

Chapter Eleven

Rigging the Referendum:

How the Rudd Government Slanted the Playing Field for Constitutional Change The Abuse of the *Referendum (Machinery Provisions) Act*

Bridget Mackenzie

On 17 May 2013, the playing field for constitutional change was slanted as Parliament assented to the Gillard Government's proposed amendments to the *Referendum (Machinery Provisions) Act*. While purporting to be simple and minor efficiency tweaks, these amendments allowed a practical application that could upend the integrity, and tradition of fairness, that has characterised the Australia referendum process for more than 100 years. By redefining the allocation of funding and limiting the distribution of information to the Australian public, this legislation paved the way for legitimised exploitation of the proposed referendum for 2013.

The changes

In particular, the passing of the bill made allowance for the Government to adopt a campaign arrangement financially weighted to the YES side of the debate by a factor of 20. By legislating away the restriction on the provision of funding for education, information, and advertising of the referendum question, the Government was empowered to fund the campaign disproportionately in favour of their desired result. And, with a reduced distribution of the YES/NO pamphlet also being assented to, being sent now only to households rather than to each individual voter, there was greater purchase created for the alternative methods the Government could chose to employ - a mighty combination. The people of Australia are central to constitutional matters. Limiting or biasing the information available means a citizenry that is ill-prepared to vote from a well-informed perspective. It effectively disenfranchises the nation.

The possibilities created by the two amendments and the gross delinquency of the process by the Rudd/Gillard governments leading up to the federal election and proposed referendum date, created an exploitative climate. Their preparations prior to the amendments being passed by the Senate and the ensuing referendum bill were characterised by procrastination, poor timing and bald-faced bribery. Was this intentional or simply the function of a government in disarray? Notwithstanding, the abuse of parliamentary process and the resultant abuse of Australian notions of egalitarianism and fairness signal the need for review of the *Referendum (Machinery Provisions) Act* and of the processes for putting a question before the Australian people.

Of the forty-four referenda put to the Australian people, only eight have been successful. Those that have succeeded share the qualities of being nation-building, pragmatic and necessarily a direct reflection of constituent values. Successful referenda

have increased and simplified voter franchise rather than seeking to restrict it. Voters have been engaged with the proposed questions. Our first referendum, in 1906, was very successful; it asked a practically new nation whether elections for the Senate should be held at the same time as the House of Representatives.* At this early stage, having only experienced two federal elections as a nation, Australian voters decided to minimise the number of times voting was required. Questions allowing the Commonwealth to make laws for Indigenous people, granting Territorians a vote in referenda, and proposing to fill Senate vacancies have achieved a positive result, while power grabs by federal governments have been soundly rejected.

The intent and capacity for empowerment, on a grassroots level, of the referenda process, is clearly defined in the original *Referendum (Machinery Provisions) Act*. In the original version of the Act, section 11, subsections (1), (2) and (3) provided that the Electoral Commission must, in the prelude to a referendum, print and post to each elector an impartial pamphlet outlining the arguments to support the Yes and No cases; and conduct the referendum and educate the public on the details of casting a vote. Sub-section 11(4) limits the capacity of the Commonwealth to spend money in relation to a referendum other than on production and delivery of the Yes/No pamphlet. There is demonstrated therein a commitment to the veracity and impartiality of information that is an essential component for informed decision-making on any level. There is a confidence in the Australian citizenry, not simply as a valuable resource, but as the very source of political and constitutional change.

The regulation of our referenda traces a democratic history rich in the development of freedom and franchise for all Australians. It was in 1912 that a particularly ambitious Labor Prime Minister, Andrew Fisher, introduced a legislative reform to the Referendum Act, activating the production and dissemination of the Yes/No pamphlet. This 2000 word document has stood the test of time in putting forward the for and against case for most questions of constitutional change. Through this publicly-funded pamphlet, Prime Minister Fisher imagined “that the case will be put forward from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other.”¹ Fisher saw the necessity of an educated and informed Australian citizenry. If people could comprehend the question at hand, they could cast a genuine vote and, thereby, ensure a genuine result. Putting aside his assumption that questions put forward by Parliament automatically are a reflection of the community’s will, he was convinced of the merits to be gained through public engagement with the question for conducting an effective referendum.

The role of the Yes/No pamphlet is an important aspect of informing the public of the official cases for referendum questions. It is one part of an education campaign that community, Parliament and stakeholders participate in throughout referenda discussions. As Alfred Deakin explained in 1912, the people “should be invited to hear all they can, to read all they can, and to think as much as they can in this regard. The more thoroughly they do that, the better it will be for us and the better for future Parliaments”.²

2013 – the proposed referendum recognition of local government. Unfortunately, the question being put to the Australian people in 2013 was one that they had already rejected twice. It was a political fix rather than a response to any deficiency in the Constitution as it related to our current practice, arising from concerns regarding the financial sustainability of local governments, particularly those in regional areas. One

method of addressing this issue was for the Commonwealth to fund local government directly, currently prohibited under the Constitution. This paper will not examine the merits of the proposal to recognise local governments in the Constitution. Rather, it will focus on the issues of abuse of process through amendments to the Act governing the conduct of referenda, the committee reporting process and the Parliament itself. As an issue, the recognition of local government in the Constitution was to address a political problem for the new minority government, and had strong support from regional independents in the wake of the 2010 election. The Federal Government began, and botched, the process of conducting the referendum, flagrantly ignoring recommendations from their own committees with respect to funding, timing and processes. The Gillard Government's bill proposed two amendments to the Referendum (Machinery Provisions) Act. Firstly, that the Yes/No pamphlet be delivered to each household only. Secondly, that the current limitation on government spending imposed by subsection 11(4) of the Act, be temporarily suspended until 2013 election day.

The amendments were in line with two recommendations put forward in December 2009 in a report by the Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No*. Recommendation 3 of this report, which was not supported by the Coalition, advised that the Yes/No pamphlet be delivered to each household rather than to each individual elector. Recommendation 11, which sought to remove the limitation on spending imposed by subsection 11(4) of the Act, had bi-partisan support. Submitters at the time stated "the restriction on Commonwealth expenditure is a barrier to the development of better and more effective referendum process. They argued that the limitation on expenditure should be lifted to allow advertising, information and education campaigns in addition to the Yes/No pamphlet."³ There is no doubt that since the establishment of the Yes/No pamphlet in 1912, the development of new technologies offers many more opportunities to communicate and engage effectively with the public. However, in the amendments to the Act, as passed in Parliament on 17 May 2013, there was no reference to a stipulation that the equal funding for the Yes/No campaigns that were to be financed by lifting expenditure restrictions until election day, 2013.

The lack of qualifying details surrounding the amendments to the *Referendum (Machinery Provisions) Act* legitimised the options for abuse of the referendum process and, by proxy, the Australian people. The arguments put forward by the Government to justify the new legislation were, however, not supported by the details of a proposal.

In fact, there were no costings, modelling or strategy. The opportunity to scrutinise the vague amendments was curtailed as there was undue haste in passing the bill to ensure all would be in place come election day. There were also delays in communication between the Opposition and the Government which compromised effective debate and clarification of the proposed amendments. Members and Senators were asked to vote on an amendment to allow for education and advertising funds, with no defined details or indication of the Government's intentions. The poor approach to governance was noted by Shadow Special Minister for State, Bronwyn Bishop, during debate in the House of Representatives: "Although the committee in 2009 proposed that any additional expenditure be provided equally for the Yes/No case, there is no provision for that in this amendment."⁴ The bill was dropped at short

notice, on the last day of sitting in the Senate, with only an hour's notice to the Opposition that the Government wanted it passed that day.

Whether by accident or design, the potential for the subversion of democratic intent was invested in the amendments. For a Government failing in the polls, heading to a certain defeat, the support of 562 local councils, their 4500 councillors, and their 145 000 staff through the proposed referendum which, if successful, would allow the Commonwealth to fund local councils directly, was too tempting. The Federal Government allocated \$11 600 000 of public money to support the Yes campaign, while only \$500 000 was allocated to the No campaign despite Members and Senators voting No to the referendum question itself.

The usual practice had been for equal funding if the vote in Parliament on the referendum question itself was not unanimous. The Joint Select Committee on the Constitutional Recognition of Local Government received many submissions on the methodology for funding the Yes/No case. The Australian Local Government Association submission proposed that funding for the Yes/No cases be allocated on the basis of the proportion of parliamentarians who voted for or against the referendum legislation. They reasoned that this would "be an equitable distribution of Commonwealth funding reflecting the will of Parliament",⁵ flying in the face of evidence that on matters of constitutional change the will of the Federal Parliament rarely reflected the will of the Australian people or of the States. It flagrantly debases the core tenet of our Constitution that posits that the will of the Australian citizenry be demonstrated through any referendum process. The proportional funding suggestion was not taken up by the committee. It recommended education in a timely manner, public engagement through a variety of media, and negotiation with the States as the best method to ensure the success of the referendum.

A central precept of democracy is the concept of free and informed debate on issues of importance. In the 2009 report, *A Time for Change*, the democratic intention of the Yes/ No case is encapsulated in their statement: "The Committee considers it important to ensure that the same principles of equality and fairness continue to apply once the limitation on Australian Government expenditure is removed. The Committee therefore supports equal funding of the Yes/No cases, irrespective of their Parliamentary support. This is in line with the original intention of the Yes/No pamphlet as well as consistent with democratic ideals of informed debate."⁶

In 2009, the Rudd Government-controlled committee, reflected the original intent of the Yes/No document. Symptomatic of the Government's malaise was rejection of its own advice. The Government surprised the Parliament with the announced funding arrangements.

Various committees and their subsequent findings and reports marked the progression towards a 2013 referendum. The abuse of process involving committees, federal relations and the Parliament by the Rudd/Gillard governments in the lead up to the proposed referendum is highlighted by an overarching lack of action or engagement with standard procedures. An expert panel, appointed in August 2011, to examine the question of local government recognition in the Constitution delivered the final report to the Gillard Government in December 2011. In November 2012, almost a full year later, the Joint Select Committee on Constitutional Recognition of Local Government was appointed to deliver a preliminary report on the likelihood of success for the 2013 referendum. Their report was handed down only a month later, in January

2013.

It is important to note in the timeline towards failure the Gillard Government-controlled committee was supportive of a 2013 referendum provided that two conditions were met. Firstly, that negotiation between the Federal Government and the States was essential to achieving support for any proposed question. Secondly, that the Government needed “to achieve informed and positive public engagement with the issue.”⁷ Coalition members of the committee expressed concern about the integrity of the public consultation, “highlighted by the excessively rushed process this Committee has agreed to put in place, which includes the perverse outcomes of holding a hearing and the delivery of a preliminary report prior to the closing date for submissions!”⁸ The abuse of process compromising the success of the proposal continued when Prime Minister Gillard, in January 2013, called the election for 13 September 2013.

Two months later the Committee on Constitutional Recognition of Local Government submitted its final report to the Government. On 21 March, with less than six months until the referendum, no public awareness campaign had begun, and many States had signalled their opposition. And yet the Gillard Government ambitiously, against advice, introduced the *Referendum (Machinery Provisions) Amendment Bill*. The evidence was stacked against the success of the referendum question. How would the Government rectify the obvious disadvantage its incompetence had brought to bear?

Ignoring recommendations and observations from their very own committees, the Gillard Government’s chaotic legislative agenda extended from this abuse of the committee process to an abuse of federal relations. Garnering the support of all the States is vital to securing a successful referendum. Negotiations with States and territories had been recommended by committees and expert panels as early as 2011. In their preliminary report of January 2013, the Expert Panel on Constitutional Recognition of Local Government underlined the rudimentary nature of this process stating, “given the importance of securing state and territory support, the Committee further recommends, Commonwealth Government Ministers immediately commence negotiations with state and territory governments to secure their support for the referendum proposal”.⁹ Despite this urgent recommendation in response to the Government’s tardy consultation and federal process, the minister delayed corresponding with the States until three weeks later, straining the success of the referendum even tighter.

This perplexing inattention to sufficient timing also marked the Gillard Government’s referendum preparations on a parliamentary level. Important supporting information was withheld from the parliamentary process, creating a murky and disorganised forum for decision-making. A financial impact statement was not provided. Nor was a detailed proposal to support the bill. And the inexplicit wording of the amendment to “not prevent” the Government from expenditure in “respect of things done” in connection with referendum proposals up to election day, 2013, did not inspire overarching confidence.

Former local government minister, Anthony Albanese, attempted to assure the “conspiracy theorists” that the amendment was a “simple piece of housekeeping”,¹⁰ going on to insinuate that the Government was being generous in its allocation of funding for both cases. “The government has received advice that it was appropriate that we had proportionate funding in accordance to the support in the parliament for

the cases. However, we are going to err on the side of generosity and the government will offer up to half a million dollars to the proponent of the no case to assist it to promote the no case to the community".¹¹

This is immediately problematic on two levels. Firstly, Mr Albanese in his grandiose announcement defined the Parliament as limited to the House of Representatives. Secondly, this plan goes against all the funding advice of the committee, which advocated equal funding for the Yes/No cases irrespective of the proportional parliamentary vote.

Six months earlier the Standing Committee on Legal and Constitutional Affairs acknowledged the tight timing, stating that "*further delays in the development of referendum materials by the AEC could impact the quality of these products which may result in uninformed votes.*"¹² Given that all Australian citizens, whether they be actively interested or wholly uninterested, are required to vote. It is therefore highly desirable to have an informed public casting a considered vote on matters of constitutional change. Central to any referendum is the engagement of the citizenry in the question and the exhibition of public debate around the topic. Concerns that the impending referendum was not addressing an accessibly topical issue were raised by the Victorian Local Governance Association. Regarding the lack of public debate around this question, it observed: "*we think that the only way to secure a successful vote is to have the public understand this issue in a way that is meaningful for them – what is the impact for them directly as ratepayers and citizens? And if that campaign has not commenced then we are concerned about the timing?*"¹³

The ambiguity continued till the end. On 15 May 2013, Senator Jacinta Collins's comments demonstrate the Government had still to decide on a course of action, four months from the proposed date for referendum: "... the amendments contained in this Bill are necessary to keep open **the option** of holding a referendum at the next election" [emphasis added].¹⁴ Coming from behind, against all advice, the only way to win was to stack the deck.

The ultimate casualty in the abuse of processes thus far demonstrated is the principle of democracy, the people of Australia and their representatives. The changes to the Act went against our egalitarian culture and notions of fairness. The changes allowed for disproportionate funding and discretionary spending of extravagant proportions.

There is no doubt of the truth that the people of Australia are sovereign and that Australia is an egalitarian nation built on principles of fairness and franchise. The duty of a government within this proposition is to support and extend this franchise by facilitating what is principled over what is expedient. The amendment to section 11(2), in sending material to the household only, restricts knowledge, whilst section 11(4), which no longer has effect post-election 2013, with its permissively undefined spending power, gives a government too much persuasive sway. Both of the amendments to the *Referendum (Machinery Provisions) Act* which passed the Senate in May 2013, without clarification, have the potential to affect the central position of the Australian citizenry as sole arbiters on how our federation is structured.

By pushing through the amendments to section 11, the Gillard Government was authorised to manipulate the dissemination of knowledge through the Yes/No campaign, and by so doing support their own agenda. Knowledge is inextricably linked to power. The dangers of government controlling the distribution of knowledge

to the public is well-documented throughout history. As Thomas Jefferson said, “If a nation expects to be ignorant and free, in a state of civilisation, it expects what never was and never will be”.¹⁵ It is deeply revealing that the Gillard Government intended to influence the outcome of the referendum through a selective apportioning of knowledge to the general public via their unequal funding system for the Yes/No cases and the reduced distribution of the Yes/No pamphlet.

When the former Government announced its proposed referendum funding, it was widely criticised for its departure from democratic principles. Adjunct Professor J. R. Nethercote of the Australian Catholic University invoked the wisdom of philosopher John Stuart Mill who argued that: “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind”.¹⁶ In questions of constitutional change, it is not up to government to back one side of the debate so disproportionately – in this instance, by a factor of 20. It smacked of “cheating” and the Australian public like nothing more than a fair fight. The Government was rightly criticised. The Australian Government should not silence an argument just because it is unpopular or not in their political interests.

Open and unbiased transmission of knowledge about the choice available is a government’s duty to the population in referenda. Equality of funding is important because money means political influence. Money can buy advertising spots, printing fees, internet addresses and marketing campaigns. While it cannot buy political engagement, it can still have an impact, particularly on those who are less engaged.¹⁷ The rise of the Palmer Party at the recent 2013 federal election is testament to this fact.

The future

It is imperative to ensure that the *Referendum (Machinery Provisions) Act*, specifically section 11, reflects our egalitarian culture and supports a fair go for both sides of an argument. Currently, if a Constitution Amendment Bill is passed unanimously, that is, where no member of Parliament has voted against it, there will not be an official “No” case presented to the public. This occurred in the referendums in 1967 on various matters affecting Aboriginals, and in 1977. The Yes/No argument takes franchise and ownership out of the people’s hands and creates a function of elitist rule. This is not in keeping with our national tenets. Fully understanding the consequences and reasons for and against a change to the Constitution is an issue of great importance and should have full regard for the lives of those it affects. Thus, irrespective of parliamentary representation on the issue, equal funding for both cases should still be provided. The natural conservatism of human nature to “say no when in doubt,” and the subsequent jeopardy to referendum success, must be counteracted by a vigorous and continuing public education campaign.

George Williams and David Hume see the prerequisites of successful referenda being bipartisanship, popular ownership and engagement, a sensible question and reform of the process in conducting referenda.¹⁸ Whilst this question did have bipartisan support, at least at the beginning, the botched timing of process reform, the lack of popular ownership and engagement meant the matter of local government inclusion in the Australian Constitution failed for the third time, not even getting to the vote, despite money being spent and time and political capital being wasted.

In fact, fundamental to the effectiveness of any change to process is the need for

education of the public. It is their will that should be determined at the ballot box. A national civics education proposal that will improve knowledge and understanding of the Australian Constitution *has* bi-partisan support and must result in real action. Research suggests that only 76 percent of voters recognised that Australia has a Constitution. The necessity of co-ordinating an active and informed citizenry, constitutionally engaged, is foundational to genuine systemic improvements. The development of the National Curriculum may provide an opportunity in addition to ensuring it is a core facet of any teacher training program and a long-term plan of adult education.

From this base of political education, dissemination of referendum information to the public gains vitality. At the time of their introduction, the Yes/No pamphlets were innovative and necessary to inform the electorate about the two cases. However, as the commissioning of the report, *Time For Change: Yes or No*, pre-empted, it is time to ask what needs to be done to effect amendments that will preserve the original intent of section 11 of the *Referendum (Machinery Provisions) Act*, promote communication of impartial information to the public, and protect the Australian citizenry from attempts at hegemonic practices.

The preparation of clear, concise Yes/No arguments are an indispensable element of fair referenda. There are a variety of options for delivery of such information to suit the diversity of the public's needs and preferences. New technologies offer media that could be utilised to enhance the franchise and freedom of an electorate when approaching a referendum. The advancement of engagement strategies to incorporate minority groups is especially possible through technological options. The illiterate, the homeless, those with language barriers; all would be passed over by the arrangements for the Yes/No pamphlet, yet all could be reached and informed by an extension of information delivery options.

The need to disseminate information about the conduct and process of the referendum should be in addition to a publicly funded neutral information campaign about the issue itself. Objective information is difficult to define, but a non-partisan body which provided a clear description of both the pros and cons of any referendum question put before the people is an idea worthy of public spending, leaving the persuasive argument for the official YES/NO cases where it is clear that strategy will be to persuade and to convince.

In the face of a 96 percent failure rate¹⁹ of referenda questions, the ALP¹⁹ must grapple with their desire for "progress" against the evidence of success in constitutional change. Parliament must discuss and resolve the issues of YES/NO campaign funding, civics education funding, examining the role of the States in any constitutional change and technological advancement in ways that keep people and States central to decisions, increasing engagement. Rather than rushing recklessly towards "good ideas", ensuring our systems and processes are suitable and effective will mean less waste of taxpayers' dollars. Similarly, repealing section 11(4), thus removing restriction on Federal Government spending, is desirable. In its place there should be a section that requires the development of a strategy and budget for communication, education and costs in conducting any proposed referendum. Holding referenda simultaneously with election campaigns increases the propensity for partisanship in the election environment and subsequent abuse of budget, process and the question itself. Holding referenda separately from elections, whilst more expensive

potentially, avoids the distraction of election debate. This would be beneficial when matters of constitutional change are before the people.

The abuse of the *Referendum (Machinery Provisions) Act* by the Rudd/Gillard governments is conclusive. The ramifications are grave whether it was enacted as an electoral distraction, as a result of minority government negotiations, as a strategy to garner support of local councillors and press, or whether it was simply the product of a government in disarray. This abuse was directly enabled by the amendments to the Referendum (Machinery Provisions) Act assented to on 17 May 2013. In seeking to secure indiscriminate and unregulated funding for the referendum, the Government was implicated in attempts to manipulate parliamentary numbers, and implement stronger, targeted, persuasive messaging for the Australian people. That the local government referendum died before the 7 September 2013 election was not because Parliament stood up, but because entrenched provisions in the Constitution stood in the way.

Over the course of our history constitutional change has been met with resistance. Our people are canny, suspicious of power, and know their own minds. They remain true to the spirit of our Constitution, even if at times parliamentarians do not. Amendments are required to the Act to keep the referendum process relevant to, and effective in, this advanced technological age whilst retaining the original intent of a fair fight in referendum votes. By combining a commitment to amending the Referendum (Machinery Provisions) Act and a long-term bi-partisan commitment to civics education, the principles of freedom and the sovereignty of the Australian people will be preserved.

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