’ of the Bathurst People’s Convention were really the people of New South Wales” (1998, 74; see also Quick and Garran 1976, 163). But 60 years after attending the Bathurst Convention, Robert Garran wrote:

its personnel was thoroughly representative - there were lawyers, doctors, clergymen, farmers, pastoralists, merchants, shopkeepers, Members of Parliament, journalists, professors, civil servants, and even an undertaker - almost everyone, in fact, who was interested enough to want to be there (1958, 108).

It might be concluded from these citations that Garran changed his mind about representation, some time between writing with Quick in 1901 and writing alone in 1958, but that is not the case. The 1901 work said the conference was unrepresentative because New South Wales dominated the Bathurst conference, whilst in 1958 Garran emphasised delegates’ diverse occupations, not where they lived.

Bannon is correct to claim that Corowa and Bathurst delegates were not representative of population distribution across the colonies at the time (see table 3.1).

<table>
<thead>
<tr>
<th></th>
<th>Corowa 1893 (n=72)</th>
<th>Bathurst 1896 (n=211)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>By group</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Federation Leagues</td>
<td>63</td>
<td>24</td>
</tr>
<tr>
<td>- Australian Natives’ Association</td>
<td>11</td>
<td>8</td>
</tr>
<tr>
<td>- Progress Committee</td>
<td>7</td>
<td>-</td>
</tr>
<tr>
<td>- Local government</td>
<td>3</td>
<td>43</td>
</tr>
<tr>
<td>- Chamber of Commerce</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>- Commercial Travellers’ Association</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>- “Invited guest”</td>
<td>-</td>
<td>15</td>
</tr>
<tr>
<td>- Progress Association</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>- Others</td>
<td>13</td>
<td>6</td>
</tr>
<tr>
<td><strong>By colony</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Victoria</td>
<td>57</td>
<td>10</td>
</tr>
<tr>
<td>- New South Wales</td>
<td>43</td>
<td>86</td>
</tr>
<tr>
<td>- South Australia</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>- Queensland</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>- Tasmania</td>
<td>-</td>
<td>0.5</td>
</tr>
<tr>
<td>- Western Australia</td>
<td>-</td>
<td>0.5</td>
</tr>
<tr>
<td><strong>Serving parliamentarians</strong></td>
<td>8</td>
<td>9</td>
</tr>
</tbody>
</table>

Note: the ‘Others’ category includes groups of fewer than three delegates, and one unaffiliated Bathurst delegate. (Source: analysis of lists in Corowa Conference 1893, 6-7; and Australasian Federation League 1897, 6-11)

All of the Corowa delegates were from New South Wales and Victoria, and 96% of the Bathurst delegates represented the same two colonies, even though “delegates were invited from leagues and organizations of all kinds throughout Australia” (Quick and Garran 1976, 163). The Corowa and Bathurst conferences were unrepresentative in
other ways, too. Analysis of the conference lists shows that:

- most Corowa delegates were listed as members of pro-federation interest groups;
- almost all delegates represented organised interests (the exceptions at Bathurst were a small contingent of “invited guests”, and just one unaffiliated delegate);
- federation leagues dominated Corowa (63%, down to 24% at Bathurst); and
- local government delegates dominated Bathurst (43%, up from 3% at Corowa).

The most serious deficiencies were the under-representation of four of the six colonies, women, and Aboriginal and Torres Strait islanders.

The argument about representation rises or falls on whether representation is measured in relative or absolute terms. Conference delegates certainly did not mirror the demographics of the colonies. All of the delegates were white men, despite the fact that women were enfranchised in South Australia in 1894, and there was some form of franchise for Aboriginal and Torres Strait Islanders in four colonies from the 1850s. By contrast, if representativeness is considered in relative terms, the picture is different. There is ample evidence to support Hirst’s claim that Australian federation was more inclusive of constituents than was the case elsewhere at the time, especially in Canada and the United States (1998, esp. 82).

The public participated at two unofficial conferences, and these conferences made a difference to federation outcomes. Constituents elected NAC delegates, debates were comparatively open, and citizen participation made a difference to the text of the constitution. Finally, political leaders looked to citizens to legitimate the Constitution by submitting it to ten referenda, and they enshrined a citizen veto over future formal constitutional change in section 128 of the constitution. The founders also instituted an elected rather than an appointed upper house.

Quick and Garran wrote in 1901 that federation was secured by a judicious mix of an elected convention, referenda, and colonial legislative processes which:

secured popular interest ... conciliated the Parliaments by giving them a voice in initiating the process, a voice in criticizing the Constitution before its completion, and a voice in requesting the enactment of the Constitution after acceptance. In other words, whilst necessarily assigning to a single body, representative of all the colonies, the task of framing the Constitution in the first instance and finally revising it, it ensured that both the peoples and the Parliaments of the several colonies should be consulted at every stage – in initiation, in deliberation, and in adoption. And lastly, by making statutory provisions in advance for every step of the process, it ensured that the matter once begun should be brought to an issue. No fuller security could have been given that the Constitution would be based upon the will of the people and of the people’s representatives (1976, 160).
As Blainey put it:

[No all-powerful cause spurred on the federal campaign. Even if there was one dominant cause, its existence cannot be proved beyond reasonable doubt ... The constitution of 1901 was a web of compromises. In the past 100 years, those federal leaders who tried to change the constitution, and failed, usually overlooked that truth (Blainey 2000).

That “web of compromises”, and federation itself, was the direct result of participation by colonial parliamentarians, and constituents. The federation process was relatively popular in that much of the nineteenth century journey to federation was more inclusive and more open than was usual in Australia or elsewhere at the time. Constituents played a pivotal role in achieving federation. They did so by initiating two unofficial ‘peoples conventions’ which kept the subject of federation on the political agenda, by participating directly in the constituent assembly of 1897-98 which produced Australia’s constitution, and by ratifying the constitution at referenda. The federation process, and section 128 of the constitution, set the pattern for public involvement in changing the constitution in the twentieth century.
### Table 3.2: Landmarks on the road to federation, 1889-1900

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Participants</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1889 Oct 24</td>
<td>Tenterfield Address</td>
<td>Henry Parkes, NSW premier</td>
<td>Suggested an appointed constitutional convention</td>
</tr>
<tr>
<td>1890 Feb 6-14</td>
<td>Federation Conference, Melbourne</td>
<td>13 Australian and NZ premiers and ministers (two each from NSW, New Zealand, Qld, SA, Tasmania and Victoria, one from Western Australia)</td>
<td>Resolved to consider union, and to convene the 1891 Convention</td>
</tr>
<tr>
<td>1891 Mar 2-Apr 9</td>
<td>National Australasian Federation Convention, Sydney (NAFC)</td>
<td>45 members of the colonial and New Zealand legislatures (7 each from NSW, Qld, SA, Tasmania, Victoria and WA, 3 from NZ)</td>
<td>Agreed on a draft constitution, later to lapse</td>
</tr>
<tr>
<td>1893 Jul 31-Aug 1</td>
<td>Federation Conference, Corowa</td>
<td>72 delegates representing the colonies of New South Wales and Victoria. Sponsor: NSW and Victorian Federation Leagues.</td>
<td>Recommended an elected convention, and that a draft constitution be put to referendum</td>
</tr>
<tr>
<td>1895 Jan 29</td>
<td>Premiers’ conference, Hobart</td>
<td>Colonial premiers</td>
<td>Majority agreed to a convention and referendum</td>
</tr>
<tr>
<td>1896 Nov 17-21</td>
<td>People’s Federal Convention, Bathurst</td>
<td>213 delegates, mostly from local government interest groups: NSW 182; Victoria 21; South Australia 3; Queensland 3; WA 3; and Tasmania 1.</td>
<td>Agreed to adopt the 1891 draft constitution as a starting point</td>
</tr>
<tr>
<td>1897 Mar 4</td>
<td>Convention elections</td>
<td>Electors of New South Wales, South Australia, Tasmania and Victoria</td>
<td>Delegates elected to National Australasian Convention</td>
</tr>
<tr>
<td>1897 Mar 22-May 5</td>
<td>National Australasian Convention (NAC), three sessions at Adelaide, Sydney, and Melbourne</td>
<td>50 colonial delegates: 10 each from NSW, SA, Tas, Vic, and WA; none from Qld or New Zealand. WA delegates chosen by the WA legislature, all others elected by constituents. All but six were parliamentarians.</td>
<td>1st session: decided to federate 2nd session: further debate, negotiation and drafting 3rd session: second draft constitution agreed</td>
</tr>
<tr>
<td>1898 Jun 3-4</td>
<td>Referenda, four colonies</td>
<td>Electors of Vic, Tasmania, and NSW June 3, electors of SA June 4</td>
<td>Fed. bills approved in Vic, Tas, and SA, but not NSW</td>
</tr>
<tr>
<td>1899 Jan 29-Feb 2</td>
<td>Referenda, five colonies</td>
<td>Premiers</td>
<td>Third draft constitution, amendments to suit NSW</td>
</tr>
<tr>
<td>1899 Apr-Sep</td>
<td>Referenda, five colonies</td>
<td>Electors of South Australia (Apr 29), New South Wales (Jun 20), Victoria and Tasmania (Jul 27), and Queensland (2 Sep)</td>
<td>Federation bills approved</td>
</tr>
<tr>
<td>1900 Jan 24-27</td>
<td>Referendum, one colony</td>
<td>Colonial premiers</td>
<td>Decided a colonial delegation would go to Westminster</td>
</tr>
<tr>
<td>1900 Jan 24-27</td>
<td>Westminster negotiations</td>
<td>Representatives of the six colonies, and Westminster</td>
<td>Constitution amended and enacted</td>
</tr>
<tr>
<td>1900 Jul 31</td>
<td>Referendum, one colony</td>
<td>Electors of Western Australia</td>
<td>Federation bill approved</td>
</tr>
</tbody>
</table>

(Sources: Quick and Garran 1976; La Nauze 1972; Crisp 1978, 7-12; Saunders 1997, 3-6; Macintyre 1998a; Bannon 1998; Bennett 1999, 4-5; National Library of Australia 2000; Parliament of Australia 2000)
**CHANGING THE CONSTITUTION 1901-1999**

Australia began the twentieth century with a constitution that the founders hoped would endure, and it did. At the end of the century, the constitution was little changed, despite continuous efforts to do so — forty-four proposals for constitutional change were put to referenda on nineteen occasions, but just eight amendments passed. TC Winter concluded in his 1973 report to the federal Labor government:

*It is simply an unfortunate fact of circumstance and of history that causes Australia to be electorally one of the last provincials, living in an age of startling national development, still using an old pianola-roll constitution: very little harmony, a great deal of noise and full of holes* (Winter 1973, 10, author’s emphasis).

There are some holes in the constitution, but is the noise caused entirely by those holes? Arguably, frequent unsuccessful attempts to change the constitution create more noise than do the constitutional defects themselves. Is the constitution defective because it does not cede more power over employment to the federal tier (put to referenda in 1911, 1913, 1919, 1926, 1944, and 1946), or because the constitution does not provide for simultaneous senate and house elections (put to referenda in 1974, 1977, 1984, and 1988), or because freedom of association and employment extends to members of the Communist Party (referendum 1951)? The matter of simultaneous elections is particularly curious — in the space of just 14 years, Labor and non-Labor governments put the same amendment to voters on four occasions.

This section examines the way formal constitutional change was attempted in Australia between 1901 and 1999. The rules for formal constitutional change are outlined, then the key events in initiating and negotiating constitutional change are examined. The role played by inquiries is examined in detail, and they are evaluated for their effectiveness as a means to achieve formal change. Arguments about why so many proposals for amending the constitution were not ratified at referenda are not covered here because those arguments were reviewed in the first chapter.
**Rules for amending the constitution**

There are no formal rules for negotiating constitutional change beyond the rules that govern the passage of bills through the parliament, but the constitution does contain specific provisions for initiating and ratifying constitutional amendments. The text of Australia’s constitution is changed only when electors voting at referenda support a federal bill for change. Section 128 of the Constitution provides as follows.

- A bill that proposes constitutional change can be put to referenda between two and six months after it is passed by an absolute majority of both houses of the federal parliament (paragraph 1).
- If one house does not pass the bill, the initiating house may put the bill again after three months; if it does not pass then, the Governor-General may agree to put the bill to referenda (par. 2).
- Electors enrolled to vote in house elections may vote at referenda; since 1977 this includes electors in the Australian Capital Territory (ACT) and the Northern Territory (NT) – the two mainland territories – because they are represented in the house of representatives (pars 1, 2, 3, 6).
- Parliament decides the manner of the vote (par. 3).
- Constitutional amendments are carried if they are approved by a national majority including the two mainland territories, and by a majority of states (par. 4).
- Proposals to change the representation of original states in federal parliament or the geographic boundaries of states must be approved also by a majority of electors in the states affected by the amendment (par. 5).
- Referenda outcomes are binding, that is, when proposals for constitutional change pass referenda, the constitution must be amended (par. 4).

Only the federal parliament can initiate an amendment – there is no formal role for sub-national assemblies or constituents. Further, a bill approved by the senate alone would not be put to referendum, despite the provisions of par. 2, because by informal agreement, the Governor-General would not issue writs without ministerial consent (Evans 2004; Bennett and Brennan 1999, 10-12). By contrast, amendments were put to referenda in 1974 without senate agreement.

Federal referenda were regulated by federal *Referendum (Constitution Alteration) Act 1906*, and its replacement the *Referendum (Machinery Provisions) Act 1984* (Saunders 2000, 9; HSCLCA 1997, 59-60). Voting at referenda became compulsory in
1924. The legislative and electoral rules for referenda are like those that apply at the federal tier generally, with these exceptions:

- voting occurs on a Saturday, provided that a state or territory election is not held on the same day;
- electors vote Yes or No to the name of the bill;
- when opinion is divided in the parliament, parliamentarians who vote for and against the bill may produce Yes and No case statements of up to 2,000 words;
- the Electoral Commission sends the Yes and No case statements and the draft legal texts to electors by mail at least two weeks before the vote (this has been done consistently since 1937);
- the Electoral Commission may provide additional educational information (since 1984); and
- for the republic referendum in 1999 only, the public education program was more extensive, and interest groups received public funding and wrote the official case statements (Saunders 2000, 9-13).

With few exceptions, these procedures applied throughout the twentieth century.

**Constitutional change in practice**

The chronology included as table 3.5 (see page 110) lists landmark events in the process of initiating, negotiating, and ratifying constitutional change in Australia from 1901 to 1999. Initiation events *generate ideas* for change; for example, the 1927-29 Royal Commission’s brief was to conduct a broad review of the constitution. Negotiation events debate *particular* ideas; for example, the 1998 Constitutional Convention debated proposals for a republic. Ratification events are the referenda at which proposals for change may be approved. The table is different from those found in existing texts because it includes in the one chronology for the entire century the main official events for each of the three stages of constitutional change, the participants, and the outcomes. Further, the events are linked where possible, for example, the table notes which inquiry recommendations were subsequently put to referenda.

**Ratification**

Ratification activity was erratic, but ever present, with at least one proposal for constitutional change put to referenda in every decade (see figure 3.2). From federation
to the end of the twentieth century, 44 questions were put to referenda, and eight passed. These amendments provided that:

1. Senate terms begin in July rather than January (1906, amend s 13);
2. The federal tier can assume state debts generally, rather than only those debts which existed at the time of federation (1910, s 105);
3. Federal and state tiers can make binding agreements about state debts (1928, ss 105A);
4. The federal tier can pay a broader range of welfare payments (1946, ss 51(xxiiiA));
5. The federal tier can legislate for Aboriginal and Torres Strait Islanders, and count them in the census (1967, ss 51(xxvi), repeal 127);
6. Casual senate vacancies are filled by persons who are members of the former senator’s party (1977, s 15);
7. Territory electors who are represented in federal parliament can vote at referenda (1977, s 128); and

Half of these amendments changed the division of powers (1910, 1946, 1967), or affected federal/state financial relations (1928).

Periods of peak activity were the second decade when 12 questions were put on five occasions, and the eighth decade when 10 questions put on three occasions (see figure 3.2 below).
Crisp noted in 1978 that more referenda were held when Labor was in office (1978, 44). The pattern continued in the 1980s when the Hawke Labor government put six proposals to referenda. Labor governed for about 30% of the twentieth century (1910-1914, 1929-31, 1943-49, 1972-75, and 1983-96), during which time Labor put more than 60% of all referenda questions.

Labor governments were not, however, more successful in achieving formal constitutional change. Just one of Australia’s eight successful referenda was put by Labor – the Chifley government’s proposal in 1946 for the federal tier to provide a broader range of social security benefits. By contrast, the Fraser Coalition government put four proposals to referenda in 1977, and three of these amendments passed. To be fair, the 1977 proposals were not on the same scale as Labor’s single reform. The three amendments that passed in 1977 entrenched provisions to fill casual senate vacancies with persons from the same party (an informal agreement for many years, but one that was breached in 1975), voting rights for some territory electors at referenda, and a mandatory retirement age for judges. As important as these changes may be, they do not equate with the payment of national social security benefits.

**Initiation and negotiation**

Most proposals for constitutional change were initiated when a bill for a referendum was introduced in parliament, but this did not necessarily mean that a referendum would be held. Between 1901 and 1988, some 109 bills did not pass or lapsed, and governments proposed 61 of these bills (Constitutional Commission 1988, 1123). For example, in 1930 the house passed a government proposal to allow the parliament to enact formal constitutional change without referenda, but the bill lapsed after the second reading in the senate where the opposition had a majority (Sawer in Galligan 1995, 97). Many non-government bills lapse, of course, because the opposition and minor parties lack the numbers in the house to pass such bills. Crisp concluded that non-government bills were “ordinarily moved for propaganda or tactical purposes” (1978, 43-44), but in 1989 Senator Macklin insisted that attempts by the Australian Democrats to introduce citizen initiatives over a ten year period were sincere (1989, 43-46). The latter view is supported by Walker’s account of the history of introducing citizen initiatives and vetoes in Australia (1993).

Governments also initiated constitutional change by convening 14 ad hoc inquiries in the twentieth century – ad hoc in the sense that they were outside the usual
parliamentary processes, and the timing of them was irregular. Governments convened one inquiry in each of the third, fourth, fifth, and sixth decades, five in the eighth decade, three in the ninth decade, and three in tenth decade (see figure 3.2). It might be argued that the frequency was less erratic than this, because the 1973-85 Australian Constitutional Convention was one inquiry, not six, but ACC is counted as six inquiries for two reasons. Governments and delegates varied considerably during this period, and the interval between ACC sessions was as long as four years and nine months.

The 14 inquiries are further distinguished by whether they were briefed to initiate ideas for change generally, or to consider particular proposals. The following nine inquiries convened to consider constitutional change generally:

- 1927-29 Peden Royal Commission;
- 1956-59 Joint Committee on Constitutional Review (JCCR);
- 1973-85 Australian Constitutional Convention (ACC) in six sessions; and
- 1985-88 Constitutional Commission.

The following five inquiries convened to consider particular proposals:

- 1934 Conference of Commonwealth and State Ministers on Constitutional Matters;
- 1942 Constitutional Convention on post-war reconstruction powers;
- 1973 TC Winter inquiry on federal power over prices and incomes;
- 1993 Republic Advisory Committee; and

The remainder of this section reviews the work of these inquiries. The aim is to assess the contribution they made to achieving constitutional change.

**Broad inquiries convened by the federal parliament**

The Bruce Nationalist government convened the Peden Royal Commission in 1927 to conduct a broad review of the constitution, with a particular focus on federal powers. The Commission’s formal brief was:

> to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation; to recommend constitutional changes considered to be desirable; and, in particular to examine and report upon the following subjects from a constitutional point of view:- Aviation, Company law, Health, Industrial powers, Interstate Commission, Judicial power, Navigation law, New States, Taxation, and Trade and commerce. (Royal Commission on the Constitution 1929, v).

The commission comprised seven members including the chair, John Beverley Peden, who was a member of the New South Wales Legislative Council (the upper house). The other six commissioners were two federal senators, a public servant, a solicitor, a state
president of the Employers’ Federation, and the secretary of the ALP’s Federal Executive (Royal Commission on the Constitution 1929, 1). According to Saunders, the Bruce government wanted to convene a parliamentary select committee, but the opposition would not agree to the composition proposed for such a committee (2000, 15).

The Commission convened for 198 days between August 1927 and December 1929, held public hearings in the capitals and four regional centres, and heard 339 witnesses (Royal Commission on the Constitution 1929, 2-3). The commission submitted its report to the Scullin Labor government just a few days after parliament was dissolved for an election. The report made 30 recommendations, none of which were pursued in the short term (JCCR 1959, 5). A proposal to allow parliament to amend the constitution without referenda did reach the second reading stage in the senate, but it was not supported by a majority of the commissioners (Saunders 2000, 15).

In the longer term, some of the commission’s recommendations were addressed, as follows (Royal Commission on the Constitution 1929, 248, 252, 261, 267, 270).

- A proposal for new federal powers over aviation was put to a referendum in 1937 by the Lyons United Australia Party government (non-Labor) in accordance with an agreement reached at the 1934 conference of commonwealth and state ministers, but it did not pass.
- A proposal to introduce a proportional representation election system for the senate was implemented legislatively by the Chifley Labor government in 1949, but it is not entrenched in the constitution.
- The commission recommended an amendment to entrench a requirement for High Court judges to retire at age 72 years. In 1977 the Fraser Liberal government proposed that judges retire at age 70, and this referendum question passed.

Two other proposals were put to referenda against the commission’s recommendations.

- A proposal for new federal powers over marketing was put to a referendum in 1937 by the Lyons United Australia Party, but it did not pass.
- A proposal to count Aboriginal and Torres Strait Islanders in the census and allow the federal parliament to legislate for them was put to a referendum in 1967 by the Holt Liberal government, and it passed with a record Yes vote. In 1929, however,
the commission concluded “on the whole the States are better equipped for controlling aborigines than the Commonwealth”.

Another two amendments that were considered by the commission (one recommended and the other not recommended) were put to referenda eight years after the inquiry adjourned, but neither amendment passed.

The 1927-29 inquiry had little effect on achieving constitutional change because only the proposal to increase federal powers over aviation and marketing can be connected directly with the commission, and it did not pass. McMillan, Evans and Storey concluded harshly that it:

produced a hopelessly polarised report ... and no serious attempt was ever made to implement any of its recommendations ... it would appear that the conclusions of any such body always run the risk, in the real world, of remaining no more than academic (McMillan et al. 1983, 349).

By contrast, members of the next inquiry wrote that the Peden Royal Commission’s report provided “most useful source material” (JCCR 1959, 5).

The second general inquiry was the parliamentary Joint Committee on Constitutional Review (JCCR), which convened from 1956 to 1959, under the Menzies Liberal-Country government. Its broad brief was:

to review such aspects of the working of the Commonwealth Constitution as the Committee considered it could most profitably consider, and to make recommendations for such amendments of the Constitution as the Committee thinks necessary in the light of experience (JCCR 1959, 189).

The committee was multi-partisan in composition, and the audience in the public gallery was diverse. When the final report was submitted in 1959, the committee comprised 14 members representing four parties (seven Labor, five Liberal, one Country Party, and one Country and Democratic League), along with the prime minister and the leader of the opposition as ex-officio members who did not attend (JCCR 1959, 1; Saunders 2000, 18). Meetings were open to the public, but only in the early stages. The 78 people who attended committee meetings did so as individuals, and as representatives of interest groups and four state parliaments (JCCR 1959, 210-211). Interest groups included employers, primary producers (sugar cane, grain, egg, and dairy products), and three groups which lobbied for the formation of new states (the New State for North Queensland Movement, the Capricornia New State Movement, and the New England New State Movement). Following a disagreement with Labor members about the extent of federal powers, the committee resolved to meet in private and limit public participation to invited guests only (JCCR 1959, 190).

The JCCR’s report listed scores of recommendations, and provided draft
amendments for many of them, but it did not stimulate debate in parliament. Just one of its recommendations was put to referendum eight years after the report was tabled, and a further five recommendations were put to referenda in the following 18 years. These amendments proposed to:

• break the nexus between the house and senate (1967);
• add new federal powers to regulate prices (1973);
• hold house and senate elections at the same time (1974 and 1977);
• reduce the threshold for passage of referenda to a national majority and majorities in three states (1974);
• set electoral boundaries by population, not the number of electors (1974); and
• fill casual senate vacancies with members of the same party (1977) (JCCR 1959, esp. 56, 34-38, 170-172, 42).

Only the 1977 casual vacancies referendum passed, but this recommendation is more directly attributable to the Australian Constitutional Convention, which made the same recommendation in 1976. According to Jack Richardson, the committee’s secretary, very few of its recommendations were taken up because government MPs were unhappy about the amount of change proposed (as cited in McMillan et al. 1983, 347-348).

The third to eighth broad reviews were conducted by the Australian Constitutional Convention (ACC), which convened six times between 1973 and 1985. The Victorian state government suggested this inquiry in 1969 as a states only conference (Parliamentary Library 1988, 623-627). The idea was taken up in February 1972 by state Attorneys-General who decided to include MPs from the federal parliament and mainland territories, and representatives of local government with limited speaking and voting rights. The Coalition was in power federally when the idea for a convention was first floated, but Labor was in office when four of the six sessions convened.

There were some positive signs in 1973 that the convention might herald a new era of cooperation between federal and state governments on constitutional reform (Ryan 1977, 4-5), but this did not last. The Liberal premiers of Victoria and New South Wales said in 1973 that they saw the convention as an opportunity to both improve the financial autonomy of the states, and provide to the federal government the additional

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16 McMillan et al. also attributed a 1967 referendum to this inquiry (1983, 347). While the JCCR did recommend an amendment to count “aboriginals” in the census, it did not recommend empowering the federal parliament to legislate for “aboriginal” persons. An amendment that included both provisions was put to referendum in 1967, and it passed.
powers it needed to manage the national economy. In a pre-emptive move, however, Labor prime minister Whitlam announced at the first session that his government would put to referenda proposals to increase federal powers over prices and incomes (Ryan 1977, 14). Just two months after the ACC adjourned in September 1973, electors voted down both amendments, with minorities in all states.

The boycotts of 1975 were a further indication of discord. The full complement of 110 delegates convened for the first session in 1973: 16 federal parliamentarians, 12 state parliamentarians from each state, three local government representatives from each state, and two local government delegates from each of the two mainland territories (Legal and Constitutional Committee 1985, 18-21). The second session was scheduled to convene in 1974 with 112 delegates, which included for the first time two delegates from the NT assembly, and two delegates from the ACT assembly in place of two delegates representing ACT local government. Participants disagreed, however, about the political composition of the convention, and the second session was postponed. When the second session convened from 24-26 September 1975 at Melbourne, it did so without 48 Liberal-National Country Party delegates from the federal parliament, NSW, Victoria, Queensland, and Western Australia. William Hewitt, a Liberal delegate representing Queensland, later attributed Queensland’s boycott to “the emphasis” placed on recognising local government in the constitution (Hewitt 1977, 21).

The 1975 session modified prime minister Whitlam’s 1974 bill for the mutual reference of powers which had lapsed, and recommended that this idea be put to a referendum. Less than two months after the second session adjourned, the Governor-General dismissed the Labor government.

The third session convened at Hobart on 27-29 October 1976, with the Fraser Coalition government in power in Canberra. This convention confirmed agreements that were forged at the second session, and reached further agreements that led directly to the four proposals that were put to referenda in 1977, three of which passed. The fourth to sixth sessions continued to reach agreements on amendments, but only one of these agreements can be linked directly to a referendum – the 1984 proposal to allow voluntary exchange of legislative powers, which did not pass. There was no seventh session because the Hawke Labor government decided to convene a constitutional commission instead (Sawer, Geoffrey 1988, 98), despite opposition from Labor and non-Labor delegates (Saunders 2000, 16-17).
The six sessions of ACC made more than 130 recommendations by majority vote, five of which were put to referenda between 1977 and 1984 (HSCLCA 1997, 3). Four recommendations made by the 1976 session were put to electors:

- hold house and senate elections on the same day (1977, did not pass);
- fill casual senate vacancies with members of the same party (1977, passed);
- allow some territory electors to vote in referenda (1977, passed); and
- federal judges retire at age 70 (1977, passed).

In addition, the 1983 session’s recommendation for the voluntary exchange of legislative powers between the two tiers of government was put to a referendum in 1984, but it did not pass.

The last broad inquiry was the Constitutional Commission of 1985-88, convened by the Hawke Labor government (HSCLCA 1997, 3-4; Constitutional Commission 1988). This inquiry sat for 85 days, including 67 days of public hearings. Its delegates were six commissioners and 37 members of five committees. When it convened, the commissioners were four legal experts (Sir Maurice Byers in the chair, Justice Toohey until 1986, Professor Enid Campbell, and Professor Leslie Zines), Gough Whitlam, former Labor prime minister, and Rupert Hamer, former Liberal premier of Victoria (Constitutional Commission 1988, v). Its terms of reference were as follows.

To inquire into and report, on or before 30 June 1988, on the revision of the Australian Constitution to:
(a) adequately reflect Australia’s status as an independent nation and a Federal Parliamentary democracy;
(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;
(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and
(d) ensure that democratic rights are guaranteed (Constitutional Commission 1988, vi).


The Hawke Labor government issued writs on 25 July 1988 for four referenda. One of the commission’s proposals was put to the vote as recommended, and another three were put in an amended form, as summarised below.

- **Recommendation:** change the house term from three to four years, with the senate term twice that of the house, and hold house and senate elections on the same day.
- **Amendment put:** change the house term from three to four years, fix the senate term at four years fixed, and hold senate and house elections on the same day.
Recommendation: require that each member of the house represent at least 100,000 electors, and entrench representation provisions for territories and new states.

Amendment put: inter alia, for the senate, the house, and state and mainland territory elections, the number of electors in each electorate will vary by no more than 10% from the average electorate size.

Recommendation: recognise local government by adding to the constitution a new clause 119A – put to referendum as recommended.

Recommendation: entrench new freedoms and rights related to conscience, movement, discrimination, “cruel and inhuman treatment”, “unreasonable search or seizure”, arbitrary arrest, and the legal processes following arrest, and amend existing provisions for trial by jury, acquisition of private property by governments, and freedom of religion.


This was the only “formal response” to the commission’s work (HSCLCA 1997, 4).

Each proposal that was put to referenda in 1988 was voted down in every state. According to Galligan, these proposals were not ratified because the commission received little support from the Hawke Labor government, and because the reforms were opposed strongly by the federal Coalition and the states, especially Queensland and Tasmania – the states preferred to continue debating constitutional change at ACC (Galligan 1995, 128).

Specific inquiries convened by the federal parliament

The federal parliament convened five inquiries to negotiate particular proposals for constitutional change. These were the 1934 Conference of Commonwealth and State Ministers on Constitutional Matters, the 1942 Constitutional Convention, the 1973 inquiry into powers over prices and incomes, the 1993 Republic Advisory Committee, and the 1998 Constitutional Convention.

The 1934 Conference of Commonwealth and State Ministers on Constitutional Matters convened in Melbourne on 16-28 February 1934 (Parliament of the Commonwealth of Australia 1935). Delegates were 22 senior members of federal and state governments representing five political parties: the United Australia Party, a precursor to the Liberal Party (eight federal delegates, and three for New South Wales),
Labor (two each for Queensland and Western Australia), the UCC/United Country Party coalition (three for Victoria), the Liberal Country League (two for South Australia), and the Nationalist party (two for Tasmania). According to Garran, who was recalled from retirement to help formulate the agenda and write briefing papers, state parliamentarians were not happy with the membership structure, and felt the conference should be delayed to allow for further discussions (1958, 207-208).

Some authors concluded that this inquiry was entirely unproductive. Russell claimed that the conference was not productive because the participants could not reach any agreement on reforms (1988, 10). McMillan et al. wrote that the conference “founedered on the rock of the States’ unwillingness to concede any further powers to the Commonwealth” (1983, 349-350). A close reading of the primary text reveals, however, more of a patchwork of agreements and disagreements.

The states were disappointed by the federal government’s response to their requests for further financial aid to cater for the consequences of the depression. While the federal government did offer to return to the states the power to tax incomes, the states were not at all keen to take up this offer. While the conference was in session, Garran penned this ditty to summarise those events:

We thank you for the offer of the cow,
But we can’t milk, and so we answer now –
We answer with a loud resounding chorus:
Please keep the cow, and do the milking for us (1958, 208).

Some states were also disappointed about their own quest for constitutional change. For example, Tasmania stood alone with its proposal to widen the scope for appeals to the British Privy Council (Parliament of the Commonwealth of Australia 1935, 66-69).

As he opened the conference, prime minister Lyons expressed reservations about embarking on constitutional change when the world was in the grip of an economic depression (Parliament of the Commonwealth of Australia 1935, 7). He went on, nevertheless, to outline 12 areas where the constitution could be improved, and to ask the states to support constitutional change in seven subject areas, either by reference or by referenda (Parliament of the Commonwealth of Australia 1935, 10-12). This would entail granting to the federal tier powers over navigation, industrial relations (minimum wages and standard hours), films, aviation, wireless broadcasting, and the control of dissidents, and expanding the High Court’s jurisdiction in corporate matters. The states agreed unanimously to increase federal powers over aviation and fisheries, with some minor qualifications.
On the subject of aviation, the federal government sought “full power to legislate with respect to aircraft and air-navigation”. The six states had previously agreed at the 1920 premiers’ conference to grant powers over aviation by reference to the Nationalist government, but only Queensland and Tasmania passed the required legislation; Victoria and South Australia passed amended acts, and the bills debated by the New South Wales and Western Australian parliaments did not pass (Parliament of the Commonwealth of Australia 1935, 53, 74-75). At the 1934 conference, Western Australia and Tasmania gave their full support to this proposal, but the other four states qualified their consent. New South Wales agreed, provided the handover of air services for medical purposes was completed in a satisfactory way. Victoria and South Australia approved concurrent, but not exclusive, federal powers. Queensland agreed, as long as the federal government did not interfere with state ownership of aircraft. Prime minister Lyons assured the delegates twice that his government did not seek exclusive powers over aviation (Parliament of the Commonwealth of Australia 1935, 53-55).

On fisheries, the federal government explained that it needed concurrent powers over fisheries inside territorial waters so it could ratify the International Convention on whaling (Parliament of the Commonwealth of Australia 1935, 61-62). The six states supported the proposal, to some extent. South Australia, Western Australia, and Tasmania gave unqualified support, New South Wales, Victoria, and Queensland supported the proposal with respect to whaling only, and Queensland asked the federal government to consider the need to legislate for trochus shells as well (Parliament of the Commonwealth of Australia 1935, 62-63).

Voting at this conference did not proceed along party lines. While the New South Wales UAP government approved four of seven proposals put by the federal UAP government, the Victorian UAP coalition government approved just two proposals. By contrast, the Queensland and Western Australian Labor governments approved five of the seven proposals. This is remarkable given that in December 1931, a little more than two years earlier, Joe Lyons resigned from the Scullin Labor ministry, led the formation of UAP, and went on to win government from 1931 to 1939, when he died in office (Henderson 2000, 154-155).
The Lyons UAP government put the proposal for new federal powers over aviation to a referendum in 1937, but only Victoria and Queensland approved it, and the proposal for new powers over fisheries was not put to the vote. Thus the 1934 conference did not achieve formal constitutional change, but this was not because the states would not agree to any of the proposals put by the federal government.

The second exercise in negotiating constitutional change originated in the ordinary legislative process. In October 1942, the Curtin Labor government introduced a bill into the federal parliament for a referendum on post-war reconstruction powers (Sawer, Geoffrey 1963, 140). That bill was referred to a bi-partisan Joint Select Committee, which suggested the 1942 Constitutional Convention. When the inquiry convened at Canberra on 24 November, prime minister Curtin said that his aim was:

> to alter the Constitution by empowering the [federal] Parliament [by reference] to make Laws for the purpose of post-war reconstruction, and by guaranteeing religious freedom and freedom of expression” (Commonwealth of Australia 1942, iv-v).

The 24 delegates were 12 federal parliamentarians (eight MPs and four senators), and the premier and leader of the opposition from each of the six states. Not only were the federal/state numbers balanced, but party representation was also split evenly between the Labor and non-Labor parties (analysis of Commonwealth of Australia 1942, iii). At the time, Labor was in power federally, and in four of the six states.

Delegates agreed unanimously to refer specific powers to the federal government, by agreement, in accordance with s 51(xxxvii) of the Constitution (Commonwealth of Australia 1942, 152-154). This agreement would continue for five years after the end of World War II, and it would allow the federal government to legislate for a wide range of subjects: employment; marketing commodities; companies, trusts, and monopolies; prices; production; foreign exchange; borrowing and investment; aviation; rail gauges; national public works; national health; Aboriginal and Torres Strait Islanders; family allowances; and providing assistance to war veterans and the dependants of veterans and deceased veterans. Delegates agreed that once this reference was in force, it could be broken only if a majority of state electors so agreed at a referendum.

The states committed to pass legislation to give effect to these changes. A commonwealth powers bill was introduced into parliament by each of the six state governments, but it passed in New South Wales and Queensland only (Commonwealth Bureau of Census and Statistics 1944, 64). Victoria passed the bill, but provided that it would not come into force until the five other states enacted their legislation. South
Australia and Western Australia legislated to refer a different set of powers to the federal tier, and the Tasmanian upper house declined to pass the bill. Two years later, in February 1944, the Curtin Labor government legislated to put the same proposal to referendum, with a proposal to entrench freedom of speech, expression, and religion (Sawer, Geoffrey 1963, 171-172), but it did not pass. Ironically, the proposal was approved by a majority of electors in South Australia and Western Australia only – the two states whose governments had legislated to refer different powers.

In 1973, Labor prime minister Gough Whitlam initiated the third specific inquiry when he appointed Terry C Winter to report on federal powers over prices and incomes. Winter had been an executive member of the Australian Council of Trades Unions (Whitlam 1973, 1). The prime minister asked him to answer the following questions.

1. In the light of international experience and policies adopted by Governments overseas, what are the deficiencies in the powers of the Australian Government in developing policies against inflation?
2. What options would be available to the Australian Government if the referendum on prices were carried alone, if that on incomes were carried alone, or if they were both carried. In the light of Australia’s particular traditions of wage and price determination, how should the Australian Government exercise powers granted to it in each of the three possible outcomes, and how would they be related to more general economic and fiscal policies?
3. What advantages would there be for the management of the Australian economy and the attainment of the Government’s social objectives, i.e. to what use could these powers be put other than in the context of general inflationary situation? (Winter 1973, 30).

This appointment was made after the government had legislated to hold a referendum proposing that the federal government acquire powers over prices and incomes – writs were issued on 12 November 1973. Winter, the sole member of the inquiry, was asked to advise what the consequences would be if the government were granted powers over prices alone, incomes alone, or both. The letter of appointment instructed Winter to consult with three commonwealth departments, and five individuals, which he duly did.

In his report, Winter agreed that the federal government should have powers over both prices and incomes (Winter 1973, 11-12, 27), and he outlined how the government might exercise control over prices, incomes, or prices and incomes. The subject was put to referendum on 8 December 1973, but it did not pass; none of the six states recorded a majority. Given that the inquiry was appointed after writs were issued for the referendum, and the report was tabled in parliament just 11 days before the referendum, it was bound to have little or no influence on achieving formal constitutional change.

The final two specific inquiries were convened to debate the question of an Australian republic. A republic debate had ebbed and flowed in Australia since European settlement, and well before federation as a constitutional monarchy in 1901,
but this was the first time that governments initiated formal debates on the subject.

The Labor party resolved at its national conference in June 1991 that Australia should become a republic by 2001, the centenary of federation (Winterton 1994, I-1). On 24 February 1993, Labor prime minister Paul Keating announced that his party would support a republic in its election campaign that year. Labor was re-elected to govern on 13 March, and on 28 April it announced the appointment of the 1993 Republic Advisory Committee (RAC 1993a, iv).

The 1993 Republic Advisory Committee (RAC) was briefed to provide an options paper on how Australia could become a republic with “minimum constitutional changes”, but not to recommend whether Australia should become a republic, or a preferred type of republic. The brief required that the committee report on the need for a head of state, the head of state’s powers, and provisions for appointment, and dismissal. It mentioned specifically the need to consider whether a republican president should be appointed by the federal government alone, by the federal government with endorsement from the federal parliament, by an electoral college of federal and state parliamentarians, or whether the head of state should be elected by federal parliamentarians or constituents.

The federal Labor government appointed seven members to the committee. Initially, these were the chair Malcolm Turnbull (then chair of the Australian Republican Movement, since 2004 a federal Liberal MP), Nick Greiner (former Liberal premier of New South Wales), Susan Ryan (former federal Labor senator), George Winterton (law academic), John Hirst (history academic and convenor of the Victorian branch of the Australian Republican Movement), Lois O’Donoghue (chair of the Aboriginal and Torres Strait Islander Commission), and television journalist Mary Kostakidis (RAC 1993a, 11). All state premiers were invited to nominate delegates, but only two states did so. In May the prime minister responded by adding two state appointments: Glyn Davis (politics academic), and Namoi Dougall (solicitor).

The Committee went to considerable lengths to encourage public participation (RAC 1993a, 15-18). In May, an issues paper and a copy of the constitution was published and distributed to a diverse range of public and private organisations. The committee then promoted the issues paper in the media, established a free telephone inquiry line, and convened public meetings in eight capital cities and 13 regional centres. As a result of these efforts, the telephone enquiry line received about 1,500
calls, and 10,000-20,000 copies of the issues paper were distributed by mail and at meetings. In addition, 33 persons made submissions to public meetings at the committee’s behest, and a further 417 individuals and organisations lodged relevant, unsolicited submissions (RAC 1993b, 329-341).

The committee’s report was tabled in parliament on 5 October 1993. It concluded that Australia could readily become a republic, as follows.

The establishment of an Australian republic is essentially a symbolic change, with the main arguments, both for and against, turning on questions of national identity rather than substantive changes to our political system (RAC 1993a, 151).

The report outlined five ways in which a republic president could be selected:

• The prime minister could select the president. To avoid perceptions of partisanship, the committee suggested the process could be managed by a constitutional council.

• The federal parliament could select the president by special majority vote, after receiving nominations from the prime minister, a special-purpose external nominations group, or parliamentarians themselves. The committee advised that whilst this arrangement could address the need for bi-partisanship, an open nomination process might deter suitable candidates. It also recommended that the prime minister should be permitted to make one nomination only.

• An electoral college could select the president. The committee warned, however, that this would not overcome the risk of partisanship.

• The president could be selected by popular ballot. Support for popular election may be high, but this method would be costly, it would invite party politics, and the process might discourage worthy candidates. If this method was chosen, the president’s powers must be codified (RAC 1993a, 65-74).

The committee advised that if the prime minister selected the republic president, this would represent the least change to current convention.

Labor did not put the question of a republic to referendum before it lost office to the Coalition in 1996, but prime minister Keating kept the subject alive by his continuous advocacy. Keating announced to parliament on 7 June 1995 that it was now government policy for Australia to become a republic by the centenary of federation in 2001, and the government would put the question of a republic to referendum in 1998 or 1999 (Australian House of Representatives 1995, 7 June, 1434-1441). His government’s preference was for the prime minister to nominate a president, with the support of two-thirds of a joint sitting of both houses of the federal parliament.
Several prominent constitutional monarchists claimed that Keating’s push for a republic was not sincere; it was instead a matter of political expediency. David Flint claimed that Keating raised the republic issue to divert attention from economic problems (1995), an approach that is reminiscent of criticisms levelled at Henry Parkes’ erratic efforts for federation in the nineteenth century. According to Atkinson, a republic was the means by which Labor could make the transition from a “paternalist State ... [to a] proactive, managerial, and amoral state” (1993, 45, 48-49, 53, 64, 114, 122-124). Atkinson equated the crown with Rousseau’s benevolent law giver – impartial, enduring, a moral guardian, and the people’s kind, legitimate, trustee – and a “nuisance” to republicans who welcomed globalisation and commodification of national resources. Two of Keating’s biographers did not reach a similar conclusion, but they did concede that for Keating “it was [politically] more useful to be in favour of a republic than to have a republic” (Edwards 1996, 526-529), and that his emphasis on “big picture” issues like a republic contributed to the perception that Labor had lost touch with the electorate (Gordon 1996 [1993], 241-242, 346-347).

The idea that Australia might officially debate a republic became a bipartisan issue when Alexander Downer, as leader of the Coalition opposition, suggested on 10 November 1994 that an assembly might convene to debate a republic (PM&C 1998a, 13). Seven months later, and the night before prime minister Keating delivered his republic speech, John Howard pledged as leader of the opposition that a Coalition government would convene a constituent assembly to debate a republic, and more.

Tonight I recommit the Coalition to having a People’s Convention in 1997 to examine to [sic] the Australian Constitution. Not only will the Convention examine the various proposals for an Australian Republic, but it will also have the scope and the authority to examine any other proposal to alter the Australian Constitution ... Our goal is to give the Australian people the Constitution they want. Mr Keating’s goal is to give the Australian people the Republic he wants (Howard 1995, 20, emphasis added).

The next day, Keating claimed that a convention would not be productive. He said:

The Parliament alone can formally decide what is put in a referendum. At most, any suggested convention can only be a consultative device and, in obvious ways, an elitist one (Australian House of Representatives 1995, 7 June).

He cited as evidence for this conclusion the limited outcomes from the ACC, and the Royal Commission that followed it. Clearly, Keating misunderstood Howard’s plan.
In the lead up to the 1996 federal election, the Coalition again promised to hold a "People’s Convention” in 1997 to debate a republic. Its Law & Justice policy, released in February 1996, said:

The current Constitutional arrangements have served Australia well ... however ... many Australians are attracted to the idea of a republic ... A Liberal and National Government will in 1997 establish a People's Convention to debate the whole issue (Liberal and National Parties of Australia 1996).

The scope had narrowed in the preceding seven months, from a debate about a republic and “any other proposal to alter the Australian Constitution”, to a debate about the “whole issue” of a republic. Again, it promised to convene an assembly, but it did not support the idea of Australia becoming a republic. Malcolm Turnbull wrote later that the Coalition’s motive was to “get the republic issue off the agenda” (1999, 13).

Headon claimed the policy was a “knee-jerk defence [to Labor policy, and once elected to office] a bit of an embarrassment for constitutional monarchist Howard” (1998a, 26). This may be why enabling legislation for the convention was not introduced in parliament until a year after the Coalition came to office.

Prime Minister Howard announced on 12 September 1996 that a constitutional convention would convene from 2 to 13 February 1998 in Canberra (PM&C 1998a, 17). Six months later in parliament, he announced the convention’s brief, as follows.

The convention will provide a forum for discussion about whether or not our present constitution should be changed to a republican one. In particular:

- whether or not Australia should become a republic;
- which republican model should be put to the electorate to consider against the status quo; and
- in what time frame and under what circumstances might any change be considered.

In establishing the convention, I am conscious of the view among many Australians in favour of a change to a republican form of government. Equally, I am conscious that the existing constitution has served Australia well, providing stable and effective democratic government. There are sincerely held views on both sides which deserve full debate in public view. The commitment to hold the convention does not represent any decision by the government that a change is necessary or desirable, nor any dissatisfaction with the workings of the current system ... this convention should deal only with the question of the head of state and, therefore, any possible change to a republican form of government (Australian House of Representatives 1997, 26 March, 3061).

Again, the convention’s scope was truncated, from debating “the whole issue” of a republic, to “deal only with the question of the head of state and, therefore, any possible change to a republican form of government”. Again, the government made it clear that it did not advocate an Australian republic.

The government decided that half of the 152 delegates would be parliamentarians and community representatives selected by governments and parliamentary parties (one independent member was chosen by random selection), and half would be elected
Delegates assembled on 2 February 1998 in Canberra. On the last two days of the assembly, they indicated their constitutional preferences by voting in formal ballots. Depending on the ballot question, options were Status Quo (no constitutional change), one of four republic models, No Model, or Abstain. On the last day of the convention, a clear majority agreed that Australia should become a republic (59% Yes, 34% No, 7% Abstain), and that the question should be put to a referendum (88% Yes, 11% No, 1% Abstain). However, neither a simple nor an absolute majority supported the Turnbull republic model that was put to referendum. When delegates were asked in the fifth ballot whether the Turnbull model should be adopted, the result was 50% Yes (exactly), 47% No and 3% Abstain. When asked in the eighth ballot whether the Turnbull model was preferred to Status Quo, the result was 48% Yes, 38% No, and 14% Abstain. The eighth ballot was the last chance for delegates to agree on one republic model, and they were deadlocked.

Winterton, who attended the assembly as a community representative, predicted such an outcome shortly before it convened.

Each of the three groups participating in the Convention should contribute a different dimension to its proceedings. The popularly elected delegates will primarily bring passion and commitment to the various shades of public opinion on the republican issue; the parliamentary representatives embody political experience and, one hopes, a facility for compromise, with the Commonwealth government presumably determined to prevent the Convention it proposed and established from descending into acrimonious deadlock and shambles; and the appointed delegates may offer a less passionate range of community views together with some legal and governmental experience. They may exert a moderating influence on the passionate commitment of the elected delegates; but this may represent an unduly optimistic perspective (1998b, 104-105).

The circumstances surrounding the deadlock are discussed when the assembly is examined in detail in chapter 4.

Delegates also debated whether the constitution should be changed to include a new preamble. The assembly did not draft a preamble, but it did specify 21 matters that should be included (PM&C 1998a, 46-47). A year later, the prime minister announced that a preamble would be put to referendum with the republic question, and that he himself would draft it (McGregor 1999b), with assistance from the poet Les Murray (Slattery 1999; Shanahan 1999c). When the prime minister’s preamble was approved by the Coalition party room and released to the media on 23 March, it attracted considerable press coverage, and criticism. Much of the criticism centred on the limited recognition of indigenous peoples, and the gender implications of using the word “mateship” (Grattan and Kingston 1999; Peatling 1999; Shanahan 1999b). For these
critics, the offending text was:

Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures. … We value excellence as well as fairness, independence as dearly as mateship (Grattan and Kingston 1999).

Les Murray said that the prime minister was happy to refer to “honouring Aboriginal stewardship” (Dore 1999), and that he warned the prime minister about using the word mateship, “But he loved the word and he was the boss” (as cited by Shanahan 1999b).

The senate, however, was less inclined to yield to the prime minister’s preferences – the preamble was re-written before the senate passed it on 12 August 1999 (Shanahan 1999d). In the course of parliamentary negotiations, the two extracts just cited became:

… honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country … valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Even with these changes, the final preamble fell well short of the assembly’s recommendations (see chapter 4).

On 6 November 1999, the republic model and preamble were put to referenda.

The result was 45.1% Yes for a the republic, and 39.3% Yes for the new preamble (see table 3.3 below).

Table 3.3: Results for the republic and preamble referenda

<table>
<thead>
<tr>
<th></th>
<th>Turnout %</th>
<th>Votes cast Total</th>
<th>Informal</th>
<th>Informal %</th>
<th>Valid votes cast Yes</th>
<th>No</th>
<th>Yes %</th>
<th>No %</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Republic</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>92.3%</td>
<td>3,948,714</td>
<td>34,772</td>
<td>0.88%</td>
<td>1,817,380</td>
<td>2,096,562</td>
<td>46.4%</td>
<td>53.6%</td>
</tr>
<tr>
<td>Victoria</td>
<td>95.2%</td>
<td>3,016,737</td>
<td>28,063</td>
<td>0.93%</td>
<td>1,489,536</td>
<td>1,499,138</td>
<td>49.8%</td>
<td>50.2%</td>
</tr>
<tr>
<td>Queensland</td>
<td>94.6%</td>
<td>2,108,694</td>
<td>14,642</td>
<td>0.69%</td>
<td>784,060</td>
<td>1,309,992</td>
<td>37.4%</td>
<td>62.6%</td>
</tr>
<tr>
<td>Western Australia</td>
<td>94.7%</td>
<td>1,114,326</td>
<td>9,500</td>
<td>0.85%</td>
<td>458,306</td>
<td>646,520</td>
<td>41.5%</td>
<td>58.5%</td>
</tr>
<tr>
<td>South Australia</td>
<td>96.0%</td>
<td>986,394</td>
<td>8,950</td>
<td>0.91%</td>
<td>425,869</td>
<td>531,575</td>
<td>43.6%</td>
<td>56.4%</td>
</tr>
<tr>
<td>Tasmania</td>
<td>96.3%</td>
<td>315,641</td>
<td>2,857</td>
<td>0.91%</td>
<td>126,271</td>
<td>186,513</td>
<td>40.4%</td>
<td>59.6%</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>95.3%</td>
<td>202,614</td>
<td>1,553</td>
<td>0.77%</td>
<td>127,211</td>
<td>73,850</td>
<td>63.3%</td>
<td>36.7%</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>85.0%</td>
<td>91,880</td>
<td>852</td>
<td>0.93%</td>
<td>44,391</td>
<td>46,637</td>
<td>48.8%</td>
<td>51.2%</td>
</tr>
<tr>
<td>Republic National</td>
<td>95.1%</td>
<td>11,785,000</td>
<td>101,189</td>
<td>0.86%</td>
<td>5,273,024</td>
<td>6,410,787</td>
<td>45.1%</td>
<td>54.9%</td>
</tr>
</tbody>
</table>

| **Preamble**   |           |                  |          |            |                       |    |       |      |
| New South Wales | 95.2%     | 3,948,482        | 39,144   | 0.99%      | 1,647,378             | 2,261,960 | 42.1% | 57.9% |
| Victoria       | 95.3%     | 3,016,716        | 30,341   | 1.01%      | 1,268,044             | 1,718,331 | 42.5% | 57.5% |
| Queensland     | 94.6%     | 2,108,659        | 16,174   | 0.77%      | 686,644               | 1,405,841 | 32.8% | 67.2% |
| Western Australia | 94.7%   | 1,114,455        | 10,436   | 0.94%      | 383,477               | 720,542  | 34.7% | 65.3% |
| South Australia| 96.0%     | 986,535          | 10,325   | 1.05%      | 371,965               | 604,245  | 38.1% | 61.9% |
| Tasmania       | 96.3%     | 315,664          | 3,343    | 1.06%      | 111,415               | 200,906  | 35.7% | 64.3% |
| Australian Capital Territory | 95.3% | 202,618          | 1,696    | 0.84%      | 87,629                | 113,293  | 43.6% | 56.4% |
| Northern Territory | 85.0%  | 91,906           | 1,015    | 1.10%      | 35,011                | 55,880   | 38.5% | 61.5% |
| Preamble National | 95.1% | 11,785,035       | 112,474  | 0.95%      | 4,591,563             | 7,080,998 | 39.3% | 60.7% |

(Source: AEC 2000, 71, 77, 83)
National support for the preamble was almost 6% lower than support for the republic. More than six years after he co-authored the first version of the preamble, poet Les Murray said “They rewrote it, and the people took it out and shot it ... it was the merciful thing to do with the rewrite, yes” (as cited by Neill 2006). For the republic question, only the Australian Capital Territory recorded majority support. Elsewhere, the Yes vote was highest in Victoria at 49.8%, and lowest in Queensland at 37.4%. Support for the preamble was also lowest in Queensland, at 32.8%. Turnout was almost the same for both questions, and the informal rate was slightly higher for the preamble question at 0.95%. These informal rates are the lowest ever recorded for national referenda. Prior to 1999, the range was 1.3% to 17.6% before voting became compulsory in 1924, and 1.3% to 8.0% since 1924.

Even though the referenda did not pass, from a broader perspective the 1998 Constitutional Convention may have been one of the most successful constitutional inquiries ever held in Australia because both of its recommendations – to put a republic and a preamble to referenda – were implemented by the government of the day.

CONCLUSIONS

Australian inquiries contributed little to achieving formal constitutional change because in most cases, governments did not act on their recommendations. Of the hundreds of recommendations made by inquiries in the twentieth century, just 15 were put to referenda as recommended, and of those 15, just three amendments passed. But should the success of inquiries be measured by how many recommendations are passed at referenda, and if so, with what should those outcomes be compared? According to Ireland (1995), inquiries are not successful if the yardstick is achieving formal constitutional change, but they do provide a public forum for discussing constitutional change, and they “meet their terms of reference”.

It may seem a small achievement that just 15 of the hundreds of recommendations made by inquiries were put to referenda, but these 15 referenda questions represent more than one-third of the 44 questions put in the twentieth century. Further, 20% of these questions passed, compared to 17% of referenda questions put by parliament without recommendations from inquiries. On this evidence, it seems that Australia’s modest record for formal constitutional change would be even lower without the contribution made by inquiries. For these statistics, however, the net was cast wide to include all inquiries, and to attribute referenda to them wherever possible. A less generous
approach, but a more realistic one, is taken in the next section.

Of the 14 inquiries reviewed above, two are eliminated because they were not asked to recommend constitutional change. The 1973 Winter inquiry into prices and incomes is not included in the next analysis because the inquiry was briefed after the government issued writs for the referendum. The second inquiry eliminated from the second analysis is the 1993 Republic Advisory Committee. Like the Winter inquiry, it was not asked to recommend whether formal change should be proposed. Instead, the committee’s brief was to report on how Australia could become a republic with minimum formal constitutional change. Other referenda that were credited to inquiries earlier are excluded now because the time between the inquiries and the referenda is too long to justify a causal link. For example, four of the five referenda questions credited to the 1956-59 JCCR were put to the vote more than ten years after it submitted its final report. In the second analysis, referenda are attributed to inquiries if recommendations were put to electors within six years. This period is chosen because it allows an incumbent government two terms in office to put its proposals to constituents. When the data are recast in this way, the original list of 14 inquiries and 15 recommendations is reduced to 12 inquiries and ten recommendations, three of which were approved.

The results of the second analysis are shown below in table 3.4. If the number of recommendations put to referenda is the measure of success, then the 1976 session of ACC is the clear leader. Four recommendations made by the 1976 ACC were put to referenda in 1977, and three of them passed.

Table 3.4: Inquiry recommendations put to referenda

<table>
<thead>
<tr>
<th>Inquiry</th>
<th>Delegates</th>
<th>Referenda</th>
</tr>
</thead>
<tbody>
<tr>
<td>1934 Conference</td>
<td>22 Federal and state ministers</td>
<td>1 0</td>
</tr>
<tr>
<td>1942 Convention</td>
<td>24 Federal and state MPs</td>
<td>1 0</td>
</tr>
<tr>
<td>1976 ACC</td>
<td>112 delegates: 16 federal MPs, 72 state MPs, 4 territory MPs, and 20 representatives of local government</td>
<td>4 3</td>
</tr>
<tr>
<td>1983 ACC</td>
<td>The same as the 1976 ACC</td>
<td>1 0</td>
</tr>
<tr>
<td>1985-88 Royal Commission</td>
<td>Six commissioners: four legal experts and two retired Labor leaders</td>
<td>1 0</td>
</tr>
<tr>
<td>1998 Constitutional Convention (the assembly)</td>
<td>152 delegates: 36 federal, state, and territory parliamentarians; 40 community representatives; and 76 elected delegates</td>
<td>2 0</td>
</tr>
</tbody>
</table>

Note: Recommendations made by the 1975 and the 1976 sessions of ACC are credited to the 1976 session because 48 of the 112 delegates did not attend the 1975 session.
No other inquiry comes close to this achievement for the number of recommendations put to referenda, whether or not those amendments passed.

If the success of an inquiry is measured instead by what proportion of its recommendations was put to referenda, then the 1998 Constitutional Convention (the assembly) is the clear leader. This group recommended that two questions be put to referenda, and both questions were put. By contrast, less than 10% of the recommendations made by ACC in 1976 were put to referenda. This second method of measuring success may be fairer to inquiry members because none of the inquiries examined here was asked to consider whether voters were likely to approve their recommendations.

This second analysis increases the success rate for inquiries to 30%, compared to a success rate of 15% for amendments put by parliament without recommendations from inquiries.\(^{17}\) It can thus be concluded from this data that referenda questions are twice as likely to succeed if they are recommended by inquiries. Why would this be the case? It may be that inquiries receive more publicity, which increases public engagement, and the likelihood that voters will support the proposals at the polls. Perhaps inquiries are perceived by the public to be more credible than parliaments, and this increases voters’ willingness to endorse changes that are recommended by inquiries. This possibility is reminiscent of Garran’s point (outlined in the last chapter) that recommendations made by constituent assemblies are less likely to be “shied at by electors” who do not support the government (1958, 209). It could also be because inquiry members are less constrained in the recommendations they can make because they are not bound to act on party lines. There is sufficient information to explore these possibilities for the 1976 ACC and the 1998 Constitutional Convention.

How do the 1976 ACC and the 1998 assembly compare for publicity, credibility, and constraint? The assembly was publicised widely, and its sessions were public, whilst the ACC sessions were closed. If we follow Garran’s argument, the assembly was more credible because half its members were not parliamentarians, compared to just 20 of 112 delegates to ACC. As to constraint, it is difficult to distinguish ACC and the convention. Any constraint imposed by party discipline at ACC would apply equally to

\(^{17}\) The figure for amendments put without recommendation from an inquiry was earlier said to be 17%. This figure reduces here to 15% because amendments made by some inquiries that were put to referenda more than six years after the inquiries adjourned are attributed to parliament.
parliamentarians at the assembly, and it would apply to the assembly’s elected delegates via the positions they took on the republic question when they stood for election. Prima facie, the only delegates not constrained in this way were 20 local government representatives at ACC, and 36 community representatives at the assembly. Given that these groups comprised just 18% and 14% of each group respectively, it is not likely that in relative terms a lack of constraint determined the success of the ACC or the assembly. On this analysis, the assembly is the clear leader for publicity and credibility, but it was a little more constrained than ACC.

It is logical to conclude that when there is more publicity, the public are more likely to know that an inquiry made recommendations, and this may increase the chance that governments will put recommendations to referenda. When that is done, proposals for constitutional change may be more credible in the eyes of voters when they arise from inquiries than when parliamentarians negotiate amendments alone. Size and composition may also be a factor for success – the ACC and the convention stand out as the largest and most diverse inquiries.

None of these favourable circumstances were sufficient, however, to ensure that the republic and preamble proposals debated by the assembly were approved at referenda. The next chapter examines the assembly in detail to answer the four thesis questions.
Table 3.5: Landmarks in the process of constitutional change, 1901-1999

<table>
<thead>
<tr>
<th>Date/s</th>
<th>Event</th>
<th>Participants</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1906 Oct. 12</td>
<td>Referendum: Q1 senate terms begin in July not January (s13)</td>
<td>Deakin Protectionist govt, turnout 50%</td>
<td>Q1 Yes; majorities in all states.</td>
</tr>
<tr>
<td>1910 Apr 13</td>
<td>Referenda: Q1 federal powers to fund states on a fixed per capita</td>
<td>Deakin Protectionist govt, turnout 62%</td>
<td>Q1 No; majority Yes 3 states, national No.</td>
</tr>
<tr>
<td></td>
<td>basis, rather than distribute 75% of net federal revenue (s87); Q2</td>
<td></td>
<td>Q2 Yes; majority 5 states (not NSW), national Yes.</td>
</tr>
<tr>
<td></td>
<td>federal powers to assume state debts (s105)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1911 Apr 26</td>
<td>Referenda to extend federal powers (s51): Q1 over commerce and</td>
<td>Fisher Labor govt, turnout 53%</td>
<td>Q1-2 No; majority Yes WA, national No.</td>
</tr>
<tr>
<td></td>
<td>industrial relations; Q2, to nationalise monopolies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1913 May 31</td>
<td>Referenda to extend federal powers (s51) over: Q1 trade and commerce;</td>
<td>Fisher Labor govt, turnout 74%</td>
<td>Q1-6 No; majority Yes Qld, SA, and WA, national No.</td>
</tr>
<tr>
<td></td>
<td>Q2 corporations; Q3 industrial disputes; Q4 trusts; Q5 monopolies;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Q6 railways industrial relations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1919 Dec 13</td>
<td>Referenda to extend federal powers (s51) for up to 3 years over: Q1</td>
<td>Hughes Nationalist govt, turnout 71%</td>
<td>Q1-2 No; Yes majorities Vic, Qld, and WA, national No.</td>
</tr>
<tr>
<td></td>
<td>trade &amp; commerce, corporations, industrial relations, and trusts;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>and Q2 nationalisation of monopolies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1926 Sep 4</td>
<td>Referenda to extend federal powers (s51) over: Q1 commerce, unions,</td>
<td>Bruce Nationalist govt, turnout 89% (compulsory</td>
<td>Q1-2 No; Yes NSW and Qld, national No.</td>
</tr>
<tr>
<td></td>
<td>and employer organisations; Q2 essential services</td>
<td>voting from 1924)</td>
<td></td>
</tr>
<tr>
<td>1928 Nov 17</td>
<td>Referendum Q1 allow federal/state agreements re assumption of state</td>
<td>Bruce Nationalist government, turnout 94%</td>
<td>Q1 Yes; Yes in all states and nationally.</td>
</tr>
<tr>
<td></td>
<td>debts (new s105A)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1927-29,</td>
<td>Peden Royal Commission on the Constitution, broad brief to</td>
<td>Convened by Bruce Nationalist govt, report to</td>
<td>Recommendations under 30 heads. Favoured: fed powers over aviation (Q1</td>
</tr>
<tr>
<td>Aug-Dec</td>
<td>recommend constitutional change, with specific mention of reviewing</td>
<td>Scullin Labor govt; 7 members, including JB</td>
<td>1937, No), and senate elected by PR (legislated in 1949). Opposed</td>
</tr>
<tr>
<td></td>
<td>Commonwealth powers</td>
<td>Peden NSW MLC (chair), Senator PP Abbott, EK</td>
<td>exempting marketing laws from s.92 (Q2 1937, No), and new federal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Bowden MP, and DL McNamara MLC; 198 sitting</td>
<td>powers to legislate for Aboriginals and Torres Strait Islanders (Q2 1967,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>days, public hearings in capitals and 4 regional</td>
<td>Yes).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>centres, 339 witnesses.</td>
<td></td>
</tr>
<tr>
<td>1934 Feb 16-18</td>
<td>Conference of Commonwealth and State Ministers on Constitutional</td>
<td>Federal and state ministers</td>
<td>One agreement put to referendum in 1937 as Q1, which did not pass.</td>
</tr>
<tr>
<td></td>
<td>Matters, Melbourne</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1937 Mar 6</td>
<td>Referenda: Q1 new federal powers over aviation (s51); Q2 marketing</td>
<td>Lyons United Australia Party govt, turnout 94%</td>
<td>Q1 No; Yes in Vic. and Qld, national No.</td>
</tr>
<tr>
<td></td>
<td>laws exempt from s.92 (new s92A)</td>
<td></td>
<td>Q2 No; No all states.</td>
</tr>
<tr>
<td>Date/s</td>
<td>Event</td>
<td>Participants</td>
<td>Outcome</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1942 Nov 24-Dec 2</td>
<td>Constitutional Convention to consider entrenching freedom of religion and expression, and new federal powers for post-war reconstruction, assistance to war veterans, employment, marketing, corporations, trusts, monopolies, prices, production, foreign exchange, aviation, rail gauges, national public works, health, family allowances, and Aboriginals and Torres Strait Islanders</td>
<td>Curtin Labor govt. Delegates were 24 MPs: 12 federal (8 House, 4 Senate), 12 state ( premiers and opposition leaders): by party, 12 Labor and 12 non-Labor</td>
<td>Unanimous agreement 2 Dec 1942 to legislate to increase federal powers by reference under s.51(xxxvii), in effect for 5 years after WWII. Repeal or amendment would require referendum with passage by national majority. Only NSW and Qld passed enabling legislation, but this proposal was put to referendum in 1944 as Q1.</td>
</tr>
<tr>
<td>1944 Aug 19</td>
<td>Referenda: Q1 new federal powers for five years (many like those sought in 1911 &amp; 1942), and new “democratic rights” (s51, s60A)</td>
<td>Curtin Labor government, turnout 97%</td>
<td>Q1 No; Yes in SA and WA, national No.</td>
</tr>
<tr>
<td>1946 Sep 28</td>
<td>Referenda for new federal powers (s51) to: Q1 provide social services (welfare); Q2 organise marketing of primary produce; and Q3 regulate industrial wages and conditions</td>
<td>Chifley Labor government, turnout 94%</td>
<td>Q1 Yes; Yes all states; Q2 No; Yes in NSW, Vic and WA, national No. Q3 No; Yes in NSW, Vic and WA, national No.</td>
</tr>
<tr>
<td>1948 May 29</td>
<td>Referendum Q1 for new federal powers to control rents and prices (s51)</td>
<td>Chifley Labor government, turnout 94%</td>
<td>Q1 No; No all states.</td>
</tr>
<tr>
<td>1951 Sep 22</td>
<td>Referendum Q1 for new federal powers to ban Communist Party and limit employment of communists (new s15A)</td>
<td>Menzies Liberal government, turnout 96%</td>
<td>Q1 No; Yes in Qld, WA and Tas, national No.</td>
</tr>
<tr>
<td>1956-59</td>
<td>Joint Committee on Constitutional Review (JCCR), broad brief to review of the Constitution as it saw fit; reported in 1958 and on 25 Nov 1959</td>
<td>Menzies’ Liberal-Country government: 14 federal MPs (10 house, 4 senate; 7 Labor, 5 Liberal, 1 Country, 1 CDL); 77 visitors.</td>
<td>Scores of recommendations. No immediate action, but 6 recommendations put in next 20 years (one twice): 1967 Q1, 1973 Q1, 1974 Q1 &amp; Q2, 1974 Q3, 1977 Q1 &amp; Q2.</td>
</tr>
<tr>
<td>1967 May 27</td>
<td>Referenda: Q1 break house nexus (ss24-26); Q2 new fed powers to legislate for ‘Aboriginals’ and count in census (ss51(xxvi), 127)</td>
<td>Holt Liberal government, turnout 94%</td>
<td>Q1 No; Yes in NSW, national No. Q2 Yes; Yes all states and nationally (91%).</td>
</tr>
<tr>
<td>Date/s</td>
<td>Event</td>
<td>Participants</td>
<td>Outcome</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1973 Dec 8</td>
<td>Referenda, new federal powers (s51) over prices (Q1), and incomes (Q2)</td>
<td>Whitlam Labor government, turnout 93%</td>
<td>Q1-2 No; No all states.</td>
</tr>
<tr>
<td>1974 May 18</td>
<td>Referenda: Q1 house and senate elections on same day (ss7,9,12,13,15); Q2 pass referenda by majorities in 3 not 4 states, territory electors vote at referenda (s128); Q3 electorate size by population not electors (s29); Q4 federal powers to borrow for, and provide finance to, local govt (s51)</td>
<td>Whitlam Labor government, turnout 96%</td>
<td>Q1-4 No; Yes in NSW only.</td>
</tr>
<tr>
<td>1975 Sep 24-26</td>
<td>ACC 2nd session, Melbourne</td>
<td>Whitlam Labor govt: 69 delegates; boycott by 48 Coalition MPs from the federal and NSW, Qld, Vic, and WA parliaments.</td>
<td>Some resolutions adopted; these were confirmed at the third session.</td>
</tr>
<tr>
<td>1976 Oct 27-29</td>
<td>ACC 3rd session, Hobart</td>
<td>Fraser Liberal govt: 134 delegates, similar structure to the 1st session</td>
<td>Further resolutions. Four recommendations put to referenda in 1977; three questions passed, one did not.</td>
</tr>
<tr>
<td>1977 May 21</td>
<td>Referenda: Q1 concurrent senate/house elections (ss7,9,12,13,15); Q2 casual senate vacancies filled by members of same party (s15); Q3 territory electors vote in referenda (s128); Q4 judges retire at 70 years of age (s72)</td>
<td>Fraser Liberal govt, turnout 92%</td>
<td>Q1 No; Yes in NSW, Vic, and SA, national Yes (66%). Q2-4 Yes; Yes all-states and national (77%, 78%, 80%).</td>
</tr>
<tr>
<td>1978 Jul 26-28</td>
<td>ACC 4th session, Perth</td>
<td>Fraser Liberal govt: similar structure to 3rd session 1976</td>
<td>Inter alia, agreed that if the Senate refused supply again after a double dissolution, the budget would be presented to the Governor-General for assent.</td>
</tr>
<tr>
<td>1983 Apr 26-29</td>
<td>ACC 5th session, Adelaide</td>
<td>Hawke Labor govt: 163 delegates, similar structure to 3rd session; Labor MPs from Queensland boycotted the session.</td>
<td>Recommended inter alia, High Court power to advise, 4-year terms for the house and 8 for the senate; and interchange of federal/state powers, put in 1984, No.</td>
</tr>
<tr>
<td>1984 Dec 1</td>
<td>Referenda: Q1 senate terms variable not fixed, and concurrent senate/house elections (ss7,12,13,57); Q2 allow voluntary referral of legislative powers between federal and state tiers (s51(375)); new s108A&amp;B</td>
<td>Hawke Labor govt, turnout 94%. Q2 originally proposed by Labor PM Whitlam in a March 1974 bill which lapsed in the Senate (Ryan 1977, 12-13)</td>
<td>Q1 No; Yes NSW, Vic, national, NT and ACT. Q2 No; No all states and NT, Yes ACT.</td>
</tr>
<tr>
<td>1985 Jul 29-1 Aug</td>
<td>ACC 6th and final session, Brisbane.</td>
<td>Hawke Labor govt, similar structure to 3rd session 1976</td>
<td>Overall, more than 130 recommendations, four questions put in 1977 (Q2-4, Yes), one put in 1984 (Q2, No).</td>
</tr>
<tr>
<td>Date/s</td>
<td>Event</td>
<td>Participants</td>
<td>Outcome</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------------------------------------</td>
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<td>---------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1985-88</td>
<td>Constitutional Commission, appointed to conduct a broad review of the Constitution, including but not limited to the division of powers and “democratic rights”.</td>
<td>Hawke Labor govt: 6 members, plus 37 members of five committees; extensive public hearings, 686 submissions.</td>
<td>Report May and July 1988. More than 100 recommendations, and 44 draft bills. Four subjects put to referenda 1988 (three in amended form), none passed.</td>
</tr>
<tr>
<td>1988 Sep 3</td>
<td>Referenda: Q1 senate terms 4 years max. not 6 fixed, fixed house terms 4 years not 3, concurrent elections (ss7,9,12,13,14,28); Q2 increase federal powers over electorate size and boundaries, entrench provisions re boundaries, franchise, and vote weights for state/territory elections (ss8,29,30,41, repeal s25, new ss197A,122A,124A-H&amp;J); Q3 recognise elected local government in state legislation (new s119A); Q4 trial by jury for some offences, states/territories acquire property on just terms, extend powers on religion to states/territories (ss80,116, new 115A&amp;B)</td>
<td>Hawke Labor government, turnout 92% Writs issued 25 July 1988.</td>
<td>Q1, 3 and 4 No; No all states and territories. Q2 No; Yes in ACT only.</td>
</tr>
<tr>
<td>1993 May-Oct</td>
<td>Republic Advisory Committee, convened to advise how Australia could become a republic with minimum constitutional change.</td>
<td>Keating Labor govt, 9 members: 3 academics, 2 lawyers, 2 ex-MPs (1 Labor, 1 Liberal), 1 ATSIC, 1 media presenter; 22 public meetings, 417 written submissions.</td>
<td>Advised that Australia could become a republic by replacing the monarch and governor-general with an Australian head of state: outline of options for head of state powers, selection, and dismissal, and the impact of a republic on the states.</td>
</tr>
<tr>
<td>1997</td>
<td>Constitutional Convention elections</td>
<td>Howard Coalition govt, non-compulsory postal ballot, turnout 45%, informal 2.2%</td>
<td>76 delegates elected to 1998 Constitutional Convention (20 NSW, 16 Vic, 13 Qld, 9 WA, 8 SA, 6 Tas, 2 ACT, 2 NT).</td>
</tr>
<tr>
<td>1998 Feb 2-13</td>
<td>Constitutional Convention, Canberra</td>
<td>Howard Coalition govt: 152 delegates, half elected, half appointed (36 community representatives and 40 state and federal parliamentarians); 1,058 written submissions.</td>
<td>A republic supported by 80% of the delegates: one of four republic models favoured by 48% of delegates voting in the last ballot. This model put to referenda in 1999.</td>
</tr>
<tr>
<td>1999 Nov 6</td>
<td>Referenda: Q1 replace the monarch and governor-general with a president (ss1-5,7,15,17-19,21,23,28,32-35,37,42,44,46-63,70,72-74,83,85,103,117,126, 128, schedule 1, new 59-63, 126-127, schedule 2); Q2 preamble (new s.125A)</td>
<td>Howard Coalition government; turnout 95%; informal Q1 0.86%, Q2 0.95%</td>
<td>Q1 No; Yes in ACT only. Q2 No; No in all states and territories.</td>
</tr>
</tbody>
</table>

CHAPTER FOUR – THE AUSTRALIAN ASSEMBLY 1998

The 1998 Constitutional Convention may have been the most successful constitutional inquiry held in the twentieth century, but was it superior to parliamentarians negotiating constitutional change alone? This chapter examines the assembly in detail to answer the four questions raised in the second chapter. Was it more representative, did it generate more public interest and consensus, and was it less partisan? These four key concepts, and the way they are measured, were defined and described fully in the second chapter.

Representation is evaluated by comparing data for assembly delegates with comparable data for the population and electors. Public interest is evaluated by comparing the number of people who made submissions to the assembly, or attended its sessions, with similar data for parliamentary inquiries. Consensus and partisanship is evaluated by examining the extent to which parliamentary and non-parliamentary delegates agreed at the assembly about whether Australia should become a republic, and how their preferences changed over time. Analysis of these indicators shows that the assembly was more representative, it generated more public interest, and it was better able to reach consensus, but it was not less partisan.

DELEGATE SELECTION

Parliamentarians were appointed directly to 40 seats. This group comprised 20 federal parliamentarians, 18 state parliamentarians, and the chief ministers of the two mainland territories. Allocation of the 20 federal seats to the parliamentary parties “broadly reflected the balance of representation of the parties across both Houses of the Commonwealth Parliament” (PM&C 1998a, 17), hence the Coalition chose 12 delegates, Labor chose six, the Australian Democrats chose one, and one of eight independent members was chosen by random selection. For each of the six state parliaments, delegates were the premier, the leader of the opposition, and one parliamentarian chosen by the premier. Representation by party was 23 Coalition, 13 Labor, two Democrat, one Greens, and one independent.

Community representatives were appointed to 36 seats. The federal government invited the public to volunteer or nominate others as candidates, and 850 nominations were received. The names of nominees were not published. The Convention report
explained that the government chose its community representatives to:

> ensure that a wide diversity of skills and experience was represented and that groups which might not have been adequately represented in the [assembly] election outcomes were afforded the opportunity to participate (PM&C 1998a, 16).

The government was particularly concerned to include Aboriginal and Torres Strait Islanders, women, representatives of every state and territory, and young people.

Seats for the 76 elected delegates were distributed among the states and territories to be “broadly in proportion with the number of seats for each [state and territory] across both Houses of the Commonwealth Parliament” (PM&C 1998a, 17). This compromise between representation-by-population and equal representation for each state was perhaps borrowed from Robert Garran. In 1958 he concluded that a bicameral assembly could satisfy the need for “rep-by-pop” and the federal principle, but this would be “too elaborate” (Garran 1958, 211). He proposed instead that an assembly should mirror a joint sitting of parliament.

Constituents chose elected delegates in a postal ballot in November and December 1997. It used a senate-styled, proportional representation system, where expression of second and subsequent preferences was optional (AEC 1998, 15-16, 76). Ballot papers listed the names of groups and individuals standing for each state and territory; of the 609 candidates, about two-thirds stood as members of 80 groups, and 176 ran as individuals. Electors could vote for one group of candidates above the line, or for one or more groups or candidates below the line; 85.4% voted above the line, compared to 94.4% at the 1996 federal election. This may indicate greater interest in, or a stronger preference for, individual candidates than is usual for parliamentary elections.

The convention election was unusual in three respects: electors voted by mail rather than in person, the names of all candidates were listed in a separate booklet rather than on the ballot paper, and voting was not compulsory. This was the first time since 1922 that electors were not required to attend the polls for a federal ballot, and turnout was 49.6%. This was higher than it was for local government elections in the 1960s and 1970s when turnout was about 30%, but lower than the last non-compulsory federal ballot in 1922, when 58% turned out to vote.

**THE AGENDA**

The rules of debate at the assembly and an agenda were circulated to delegates in advance, and agreed on the first day. Generally, business flowed from the public chamber, to in-camera working groups and the resolutions group, then back to the chamber where final resolutions were determined (PM&C 1998c, 143-144; PM&C
Analysis of the notice papers (PM&C 1998c, 2-12) shows that 90 hours were allocated to plenary sessions, of which 55% was spent in debate or hearing reports from working groups and the resolutions group, 38% was used for “general addresses”, and 7% was used for preliminary business. The time allocated to general addresses was provided for delegates to speak to the question “Should Australia become a republic?”, and all but 20 of the 176 delegates did so. Whilst attendance in the chamber for general addresses was often low – in part because delegates were participating in working groups – the speeches provide a wealth of information about the delegates themselves, and why they took the positions they did on the question of an Australian republic.

Working groups debated in-camera, and presented their provisional resolutions to plenary sessions. Provisional resolutions that were supported by at least 25% of the delegates were referred to the resolutions group, which met in-camera and drafted the final plenary resolutions. These resolutions were presented to plenary sessions for debate, amendment, and adoption, as the delegates saw fit. The resolutions group comprised 11 delegates who were chosen by the assembly’s non-voting chair and deputy chair from a list of 25 volunteers (PM&C 1998b, 81-82).

Most of the working groups were anticipated in the original agenda, whilst others were formed when ten or more delegates agreed to discuss a particular subject. In all, 25 working groups convened to debate the topics listed on table 4.1 below.

Delegates were free to join any working group, provided they produced arguments in support of their topic. A member of group D could not, for example, argue for direct election because that group’s topic was “Prime ministerial appointment, with or without a special council”. The only other limit on participation was imposed by the timetable, which prevented a delegate joining two working groups on the same broad topic because the groups met at the same time. A number of delegates did, however, join more than one working group on different topics. Total membership of the working groups was 227, ranging from just three members for group N which presented arguments for the proposition “There should be simultaneous change across all States if a national majority agrees to change to a republic”, to 17 members for group C which argued for the appointment of a president by a special majority of parliament. Working groups usually convened when delegates were delivering general addresses in the chamber.
### Table 4.1: Assembly working groups

<table>
<thead>
<tr>
<th>Subject</th>
<th>Working Group Topic</th>
<th>Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preamble &amp; transitional clauses</td>
<td>H(i) Preamble and transitional clauses generally</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>H(ii) Retain “humbly relying on the blessing of Almighty God”</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>H(iii) Recognise prior occupation of Australia by indigenous peoples</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>H(iv) Recognise citizens’ rights</td>
<td>9</td>
</tr>
<tr>
<td>Head of state’s powers</td>
<td>1. Same powers as the Governor-General, no provisions for conventions</td>
<td>7</td>
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<tr>
<td></td>
<td>2. Same powers, reference to unspecified conventions for reserve powers</td>
<td>5</td>
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<tr>
<td></td>
<td>3. Same powers, and a written, non-binding statement of conventions</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>4. Same powers, codified reserve powers as binding rules</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>5. Same powers, and the defects of alternative republic models</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>6. Broader powers</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>7. Lesser powers which are codified</td>
<td>11</td>
</tr>
<tr>
<td>Head of state’s appointment &amp; dismissal</td>
<td>A. Popular election with open nominations</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>B. Popular election with parliamentary nominees</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>C. Parliamentary appointment by special majority</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>D. Prime ministerial appointment, with or without a special council</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>E. Present system, and the defects of other alternatives</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>F. Nomination through a special council, then popular election</td>
<td>9</td>
</tr>
<tr>
<td>Other issues</td>
<td>I. How to maintain debate about constitutional reform</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>J. Head of state’s oath of allegiance</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>K. National flag and coat of arms</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>L. Dual citizenship and the head of state</td>
<td>7</td>
</tr>
<tr>
<td>Effect on the states</td>
<td>M. States to decide independently whether they become republics</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>N. If there is a national majority in favour, states become republics</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>O. As (N), but there must also be a majority in all states</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>P. Current links between states and Crown, and criticism of options M-O</td>
<td>5</td>
</tr>
</tbody>
</table>

(Source: PM&C 1998c, 146-177)

### The Preamble

The assembly made 21 recommendations for a new preamble, just nine of which were included in the preamble that was put to referendum. The preamble that was passed by parliament is reproduced on table 4.2 below in the left pane, with the assembly’s recommendations aligned by subject in the right pane. The differences are highlighted in bold font.

The preamble that was put to referendum did not mention a republic at all. This may have been done in anticipation of the possibility that the electorate would support the preamble, but not a republic, in which case the new preamble could still be implemented. The same cannot be said for the other omissions.
Table 4.2: The preamble put to referendum and the assembly’s recommendations

<table>
<thead>
<tr>
<th>PREAMBLE PUT TO REFERENDA</th>
<th>ASSEMBLY RECOMMENDATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government <strong>to serve the common good.</strong></td>
<td><strong>Reference to the people of Australia having agreed to reconstitute our system of government as a republic</strong> (9); Reference to “Almighty God” (2); Reference to the origins of the Constitution, and <strong>acknowledgement that the Commonwealth has evolved into an independent, democratic and sovereign nation under the Crown</strong> (3); Recognition of our federal system of <strong>representative democracy and responsible government</strong> (4);</td>
</tr>
<tr>
<td>We the Australian people commit ourselves to this Constitution:</td>
<td><strong>Introductory language in the form “We the people of Australia”</strong> (1); <strong>Concluding language to the effect that “[We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution”</strong> (10).</td>
</tr>
<tr>
<td>proud that our national unity has been forged by Australians from many ancestries;</td>
<td><strong>Recognition of Australia’s cultural diversity</strong> (7);</td>
</tr>
<tr>
<td>never forgetting the sacrifices of all who defended our country and our liberty in time of war;</td>
<td></td>
</tr>
<tr>
<td>upholding <strong>freedom, tolerance, individual dignity and the rule of law</strong>;</td>
<td><strong>Affirmation of the rule of law</strong> (5); <strong>Affirmation of the equality of all people before the law</strong> (11);</td>
</tr>
<tr>
<td><strong>honouring</strong> Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;</td>
<td><strong>Acknowledgement of the original occupancy and custodianship of Australia</strong> by Aboriginal peoples and Torres Strait Islanders (6); <strong>Recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia’s indigenous peoples</strong> (13).</td>
</tr>
<tr>
<td><strong>recognising the nation-building contribution of generations of immigrants;</strong></td>
<td><strong>Recognition of Australia’s cultural diversity</strong> (7);</td>
</tr>
<tr>
<td>Mindful of our responsibility to protect our unique natural environment;</td>
<td><strong>Affirmation of respect for our unique land and the environment</strong> (8);</td>
</tr>
<tr>
<td>supportive of achievement as well as equality of opportunity for all;</td>
<td><strong>Recognition of gender equality</strong> (12);</td>
</tr>
<tr>
<td>And valuing independence as dearly as the national spirit which binds us together in both adversity and success.</td>
<td></td>
</tr>
</tbody>
</table>

**PROPOSED NEW S 125A**

<table>
<thead>
<tr>
<th>ASSEMBLY RECOMMENDATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.</td>
</tr>
</tbody>
</table>

**Note 1:** a number in brackets after each recommendation indicates whether the assembly resolved that it “should” be included (numbers 1-10) or it should be “considered for inclusion” (numbers 11-13).

(Source: analysis of PM&C 1998a, 46-47)
There are four important differences between the prime minister’s preamble and the assembly’s recommendations, as follows.

- Australians would pledge to “commit ourselves to this Constitution”, without “asserting our sovereignty”.
- The preamble would recognise “the nation-building contribution of generations of immigrants” in times past and “unity” now, but it would not recognise continuing “cultural diversity”. The Coalition government remains averse to the idea of celebrating diversity – seven years after the preamble was put to referendum, it announced plans to replace the word “multiculturalism” with something more in keeping with “increasing integration and responsibility among migrants” (Hart 2006, emphasis added).
- The constitution would honour indigenous peoples for their “deep kinship with their lands” and “ancient and continuing cultures which enrich the life of our country”, but it would not mention “original occupancy and custodianship of Australia”, or “continuing rights”. McGregor reported in 1999 that the prime minister said he did not include the words custodianship or stewardship because “the concept might be too far ahead of public opinion” (as paraphrased by McGregor in 1999a, 6).
- Australians would be “supportive of achievement as well as equality of opportunity for all”, without any “affirmation of the equality of all people before the law” or “recognition of gender equality”. By contrast, the Canada Clause proposed in 1992 would entrench Aboriginal self-government, and equal rights for women, and the clause would be justiciable (see chapter six).

**Debating a republic**

In plenary sessions, delegates debated the merits of constitutional monarchy and four republic models (PM&C 1998a, 44-45, 124-132; PM&C 1998b, 878-879). Those who opposed all proposals to change the constitution voted Status Quo when this was offered in the third ballot, and in other ballots they voted No Model or Abstain. Other delegates voted for one or more of the republic models, No Model when their favoured models were eliminated, or Abstain. Abstain was a formal voting option – the Chair explained just before the third vote how delegates should mark their ballot papers to record an abstention (PM&C 1998b, 878).

The four republic models were coded A to D, but were more commonly referred to by the names of delegates who proposed them. Hence model A was the Gallop model (proposed by Geoff Gallop, leader of the opposition in Western Australia, premier 2001-
2006), B was the Hayden model (proposed by Bill Hayden, former federal Labor minister, and Governor-General 1989-96), C was the McGarvie model (proposed by Richard McGarvie, Governor of Victoria 1992-97), and D was the Turnbull model (proposed by Malcolm Turnbull, barrister and merchant banker, chairman of the Australian Republican Movement, chair of the 1994 Republic Advisory Committee, and federal Liberal MP since 2004). These models differed about how a republic president would be selected and dismissed.

The president was selected by popular ballot in the Hayden and Gallop models. In the Hayden model, electors chose the president from among candidates who qualified to run for office by showing that 1% of the electorate supported them. In Gallop, nominations were called from the public, parliament selected three or more candidates from these nominees, then the electorate chose the president.

The other two republic models did not select a president by direct election. In the McGarvie model, a three-person constitutional council was appointed by government to receive nominations in confidence. The prime minister received a confidential report from the council, then named the president who need not be a nominee. In the Turnbull model, a committee appointed by parliament received nominations from the public, then the prime minister named a candidate who need not be a nominee. The prime minister’s nominee became president if the leader of the opposition and two-thirds of a joint sitting of federal parliament ratified the nomination. The Turnbull model specified that there would be no parliamentary debate about the nominee prior to the vote.

The procedures for dismissal varied also. In the Hayden model, the president could be dismissed by the prime minister with the consent of a majority of both houses of parliament. In the Gallop model, the president could be dismissed by an absolute majority of the house of representatives. In the Turnbull model, the prime minister alone could take a decision to dismiss the president, but that decision had to be ratified by a majority of the house within 30 days. If the House declined to ratify the decision, the president was not restored automatically to office. In the McGarvie model, the prime minister alone could dismiss the president.

These five constitutional options – constitutional monarchy and the four republic models – are ordered on a continuum in figure 4.1 below according to the number of people who participate directly in selecting a president. Participation is lowest in constitutional monarchy and the McGarvie model because the prime minister alone can choose the president. Participation is higher in the Turnbull model because appointment
is subject to the consent of the leader of the opposition and two-thirds of the members of federal parliament. Participation is higher again in the Gallop and Hayden models because the president is selected by popular ballot. The Hayden model is less constrained than the Gallop model because parliamentarians do not screen nominations.

<table>
<thead>
<tr>
<th>Constitutional Monarchy</th>
<th>McGarvie Micro Republic</th>
<th>Turnbull Mini Republic</th>
<th>Gallop Midi Republic</th>
<th>Hayden Maxi Republic</th>
</tr>
</thead>
</table>

**Figure 4.1: Constitutional preference continuum**
(Source: Kreibig 1998, 40)

The continuum also indicates the amount of constitutional change entailed in the options – from no change at the left, to the most change at the right.

On the last two days of the assembly, delegates cast formal votes for the five options shown in figure 4.1. All of the ballots, and the options offered in them, are listed below in table 4.3.

**Table 4.3: Formal ballots and voting options**

<table>
<thead>
<tr>
<th>Ballot</th>
<th>Topic</th>
<th>Ballot options</th>
</tr>
</thead>
<tbody>
<tr>
<td>1, day 9</td>
<td>Republic model elimination round 1</td>
<td>Hayden, Gallop, McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>2, day 9</td>
<td>Republic model elimination round 2</td>
<td>Gallop, McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>3, day 9</td>
<td>Republic model elimination round 3</td>
<td>McGarvie, Turnbull, status quo, no model, abstain</td>
</tr>
<tr>
<td>4, day 9</td>
<td>Republic model elimination round 4</td>
<td>McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>5, day 10</td>
<td>Should the Turnbull model be adopted?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>6, day 10</td>
<td>Should Australia become a republic?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>7, day 10</td>
<td>Transitional &amp; consequential issues</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>8, day 10</td>
<td>Is Turnbull preferred to status quo?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>9, day 10</td>
<td>Should a referendum be held?</td>
<td>Yes, no, abstain</td>
</tr>
</tbody>
</table>

(Source: PM&C 1998b, 873-884, 929-930, 946-948, 962-965, 992-994)

Ballots one to four, which were held on the ninth day, were designed to eliminate the less popular republic models. There was little or no time for deliberation, negotiation, or even contemplation between these ballots because they were run back-to-back in less than 75 minutes, during which time the options were not debated.

The results for ballots one to five, and eight, are shown in table 4.4. On the tenth and last day, delegates were asked in ballots five and eight if they preferred the Turnbull model. Support for the Turnbull model decreased by three votes between the fifth and the eighth ballot, to 73 of 152 votes, or 48%. The flow of votes was four from Yes to Abstain, two from Yes to No, and three from No to Yes. In addition, 15 votes flowed from No to Abstain, and one vote flowed from Abstain to No. When the Turnbull republic model was put to voters at a referendum in 1999, the Yes vote was 45.1%.
Table 4.4: Assembly ballots and flow of votes

<table>
<thead>
<tr>
<th></th>
<th>A Gallop</th>
<th>B Hayden</th>
<th>C McGarvie</th>
<th>D Turnbull</th>
<th>Not Turnbull</th>
<th>No Model</th>
<th>Status Quo</th>
<th>Abstain</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballot 1</td>
<td>27</td>
<td>4</td>
<td>30</td>
<td>59</td>
<td>31</td>
<td>0</td>
<td>151</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flow from B</td>
<td>+2</td>
<td>-4</td>
<td>+1</td>
<td></td>
<td>+1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flow from D</td>
<td>+1</td>
<td></td>
<td>-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballot 2</td>
<td>30</td>
<td>31</td>
<td>58</td>
<td>32</td>
<td>0</td>
<td>151</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From A</td>
<td>-30</td>
<td></td>
<td></td>
<td>+13</td>
<td>+11</td>
<td>+2</td>
<td>+4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>From C</td>
<td>-9</td>
<td></td>
<td></td>
<td></td>
<td>+9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From D</td>
<td>-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>+1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From No Model</td>
<td></td>
<td></td>
<td></td>
<td>-31</td>
<td>+31</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballot 3</td>
<td></td>
<td>22</td>
<td>70</td>
<td>12</td>
<td>43</td>
<td>4</td>
<td>151</td>
<td></td>
<td></td>
</tr>
<tr>
<td>From No Model</td>
<td></td>
<td></td>
<td></td>
<td>+1</td>
<td>-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Status Quo</td>
<td>+10</td>
<td></td>
<td></td>
<td>+1</td>
<td>+32</td>
<td>-43</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Abstain</td>
<td>+1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballot 4</td>
<td></td>
<td>32</td>
<td>73</td>
<td>43</td>
<td>3</td>
<td>151</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From C(^{19})</td>
<td>-31</td>
<td></td>
<td></td>
<td>+4</td>
<td>+25</td>
<td>+2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From D</td>
<td>-3</td>
<td></td>
<td></td>
<td>+1</td>
<td></td>
<td>+2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From No Model</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>+43</td>
<td>-43</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Abstain</td>
<td>+1</td>
<td></td>
<td></td>
<td></td>
<td>+2</td>
<td>-3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballot 5</td>
<td></td>
<td>75</td>
<td>71</td>
<td>4</td>
<td>150</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From D</td>
<td>-6</td>
<td></td>
<td></td>
<td>+2</td>
<td></td>
<td>+4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Not D</td>
<td>+3</td>
<td></td>
<td></td>
<td>-18</td>
<td></td>
<td>+15</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From Abstain</td>
<td>+1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballot 8(^{20})</td>
<td></td>
<td>73</td>
<td>57</td>
<td></td>
<td>22</td>
<td>152</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Source: reproduced from Kreibig 1998, 38, with some amendments)

The results for the six ballots are shown in closed boxes under eight columns, one for each option that was offered in the ballots. The number of votes for each option is shown in the rows which are formatted as closed boxes, while data for the movement of votes is shown in rows between the closed boxes. For example, the two rows between the closed boxes for ballot 1 and ballot 2 show: when the Hayden model was eliminated in the first round, the four delegates who had voted for it (-4) cast their votes in the second ballot for Gallop (+2), McGarvie (+1), and No Model (+1); another delegate changed their vote from Turnbull (-1) to Gallop (+1). Where cells are shaded, this means that the option was not offered in that ballot.

\(^{19}\) One vote did not transfer because Anderson voted for model C in ballot 4 but did not vote in ballot 5.

\(^{20}\) The flow of votes does not reconcile from ballot five to ballot eight because two delegates who voted in ballot eight did not vote in ballot five, namely Anderson (against Turnbull model D), and McNamara (for Turnbull model D).
REPRESENTATION

The assembly was a diverse group. Its delegates included residents of every state and mainland territory. The age range was wide at 18 to 85 years, about one-third of the delegates were women, and 9% were born abroad. By occupation, the delegates were students, retirees, parliamentarians, religious leaders, engineers, commercial executives, interest group leaders, academics, legal practitioners, journalists, public servants, and farmers and graziers, together with an artist, a film producer, a medical doctor, a hotel licensee, an Olympic athlete, and one unemployed person. Certainly a diverse group, but was it representative?

Descriptive data for the assembly delegates were compiled from official documents, autobiographies, biographies, publications, and speeches, and from personal communications with the delegates. Data for delegates’ gender, age, formal education, aboriginality, and place of birth were compared to data for the Australian population drawn from the 1996 census. While census data are imperfect for the present purposes because they include minors and people who are not eligible to vote, equivalent data for electors are not published. Data for delegates’ place of residence were compared with data for electors that were compiled by the Australian Electoral Commission just prior to the 1999 referenda. Analysis of place of residence is shown separately below to simplify the presentation.

Place of residence

The results for place of residence are shown in table 4.5 below, in two parts. The top half of the table shows the proportion of electors, parliamentarians, and delegates for each state and territory, expressed as a percentage. The lower half of the table shows the disproportions for each state and territory, which is calculated by subtracting the percentage of electors or federal parliamentarians from the percentage of delegates. A negative number in the disproportions section indicates under-representation, while a positive number indicates over-representation.

The lower half of the table shows that the three largest states were under-represented at the assembly, while the three smaller states and both mainland territories were over-represented. The ‘All delegates to electors’ line shows that New South Wales was under-represented by 10%, Victoria by 6%, and Queensland by 3%, while the other states and territories were over-represented by up to 5.5%.

21 I gathered most of this data for my honours thesis (Kreibig 1998). For this thesis, I updated it, added to it, and repeated the analysis.
Table 4.5: Representation of place of residence

<table>
<thead>
<tr>
<th>Group by state or territory (row %)</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electors</td>
<td>33</td>
<td>26</td>
<td>18</td>
<td>9</td>
<td>8</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Federal Parliament</td>
<td>28</td>
<td>22</td>
<td>17</td>
<td>12</td>
<td>11</td>
<td>8</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Assembly Delegates</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- All delegates</td>
<td>23</td>
<td>20</td>
<td>15</td>
<td>13</td>
<td>14</td>
<td>8</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>- Parliamentarians</td>
<td>20</td>
<td>15</td>
<td>10</td>
<td>15</td>
<td>23</td>
<td>10</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>- Community representatives</td>
<td>19</td>
<td>22</td>
<td>17</td>
<td>11</td>
<td>11</td>
<td>6</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>- Elected</td>
<td>26</td>
<td>21</td>
<td>17</td>
<td>12</td>
<td>11</td>
<td>8</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

Disproportions (points difference)\(^1\)

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>All delegates to electors</td>
<td>-10.4</td>
<td>-5.8</td>
<td>-2.9</td>
<td>3.0</td>
<td>5.5</td>
<td>5.3</td>
<td>2.2</td>
<td>3.1</td>
</tr>
<tr>
<td>Parliamentary delegates to electors</td>
<td>-13.5</td>
<td>-10.5</td>
<td>-8.0</td>
<td>5.5</td>
<td>14.2</td>
<td>7.4</td>
<td>3.3</td>
<td>1.6</td>
</tr>
<tr>
<td>Community representatives to electors</td>
<td>-14.0</td>
<td>-3.3</td>
<td>-1.3</td>
<td>1.6</td>
<td>2.8</td>
<td>2.9</td>
<td>3.8</td>
<td>7.5</td>
</tr>
<tr>
<td>Elected delegates to electors</td>
<td>-7.1</td>
<td>-4.5</td>
<td>-0.9</td>
<td>2.3</td>
<td>2.2</td>
<td>5.3</td>
<td>0.9</td>
<td>1.8</td>
</tr>
<tr>
<td>Elected delegates to federal parliament</td>
<td>-1.5</td>
<td>-0.9</td>
<td>0.1</td>
<td>0.2</td>
<td>-0.2</td>
<td>0.3</td>
<td>0.4</td>
<td>1.7</td>
</tr>
</tbody>
</table>

(Sources: electors AEC 2000, 53; parliament Parliamentary Library 1996; data for delegates gathered from Kreibig 1998, 15)

Note 1: a negative number is under-representation, and a positive number is over-representation.

The breakdown of the disproportions by delegate group for each state and territory shows that the highest disproportions were found for parliamentarians and community representatives. Parliamentarians under-represented Victoria and Queensland by 10% and 8% respectively, and they over-represented Western Australia, South Australia, and Tasmania by 5%, 14%, and 7% respectively. Community representatives under-represented New South Wales by 14%, and they over-represented the Australian Capital Territory and the Northern Territory by 4% and 7% respectively. The disproportions tended to be smaller for elected delegates.

The disproportions for parliamentary delegates occurred in part because federal seats were allocated by seniority and portfolio, not state affiliation. For example, parliamentarians affiliated with South Australia were over-represented by 14%, but this figure was inflated by two South Australians who were appointed because of their roles in the federal parliament at the time: Natasha Stott Despoja was appointed as leader of the Australian Democrats, and Nick Bolkus was appointed as opposition shadow attorney-general and minister for justice with specific responsibility for the republic debate. If the people who held these two parliamentary positions at the time resided in New South Wales, then over-representation for South Australia would improve from
14% to 9%, and under-representation for New South Wales would improve from 13% to 8%. The point to draw from this example is that small changes in the state affiliation of particular parliamentary delegates would produce relatively large changes in the results.

The disproportions for community representatives are more difficult to explain, as the federal government was free to ensure when it selected these delegates that the geographic spread was equitable. There is a strong negative correlation between the size of the state and territory electorates and the disproportion rate, which ranges from the under-representation of New South Wales by 14% to the over-representation of the Northern Territory by 7%. Again, small changes to the allocation of seats across the states and territories would produce a much more equitable result. If, for example, one delegate was allocated to each of the two territories and the balance of three delegates were allocated to New South Wales, then the territories would still be over-represented by 1% to 2%, but the under-representation figure for New South Wales would improve from 14% to 6%. Clearly, the government was not concerned about the geographic representation of electors when it chose its community representatives.

For the elected delegates, the geographic distribution was not consistent with either the senate, where each state has an equal number of seats, or the house of representatives, where population determines how many seats are allocated to each state. The penultimate line of the table compares the number of electors in each state and territory with the number of elected seats allocated to each state and territory. It shows that the three larger states were under-represented by up to 7%, and the other states and territories were over-represented by up to 5%. In 1996, the government announced “The elected delegates will be divided between the States and Territories, broadly in line with the composition of the Commonwealth Parliament” (Minchin 1997; see also PM&C 1998a, 17) – such a distribution would mirror the composition of a joint sitting of parliament. The last line of the table shows that this objective was achieved, broadly. While NSW, Victoria, and Queensland are still under-represented, the differences are much smaller (1.5%, 0.9%, and 0.1% respectively). These margins are so small that changing the distribution of seats would not improve the outcome overall. For example, if one seat changed from the Northern Territory to NSW, then NSW is over-represented by 1.1%, but Northern Territory is under-represented by 1.3%. The over- and under-representation of states and territories is illustrated in figure 4.2 below, which shows that overall, elected delegates were more representative of the geographic spread of electors than were parliamentarians, or community representatives.
Gender, age, education, aboriginality, and place of birth

The results for gender, age, formal education, aboriginality, and place of birth are summarised in table 4.6 below. The last two columns of the table show that the assembly delegates were not representative of selected population demographics.

- Median age for delegates was 50 years – five years higher than the estimate for all residents of voting age.
- Two-thirds of the delegates were men, which means that women were under-represented by a margin of about 17%.
- Delegates were almost twice as likely to have a post-school qualification (81% cf. 42% respectively).
- Aboriginals and Torres Strait Islanders were over-represented (5% cf. 2%).
Delegates were much less likely to be born abroad (9% cf. 26%).

Table 4.6: Representation of gender, age, education, aboriginality, and place of birth

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Delegates</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MPs</td>
<td>Community Representatives</td>
</tr>
<tr>
<td>Gender (% men)¹</td>
<td>83</td>
<td>50</td>
</tr>
<tr>
<td>Age (median years)²</td>
<td>50</td>
<td>54</td>
</tr>
<tr>
<td>Education, post-school qualification (%)³</td>
<td>77</td>
<td>75</td>
</tr>
<tr>
<td>Aboriginals and Torres Strait Islanders (%)</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Born abroad (%)</td>
<td>3</td>
<td>19</td>
</tr>
</tbody>
</table>

(Sources: population ABS 1998, B03 and B17; delegates, data adapted from Kreibig 1998; and PM&C 1998a, 62-113)

Notes:
¹ Census data for 1996 are adjusted to exclude overseas visitors and persons who probably were not 18 years old, but the data still includes persons who were not registered to vote.
² While the differences for education may be overstated because census data are for persons aged 15 years or more and the youngest assembly delegate was aged 18 years, five of the delegates (3% of the assembly) were students who did not as yet have a post-school qualification.
³ Women, youth, and people born abroad were under-represented, delegates were more highly educated, and Aboriginals and Torres Strait Islanders were over-represented.

Further analysis of median age shows that Labor parliamentarians were more representative than their Coalition colleagues (48 years and 52 years respectively), and women were more representative for age than men (44 years and 52 years respectively). Women parliamentarians were representative for age at median 45 years, but women who were elected or appointed as community representatives were not.

Elected delegates were more likely to be born abroad than were parliamentary delegates (8% and 3% respectively), and the gender balance was better for elected delegates than it was for parliamentarians (65% and 83% men respectively). Elected delegates were, however, more likely to hold tertiary qualifications than were parliamentarians or community representatives (76%, 64%, and 61% respectively).

The disparities were less marked for community representatives than for either parliamentarians or elected delegates, except for aboriginality and age. This better result was consistent with the Coalition’s declared intention to achieve broad representation when it selected these delegates (Minchin 1997, 2). The community group was very nearly representative for gender at 50% men, its members were less likely to have a tertiary degree (61%), and more of them were born abroad (9%). The median age for community representatives was, however, four years higher than it was for either
parliamentarians or elected delegates. This is noteworthy, given that the Coalition emphasised the need to include youth when it chose its community representatives.

The answer to the question of descriptive representation is a mixed one. Appointed delegates were the most representative group for gender, formal education, and place of birth, but they were least representative for aboriginality and age. Elected delegates were most representative for aboriginality, and they held the middle ground for representation of gender and place of birth, but they were least representative for formal education. Parliamentarians were most representative for age (by less than one year), and the result for formal education was only a little higher than it was for community representatives, but parliamentarians were least representative for gender, place of birth, and aboriginality. In brief, non-parliamentarians were more representative than parliamentarians for four of the five features examined here.

**Constitutional preferences**

The question of whether the assembly better reflected electors’ constitutional preferences is answered by comparing responses to two equivalent questions. In the eighth assembly ballot, delegates voted Yes, No, or Abstain to the statement:

that this Convention supports the adoption of a republican system of government on the bipartisan appointment of a President model [the Turnbull model] in preference to there being no change to the Constitution (PM&C 1998b, 982).

The model mentioned was the model put to referendum. Voters at the referendum were required to answer Yes or No to the statement:

A PROPOSED LAW: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament (AEC 2000, 9).

The exact form of the referendum question was the subject of heated debate over what it did and did not say, and how this would prejudice the outcome. The Joint Select Committee on the Republic Referendum recommended changing the long title of the Bill to “A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic, with the Queen and Governor-General being replaced by an Australian President”. This amended title said that the president would be Australian, but not that parliament chose the president (JSCRR 1999, vii).

Results for the assembly ballots and the referendum are shown below in table 4.7. The top half of the table shows the proportion of electors and delegates who supported the model by state, expressed as percentage. The bottom half of the table shows variations in support, calculated by subtracting the percentage of electors who supported the republic model from the percentage of delegates who supported it, so a positive
number indicates that delegates were more supportive, and a negative number indicates delegates were less supportive.

The national results for electors and delegates were remarkably similar. The national figures on the first two lines of table 4.7 show that 45% of electors and 48% of delegates supported the Turnbull republic model. This suggests that the assembly as a whole was successful in representing electors’ preferences.

Table 4.7: Representation of preferences

<table>
<thead>
<tr>
<th>Support for the Turnbull republic model</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electors</td>
<td>46.4</td>
<td>49.8</td>
<td>37.4</td>
<td>41.5</td>
<td>43.6</td>
<td>40.4</td>
<td>45.1</td>
</tr>
<tr>
<td>All Delegates</td>
<td>48.6</td>
<td>53.3</td>
<td>21.7</td>
<td>42.1</td>
<td>61.9</td>
<td>50.0</td>
<td>48.0</td>
</tr>
<tr>
<td>Parliamentary delegates</td>
<td>62.5</td>
<td>66.7</td>
<td>25.0</td>
<td>50.0</td>
<td>77.8</td>
<td>75.0</td>
<td>62.5</td>
</tr>
<tr>
<td>Community representatives</td>
<td>42.9</td>
<td>50.0</td>
<td>0.0</td>
<td>25.0</td>
<td>50.0</td>
<td>50.0</td>
<td>38.9</td>
</tr>
<tr>
<td>Elected delegates</td>
<td>45.0</td>
<td>50.0</td>
<td>30.8</td>
<td>44.4</td>
<td>50.0</td>
<td>33.3</td>
<td>44.7</td>
</tr>
</tbody>
</table>

Variation between delegates and electors (percentage points)

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>All delegates</td>
<td>2.2</td>
<td>3.5</td>
<td>-15.7</td>
<td>0.6</td>
<td>18.3</td>
<td>9.6</td>
<td>2.9</td>
</tr>
<tr>
<td>Parliamentary delegates</td>
<td>16.1</td>
<td>16.9</td>
<td>-12.4</td>
<td>8.5</td>
<td>34.2</td>
<td>34.6</td>
<td>17.4</td>
</tr>
<tr>
<td>Community representatives</td>
<td>-3.5</td>
<td>0.2</td>
<td>-37.4</td>
<td>-16.5</td>
<td>6.4</td>
<td>9.6</td>
<td>-6.2</td>
</tr>
<tr>
<td>Elected delegates</td>
<td>-1.4</td>
<td>0.2</td>
<td>-6.6</td>
<td>2.9</td>
<td>6.4</td>
<td>-7.1</td>
<td>-0.4</td>
</tr>
</tbody>
</table>

(Sources: delegates, PM&C 1998b, 983-984; electors, AEC 2000, 77)

NOTES:
1. The national total includes territories, which is how referenda votes are counted.
2. Support is the portion that voted Yes at the referendum, or the eighth assembly ballot.

By state and delegate group, however, there were some stark differences. Support for the Turnbull republic model by both electors and delegates was relatively strong in New South Wales and Victoria, moderate in Western Australia and Tasmania, polarised in South Australia, and weak in Queensland. South Australian delegates recorded the highest support at 62%, and also the highest discrepancy because support from South Australian electors lagged well behind at 44%. Queensland recorded the lowest support figures overall at 37% for electors, and 22% for delegates. The gap between Queensland delegates and the convention as a whole was startling, at more than 26%.

The ‘All Delegates’ line on the lower half of the table shows that for each state except Queensland, delegates were more supportive of the Turnbull republic model than were electors. The smallest variation in this pattern was recorded for Western Australia where the difference was just 0.6%. The largest variation was found for South Australia where the difference was 18.3%. For Queensland, delegates were much less likely to support the Turnbull model than were electors in that state – by a margin of almost 16%.
Analysis of preferences by selection shows that parliamentarians were much more likely to support the Turnbull republic model than were electors. Across all the states, 63% of the parliamentary delegates supported it, compared to 45% of electors. Again with the exception of Queensland, variations for parliamentarians by state were consistently positive, ranging from 8% for Western Australia to 34% for South Australia, and 35% for Tasmania. For Queensland, the variation was –12%; parliamentary delegates for Queensland were less likely to support the Turnbull model than were Queensland electors, and they were of course much less likely to support the model than were other parliamentarians at the assembly. For parliamentarians, support of the Turnbull model by state ranges from 25% for Queensland, to 50% for Western Australia, to 78% for Tasmania – a difference of up to of 53%.

The results by state for community representatives are the most diverse. While preferences for the Victorian community representatives almost matches electors (variation +0.2%), and the variation for New South Wales is just –3.5%, the variations for the other states ranges from +6.4% for South Australia to –37.4% for Queensland. The last result is the most marked for any group examined here.

Elected delegates represented electors’ preferences most accurately, with a national variation of just +0.4%. This is remarkable given that turnout for the assembly election was only 49.6%. This result makes it difficult to claim that the interests of particular preference groups were not represented in the assembly election, especially considering that the variation for elected delegates state-by-state was also generally less than it was for parliamentarians, or for community representatives (mean variation - 0.9% elected, +16.3% parliamentarians, and –6.9% community representatives). Variations were identical, however, for elected delegates and community representatives for Victoria and South Australia. Figure 4.3 below illustrates the results.
Figure 4.3: Variation in support for the Turnbull republic model by state

Note: Variation is delegates voting Yes less electors voting Yes, expressed as a percent.

Elected delegates were more representative of electors’ views as expressed at the referendum. While community representatives reflected electors’ preferences well in three states, generally they were much less likely to favour the republic model than were electors. Parliamentarians in every state except Queensland were more likely to support the Turnbull model than were community representatives, elected delegates, or electors. If these parliamentarians debated a republic alone, the Turnbull model would have been carried with a Yes vote of 62.5% nationally, and majorities in four of the six states.

A comparison of the results for parliamentarians, community representatives, and elected delegates shows that elected delegates were the most representative for constitutional preferences, place of residence, and aboriginality. Community representatives were most representative for gender, place of birth, and formal education. For each facet of representation examined here, parliamentarians were the least representative group; the disparities were especially marked for aboriginality, gender, and place of birth. The Australian assembly was more representative than it
would have been if these parliamentarians had debated this constitutional change alone.

**PUBLIC INTEREST**

Members of the public made more than 1,000 written submissions to the assembly and the government (PM&C 1998a, 52), and lodged an unknown number of submissions directly with the delegates. As a measure of interest, this compares favourably with the 1988 Constitutional Commission, which received 686 submissions (Constitutional Commission 1988, 911-912), and the 1993 Republic Advisory Committee, which received 417 submissions (RAC 1993b, 331-341). It is more relevant, however, to compare the assembly with occasions where parliamentarians convened alone.

The Joint Select Committee on the Republic Referendum convened in 1999 to review the Constitution Alteration (Establishment of Republic) 1999 bill, and the Presidential Nominations Committee Bill 1999. The committee comprised 12 members of the house of representatives and six senators, split evenly between government and non-government parties. Its brief was to “inquire into and report on the provisions of bills introduced by the Government to give effect to a referendum on a republic” (JSCRR 1999, x). The committee received 122 written submissions (JSCRR 1999, 137-142), which is just 12% of the number received by the assembly. This was a modest result, given that the committee issued 200 requests for submissions, and “advertised widely … in newspapers in metropolitan and regional areas” (JSCRR 1999, 3).

People also demonstrated interest in the assembly by attending inquiries in person. Demand for public seats was so high that access to the gallery was rationed. Even so, people queued for seats, and up to 300 visitors crowded into the public gallery each hour to witness the debates (PM&C 1998a, 54). This result cannot be compared to the JSCRR inquiry, however, because the secretariat did not record the number of people who attended its sessions – it is not customary to do so (Claressa Surtees, then secretary of the committee, pers. comm. 2 June 2006). Fortunately, data for attendance at one recent constitutional inquiry are available. In 2003 the Coalition government convened an inquiry into s 57 deadlock provisions, called for submissions, and held eight meetings in the capital cities between October and December. In answer to a question on notice from a Labor MP, the prime minister advised that about 237 people attended these eight meetings – attendance ranged from fewer than 15 people in Canberra, Adelaide, and Darwin, to about 60 in Melbourne (Australian House of Representatives 2004, 2 March, 25696). The inquiry was abandoned soon after because public interest
was considered to be too low. Seccombe noted that apart from a lack of interest, the proposals met with “overwhelming political opposition” (Seccombe 2004, 5).

Behaviour at the referenda also indicated that interest was high. As mentioned earlier, the informal rate was the lowest ever recorded for Australian referenda. The turnout was also relatively high at 95.1% for both questions. This is the third highest turnout ever recorded, and the highest turnout for a referendum since 1951.

Each of these indicators suggests strongly that the assembly generated more interest than would be the case if parliamentarians debated constitutional change alone.

**CONSENSUS**

This section answers the question about consensus by comparing the votes cast by parliamentarians and non-parliamentarians in the nine formal ballots that were held at the assembly. The ballots and the choices offered in them were listed earlier in table 4.3. The table is repeated below for the reader’s convenience.

<table>
<thead>
<tr>
<th>Ballot</th>
<th>Topic</th>
<th>Ballot options</th>
</tr>
</thead>
<tbody>
<tr>
<td>1, day 9</td>
<td>Republic model elimination round 1</td>
<td>Hayden, Gallop, McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>2, day 9</td>
<td>Republic model elimination round 2</td>
<td>Gallop, McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>3, day 9</td>
<td>Republic model elimination round 3</td>
<td>McGarvie, Turnbull, status quo, no model, abstain</td>
</tr>
<tr>
<td>4, day 9</td>
<td>Republic model elimination round 4</td>
<td>McGarvie, Turnbull, no model, abstain</td>
</tr>
<tr>
<td>5, day 10</td>
<td>Should the Turnbull model be adopted?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>6, day 10</td>
<td>Should Australia become a republic?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>7, day 10</td>
<td>Transitional &amp; consequential issues</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>8, day 10</td>
<td>Is Turnbull preferred to status quo?</td>
<td>Yes, no, abstain</td>
</tr>
<tr>
<td>9, day 10</td>
<td>Should a referendum be held?</td>
<td>Yes, no, abstain</td>
</tr>
</tbody>
</table>

(Source: PM&C 1998b, 873-884, 929-930, 946-948, 962-965, 992-994)

The first four ballots were designed to eliminate all but one of the four republic models. The four models were included in the ballots because their proponents had demonstrated support from at least ten delegates.

The Turnbull republic model received more Yes votes in the fourth ballot than did any other republic model, so the fifth ballot asked delegates whether they preferred it to the other three republic models. The eighth ballot asked a different question, namely whether delegates wanted to adopt the Turnbull republic model rather than leave the constitution unchanged. The sixth ballot tested support for a republic in principle, and the ninth ballot asked whether a referendum should be held. The seventh ballot asked delegates to vote on forty-six transitional and consequential resolutions that would arise if Australia became a republic, including such diverse subjects as the preamble, membership of the Commonwealth, and withdrawing currency that bears the Queen’s
image. The level of support for each ballot option by group is detailed below in table 4.8. Each cell shows the proportion of delegates that chose each option. The results show that unanimity was achieved twice, both times by parliamentarians. In the last ballot all parliamentarians agreed that a republic referendum should be held (positive unanimity), and in the first ballot no parliamentarians supported the Hayden republic model (negative unanimity).

Table 4.8: Support for ballot options by ballot and delegate group

<table>
<thead>
<tr>
<th>Ballot</th>
<th>Support by Delegate group (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MPs</td>
</tr>
<tr>
<td>1 Elimination round 1</td>
<td></td>
</tr>
<tr>
<td>- Hayden</td>
<td>0.0</td>
</tr>
<tr>
<td>- Gallop</td>
<td>23.1</td>
</tr>
<tr>
<td>- McGarvie</td>
<td>38.5</td>
</tr>
<tr>
<td>- Turnbull</td>
<td>38.5</td>
</tr>
<tr>
<td>2 Elimination round 2</td>
<td></td>
</tr>
<tr>
<td>- Gallop</td>
<td>23.1</td>
</tr>
<tr>
<td>- McGarvie</td>
<td>38.5</td>
</tr>
<tr>
<td>- Turnbull</td>
<td>38.5</td>
</tr>
<tr>
<td>3 Elimination round 3</td>
<td></td>
</tr>
<tr>
<td>- McGarvie</td>
<td>23.1</td>
</tr>
<tr>
<td>- Turnbull</td>
<td>59.0</td>
</tr>
<tr>
<td>- Status quo</td>
<td>15.4</td>
</tr>
<tr>
<td>4 Elimination round 4</td>
<td></td>
</tr>
<tr>
<td>- McGarvie</td>
<td>38.5</td>
</tr>
<tr>
<td>- Turnbull</td>
<td>61.5</td>
</tr>
<tr>
<td>5 Should the Turnbull model be adopted?</td>
<td>60.5</td>
</tr>
<tr>
<td>6 Should Australia become a republic?</td>
<td>67.5</td>
</tr>
<tr>
<td>7 Transitional &amp; consequential issues</td>
<td>79.5</td>
</tr>
<tr>
<td>8 Is Turnbull preferred to status quo?</td>
<td>62.5</td>
</tr>
<tr>
<td>9 Should a referendum be held?</td>
<td>100.0</td>
</tr>
</tbody>
</table>


Abstain is counted as a negative vote because (as mentioned earlier) it was a formal voting option in every ballot, and because in this particular context there is no reason to suspect that delegates who voted Abstain wanted to record a positive vote for any other option that was offered. The latter point is demonstrated by the following exchange between an appointed delegate and the deputy chair, just before the eighth ballot. In that ballot, delegates were asked whether they preferred the Turnbull model to the status quo. Delegates could vote Yes, No, or Abstain.

The Most Reverend PETER HOLLINGWORTH – … I and others here find ourselves between a rock and a hard place. The problem lies in the way the motion has been formulated in the sense that it asks the members of this Convention to make a clear statement about whether they prefer the
bipartisan model republic hastily drawn together yesterday to the status quo. … It was in the spirit of compromise that I felt that it must be supported [earlier], even though it would not be my preference. The point I want to make is that I and others are now confronted with a real moral dilemma. If we are forced to make a choice between the status quo, which is tried, tested and known, and a bipartisan [Turnbull] republican model which contains a number of procedural problems that are unresolved, I regret to say that I would have to abstain from the proposal, even though I had done some prior work in developing the compromise which is before the Convention. Hence the moral dilemma about which I seek advice.

**DEPUTY CHAIRMAN** – I am in no position to rule on moral dilemmas. You are infinitely better placed than I am.

**The Most Reverend PETER HOLLINGWORTH** – Can I make it clear that I am forced by the motion to abstain from voting (PM&C 1998b, 981-982).

Clearly, Hollingworth did not want to vote for the Turnbull model, or against it. In this context, Abstain cannot possibly mean Yes. Nor can it mean that delegates did not care enough to vote, as may be the case with some public polls.

The extent of consensus by delegate group is easier to identify using figure 4.4, which is included on the next page. Each set of three bars represents an option that was offered in a ballot, with the ballots re-ordered to bring together results for the same options. For example, all of the results for the McGarvie model are together, labelled as ER1 for the first elimination round, ER2 for the second elimination round, and so on.

The results for parliamentarians, community representatives, and elected delegates are plotted against each option as a shaded bar that indicates a positive or negative result: results above 50% are plotted on the positive y-axis, and results below 50% are plotted on the negative y-axis. Hence the group with the longest bar on the y-axis is the group that was better able to reach consensus on that option. For example, on the question of whether Australia should become a republic (the sixth ballot), 68% of parliamentarians and 62% of elected delegates voted Yes. These results are plotted on the positive axis because the Yes vote was higher than the No vote. By contrast, 58% of the community representatives voted No in that ballot, which is plotted as on the negative axis because there were more No votes than Yes votes. For this ballot, parliamentarians were better able to reach consensus than were community representatives or elected delegates. The group that came closest to either positive or negative consensus on each option is further highlighted with an asterisk immediately above or below the x-axis.
Figure 4.4: Consensus by ballot and delegate group

*An asterisk adjacent to the X-axis marks the group that came closest to achieving unanimity on that option
All of the results are negative until the third elimination round. Negative unanimity was almost achieved five times when less than 3% of the community representatives voted for Gallop in the second ballot, and less than 3% of the elected delegates supported McGarvie in the first, second, third, and fourth ballots. Clearly, elected delegates did not want the McGarvie model.

Most parliamentarians supported Turnbull from the third elimination round, and maintained their support for that option for the remaining ballots. By contrast, a majority of elected delegates did not at any time support one constitutional option. A majority of community representatives supported Turnbull in the fifth ballot, but just 39% of these delegates supported it in the eighth ballot.

Which group, then, was better able to reach consensus? If we look only at positive majorities, the clear answer is parliamentarians, because they reached majority agreement on a republic, transitional issues, a referendum, and one republic model. But deciding this question by examining positive majorities only would ignore, for example, the preferences of every delegate who did not want Australia to become a republic. Such an analysis would be flawed.

Analysis of all outcomes shows that community representatives and elected delegates were better able to reach consensus more often than parliamentarians. Figure 4.4 shows that the tallies were highest when community representatives voted:

- against Gallop in the first and second elimination rounds; and
- against Turnbull in the third elimination round.

The tallies for elected delegates were highest when they voted:

- against McGarvie in the first, second, third, and fourth elimination rounds; and
- against Turnbull in the first and second elimination rounds.

The tallies for parliamentarians were highest when they voted:

- against Hayden in the first elimination round;
- for Turnbull in the fourth elimination round, and in the fifth and eighth ballots;
- against status quo in the third elimination round;
- for a republic, for transitional and consequential issues, and for a referendum.

Non-parliamentarians were better able to reach consensus nine times, while parliamentarians were better able to reach consensus eight times.

Non-parliamentarians were better able to reach consensus than were parliamentarians, but the results for individual ballots was sometimes very close. The
results for the Turnbull model in the second elimination round was community representatives -61%, parliamentarians -61.5%, and elected delegates -62%, a difference overall of just 1%. For six of the 17 options that are shown on figure 4.4, the variation across the three groups was 3% or less. The data allow the conclusion, nevertheless, that non-parliamentarians were better able to reach consensus at the Australian assembly than were parliamentarians.

PARTISANSHIP

This section answers the last question that arose from the literature reviewed in the second chapter, namely, was the Australian assembly less partisan than it would have been if parliamentarians debated this constitutional change alone? As explained in the second chapter, the question is answered by establishing what proportion of the parliamentary and non-parliamentary delegates change their preferences during the course of the assembly. The less partisan group is the group that includes more delegates who changed their preference votes.

In the analysis that follows, constitutional preferences are identified using seven of the nine formal ballots (for a list of the ballots, see table 4.3 on page 133), and statements made by the delegates at the assembly and elsewhere. One parliamentary delegate (Pat McNamara) is not included because he did not attend for six of the eight ballots, and he did not address the convention, so his preferences cannot be determined.

Two of the ballots are not used because they do not necessarily indicate delegates’ preferences. When delegates were asked in the seventh ballot to vote on transitional and consequential issues that would arise if Australia became a republic, the vote was split Yes, No and Abstain across constitutional monarchists, and republicans. Similarly, when delegates were asked in the ninth ballot whether a referendum should be held, again the votes were split across the preference groups. This is not surprising given that some constitutional monarchists and republicans supported a referendum because they believed electors should decide the issue, some constitutional monarchists voted No because they did not want a republic of any kind, and some republicans voted No because they did not support a referendum on the Turnbull republic model.

Analysis of the ballots showed that parliamentarians exhibited less partisan voting behaviour than did non-parliamentarians – the results are summarised in table 4.9 below. The top half of the table shows the distribution of partisan delegates by selection and constitutional preference, while the bottom half of the table shows the voting pattern
for each constitutional preference. Data in the last column at the top of the table show that 74% of the parliamentarians voted in a way that indicates partisanship, compared to 84% of the non-parliamentarians – a substantial difference of 10%.

Table 4.9: Partisans by delegate group and constitutional preference

<table>
<thead>
<tr>
<th>Selection (row %)</th>
<th>Const.</th>
<th>Monarchy</th>
<th>Status Quo</th>
<th>McGarvie</th>
<th>Turnbull</th>
<th>Gallop</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parliamentarians</td>
<td>-</td>
<td>15.4</td>
<td>20.5</td>
<td>38.5</td>
<td>-</td>
<td>74.4</td>
<td></td>
</tr>
<tr>
<td>Non-parliamentarians</td>
<td>26.8</td>
<td>3.6</td>
<td>7.1</td>
<td>36.6</td>
<td>9.8</td>
<td>83.9</td>
<td></td>
</tr>
<tr>
<td>- Community rep’s</td>
<td>11.1</td>
<td>8.3</td>
<td>19.4</td>
<td>33.3</td>
<td>2.8</td>
<td>75.0</td>
<td></td>
</tr>
<tr>
<td>- Elected delegates</td>
<td>34.2</td>
<td>1.3</td>
<td>1.3</td>
<td>38.2</td>
<td>13.2</td>
<td>88.2</td>
<td></td>
</tr>
<tr>
<td>All delegates</td>
<td>19.9</td>
<td>6.6</td>
<td>10.6</td>
<td>37.1</td>
<td>7.3</td>
<td>81.5</td>
<td></td>
</tr>
</tbody>
</table>

Voting patterns

<table>
<thead>
<tr>
<th>Ballot 1 – elimination</th>
<th>No model</th>
<th>McGarvie</th>
<th>Turnbull</th>
<th>Gallop</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballot 2 – elimination</td>
<td>No model</td>
<td>Hayden</td>
<td>McGarvie</td>
<td>Turnbull</td>
</tr>
<tr>
<td>Ballot 3 – elimination</td>
<td>Status quo</td>
<td>Status quo</td>
<td>McGarvie</td>
<td>Turnbull</td>
</tr>
<tr>
<td>Ballot 4 – elimination</td>
<td>No model</td>
<td>McGarvie</td>
<td>Turnbull</td>
<td>No model</td>
</tr>
<tr>
<td>Ballot 5 – Turnbull</td>
<td>No</td>
<td>No/Abstain</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ballot 6 – republic</td>
<td>No</td>
<td>Yes/No/Abstain</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Ballot 8 – Turnbull</td>
<td>No</td>
<td>No/Abstain</td>
<td>Yes</td>
<td>No/Abstain</td>
</tr>
</tbody>
</table>


Further analysis of the voting patterns for parliamentarians showed that the favourable result for partisanship is largely attributable to the Labor delegates. Table 4.10 below shows the proportion of parliamentarians who were committed (did not change their preferences), moderate (changed their preferences once), and equivocal (changed their preferences more than once).

Table 4.10: Parliamentary support for the Turnbull model by party

<table>
<thead>
<tr>
<th></th>
<th>Liberal</th>
<th>National</th>
<th>Coalition</th>
<th>ALP</th>
<th>Democrats</th>
<th>Greens</th>
<th>Independent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Committed</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>9</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>Moderate</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Equivocal</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Opposed</td>
<td>8</td>
<td>5</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Total</td>
<td>17</td>
<td>5</td>
<td>22</td>
<td>13</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>39</td>
</tr>
</tbody>
</table>

| Partisans         | 13      | 5        | 18        | 9   | 1         | 0      | 1           | 29    |       |
| % Partisans       | 76%     | 100%     | 82%       | 69% | 50%       | 0%     | 100%        | 74%   |       |

Excluding Democrats, Greens, and independent delegates because these contingents are so small, ALP delegates achieved the lowest score for partisanship of 69%, compared to 76% for the Liberals, 100% for the Nationals, and 82% for the Coalition (Liberals and Nationals combined). The difference for partisanship between parliamentarians and community representatives was less than 0.6% (see table 4.9), but this contingent was too small to bring the overall result for non-parliamentarians anywhere near the result for parliamentarians. The voting pattern for each preference group is explained below.

The 30 constitutional monarchy partisans voted against every republic option in every ballot. This group comprised 26 elected delegates, and four community representatives appointed by the federal government. All but two of the elected delegates published official campaign statements that opposed constitutional change explicitly. The exceptions were members of the Safeguard the People group, which published a statement expressing caution about constitutional change, but not ruling out a conservative republic model.

The 16 McGarvie partisans voted for McGarvie in elimination rounds one to four, then against Turnbull when it was offered alone in the fifth and eighth ballots. This group comprised eight parliamentarians (seven Coalition and one independent), seven community representatives, and one delegate elected to the assembly using a campaign statement that said he was undecided about whether Australia should become a republic.

The 56 Turnbull partisans voted for Turnbull in ballots one to four, five and eight, and for a republic in ballot six. By selection, 15 were parliamentarians (five Liberal, nine Labor, and one Democrat), 12 were community representatives, and 29 were elected (27 for the ARM and two ungrouped).

The 11 Gallop partisans voted for Gallop when it was available in the first and second ballots, then did not vote for any other republic option, but they did vote for a republic in the sixth ballot. This group comprised 10 elected delegates who had promoted direct election in their election campaigns, and one community representative.

Finally, the ten Status Quo partisans voted McGarvie, Hayden, Status Quo, and No Model in the four elimination rounds, then No to Turnbull, and No a republic in the fifth, sixth, and eighth ballots. The group comprised six Coalition parliamentarians (including the prime minister, the deputy prime minister, and the Queensland premier who represented the National Party), three community representatives (including Bill
Hayden, former federal Labor minister and governor-general 1989-96), and one delegate elected on a constitutional monarchy ticket. It does not seem that these delegates belong to one group because their votes were so different, and they did change their votes.

Nine of the 10 delegates voted McGarvie, Status Quo, then McGarvie again, while the tenth member voted Hayden, No Model, Status Quo, then No Model. This group are united, however, by voting against Turnbull, against a republic, and for Status Quo. They are grouped together for this reason, and because statements made by them in the debates and elsewhere show that they did not prefer a republic of any kind.

In his opening address, prime minister Howard asked delegates to vote for a republic of some kind so that it could be put to referendum:

[The] major goal of this Convention should be to reach a clear view on which republican model ought to be pitted against present arrangements at a constitutional referendum (PM&C 1998a, 3 emphasis added).

Despite his aversion to a republic, he followed his own urgings and voted McGarvie, Status Quo on the one occasion it was offered, McGarvie again, then No to a republic. Seven other members of this group did the same, and five of them made it clear before they cast their votes for the McGarvie model that they did not favour a republic of any kind.

As one who sees it as his role to defend our constitutional arrangements I believe that this Convention must settle on an alternative model for our head of state, one that can be put before the Australian people… the National Party does not believe that a strong enough case for change has been made (Anderson, federal Coalition MP in PM&C 1998a, 534).

We are here to discuss what sort of republic we should have, what actual proposal should be put to the Australian people … Of these three models, [McGarvie] is the most attractive, albeit an ugly bunch (Borbidge, state Coalition MP in PM&C 1998a, 49).

[Given the] real complexities and drawbacks [of a republic] … the Convention should nevertheless focus on the three [republic] models (Fischer, federal Coalition MP in PM&C 1998a, 250).

Denver Beanland, the last state Coalition parliamentarian in this group, criticised direct election and the McGarvie model, and urged delegates three times to consider selecting a president using an electoral college – if Australia became a republic – because this would be consistent with the federal principle (PM&C 1998a, 215-217, 367, 541-544).
The two non-parliamentary members of the group did not clarify their preferences in the debates. Joan Moloney, a community representative, spoke once for about two minutes, in which time she suggested an electoral college should select a republic president (PM&C 1998a, 550). Michael Castle, elected on a constitutional monarchy ticket, did not address the assembly.

It is not surprising that almost all of the Status Quo partisans voted in the first instance for the McGarvie republic model. When the constitution is read with informal constitutional agreements, there is little or no functional difference between it and the McGarvie model because the monarch is not active in Australian affairs, and the prime minister chooses the governor-general (see esp. Howard, Newman, Craven and McGarvie in PM&C 1998b, 4, 609, 990, 588, 842). Winterton argued that the McGarvie model was not a republic at all (PM&C 1998b, 685). Richard McGarvie, who proposed the model, said he sided with neither monarchists nor republicans, and he abstained from the last ballot which asked whether a referendum should be held (PM&C 1998b, 936; also McGarvie 1999, 91).

It may seem odd to include Bill Hayden in the Status Quo group, given that he proposed the most radical republic model. He voted for his model on the one occasion it was offered in the first ballot, then voted No Model, Status Quo, No Model, No to Turnbull, and No to a republic. By contrast, the three other delegates who voted for the Hayden model in the first ballot went on to vote for other republic models. This could be read to mean that for Hayden it had to be a Hayden republic, or no republic, but statements made by him paint a different picture.

Hayden has repeatedly denied he is a republican. He made that clear in an address to the National Press Club in 1996 (Hayden 1996a), and elaborated on it in an autobiography published in the same year. In that work he wrote that Australia was already independent, and that becoming a republic would be entirely symbolic:

For my part I can see no point in embarking on a spirited, time-consuming, resource-hungry hard-sell campaign to enable a bit of tarting up of a vehicle which not only do we already own but performs quite effectively (Hayden 1996b, 548).

He argued at length against proposals for direct election of a republic president, then concluded “I am obviously not a militant republican. Neither am I a deferential royalist” (Hayden 1996b, 559). He restated his position on the second day of the assembly:

My preferred position is the status quo. I am not here as an ideologue from the republicans or from the constitutional monarchists. I am a pragmatist …I am not a republican. If I were, however, I would support the ‘whole Monty’ as they say these days. …But I am not a republican (PM&C 1998b, 180, 183).
Just before the first ballot, Patrick O’Brien (an elected delegate who supported direct election) asked Hayden whether he would vote for his own model. Hayden replied:

I do not belong to the constitutional monarchy group. I have never been to one of their meetings. I have never joined them. I have consistently said I stand for the status quo because I am worried about the implications of processes of change. Those worries are still there but I have no problem at all in voting for this. The dismissal procedure satisfies a worry I did have about a demagogue. But, if it is defeated, I am not going to vote for the other half-bred sorts of things that have been put forward because they are gratuitously offensive to the Australian public and what it rightly expects to happen (PM&C 1998b, 837).

By his own account, then, Hayden was not a republican.

Given that Hayden was not a republican, why did he propose a radical republic model? A benign explanation can be gleaned from the speech he delivered on the ninth day when he presented his model to the assembly, and from the quotation just cited. He proposed a direct election republic model because he believed that the public wanted direct election, so it should be debated (PM&C 1998b, 833-838). Like other members of the Status Quo group, he heard the prime minister’s call to support a republic model of some kind. On the ninth day, Hayden said:

Geoffrey Gallop made the observation that I am both radical and conservative at the same time. There has often been some truth to that. … where it is safe and proper to be radical I am prepared to do so and when it is going to be dangerous then I will be conservative. If I believe that the changes being proposed are going to be dangerous, then I will be conservative about them but if I can see a break for change, given the fact that the Prime Minister asked us to come up with something, then I will be radical (in PM&C 1998b, 869, emphasis added).

It was safe to propose his model because it was most unlikely to succeed, as he acknowledged. Republic models were not debated unless they were supported by at least ten delegates. Hayden obtained ten signatures to support his model, but just before the first ballot he announced that he did not expect his supporters to vote for it (PM&C 1998b, 833). This is understandable, given that three of his supporters were elected on constitutional monarchy tickets (Bradley, Panopoulos, and Wilcox), and the final signatory was Geoffrey Blainey who is known to support the status quo (Blainey 1992; Blainey 1994; Blainey in PM&C 1998b, 766).

**DISCUSSION**

Why was the Turnbull republic model put to referendum when a majority of the delegates did not support it? In 1996, the Coalition’s *Law and Justice Policy* said:

If a **consensus** emerges from the People’s Convention regarding the Head of State, that **consensus** will be promoted by the Government at a Constitutional referendum. If no **consensus** emerges, then the Australian people will be asked to vote on a series of options for changes to establish which of them they desire (Liberal and National Parties of Australia 1996, emphasis added).

By any conventional understanding of the word consensus as agreement, this meant that
if at least a majority of delegates supported a particular republic model, then that model would be put to referendum. If they did not, then a multiple-choice plebiscite would be held. On the first day of the Convention, however, the prime minister announced:

if clear support for a particular republican model emerges from this Convention my government will, if returned at the next election, put that model to a referendum of the Australian people before the end of 1999. ... If this Convention does not express a clear view ... the people will be asked to vote in a plebiscite which presents them with all the reasonable alternatives. A formal constitutional referendum, offering a choice between the present system and the republican alternative receiving most support in the plebiscite, would then follow. It is the hope of my government that this Convention will speak with sufficient clarity to obviate the need for a plebiscite (PM&C 1998b, 3 emphasis added).

Between 1996 and 1998, the threshold for a referendum changed from “consensus” to “clear support” or “clear view”. While it was not at all clear what “clear support” or “clear view” meant, it was clear at this point that if the convention did not reach a “clear view”, then a plebiscite would be held to offer electors more than one alternative to constitutional monarchy.

Just before the eighth ballot, where delegates were asked if they preferred the Turnbull republic model to status quo, the prime minister rose without prompting to remind delegates of his position. He is cited here in full, to avoid misrepresentation.

Mr HOWARD – Mr Deputy Chairman, I start my brief remarks by taking the Convention back to the charge I gave it at the beginning, because I think some of the words that I then used have, either through inadvertence or on some occasions deliberately, been misrepresented. What I said – and I think it is very important for the vote that is to take place in a moment and also later on this afternoon; I will repeat the words in that speech – was:

I inform the Convention that if clear support for a particular republican model emerges from this Convention my government will, if returned at the next election, put that model to a referendum …

Let me repeat that: if there is clear support for a particular republican model, we will put it to referendum.

I want to make it very plain that I chose those words deliberately. They were meant to convey a very clear and unmistakable meaning. I want to repeat them the moment before the vote is taken.

I also repeat again – this is well known – that I have been a supporter of the present system for many years. My party knew my position when it made me its leader in 1995. The Australian people knew my position when they elected my government to power in March 1996. I have never disguised, in the interests of responding to what may appear to be majority support for a particular proposition, a point of view that I cannot in conscience embrace.

I remain opposed to change because I honestly do not believe that Australia would be a better country if we abandoned the present constitutional system. That is my honestly held belief. I find it a curious notion in this debate that in some way a mark of leadership is to repudiate something which, deep down in your heart, you believe in, in the name of responding to what is the current transient, perhaps enduring, support for a particular point of view.

I can respect the strength of feeling of people like Phil Cleary. He may disagree with me on many things – and he does on just about everything, I think – but I can respect his point of view. I said to people when this Convention started that I wanted it to be an occasion for plain speaking. I have not disguised my view.
I do not support the present system out of some nostalgia for a British past nor for the singing of ‘God save the Queen’ or for something that is now distant. I support it because, through an accident of history and the maturity of the Australian people, we have embraced to ourselves a system of government that has given us a coherence and a stability that are the envy of this world. In the true Burkian [sic] tradition of honourable conservatism – and I think honourable conservatism as well as constructive conservatism are important on these occasions – I believe it is eminently consonant with a democratic, inclusive future for Australia to maintain that system (PM&C 1998b, 980-981).

Even at the eleventh hour, and despite the prime minister’s declared intention, it is not clear what the prime minister meant by “clear support”. It is clear only that he intended his original words, and this subsequent explanation, to “convey a very clear and unmistakable meaning”, and that he did not support Australia becoming a republic.

When the chair declared the Turnbull model carried in the eighth ballot, by 73 Yes, 57 No, and 22 Abstain, some delegates objected. Patrick O’Brien said:

it is not a majority of the delegates … I, maybe mistakenly – I am not challenging the chairman’s ruling anymore – did believe that whatever went to the people would have to receive the votes of at least a majority of delegates. I know for a fact that some delegates here understood that in abstaining they were actually voting, and that happens to be the case (PM&C 1998b, 987).

Eric Bullmore asked the prime minister why the result did not trigger a plebiscite.

Again, the exchange is cited in full to ensure accurate representation of both speakers.

Mr BULLMORE – Is it possible for me to ask the Prime Minister to clarify what he said leading up to this, before he convened the Convention and before the election? He also made a statement on plebiscites if we did not reach a consensus here. Could he maybe clarify for us on the consensus?

Mr HOWARD – The language that I used very deliberately and very carefully in my opening speech at the beginning of the Convention was ‘clear view’. As I said a moment ago, when you have a combination of 89 out of 152 voting generically for a republic, and clearly the republican model attracting the most support at this Convention is the one that has been adopted, in those terms I am satisfied beyond any reasonable doubt that the charge given to the Convention has been fulfilled. I think the matter ought to now be remitted to the Australian people for their verdict.

Mr BULLMORE – The question was: what was the position on a plebiscite?

Mr HOWARD – The position on the plebiscite was that, if there had not been a clear view in support of a particular republican model, then we would have had a plebiscite. But there is a clear view in support of a particular republican model; therefore we do not need a plebiscite. I do not want to have a plebiscite and I will not have a plebiscite (PM&C 1998b, 991 emphasis added).

It seems that when the prime minister said on the first day that the threshold for a referendum was “a clear view” or “clear support for a particular republican model”, he meant “most support”, not any kind of majority support. When he explained on the last day just before the eighth ballot what he meant by “clear view”, he already knew that the Turnbull model had received more support than had any other republican model. It is reasonable in these circumstances to conclude that he had decided to hold a referendum before he knew the result of the eighth ballot. Would he hold a referendum if the result
of the eighth ballot was 45% Turnbull, 50% status quo, and 5% abstain? In theory he would, because the Turnbull republic model would still have more support than any other republic model, even though in both scenarios a majority did not vote for it.

Why did the prime minister oppose a plebiscite so strenuously, saying “I do not want to have a plebiscite and I will not have a plebiscite”? Why did he decide instead to put to referendum a model that was not supported by a majority of the delegates? What were his options? The government could hold a referendum or a plebiscite, or declare that neither was appropriate in the circumstances. Politically, the last option was not viable for a government returned to office less than two years earlier, after 13 years in opposition. If the government did not hold a public vote on a republic, it would surely stand accused of intentionally blocking transition to a republic, especially given that the prime minister’s opposition to a republic was so well known. If the government authorised a plebiscite, more than one republic model would be offered, and one of these models would entail a directly elected head of state. By all accounts, such a model would be popular, and it might well carry the day.

A summary of results for republic opinion polls from 1966 to 2006 is presented as figure 4.5. The green and red bars indicate, on average, how many respondents said that they supported or opposed a republic, while the dotted line indicates how many respondents said they were undecided. The two (curved) polynomial trendlines, which smooth the peaks and troughs in the Yes and No results, indicate that support for a republic exceeded opposition for the first time in 1992, peaked in 1996, and fell away a little from 1997 to 1999. While advocates were not a majority in 1999, as they were in 1996-1998, they still outnumbered opponents. For nine polls conducted in 1999, the results were an average of 48% Yes, 42% No, and 10% undecided. When pollsters asked respondents in February 1998 whether they preferred a monarchy or a republic with a directly elected president, the result was 52% for a republic, 37% opposed, and 11% undecided. To the extent that this poll is valid and reliable, a referendum or plebiscite that offered a directly elected president in 1999 would have passed. When he opened the assembly, the prime minister said he knew polls indicated “overwhelming public support for the popular election of a president” (PM&C 1998b, 3).22

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22 According to the polls, support for a republic rose from 48% in 1999 to 52% in 2000 and 2001, then declined to 46% in January 2006, about 9% above the peak of 55% in 1996. An ARM poll of its members in 2002 found “a fairly even break between those who support direct election … and those who support parliamentary election” (Australian Broadcasting Corporation 2002).
This evidence supports the idea that the government put the Turnbull model to a referendum rather than hold a plebiscite because it saw that path as a way to close the republic debate without becoming a republic.
(Sources: data from 1966 to February 1999 are from Warhurst 1999, attributed there to George Winterton for 1953-1994, and the Sydney Morning Herald and the Australian newspapers from 1994 to February 1999. Data from March 1999 were obtained from the Sydney Morning Herald and the Australian.)

Figure 4.5: Republic opinion polls 1966-2006
Quite apart from poll data and the results at the assembly, some expert opinions lend support to the proposition that the prime minister did not believe the Turnbull model would pass at referendum. In 1999 Malcolm Turnbull published an account of a private conversation he had in July 1996 with John Howard, and two other Coalition parliamentarians (Nick Minchin, and Tony Abbott). According to Turnbull, he urged the prime minister to hold a plebiscite on a republic, and not convene an assembly at all; if the result of the plebiscite was favourable, parliament could then devise a suitable republic model (1999, 17-18). According to Turnbull:

Howard did not want to do anything of the kind. His concern was to stop a republic from happening. He wanted to keep the republicans fighting on two fronts: against monarchists who wanted no change and against other republicans who wanted a different sort of republic.

I tried, as I did on so many occasions, to appeal to his sense of political responsibility. Surely, even as a monarchist, he had a vested interest in the best republican model’s [sic] being presented to the people. Surely, as Prime Minister, he should have a hand in framing the model and be able, at least, to assure voters that it was safe and workable.

These lofty arguments did not make much headway. He remained as cheerfully cynical as ever. At our meeting in July 1996 he tried to provoke me by saying, ‘How would you feel if we had a plebiscite asking whether they wanted a President chosen by Parliament or by the people? You’d hate that, because they would not support your model.’ He grinned at his clever proposal (Turnbull 1999, 18).

George Winterton – an appointed delegate to the convention – wrote in 1998:

The Convention's failings are largely attributable to two factors: insufficient attention was devoted to the details of the republican model, and the ARM conceded too much to the Prime Minister and other supporters of the McGarvie model in a futile attempt to secure their support (1998a, 7).

Winterton predicted before the referendum that it would not pass because the model was flawed.

CONCLUSIONS

The four questions posed in this thesis have now been answered for the 1998 Constitutional Convention, as follows.

• The assembly was more representative of electors’ personal characteristics and constitutional preferences than it would have been if the parliamentarians had convened alone. Community representatives were most representative for population demographics (place of birth, gender, and formal education), while elected delegates were most representative for place of residence, aboriginality, and

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23 Malcolm Turnbull was elected to the federal parliament as the Liberal member for Wentworth in 2004. He was appointed Minister for the Environment and Water Resources from 30 January 2007 by prime minister Howard. According to Phillip Adams, Howard “gave his show pony a white horse – Turnbull could save Australia from thirst and that climate change crap. … He’s got no support from the parliamentary heavies. … Too often Turnbull is forced to echo his PM’s evasions and back-sliding when you know he’d prefer to charge right in” (Adams 2007).
electors’ constitutional preferences. Parliamentary delegates were least representative for all categories except age: median age was 50 years for both parliamentarians and elected delegates, and 54 years for community representatives.

- The assembly generated more public interest than did parliamentary inquiries into the constitution, or constitutional inquiries conducted by specialists who were appointed by the federal parliament.
- Non-parliamentarians were better able to achieve consensus than were parliamentarians, but the margin of difference was small.
- Parliamentarians, especially the Labor parliamentarians, exhibited less partisan behaviour in the ballots than did non-parliamentarians, and the margin of difference was large.

These results suggest that electors chose delegates who shared their constitutional preferences rather than their demographic characteristics, and these delegates expressed those preferences, and stood by them, hence partisanship was highest for elected delegates. The government chose community representatives to better reflect some population demographics, but these delegates were less likely to share electors’ constitutional preferences than were the elected delegates. The results signal how difficult it is to achieve demographic, geographic, and preference representation at the same time.

In the final analysis the most important variable is constitutional preferences, because it is electors’ constitutional preferences, as expressed at referenda, which determine whether formal constitutional change is ratified. Elected delegates’ preferences varied from the referendum result by no more than 7.1%, compared to a variation of up to 34.6% for parliamentarians and 37.4% for community representatives.

If these parliamentarians had decided the question of a republic alone, the proposal would have passed with a national majority, and a majority in four of the six states. By contrast, a majority of voters rejected the republic proposal, as did a majority of the elected delegates that voters had chosen to represent them at the assembly.
CHAPTER FIVE - CANADA

Australia and Canada share a history of European settlement of lands occupied by Aboriginal peoples, but the history of the geographic and constitutional development of the two federations is different. All of Australia’s colonies were British from the arrival of the first fleet in 1788. By contrast, Canada’s early European settlements were frequently the subject of violent struggles between the British and French settler nations, and territorial disputes with others. Whilst all six Australian colonies joined the federation in 1901, the Canadian union began as four provinces in 1867 and expanded to ten provinces and two territories over the next 82 years. The creation of Nunavut as a self-governing Canadian territory for Aboriginal peoples in 1998 increased the total to ten provinces and three territories.

This chapter begins with an outline of early European settlement of Canada, to provide context for a discussion of the process of federation and confederation, and to indicate some of the origins of continuing tensions between English and French speaking communities. It draws on materials provided by Library and Archives Canada (2007f), except where indicated otherwise. The second section examines the process of formal constitutional change from 1867 to 1999. It shows how the process changed over time, and examines in detail the long-standing question about the need for provincial consultation and consent.

EUROPEAN PRE-FEDERATION HISTORY

By the middle of the eighteenth century, Britain and France had claimed almost all of the eastern half of Canada. The British claimed Newfoundland Island in 1583, and established colonies there from 1610, but abandoned them by about 1660 (Baker 2003, 4). From 1670, the British granted extensive lands around Hudson Bay to the Hudson Bay Company for commercial purposes. In the seventeenth century, the French established colonies in present-day New Brunswick (1604), Nova Scotia (1605), and Québec (1609), and assumed control of Newfoundland despite British protests (1662).

England and France went to war over Canadian territory in 1689 and again in 1702.
The 1713 Treaty of Utrecht passed control of New Brunswick, Nova Scotia, and Newfoundland to the British. In 1719, the French established a permanent settlement on Prince Edward Island. Figure 5.1 shows the extent of territorial disagreements circa 1740: yellow areas were French, tan areas were British, and green areas were in dispute (Natural Resources Canada 2003a).

After the British defeated the French in the 1754-1760 war, the 1763 Treaty of Paris ceded to Britain all French lands except St. Pierre Island and Miquelon Island. The British intended to assimilate the French, albeit with some accommodations such as protection of the French language, freedom to practise Catholicism (though the franchise was denied to Acadian Catholics in the late 1700s), and self-government through the Québec Act of 1774. In 1755, the British deported French-speaking Acadian people across the border to British colonies in the United States because they would not swear allegiance to Britain. In 1776, Britain transferred ownership of Prince Edward Island lands to absentee British landlords, by lot.

In an attempt to settle continuing disputes between French and British residents, the British divided Québec in 1791. Upper Canada (now Ontario) was mainly English speaking with a common law system, while Lower Canada (now Québec) was mainly French speaking with a civil law system. Each colony had its own assembly, with an upper house appointed by the Governor. When these measures failed to quell civil unrest, the British passed the 1840 Act of Union, which reunited Upper and Lower Canada as the Province of Canada, comprising Canada East and Canada West. The Act provided for the retention of a civil/common law distinction, and equal representation of East and West Canada (even though Québec had a larger population), but English was the only official language until 1848. For more than 25 years, the province of Canada operated as a dual system with considerable difficulty. East and West Canada could obstruct legislative initiatives proposed by the other side because each colony had the same number of seats in the house of assembly, and there were practical difficulties in alternating the capital between Toronto and Québec City.

When the United States declared war on the British in Canada in 1812, British and French colonial forces responded. The United States withdrew in 1813, and the Treaty of Ghent was signed at the end of 1814, but not before Washington DC was “raided and burned” (Library and Archives Canada 2006, 2). In July 1866 – less than a year before federation – the US House of Representatives passed a bill to annex all Canada Lands.
Étienne-Paschal Taché, Premier of Lower Canada, said in the Canada province parliament:

If the opportunity [Confederation] which now presented itself were allowed to pass by unimproved, whether we would or would not, we would be forced into the American Union by violence, and if not by violence, would be placed upon an inclined plain [sic] which would carry us there insensibly (Taché, in Canada Province 1865, 3 February, 6, as said).

By contrast, concerns in the Australian colonies at the end of the nineteenth century about French and German activities to the near north of Australia (Garran 1958, 89; Stephen 2004, 27) are relatively insignificant. Nevertheless, the Canadian and Australian colonies shared an expectation that federation could improve their economies, infrastructure, and defence.

**FEDERATION 1867**

The idea of a Canadian federation was realised with much less public involvement than was the case in Australia. It was achieved through a series of inter-government conferences, the most important of which were held at Charlottetown, Québec City, and London between 1864 and 1866 (Library and Archives Canada 2007f).

The Atlantic colonies initiated the 1864 meeting to discuss a Maritime union between New Brunswick, Nova Scotia, and Prince Edward Island. When Canada asked to be included, the parties agreed they could attend, but only as observers (Library and Archives Canada 2007a, 2). The participants did not think Newfoundland was interested in union, and that colony made its request too late to arrange for a delegation to attend. The four other colonies sent 23 representatives to a conference at Charlottetown on 1-9 September 1864. New Brunswick, Nova Scotia, and Prince Edward Island were each represented by five delegates, and the Canada province sent eight delegates (Waite 1970, 25-27). Most of the delegates from Prince Edward Island were opposed to union, but they were encouraged by an offer of financial assistance to buy back land from British landlords. The delegates resolved that the subject of a union had merit, and adjourned for further discussions in Québec City a month later.

Representatives of all five colonies convened at Québec City on 10-27 October 1864 to debate the details of federation (Library and Archives Canada 2007d). Representation was uneven, with 12 delegates for Canada (six each for Canada East and Canada West), seven for New Brunswick, five for Nova Scotia, seven for Prince Edward Island, and just two for Newfoundland. Canada was a full participant this time, while Newfoundland had observer status because its two delegates were not authorised to reach any agreements on behalf of their colony. Anti-union sentiment ran high in
Newfoundland, with anti-unionists raising fears about Québec, taxes, and conscription. The constituents of Newfoundland elected a pro-union government to power in 1865, but the legislature voted that year to defer debating union. The Prince Edward Island delegation found that the offer of funds to buy back land from absentee landlords was no longer part of the agreement. Many of its constituents, and five of its seven newspapers, opposed union; in May 1866, the legislature passed a resolution against union, and rejected a later offer to restore funding for land purchases. Despite these difficulties, delegates agreed to 72 provisions for a federal union between “the [two] Canadas … Nova Scotia, New Brunswick and Prince Edward Island, … [with] Provision being made for the admission … of Newfoundland, the North-West Territory, British Columbia and Vancouver” (Library and Archives Canada 2007e).

A delegation of 16 men representing Canada, New Brunswick, and Nova Scotia went to London in 1866 to ask Britain to enact the constitution (Library and Archives Canada 2007b). While in London, the delegates drafted the bill, and negotiated the final text. Joseph Howe of Nova Scotia led an anti-union group which lobbied the Colonial Office, to no avail. In a period of less than seven weeks, the legislative cycle was completed. The federation bill was passed by the house of lords on 26 February 1867 and the commons on 8 March “with very little debate”, and it received royal assent on 29 March 1867 (Library and Archives Canada 2007b, 2; Hurley 1996, 10). The British North America Act 1867 (UK) 30 & 31 Vict, c 3 (the 1867 constitution) created the federal Dominion of Canada, comprising the provinces of Ontario, Québec, Nova Scotia, and New Brunswick.

CONFEDERATION 1870-1999

Geographically, the formation of Canada was incremental, compared with Australia’s quantum leap. Figure 5.2 to the right shows that the 1867 union included only a small part of the eastern side of what is now Canada (Natural Resources Canada 2003b). The remaining areas (shaded yellow) were British possessions. Over the next 38 years, a further five provinces and two territories were formed from British possessions and admitted to the union.
The British purchased Hudson Bay Company lands in 1869, and amalgamated them with adjoining areas to create the North-Western Territory. Britain transferred control of the Territory to Canada in 1870, at which time Canada admitted it to the union as the province of Manitoba and the Northwest Territories. A year later, British Columbia joined the union as the sixth province, followed by Prince Edward Island in 1873 – on better terms than were offered in 1866. The Northwest Territories reduced in size again when parts of it became the Yukon territory in 1898, and the provinces of Alberta and Saskatchewan in 1905. This expanded the union to nine provinces and two territories.

Newfoundland, which declined to join the union in 1867 because it was not satisfied with the financial arrangements, did so in 1949 following a constituent assembly and two plebiscites. Finally, Nunavut became Canada’s third territory in 1999.

**CHANGING THE CONSTITUTION 1867-1999**

**The Rules for amending the constitution**

The rules for amending the constitution changed considerably over time. The founders could not agree on an amending formula in 1867, so Britain assumed this authority, but it did not act unilaterally (Gérin-Lajoie 1950, 136). According to Guy Favreau (1965, 11-16), federal minister of justice, four principles governed the process of formal constitutional change from 1871 to 1964. First, the federal government initiated amendments, and Britain enacted them with few, if any, alterations. Second, whilst Canadian governments initiated amendments unilaterally for most of the first three decades despite protests in federal parliament, from 1895 Britain required the consent of the Canadian parliament, usually indicated by joint or several addresses to the crown. Third, Britain would not respond to requests for amendments from provinces. For example, it declined to respond in 1868, 1869, 1874, and 1887. Fourth, the Canadian parliament would not seek amendments “directly affecting federal-provincial relationships without consultation and agreement with the provinces”. The fourth principle is contentious because ‘consultation’ and ‘agreement’ are not defined.

From 1949, section 91(1) of the 1867 constitution allowed the federal parliament to enact some amendments without consulting Britain or the provinces. This facility did not extend to amending requirements for the parliament to meet at least once per year, and hold elections at least every five years, or amendments concerning exclusive
provincial powers, the powers of the provincial legislatures, schools, and use of the English and French languages.

Britain’s role in amending Canada’s constitution ended in 1982 when its parliament passed the Constitution Act 1982 as Schedule B to the Canada Act 1982, (UK) c.11 which came into force on 17 April 1982 (the Canadian constitution 1982). Since that time, the senate, the house of commons, or a provincial legislature can initiate an amendment (s 46). Thresholds for ratification vary according to the subject of the amendment, as follows.

1. Unanimous agreement between the federal and provincial governments is required to change provisions for the monarch, governor general, lieutenant governors, minimum representation of provinces in the lower house, use of the English and French languages in all provinces, the composition of the Supreme Court, and the rules for amending the constitution (s 41).

2. Amendments that do not affect all provinces require bilateral or multi-lateral agreement between the federal government and the legislatures of provinces concerned (s 43).

3. The federal parliament alone can change provisions concerning the federal executive, the house of commons, and the senate that are not specified elsewhere in the amendment procedures (s 44).

4. All other amendments require the consent of the federal government and seven of the ten provincial governments, provided those provinces represent at least 50% of the national population as enumerated in the most recent census (ss 38, 42). This 7/50 rule applies to amendments that create new provinces, extend provincial boundaries into territories, change the proportionate representation of provinces in the senate and house of commons, change the senate’s powers or how senators are chosen, and provisions for the Supreme Court other than changes to its composition.

Such an amendment cannot be enacted in less than 12 months unless every provincial legislature approves it, or signifies its dissent (s 39(1)). This provision means that a province which wanted to dissent from certain types of amendments, and thereby be entitled to the opting out provisions of s 38(3), would not be surprised by the enactment of an amendment because the 7/50 rule was satisfied before that province had officially declared its dissent. An amendment lapses if
the 7/50 rule is not satisfied within three years of the day on which the first provincial legislature approves it (s 39(2)).

5. A province can opt out of a 7/50 amendment that would otherwise reduce its powers, rights, or privileges (s 38). If such an amendment transfers powers over education and culture to the federal tier, provinces that opt out are entitled to federal compensation (s 49).

The senate can veto amendments of the third type above; otherwise, it has a 180-day suspensive veto only (s 47). There is no formal role in any amendment procedure for the territories. Nor is there any formal role for constituents. By contrast, Australian constituents have an absolute veto over proposals for formal constitutional change, exercised at referenda.

Constitutional change in practice

This section does not begin with a clear statement of how many times the Canadian constitution has been amended, as was done for the Australian case, because authors reach different conclusions on this point. When Clokie raised the question more than 60 years ago, he warned “Such being the paradoxical state of the Canadian constitution, its problems challenge every student of government” (1942, 3). That challenge must be met, however, because the thesis cannot review the process of formal constitutional change without first establishing a credible account of the number of times the constitution has been amended.

How many times has the constitution been amended?

Analysis of an annotated copy of the constitution published by the Department of Justice yielded the longest list of constitutional changes between 1867 and 1999 (2001).

The preface explained that the annotations covered “direct amendments” which changed the text of the 1867 or 1982 constitution, “indirect amendments” which did not alter either text, and comments on sections that were spent or probably spent (Department of Justice Canada 2001, foreword). The authors did not provide a consolidated list of changes, and they did not say what type of change was covered in each footnote, but that information can be derived from the note, and the acts and instruments referred to in it. For example, note 7 to s 5 of the 1867 constitution said that British Columbia, Prince Edward Island, and Newfoundland joined the union in 1871, 1873, and 1949 respectively by orders in council (cabinet decisions) in accordance with ss 146-147. A close reading of those orders shows that the text of the constitution
did not change, so these are “indirect amendments”, which are not counted as amendments in this thesis. That general rule applies only until 1982 because in that year this text was added to the constitution:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
   (2) The Constitution of Canada includes
   (a) the Canada Act 1982, including this Act;
   (b) the Acts and orders referred to in the schedule; and
   (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The schedule referred to under (2)(b) includes the orders in council admitting the three provinces mentioned above, so subsequent alteration of the terms of union for Newfoundland in 1987, 1997, and 1998, and Prince Edward Island in 1994 are counted as amendments in this thesis.\textsuperscript{24} Analysis of all 108 footnotes and related instruments shows that the text of the 1867 and 1982 constitutions changed 26 times between 1867 and 1999. Table 5.1 lists each amendment by year, sections affected, the nature of the amendment, the instruments used to secure it, and the parties who consented to the amendment.

The amendments listed in table 5.1 do not reconcile with other accounts. For the period 1867 to 1949, table 5.1 lists seven amendments, but Gérin-Lajoie (1950) cites 15, and Favreau (1965) and Russell (1988) cite 18. These discrepancies are reconciled in the next section. The names of many acts were changed by the 1982 constitution, but the original names are retained in tables 5.1 and 5.2 and the discussion to make it easier for readers to validate the reconciliation to sources published before 1982.

\textsuperscript{24} The name of Newfoundland changed to Newfoundland and Labrador in 2001 (Government of Canada 2001).
<table>
<thead>
<tr>
<th>In force</th>
<th>Section affected(1)</th>
<th>Amendment</th>
<th>Amending instrument(2)</th>
<th>Agreed by federal government and …(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1875</td>
<td>18 -</td>
<td>Provide that the parliament may legislate for its privileges, immunities, and powers, provided they do not exceed those of the British parliament when such legislation is enacted</td>
<td>Parliament of Canada Act, 1875, 38-39 Vict., c.38 (UK)</td>
<td>UK Yes HC No Sen No Provinces None</td>
</tr>
<tr>
<td>1875</td>
<td></td>
<td>Repeal the enacting clause, and reference to royal heirs and successors; repeal s4 in part, leaving in place the meaning of the name Canada</td>
<td>UK alone</td>
<td></td>
</tr>
<tr>
<td>1893</td>
<td>Enacting, 2, 4</td>
<td>House of commons: change the basis on which seats are distributed from a particular census to “subsequent” census</td>
<td>Statute Law Revision Act 1893, 56-57 Vict., c.14 (UK)</td>
<td></td>
</tr>
<tr>
<td>1893</td>
<td></td>
<td>Repeal provision for the first commons election, the requirement for senators to be summoned by royal warrant, protocols for colonial parliamentarians accepting appointment to the senate, provision for the timing of the first election and legislative session in Ontario and Quebec after union, and reference to the New Brunswick assembly completing its term</td>
<td></td>
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<tr>
<td>1893</td>
<td></td>
<td>Repeal provision for constructing an inter-colonial railway</td>
<td></td>
<td></td>
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<tr>
<td>1907</td>
<td>118 -</td>
<td>Vary federal grants paid to the provinces</td>
<td>Constitution Act, 1907, 7 Edw. VII, c.11 (UK)</td>
<td>UK Yes HC Yes Sen Yes Provinces All</td>
</tr>
<tr>
<td>1915</td>
<td>21,22,26-28,147</td>
<td>Senate: increase from 72 to 96 seats (maximum 104, 110 if Newfoundland is admitted); change the number of equally sized divisions from 3 (Ontario, Quebec, Maritime) to 4 (Ontario, Quebec, Maritime, Western); and increase the number of senators the monarch or governor general can add from 3-6 to 4-8, allocated equally across the senate divisions</td>
<td>Constitution Act, 1915, 5-6 Geo. V, c.45 (UK)</td>
<td>UK Yes HC Yes Sen Yes Provinces None</td>
</tr>
<tr>
<td>1915</td>
<td></td>
<td>House of commons: provide that every province will have at least as many seats in the commons as it does in the senate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1940</td>
<td>91(2A) -</td>
<td>Add exclusive federal powers over unemployment insurance</td>
<td>Constitution Act, 1940, 3-4 Geo. VI, c.36 (UK)</td>
<td>UK Yes HC Yes Sen Yes Provinces All</td>
</tr>
<tr>
<td>1946</td>
<td>51(1) -</td>
<td>House: increase to 255 seats, allocated by population; allocate 1 seat to Yukon and 1 to any other territory that is not part of a province</td>
<td>British North America Act, 1946, 9-10 Geo. VI, c.63 (UK)</td>
<td>UK Yes HC Yes Sen Yes Provinces None</td>
</tr>
<tr>
<td>In force</td>
<td>Section affected</td>
<td>Amendment</td>
<td>Amending instrument</td>
<td>Agreed by federal government and provinces</td>
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<tr>
<td>1867 Act</td>
<td>1982 Act</td>
<td>Amendment</td>
<td>(2)</td>
<td>UK</td>
</tr>
<tr>
<td>1949</td>
<td>91(1), 91A</td>
<td>Parliament can change the constitution by legislation, but not provisions for exclusive provincial powers, schools, English and French languages, minimum sittings of parliament, and maximum parliamentary terms</td>
<td><strong>British North America (No. 2) Act, 1949</strong>, 13 Geo. VI, c.81 (UK)</td>
<td>Yes</td>
</tr>
<tr>
<td>1950</td>
<td>118</td>
<td>Repeal provision for federal grants to provinces as spent</td>
<td><strong>Statute Law Revision Act, 1950</strong>, 14 Geo. VI, c.6 (UK)</td>
<td>UK alone</td>
</tr>
<tr>
<td>1951</td>
<td>94(A)</td>
<td>Add concurrent federal powers over old age pensions</td>
<td><strong>British North America Act, 1951</strong>, 14-15 Geo. VI, c.32 (UK)</td>
<td>Yes</td>
</tr>
<tr>
<td>1952</td>
<td>51(1)</td>
<td>House: increase to 263 seats; no province to lose 15% or more seats by this adjustment, or have fewer seats than did a less populous province; allocate 1 seat to Yukon</td>
<td><strong>British North America Act, 1952</strong>, SC 1952, c.15</td>
<td>Yes</td>
</tr>
<tr>
<td>1960</td>
<td>99</td>
<td>Provide that superior court judges retire at age 75</td>
<td><strong>Constitution Act, 1960</strong>, 9 Eliz. II, c.2 (UK)</td>
<td>Yes</td>
</tr>
<tr>
<td>1964</td>
<td>94A</td>
<td>Broaden concurrent federal powers over pensions</td>
<td><strong>Constitution Act, 1964</strong>, 12-13 Eliz. II, c.73 (UK)</td>
<td>Yes</td>
</tr>
<tr>
<td>1965</td>
<td>29(2)</td>
<td>Senate: senators retire at age 75</td>
<td><strong>Constitution Act 1965</strong>, SC 1965, c.4</td>
<td>Yes</td>
</tr>
<tr>
<td>1974</td>
<td>51(1)</td>
<td>House: allocate 75 seats to Québec, plus 4 seats every 10 years; add new formulae for determining the number of seats allocated to other provinces</td>
<td><strong>Constitution Act, 1974</strong>, SC 1974-75-76 c.13</td>
<td>Yes</td>
</tr>
<tr>
<td>1975</td>
<td>51(2)</td>
<td>House: add 1 seat for Yukon, and 2 seats for Northwest Territories</td>
<td><strong>Constitution Act (No. 1), 1975</strong>, SC 1974-75-76, c.28</td>
<td>Yes</td>
</tr>
<tr>
<td>1975</td>
<td>21,22,28</td>
<td>Senate: increase from 102 to 104 seats (increase maximum from 110 to 112); allocate 1 seat to Yukon, and 1 to Northwest Territories</td>
<td><strong>Constitution Act (No. 2), 1975</strong>, SC 1974-75-76 c.53</td>
<td>Yes</td>
</tr>
<tr>
<td>In force</td>
<td>Section affected(1)</td>
<td>Amendment</td>
<td>Amending instrument(2)</td>
<td>Agreed by federal government and …(3)</td>
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<tr>
<td>1867 Act</td>
<td>1-34</td>
<td>Add a Charter of Rights and Freedoms, including provisions that: provinces can legislate notwithstanding the Charter (s33); federal and provincial parliamentary terms do not exceed five years except “In time of real or apprehended war, invasion, or Parliamentary insurrection” (s4); and parliament must sit at least once every 12 months (s5)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>35</td>
<td>Entrench rights for Aboriginal peoples</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>36</td>
<td>Entrench a commitment to redress provincial inequalities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>37</td>
<td>Convene a first ministers’ conference within a year on the constitution, including Aboriginal issues in consultation with them; include territories on matters that affect them; and repeal s37 when s37.1 comes into force</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>38-44,46-49</td>
<td>Change the rules for amending the constitution; provide that when some provinces transfer powers over education or culture to the federal tier, other provinces are compensated</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>25(b), 35(1,3-4)</td>
<td>Change wording of Aboriginal rights section, clarify “treaty rights” and provide that they apply to men and women</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>37.1,54,1 add, 61 amend</td>
<td>Hold two first ministers’ conferences on the constitution by April 1987, including Aboriginal issues; include Aboriginal peoples and territories for matters that affect them</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>51(1)</td>
<td>House: determine seats per province by census, provided that no province loses seats</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In force</td>
<td>Section affected(1)</td>
<td>Amendment</td>
<td>Amending instrument(2)</td>
<td>Agreed by federal government and …(3)</td>
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<tr>
<td></td>
<td>1867 Act</td>
<td>1982 Act</td>
<td></td>
<td>UK</td>
</tr>
<tr>
<td>1987</td>
<td>Newfoundland Terms of Union 1949</td>
<td>Extend rights and privileges for education to the Pentecostal Assemblies</td>
<td>Constitution Amendment Proclamation, 1987</td>
<td>n/a</td>
</tr>
<tr>
<td>1993</td>
<td>-</td>
<td>16.2</td>
<td>Provide for the preservation and promotion of English and French linguistic communities in New Brunswick</td>
<td>Constitution Amendment Proclamation, 1993 (New Brunswick Act)</td>
</tr>
<tr>
<td>1994</td>
<td>Prince Edward Island Terms of Union 1873</td>
<td>Change references to a steam service to a fixed crossing, allow provincial tolls for the use of the Confederation Bridge</td>
<td>Constitution Amendment Proclamation, 1993 (Prince Edward Island)</td>
<td>n/a</td>
</tr>
<tr>
<td>1997</td>
<td>Newfoundland Terms of Union 1949</td>
<td>Specify Newfoundland’s powers over education, schools, school boards, and religious instruction</td>
<td>Constitution Amendment Proclamation, 1997 (Newfoundland Act)</td>
<td>n/a</td>
</tr>
<tr>
<td>1997</td>
<td>93A</td>
<td>-</td>
<td>Exempt Québec from the limits to exclusive provincial powers over education that are listed in s93</td>
<td>Constitution Amendment, 1997 (Québec)</td>
</tr>
<tr>
<td>1998</td>
<td>Newfoundland Terms of Union 1949</td>
<td>Grant Newfoundland exclusive powers over education</td>
<td>Constitution Amendment Proclamation, 1998 (New. Act)</td>
<td>n/a</td>
</tr>
<tr>
<td>1999</td>
<td>-</td>
<td>Schedule</td>
<td>Add Constitution Act, 1999 (Nunavut), which includes new boundaries for Yukon, Northwest Territories, and Nunavut</td>
<td>Constitution Act 1999 (Nunavut), SC 1998, c.15</td>
</tr>
</tbody>
</table>

21,28 - Senate: increase from 104 to 105 seats (raise maximum from 112 to 113); allocate 1 seat to Nunavut

51(2) - House: allocate 1 seat to Nunavut, reduce Northwest Territories’ allocation from 2 seats to 1 seat

(Sources: Department of Justice Canada 2001; Gérin-Lajoie 1950, xiv-xxv, 61-129; Favreau 1965, 8-16; Russell 1988; Hurley 1996, 277-283; Maton 2000; Okalik 2001, and the acts and other instruments cited in these sources)

Notes:
2. The schedule to the 1982 constitution changed the name of many of these acts. This table uses the original names to make it easier for the reader to validate and reconcile commentaries published before 1982.
3. Parties are Britain (UK), the Canadian house of commons (HC), the Canadian senate (Sen), and the provinces.
Different conclusions in Gérin-Lajoie, Favreau, Russell, and this thesis suggest different views about which documents comprise the constitution, and what constitutes an amendment. Clokie offered the following explanation for why authors disagree.

Such a review [of British legislation for Canada] should show that it is impossible to speak in terms of definitive “constitutional amendments”. There is no reason for expecting Canadian legislation to have the neatness and orderliness of the numbered American amendments or to be capable of systematic insertion at the correct place in the Act of 1867 in the Australian manner ... the haphazard method found here is a consequence of using the British Parliament as a constituent authority. In the largest sense, it arises wherever a legislature is the constituent body and the same problem - What statutes are constitutional amendments? - is to be met with in New Zealand, South Africa, and Ireland (1942, 9).

For Clokie, the source of the problem was the “haphazard” amendment process.

Gérin-Lajoie provided a comprehensive and persuasive account of his reasoning. His list of 15 amendments to 1949 included six of the seven amendments shown on table 5.1 (the amendments table), plus nine other constitutional changes shown on table 5.2 (the changes table). He explained that the process of identifying amendments to the Canadian constitution is not simple or straightforward because:

> [t]he phrase “Amendments to the Constitution” applied to the Constitution of Canada does not convey a definite meaning. The Constitution of Canada is not made up of a document called the Constitution and of a definite set of amendments... They may be classified as constitutional documents only by looking at their contents. … This process obviously involves a large amount of interpretation and personal judgment which hardly leads to absolute certainty (1950, 47-48, emphasis added).

His list of amendments differs from the one adopted in this thesis because his definition of the constitution is broader, and his definition of an amendment is narrower.

For Gérin-Lajoie, the Canadian constitution comprised “fundamental” written laws that could not be changed by Canadian legislatures acting alone (1950, 23). A constitutional change was an amendment if it: changed the text of a safeguarded document or added new documents to it; “required an act of Parliament of the United Kingdom because it could not have been achieved by any other means”; and signalled “the moving from one constitutional position to another which is repugnant to, or goes beyond, the terms of the Constitution” (1950, 48-49).

The first criterion requires that amendments change or supplement documents that are “safeguarded against repeal or amendment by the unilateral action of any legislative body in Canada”. The safeguarding mechanism from 1931 was s 7(1) of the British Statute of Westminster, 1931 (Gérin-Lajoie 1950, 6), which reads: “Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder”. Gérin-Lajoie counted the granting of powers over natural resources to Manitoba, British
Columbia, Alberta, and Saskatchewan by the *Constitution Act, 1930* (UK) because it was a safeguarded act. As he explained it:

This further amendment to the Constitution did not embody any new provision in the text of the *British North America Act, 1867*. Moreover, it did not in the slightest degree affect that act. … [but it is] an amendment to the (safeguarded) acts of the Parliament of Canada … [and is thus] an amendment to the Constitution as defined at the outset of this work (Gérin-Lajoie 1950, 91).

Each of the nine constitutional changes listed against Gérin-Lajoie on the changes table varied a safeguarded act. The two changes listed for 1943 and 1949 did not alter the text of safeguarded acts, but they still count for him because they introduced alternatives to ss 51, 93, and 121 of the 1867 constitution. These changes do not count as amendments for this thesis, however, because they did not alter the text of the 1867 constitution.

The second criterion provided that constitutional changes are not amendments unless British legislation was required. This explains why, for example, Gérin-Lajoie did not count the admission to the union of Yukon (1898), Alberta (1905), and Saskatchewan (1905) by Canadian legislation alone. These constitutional changes do not count as amendments in this thesis either, but for a different reason – the text of the 1867 constitution did not change.

Gérin-Lajoie’s third criterion required that an amendment signal the adoption of a different constitutional position, which is why he did not count the repeal of obsolete or spent provisions in 1893 and 1927. Safeguarded documents were changed, and British acts were required, but Canada’s constitutional position did not change because the provisions were already obsolete or spent. The 1893 change does count as an amendment in this thesis, however, because it did alter the text of the 1867 constitution. The 1927 change is not counted because neither the *Statute Law Revision Act, 1927* (UK) nor the act which it repealed – the *British North America Act, 1916*, (UK) – changed the text of the 1867 constitution.

In brief, the surplus of eight amendments for Gérin-Lajoie comprises nine changes that he counted because safeguarded acts other than the 1867 constitution were altered, and one amendment that he did not count because it did not signal the adoption of a different constitutional position.
## Table 5.2: Other constitutional changes, 1867-1949

<table>
<thead>
<tr>
<th>Year</th>
<th>Constitutional change</th>
<th>Gérin-Lajoie 1950</th>
<th>Favreau 1965</th>
<th>Russell 1988</th>
<th>Instrument</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td>Admit Rupert’s Land and North-Western Territory as Northwest Territories</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Rupert’s Land and North-Western Territory Order in council 23 June 1870</td>
</tr>
<tr>
<td>1871</td>
<td>Confirm admission of Manitoba in 1870, and federal powers to form provinces from territories, alter boundaries with provincial consent, and provide for federal representation of provinces</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Unilateral federal government request, British North America Act, 1871, 34 and 35 Vict., c28 (UK)</td>
</tr>
<tr>
<td>1871</td>
<td>Admit British Columbia, and allocate 3 senate seats</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>British Columbia Terms of Union, order in council 16 May 1871</td>
</tr>
<tr>
<td>1873</td>
<td>Admit Prince Edward Island</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Prince Edward Island Terms of Union, order in council 26 June 1873</td>
</tr>
<tr>
<td>1886</td>
<td>Grant federal powers to provide federal representation to territories</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Joint address, British North America Act, 1886, 49 &amp; 50 Vict., c35 (UK)</td>
</tr>
<tr>
<td>1889</td>
<td>Extend the boundaries of Ontario</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Joint address, address by Ontario legislature, and Canada (Ontario Boundary) Act, 1889 (UK)</td>
</tr>
<tr>
<td>1895</td>
<td>Provide that parliament can appoint a senate deputy speaker in the speaker’s absence</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Federal legislation and Canadian Speaker (Appointment of Deputy) Act, 1895, 59 Vict., c.3 (UK)</td>
</tr>
<tr>
<td>1916</td>
<td>Extend parliament’s term past five years during World War I</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Joint address, British North America Act, 1916, 6-7 Geo. V, c.19 (UK)</td>
</tr>
<tr>
<td>1927</td>
<td>Repeal obsolete provisions that were enacted in 1916</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Statute Law Revision Act, 1927 (UK)</td>
</tr>
<tr>
<td>1930</td>
<td>Natural resources provisions extend to Manitoba, British Columbia, Alberta, Saskatchewan</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Joint address, as agreed with the four provinces, Constitution Act, 1930, 20-21 Geo. V, c26 (UK)</td>
</tr>
<tr>
<td>1931</td>
<td>Add federal power to legislate extra-territorially, and federal/provincial power to repeal UK law except for the British North America Act</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Statute of Westminster, 1931, 22 Geo. V. c.4 (UK), consultation with Commonwealth members, and Canadian joint address</td>
</tr>
<tr>
<td>1943</td>
<td>House of commons: delay adjusting size according to 1941 census until after World War II</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Joint address, British North America Act, 1943, 6-7 Geo. VI, c30 (UK); protest from Québec</td>
</tr>
<tr>
<td>1949</td>
<td>Admit Newfoundland, allocate 6 senate and 7 house seats; make special provisions for education and religious instruction, and the distribution of margarine</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Terms of Union by consent of the federal and Newfoundland governments, two Newfoundland referenda, joint address, Newfoundland Act, 1949, 12-13 Geo. VI, c22 (UK)</td>
</tr>
</tbody>
</table>

### Notes:

1. Russell (1988, 24) listed a change in 1896, which is counted here as the 1886 amendment of similar intent.
2. Gérin-Lajoie wrote that none of the four provinces affected by this amendment objected to it when it was raised in 1927 (1950, 91-93), whilst Favreau claimed that one province was not consulted (1965, 13).

(Sources: Gérin-Lajoie 1950; Favreau 1965; Russell 1988)
Favreau (1965, 4-7) described 24 amendments for the period 1867-1964, compared to 12 that are listed on the amendments table. He counted all 12 amendments on the changes table, including the repeal of obsolete or spent provisions in 1893, which Gérin-Lajoie did not count. The surplus of 12 changes comprises eight of the nine changes attributed to Gérin-Lajoie (not the 1989 extension of Ontario’s boundaries), plus four changes that Gérin-Lajoie did not count. The four extra changes are the repeal of obsolete and spent provisions (1927), and the admission by order in council of Northwest Territories (1870), British Columbia (1871), and Prince Edward Island (1873) in accordance with s 146 of the 1867 constitution.

According to Russell (1988, 7), there were 23 amendments for the period covered by Favreau (1867-1964). He did not provide a list, but it is possible to construct one from the text on pages 5 and 6, and from footnotes 5, 7 to 11, and 13 to 15 on pages 24-25. Analysis of these portions of the article shows that for the period 1867-1981, Russell counted 27 changes, compared to 16 on the amendments table. The surplus of 11 comprises the 12 alterations listed on the changes table, minus the repeal of obsolete provisions in 1950, which Russell did not count. The only difference between Favreau and Russell is that Favreau counted this amendment, whilst Russell did not. It is not clear why Russell did not include it – it would not be that he followed Gérin-Lajoie’s reasoning, because he did count the repeal of obsolete and obsolete or spent provisions in 1893 and 1927. Nor is it clear why Favreau and Russell did not follow Gérin-Lajoie and count the extension of Ontario’s boundaries in 1889.

Despite the differences, this analysis of Department of Justice, Gérin-Lajoie, Favreau, and Russell confirms that table 5.1 lists every formal amendment made to the 1867 constitution between 1867 and 1981. The table also includes, from 1982, every formal amendment of the Canadian constitution, as defined by s 52 of the 1982 Constitution.

Analysis of the content of these 26 amendments shows that with the exception of the 1982 amendment, a little over two-thirds were enacted to change the division of powers (nine amendments, groups two and three below), or the size or composition of the federal parliament (eight amendments, group one below).


3. Three amendments provided federal powers to legislate for social security (1940, 1951, and 1964).

4. One amendment changed the way federal grants to provinces were calculated (1907).

5. Two amendments set a retirement age for judges and senators (1960 and 1965 respectively).

6. One amendment empowered the federal parliament to legislate for its privileges, immunities, and powers (1875).

7. Two amendments repealed spent or obsolete provisions (1893 and 1950).

8. One amendment empowered the federal tier to make some constitutional amendments without recourse to Britain or the provinces (1949).

9. The 1982 amendment: defined the constitution; changed the procedures for amending federal and provincial constitutions; added a Charter of Rights and Freedoms; ceded to the provinces powers over non-renewable natural resources, forestry resources, and electrical energy; and provided for Aboriginal rights, a first ministers’ constitutional conference, redressing provincial inequalities, and compensating provinces when the federal tier assumed powers over education or cultural matters in other provinces.

10. One amendment in 1984 changed the wording of Aboriginal rights, and entrenched a further first ministers’ conference on constitutional matters.

Without doubt, the 1982 amendment is the most substantial one, so much so that it overlaps most of the other categories.

The process of formal constitutional change

The question of consultation and consent is a contentious and perennial procedural issue – when Canada amends its constitution, who should be consulted, and whose consent is required?

The lack of consultation is not controversial for four of the 26 amendments. Britain did enact two amendments unilaterally in 1893 and 1950, but these amendments merely repealed obsolete or spent provisions. The Canadian parliament did not consult Britain or the provinces when it entrenched a retirement age for judges in 1965, and
when it altered the composition of the house of commons in 1986, but it was empowered to do so by s 91(1) of the 1867 constitution and s 44 of the 1982 constitution respectively. However, the federal government did not consult the parliament when it enacted the first amendment in 1875 to provide for parliament’s privileges, immunities and powers, and it altered the terms of union for Newfoundland in 1997 despite the senate’s refusal to pass the bill.

The record for provincial consultation is more complex. Setting aside the four uncontroversial amendments mentioned in the last paragraph, the government did not seek provincial consent for eight of 22 amendments:

- six amendments to vary the size or composition of the house or the senate in 1915, 1946, 1952, 1974, and twice in 1975;
- an amendment in 1865 to allow the federal parliament to legislate for its privileges, immunities, and powers; and
- an amendment in 1949 to allow parliament to make some constitutional changes alone.

When it did seek the consent of the provinces for the remaining 14 amendments:

- five were enacted with the consent of all provinces in 1907, 1940, 1951, 1960, and 1964;
- seven amendments that affected some but not all provinces were enacted with the consent of the provinces directly affected in 1987, 1993, 1994, 1997 (twice), 1998, and 1999, in accordance with s 43 of the 1982 constitution; and
- two amendments in 1982 and 1984 were approved by all provinces except Québec.

This quantitative analysis shows that the federal government consulted the provinces more often than not (14 of 22 amendments), and when it did, the provinces usually agreed (12 of 14 amendments). This conclusion is, however, a simplification.

The following outline of the passage of nine amendments illustrates the extent and nature of disagreements over time.

- The 1875 amendment to empower parliament to legislate for its privileges, immunities, and powers was secured despite protests in the federal parliament (Gérin-Lajoie 1950, 58-60; Favreau 1965, 11). The federal government asked Britain to enact the amendment without informing the parliament, and in Britain the Parliament of Canada Act, 1875 passed without debate. In the Canadian parliament in 1876, the Conservative opposition claimed that when it was in power five years
earlier, the commons agreed to an opposition motion that the constitution would not be amended without a joint address. The Liberal prime minister conceded that the parliament had reached such an agreement.

- The 1907 amendment changed federal grants to the provinces (Gérin-Lajoie 1950, 78-82; Favreau 1965, 12; Hurley 1996, 19). The British parliament enacted the amendment in accordance with a joint address and the consent of all provinces, but not before Britain responded to a provincial protest. According to Gérin-Lajoie (1950, 74-83), the premier of British Columbia withdrew his approval for the amendment in 1906 because the federal government denied his request for a special extra grant. He travelled to Britain and lodged a formal complaint about both the grant, and inclusion in the amendment of a finality clause which said that the new scale of grants “shall be a final and unalterable settlement of the amounts to be paid yearly to the several provinces”. While he did not obtain an extra grant, Britain excised the finality clause from the amendment. According to Gérin-Lajoie, this was the only time that British altered an amendment because a province objected. British Columbia did not subsequently signal its consent to the amendment, but as Gérin-Lajoie wrote, “there is no conclusive evidence that the bill in its final form was still opposed by Premier McBride” (1950, 83).

- The 1915 amendment changed the size and structure of the senate and the house, without consulting the provinces. No objections were raised to the senate amendment (Gérin-Lajoie 1950, 84-85; Favreau 1965, 12-13), but the proposal was controversial because under the new arrangement the Maritime provinces would lose seats in the commons (Gérin-Lajoie 1950, 87-89; Chrétien 1981, 6-7, 39-41). The subject was discussed at provincial conferences in 1910 and 1913, but it was not resolved. A special joint committee of the parliament recommended in 1914 that each province should have at least as many seats in the commons as it did in the senate. The committee changed representation for British Columbia in response to submissions from that province, but it did not yield to arguments by the premier of Prince Edward Island that it should retain the six commons seats allocated to it when it joined the union in 1873. A senate motion to require provincial consent before enacting the amendment was lost on division. The house approved a joint address requesting the amendment in 1914, but the senate did not agree until it was put again in 1915. While the federal government did not consult the provinces about the final
form of the amendment, according to Gérin-Lajoie (1950, 88) there is no record of any province objecting to it.

- The 1940 amendment to provide exclusive federal powers over unemployment insurance was enacted with the agreement of all the provinces, but during the course of debating the amendment in the house, prime minister Mackenzie King questioned whether it was necessary to obtain consent from the provinces (Hurley 1996, 20-21).

- The 1946 amendment increased the size of the house. It was secured by a joint address, despite official protests by the Québec government, and a motion put by the federal opposition calling for consultation with the provinces; that motion was defeated by 108 to 48 votes (Gérin-Lajoie 1950, 118-119; Favreau 1965, 13). The parliament initiated similar alterations to the size or composition of the senate or the house in 1952, and 1974, and twice in 1975, without consulting the provinces. When the size of the commons increased again in 1986, the rules had changed. Provincial consent was not required unless an amendment changed the “principle of proportionate representation” of provinces in the house or the number of senators allocated to each province, or if it caused a province to have more senators than MPs (constitution 1982, ss 42(1)(a), 42(1)(c), and 41(b) respectively).

- The 1949 amendment empowered the Canadian parliament to make some amendments to the constitution without consulting Britain or the provinces. According to Gérin-Lajoie (1950, xiv-xix), the government did not consult the provinces about this amendment, despite protests from the federal leader of the opposition and some provincial governments. The prime minister offered to meet with the provincial premiers to devise a local procedure for amending sections of the constitution that were not covered by the amendment, but the premiers of Québec, Alberta, Ontario, Nova Scotia, and Saskatchewan declined the invitation, or raised objections. The prime minister said in an address to the parliament that just as he saw no need to consult the provinces about provisions in the federal constitution that concerned the federal parliament alone, he did not expect the provinces to consult him about amending their constitutions.

- The 1982 amendment was an omnibus package. On 5 November 1981, all provinces except Québec approved it. On 25 November 1981, Québec issued a decree to announce “Quebec formally vetos the Resolution”, and initiated legal action in the Court of Appeal for Québec which is discussed further below. The
amending legislation passed the house on 2 December 1981, the senate on 8 December, and Westminster on 25 March 1982. It received royal assent on 29 March, and came into force on 17 April 1982. A special joint committee convened from 6 November 1980 to 9 February 1981, and its public hearings were televised (Federal-Provincial Relations Office 1990, 4); this was the first time the public was consulted directly about constitutional change. There were no public hearings on the final package, however, and at the provincial level, only the Alberta assembly debated it – for one day (Federal-Provincial Relations Office 1990, 7; Hurley 1996, 62-65).

- The 1984 amendment changed the wording of Aboriginal rights and mandated two first ministers’ conferences on the constitution. It was enacted under the 7/50 rule with the consent of the federal parliament, representatives of four Aboriginal organisations, and all provinces and territories except Québec. The Québec government said it did not necessarily disagree with the content of the amendment, but it would not participate in the consultation process until the federal government met its constitutional demands (Hurley 1996, 90-92).

- A bilateral amendment in 1997 varied the Newfoundland terms of union to provide differential powers over education, schools, and religious instruction. The Constitution Amendment Proclamation, 1997 (Newfoundland Act) records that the Newfoundland legislature approved it on 31 October 1995, and the federal house of commons passed it twice – on 3 June 1996, and again on 4 December 1996, after the senate exercised its suspensive veto. Newfoundland voters also approved it at a plebiscite in 1995 (Maton 2000).

In brief, Britain changed one amendment in response to protests from British Columbia in 1907, and the Canadian parliament was similarly responsive to British Columbia in 1915. By contrast, the Canadian senate did not agree to the Newfoundland amendment of 1997, and Québec did not consent to four amendments in 1946, 1949, 1982, and 1984. Québec’s dissent is enduring, and unlimited. When the federal government fulfilled Québec’s request for an amendment to exempt it from s 93 of the 1867 constitution in 1997, Québec declared in the proclamation that its consent to that amendment “in no way constitutes recognition by the National Assembly [the Québec legislature] of the Constitution Act, 1982, which was adopted without its consent”.

Québec took the issue of provincial consent to the courts in 1981. On 25
November 1981, the Québec government asked the Court of Appeal for Québec to rule on whether by informal agreement the federal parliament could resolve to amend the constitution without Québec’s consent, and whether it could do so despite Québec’s objections. The court heard the appeal on 15-17 March 1982, and dismissed it in a unanimous judgment delivered on 7 April 1982. The Attorney General for Québec filed an appeal against the decision with the Supreme Court on 13 April – just four days before the federal government proclaimed the 1982 amendment.

In *Re: Objection to a Resolution to Amend the Constitution* [1982] 2 SCR 793, the question put to the Supreme Court was identical to the one put to the Court of Appeal for Quebec.

Is the consent of the Province of Québec constitutionally required, by convention, for the adoption by the Senate and the House of Commons of Canada of a resolution the purpose of which is to cause the Canadian Constitution to be amended in such a manner as to affect:

(i) the legislative competence of the Legislature of the Province of Québec in virtue of the Canadian Constitution;
(ii) the status or role of the Legislature or Government of the Province of Québec within the Canadian federation;
and, does the objection of the Province of Québec render the adoption of such resolution unconstitutional in the conventional sense? (at 798-799).

The Supreme Court heard the case on 14-15 June 1982, and dismissed it in a unanimous judgment handed down on 6 December 1982.

The appellant submitted that by informal agreement, amendments such as those proposed in 1981 required the consent of all the provinces, or in the alternative, Québec had a unique power of veto over such amendments (at 801). The respondent, the Attorney General of Canada, submitted that the court should not answer the appellant’s question because it was a “purely political question”, which was now moot; if the court answered the question, it should answer in the negative for reasons given in *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753 (the first reference), or because the process adopted by the Canadian government in 1981 satisfied the conditions set down in that judgment (at 805-806). The court resolved that it would answer the question “to dispel any doubt over it” (at 806).

In the first reference, the court ruled that parties wishing to establish the existence of conventions needed to cite precedents and reasons, and show that actors believed they were bound by them. In the second reference, Québec cited as positive precedents amendments enacted with the consent of all provinces in 1930, 1931, 1940, 1951, and 1964, and as negative precedents proposals abandoned in 1951, 1960, 1964, and 1971 (at 803). Québec submitted further that an amendment which affected a provincial
legislature had never been enacted without the consent of that province (at 803-804). As to reasons, Québec submitted that the federal principle required unanimity, and the duality principle required that Québec have a veto over certain amendments (at 804). As to belief, Québec submitted that belief could be inferred from the precedents and reasons just cited (at 804-805).

The court upheld the decision reached in the first reference that a convention of unanimity did not exist.

That some of the actors in the precedents had accepted the rule of unanimity is not doubted and was recognized by this Court in the majority opinion at p. 904 of the First Reference. But this is not enough. Other important actors declined to accept the unanimity rule, as indicated in the majority opinion at p. 902 of the First Reference. The opinion expressed in the First Reference that there existed no conventional rule of unanimity should be re-affirmed (at 812).

While some actors certainly believed that such a convention existed, others did not.

On the question of whether Québec had a unique right of veto over constitutional change, Québec submitted that it had acquired such a right by the principle of duality, defined as follows.

In the context of this reference, the word “duality” covers all the circumstances that have contributed to making Quebec a distinct society, since the foundation of Canada and long before, and the range of guarantees that were made to Quebec in 1867, as a province which the Task Force on Canadian Unity has described as “the stronghold of the French-Canadian people” and the “living heart of the French presence in North America”. These circumstances and these guarantees extend far beyond matters of language and culture alone: the protection of the British North America Act was extended to all aspects of Quebec society – language, certainly, but also the society's values, its law, religion, education, territory, natural resources, government and the sovereignty of its legislative assembly over everything which was at the time of a “local” nature (at 813).

The court ruled that the appellant “failed completely to demonstrate compliance with the most important requirement for establishing a convention, that is, acceptance or recognition by the actors in the precedents” (at 814). When the first amendment was enacted under the new rules in 1984, Québec withheld its consent.

The Meech Lake Accord 1987-1990

The Québec Liberal government announced on 9 May 1986 – six months after it won office – that Québec’s objections to the constitution would be overcome when the five amendments specified in its election campaign statement of February 85 were enacted (Federal-Provincial Relations Office 1990, 8-10; Maton 1995). These amendments would recognise Québec as a distinct society, increase provincial powers over immigration, allow provinces to nominate Supreme Court judges, limit federal spending powers, and provide to Québec a veto over future amendments (Hurley 1996, 108-109).
All of the first ministers agreed on 30 April 1987, at Meech Lake, that they would consider Québec’s request. On 3 June, they approved a legal text for amendments to:

- recognise Canada comprises French and English-speaking communities and Québec is a distinct society, commit the parliament and provincial legislatures to preserving French and English-speaking communities, and commit Québec to preserving and promoting its distinct society;
- fill senate vacancies for a province with persons nominated by that province;
- negotiate binding federal/provincial agreements on immigration that are consistent with national standards and objectives, and the Charter of Rights and Freedoms;
- choose members of the Supreme Court from among provincial nominees, and ensure that at least three of the nine justices are members of the Québec bar, and are nominated by Québec;
- pay federal compensation to provinces that opt out of national shared cost programs in areas of exclusive provincial jurisdiction, as long as those provinces provide like programs;
- convene a first ministers’ conference on economic matters at least once per year;
- when one or more, but not all provinces, transfer powers to the federal tier, pay federal compensation to the other provinces;
- change the amending formula to require the consent of all federal and provincial legislatures to amend provisions for the Queen, governor general, lieutenant governors, powers of the senate, selection of senators, distribution of senate seats, guaranteed minimum representation of provinces in the house, the principle of proportionate representation in the house, the use of the English and French languages, the Supreme Court, expansion of provinces into territories and creation of new provinces, and the amendment rules (subjects shown in italics were then governed by the 7/50 rule);
- hold a first ministers’ conference on the constitution at least once per year from 1988 (Governments of Canada 1987).

Some amendments required unanimous federal/provincial agreement, while others were governed by the 7/50 rule. Unanimity was required, however, because the first ministers agreed to the amendments as a package. This meant that all federal and provincial legislatures had to ratify the Meech Lake Accord within three years, and all but two of the eleven legislatures did so (Hurley 1996, 271-272).
Québec passed its legislation just 20 days after the first ministers approved the legal text. The house of commons passed it about two months later, and again on 22 June 1988, after making amendments to satisfy the senate. Within a year of Québec giving its consent, the federal parliament and five provinces had approved it. By the two-year mark, only eight provincial legislatures had passed enabling legislation. When the New Brunswick legislature ratified the accord on 15 June 1990 – just 12 days before the deadline expired – the provincial tally remained at eight because the new Liberal government in Newfoundland rescinded that legislature’s approval on 5 April 1990. In Manitoba, where the accord was most unpopular, the legislature introduced a bill to ratify it on 16 December 1988, but withdrew the bill on 19 December (Monahan 1991, 234, 292). Federal/provincial negotiations continued until the first ministers issued a final communiqué on 9 June 1989. At this stage, there was not enough time for Manitoba to hold public hearings on the final bill, as required in that province. The minority Conservative government could have moved to alter the requirements for hearings and debates by a unanimous vote, but Elijah Harper (New Democrat) was opposed, so neither the motion nor the accord was put to the vote in the legislature (Monahan 1991, 292; Brock 1993, 33). According to Matthew Mendelsohn, the legislature was relieved that this meant the Meech Lake round was over for them (pers. comm. 14 November 2001). When the deadline for enacting the accord expired on 22 June 1990, the federal parliament and eight of ten provinces had approved it, but Newfoundland and Manitoba had not. The Meech Lake Accord could not be enacted.

Many commentators concluded that the Meech Lake amendment failed in part for the lack of meaningful public involvement (Brock 1991; Cohen 1991, 270-277; Russell 1993a, 140-145, 156-157; Watts 1993, 9-10; Hurley 1996, 113-114; Cairns 1997, 60). That conclusion may seem harsh, given the federal parliament and five provincial legislatures convened eleven public hearings for a total of 124 days, heard 1,020 individual and group witnesses, and received 1,508 additional submissions (analysis of Hurley 1996, 273-274).

Québec was the first to convene a hearing. The Québec National Assembly convened hearings for eight days from 12 May 1987 to consider the accord ‘in principle’ (Hurley 1996, 111, 273). Elsewhere, the house of commons’ hearing in August-September 1987 of New Brunswick’s resolution was by far the most popular with 755 submissions and 161 witnesses over 18 days (an average of 51 submissions and
witnesses per day), followed by Manitoba’s hearings on the accord in April-May 1989 which heard and received an average of 32 witnesses and submissions per day. At the other end of the scale, Ontario’s hearings in February-May 1988 attracted about 16 witnesses and submissions per day. This is not surprising given the Ontario Liberal government announced it would approve the accord regardless of the outcome of public hearings (Nystrom and Hunter’s minority report in Beaudoin-Edwards SJC 1991, 74). As these NDP parliamentarians put it, “Is it any wonder that … the overwhelming reaction is suspicion or, worse still, disdain for the entire committee process?”.

Without doubt, the hearings informed the public about the accord, but did governments consult constituents? Governments said they could not sever any provisions from this package – it was a ‘seamless web’ of compromises forged by eleven governments over an extended period. Once the legal text was agreed, it was not open to amendment in response to public submissions. The Federal-Provincial Relations Office noted in 1990: “A common criticism during the hearings was that the public was presented with a ‘done deal’ and that examination of the resolution was aimed more at careful scrutiny than at discussion of alternatives” (1990, 9). Cairns concluded that the accord did not succeed because “it clashed with the competing constitutional visions of aboriginal peoples, of English-speaking Canadians who identified strongly with the Charter, and of supporters of a strong central government” (1991a, 18). Brock noted that the commons, the senate, a special joint committee, and three provincial parliamentary committees all acknowledged criticisms of the process – the process was “hasty, undemocratic, elitist, unrepresentative, secretive, and a violation of Canadian political norms” (1991, 59, 83). According to Cohen,

In reality, there was virtually no public consultation until after the fact [finalisation of the legal text], and even then, half the provinces avoided public hearings. In another era, that approach would have been fine. Brian Mulroney [then Conservative prime minister] talked as if the country could still make constitutions the way the Fathers of Confederation had – in private, in profanity, pined with liquor. ‘In Charlottetown, the boys arrived in a ship – and spent a long time in places other than the library,’ he said. ‘This is the way it was done. This is the way Confederation came about. There was no great public debate; there were no great public hearings. It became a kind of tradition’ (1991, 271).

At the end of 1991, the same Conservative government set such a ‘tradition’ aside and convened five constituent assemblies to debate its own set of proposals for formal constitutional change.

**The Charlottetown Accord 1990-1992**

Even before the Meech Lake Accord lapsed on 22 June 1990, legislatures in
Québec, the Yukon, and Prince Edward Island had initiated further inquiries into the constitution. By the time the Mulroney Conservative government announced it would convene assemblies to debate its proposals for reform, all of the provincial and territorial governments had initiated inquiries into the constitution, and with the exception of New Brunswick, all provinces and territories had convened public hearings. Figure 5.3 on the next page illustrates the sequence of events.

Liberals in power in Québec convened the Allaire Committee in February 1990 to recommend further proposals for amending the constitution, assuming that the all governments ratified the Meech Lake Accord. The resolution of appointment noted, however, that:

A movement opposed to the Meech Lake Accord has developed and this movement threatens to cause two provinces to refuse to honour their signature and ratify the Accord within the stipulated period; another province threatens to rescind the support its Legislative Assembly has already given to the Accord (Allaire Committee 1991, VII).

The committee published its report on 28 January 1991, and the Québec government adopted it after the Meech Lake Accord lapsed. The report proposed a massive expansion of powers for Québec. It also proposed that Québec hold a referendum in 1992 to offer constituents a choice between a new package of reforms proposed by the federal government, or secession from the Canadian union (Allaire Committee 1991, 37-40, 48-49).
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**Figure 5.3: Public consultations about the constitution, 1990-1992**


Note 1: The timeline shown for this consultation indicates hearing dates only; all others show elapsed time. No timeline is to scale.
On 4 September 1990, after the Meech Lake Accord lapsed, the Québec government convened the Bélanger-Campeau Commission to make recommendations to the legislature about Québec’s constitutional status. The commission comprised 19 parliamentarians and 17 non-parliamentarians. It held hearings across the province, and received written and oral submissions from almost 1,000 groups and individuals. Like the Allaire commission, it recommended either radical constitutional reform, or secession. Its report of 27 March 1991 advised the government to form two special parliamentary commissions – one to study “accession to sovereignty”, and another to consider “any offer of a new partnership of a constitutional nature made by the Government of Canada”, provided it was binding on all governments (Bélanger-Campeau Commission 1991, 79-82). The report also recommended that Québec hold a referendum on sovereignty on 8-22 June or 12-26 October 1992; “should the outcome of the referendum be positive, Québec will acquire the status of a sovereign State one year, day for day, after the date of the referendum”. On 20 June 1991, Québec passed legislation to hold a plebiscite on sovereignty in June or October the following year (Hurley 1996, 119). More than four years later – on 30 October 1995 – Québec held its plebiscite on sovereignty. The result was very close – 49.42% Yes, and 50.58% No.

The federal government began its public consultations on 1 November 1990 when it briefed the Citizens’ Forum on Canada’s Future (the Spicer Commission) to consult the public about Canada’s future. The brief was as broad as it was long, at more than 550 words. The commission was to obtain representative views from Canadians about a wide range of topics, including values, identities, interests, national challenges, actions governments should take, relationships between Aboriginals and non-Aboriginal peoples, the official language policy, multiculturalism, and balancing individual and collective rights (Spicer Commission 1991a, “The Mandate”). The 12 commissioners interpreted the brief as requiring them to “set out to collect and focus citizens’ ideas for their vision of the country, and to improve the climate of dialogue by lowering the level of distrust” (Spicer Commission 1991c, section 2).

Over 17 weeks, the Spicer Commission directly engaged 211,454 people in the constitutional debate. Wendy Porteous – the commission’s associate executive director – analysed public participation in forum activities by the nature of the participation, representation by province, and representation by gender. Her data

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25 This cannot be expressed as a proportion of the population because individuals making multiple submissions and phone calls, or attending more than one group discussion, are counted on each occasion.
showed that 94,257 people (excluding spectators) attended group discussions moderated by the commission’s representatives, 75,069 people rang a toll-free telephone service, and 41,858 people sent letters, briefs, or reports (1992, appendix 2). Participation by type was 45% group discussions, 36% telephone contact, and 20% written submissions.26

Analysis of Porteous’ data shows that for eight of the 12 provinces and territories, participation was roughly in proportion to the population (±5%), as illustrated in figure 5.4 below.

Under-representation of Québec is startling at –10% to –17%. Ontarians were under-represented at group discussions, but they were over-represented as 1-800 callers and authors of submissions (-10%, +11%, +4% respectively). Otherwise, New Brunswick and Manitoba were over-represented at group discussions by 6% and 7% respectively. Except for Québec, these results are remarkably good, given that participants were self-selected. By contrast, Porteous’ analysis of 1-800 callers by gender showed that the gender deficit for women was about 12%. The commissioners expressed regret about

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26 I am grateful to Alan Cairns for suggesting I look at the data this way (pers. comm. 3 November 2001), and to Janet Hiebert for showing me where to find the data (pers. comm. 13 November 2001).
the under-representation of French-speaking people from Québec and Aboriginal peoples, and noted that “many [Aboriginals] reacted to the Forum with suspicion as a people who have been ‘commissioned-out’ with no real hope of resolving their grievances” (Spicer Commission 1991c). Aboriginal peoples were indeed “commissioned-out” when the prime minister agreed to the commission’s request to delete Aboriginal issues from the brief because the commissioners “had neither the time nor expertise to study longstanding aboriginal issues” (Spicer Commission 1991c, section 2). It was, nevertheless, “the most widespread popular consultation ever held in Canada” (Porteous 1992, 1, 7), at a cost of $22.12 million (Privy Council figure in Pal and Seidle 1993, 184).

The commission delivered its report on 27 June 1991. The report made ten recommendations (Spicer Commission 1991d, section 5), and supported them with histograms to illustrate the range of opinions expressed (Spicer Commission 1991a).

1. Add a preamble to “explain Canada’s past, its identity and values, and Canadians’ free commitment to the future”.

2. Inform Canadians of the negative consequences of Québec secession. The report argued strongly against separation of Québec. In a statement reminiscent of Sir Étienne-Paschal Taché’s concerns in 1866, the commissioners observed:

   Canada without Quebec would be subject to possibly intolerable pressures to fissure along north/south lines. And we need be in no doubt: the various provinces and regions, if driven in despair to join the United States, would do so as supplicants. They would be in no position to dictate terms. We would be foolish to expect charity. Governments - and every Canadian - must think much more, and much more deeply, about all this (Spicer Commission 1991d, section 3).

Most participants said they believed that separation of Québec would have a negative effect on both Québec and Canada.

3. Review how the official languages policy is implemented “with a view to ensuring that it is fair and sensible”, and encourage children to learn both English and French at school. Most participants approved of bilingualism generally, but not the government’s policies. Most of the participants who participated by telephone expressed negative opinions on both the principles and practices.

4. Settle Aboriginal land claims, implement Aboriginal self-government, and recognise the first nations officially. An overwhelming majority of the participants supported settling land claims, and a smaller majority favoured Aboriginal self-government.

5. Streamline multicultural programs, educate Canadians about the value of those programs, and provide a limited amount of education about Canada to migrant children. Most participants approved of multiculturalism generally, but did not
approve the government’s policies. Most people who participated by telephone expressed negative opinions on principles and policies.

6. Broaden Canadians’ knowledge about their nation by youth travel and exchange programs, more affordable travel, civics education at schools, and a shared history curriculum for all provinces except Québec.

7. Educate Canadians about government roles in mediating economic difficulties. More than 80% of discussion group participants expressed concern about the economy (particularly the deficit), but the rate was 40% or less for those who made written submissions or called the toll-free telephone service.

8. Rationalise the federal/provincial division of powers, but protect institutions, national standards, and values. Participants in every province and territory except Québec preferred a stronger federal government to devolving powers.

9. Reform or abolish the senate.

10. Improve perceptions of government leadership and democracy by modifying question time procedures to make it less partisan and adversarial, allowing more free votes, and applying the consultation methods used by the commission. More than 95% of participants who raised the subjects of political institutions, political leadership, and the prime minister’s leadership expressed negative opinions.

Two commissioners wrote dissenting reports (Spicer Commission 1991b).

Commissioner Cashin claimed the consultation process was shallow and contrary to the institutions of representative government, the analysis was flawed because it did not examine relationships between views expressed on different topics, and “there is a great preoccupation with process and personalities”. Commissioner Normand also claimed that the consultation process was superficial – it was “similar to that of open-line radio shows”. He added that the subject of Québec was “trivialized”, the forum was costly and inefficient, and constructive suggestions made by participants and commissioners in the main report were “either too convoluted in form or too timid in content to be adequate for resolving the problems at hand”.

Just one month after it convened the Spicer Commission, the government announced the formation of the Beaudoin-Edwards Special Joint Committee to:

consult broadly with Canadians and inquire into and report upon the process for amending the Constitution of Canada, including, where appropriate, proposals for amending one or more of the amending formulae (Beaudoin-Edwards SJC 1991, vii).

The committee comprised 10 senators and 20 MPs (16 Progressive Conservative, nine Liberal, three NDP, and two Conservative). It held public hearings in all provinces and
territories, received more than 500 written submissions, heard 209 witnesses, and submitted its report on 20 June 1991 (Beaudoin-Edwards SJC 1991, 9-10). The report proposed new amendment rules (including basing consent on regions rather than provinces, and reducing the ratification period from three years to two years), opposed the use of constituent assemblies (as described in the second chapter), and supported the use of plebiscites to measure public approval of proposals for formal constitutional change (1991, 26-26, 31, 42). According to Hurley (1996, 119-120), the federal government had already announced on 13 May 1991 that it would legislate for plebiscites. The legislation was tabled on 15 May 1992 and adopted on 22 June 1992, by which time British Columbia, Québec, and Alberta, had done the same. Exactly a year before, legislation for a plebiscite on secession to be held in June or October 1992 was put to the Québec legislature, which passed it on 20 June 1991.

The Beaudoin-Edwards SJC exceeded its brief in making five specific recommendations for amendments to:

- require that three members of the Supreme Court are from Québec;
- consult Aboriginal peoples about amendments that affect them, and hold conferences on Aboriginal issues every two years;
- require that provinces are not created from, or extended into, a territory without the legislative consent of that territory;
- provide that territories participate in constitutional conferences; and
- provide for the voluntary delegation of powers between the federal and provincial tiers (1991, 16-17, 19, 29-30).

The committee also recommended that federal, provincial, and territorial legislatures change their procedural rules to require public hearings on formal constitutional amendments, held “early enough to allow for changes to the proposal” (1991, 55). In less than six months, the federal government met this recommendation (and went against another) by convening five constituent assemblies to debate its embryonic proposals for constitutional change.

About a week before the Beaudoin-Edwards SJC submitted its report, the federal government appointed the Beaudoin-Dobbie Special Joint Committee of the Senate and the House of Commons. Its brief was to:

[I]nquire into and make recommendations to the Parliament on the proposals of the Government of Canada for a renewed Canada contained in documents to be referred to it, from time to time, by the Government of Canada (Beaudoin-Dobbie SJC 1992, ix).

The document that was referred to the committee – *Shaping Canada's Future Together*
– contained 28 proposals for constitutional change. The government released the
document and referred it to the SJC on 24 September 1991 (Beaudoin-Dobbie SJC
1992, 3), and published as a glossy pamphlet four days later (Hurley 1996, 120).

The Beaudoin-Dobbie SJC visited every province and territory, convened 78
hearings between 25 September 1991 and 11 February 1992, heard more than 700
witnesses, and received almost 3,000 submissions (Beaudoin-Dobbie SJC 1992, 3; Pal
and Seidle 1993, 181). Its report, submitted on 1 March 1992, said that if the
constitution and Canada was to be renewed, Canada needed to meet the “Challenge of
Inclusion”, and “the Challenge of Vision”. To meet the challenge of inclusion, Canada
and its constitution needed to be inclusive of Québec, Aboriginals, the western and
Atlantic provinces, women, and “the variety of special needs and cultural perspectives
that are now part of the Canadian reality” (Beaudoin-Dobbie SJC 1992, 17-18). On
vision, the committee said that the constitution should include “a new provision in the
Constitution that defines the Canadian people and their highest political values ... a new
social contract ... important economic goals ... [and to allow it] to forge a political
consensus, the instruments of political cohesion that could give them effect (Beaudoin-
Dobbie SJC 1992, 18-19).

The committee reached majority agreement in favour of the following
amendments, and provided legal drafts for almost all of them.

1. Add a preamble to specify Canadian identity and values – one preamble
   recommended, plus two alternatives (Beaudoin-Dobbie SJC 1992, 23, 125-128).
2. Amend the Canada Clause to elaborate on rights and values – one draft
   recommended, and one alternative provided (Beaudoin-Dobbie SJC 1992, 24, 106,
   129-130).
3. Amend the Charter to recognize Québec as a distinct society, and the nation’s
   “linguistic duality” (Beaudoin-Dobbie SJC 1992, 26-27, 107).
4. Provide for Aboriginal self-government, gender equality, and prior consultation of
   Aboriginal peoples about constitutional changes that affect them (Beaudoin-Dobbie
5. Enlarge the senate, and elect senators for fixed terms of up to six years using a PR
   system with multi-member constituencies, at elections held separate from the house
   of commons elections. Allocate seats to the provinces and territories roughly (but
   not only) in proportion to population, with guaranteed representation for Aboriginal
   peoples if they wish it. The senate has a 180-day veto over ordinary bills, and a 30-
day veto over money bills. A majority of Francophone senators can veto bills regarding language and culture for French communities, and the senate can veto some senior government appointments (Beaudoin-Dobbie SJC 1992, 44-58).

6. Provide that the federal government chooses new members of the Supreme Court from nominations submitted by provincial governments, and three of the nine members are from the Québec bar (Beaudoin-Dobbie SJC 1992, 59-60, 109-113).

7. Amend the division of powers to provide for concurrent federal/provincial powers over inland fisheries and personal bankruptcy, delegation of powers between the federal and provincial legislatures, clarification of shared powers over labour market programs, greater powers for Québec over culture and broadcasting, and entrenchment of federal/provincial agreements on immigration (Beaudoin-Dobbie SJC 1992, 66-72, 77-81, 114-120).


9. Entrench an economic union clause which, with certain exceptions, provides for the free movement of “goods, services, persons, and capital” between the provinces and territories, and a dispute resolution procedure (Beaudoin-Dobbie SJC 1992, 86-87, 121-122).

10. Entrench a “social covenant” which requires governments to set goals for universal health care, social security benefits, education, protecting the environment, and collective bargaining in workplaces. Entrench an “economic union” which aims to improve the economy, allow the free movement of goods, services, people, and capital, and achieve full employment and a “reasonable standard of living” (Beaudoin-Dobbie SJC 1992, 87-89, 122-124).

11. Entrench annual first ministers’ conferences (Beaudoin-Dobbie SJC 1992, 90, 124).

The tenth proposal for a “social covenant” (later referred to as a “social charter”) was not part of the federal government’s package; it was suggested at the assembly.

The committee did not support federal proposals to entrench property rights, tighten the threshold for invoking the notwithstanding clause, vary the distribution of residual powers, and entrench a mandate for the Bank of Canada (Beaudoin-Dobbie SJC 1992, 34-35, 83-84, 89). Nor did it specifically approve a proposal to grant exclusive federal powers over “any matter that it declares to be for the efficient functioning of the economic union” if it was approved under the 7/50 rule with compensation for provinces that opt out (Government of Canada 1991, 12).
The committee referred back a number of proposals that it did not think should be pursued as formal constitutional change. These were proposals to: reform house of commons procedures; “streamline” government, and share powers by bilateral agreements over tourism, forestry, mining, recreation, housing, municipal/urban affairs … regional development, and family policy … [and] energy”; increase provincial powers over culture and broadcasting matters for provinces other than Québec; repeal the declaratory power which allows the federal government to legislate for certain public works within provinces; and consult provinces about appointments to the Bank of Canada (Beaudoin-Dobbie SJC 1992, 40, 66-67, 72-74, 77, 84-85, 89). The federal government also proposed to change the amending formula to extend the unanimity rule to provisions affecting the powers, structure, and selection of senators, MPs, and members of the Supreme Court. In response, the committee provided five options, and suggested the government needed to consider the effect of the formation of new provinces on the amending formula (Beaudoin-Dobbie SJC 1992, 92-95).

In December 1991, a little over two months before the Beaudoin-Dobbie SJC completed its hearings, the government announced a further public inquiry into the constitution – the five constitutional conferences that are the principal subject of this thesis.27

The assemblies’ resolutions are described in detail in the next chapter. In brief, they responded to the 28 federal proposals for constitutional reform as follows.

- Delegates supported proposals for: recognition of Québec as a distinct society; Aboriginal self-government and consultation with them on constitutional matters; a Canada Clause; more free votes in federal parliament; an “elected, effective, and fully representative” senate; increased powers for Québec (but not other provinces); new exclusive federal powers over national or emergency matters; and entrenching a requirement that three of the nine Supreme Court judges be from Québec.

- Delegates did not support proposals for: new federal powers to manage the economic union; a process to harmonise federal/provincial economic policies; requiring the Bank of Canada to preserve price stability; entrenching property rights; raising the threshold to invoke the notwithstanding clause; simultaneous house/senate elections; a Council of the Federation; providing for delegation of powers between federal and provincial legislatures; and limiting new federal programs in areas of exclusive provincial jurisdiction.

27 Later the government announced it would convene a conference on Aboriginal issues on 13-15 March, with half the 184 delegates chosen by four peak Aboriginal organisations (Clark 1991a).
The assemblies did not agree on the distribution of senate seats, the senate’s veto powers, and a national common market clause. Delegates expressed little interest in proposals to reduce the number of no-confidence votes in parliament, allow provinces other than Québec to nominate Supreme Court judges, repeal the federal declaratory power, rationalise specified government services, and change the amendment formula. They added three new proposals: elect senators using a proportional representation system with single transferable votes but no party lists, entrench a social charter, and restore Québec’s veto over institutional change. The three co-chairs submitted the assemblies’ reports to the Beaudoin-Dobbie SJC at the end of February 1992.

Beginning the month after the assemblies submitted their reports, the first ministers negotiated the Charlottetown Accord in a series of closed-door meetings held between 12 March and 28 August 1992. First ministers’ meetings on the constitution (MMC) convened at Ottawa on 18 August and at Charlottetown on 27-28 August (CICS 2004, 98-100). These were large gatherings of 372 and 240 people respectively, which included federal, provincial, and territory first ministers, government officials, and representatives of peak Aboriginal groups. On 28 August, the participants reached agreement on a package of constitutional reforms known as the Charlottetown Accord. On the same day, MMC members agreed to put the accord to constituents at two plebiscites on 26 October 1992 – one for Québec, and one for the rest of Canada (Hurley 1996, 127). According to Hurley, “As a political matter, it was agreed among leaders that the referendum would have to be supported in all provinces in order to pass, although this was not legally required” (1996, 128). According to Brock:

> Perhaps above all the governments were attempting to address the problem of political legitimacy. A federal government with poor standing in the public opinion polls could not command the requisite authority to go forward with wholesale constitutional reform. Public ratification deflected charges of elitism and illustrated the confidence of the leaders in the deal (1993, 30).

Legal text for the Accord was released on 9 October, about two weeks before the vote. A copy of the Accord was sent to every household, and the legal text was made available at post offices (Hurley 1996, 128).

The *Referendum Act*, SC 1992, c 30 provided for the conduct of the plebiscite and the plebiscite campaigns in all provinces and territories except Québec. The federal government did not fund campaign committees, but it did regulate their finances. Individuals or groups that spent more than $5,000 on a campaign had to register with the Chief Electoral Officer, and expenditure by each registered committee could not exceed in aggregate 56.4 cents for each elector registered in the district/s covered by the
committee (s 15). Committees could not accept donations from foreign governments, or individuals, companies, and trades unions that were not Canadian (s 14). The government also compelled broadcasters to provide a set amount of free time to registered committees who paid a $500 deposit, and allocate time equally to Yes and No groups; deposits were refunded to committees that used their allocated time (ss 21-26).

The five-volume official report on the plebiscite published by Elections Canada provides a wealth of information on the process, the committees, and the results. Elections Canada mounted an impressive information campaign (1992a, 43-46). It fielded 195,000 telephone enquiries over about 40 days (compared to just 1,480 for the 1988 federal election), funded television, radio, and newspaper advertisements, produced 29 publications, and broadcast information about the plebiscite on the Parliamentary Channel (free-to-air television) for more than a month, 24 hours a day. Promotional programs were tailored to reach Anglophones, Francophones, people who spoke 45 of the 53 Aboriginal languages, “ethnocultural groups” who spoke 39 languages, people with disabilities, the homeless, youth, and prisoners.

Elections Canada also registered 241 campaign committees (205 Yes, and 36 No), and monitored donations and expenses (1992a, 27-31). Almost all committees lodged financial returns, which showed donations were $12.6 million, expenses were $12.1 million, and the Yes committees received and spent about ten times more than No committees (1992c, 29-31). According to Hurley, the Yes committees were “poorly organised”, and the No committees were more effective because their criticisms were specific (1996, 128-129).

Electors went to the polls on 26 October 1992 to answer Yes or No to the question “Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?” (Elections Canada 1992a, 7). Almost 75% turned out, and 55% answered No (see table 5.3 below). Majorities in six provinces and one territory voted No. The Yes vote was strong for Prince Edward Island (74%), Newfoundland (63%), New Brunswick (62%), and Northwest Territories (61%), but very close for Ontario (50.15% Yes). The No vote was unequivocal for British Columbia (68%), Manitoba (62%), Alberta (60%), Québec (57%), the Yukon (56%), and Saskatchewan (55%), and close for Nova Scotia (51%). Fears did not eventuate that Québec would vote Yes while the rest of Canada voted No. The No vote was higher for Québec (57%) than for the rest of Canada (54%, median 51%). The turnout was highest for Québec (83%), but so was the informal rate (2.2%, three times the next highest rate).
### Table 5.3: Results for the Charlottetown plebiscite

<table>
<thead>
<tr>
<th>Province</th>
<th>Turnout</th>
<th>Total</th>
<th>Informal</th>
<th>Valid votes</th>
<th>Yes</th>
<th>No</th>
<th>Yes %</th>
<th>No %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>53.3%</td>
<td>212,393</td>
<td>1,068 0.5%</td>
<td>133,583</td>
<td>77,742</td>
<td>63.2%</td>
<td>36.8%</td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>70.5%</td>
<td>65,974</td>
<td>305 0.5%</td>
<td>48,541</td>
<td>17,128</td>
<td>73.9%</td>
<td>26.1%</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>67.8%</td>
<td>450,722</td>
<td>2,065 0.5%</td>
<td>218,967</td>
<td>229,690</td>
<td>48.8%</td>
<td>51.2%</td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>72.2%</td>
<td>381,996</td>
<td>2,642 0.7%</td>
<td>234,469</td>
<td>144,885</td>
<td>61.8%</td>
<td>38.2%</td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>82.8%</td>
<td>4,033,021</td>
<td>87,832 2.2%</td>
<td>1,709,075</td>
<td>2,236,114</td>
<td>43.3%</td>
<td>56.7%</td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>71.9%</td>
<td>4,834,742</td>
<td>29,564 0.6%</td>
<td>2,409,713</td>
<td>2,395,465</td>
<td>50.1%</td>
<td>49.9%</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>70.6%</td>
<td>2,523,193</td>
<td>2,370 0.5%</td>
<td>199,905</td>
<td>320,918</td>
<td>38.4%</td>
<td>61.6%</td>
<td></td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>68.7%</td>
<td>456,610</td>
<td>1,644 0.4%</td>
<td>203,525</td>
<td>251,441</td>
<td>44.7%</td>
<td>55.3%</td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>72.6%</td>
<td>1,219,887</td>
<td>2,958 0.2%</td>
<td>484,472</td>
<td>732,457</td>
<td>60.2%</td>
<td>39.8%</td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>76.7%</td>
<td>1,673,947</td>
<td>6,047 0.4%</td>
<td>528,773</td>
<td>1,139,127</td>
<td>31.7%</td>
<td>68.3%</td>
<td></td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>70.4%</td>
<td>24,172</td>
<td>169 0.7%</td>
<td>14,723</td>
<td>9,280</td>
<td>61.3%</td>
<td>38.7%</td>
<td></td>
</tr>
<tr>
<td>Yukon Territory</td>
<td>70.0%</td>
<td>12,342</td>
<td>66 0.5%</td>
<td>5,360</td>
<td>6,916</td>
<td>43.7%</td>
<td>56.3%</td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>82.8%</td>
<td>4,033,021</td>
<td>87,832 2.2%</td>
<td>1,709,075</td>
<td>2,236,114</td>
<td>43.3%</td>
<td>56.7%</td>
<td></td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>71.8%</td>
<td>9,855,978</td>
<td>48,898 0.5%</td>
<td>4,482,031</td>
<td>5,325,049</td>
<td>45.7%</td>
<td>54.3%</td>
<td></td>
</tr>
<tr>
<td>Canada, total</td>
<td>74.6%</td>
<td>13,888,999</td>
<td>136,730 1.0%</td>
<td>6,191,106</td>
<td>7,561,163</td>
<td>45.0%</td>
<td>55.0%</td>
<td></td>
</tr>
</tbody>
</table>

(Sources: Elections Canada 1992b, 3-4; Directeur Général des Élections du Québec 1992)

Moving left-to-right across Canada, the Yes vote decreased, (see figure 5.5).

![Figure 5.5: Charlottetown Accord Yes vote by province](image)

(Sources: Elections Canada 1997 3-4; Directeur Général des Élections du Québec 1992)
Québec held its sovereignty plebiscite on 30 October 1995, three years after the Charlottetown Accord plebiscite. The question put was:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the Future of Quebec and of the agreement signed on June 12, 1995?

The turnout was extraordinarily high at 92%, and the result was extraordinarily close – 50.6% No, and 49.4% Yes (Bishop 1995, 1).

CONCLUSIONS

Between 1867 and 1982, Britain enacted formal constitutional change in accordance with requests from one or both houses of the federal parliament, and more often than not, the consent of some provinces. The enduring question during this period was whether the federal government should consult all of the provinces, and whose consent was required. Britain’s role ended in 1982 when it enacted new amendment rules that specified clearly the circumstances in which provincial consent was required. Before this amendment was enacted, the Québec government argued in the courts that it had a unique right of veto over formal constitutional change, to no avail.

All provincial governments approved the 1987 Meech Lake Accord for major constitution reform, but it lapsed in 1990 because two provincial legislatures did not pass legislation to signify their consent. Governments were criticised for not consulting constituents about the Accord until after they had agreed to it as a package, at which time public dissent was not effective. In the next two years, Canada moved from negotiating formal constitutional change behind closed doors, to almost full-blown public participation. Between 1990 and 1992, the federal government and all but one sub-national government convened public hearings about new ideas for constitutional change – before the first ministers committed themselves to the Charlottetown Accord. Even so, constituents did not ratify the Accord, arguably because governments were not responsive to expressions of dissent before and after first ministers reached their agreement on the accord. Such dissent was abundantly clear at the constituent assemblies.
CHAPTER SIX – THE CANADIAN ASSEMBLIES 1992

This chapter examines the Canadian assemblies in detail to address the four thesis questions for Canada. The structure of the chapter is much like the fourth chapter which examined the Australian case. Initiation of the assemblies is outlined, then the assemblies’ brief, membership, and agenda is summarised. Almost all of the chapter is devoted to presenting data, evidence, and arguments that answer the thesis questions. Research reported in this chapter shows that the assemblies were more representative of the population and electors, they generated more public interest, and they were better able to reach consensus on the proposals put to them than were relevant groups of politicians convening alone to debate constitutional change. The question about partisanship could not be answered because an official record of delegates’ preferences was not created and retained.

Joe Clark (federal minister for constitutional affairs) announced late in 1991 that the government would convene a series of five public conferences early in 1992 to debate its 28 proposals for constitutional change. The aim was:

- to facilitate consultation among elected officials, constitutional experts, and the public on the 28 proposals for constitutional change contained in the Government of Canada’s *Shaping Canada’s Future Together*;
- to increase public understanding of the proposals and/or alternative proposals for constitutional change;
- to stimulate specific commentary on the viability of the specific proposals, and to identify viable alternatives;
- to identify areas of broad agreement on principles, and to discuss possible tradeoffs;
- to involve a broad and balanced cross-section of Canadians which reflect the make-up of the country (Clark 1991b, 1, issued 2 December).

Why did the government propose these conferences? As Hurley explains it, the government convened them just in case the Beaudoin-Dobbie SJC did not fulfil its brief.

By November [1991], for a number of reasons, including logistics, the committee’s work was in question and – with a February 28, 1992, reporting deadline – tensions mounted. It was not clear whether the committee would be able to complete its work successfully and in a timely fashion. In this context, the Government decided on an initiative that would assist the committee and, if a report was not ultimately possible, that would provide an acceptable alternative (1996, 121-122).

According to Brock, “hearings ground to a halt in Manitoba” (1993, 30). Arthur Kroeger, co-ordinator of the Constitutional Conferences Secretariat, wrote:

The difficulties experienced by the Committee in its initial set of hearings in Prince Edward Island, Ontario, and Manitoba were widely reported in the media, and there is no need for me to recount them here. Suffice it to recall that in the first part of November the Committee returned from Manitoba in deadlock, and there was considerable doubt that the necessary agreements could be reached among the three [political] parties to permit a resumption of its hearings (1992, 1).

Peter Harrison, the deputy co-ordinator, wrote:

The Special Joint Committee (SJC) began a complex set of hearings and, in order to maximize
input from as many groups and individuals as possible, decided to hold sessions in a variety of communities across the country. … On one occasion during its visit to Manitoba in November 1991, the SJC was faced with an empty hall. The hearing was cancelled and, in a climate of political confusion, the Committee re-considered its plans. Whatever the anatomy of the problem, the situation was sufficiently critical for the government to assess its alternatives for re-energizing the Parliamentary process (1992, 1).

Pal and Seidle provided a comprehensive explanation, as follows.

By early November 1991, following some experiments in consultation – including town hall meetings, which were abandoned after no witnesses came forward in St. Pierre Jolys, Manitoba – the Joint Committee was at an impasse. … Meetings could not proceed because the Opposition members refused to attend. A senior member of the Committee’s staff provided the following observations (confidential interview). The idea of holding town hall meetings reflected the influence of the Spicer Commission’s innovations in consultation. Town hall meetings on Prince Edward Island had worked well, but the organizational challenges were greater in larger provinces. Some of the Committee’s difficulties can be attributed to its tight timetable and constraints on resources. When the Committee set its budget, it was conscious of media criticism of the Spicer Commission’s spending [costs were $22.12 million for Spicer and $4.2 million for the SJC]. A higher budget would have allowed advance work to be carried out (none was done for the Manitoba visit) (1993, 153, 184, and 192-193 in footnote 25).

By these accounts, the federal government’s decision to hold the conferences was an impromptu one, and it was productive. The members of the Beaudoin-Dobbie SJC – who were ex-officio delegates at all five assemblies – noted that the “insightful discussions and vigorous debates that took place during these conferences were of considerable help to us” (Beaudoin-Dobbie SJC 1992, 4)

The government announced it would fund the conferences and provide a co-ordinator and a secretariat. Four “independent institutes” would be entirely responsible for choosing the delegates and running the conferences as they saw fit, as long as they satisfied the broad guidelines provided to them by the government. These institutes were the Atlantic Provinces Economic Council, the Canada West Foundation, the CD Howe Institute, and the Institute for Research on Public Policy (Clark 1991b, 1-2).

According to Milne, the government initially planned to maintain control over the conferences, but the institutes declined to participate on this basis (1992, 30). The federal government did, nevertheless, manage the final conference jointly with the four institutes (Harrison 1992, 5).

Generally, the institutes could choose about 200 delegates to attend each conference, within these guidelines.

(i) The Institutes are to invite to the Conferences on an ex-officio basis:
- all members of the Joint Parliamentary Committee [Beaudoin-Dobbie SJC];
- two individuals selected respectively by each of the caucuses of the three federal political parties with Parliamentary status;
- two individuals from each province and territory, to be selected by the Premier/Head of Government; and
- one representative of each of the four national Aboriginal organizations.

(ii) The Chairpersons of the Conferences are to be eminent Canadians with no active partisan affiliations.
Experts invited by the Institutes to participate in panels and workshops must, taken together, represent a broad and balanced cross-section of views. The Institutes are to ensure the substantial representation of a reasonable cross-section of interests, including business, labour, and non-government organizations. The public is to be represented in a manner that reflects the major components of Canadian society. Individuals selected should have a demonstrated interest in, and some knowledge of constitutional matters, and should have a significant record of service to their communities. The Institutes are responsible for determining the manner in which these individuals are selected (Clark 1991b, 3-4).

The government authorised a Constitutional Conferences Secretariat to coordinate the conferences. Arthur Kroeger led the CCS (Clark 1991b, 6,8), with Peter Harrison as his deputy (Harrison 1992). Both men were senior bureaucrats.

The five assemblies convened in five cities across the nation to debate some or all of the federal government’s proposals for constitutional change. These proposals were published in a glossy, A4 sized magazine format with the title *Shaping Canada’s Future Together: proposals* (Government of Canada 1991). The timetable for the conferences, and the subjects they would discuss, was:

- 17-19 January 1992 at Halifax – the division of powers;
- 23-26 January 1992 at Calgary – institutional reform;
- 31 January to 2 February 1992 at Montreal – the economic union;
- 7-9 February 1992 at Toronto – identity, rights, and values; and

Parliamentarians occupied about one-third of the seats because the brief required that the assemblies include 64 ex-officio delegates (category (i) above). Ex-officio delegates were the 30 members of the Beaudoin-Dobbie SJC, six federal MPs chosen by the three parties with parliamentary status, 24 persons nominated by the first ministers of the provinces and territories, and four non-parliamentarians representing the first nations. The organisers were free to choose other delegates as experts or as members of interest groups (category (iii) and (iv)), or as qualified individuals (category (v)), provided they reflected the “views”, “interests”, and “major components of Canadian society”.

**DELEGATE SELECTION**

The organisers received about 2,900 nominations for about 700 seats that were available to experts, interest groups, or individuals at the first four conferences (the fifth conference comprised delegates selected from the first four conferences). About 1,700 experts or interest groups submitted nominations voluntarily, or in response to invitations sent by CCS to 93 peak interest groups (Kroeger 1992, 5; Harrison 1992, 10). More than 1,200 individuals nominated themselves to attend as ‘ordinary
Canadians’, largely in response to press advertisements (Kroeger 1992, 5-6; Harrison 1992, 10). Newspapers advertisements described the procedure as follows.

Canadians, age 18 or over, can send a one-page letter in the official language of their choice, including:

- your full name
- the address and telephone number where you can be reached Jan. 3-6.
- a few paragraphs describing your knowledge of and interest in constitutional issues and your record of community service …

A limited number of participants will be randomly selected from the applications received. If your name is selected, you will be telephoned by January 6.

The personal expenses of participants will be paid “on request”, to ensure that costs are not a barrier to participation (extract from advertisement reproduced in Harrison 1992, annex III).

Organisers chose 360 nominees to attend the conferences (derived from Harrison 1992, 10-11).

The conference report for Calgary provides a breakdown of delegate numbers by selection category, but the other reports do not (Government of Canada 1992, C2). Figures in the conference brief and reports, and two commentaries, indicate that about 27% of the delegates were appointed as ex-officio members, about 38% were chosen as experts or members of interest groups, and about 35% were selected as representative individuals (see table 6.1).

<table>
<thead>
<tr>
<th>Conference</th>
<th>Ex-officio</th>
<th>Experts/Interest Groups</th>
<th>RSPs</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Halifax</td>
<td>29%</td>
<td>26%</td>
<td>19%</td>
<td>27%</td>
<td>45%</td>
</tr>
<tr>
<td>Calgary</td>
<td>23%</td>
<td>48%</td>
<td>21%</td>
<td>7%</td>
<td>29%</td>
</tr>
<tr>
<td>Montreal</td>
<td>28%</td>
<td>31%</td>
<td>13%</td>
<td>28%</td>
<td>41%</td>
</tr>
<tr>
<td>Toronto</td>
<td>26%</td>
<td>40%</td>
<td>8%</td>
<td>26%</td>
<td>34%</td>
</tr>
<tr>
<td>Vancouver</td>
<td>29%</td>
<td>47%</td>
<td>23%</td>
<td>1%</td>
<td>24%</td>
</tr>
<tr>
<td>Average</td>
<td>27%</td>
<td>38%</td>
<td>17%</td>
<td>18%</td>
<td>35%</td>
</tr>
</tbody>
</table>

(Sources: Government of Canada 1992, C2; Clark 1991b, 3-4; Harrison 1992, 11, 24; Milne 1992, 34)

Notes:
1. RSPs are randomly selected participants.
2. Figures for Calgary are in the conference report. The total for each conference and the number of RSPs are in Milne. Figures for ex-officio delegates are from the brief. Figures for Vancouver experts/interest groups, and Others at Halifax, Montreal, and Toronto are in Harrison. Figures for experts/interest groups at Halifax, Montreal, and Toronto are deduced from other data.

The ex-officio category ranged from 23% at Calgary to 29% at Halifax and Vancouver, whilst the figures for other categories varied widely. Experts and members of interest groups ranged from 26% at Halifax to 48% at Calgary, with the latter figure including

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28 Each of the reports is page numbered 1-n within the Compendium. An alphabetical character is added to citations to show which report is cited: H(alifax), C(algary ), M(ontreal), T(oronto), and V(anouver).
“facilitators [and] rapporteurs” as well as “advisors” (Government of Canada 1992, C2). The individuals category ranged from 24% at the final Vancouver conference to 45% at Halifax. The proportion of individuals selected randomly from a structured sample (RSP delegates) ranged from 8% at Toronto to 23% at Vancouver.

**THE AGENDA**

Analysis of the conference agendas shows that the format for each conference was similar. Generally, delegates heard formal presentations on a topic in plenary session, debated that proposal in workshops, and then returned to plenary session to hear and discuss a rapporteur’s summary of the outcomes. This three-step process was repeated three to five times for four conferences, but at Montreal, there was only one cycle. This may be because the Montreal conference debated four closely related topics. By contrast, the process repeated five times at Calgary, where delegates debated six relatively disparate topics, and four times at Halifax, where delegates debated ten topics.

Figure 6.1 shows that delegates spent about one-quarter of the available time in formal presentations, and about three-quarters of the available time in sessions devoted to workshop discussions or workshop reports.

![Figure 6.1: Use of time at the assemblies by activity](source: analysis of Government of Canada 1992, H27-29, C21-24, M23-25, T18-21, V25-28)

**REPRESENTATION**

The rationale for examining descriptive and acting-for representation was explained toward the end of the second chapter. Research for the Australian case included an analysis of delegates by place of birth, aboriginality, place of residence, age,
gender, formal education, and constitutional preferences, but not all of these indicators are available for the Canadian case.

The official conference reports contained almost no information about the delegates. None of the reports summarised delegates’ traits, and none provided a delegate list, but every report did comment on the delegates. Set out below is a complete list of every statement that could be used to measure representativeness.

The [Halifax] participant list, numbering just over 200, was made up of a diverse group of men and women from across Canada. … As organisers of the conference, APEC made a concerted effort to achieve a mix of participants strongly reflective of the Canadian population. There were observers who expressed the view that the conference had brought together the most representative group of Canadians that had ever met to discuss the constitutional future of the federation (Government of Canada 1992, H3).

[At the Calgary conference the aim was] to involve a broad and balanced cross-section of Canadians which reflects the regional, gender, linguistic and aboriginal make-up of the country. … There were 256 participants in the Calgary conference. Figure 1 indicates the type and number of participants [by selection method]. A number of techniques were used to obtain a broad and representative cross section of Canadians to participate in the Calgary conference … [described in detail]. In the selection of Conference participants care was taken to ensure regional representation from every province and territory, gender equity, aboriginal participation, and a balance of age and occupational groups. Forty-two percent of the non-ex officio participants were women (Government of Canada 1992, C1-2).

In choosing the [Montreal] delegates, the conference organizers took care to balance the need for a conference that was as representative as possible of the Canadian people with the need for a group with knowledge of how Canada’s economic union works (Government of Canada 1992, M4).

The participants at the Toronto conference were chosen to reflect, as closely as possible, the composition of Canadian Society (Government of Canada 1992, T2-3).

Ex-officio participants apart, half of those selected for the [Vancouver] conference were women (Government of Canada 1992, V4).

The report for every conference except Vancouver mentioned that achieving representativeness was important to the organisers, but with one exception, the reports do not provided evidence to show how close the organisers came to achieving that goal. The Halifax and Vancouver reports provide the least information about delegates – these reports do not even say how many people attended the assemblies. The Calgary report provides the most detail, namely the variables that were considered when delegates were selected (place of residence, gender, first language, aboriginality, occupation, and age), the number of delegate by selection category, and the gender ratio for delegates who were not ex-officio members.

Peter Harrison and David Milne published articles that included an analysis of the delegates’ traits (Harrison 1992; Milne 1992), but these data are incomplete or inconsistent, and it was not possible to validate them against primary sources. Harrison provided an analysis of Vancouver delegates by selection method (ex-officio,
experts/interest groups, and randomly selected). He also presented for all five
conference an analysis of delegates except ex-officio members by province of residence,
language group, and gender. Milne tabulated data for all delegates by region, language
group, and gender, and data for the number of delegates chosen by random selection.
He cited as his source “official summaries of invitation lists” (Milne 1992, 34-35).

I was not able to obtain copies of these “official summaries”. I found Harrison
and Milne, and Dr Harrison responded to my request for help. He could not supply any
records, but did recall that when he was Deputy Coordinator of the Constitutional
Conferences Secretariat in 1992, the secretariat sent all of the records to the Office of
the Privy Council Office for archiving (pers. comm. 2 April 2005). I lodged a request
for information with OPC in 2005, and corresponded with OPC staff from April to
September of 2005 (including Patrick Fafard whose work was reviewed in the second
chapter), but OPC would neither confirm nor deny that they held relevant records. In
October 2005, the Australian National University made an official request on my behalf.
That request included the following description of records sought.

Subject: The Renewal of Canada Conferences held during 1992 at Halifax (17-19 January),
Calgary (23-6 January), Montreal (31 January-2 February), Toronto (7-9 February), and
Vancouver (14-16 February).
1. Delegate lists for each conference. These are referred to by David Milne (1992) “Innovative
Constitutional Processes: Renewal of Canada Conferences, January-March 1992”, in Brown,
Douglas L and Robert Young eds, Canada: The State of the Federation 1992, Institute of
Intergovernmental Relations: Kingston, Ont. 27-51.
2. Biographical data for any or all of the delegates.
3. The number of people who attended any or all of the conferences as visitors.
4. The number of public submissions made to any or all conferences.
5. For any formal ballots held, the questions put and the results of the ballots.
6. Details of any other records that are available for the conferences.

On 8 November 2005, OPC replied that Dr Fafard no longer worked there, and that:

Unfortunately, we do not hold any archives on this issue related to Ms Kreibig’s request. … For
information pertaining to the public consultation aspects of the Conferences, she should contact
Reference Services at the National Archives of Canada. They would have a record of any relevant
government publication or relevant documents (Anestis, pers. comm. 8 November 2005).

I contacted Ian McDonald at Library and Archives Canada, and he conducted a thorough
search of their records. He supplied press reports and extracts from the Special Joint
Committee’s minutes and proceedings, but otherwise could not find anything that I did
not already have. I am grateful to him for his endeavours.

All possible sources are exhausted. While it is difficult to credit that the federal
government retained so few records on the conferences, advice from the official
custodians of government records has to be accepted. The task now is to analyse data
that are available, and inform the reader how incomplete and inconsistent data are used.
Milne wrote that he compiled his data from “official summaries of invitation lists” (1992, 34-35), but total figures for four of the five conferences cannot be validated.

- For Halifax, Milne wrote there were 221 delegates, the official report says there were “just over 200” delegates (Government of Canada 1992, H3), and a press report says there were “about 230 participants” (Beltrame 1992).
- For Montreal, the total figures were 232 in Milne, and 234 in the Compendium (Government of Canada 1992, M4).
- For Toronto, the total figures were 246 in Milne, and 254 in the Compendium (Government of Canada 1992, T2).
- For Vancouver, the official report did not say how many delegates registered. Milne wrote the figure was 217, whilst Harrison wrote it was 215 (1992, 24).

As Milne’s figures for Montreal and Toronto were lower than the official tally, it is possible that some delegates who registered to attend did not attend. It is also possible that when he analysed the data, Milne excluded delegates for whom some descriptive data were missing. It is conceivable, for example, that Milne could not determine gender or language group for some delegates. Harrison outlined the difficulties experienced in trying to assemble a representative group, as follows.

While certain personal attributes may be easily identifiable – such as gender, which can often but not always be deduced from a person’s name – others are more difficult to identify. Mother tongue is not always evident in a name, and ethnicity even less so. Furthermore, it is not only indiscreet but could well be illegal to probe into an individual’s personal characteristics prior to inviting him/her to a conference (Harrison 1992, 26).

This does not account for the difference between Harrison and Milne for Vancouver because they analyse the same traits for the same conference. As Dr Milne did not respond to requests for further information, the present analysis proceeds with an acknowledgement that data may be missing for 10 of the 1,172 delegates (0.85%).

**Place of Residence**

Milne tabulated the number of delegates at each conference by place of residence, grouped under five headings: Atlantic, Québec, Ontario, West, and North. He did not say which provinces and territories were included in the regional groups, but it is reasonable to conclude that Atlantic is Newfoundland, Prince Edward Island, Nova Scotia, and New Brunswick, West is Manitoba, Saskatchewan, Alberta, and British Columbia, and North is the Northwest Territory and Yukon.
Milne concluded from his data that the disproportions in regional representation were “rather startling”, particularly the over-representation of western provinces.

While the number of provinces that had to be represented by a respectable minimum dictated numbers of participants from both the Atlantic and western provinces (and the north) much higher than could possibly be justified by population, this rationale still does not explain the marked predominance of participants from western Canada. In total conference participation, for example, the west outstripped all other regions in attendance, enjoying almost 100 more delegates than Ontario. … Note the total western representation at the Calgary conference that quite handsomely outstrips that of Ontario and Quebec combined; indeed, the Atlantic and western regions alone account for more than twice the numbers of Ontario and Quebec. These regional figures certainly depart sharply from Canadian population indicators, underplaying significantly Ontario’s representation (1992, 34).

Milne compared conference data with population data, so the same comparisons are made in this thesis. While it is more relevant to use data for electors, in this case it would make little difference to the results because the distribution of population and electors for the five regions varies by no more than 1.8% (analysis of Elections Canada 1997; and Duchesne, Nault, Gilmour et al. 1999, 137).

Milne concluded that the over-representation of western provinces was particularly strong, but it is not clear why he does so. His data record that the west had exactly 100 more delegates than did Ontario, but that produces a relatively modest figure for over-representation, as shown in table 6.2 below. The west had 28.9% of the population, and its delegates occupied 31.8% of the seats at the assembly, so the over-representation figure is just 2.9%.

**Table 6.2: Geographic representation at the assemblies**

<table>
<thead>
<tr>
<th>Region (row percent)</th>
<th>North</th>
<th>Atlantic</th>
<th>Québec</th>
<th>West</th>
<th>Ontario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assembly Delegates</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Halifax</td>
<td>4.5%</td>
<td>23.1%</td>
<td>19.9%</td>
<td>28.1%</td>
<td>24.4%</td>
</tr>
<tr>
<td>Calgary</td>
<td>5.5%</td>
<td>22.7%</td>
<td>15.6%</td>
<td>41.4%</td>
<td>14.8%</td>
</tr>
<tr>
<td>Montreal</td>
<td>3.4%</td>
<td>16.8%</td>
<td>25.9%</td>
<td>26.7%</td>
<td>27.2%</td>
</tr>
<tr>
<td>Toronto</td>
<td>4.5%</td>
<td>15.0%</td>
<td>24.0%</td>
<td>27.2%</td>
<td>29.3%</td>
</tr>
<tr>
<td>Vancouver</td>
<td>3.7%</td>
<td>16.1%</td>
<td>24.0%</td>
<td>35.0%</td>
<td>21.2%</td>
</tr>
<tr>
<td>All assemblies</td>
<td>4.4%</td>
<td>18.8%</td>
<td>21.8%</td>
<td>31.8%</td>
<td>23.3%</td>
</tr>
<tr>
<td>Population</td>
<td>0.3%</td>
<td>8.4%</td>
<td>25.1%</td>
<td>28.9%</td>
<td>37.3%</td>
</tr>
<tr>
<td>Disproportions</td>
<td>4.0%</td>
<td>10.4%</td>
<td>-3.3%</td>
<td>2.9%</td>
<td>-14.0%</td>
</tr>
</tbody>
</table>

(Sources: analysis of Milne 1992; and population figures from Duchesne et al. 1999, 137)

Under-representation of Ontario (-14.0%) and Québec (-3.3%) is not attributable to over-representation of the West (+2.9%). Rather, it highlights over-representation of Atlantic provinces (+10.4%), and the north (+4.0%).

Table 6.3 and figure 6.2 below compare the results for the assemblies with similar data for the first ministers who negotiated the accord, and the Beaudoin-Dobbie SJC.
Table 6.3: Geographic representation – assemblies, SJC, and first ministers

<table>
<thead>
<tr>
<th>Region (row percent)</th>
<th>North</th>
<th>Atlantic</th>
<th>Québec</th>
<th>West</th>
<th>Ontario</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td>0.3%</td>
<td>8.4%</td>
<td>25.1%</td>
<td>28.9%</td>
<td>37.3%</td>
</tr>
<tr>
<td>Assemblies</td>
<td>4.4%</td>
<td>18.8%</td>
<td>21.8%</td>
<td>31.8%</td>
<td>23.3%</td>
</tr>
<tr>
<td>First ministers</td>
<td>15.4%</td>
<td>30.8%</td>
<td>15.4%</td>
<td>30.8%</td>
<td>7.7%</td>
</tr>
<tr>
<td>SJC members</td>
<td>3.3%</td>
<td>16.7%</td>
<td>30.0%</td>
<td>30.0%</td>
<td>20.0%</td>
</tr>
</tbody>
</table>

Disproportions

<table>
<thead>
<tr>
<th>Proportions</th>
<th>Assemblies</th>
<th>First ministers</th>
<th>SJC members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent</td>
<td>4.0</td>
<td>15.0</td>
<td>3.3</td>
</tr>
<tr>
<td>Proportion</td>
<td>10.4</td>
<td>22.4</td>
<td>8.3</td>
</tr>
<tr>
<td>Disproportion</td>
<td>-3.3</td>
<td>-9.7</td>
<td>4.9</td>
</tr>
<tr>
<td>Change</td>
<td>2.9</td>
<td>1.9</td>
<td>1.1</td>
</tr>
<tr>
<td>Percentage change</td>
<td>-14.0</td>
<td>-29.6</td>
<td>-17.3</td>
</tr>
<tr>
<td>Disproportion (%)</td>
<td>4.00</td>
<td>15.00</td>
<td>3.0</td>
</tr>
</tbody>
</table>

(Sources: analysis of assembly data in Milne 1992; population data in Duchesne et al. 1999, 137; first ministers’ biographies in Marsh 2006; and SJC members’ biographies in Parliament of Canada 2006a)

Disproportions for the assemblies range from $-14\%$ for Ontario to $+10\%$ for the Atlantic region, but disproportions for first ministers are higher in four of the five regions. At the extremes, first ministers over-represented the Atlantic region by 22%, and under-represented Ontario by almost 30%. For the West, however, disproportions are lower for first ministers than assemblies, at $+1.9\%$ and $+2.9\%$ respectively. The results are better for the SJC than they are for first ministers because for three of the five regions (North, Atlantic, and East), disproportions are lower than they are for the assemblies. However, the much less favourable results for the SJC in Québec and Ontario produce a median disproportion figure for the SJC that is higher than it is for the assemblies. The median disproportions are assemblies 4.00 (North region), SJC 4.90 (Québec), and first ministers 15.00 (North).
The assemblies were more representative of constituents by region than were the first ministers, or the Beaudoin-Dobbie SJC.

**Gender**

An equitable gender balance was not achieved at any of the conferences. The 1992 census recorded that men comprised 49.6% of the population, and the range was 49.3% for Québec to 52.2% for the Northwest Territory (Duchesne et al. 1999, 137). Analysis of Milne’s data for the assemblies (1992, 34) shows that 67.7% of the delegates were men – the deficit for women was a little over 18% (table 6.4 below).

| Table 6.4: Representation of gender |
|-------------------------------|----------------|----------------|
| Assemblies                    | Men            | Women’s deficit |
| Halifax                       | 67.9%          | 18.3%           |
| Calgary                       | 68.8%          | 19.2%           |
| Montreal                      | 73.3%          | 23.7%           |
| Toronto                       | 67.5%          | 17.9%           |
| Vancouver                     | 60.8%          | 11.3%           |
| All conferences               | 67.7%          | 18.2%           |
| Population                    | 49.6%          |                 |

(Sources: first ministers CICS 2004; Marsh 2006; Civics Channel 2006; population Duchesne et al. 1999, 137; conferences Milne 1992, 34)

Analysis of gender for each assembly shows that the deficit for women ranged from 11.3% at Vancouver to 23.7% at Montreal. While the monopoly Cairns mentioned was undermined, it certainly was not redressed.

Official reports for the Calgary and Vancouver assemblies claimed that the organisers aimed to achieve gender representativeness, but Milne concluded:

> Clearly, a total gender imbalance of about two to one in favour of males also existed, with only the Vancouver meeting deciding to choose a majority of women among non-ex officio members (Milne 1992, 34, emphasis added).

The organisers were, however, severely handicapped by the brief. The federal government instructed the organisers to invite as ex-officio delegates all 30 members of the Beaudoin-Dobbie SJC, 6 members of the federal caucus, 24 persons nominated by the first ministers of the provinces and territories, and four people representing Aboriginal organisations (Clark 1991b, 3-4).

The results derived from an analysis by gender of the first ministers who negotiated the Accord, and the members of the Beaudoin-Dobbie SJC who debated its precursor, are even less equitable. Biographical records available from the parliament’s
web site shows that 12 of the 13 first ministers were men (the exception was Nellie Cournoyaa, first minister for the Northwest Territories) hence men comprised 92.3% of the first ministers’ group, and the deficit for women was 42.7%. Analysis of the committee’s report and biographies supplied by parliament show that 80% of the committee’s members were men (Beaudoin-Dobbie SJC 1992; Parliament of Canada 2006a), which is consistent with the gender balance for parliament. Parliamentary research shows that in 2006, women comprised 20.8% of the lower house and 35% of the senate, little changed from 1993 when women held 18% of the lower house seats (Cool 2006, 3).

The assemblies were not representative of the population for gender, but the gender deficit for first ministers and SJC members was even greater, as illustrated in figure 6.3.

![Figure 6.3: Representation of gender](image)

This result for gender representation is nevertheless an improvement on past outcomes. Soon after the conferences, Alan Cairns wrote:

Canada’s recent constitutional pilgrimage has also undermined the former virtual monopoly of men over constitutional discourse and the agenda of constitutional change. Yesterday's constitution, although this was only dimly seen by our predecessors, was male (Cairns 1993, 6).

Credit is due to the conference organisers for doing what they could to redress the historic deficit for women, within the constraints of their brief. The organisers could not have achieved gender equity overall unless they applied a strong gender bias against
men when they were in a position to choose delegates.

**Constitutional preferences**

It is clear from the result of the plebiscite that the first ministers did not represent voters’ preferences at all well. The first ministers agreed unanimously in August 1992 that all 35 proposals described in the Draft Legal Text should be implemented, but only 45% of Canadian electors voted Yes when the package was put to them in October 1992. The question for this thesis, however, is whether delegates at the five assemblies better represented electors’ constitutional preferences than did the first ministers, which means that outcomes for the assemblies, the first ministers’ conferences, and the plebiscite need to be compared.

It is difficult to compare constitutional preferences for delegates and voters because the two groups did not consider the same package of proposals. For example, assembly delegates did not support federal proposals to entrench property rights, form a council of the federation, and entrench exclusive federal powers to manage the economic union, but these proposals were not put to voters. On the other hand, the package put to voters included proposals to increase the size of the federal house of commons, and guarantee that Québec would hold 25% of the commons seats regardless of its population, but these ideas were not put to the assembly. The second difficulty is that voters answered Yes or No to the entire package, which does not indicate their preference for each proposal.

It is still possible to answer the thesis question using data from surveys of electors conducted before and after the vote. LeDuc and Pammett concluded from their analysis of a telephone survey of 1,115 voters that the factor bearing most strongly on the No vote was the substance of the proposals, rather than perceived benefits of the package to particular groups, the effect of parties and politicians on voters, or any other statistically significant variable (1995, 31-32). They found that at least 60% of No voters opposed proposals for an equal senate, delegating more powers to the provinces, Aboriginal self-government, the distinct society clause, a larger house of commons, and the 25% guarantee for Québec. As mentioned earlier, the assemblies did not debate the two proposals for the commons, but the results for the other four proposals can be compared.

Assembly delegates and voters who rejected the Accord were reluctant to accept the proposal for an equal senate where each province has the same number of seats. At the assemblies, delegates agreed the senate “must be elected, effective and fully representative of Canadian society”, and that smaller provinces should have more
senators, but only a minority of delegates supported the idea of an equal senate (Government of Canada 1992, V9, C10, V10). LeDuc and Pammett found that 67% of those who voted No at the plebiscite disagreed with the proposal for an equal senate (1995, 17). Henry’s analysis of opinion polls on senate reform since 1944 shows that soon after the first ministers released their Accord, support for reform of the senate dropped from 49% to 30% and support for not changing the senate rose to 21%, which was the highest result recorded for that option since 1954 (Henry 1993, 5-6). When Johnston et al. surveyed 2,530 people, they found that a minority approved of the proposal for a triple-E senate (elected, equal, and effective) – the approval figure was only about 16% for Québec, and about 23% for the rest of Canada (Johnston et al. 1996, 79). A clear majority of the respondents in Québec and elsewhere who did not approve the senate proposal preferred the status quo (about 16% and 20% respectively), abolition of the senate (about 47% and 40% respectively), or they did not have an opinion (about 20% and 14% respectively). It needs be noted, however, that very few assembly delegates supported abolition of the senate. When the proposal was debated fully at Calgary, delegates were “united in rejecting the notion of abolishing the senate, an idea which was dismissed out of hand in most workshops and defended by solitary individuals in only a few” (Government of Canada 1992, C7).

Delegates and voters reached similar conclusions on proposals to amend the division of powers. Delegates agreed that additional powers should be granted to Québec, but otherwise there was little support or discussion of the proposal to grant all provinces exclusive powers over labour market training, immigration, culture, broadcasting, tourism, forestry, mining, recreation, housing, and municipal/urban affairs (Government of Canada 1991, 34-37; Government of Canada 1992, H13-16, V10-12). In their analysis of voters’ preferences, LeDuc and Pammett reported that 60% of those who voted No opposed the idea of granting more powers to the provinces (1995, 17). The package put to voters ceded to the provinces additional powers over all of the above subjects, plus regional development (Governments of Canada 1992c, 16-21).

The results for the other two proposals are not consistent. Assembly delegates “strongly agreed that the Aboriginal peoples of Canada have the right to self-government”, and “enthusiastically endorsed” entrenchment of that right (Government of Canada 1992, T11, V8). A majority of people who contributed to the Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government (Spicer Commission’s inquiries also supported Aboriginal self-government).
According to LeDuc and Pammett, however, 66% of voters who voted No at the plebiscite disagreed with the proposal for Aboriginal self-government (1995, 17).

Finally, assembly delegates and voters reacted differently to the proposal to recognize Québec as a distinct society. The official report said that delegates at Toronto “agreed very strongly that Quebec should be recognized as a ‘Distinct Society’”, and that delegates agreed to both the distinct society and linguistic duality provisions, even though they did not like the way they were expressed (Government of Canada 1992, T8-9, T15). At Vancouver, delegates “enthusiastically reaffirmed the endorsement [at the Toronto assembly] of distinct society for Quebec” (Government of Canada 1992, V7). This does not compare well with LeDuc and Pammett’s conclusion that 72% of voters who opposed the Accord did not agree with the proposal to recognize Québec as a distinct society (1995, 17). Nor does it compare well with a poll conducted by Environics late in 1996, which found that 52% outside Québec still opposed entrenching recognition of Québec as a distinct society (in Resnick 1997, 114-115). There is, however, some doubt about whether the Toronto delegates supported the distinct society provisions “very strongly”. Maser and Bryden (1992) wrote that delegates did agree to the distinct society clause, but “the endorsement was more apparent than real” because some delegates doubted it would satisfy Québec, some felt it went too far, some from Québec said it was a “hollow gesture”, and delegates from Québec and elsewhere disagreed with how distinct society was defined. Christian Dufour, a politics academic at Laval University, said in a contemporaneous interview: “There’s a complete breakdown … [delegates from Québec and elsewhere] aren’t speaking the same language” (as quoted by Maser and Brydon 1992).

The Spicer Commission summarised contributions on the subject of Québec as a distinct society as follows.

Forum participants are very often quite willing to recognize Quebec’s cultural and linguistic distinctiveness; what they cannot accept is that the provincial government of Quebec should have special powers deriving from this cultural distinctiveness that would have the effect of creating two different definitions of the rights and obligations of Canadian citizenship. … Although a minority would be willing to extend special treatment to Quebec to keep the province in confederation, even most of those Participants outside Quebec who recognize the province’s distinct society strongly believe that its distinctiveness must be protected within a fair and equal confederation or Quebec must be left to pursue its destiny alone (Spicer Commission 1991e, 12).

The commission also reported that outside Québec, contributors were not happy to see powers devolved from the federal tier to Québec (Spicer Commission 1991e, 13). These results are at odds with the outcomes for the assemblies, which supported recognition of Québec as a distinct society, devolution of powers to Québec but not to
other provinces, and “restoration of Quebec’s veto on institutional change”.

Even though there is a patchwork of agreements and disagreements between conference delegates and voters, there is enough evidence to reach a conclusion. All of the first ministers supported all of the proposals put to voters, but a sizeable portion of assembly delegates and voters opposed the proposals for an equal senate, and transferring powers to the provinces. These differences are sufficient, and the subjects are sufficiently important, to justify the conclusion that assembly delegates were more representative of voters’ constitutional preferences than were the first ministers.

In brief, the assemblies were more representative of all variables for which data are available – place of residence, gender, and constitutional preferences.

PUBLIC INTEREST

The turnout rate for the October 1992 plebiscite indicates that public interest in the Charlottetown proposals was comparatively high. This was the third federal plebiscite held since federation. On 29 September 1898, 45% of registered electors turned out to cast their votes for or against the prohibition of alcohol. Even though a slim majority voted Yes (51.3%), and Quebec was the only province where a majority was recorded for No, the federal government did not impose prohibition (Boyer 1982, 51-52). On 27 April 1942, the Liberal government asked voters whether they agreed it could impose conscription, despite its promise not to do so in the 1940 election campaign; 71.3% turned out, the result was 64% Yes, and conscription was introduced about two years later (Boyer 1982, 55-56, 60). The turnout rate for the Charlottetown plebiscite on 26 October 1992 was 75% – the highest turnout to date, and 5-13% higher than it was for the five federal elections held since 1992 (figure 6.4).
These data support the idea that interest in the Charlottetown amendment was high, especially since Canadians are not required to attend the polls for plebiscites or elections. It is not possible, however, to attribute this interest to the assemblies directly.

Polls indicated that most Canadians said they were informed on the Charlottetown Accord. A Gallup poll in May 1990 (just before the Meech Lake Accord lapsed) reported that 45% of respondents felt “Quite or Fairly well informed” about the package. When Environics put a similar question on 15 October 1992, 55% said they felt “very informed or somewhat informed” about the Charlottetown plebiscite (Henry 1993, 11). This is a commendable result for awareness, but it does not indicate interest.

For the Australian case, data were compared for the number of submissions made to the assembly and inquiries, and attendance at public sessions. This is not possible for the Canadian case because sources found for this thesis do not say whether the assemblies or the first ministers’ meetings invited or received submissions.

Only one of the five assembly reports gave a figure for the number of people who attended the sessions, as follows.

A description of the mood and dynamics of the [Calgary] Conference would not be complete without a mention of the 439 visitors who registered at the door to observe the proceedings in person. They sat around the edges of the room in every workshop, jammed the back of the hall in every plenary session, and mingled with the participants at the refreshment breaks to share their impressions and register their concerns. In total, they outnumbered the official conference participants, their presence testifying to their interest in the subject and their non-disruptive behaviour a symbol of the civility of the nation that we are trying to preserve (Government of Canada 1992, C2).
Peter Harrison wrote that “over 200” visitors attended the final Vancouver conference (1992, 24). Neither report indicated whether the number stated was the number of visitors per day, or the number of visitors for the entire conference. If the number cited for Calgary was a total figure, then the average daily figure would be 146, and the Calgary report would not then say that visitors “outnumber[ed]” the 256 delegates. Figures cited in the Calgary report and Harrison are therefore taken to be daily figures.

There is no record of the number of visitors who attended the Halifax, Montreal, and Toronto assemblies, but these can be estimated from data for Vancouver and Calgary. The population of the city where the assemblies were held would have a strong bearing on attendance because the larger the city, the more people there would be who could attend the assembly at a relatively low cost. For Calgary and Vancouver, table 6.5 below shows the metropolitan population, actual visitor numbers (in bold type), and visitor numbers per million of population for that city. The table also shows an estimate of visitor numbers for Halifax, Montreal, and Toronto, which was calculated by multiplying the mid-point attendance for Calgary and Vancouver (266) by the population for those three cities. This yields an average a daily attendance figure of 604 for all assemblies.

<table>
<thead>
<tr>
<th></th>
<th>Population (millions)</th>
<th>Attendance Per day</th>
<th>Per million population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Halifax</td>
<td>0.3738</td>
<td>100</td>
<td>266</td>
</tr>
<tr>
<td>Calgary</td>
<td>1.0020</td>
<td><strong>439</strong></td>
<td><strong>438</strong></td>
</tr>
<tr>
<td>Montreal</td>
<td>3.5471</td>
<td>945</td>
<td>266</td>
</tr>
<tr>
<td>Toronto</td>
<td>5.0204</td>
<td>1338</td>
<td>266</td>
</tr>
<tr>
<td><strong>Vancouver</strong></td>
<td>2.1113</td>
<td><strong>200</strong></td>
<td><strong>95</strong></td>
</tr>
<tr>
<td>Total</td>
<td>12.0546</td>
<td>3021</td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>2.4109</td>
<td>604</td>
<td><strong>251</strong></td>
</tr>
<tr>
<td>Average except Montreal &amp; Toronto</td>
<td>1.1624</td>
<td>246</td>
<td><strong>229</strong></td>
</tr>
</tbody>
</table>

(Sources: Calgary, Government of Canada 1992, C2; Vancouver, Harrison 1992, 24; population, Statistics Canada 2007)

Many factors other than population could affect attendance, such as the remoteness of a city, how convenient the assembly location was within a city, the subjects discussed at each assembly, and even expectations about the weather. Geographic remoteness could explain, for example, why the per capita attendance figure for Vancouver (on the east coast) and Halifax (on the west coast) were so much lower than they were for Calgary. By contrast, the figures for Montreal and Toronto are so
high, it seems that an adjustment is necessary. Surely if attendance was this high, the reports would mention it. Further, how could organisers accommodate so many visitors? The first point is stronger than the second, however, because the Australian assembly accommodated more than 300 visitors per hour.

Whatever the attendance figures were for the assemblies, it would necessarily exceed attendance at first ministers’ meetings because those meetings are not open to the public. That leaves open the broader question of whether other parliamentary enquiries into the constitution generated more or less interest.

The Spicer Commission certainly stimulated extremely high levels of public participation (as outlined earlier in this chapter), but this inquiry is a not a suitable comparison because the commissioners were not parliamentarians. Moreover, the forms of public participation used by Spicer are not comparable to attendance at the assemblies. For example, 75,069 callers rang the commission’s 1-800 telephone service, but relatively little effort is required to participate in this way, compared to attending hearings in person. Fortunately, the federal government also convened two inquiries that are suitable for present purposes. All of the members of the Beaudoin-Edwards and Beaudoin-Dobbie special joint committees were federal parliamentarians, and both committees inquired into relevant constitutional reforms.

The Beaudoin-Edwards SJC held public hearings in 20 cities and towns across the nation from 19 February to 30 April 1991, heard 209 witnesses, and received more than 500 submissions (Beaudoin-Edwards SJC 1991, 9-10). The Beaudoin-Dobbie SJC convened public hearings from 25 September 1991 to 11 February 1992 (Pal and Seidle 1993, 181). Over a period of about 227 hours, the committee heard more than 700 witnesses at 78 public meetings, and received almost 2,000 submissions (Beaudoin-Dobbie SJC 1992, 3). The Beaudoin-Dobbie SJC was twice as long as the Beaudoin-Edwards SJC, and it heard more than three times the number of witnesses, and received four times the number of submissions. This is not surprising, given that its brief was wider: the Beaudoin-Edwards SJC reviewed the process of amending the constitution, while the Beaudoin-Dobbie SJC reviewed federal proposals to amend the constitution, including the amendment formula.

Unfortunately, neither the official SJC reports, nor any other source found for this thesis reported how many people attended the hearings conducted by these committees. It seems that in Canada, like Australia, it is not customary to record audience numbers for parliamentary inquiries. It is possible nevertheless to estimate the attendance figures
these committees would need to achieve to exceed attendance figures for the
conferences. If both committees convened hearings for one-quarter of the time set aside
for hearings (Pal and Seidle 1993, 181), then the Beaudoin-Edwards SJC allocated 18
days to hearings, and the Beaudoin-Dobbie SJC allocated 35 days to hearings. Looking
back to the previous paragraph, the estimate for the Beaudoin-Edwards SJC looks to be
about right because the report said it convened hearings in 20 cities and towns.

To exceed the attendance figures for the conferences (excluding assembly figures
for Montreal and Toronto altogether because they may be high), the Beaudoin-Edwards
SJC and the Beaudoin-Dobbie SJC hearings would need to attract more than 229
visitors per day and a total of more than 4,216 and 8,022 visitors respectively. This is
exceedingly unlikely. As explained earlier in this chapter, the federal government
initiated the assemblies because it feared the Beaudoin-Dobbie SJC would not fulfil its
brief, in part because public interest in its work was limited. No one attended its hearing
in Manitoba, and the commentaries cited earlier reported that interest in the hearings on
Prince Edward Island and in Ontario was also very low. As already noted, the
Beaudoin-Edwards SJC was less popular than the Beaudoin-Dobbie SJC, as measured
by the number of witnesses heard and submissions received.

Available evidence allows the conclusion that the Canadian assemblies generated
more public interest – as demonstrated by attendance at public sessions – than did
inquiries where parliamentarians convened alone.

**CONSENSUS**

The authors reviewed in the second chapter disagreed about whether assemblies
were superior to parliamentarians in their ability to achieve consensus. That question is
answered here using a detailed analysis of agreements reached by first ministers, the
Beaudoin-Dobbie SJC, and the assemblies, which is included as table 6.7 at the end of
this chapter.

It seems obvious to conclude that first ministers were better able to reach
consensus because they were unanimous in their support of all 35 proposals in the draft
legal text (Governments of Canada 1992c). A close reading of the Accord of 28 August
shows, however, that the first ministers did not reach agreement on a further 11
proposals to:

1. entrench a common market clause in s121;
2. allow Aboriginal peoples to participate in the selection of Supreme Court judges,
   and make submissions to the court on Aboriginal issues;
3. reserve house of commons seats for Aboriginal peoples;
4. constrain federal spending in areas where provinces exercise exclusive powers;
5. delay the justiciability of Aboriginal self-government for five years;
6. rationalise the division of powers for drug prosecutions, wildlife conservation and protection, transport of dangerous goods, soil and water conservation, ferries, small craft harbours, financial sector regulation, unfair trade practices, and inspection programs;
7. require notice to amend federal legislation for Established Programs Financing;
8. entrench a consultation process for international treaties and agreements;
9. entrench participation of Aboriginal peoples in first ministers’ conferences or intergovernment agreements on the division of powers;
10. provide for senate by-elections; and
11. specify federal powers over national labour market training, or “a framework for compensation issues” (Governments of Canada 1992b, 6, 11-12, 15, 20, 27-28).

With the exception of providing for senate by-elections (item 10 above), all of these disagreements are about empowering Aboriginal peoples (items 2, 3, 5, and 9 above), or the federal/provincial division of powers (items 1, 4, 6-8, and 11 above).

The Beaudoin-Dobbie SJC fared better, as its members were unable to agree on just five proposals:
1. raising the threshold for the notwithstanding clause;
2. entrenching the right to privacy;
3. how to allocate senate seats across the provinces and territories;
4. how to alter the formula for amending the constitution; and
5. how to provide for the formation of new provinces from territories in the amending formula (Beaudoin-Dobbie SJC 1992, pages 36, 37, 51, 94, and 95 respectively).

These disagreements are doubly noteworthy because most SJC members represented the government which proposed the amendments. The political composition of the committee was 16 Progressive Conservative, nine Liberal, three NDP, and two Conservative (Beaudoin-Dobbie SJC 1992, 1; Parliament of Canada 2006b).

The five assemblies were also unable to agree on five proposals, including two that are listed above for the SJC:
1. entrenching a social charter, though they agreed there should be one;
2. repealing the federal declaratory power;
3. allocating senate seats across the provinces and territories;
4. altering the formula for amending the constitution; and
5. entrenching a common market clause (Government of Canada 1992, pages V13-14, H15, C10 and V10, C4, and M7 respectively).

Neither the Beaudoin-Dobbie SJC nor the assemblies were able to agree about the distribution of senate seats, and the rules for amending the constitution. It should be noted that the SJC had a much longer time in which it could debate the proposals. Most assembly delegates had the opportunity to discuss the proposals for about three days, and delegates selected to attend the final conference could do so for about six days. The Beaudoin-Dobbie SJC convened for three months, and the first ministers convened over a period of about five months.

Statistical analysis of all outcomes for the three groups shows that the assemblies were better able to reach consensus, by a margin of just 0.7% (table 6.6 below).

<table>
<thead>
<tr>
<th></th>
<th>Assemblies</th>
<th>SJC</th>
<th>First ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of proposals considered</td>
<td>44.0</td>
<td>46.0</td>
<td>64.0</td>
</tr>
<tr>
<td>- Number approved</td>
<td>27.5</td>
<td>31.5</td>
<td>49.5</td>
</tr>
<tr>
<td>- Number rejected</td>
<td>12.0</td>
<td>9.5</td>
<td>4.5</td>
</tr>
<tr>
<td>- Number not agreed</td>
<td>4.5</td>
<td>5.0</td>
<td>10.0</td>
</tr>
<tr>
<td>Consensus (approved plus rejected)</td>
<td>39.5</td>
<td>41.0</td>
<td>54.0</td>
</tr>
<tr>
<td>Consensus %</td>
<td>89.8%</td>
<td>89.1%</td>
<td>84.4%</td>
</tr>
</tbody>
</table>

(Sources: analysis of Government of Canada 1992; Beaudoin-Dobbie SJC 1992; Governments of Canada 1992b; Governments of Canada 1992c)

Note: tallies are fractional when groups resolved part of a proposal differently, for example split results for Aboriginal self-government and delaying justiciability in federal proposal #4. While it may appear that this result is ‘too close to call’, consideration of the special advantages afforded to the first ministers and the SJC dictate otherwise.

While it may appear that this result is ‘too close to call’, consideration of the special advantages afforded to the first ministers and the SJC dictate otherwise.

The political composition of the SJC inflates its score. It made recommendations based on majority agreement, and a majority of its members were parliamentarians who represented the governing party. The report noted minority dissent by non-government members on five proposals, but this was not enough to change a majority resolution (Beaudoin-Dobbie SJC 1992, 35, 36, 37, 54-55, 74).

There was no party majority to help the first ministers reach consensus. To the contrary, the political composition of the first ministers’ group was four Progressive
Conservative, four Liberal, four NDP, and one independent. The consensus figure for the first ministers is inflated, nevertheless, by their agreement on nine matters that were not put to the assemblies:

- broaden construction of the name Canada to mean “Canada as constituted under the Constitution of Canada”;
- change the phrase “an Upper House styled the Senate” to “the Senate” in s.17;
- simplify the expression of the Governor General’s power to summon senators;
- define senate sitting day to mean a day on which the house sits;
- use gender-neutral language when referring to the governor general and royal assent;
- modernise provisions for royal assent to bills;
- capitalise the word Aboriginal;
- broaden the definition of the Canadian constitution to include “any other amendment to the Constitution of Canada”; and
- broaden the definition of constitution acts to include “any amendments thereto”

None of these amendments is controversial, so it is exceedingly likely that the assemblies would have approved them, given the chance. This would increase the consensus score for the assemblies.

The advantages afforded to first ministers and the SJC in reaching agreements strengthens the conclusion that the assemblies were better able to reach consensus about constitutional change than were parliamentarians convening alone.

**PARTISANSHIP**

The question of whether constituent assemblies are less partisan was answered for the Australian case by examining how frequently assembly delegates and parliamentarians changed their expressed preferences when they voted at the assembly. Unfortunately, there are no equivalent records for the Canadian assemblies, the Beaudoin-Dobbie SJC, or the first ministers’ meetings.

The co-convenor at Calgary wrote that 63% of the delegates at Halifax changed their minds during the course of the debates (Government of Canada 1992, C16), and Beltrame (1992) claimed that no ex-officio or expert delegate who spoke on the last day said they had changed their views. While this scant evidence might suggest that non-parliamentarians were more likely to change their views, it is insufficient grounds on
which to reach a conclusion on the question of partisanship.

**DISCUSSION**

The high consensus scores for the assemblies, the Beaudoin-Dobbie SJC, and the first ministers suggest there the three groups were largely in agreement. A comparative reading of outcomes across table 6.7 (at the end of this chapter) shows that the three groups did agree to these ten amendments:

- recognise Québec is a distinct society;
- recognise Canada’s linguistic duality;
- entrench Aboriginal self-government, consult Aboriginals about constitutional change that affects them, and guarantee representation of Aboriginals in the senate;
- entrench a Canada Clause;
- legislation for language and culture matters does not pass the senate unless a majority of Francophone senators approves it;
- new supreme court judges are appointed from among provincial nominees, and three of the nine judges are from Québec; and
- entrench annual first ministers’ conferences and enforcement of intergovernment agreements.

The assemblies and the SJC did not approve the following six proposals, and the first ministers abandoned them:

- entrench property rights;
- raise the threshold for invoking the notwithstanding clause;
- form a new Council of the Federation (the SJC made no comment);
- require that the Bank of Canada act to preserve price stability;
- change the provision for residual powers; and
- provide for legislative inter-delegation between governments.

First ministers were responsive also in adopting four new proposals that were initiated by the assemblies, and supported by the SJC:

- entrench gender equality rights for Aboriginals;
- consider the formation of new provinces in the amending formula;
- entrench a social charter; and
- devolve powers over regional development, by inter-government agreement.

This means that the assemblies, first ministers, and the SJC agreed on 20 subjects.

Territories 2006, 1).
By contrast, the first ministers ignored three recommendations made by the assemblies and the SJC to: choose senators by direct election; hold house and senate elections separately; and consider population distribution when allocating senate seats to the provinces. The first ministers also ignored the assemblies’ acceptance of the federal proposal for the senate to have an absolute veto over ordinary legislation.

The first ministers were responsive to the preferences expressed by the assemblies and the SJC in that they acted against just four of 24 recommendations. Once again, however, this purely quantitative analysis is misleading because it does not consider the relative importance of each proposal, or interrelationships between the proposals.

The triple-E senate (elected, equal, and effective) became a single-E senate (equal) in the course of the first minister’s negotiations. Ironically, the one feature retained in the first ministers’ agreement – equal representation of the provinces in the senate – was the feature opposed by the assemblies and the SJC.

The federal government initially proposed a “directly elected Senate” (Government of Canada 1991, 17), and the assemblies and the SJC supported that proposal unequivocally (Government of Canada 1992, C7, V9; Beaudoin-Dobbie SJC 1992, 45). However, the first ministers agreed only that the federal parliament “may provide for all matters relating to the election of senators”, and that provincial legislatures “may provide for the indirect election of senators … and all matters relating thereto” (Governments of Canada 1992c, 3, emphasis added). As all provincial legislatures are unicameral, this meant that provincial governments, rather than the federal government, could appoint senators.

The government proposed that the senate have an absolute veto over “ordinary bills” (Government of Canada 1991, 20), and the assemblies supported that proposal unequivocally (Government of Canada 1992, C8, V9), but a majority of the SJC agreed that the senate should have a 180-day veto only (Liberals dissenting). The first ministers’ accord proposed that the senate would have an absolute veto over three types of bills, being bills that: “contain provisions that would result in fundamental tax policy changes that are directly related to natural resources or electrical energy”; “materially affect the French language or culture in Canada”; or “amend[s] the Constitution of Canada in relation to the Senate or the House of Commons” (Governments of Canada 1992c, 10, 11, and 7 respectively). Reconciliation committees, and a simple majority vote of joint sittings, would resolve deadlocks on all other legislation (Governments of
Such joint sittings would favour the government and the house because the first ministers also agreed to increase the size of the house from 295 to 337 seats (and 345 in 1996), and to reduce the size of the senate from 112 to 62 seats (Governments of Canada 1992c, 3, 31). This raises the house share of a joint sitting from 72.5% to 84.5%, which means that a government could override a senate veto with a 5% majority in the house, and just 23% of the senate seats. The proposals to change the size of the house and the senate were not put to the assemblies or the SJC.

The senate’s effectiveness was thus symbolic only. The triple-E senate would be equal, but it would not be elected or effective. As noted earlier, voter dissatisfaction with the first ministers’ proposals for senate reform was a major factor in their decision to vote No to the accord.

31 Since 1982, the senate has had an absolute veto over changing provisions for the senate or house that are not mentioned elsewhere in the amendment rules (1982 constitution, s.44, 47). On appropriation and tax bills, since 1867 the constitution has provided that such bills become law if the governor general recommends them, and the house then passes them by a majority vote (1867 constitution ss 53-57).
CONCLUSIONS

The assemblies were more representative of constituents’ constitutional preferences than were the first ministers or the Beaudoin-Dobbie SJC, and the assemblies were more representative of constituents for place of residence and gender. Further, the assemblies generated more public interest, and they were better able to reach consensus on the proposals put to them. The thesis question about whether the assemblies were less partisan is not answered, for want of sufficient evidence.

Content was one of the main reasons voters did not support the Charlottetown Accord. The assemblies, the Beaudoin-Edwards SJC, and members of the public who made submissions to hearings raised similar objections to the proposed amendments, but governments were unresponsive. The broad questions about whether governments should be responsive to constituents, and how responsive they should be, are hotly contested. Arguments for and against more responsive government are similar to arguments for and against constituent assemblies.

About five months after the Meech Lake Accord lapsed – at a time when calls for more public participation and more responsive government were strong – about 50 academics and commentators convened at Toronto to discuss how Canada’s constitutional debates could be resolved. Richard Simeon opened the conference with these words: “We must consider all options. We must break the mould. We must seek new ways of identifying issues and new language for discussing them” (1991, 1). A “brain-storming session” titled “The Political Dynamics of Future Constitutional Discussion” debated public participation in constitutional debates (PP), and the need for responsive government. A précis of key points made in the transcript of discussion is set out below. The speaker sequence was changed to draw themes together, and the tag “cf.” is used to highlight arguments against public participation.

- Public participation (PP) will not diminish politicians’ roles (Brock)
- cf. Government “has the moral responsibility to speak for Canada or resign” (Laidler)
- cf. “When did parliamentary democracy become such a defective alternative to plebiscites?” (Dupré)
- PP needs to occur before first ministers reach agreement (Bredt)
- cf. Politicians control the process; hearings “are stage shows” (Côte)
- cf. Need “at least a public perception of broad participation” (Monahan)
- PP is democracy, politicians should not refuse to change their proposals (Breton);
- Politicians need to explain and justify their proposals, and show they listened (Brock, Crispo)
- cf. We can ignore the “higher volume of discord” in constitutional debates (Watson).
- cf. More PP will “overload” the agenda (Gibbins)
- There is a “profound legitimacy crisis”, in Canada and elsewhere (Whitaker)
- PP can add legitimacy (Pritchard, Meekison, Whitaker)
- cf. PP will “give legitimacy to darker voices” (Gibbins)
- Constitutional change via executive federalism is no longer acceptable (Dupré, Hartle, Schwartz)
• cf. Negotiations must be conducted in private (Crispo)
• Need something more responsive than representative government (Greschner); a “more democratic process of representation” (Whitaker)
• Need a legislative “nonconstititutional constituent assembly” to tell Québec what ROC wants (Scott)
• Need an “elected constituent assembly” of legislators and local government (Hartle)
• “We still do not seem to have a sense of how to forge a consensus” (Abrams).

Participants agreed that Canada needed something more than executive federalism, and that public participation in constitutional debates was higher now and would remain high, but they disagreed about whether public participation was desirable, and whether it could be accommodated safely. For some speakers, public participation could add legitimacy, but to achieve that, parliamentarians needed to engage in a dialogue with constituents about their proposals. For others, public participation threatened the institutions of representative government unnecessarily, it could “overload” the agenda, and it could “give legitimacy to darker voices”. For one speaker, the louder public voices could be safely ignored, and for another, demand for public participation could be satisfied by “a public perception of broad participation” (emphasis added).

Suggestions on ways to improve the chance of achieving formal constitutional change in future included a “nonconstititutional constituent assembly”, a constituent assembly whose members would represent the legislatures and local government, and convening hearings before the first ministers reached agreement about constitutional change. There was no agreement on what process should be adopted, or whether governments needed to be more responsive.
### Table 6.7: Agreements reached by assemblies, SJC, and first ministers

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<tr>
<th>Federal government</th>
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<tr>
<td><strong>IDENTITY, RIGHTS, AND VALUES</strong></td>
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<tr>
<td><strong>Property rights:</strong> guarantee property rights (proposal #1.1).</td>
<td>“[O]verwhelmingly rejected” (T15).</td>
<td>Government members agreed, opposition members dissented (35).</td>
<td>Agreed “not to pursue” (Accord, 27).</td>
</tr>
<tr>
<td><strong>Notwithstanding clause (s33): raise threshold for invoking it from majority to 60% (#1.2).</strong></td>
<td>“Majority” favoured the clause, but “many” thought increasing the threshold would make little difference to “preventing abuse” (T17).</td>
<td>Recommended postponing discussion of this issue. NDP members agreed at least s15(1) should be exempt (36).</td>
<td>Agreed “not to pursue” (Accord, 27).</td>
</tr>
<tr>
<td><strong>Québec &amp; linguistic duality:</strong> amend Charter to recognise Québec as a distinct society, and interpret Charter to preserve linguistic duality (#2.1).</td>
<td>“[A] general will” to recognise Québec’s differences (H10). “Agreed very strongly” on linguistic duality clause (T8). [E]nthusiastically reaffirmed the endorsement of distinct society for Quebec” (V7-8).</td>
<td>Recommended amending the Charter to recognise Québec as a distinct society, and linguistic duality (26).</td>
<td>Agreed to include in the Canada clause recognition of Québec as a distinct society with a French-speaking majority, and official language minority communities throughout Canada (Text #1).</td>
</tr>
<tr>
<td><strong>Aboriginal self-government:</strong> entrench the right to Aboriginal self-government in the Charter, enforceable in 10 years (#4).</td>
<td>“[S]trongly agreed that the Aboriginal peoples of Canada have the right to self-government” (T11). “Enthusiastically endorsed” entrenchment; “overwhelming commitment to the principle” (V8).</td>
<td>Recommended entrenchment of “inherent right of aboriginal peoples to self-government” and “a transition process”, but not delay justiciability (28-31).</td>
<td>Agreed to entrench the “inherent right of self-government within Canada” (Text #18,29). Did not agree about whether to delay justiciability for five years (Accord, 20).</td>
</tr>
<tr>
<td><strong>Consultation with Aboriginals peoples:</strong> include Aboriginal peoples in current constitutional negotiations and entrench provisions for future consultations (#3,5).</td>
<td>“[O]verwhelming commitment … to a process” for achieving Aboriginal self-government (V8).</td>
<td>Agreed Aboriginal peoples should be included in future constitutional discussions that directly affect them, and a conference on Aboriginal issues should be convened two years after self-government is entrenched (32-33).</td>
<td>Agreed to entrench consultation with Aboriginals, and to hold four conferences on Aboriginal issues, the first by 1996 (Text #29). Did not agree on entrenching their participation in first ministers’ conferences or intergovernment agreements re the division of powers (Accord, 28).</td>
</tr>
<tr>
<td>“Generally endorsed” application of the Charter to Aboriginal governments (V8).</td>
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<td>Agreed the Charter and notwithstanding clause applies to Aboriginal legislatures (Text #26,27).</td>
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<td>Agreed gender equality rights should apply to Aboriginal peoples (31).</td>
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<td>Agreed to entrench equal rights for Aboriginal men and women (Text #29).</td>
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<td>Agreed to entrench protection of Aboriginal “languages, cultures or traditions” (Text #25).</td>
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<td>Agreed federal powers over Aboriginal lands to include all Aboriginals, and “Indians” should read “all the Aboriginal peoples of Canada” (Text #8).</td>
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<tr>
<td><strong>Canada Clause:</strong></td>
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<td>Agreed to a judicable Canada clause, including recognition of Québec as a “distinct society”, Aboriginal peoples (not their contributions), and protections and rights for all Canadians (Text #1).</td>
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<td>entrench a statement of national values (#7).</td>
<td>Agreed there should be a Canada clause; “a majority felt strongly ... [it] should ‘have teeth’ ... [with] specific protections and rights” (T7), and it should be “brief and inspirational” (V14).</td>
<td>Agreed there should be a Canada clause which recognises the contribution of Aboriginal peoples, their cultures, rights, and responsibilities (23,34).</td>
<td>“Some government members” agreed right to privacy should be entrenched; opposition members disagreed (37).</td>
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<td>Agreed there should be a Canada clause; “a majority felt strongly ... [it] should ‘have teeth’ ... [with] specific protections and rights” (T7), and it should be “brief and inspirational” (V14).</td>
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<td><strong>INSTITUTIONAL REFORM</strong></td>
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<td><strong>House of Commons:</strong></td>
<td>allow MPs more free votes, and have fewer votes of confidence (#8).</td>
<td>“Strong support” for more free votes; votes of confidence not mentioned (C3).</td>
<td>Agreed that this topic should be pursued in the house, not by formal constitutional change (40).</td>
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<td>Agreed to guarantee Québec 25% of the house seats, and allocate other seats by population. Under the new rules no province has fewer seats than it did on 17 April 1982, none loses more than one seat or has fewer seats than a less populous province. Territory allocations do not reduce (Text #5).</td>
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<td>Wanted reform of question time, and a less adversarial parliament (C3).</td>
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<td><strong>Senate</strong>: directly elected; special joint committee to consider senate reforms in detail (#9.1,10).</td>
<td>“Virtually unanimous in recommending a reformed senate” (C8); “overwhelmingly preferred … direct election” (C7); senate “must be elected, effective and fully representative of Canadian society” (V9).</td>
<td>Agreed the senate should be directly elected (45).</td>
<td>Agreed to an elected senate; parliament to decide election methods; and provinces may elect senators indirectly, set gender quotas, and decide electoral boundaries (Text #4). Did not agree on provisions for by-elections (Accord, 28).</td>
</tr>
<tr>
<td>Senate with “much more equitable provincial and territorial representation” (#9.3).</td>
<td>“Supported greater [but not equal] representation for provinces with small populations”.. No agreement on distribution of seats (C10, V10).</td>
<td>Agreed the distribution of seats should be “equitable” (not equal). Provided two options for seat distribution (51).</td>
<td>Agreed to a smaller senate of 62 members (6/province, 1/territory) plus an undetermined number of Aboriginal senators (Text #4).</td>
</tr>
<tr>
<td>Guaranteed representation of Aboriginals in senate (#6,9.6).</td>
<td>Agreed there should be quotas for Aboriginal peoples (C14,V10).</td>
<td>Agreed to quotas for Aboriginal peoples, if they desire it (33,52).</td>
<td>Agreed to provide an unspecified number of seats for Aboriginal peoples (Text #4).</td>
</tr>
<tr>
<td>Federal legislation requires majority approval of both houses (#9.4), except:</td>
<td>Agreed (C8,V9); see further under #9.4.3 below.</td>
<td>Agreed senate should have a 180-day suspensive veto over “normal bills”, then house can override deadlocks. Liberals for an absolute veto (54-55).</td>
<td>Agreed to resolve deadlocks on ordinary bills by “reconciliation committees”, and simple majority votes at joint sittings. Both houses must approve bills that amend constitutional provisions for the house or senate (Text #4).</td>
</tr>
<tr>
<td>(a) double majority for passage of “language and culture” matters in the senate (#9.4.1).</td>
<td>Eight 8 of 15 groups supported a double majority for language and culture matters; no group opposed it (C9).</td>
<td>Agreed to a double majority requirement for language and culture matters (57).</td>
<td>Agreed (Text #4).</td>
</tr>
<tr>
<td>(b) for matters of national importance, six-month suspensive veto only (#9.4.2).</td>
<td>“Opposed” (C10, V9).</td>
<td>Opposed; favoured a house override with a special majority (54).</td>
<td>Agreed to a senate veto on natural resources tax policy (Text #4).</td>
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<td>(c) no powers to legislate for appropriation or borrowing (#9.4.3).</td>
<td>“Generally” wanted a more a powerful senate that could not defeat the government with a confidence vote. 2 workshops wanted an absolute veto, 4 wanted an absolute veto for ordinary bills, 1 wanted a special majority, and 1 supported the federal proposal (C8-9).</td>
<td>Agreed the senate should have a 30-day suspensive veto over supply bills (56).</td>
<td>Agreed the senate would have only a 30-day suspensive veto over money bills (Text #4).</td>
</tr>
<tr>
<td>Senate continues to conduct special inquiries (#9.5).</td>
<td>Not mentioned in reports.</td>
<td>Not mentioned in report.</td>
<td>Not mentioned in Accord or Text.</td>
</tr>
<tr>
<td>Senate ratifies appointments to certain regulatory boards and agencies (#11).</td>
<td>Not mentioned in reports except for appointment of the Reserve Bank’s governor (see proposal #17 below).</td>
<td>Agreed the senate should be able to ratify appointments to the Bank of Canada and other agencies (58).</td>
<td>Agreed the parliament can provide that any appointment is subject to senate approval (Text #4).</td>
</tr>
<tr>
<td>Vancouver delegates, and 12 of 15 Calgary groups, opposed quotas for women and minorities other than Aboriginals (V10, C14).</td>
<td>“Clear support” for PR &amp; MMC with STV (not lists); no support for FPTP (C8). “Preferred” election methods are PR and STV, not party lists or FPTP (V10).</td>
<td>Agreed senators should be elected with a PR electoral system and multi-member constituencies (46-47).</td>
<td>[Election method to be determined by federal and provincial legislatures under federal proposal #9.1 above.]</td>
</tr>
<tr>
<td>“[S]trong preference” for 6-8 year terms, half-senate elections every 3-4 years (C8).</td>
<td>Agreed senators should serve a fixed term of up to six years (49).</td>
<td>[This option excluded by agreement to simultaneous elections, federal proposal #9.2 above.]</td>
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Also agreed to:
1. change the phrase “an Upper House styled the Senate” in s17 to “the Senate” (Text #3);
2. reduce senate quorum from 15 to 10, and resolve tied votes by speaker’s vote [speaker votes now, and tied votes are negatived] (Text #4);
3. simplify the expression of the Governor General’s power to summon senators (Text #4).
4. define senate sitting day to mean a day on which the house sits (Text #4);
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<td><strong>Supreme Court:</strong></td>
<td>(a) judges nominated by provinces and territories; (b) three of the nine judges are from Québec (#12).</td>
<td>“Substantial support”, but “little interest” (C4). (b) “considerable support” (C4).</td>
<td>Agreed to both proposals (60).</td>
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<tr>
<td><strong>Amending formula:</strong> extend requirement for unanimity to provisions for the Supreme Court, the selection, composition and powers of the two houses of parliament, and compensate provinces that opt out of federal programs (#13).</td>
<td>“[N]o broad interest and no general discussion of options, but support for a Quebec veto” over institutional change (C4).</td>
<td>Suggested five options and urged first ministers to consider them. Noted “it should be a matter of the highest priority during this round of constitutional negotiations to find an amending formula that meets the needs of Quebec” (94).</td>
<td>Agreed to change the rules to: compensate provinces when powers are transferred from some provinces to the federal tier; require unanimous federal/provincial agreement to change provisions for the senate, house size relative to the senate, use of English and French languages, Supreme Court composition, forming new provinces, and changing the amending formula; require 7/50 agreements to alter how Supreme Court judges are selected, but not amendments that affect one province; and exclude new provinces from this new formula (Text #32). Both houses must approve changes to house or senate provisions (Text #4).</td>
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<td>Agreed should not enact an amendment that affects Aboriginal peoples without their consent (32).</td>
<td>Agreed Aboriginal peoples can propose amendments that directly affect them, which will not pass without “substantial consent” from them (Text #33).</td>
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<td>“Some delegates were concerned that the existing amending formula unduly hampers the aspirations of the northern territories eventually to become provinces” (V9).</td>
<td>Urged the government to consider the relationship between the amending formula and formation of new provinces from territories (95).</td>
<td>Agreed the parliament can form new provinces in a territory if the territory’s legislature agrees (Text #21-22).</td>
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<td>Constitution should include “restoration of Quebec’s veto on institutional change” (V7).</td>
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<td><strong>Council of the Federation:</strong> entrench new federal/provincial body to coordinate policies, subject to 7/50 rule (#28).</td>
<td>“Little support” (C5)</td>
<td>Not mentioned in report.</td>
<td>Not mentioned in Accord or Text.</td>
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**ECONOMIC UNION**

| Common market clause: broaden s121 provisions for free inter-provincial trade except as approved under 7/50 rule (#14). | “There were those who strongly endorsed … Others strongly opposed … others … had questions and concerns about the scope of the proposal” (M7). | Agreed the constitution should require governments to cooperate to achieve the free movement of people, goods, services, and capital (88-89). Replace s121 as suggested, with some exceptions, and entrench a dispute resolution mechanism (86-87). | Did not reach agreement about entrenching a common market clause in s121 (Accord, 6). Agreed to include in s36(3)(b) provision for “the free movement of persons, goods, services and capital” (Text #31). |

<p>| Power to manage the economic union: exclusive federal powers over “any matter that it declares to be for the efficient functioning of the economic union”, subject to 7/50 rule. Provinces may opt out for three years if 60% of its legislature agrees (#15). | “Virtually unanimous rejection … few, if any … were prepared to grant … an open-ended, general new power” (M10); “Preservation of the Canadian political union” more important now (M3). “Many … strongly supported the principle … many had serious misgivings … many sought, at the least, a clarification” (V12-13). | | “The need … [for] a social charter … arose repeatedly” (C12). “Many participants agreed on the principle of a social charter (M16); “no agreement” about whether protection of social programs should be entrenched (V13-14). | Agreed the constitution should include provision for a “social covenant” to commit governments to: provide health care, social services, welfare, and education; maintain the “integrity of the environment”, full employment, and a “reasonable standard of living”; and allow collective bargaining in workplaces (87-88). | Agreed to: commit governments to provide specified public goods and services; protect workers’ collective bargaining rights and the environment; entrench a commitment to “preservation and development of the Canadian social and economic union” and monitor achievement of it; and provide “reasonably comparable economic infrastructure”, equalization payments, and consultation (Text #30-31). |</p>
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<td><strong>Economic policies:</strong> entrench a federal/provincial process to harmonise fiscal policies with federal monetary policies (#16).</td>
<td>“Almost unanimously held view” amendment not needed (M14). “Much support” to entrench annual first ministers’ meetings, and enforcing intergovernment agreements (M12).</td>
<td>Agreed an annual first ministers’ conference should be entrenched (90).</td>
<td>Agreed to entrench: an annual first ministers’ conference, and enforceable intergovernment agreements renewable every five years (Text #17,31).</td>
</tr>
<tr>
<td><strong>Bank of Canada:</strong> (a) bank required to preserve price stability (b) consult provinces and territories on board membership (c) senate to ratify appointment of the bank’s Governor (#17).</td>
<td>(a) “opposed” (C4); “with almost no exception the view was ... Bank’s mandate ... should be left broad” (M17) (b) “widespread support” (C4); (c) little “specific discussion” (C4). &quot;Unequivocal answer&quot; that these ideas should not be entrenched (M17).</td>
<td>(a) Agreed the proposed mandate should not be entrenched (89). (b) Agreed on consultation (89). (c) Agreed under proposal #11 above.</td>
<td>(a) Not mentioned in Accord or Text. (b) Not mentioned in Accord or Text. (c) Agreed to afford the senate a 30-day suspensive veto on the appointment of the Bank of Canada governor (Text #4).</td>
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**DIVISION OF POWERS**

<p>| Labour market training: an exclusive provincial power (#18). | At Halifax: labour market training, “some support”, provided there were national standards (H13-14); “general support for [immigration] proposal, but not to entrench it (H14); “strong view that the proposal [for culture matters] was desirable for Quebec but not for other provinces” (H14); “not much discussion ... and very little concern” about broadcasting powers (H14-15). The final conference “strongly and clearly reaffirmed the results of the Halifax conference” e.g., wider powers for Québec only. “Broad agreement that at a minimum it would include labour force training, unemployment insurance, communications ... clear majority [resolved that there should be] national, collaboratively-set standards, strong central government, and powers uniquely exercised by Québec” (V10-12). | Agreed: provinces should have exclusive powers over labour market training on request; federal funds should be allocated by need; and federal tier should retain power over “unemployment insurance and any other head of power” (71). | Agreed to grant to provinces power over labour market development and training, with federal power over unemployment insurance and federal labour programs (Text #9). Did not agree on federal powers over national policy (Accord, 15), or “a framework for compensation issues” (Accord, 28). |
| Immigration: provinces empowered to negotiate special agreements with the federal government (#19). | | Agreed (81). | Agreed to entrench federal/provincial agreements on immigration and aliens, provided they are consistent with federal legislation and Charter, and approved by federal and provincial parliaments (Text #12). |
| Culture: provinces empowered to negotiate agreements with the federal government (#20). | | Agreed that the government should reconsider this proposal, except as it applies to Québec (77-78). | Agreed to grant provinces exclusive powers over culture, with federal power over national matters and grants (Text #10). |
| Broadcasting: provincial role in licensing, broadcasting, and selecting CRTC commissioners (#21). | | Agreed the government should reconsider this proposal, except as it applies to Québec (77,79). | Agreed to entrench inter-government negotiation of agreements on telecommunications regulation (Text #10). |</p>
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<td><strong>Residual power:</strong> exclusive federal power over national or emergency matters. Provinces exercise the remaining residual powers (#22).</td>
<td>Supported by “most”, but “a generally acknowledged uncertainty about the significance and implications of changes to this power” (H15).</td>
<td>Agreed should not change residual power (84).</td>
<td>Agreed not to pursue (Accord, 27).</td>
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<td><strong>Declaratory power:</strong> repeal federal power to declare provincial works are “for the general advantage” of Canada or other province/s (#23).</td>
<td>“Little discussion”, “general lack of understanding about the significance and implications ... The strongest view ... seemed to be in favour of leaving it in the Constitution” (H15).</td>
<td>Agreed to repeal the declaratory power (85).</td>
<td>Agreed to provide that the federal government can make or rescind declarations with the explicit consent of the relevant provincial assembly (Text #9).</td>
</tr>
<tr>
<td><strong>Tourism, forestry, mining, recreation, housing, and municipal/urban affairs:</strong> to be exclusive provincial powers (#24).</td>
<td>“Limited support” (H16). Strong view that there should be wider powers for Québécois (V10-12).</td>
<td>Agreed powers over tourism, forestry, mining, recreation, housing, and municipal/urban affairs should be devolved by bilateral agreement, with agreements enforced by proposal 27 below (74).</td>
<td>Agreed to grant to provinces these six areas as exclusive powers, with equality for territories (Text #11). Did not agree on a process for constraining federal spending in these areas (Accord, 15).</td>
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<td><strong>Legislative delegation:</strong> allow referral of powers between federal and provincial tiers by consent (#25).</td>
<td>“Reaction was largely negative” (H16).</td>
<td>Agreed that referral powers should be entrenched, but expressed some concerns (68).</td>
<td>Agreed “not to pursue” (Accord, 27).</td>
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<td><strong>Rationalize government powers</strong> over drug prosecutions, wildlife conservation and protection, transport of dangerous goods, soil and water conservation, ferries, small craft harbours, financial sector regulation, bankruptcy law, unfair trade practices, and inspection programs (#26).</td>
<td>“Limited discussion … general support for the principle … of little concern” (H17,24).</td>
<td>Agreed that powers over <em>inland fisheries</em> and personal bankruptcy should be concurrent. Otherwise, federal/provincial governments should rationalise government services without resorting to formal constitutional change (66).</td>
<td>Agreed not to pursue altering the division of powers for “personal bankruptcy and insolvency, intellectual property, interjurisdictional immunity, inland fisheries, marriage and divorce, ... appointment of [provincial] judges, ... taxation of federal and provincial governments, ... export of natural resources, notice for changes to ... equalization payments, ... implementation of international treaties” (Accord, 27). No comment on the other nine powers</td>
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| **Federal programs in exclusive provincial jurisdiction:**  
entrench a commitment to not introduce new programs without 7/50 approval, and provide opting out compensation (#27). | “Appeared not to favour particular elements … a general acceptance of a need to retain the power of the federal government to spend money as necessary, there is also a concern that this power not be exercised arbitrarily” (H17,18). | Agreed intergovernment agreements should be entrenched to add certainty and protection (69). Agreed should entrench compensation, but not “blanket restrictions on the use of federal spending power” (81). | Agreed to entrench a process to monitor federal expenditure in areas of exclusive provincial jurisdiction, and compensation for provinces that opt out of national shared-cost programs (Text #31,16). |
| Broad agreement that powers over regional economic development should devolve to Québec (V11). | Agreed that regional development could be devolved to provinces by agreement; Liberal dissent (74). | | Agreed to entrench regional development agreements between federal and provincial or territorial governments (Text #10). |
| | Agreed could devolve powers over family policy and energy development by inter-government agreement (74). | | |

**OTHER PROPOSALS**

Also agreed to:
1. broaden the word Canada to mean “Canada as constituted under the Constitution of Canada” (Text #2);
2. use gender-neutral language in provisions for the governor general and royal assent (Text #6);
3. simplify the expression of provisions for royal assent to bills (Text #6);
4. simplify expression of passage and assent for money bills in provincial legislatures (Text #7);
5. entrench the right to vote in provincial elections (Text #24);
6. capitalise Aboriginal (Text #28);
7. broaden the definition of the Canadian constitution to include “any other amendment to the Constitution of Canada” (Text #34);
8. broaden the definition of references to constitution acts to include “any amendments thereto” (Text #35).
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<td>Did not agree about: “requiring notice for changes to federal legislation respecting Established Programs Financing” (Accord, 27); and processes for negotiating and implementing international treaties and agreements (Accord, 27-28).</td>
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(Sources: federal proposals in Government of Canada 1991; assembly resolutions in Government of Canada 1992; Beaudoin-Dobbie SJC 1992; and first ministers’ resolutions in the Accord Governments of Canada 1992b; and in the final legal text Governments of Canada 1992c)

Notes:
1. Pinpoint citations use the proposal number for the original federal government proposals, page numbers for the assembly reports (with an alphabetical prefix to indicate which report is cited), page numbers for the Beaudoin-Dobbie SJC, subject numbers for the first ministers’ legal text, and page numbers for the first ministers’ Accord.
2. Italics indicate that the proposal was not part of the original federal proposal.
3. This table does not include two amendments proposed as bilateral agreements: recognition of Métis in the *Alberta Act* (Text #23), and entrenchment of language rights for New Brunswick (Text #36).
CONCLUSION

The aim of this thesis was to evaluate whether including constituents directly in negotiating proposals for formal constitutional change at constituent assemblies could improve the rate of formal change in Australia and Canada. Examination of two assemblies – the Australian Constitutional Convention 1998 and the Renewal of Canada Conferences 1992 – showed that they were superior for representation, public interest, and consensus, compared to parliamentarians convening alone. The research also showed that governments were unresponsive to a number of assembly recommendations that subsequently were cited by voters as crucial factors in their decision to vote No during the ratification phase.

In the first chapter, Lutz’ quantitative method was used to establish that the rate of formal constitutional change in Australia and Canada was low, compared to 29 other nations. It was argued that informal constitutional change is no substitute for changing the text of the constitution, because it lacks the force and permanency of formal amendments. Further, heavy reliance on informal constitutional change can produce uncertainty, and a less stable political environment.

Even so, some Australian and Canadian analysts concluded that there was little or no need for formal constitutional change (Sawer, Geoffrey 1973, 213; Russell 1993b, 37; Galligan 1995, 118, 120-132). Galligan and Russell wrote:

There is little need for change in Australia’s constitutional system since governments can do just about all they want to do under existing constitutional arrangements [through judicial interpretation and informal agreements]. … Perhaps more curious is the unreflective reformist mindset that persists in advocating or expecting constitutional reform even though there is not much apparent need for change … progressive elites and federal governments should stop pestering the Australian people with referendum proposals that are unnecessary (Galligan 1995, 118, 132).

It will be no more easy for politicians [in Canada] to break from these practices [of seeking formal constitutional change] than for the intelligentsia to abandon its predilection for constitutional solutions to every national problem (Russell 1993b, 37).

Others concluded that the lack of formal constitutional change was a problem (Sharman 1990; Cook 1994, 23; Watts 1999, 13; Saunders 2000, 4-5). According to Cook, the “Canadian leadership still has the assignment to present Canadians with a proper constitution” (1994, 23). Watts wrote:

Experience in federations elsewhere … indicates that the repeated refusal to resolve basic problems … may accentuate internal grievances and frustrations cumulatively to the point where eventually disintegration may become unavoidable. … [T]he incremental approach is not likely to move sufficiently quickly to meet the urgent concerns … nonconstitutional adjustment cannot provide the … assurance of constitutional safeguards that formal constitutional amendments would (1999, 12-13).
In Australia, 44 proposals for formal constitutional change were put to referenda between 1906 and 1999, and only eight proposals were ratified. Analysis of the literature about why constitutional referenda rarely pass in Australia showed there were no compelling answers to this question, and that relatively little attention was given to the process used to negotiate change. According to Saunders, “In a system of representative government, the existence of such a gap merits inquiry and appropriate remedial action”; the solution is not to do away with public involvement in ratifying constitutional change, but to find better ways for parliaments and electors to work together (2000, 25, 4).

Analysts writing on both sides of the argument about the need for formal constitutional change agreed that Australia and Canada needed to find new ways to debate proposals (Spicer Commission 1991d, 13; Brock 1991; Russell 1991b, 147; Warhurst 1995, 40, 45, 48; Cairns 1997, 51, 61; Resnick 1997, 120; Watts 1999, 15; McKenna 2000, 11; Saunders 2000, 4, 28; Winterton 2001). In the 1990s, the Australian and Canadian federal governments departed from usual practice and convened the 1998 Constitutional Convention and the 1992 Renewal of Canada Conferences. These constituent assemblies (or mini constituent assemblies) debated the merits of proposals for major constitutional reforms.

A review of the literature about the value of constituent assemblies (chapter two) showed that authors disagreed about whether, compared to parliamentarians convening alone to debate formal constitutional change, constituent assemblies were:

- more representative of constituents;
- better able to generate public interest;
- better able to reach consensus; and
- less partisan.

This thesis addressed these four questions. The review also showed that authors disagreed about what the term constituent assembly meant. For this thesis, a constituent assembly is:

- a special-purpose group authorised by government to debate and recommend constitutional change; where
- all delegates are empowered to act as equal participants at the assembly; and
- at least half of the delegates are chosen by constituents, rather than by serving politicians.
The cases selected for this thesis are constituent assemblies, according to that definition, and according to definitions provided by Fafard and Reid (1991, 5-6, 11-17). According to Elster’s definition, however, 34% of the Australian delegates and 63% of the Canadian delegates may not qualify as delegates to an assembly because they were not directly elected to the assembly (2006, 182-183). It is possible that Elster would allow that these are assemblies if governments had a mandate to negotiate formal constitutional change, to choose delegates, and to authorise others to choose delegates on their behalf. I cited two conservative analysts who wrote that the Renewal of Canada Conferences were “mini constituent assemblies” (Russell 1993a, 177), or that they “served almost as mini-constituent assemblies” (Watts 1999, 6).

The Australian and Canadian cases may be mini constituent assemblies, rather than constituent assemblies. They were “mini” in the sense that they convened for a short time, and four of the five Canadian assemblies considered only some of the federal government’s proposals for constitutional reform. They were, nonetheless, landmarks in the evolution of procedures for amending the Australian and Canadian constitutions. For the first time in Canada, and for the first time since Australia drafted its first constitution in 1878-89, parliamentarians, experts, and ‘ordinary citizens’ came together formally as equals to debate constitutional change. Questions about the value of constituent assemblies are relevant to them, and answering those questions may help to find ways for parliamentarians and constituents to work together in future to achieve formal constitutional change.

Authors writing about the value of constituent assemblies rarely wrote what they meant by representativeness, public interest, consensus, and partisanship, so these terms were defined in a testable form, and the way these qualities were measured was explained and justified.

- **Representation:** I reviewed contrasting views about what the word representation means in politics (Pitkin 1967; Phillips 1995; Przeworski 1997; Sawer, Marian 1999), and explained why I measured representativeness using the acting-for conception for constitutional preferences, and the descriptive conception for place of residence, place of birth, aboriginality, age, gender, and formal education.

- **Public interest:** I explained why I chose to measure public interest by comparing specific behaviours, rather than self-reported levels of interest in the constitutional debates. I gave weight to making submissions and attending assembly sessions
because these forms of public participation require more commitment and effort than, say, ringing the Spicer Commission toll-free line.

- **Consensus**: I explored literal and specialist interpretations of the word consensus, and explained why I measured consensus by comparing the extent to which parliamentarians and non-parliamentarians agreed or disagreed.

- **Partisanship**: I explored literal and specialist uses of the word partisan and partisanship, and explained why I measured partisanship by examining how often parliamentarians and non-parliamentarians appeared to change their views on constitutional issues when they were at the assemblies. I also expressed reservations about this method.

The remainder of the thesis examined the two case studies.

The third chapter examined the way federation was achieved in Australia in 1901, the rules for amending the constitution, and the process of formal constitutional change from 1901 to 1999. The discussion of federation showed that public participation was pivotal in achieving federation, through activism, informal conferences in 1893 and 1896 (which kept the subject of federation on the agenda), the elected constituent assembly of 1897-98, and referenda. The rest of the chapter examined the process of formal constitutional change in the twentieth century, with an emphasis on the initiation and negotiation stages. Analysis of 14 ad-hoc inquiries convened by the federal parliament showed that their recommendations were rarely put to referenda, but when they were, proposals recommended by inquiries were twice as likely to pass, compared to recommendations initiated by parliamentarians alone. It also showed that if the success of an inquiry was measured by how many of its recommendations were put to referenda, then the 1998 Constitutional Convention (the constituent assembly) was the clear leader because it recommended that two questions be put to referendum, and both questions were put.

The Australian assembly was described and examined in detail in the fourth chapter. To answer the question about representativeness, formal ballots were analysed, delegates’ constitutional preferences were identified, and demographic indicators were compiled. When these variables were compared to similar data for constituents and the population, analysis showed that the non-parliamentarians were more representative for constitutional preference, place of residence, gender, formal education, aboriginality, and place of birth, while parliamentarians were slightly more representative for age
Dale Kreibig, Changing constitutions through constituent assemblies, 18 July 2007

(women parliamentarians were representative for age). Almost the same proportion of elected delegates and constituents voting at the referendum supported the republic model that was put (44.7% and 45.1% respectively). This is a remarkably good result for representativeness, given the turnout for the assembly election was just 49.6%.

The assembly generated more public interest than did comparable parliamentary inquiries, as evidenced by the number of submissions made. Further, turnout for the referendum was relatively high at 95.1%, and the informal rate was the lowest ever recorded for Australian referenda.

The results for consensus and partisanship were mixed. Preliminary analysis showed that a majority of the parliamentary delegates agreed in the third to eighth ballots to support the model that was put to referendum, and a majority agreed to a republic rather than the status quo, transitional provisions, and a referendum. By contrast, at no time did a majority of the elected delegates support any one constitutional option – their preferences were diverse. A more comprehensive examination of support and dissent showed that it was the non-parliamentarians who were better able to reach consensus, but the results for individual ballots were often very close. For six of the 17 ballot outcomes examined, the consensus scores for parliamentarians, elected delegates, and community representatives varied by no more than 3%.

Further examination of the ballots showed that parliamentarians appeared to be less partisan than non-parliamentarians, in that more of them changed their votes. In this case, the difference margin was distinct: 26% of the parliamentary delegates changed their votes, compared to 16% of the non-parliamentary delegates – a difference of 10%. However, evidence from the debates suggested strongly that Coalition parliamentarians did not vote in accordance with their preferences in the early ballots. Instead, they followed their prime minister’s urgings to support a republic model of some kind, even if they preferred constitutional monarchy or status quo. Analysis of votes for Labor parliamentarians showed 31% of that group changed their votes. The chapter concluded with a discussion of why the Turnbull republic model was put to a referendum when a majority of the delegates did not vote for it in the final ballot.

Canada’s pre-federation history was outlined briefly in the fifth chapter to indicate some of the sources of continuing conflict between Anglophone and Francophone constituents. The federation process was covered briefly too, because there was little public involvement. The fifth chapter was devoted almost entirely to examining the
process of formal constitutional change from 1867 to 1999 with an emphasis on inter-government consultation and consent, because that is a contentious and divisive issue in Canada, especially for Québec. The analysis could not begin without first knowing how many times the constitution had been amended, which was exceedingly difficult to establish. An annotated constitution (Department of Justice Canada 2001) was compared with commentaries written by Gérin-Lajoie (1950), Favreau (1965) and Russell (1988), the differences were reconciled and explained, and it was concluded that the text of the Canadian constitutions 1867 and 1982 was amended 26 times between 1867 and 1999. The rest of the chapter examined the way those 26 amendments were enacted.

Britain amended Canada’s constitution unilaterally in 1893 and 1950, but these amendments were not controversial because they repealed obsolete or spent provisions. The Canadian parliament enacted two amendments in 1965 and 1986 without consulting Britain or the provinces, as it was empowered to do. By contrast, the federal government did not consult the parliament when it enacted an amendment in 1875, and it enacted an amendment in 1997 without the senate’s consent. The record for consulting provinces about amendments was more complex. Setting aside the four uncontroversial amendments just mentioned, the federal government did not seek provincial consent for eight of 22 amendments. Québec did not consent to amendments in 1946, 1949, 1982, and 1984, and when an amendment was enacted for Québec in 1997, Québec’s proclamation said it did not recognise the 1982 constitution because it was enacted without its consent. Québec took the issue of provincial consent to the Supreme Court to challenge the 1982 amendment before it was enacted, but did not succeed. The court ruled that Québec did not demonstrate it had acquired a right of veto over certain amendments, either by informal agreement, or by the principle of duality.

The last section of the fifth chapter described in more detail the procedural aspects of two proposals that did not proceed to enactment in Canada – the Meech Lake Accord 1987-90 and the Charlottetown Accord 1990-92. The Meech Lake Accord lapsed on 22 June 1990 because not all provinces passed enabling legislation. Many commentators concluded that it did not succeed, in part, for want of meaningful public involvement (Brock 1991; Cohen 1991, 270-277; Russell 1993a, 140-145, 156-157; Watts 1993, 9-10; Hurley 1996, 113-114; Cairns 1997, 60). The Charlottetown round was different in some respects. By the time the federal government announced in December 1991 that it
would convene five assemblies to debate its proposals for reform, all but one of the provincial and territorial governments had initiated public hearings about the constitution. The assemblies provided their report to the federal government in February 1992, and the first ministers negotiated the final text of the Accord behind closed doors between March and August 1992. Procedurally, the point of contrast for the two accords is that public consultations for Meech occurred after the first ministers agreed on the Accord, whilst public consultations for Charlottetown were held before the first ministers negotiated their final package. However, neither of the accords was open to amendment in response to public input.

The Canadian assemblies were described and examined in the sixth and last chapter, where three of the four thesis questions were answered. This was relatively difficult to do because very little authoritative information was available, compared to the Australian case. To answer the question of representativeness, demographic and preference data were compared for parliamentary delegates, non-parliamentary delegates, first ministers, the Beaudoin-Dobbie SJC, constituents, and the population, but fewer comparisons could be drawn because data were not available. Even so, there were enough data to conclude that the assemblies were more representative than parliamentarians for constitutional preferences, place of residence, and gender.

The question about public interest was answered for the Australian case by comparing data for submissions and attendance, but this could not be done for Canada because there was no official record of submissions to first ministers’ meetings or the assemblies, attendance figures were available for only two of the five assemblies, and two particularly relevant parliamentary inquiries did not publish attendance figures. It was possible, nevertheless, to estimate attendance for three assemblies, and to show it was exceedingly unlikely that comparable parliamentary inquiries attracted more visitors than did the assemblies.

The last section of chapter six established that the assemblies were better able to reach consensus than were parliamentarians. Unlike the Australian case, there were no formal records of ballots at the assemblies, the first ministers’ meetings, or the Beaudoin-Dobbie SJC, so the question was answered by analysing official texts that described agreements reached by those three groups. A simple statistical analysis of the outcomes showed that the assemblies were better able to reach consensus, but the margin of difference was very small. The assemblies agreed on 89.8% of the subjects
put to them, compared to 89.1% for the Beaudoin-Dobbie SJC, and 84.4% for the first ministers. That conclusion is robust, nevertheless, because special advantages were afforded to the SJC and the first ministers. The SJC made its recommendations by majority agreement, and a majority of its members were parliamentarians who represented the government. The consensus figure for the first ministers was inflated by their agreement to nine uncontroversial amendments that were not put to the assemblies. The question about partisanship was not answered because an official record of delegates’ individual preferences was not created and retained.

Despite the favourable results for the assemblies, and unprecedented public participation in the Australian and Canadian constitutional debates in the 1990s, constituents did not approve the proposals put to them at the polls.

Australia returned to its procedural roots in 1998 when parliamentarians and constituents came together to debate constitutional change, as they had in 1897-98 to debate federation. The founders were more successful at their constituent assembly, but this is not surprising given the advantageous circumstances. In 1998, delegates convened for two weeks without recess, and their agenda was restricted. By contrast, the founders convened for 17 weeks between March 1897 and March 1898, lengthy adjournments allowed for reflection, discussion, negotiations, and feedback from constituents, and the agenda was broad. Much more recently, the parliamentary Australian Constitutional Convention convened for four weeks in six sessions held between 1973 and 1985 (chapter three). If the 1998 assembly had convened for four weeks with adjournments, it may have found a way to blend the Turnbull and Gallop models to provide a stronger role for constituents in choosing their president, and to examine further the question of codifying the president’s powers.

Canada made a quantum leap from negotiating formal constitutional change behind closed doors, using the techniques of executive federalism, to almost full-scale public participation in the 1990s (cf. Cairns 1991a, 17-20, 26). Until the mid-1980s, provincial consultation and consent was the primary concern (see chapter five). Now public consultation and consent was important as well. Governments invited constituents to participate in the constitutional debates, and to deliver their judgment on the first ministers’ accord at a plebiscite in 1992. Delegates to the 1992 Canadian assemblies, like their counterparts in Australia, convened for a relatively short time
without recess (three to six days for each delegate), and for most delegates the agenda was restricted to debating only some of the 28 federal proposals. By contrast, the Canadian founders convened with a broad agenda, they debated federation formally for five weeks at two sessions between 1864 and 1866, and they devoted a further seven weeks to negotiations and drafting in Britain in 1866-87 (chapter five). In 1992, The Beaudoin-Dobbie SJC convened for six months to debate the 28 federal proposals. First ministers reached their agreement on the Charlottetown Accord over a period of about five months.

The timing and quality of public consultations in Australia and Canada may have increased public dissent. Once governments agreed to the Meech Lake Accord and the Charlottetown Accord, constituents were invited to express their opinions at public hearings, but the accords were not open to amendment. Governments proposed senate reforms that were contrary to recommendations made by the assemblies and the Beaudoin-Dobbie SJC, and added new reforms like the 25% commons guarantee for Québec, which had not been broached with the assembly, the SJC, or constituents. In Australia, the federal government put to referendum a republic model that was not supported by a majority of the assembly delegates, and the prime minister took it upon himself to write a new preamble which did not include many important elements recommended by the assembly (chapter four). Moreover, Australian governments of all kinds have a long history of ignoring recommendations made to them by inquiries they appoint to consider formal constitutional change (chapter three).

The two constituent assemblies examined in this thesis demonstrated that parliamentarians and constituents can come together as equals and debate proposals for formal constitutional change constructively. This is one answer to Saunders’ challenge to find ways to forge a closer partnership between parliamentarians and voters (chapter one). The assembly delegates are due praise for achieving superior outcomes for representativeness, public interest, and consensus, but even perfect scores are meaningless if governments are unresponsive.

Questions about the quality of debates at the assemblies and the responsiveness of governments to assembly agreements were not examined in this thesis because these questions did not arise from the literature about constituent assemblies that was reviewed in chapter 2.
Elster and Uhr did write that constituent assemblies were more deliberative, but this was not sufficient to justify a separate question on that topic, even given the logical relationship between consensus, partisanship, and deliberative democracy. The subject is, nevertheless, highly relevant to the broader question of whether constituent assemblies might be a more productive way to achieve formal constitutional change.

The ideal that citizens can productively come together as interested, informed, equals and agree on the rules by which they are governed is not new, and the debate about whether citizens are competent to participate in this way is a perennial one (Kreibig 2000). In brief, Socrates argued that only those who were selected and trained to rule should rule, and a just state was one in which “each of our three classes [workers, military, and guardians] … does its own job and minds its own business” (as cited in Plato 1987 [c. 375BC], 434c). By contrast, Pericles said at about the same time:

> Our constitution is called a democracy because power is in the hands not of a minority but of the whole people … we do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all (as cited in Thucydides 1972 [c. 400 BC], 147).

In 1774, Edmund Burke told his constituents “Your representative owes you, not his industry only, but his judgement; and he betrays you, instead of serving you, if he sacrifices it to your opinion” (1774, 11). Less than 20 years later, Rousseau wrote that freedom is “obedience to a law one prescribes to oneself”, and “the moment a people adopts representatives it is no longer free” (1968 [1792], 65, 143). In 1861, John Stuart Mill concluded, nevertheless, that representative government was the best form of government.

> [I]t is evident that the only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate; that any participation, even in the smallest public function, is useful; that the participation should everywhere be as great as the general degree of improvement of the community will allow; and that nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state. But since all cannot, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of perfect government must be representative (1993 [1861], 234).

One of the best known contemporary works on deliberative democracy is James Fishkin’s *The Voice of the People* (1995), in which he advocated a stronger role for citizens in public decision-making. There is now a wealth of contemporary literature about deliberative democracy, some of which raises doubts about the prospects for modern deliberative democracy. For example, Fishkin wrote that when participants change their views during deliberations, that change may be short-term (1995, 188, 221). Elster warned that public deliberation could cause grandstanding and rhetoric (see
chapter 2), and Gambetta (1998) cautioned against implementing standard deliberative techniques in “‘Claro!’ culture” environments, where individuals tend to have strong opinions, and seek first to win arguments, rather than deliberate with others. Finally, if for most citizens public participation in deliberations is limited to observing their representatives being selected randomly from a structured sample, and witnessing some of the debates, then the outcomes may be quite limited for public interest, knowledge, partisanship, and consensus if citizens then vote at referenda and plebiscites.

On responsiveness, future case studies of constituent assemblies should examine the subject, not only because unresponsive governments can ignore assembly outcomes, but also because different ideas about responsive government are at the heart of disagreements about public participation in general, and the value of constituent assemblies.

The first challenge would be to define what responsiveness means within a system of representative government, and there is a wealth of literature on that topic. Saward wrote that in a democracy, responsiveness is about outcomes rather than the process, and “responsive rule … [requires] a necessary correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts” (1998, 50-52). A call for more public participation in constitutional debates is a call for something more than traditional representative government, but it is not a call to dismantle representative government. Saward defined democracy and responsive rule in terms of thresholds and a continuum, with many points between representative government and direct democracy (1998, esp. 144-154). Proposals for greater public participation in constitutional debates do challenge traditional models of representative government and representative democracy, but they do not demand that representatives as trustees become delegates, to use Riemer’s stereotypes (see page 67). There are many shades of grey between conceptions of representatives acting as delegates, doing their constituents’ bidding, and representatives acting as trustees, serving what they perceive to be constituents’ best interest.

After the Meech Lake Accord lapsed in Canada, Cairns concluded that public participation had to involve more than tallying the preferences of active interest group members because that “does not satisfy the representational requirements of a legitimate process” (1991a, 28-29). After Charlottetown, he concluded that if governments proposed packages that could not be altered, then the public role “lacks substance”
Brock wrote that public consultation and public ratification was now required for major constitutional reforms, and governments needed to be responsive to public input (1993, 32). Politicians needed to consider the strength and nature of “public concerns”, consider the recommendations of inquiries when they negotiate reforms, and justify their proposals normatively and practically.

Leaders must be responsive to public demands but willing to make independent decisions and then to defend those decisions before the public in terms that are meaningful to them. This is a much more challenging form of leadership than one which tabulates preferences and then defends them on that basis while abdicating responsibility for those decisions or the direction of reform (Brock 1993, 32).

For Russell, however, the responsibility for negotiating constitutional change must remain with legislatures, albeit in the hands of a larger, and more representative group of legislators.

If we must indulge in constitutional politics we will have to find a new constitutional process – one that is compatible with the democratic ethos of our times. … [at] the negotiating stage, the First Ministers [sic] Conference will have to be replaced by a forum with a more democratic legitimacy … the best bet, I think, is a conference attended by all-party delegations from the constituent legislative assemblies with the results to be ratified by the legislatures (1991a, 67-68).

In Australia, Winterton argued that the parliament “should honour the [1998] Convention’s resolutions – adopted, after all, by the people’s representatives especially elected for that task – but some refinement, especially to any codified presidential reserve powers, may be essential” (2001, 25). Others continued to argue that negotiating formal constitutional change was necessarily an ‘elite’ process.

Resnick advised those who argued for more public participation to remember “The question is not one of unlimited direct democracy, of non-stop participation by members of society in political affairs” (1990, 261, 258). According to Resnick:

Parliamentary (and legislative) sovereignty has come to mean the right of prime ministers and premiers, with no explicit mandate from their constituents, to undertake fundamental constitutional change. The legitimacy of their actions derives from a Burkean-type notion of the privileged knowledge, judgment, and power that legislators, unlike the mere mortals who elect them, enjoy …

We can aspire to greater participation and democratic practice, but we cannot forfeit other objectives – functioning political authority, an extensive division of labour, a vibrant familial and private sphere – in the process (1990, 94, 262 respectively).

According to Resnick, representative government suits large nation-states, and satisfies the need for governability. Those who advocate greater public participation in public policy debates need to find a balance between democracy as practiced (by the few) in ancient city-states and the liberal form of representative government (Resnick 1990, 37).
Constituents also need to be responsive to governments and their proposals for formal constitutional change. This could include a commitment by constituents to be well informed on the proposals put to them, to consider the preferences of others (including parliamentarians), and to express dissent in a way that encourages constructive debates. According to Russell, however, that would not be enough.

The Canadian people have at this point in the odyssey clearly established their constitutional sovereignty. They are the country’s highest constitutional authority. … But the Canadian people may have become constitutionally sovereign without having constituted themselves as a people. The Canadian people or peoples have not explicitly affirmed a common understanding of the political community they share. They would have done had they endorsed the Charlottetown Accord. … But if for some time they carry on together developing a common constitutional tradition, it will turn out that they are after all the people of Edmund Burke, not John Locke, and that their social contract is essentially organic, not covenantal. Some of us might settle for that (Russell 1993a, 234-235).

I struggle to accept that the No vote in 1992 means that the Canadian people have not “constituted themselves as a people”, any more than I would accept that Australians have not “constituted themselves as a people” because they voted No to a republic and a new preamble in 1999. Perhaps the process was not sufficiently responsive to allow it.

This thesis has argued that proposals for a republic in Australia and the Charlottetown Accord in Canada were not ratified largely because of the content of the proposals, and the way they were negotiated. The constituent assemblies delivered on their promise to be more representative of constituents, their promise to generate more public interest, and their promise to generate a higher level of consensus, but governments were unresponsive to critical recommendations made by the assemblies.

It remains to be seen whether other studies validate and replicate the conclusions reached in this thesis. In the meantime, it is to be hoped that Australia and Canada will not need to wait for a crisis before more is done to close the gap that exists between parliamentarians and constituents when they debate proposals for formal constitutional change. If we do wait, then a crisis can induce “threat based bargaining” in place of constructive deliberation (Elster 1995, 394). Better that responsible and responsive parliamentarians, and responsible and responsive constituents, find peaceful ways to agree on the rules that bind them all, together.
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