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ACHIEVING FAIRNESS IN THE ALLOCATION OF PUBLIC FUNDING IN REFERENDUM CAMPAIGNS

Abstract

In 2013 the Gillard Government caused controversy when, in the lead-up to its planned referendum on local government recognition, it allocated 95 per cent of available promotional funding to the Yes campaign. This occurrence affirms that funding allocation is emerging as a contentious area in Australian referendum practice, and there are signs that disagreements about funding could have an impact on the proposed referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. This article argues that the existing regulation of federal referendum expenditure is inadequate and a more principled and long-term approach is required. It evaluates the merits of three different approaches to funding allocation: *equal funding*, which sees funding shares divided equally between the Yes and No campaigns; *proportionate funding*, by which available money is allocated in proportion to parliamentary support; and *discretionary funding*, whereby promotional funds are apportioned at the discretion of the federal government. The article argues that legislation should be passed to establish a sustainable approach to funding allocation that advances, as much as possible, the objective of fairness in referendum campaigns. To this end it identifies and evaluates several reform options that, although imperfect, are preferable to the status quo.

I Introduction

In 2013 the federal Labor Government proposed, and then abandoned, a referendum on the constitutional recognition of local government.[1] That proposal is largely forgotten now and it seems unlikely that the issue will be revisited in

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1 For a detailed analysis of the constitutional issues raised by recent proposals for local government recognition see Anne Twomey, 'Always the Bridesmaid — Constitutional Recognition of Local Government' (2012) 38(2) *Monash University Law Review* 142; on the events leading up to the abandonment of the referendum, see A J Brown and Paul Kildea, 'The Referendum That Wasn't: Constitutional Recognition of Local Government and the Australian Federal Reform Dilemma' (2016) 44 *Federal Law Review* 143.

the near future.[2] However, the events leading up to the shelving of the 2013 poll are of enduring interest for the spotlight they placed on the regulation of federal expenditure in Australian referendum campaigns. In a controversial move, the Gillard Government secured Parliament's agreement to a suspension of statutory limits on referendum expenditure,[3] and then used its newly acquired spending freedom to grant a massive financial advantage to the Yes campaign. Of the $10.5 million the government set aside to fund partisan campaigns, it allocated $10 million (or 95 per cent) to the Australian Local Government Association (ALGA), and just $500 000 to opponents of local government recognition.[4] These funding shares were in line with the proportion of votes cast for and against the proposed constitutional amendment in Parliament.[5] The Opposition accused the government of putting the 'fairness' of the referendum at risk by 'trying to buy the result',[6] and of 'skew[ing] public information'.[7] The fallout ultimately proved damaging to the fragile bipartisanship that had formed around the referendum proposal.[8]

The events of 2013 affirm that funding allocation is emerging as a contentious area in Australian referendum practice. They mark the second consecutive occasion on which Parliament has moved to override legal limits on referendum spending; it did the same in the lead-up to the 1999 republic referendum, freeing the Howard Government to allocate promotional monies (in equal shares) to Yes and No

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2 Soon after its election in 2013, the Abbott Government ruled out pursuing a referendum on the issue, and the Turnbull Government has done nothing to revive the idea: Phillip Hudson, 'Abbott Government Kills off Local Government Referendum', *Herald Sun* (online), 31 October 2013 <http://www.heraldsun.com.au/news/abbott-government-kills-off-local-government-referendum/story-fni0fiyv-1226750784515>.

3 *Referendum (Machinery Provisions) Amendment Act 2013* (Cth).

4 Anthony Albanese, 'Funding Provided to Promote Public Debate about Constitutional Change' (Media Release, 17 June 2013).

5 Ibid. The House of Representatives and the Senate approved the Constitution Alteration (Local Government) 2013 by margins of 134–2 and 46–8, respectively.

6 Christian Kerr, 'Bid to "Buy" Referendum Result', *The Australian* (online), 18 June 2013 <http://www.theaustralian.com.au/national-affairs/bid-to-buy-referendum-result/story-fn59niix-1226665281814>.

7 Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3424 (David Bushby). See also Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3359–60 (George Brandis).

8 On 2 July 2013, Tony Abbott denounced the referendum process as undemocratic and encouraged Australians to vote against the proposal if they did not understand it. While not a formal withdrawal of support, this effectively ended any spirit of bipartisanship: Judith Ireland, 'Coalition Delivers Blow to Local Government Referendum's "Yes" Campaign', *The Sydney Morning Herald* (online), 2 July 2013 <http://www.smh.com.au/federal-politics/political-news/coalition-delivers-blow-to-local-government-referendums-yes-campaign-20130702-2p8we.html>.

campaign committees.[9] In each case the effect of Parliament's actions was to leave decisions about funding shares entirely in the hands of the federal government that had initiated the referendum. While a virtue of this 'ad hoc' approach is flexibility, its vice is that it leaves a critical aspect of the referendum campaign to be determined in the absence of agreed standards.

The shortcomings of this are apparent when we consider the proposed referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples, which could take place as early as May 2017.[10] Should the sponsoring government make promotional funding available, the apportionment of that money between the Yes and No campaigns is likely to be a matter of debate. Already, leading Indigenous commentator Marcia Langton has argued that the referendum 'will almost certainly fail' if public funding is made available to the No case.[11] The Australian Monarchist League, meanwhile, has said that both sides should receive equal funding.[12] This is not a trivial disagreement and it underscores the need for a principled approach to funding allocation to be developed well in advance of polling day. To delay doing so risks the possibility of controversy over Commonwealth spending flaring up during the campaign, just as it did in 2013, and damaging the legitimacy of the process. Debates about funding allocation could also prove divisive in connection with the proposed plebiscite on same-sex marriage.

This article argues that a principled and long-term regulatory approach to funding allocation is needed. It evaluates the merits of three different approaches to funding allocation: *equal funding*, which sees funding shares divided equally between the Yes and No campaigns; *proportionate funding*, by which available money is allocated in proportion to parliamentary support; and *discretionary funding*, whereby promotional funds are apportioned at the discretion of the federal government. Each model is assessed with respect to its capacity to advance fairness in referendum campaigns. The article acknowledges that any attempt to develop a sustainable approach to funding allocation must confront a variety of design challenges, and it is probably impossible to fashion a 'perfect' set of legislative rules that meets

9 The Howard Government allocated $7.5 million each to the two campaign committees; it also used its spending freedom to establish a $4.5 million neutral public education campaign: Daryl Williams and Chris Ellison, 'Committees for the Advertising for the Referendum on the Republic' (Joint News Release, 19 February 1999).

10 Michael Gordon and Fergus Hunter, 'Recognition Next Year "Achievable": Turnbull', *The Sydney Morning Herald* (online), 10 February 2016 <http://www.smh.com.au/federal-politics/political-news/recognition-next-year-achievable-turnbull-20160210-gmqrra.html>.

11 Meredith Booth, '"No" Case Funding "Would Kill Indigenous Vote": Marcia Langton', *The Australian,* 3 June 2015, quoting Marcia Langton, 'Freedom Songs: The Unfinished Business of the 1967 Referendum' (Speech delivered at the Lowitja O'Donoghue Oration of the Don Dunstan Foundation, University of Adelaide, 2 June 2015) <http://www.dunstan.org.au/resources/recordings/>.

12 Australian Monarchist League, Submission No 104 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, 31 January 2015, 3.

all of these. Nonetheless, even an imperfect regulatory regime, devised following careful parliamentary consideration of the complex issues involved, is preferable to the status quo.

This article continues in Part II with an overview of the legislative framework that governs Commonwealth funding of referendum advocacy, followed by an analysis of its shortcomings and recent calls for reform. Part III considers the meaning of fairness in the context of referendum finance, and suggests that it can be broken down into the values of equal opportunity, deliberation and administrative neutrality. Part IV examines the merits of the three models of funding allocation and assesses the extent to which they promote fairness. In Part V, the article gives an overall assessment of the three models, before identifying and evaluating several reforms that could help provide a principled, long-term approach to funding allocation.

II Referendum Finance in Australia: The Legal Framework

A *Scope and Rationale*

Across the globe, a range of approaches is taken to the regulation of money in referendum campaigns. Some jurisdictions place little or no legal limits on campaign finance, while others employ a variety of regulatory tools including disclosure obligations, expenditure caps, rules about media access and the provision of public funding.[13] A key objective behind much of the regulation is the creation of a 'level playing field', by minimising the advantage that wealthier groups might enjoy due to a greater ability to raise and spend money.[14] This is not to say that money will necessarily determine the outcome of a referendum — one can point to instances where one side had a large financial advantage and lost[15] — although research on ballot initiatives in the United States indicates that a group is more likely to win if it significantly outspends its opponents.[16]

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13 For an overview, see International IDEA, *Direct Democracy: The International IDEA Handbook* (2008) 147–8.

14 Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 222; International IDEA, above n 13, 152.

15 In Canada, for example, supporters of the Charlottetown Accord were defeated at a 1992 referendum despite spending $11.25 million compared to their opponents' $883 000: Richard Johnston, 'Regulating Campaign Finance in Canadian Referendums and Initiatives' in Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009) 23, 27.

16 Thomas Stratmann, 'Campaign Spending and Ballot Measures' in Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009) 9, 16–17.

Australia takes a mostly 'laissez faire' approach to the regulation of referendum finance.[17] There are no spending caps or media access rules, and campaign groups are not required to disclose the sources or amounts of their funding. This 'light touch' approach to regulation might be explained by the fact that referendums in Australia have not historically been the site of substantial expenditure.[18] The primary piece of campaign material has long been the official pamphlet, which is funded by the federal government, and other campaigning has traditionally been limited to newspaper advertisements and public meetings.[19] Further, commercial interests have not played a major role in campaigns, perhaps because most proposals for constitutional amendment are technical in nature and are directed at reallocating political power rather than disturbing existing social and economic interests.[20]

In an otherwise loose regulatory regime, legislation places strict limits on Commonwealth expenditure on referendum advocacy.[21] Section 11(4) of the *Referendum (Machinery Provisions) Act 1984* (Cth) provides that the Commonwealth 'shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law' unless that spending is in relation to:

- the preparation, printing and distribution of the official Yes/No information pamphlet, its translation into other languages and its adaptation for the visually impaired.[22] This pamphlet sets out arguments for and against the proposed constitutional amendment, as authorised by members of Parliament, and includes a statement showing the relevant textual changes;[23]

17 Compare Orr and Tham, who use the same term to describe Australia's approach to political finance regulation generally: Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 239; Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) 23–4.

18 Contrast the United States, where enormous resources are spent on campaigns promoting and opposing ballot initiatives: Daniel A Smith, 'US States' in Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009) 39, 44–6.

19 Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1, 16–17.

20 Ibid 16.

21 Note that, outside of such spending, referendums make large demands on the public purse. Some of the most costly activities include the administration of the ballot and the running of advertisements to raise awareness of the referendum. In 1999, for instance, the Australian Electoral Commission (AEC) spent approximately $33 million on the administration of the republic referendum and $7 million on advertising. In 2013, the government allocated $44 million to the AEC to run the poll on local government recognition. See George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 87; Commonwealth, *Budget Measures 2013–14 — Part 2: Expense Measures* (2013) 246 <http://www.budget.gov.au/2013-14/content/bp2/download/BP2_consolidated.pdf>.

22 *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(4)(a)–(ac).

23 Ibid s 11(1).

- the 'provision by the Electoral Commission of other information relating to, or relating to the effect of, the proposed law';[24] or

- the salaries and allowances of MPs, their staff and public servants.[25]

These spending restrictions were introduced in 1984 with the objective of ensuring even-handedness in federal referendum spending. The catalyst for these reforms was an announcement by the Hawke Government in late 1983 that it was going to spend $1.25 million exclusively on the promotion of five proposals it intended to put to a referendum. Non-government MPs viewed this as an unjustified departure from the longstanding practice in which governments had limited their advocacy spending to the official pamphlet and had sought to persuade voters through other means that did not require the expenditure of public funds.[26] While Hawke's referendum was later abandoned, disquiet among these MPs persisted and in 1984 they sought to impose expenditure limits by introducing amendments to a government Bill covering general matters of referendum administration.[27] After initial resistance, the government supported the amendments, now enshrined in s 11(4).

The parliamentary debates of the time reveal striking parallels with the sentiments and language of the more recent conflict over funding in 2013. Opposition MPs complained that Hawke's extra funding was 'unfair',[28] 'unprincipled'[29] and an 'unprecedented misuse of public funds.'[30] Australian Democrat Senator Michael Macklin, who introduced the measure in the Senate, stressed the importance of spending limits to ensure that voters were provided with fair and balanced information.[31] Liberal MP Steele Hall, another protagonist in the debate, spoke of the need for legislation to restrain governments from intervening in referendum campaigns

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24 Ibid s 11(4)(b).

25 Ibid s 11(4)(c).

26 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3312 (Shirley Walters).

27 Referendum (Machinery Provisions) Bill 1984 (Cth).

28 Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3325 (Michael Townley).

29 Ibid 3320 (Noel Crichton-Browne).

30 Ibid 3323 (Brian Harradine).

31 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2763 (Michael Macklin). See also comments by Philip Ruddock ('there is a democratic right to be able to hear the arguments unhindered by an enormous amount of public moneys being advanced in relation to only one side of the case') and Senator Noel Crichton-Browne (equal funding as ensuring 'full knowledge of all the facts' and 'objective judgments' by voters): see respectively, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1984, 2362; Senate, 6 December 1983, 3320.

in a partisan fashion. For Hall, '[t]he morality of the situation [wa]s quite clear: A government going to the public in a referendum must be even-handed.'[32]

B *Shortcomings and Vulnerability*

Section 11(4) ensures that the federal government will be neutral when it comes to expenditure on referendum arguments. Its means of achieving neutrality, however, suffers from three shortcomings. These shortcomings have made s 11(4) vulnerable to override despite its legislative status, and with the risk of override comes the prospect of the Commonwealth having absolute discretion as to how it allocates promotional funding.

First, s 11(4) prevents the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, even if it wishes to do so in an even-handed manner.[33] It also prohibits federal governments from funding Yes and No committees to undertake their own advertising and other campaigning. This restriction seems particularly tough in a modern campaign environment that relies so heavily on television advertising. In 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs ('House Standing Committee') expressed the view that s 11(4) 'severely restricts the way in which the Government can engage with electors on issues of constitutional change'.[34] The Committee concluded that the existing expenditure limits were too strict and recommended that they be lifted.[35]

Second, s 11(4) presents a barrier to government spending on education campaigns. While the provision concerns spending on the presentation of arguments, educational spending is capable of being brought within its scope due to the fact that the distinction between argument and neutral information is often difficult to identify. This was confirmed in *Reith v Morling*, a case in which Liberal MP and Shadow Attorney-General Peter Reith successfully sought an injunction restraining Commonwealth spending on two advertisements produced by the Attorney-General's Department

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32 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1984, 2344.

33 Surprisingly, this aspect of s 11(4) provoked little comment from parliamentarians when they debated the legislation. Exceptionally, see contributions by Gareth Evans ('[m]ost people now look to television for information about what is going on') and Michael Macklin, who suggested that television might be used for the promotion of the Yes and No cases: see respectively, Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2764; 7 December 1983, 3370.

34 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No? — Inquiry into the Machinery of Referendums* (2009) 64, recommendation 11. See also Williams and Hume, above n 21, 260–1; Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010) 35 *Alternative Law Journal* 22, 24.

35 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, recommendation 11.

in connection with the 1988 referendum.[36] One advertisement mentioned that the referendum proposals had emerged from a consultative Constitutional Commission process 'representing a cross-section of Australians'; the other drew a comparison between the referendum and the federal Parliament 'outgrow[ing] its old home' and moving to a 'magnificent new Parliament House'.[37]

Justice Dawson, sitting alone, acknowledged that making a judgment on such an issue was 'to some extent, a matter of impression', but ultimately ruled that the advertisements went beyond the raising of public awareness and engaged in promotion of the arguments in favour of the referendum proposals.[38] This 'strict'[39] interpretation of s 11(4) creates considerable uncertainty for federal governments wishing to spend money on public education campaigns. Indeed, this uncertainty directly influenced the Howard Government's decision to seek the suspension of s 11(4) in 1999: it feared that expenditure on educational material would amount to a 'technical breach' of the Act.[40] The *Reith* decision also signals to the AEC that its own educational initiatives — which are the subject of federal expenditure under s 11(4)(b) — will be vulnerable to challenge should they stray beyond promoting awareness about the fact of the referendum and the method of voting.[41]

Third, s 11(4) is selective in its application. The spending limits apply only to the Commonwealth; there are no equivalent restrictions on expenditure by state and territory governments, political parties, interest groups or individuals. These entities remain free to spend as much money as they like promoting or opposing federal government proposals for constitutional change. This asymmetry is most significant with respect to state governments, which have on occasion been willing to fund campaigns opposing referendum proposals.[42] An argument can be mounted that states should be allowed to spend freely in referendum campaigns, as only the Commonwealth can initiate amendments to the *Constitution* and state governments need to be able to defend themselves against referendum proposals that centralise power. On the other hand, it might be said that s 11(4) impedes the ability of the Commonwealth to persuade the public about changes it considers to be in the national interest, by leaving it exposed to well-funded opposition campaigns conducted by the states. This raises questions about the fairness of current spending regulations, which are taken up later in this article.

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36 (1988) 83 ALR 667 ('*Reith*').

37 Ibid 670.

38 Ibid 672.

39 Williams and Hume, above n 21, 66.

40 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 March 1999, 3762 (Daryl Williams).

41 Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *Public Law Review* 117, 123, 127–8.

42 State-funded campaigns are discussed in Part IV. See generally, Williams and Hume, above n 21, 160–1, 175.

In hindsight, these three shortcomings rendered the expenditure limitations in s 11(4) unsustainable. It was only a matter of time before they were challenged by a federal government seeking greater spending freedom during a referendum campaign. It is in this context that we should view the decisions of the Howard and Gillard Governments to evade the constraints imposed by s 11(4). In both instances, the government sponsoring the referendum wanted more capacity than the law allowed to utilise mass media for the presentation of arguments, and to run genuine public education initiatives.[43] Putting aside the recent controversy over funding allocation, the actions of the Howard and Gillard Governments affirm how unsuited s 11(4) is to the contemporary campaign context.

It seems unlikely that the terms of s 11(4) will be revisited anytime soon, despite the recommendation of the House Standing Committee. The federal government, in its response to the Committee's report, said that it would instead consider changes to referendum machinery (including funding arrangements) 'on a case by case basis'.[44] However, whether the government retains the status quo, or undertakes reform by lifting the existing expenditure restrictions, the issue of funding allocation remains to be confronted. If governments are left to suspend spending limits on an ad hoc basis, we will intermittently be faced with the question of whether promotional funding should be distributed equally between the Yes and No campaigns. As the events of 2013 show, any legal obligation to neutrality falls away once s 11(4) is suspended and the government has absolute discretion as to how much financial support it gives to each campaign. Alternatively, if the Parliament decides to permanently lift the spending limits in s 11(4), as recommended by the House Standing Committee, the question naturally arises as to how much discretion the government should have in allocating promotional funding between supporters and opponents of constitutional change. Should the government be required to apportion funds equally, in proportion to parliamentary support, or should it have complete freedom in how it spends promotional money?

The remainder of this article seeks to develop a principled approach to this question. It does so by assessing the degree to which these different approaches to funding allocation help to advance the value of fairness. Undertaking such an analysis is particularly important when we consider that, in Australia's mostly 'laissez faire' regulatory environment, the allocation of public funding is one of the few regulatory tools available for promoting fairness. Before commencing this analysis it is necessary to say more about what the idea of 'fairness' means in the context of referendum expenditure.

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43 In addition to its promotional spending, the Gillard Government used its spending freedom to allocate $11.6 million to the Department of Regional Australia, Local Government, Arts and Sport to run a civics education campaign: Commonwealth, *Budget Measures 2013–14 — Part 2: Expense Measures* (14 May 2013) 246 <http://www.budget.gov.au/2013-14/content/bp2/download/BP2_consolidated.pdf>.

44 Australian Government, *Australian Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report: A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (2012) 3.

III Fairness and Referendum Expenditure

One of the challenges in assessing the fairness of different approaches to referendum expenditure is that the very idea of fairness is difficult to define and can take on different meanings depending on the context.[45] On the other hand, it is imprecise and generally unhelpful for an author to make an argument for or against a certain position by simply stating that it is more or less 'fair'. With this in mind, I have broken down the concept of fairness into three distinct, if overlapping, values: equal opportunity, deliberation and administrative neutrality. The choice of these three particular values is informed both by the literature on campaign finance,[46] and by a close analysis of parliamentary and public debates in which the 'fairness' of public funding is discussed.

In taking this approach, I do not pretend to set down a comprehensive notion of fairness that can be applied to all policy debates. Nor should this approach be seen as precluding reference to other considerations — such as federalism — that are relevant to any debate about the allocation of referendum funding. The purpose of my approach is to provide a useful and transparent framework for organising my analysis of the different models of referendum funding.

Turning to the first of the three values, the notion of equal opportunity captures the ideal that both supporters and opponents of constitutional change have a roughly equal chance to make their case to voters. They should each have an effective opportunity to participate in the referendum process, and to attempt to influence those casting a vote.[47] An important element of this is that both sides enjoy fair access to the public arena so that they can make their case to voters.[48] Where one side is denied fair access of this kind, the chances of a 'fair rivalry'[49] between Yes and No campaigns is diminished. The allocation of advocacy funding obviously has the potential to promote or undermine the achievement of equal opportunity. To the extent that one side of a referendum debate enjoys superior campaign resources, it has a larger capacity to access the public arena through television advertising and other means. In relative terms, the ability of the wealthier campaign group to influence voters' preferences is greater, and the competitiveness of the referendum is weakened.

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45 International IDEA, above n 13, 145.

46 See, eg, Andrew Geddis, 'Three Conceptions of the Electoral Moment' (2003) 28 *Australian Journal of Legal Philosophy* 53; Tham, above n 17; Orr, *The Law of Politics*, above n 17.

47 Geddis, above n 46, 67.

48 Here I draw on Tham's discussion of fairness in the context of political finance regulation: Tham, above n 17, 9.

49 Adopting Keith Ewing's term to describe the promotion of fair competition between political parties in the context of elections: Keith Ewing, *The Funding of Political Parties in Britain* (Cambridge University Press, 1987) 182, cited in Tham, above n 17, 12.

The second value, deliberation, is closely related to equal opportunity. Where opposing campaign groups have fair access to the public arena, public debate and the free exchange of ideas are likely to be fostered.[50] Voters will be able to access a variety of information, weigh up competing arguments, and make considered choices at the ballot box. On the other hand, where one side enjoys a substantial financial advantage over the other, the information environment may become distorted and weaken the quality of public deliberation. Tony Abbott captured the essence of the deliberative ideal in a letter to Julia Gillard in 2013 when he said that proposals for constitutional change should succeed on the strength of a fair and well-argued case, not the weight of advertising, and that '[a]rgument, not money, should determine the outcome'.[51] The fear being expressed here is that, where one side enjoys a financial advantage over the other, voters will be overexposed to arguments from one side of the issue and their ability to form reasoned judgments will be diminished.[52]

The third value, administrative neutrality, is also tightly connected to equal opportunity. It refers to the notion that elections and referendums should be administered in an impartial manner. Elements of administrative neutrality include the conduct and oversight of elections by independent electoral management bodies, and the locating of polling booths in politically neutral venues.[53] Most importantly for this article, it also encompasses neutrality in government spending — that is, the notion that '[t]here should be protections against the inappropriate use of the resources of the state for political benefit.'[54] This idea informs the Australian government's guidelines on information and advertising campaigns, which provide that campaign materials 'should be presented in an objective, fair and accessible manner' and 'should be objective and not directed at promoting party political interests'.[55] Applied to the specific context of referendum campaigns, a government would be seen as violating the principle of administrative neutrality where it used public funds in a one-sided way to help bring about its favoured outcome.

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50 Tham, above n 17, 11. On deliberation generally see Simone Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307.

51 Kerr, above n 6.

52 Of course, ensuring fair access to the public arena will not guarantee a high standard of public discourse — campaigners may make misleading arguments, and the adversarial, 'high stakes' nature of referendums may present a barrier to reasoned debate more generally. On the relationship between referendums and deliberation see Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendehlson and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan, 2001) 231.

53 Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy* (2009), 21 [2.10].

54 Ibid.

55 Department of Finance, *Guidelines on Information and Advertising Campaigns by Non-corporate Commonwealth Entities* (1 February 2015), 6–7, principles 2–3. On government advertising and its regulation see Tham, above n 17, ch 6.

Having broken down the concept of fairness into three more specific values, we are now in a position to appraise the three different models of funding allocation: equal, proportionate and discretionary.

IV Allocating Promotional Funding: Three Models

A *Equal Funding*

In many ways, equal funding seems the obvious means of achieving a fair division of referendum campaign resources. It advances all three of the values set out above. It helps to secure equal opportunity by giving each campaign group the same amount of federal resources to access the public arena and make their case to voters. This even share of federal funds fosters deliberation by ensuring that voters will be exposed to arguments from both sides, thus aiding an informed choice at the ballot box. And, as the Commonwealth refrains from giving a financial advantage to one side over the other, administrative neutrality is maintained.

For more or less the same reasons, the adoption of a neutral position on the allocation of public funding is considered to be an element of good referendum practice in many overseas jurisdictions. The Venice Commission, an advisory body to the Council of Europe on constitutional matters, has developed a *Code of Good Practice on Referendums* in which it endorses 'a neutral attitude by administrative authorities' towards public funding of campaigns.[56] The Commission regards this as necessary to achieving 'equality of opportunity' for the supporters and opponents of reform proposals.[57]

In the United Kingdom, there exist a number of regulatory measures which aim to achieve 'parity of arms' between campaign groups at referendums.[58] Legislation mandates the equal allocation of public funding between the Yes and No sides: it is a statutory requirement that identical grants of up to £600 000 be given to the two 'designated organisations' that act as the umbrella groups arguing for and against a reform proposal.[59] A spending cap of £5 million also applies to these organisations. The legislation contemplates that, aside from the two umbrella groups, other entities (such as political parties, trade unions, corporations and interest groups) may also participate in the campaign. These organisations must register as permitted participants if they wish to spend above £10 000, and face a limit on how much

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56 European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice on Referendums*, adopted 16–17 March 2007, 2.2(a).

57 Ibid.

58 For an overview of the UK regulatory regime see Keith D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election Law Journal* 499, 514–19; Navraj Singh Ghaleigh, 'Sledgehammer and Nuts? Regulating Referendums in the UK' in Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009) 180, 189.

59 *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 110.

referendum expenditure they may incur.[60] A separate measure prohibits the publication of promotional material by the central or local governments; this encompasses material providing general information about the referendum, or putting arguments for or against a proposal.[61]

In Ireland, following a decision of the Supreme Court in *McKenna v An Taoiseach [No 2]*,[62] the government is prevented from spending public money to support one side of a referendum campaign. In that case, Green Party MEP Patrick McKenna successfully challenged the government's spending of £500 000 to promote a Yes vote in the divorce referendum. The Court ruled that the use of public funds to promote a particular result breached the Irish Constitution.[63] A constitutional amendment would now be necessary for the Irish government to allocate unequal shares of funds to campaign groups.

The House Standing Committee, in considering reforms to referendum expenditure regulation in Australia, endorsed an approach in line with these international practices. It recommended that, should existing expenditure limits be removed, s 11(4) be amended 'to include provisions to ensure that spending is directed … to equal promotion of the Yes/No arguments'.[64] In the Committee's view, this would help to achieve 'equality and fairness' and would be 'consistent with democratic ideals of informed debate'.[65] Subsequent to this inquiry, Williams and Hume expressed a similar view, stating that a requirement for equal funding of Yes and No cases should be seen as a 'quid pro quo' for the lifting of existing restrictions on Commonwealth spending.[66]

Of course, the fact that numerous overseas jurisdictions favour a neutral approach by governments to the allocation of public funding does not mean that it is the best approach for Australia, or that it carries no downsides. A strict commitment to equal funding can be criticised for being rigid, and thus insensitive to contextual factors affecting particular referendum campaigns. For instance, parity in public funding may seem incongruous where a proposal enjoys widespread community backing and the case against is supported by only a marginal few. The 1967 Aboriginals proposal arguably falls into this category.[67] Similar issues could arise with respect to narrow,

60 Ibid ss 117–18, sch 14.

61 Ibid s 125.

62 [1995] 2 IR 10.

63 Ibid 42 (Hamilton CJ), 43 (O'Flaherty J), 50 (Blayney J), 53 (Denham J). See also discussion in Karin Gilland Lutz, 'Referendums and Spending in Ireland' in Karin Gilland Lutz and Simon Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009) 116, 122–5.

64 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, 65, recommendation 11.

65 Ibid 66 [5.53].

66 Williams and Hume, above n 21, 261.

67 This was a proposal to amend the race power in s 51(xxvi), to enable the Commonwealth to legislate with respect to Aboriginal peoples, and to repeal s 127, which prevented 'aboriginal natives' from being counted in reckoning Australia's population.

mechanical alterations to the constitutional text. In such cases, some may ask, 'is it really *fair* that opponents of this change get equal funding?' There would be particular uncertainty in situations where parliamentary approval of the referendum Bill was unanimous — with no MPs lined up on the 'No' side, it would be unclear who the recipient of the available promotional funds should be. Further, an equal funding requirement leaves no capacity for federal governments to give extra resources to Yes campaigns in the event of significant oppositional spending by third parties.

The case for the equal allocation of promotional funds is nonetheless a strong one. It is built on sound conceptual foundations, is consistent with international practice and has been endorsed by leading scholars and a recent parliamentary inquiry.

B *Proportionate Funding*

Under a proportionate approach, the funding shares allocated to Yes and No campaigns will vary from referendum to referendum, in line with the level of support that the proposed amendment receives in Parliament. Given that a proposal can only proceed to a referendum if a majority of parliamentarians supports it,[68] the Yes campaign will always receive more promotional funds than its opponents.

Despite the controversy that this approach generated in 2013, it was not the first time that it had been advocated by an Australian government. In 1984, Attorney-General Gareth Evans put forward a detailed proposal for proportionate funding in an attempt to counter the (ultimately successful) push by opposition MPs to ban the Commonwealth from funding any advocacy outside of the official pamphlet. Evans's measure would have permitted the Commonwealth to spend money on advocacy beyond the pamphlet, and required that this additional 'promotional' spending be allocated in proportion to the support that the proposed constitutional amendment enjoyed in Parliament.[69] While the Senate roundly rejected this proposal,[70] it remains of contemporary interest for the robust defence Evans gave to the idea of apportioning promotional funds unequally.

As I explain below, the proportionate model resists the notion that an even split of funds produces fairness in a referendum campaign. Its claims to fairness rest instead on its connection with community opinion, and an in-built flexibility that allows it to respond to existing inequalities in the campaign environment.

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68 Except in the case of a deadlock between the two Houses, where the support of a minority of MPs may be sufficient. Section 128 of the *Constitution* provides that, where one House proposes a change that is rejected twice by the other House (with a three month interval in between), the Governor-General retains a discretion to submit the proposed constitutional change to a referendum.

69 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2729 (Gareth Evans).

70 Ibid 2762.

1 *Fairness and Community Opinion*

The driving rationale behind proportionate funding is that it enables an allocation of funds that roughly reflects the balance of community opinion on a referendum proposal. The votes cast for and against the referendum Bill serve as a proxy for the views of the public. Gareth Evans gave voice to this chain of reasoning in the following way:

> Funding in proportion to the votes cast in Parliament seems to the Government to be fair and equitable. After all, Parliament represents, or is supposed to represent, the will of the people. Votes in Parliament are a fair indication of the interests that are lined up in support of, or in opposition to, any proposal for amending the *Constitution*.[71]

Evans describes proportionate funding as 'fair and equitable' and, in doing so, presents an alternative view of fairness to that which underpins equal funding. Fairness in the allocation of public money is achieved by apportioning funds in line with the views of those who, collectively, are the source of that money: the people. Institutionally, Parliament is seen as the best available representation of those views.

This approach to funding allocation can be said to promote 'fair rivalry' by ensuring that views that are unpopular in the community are not accorded a disproportionate voice in the public arena. The equal funding model, on the other hand, can be criticised on this basis — it arguably undermines fair rivalry by giving opponents of constitutional change the means to promote their message in the public arena to a degree that far exceeds their public support. This in turn distorts public deliberation, as unpopular or marginal arguments are given close to equal footing in the campaign environment. Administrative neutrality might be maintained under equal funding, but it conceals these distortions. In any event, administrative neutrality is also maintained under proportionate funding, as it is not the government but the public (via Parliament) that determines the proportion of funds that each campaign receives.

This alternative notion of fairness already informs the allocation of federal public funding to political parties.[72] After each election, parties receive a certain amount of money for every first preference vote they obtained above a certain threshold.[73] This allows parties to recoup expenses incurred by them in the lead-up to an election. The rationale behind tying funding to votes is that it ensures that the amount of public money claimable by parties is in line with the degree of electoral support they command.[74] Under a proportionate approach to allocating referendum funding, monies are similarly divided according to public support, but the respective shares are determined in advance of the poll and by reference to votes cast in Parliament.

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71 Ibid 2731 (Gareth Evans).

72 Orr, *The Law of Politics*, above n 17, 269.

73 Ibid 249. This amount was $2.49 per vote at the 2013 federal election: AEC, *Current funding rate* (24 November 2015) <http://www.aec.gov.au/parties_and_representatives/public_funding/Current_Funding_Rate.htm>.

74 Orr, *The Law of Politics*, above n 17, 249.

The proportionate model can be said to be especially appropriate where a strong community consensus exists around a referendum proposal. As noted above, where the weight of opinion is behind a constitutional amendment, it may seem odd that a few opponents of change should receive an equal share of federal money. Looking back over Australia's referendum history, some proposals have received very strong endorsement in federal Parliament: four proposals have received unanimous support in both Houses,[75] while others were opposed by only a handful of MPs.[76] It might be queried whether a No campaign really deserves to receive equal funding in such situations.

This justification arose in debates about proportionate funding in both 1984 and 2013. Gareth Evans cited community consensus as a reason for unequal funding, arguing that 'there are some proposals which have such overwhelming majority support and such idiosyncratic opposition that public funds really ought not to be advanced to that idiosyncratic, eccentric, perhaps tendentious … fringe'.[77] Similarly, Anthony Albanese saw opposition to local government recognition as a fringe view that had only a weak claim to public funding. He remarked: 'the idea that we are going to fund either the Institute of Public Affairs to the tune of $10m, or Green Left Weekly, for that matter, is, I think, absurd'.[78]

2 *Fairness and Substantive Equality*

The proportionate model can also claim to promote fairness by advancing equal opportunity in a more substantive way than is possible with equal funding. It does this by giving the Commonwealth the flexibility to respond to two factors that prevent a true level playing field in referendum campaigns: the possibility of unlimited spending by third parties, and the natural advantages of No campaigns. The equal funding model, far from addressing these matters, assumes the existence of a level playing field and so only reinforces these existing inequalities.

Proportionate funding enables the federal government to offset campaign expenditure by other entities, such as state and territory governments, political parties, interest groups and individuals, who face no legal restrictions on their spending abilities. Referendum history demonstrates the willingness of state governments, in particular, to fund campaigns opposing constitutional change. In 1988 the Queensland National government spent over $1 million on advertisements opposing the Fair Elections proposal, which would have required the State to abandon its long-standing

75 The Aboriginals proposal (1967), and the Senate Casual Vacancies, Retirement of Judges and Referendums proposals (1977).

76 For example, in 1967 just seven MPs voted against the proposal to remove the parliamentary nexus, while in 1999 only Independent Peter Andren opposed the Bill that proposed the insertion of a new preamble into the *Constitution*. Just 10 MPs voted against the 2013 proposal to grant constitutional recognition to local government.

77 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2732 (Gareth Evans).

78 Anthony Albanese, quoted in Christian Kerr, 'Coalition Could Change Tack on Referendum', *The Australian*, 19 June 2013, 5.

gerrymander and put in place electoral arrangements that respected the principle of 'one vote, one value'.[79] In 1977 the Queensland and Western Australian governments both ran advertising campaigns against the federal government's referendum proposals.[80] It is also noteworthy that fear of state spending was a key motivation for the Hawke Government when it gave extra funds to the Yes campaign in 1983. At the time of its controversial spending announcement, the government was aware that Queensland and Tasmania were considering giving financial support to an opposition campaign.[81]

Given that state governments and other entities are not bound to be even-handed in their spending, a proportionate funding model is a means of restoring balance. In situations where state governments are expected to run advertising campaigns against proposed constitutional reforms, this model frees the Commonwealth, through the weight of votes in Parliament, to offset that by giving extra money to support the Yes case, and in so doing promote fair rivalry between the Yes and No campaigns. The extra money for supporters of constitutional change could also foster deliberation, as it would help expose voters to a wider variety of arguments.

Proportionate funding might also be said to provide a means of offsetting the inherent advantages of No campaigns. Gareth Evans made much of this when seeking to justify extra funding for the Yes case in 1983. In his view, supporters of constitutional amendment always have the tougher task because they have to convince a cautious public of the need for change. By contrast, opponents need only argue in favour of the status quo and exploit voters' bias in favour of retaining it.[82] Other perceived advantages are that No campaigns attract more media attention[83] and can more readily appeal to the emotions and fears of voters.[84] Evans put this last point in characteristically direct fashion when he remarked that the Yes campaign required additional funding 'to give it a chance of competing with the raw, crude, vulgar emotion of the kind which gets generated in referendum campaigns.'[85] If Evans is

79 Williams and Hume, above n 21, 175.

80 Ibid 160–1.

81 Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3328 (Gareth Evans). The prospect of state spending may have also been a consideration in 2013: at the time of the funding announcement it was understood that New South Wales, Victoria and Western Australia were all opposed to the proposed amendment, although whether those States would have actively funded an opposition campaign is not known: Heath Aston and Judith Ireland, 'Warning over "Truncated" Run to Referendum', *The Sydney Morning Herald* (Sydney), 10 May 2013, 10.

82 Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3327–8 (Gareth Evans). On status quo bias, see Williams and Hume, above n 21, 207–8.

83 Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3315 (Alan Missen).

84 For examples of 'unscrupulous campaigning', see Williams and Hume, above n 21, 82–5.

85 Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3328 (Gareth Evans).

correct, the extra money that proportionate funding generates for the Yes case is a way of levelling out the campaign playing field.

Of course, an argument can also be made that Yes campaigns have distinct advantages of their own. The Yes case will usually have the backing of the federal government and enjoys the benefits that flow from that. For instance, the government controls the timing of the referendum and so can choose to hold it at a time when support is expected to be highest. The Yes campaign also benefits from the Prime Minister's unrivalled capacity to generate media coverage. As one senator put it, '[t]he reality is that the Yes case has the advantage because the Government is on its side'.[86] These considerations weaken the contention that extra funding for the Yes case is necessary to bring balance to the campaign environment.

3 *Criticisms*

Proportionate funding's claims to fairness can be challenged on at least three grounds. First, it is arguable that the very idea of making funding shares contingent upon the prevailing balance of community opinion is problematic from a deliberative point of view. According to deliberative principles, the strength of an argument is not to be judged on the degree of support it enjoys at a given point in time. Instead, a proposition should stand or fall only on the strength of the reasons supporting it — that is, the 'force of the better argument' is decisive.[87] If an argument is weak or marginal, this is not something that can be determined in advance by reference to public opinion. Instead, it is something to be tested and exposed in the public arena through debate and discussion. The proportionate funding model is problematic in this sense because it effectively pre-judges one referendum argument as more meritorious than the other based on a consideration that — from a deliberative perspective, at least — is irrelevant. That argument is then given greater exposure in the public arena, thanks to the additional funds its supporters receive, which undermines the deliberative nature of the wider referendum process.

This objection to proportionate funding has particular relevance in the referendum context, as neither community opinion nor parliamentary votes are necessarily a good reflection of the merits of a proposed constitutional amendment. Debates about constitutional reform are often sharply contested, with sensible, plausible arguments to be made on both sides.[88] The proposal to empower the Commonwealth to directly

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86 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2767 (Noel Crichton-Browne).

87 Joshua Cohen, 'Deliberation and Democratic Legitimacy' in Alan Hamlin and Philip Pettit (eds), *The Good Polity: Normative Analysis of the State* (Basil Blackwell, 1989) 17, 22; Jürgen Habermas, *Moral Consciousness and Communicative Action* (Christian Lenhardt and Shierry Weber Nicholsen trans, MIT Press, 1990) 89.

88 Senator George Brandis put this in colourful terms when criticising the Gillard Government's funding allocation: 'to put a proposition that a three-year-old child could understand, there are two sides to every story': Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3359.

fund local government provides a good demonstration of this. Some constitutional experts endorsed the reform, arguing that the amendment was necessary to address funding uncertainties that had arisen in recent High Court decisions.[89] At the same time, other experts disputed the necessity of the amendment and expressed concerns that the change would increase Commonwealth power at the expense of the states.[90] In situations like this, where the merits of a referendum proposal are genuinely open to contest and debate, the allocation of promotional funds on the basis of existing community opinion seems arbitrary from a deliberative perspective, and risks weakening the deliberative quality of the referendum campaign.

Second, even if one accepts community opinion as a fair basis on which to allocate referendum funding, the use of parliamentary votes as a proxy is problematic. Close inspection of the referendum record suggests that the asserted link between parliamentary and public opinion is doubtful. Of the 44 referendum proposals that have passed through Parliament and proceeded to a vote, 31 have failed to win majority support among voters.[91] Within that category of failed referendums, some have displayed especially large discrepancies between legislator and voter preferences. The 1967 proposal to remove the parliamentary 'nexus',[92] for example, was supported by almost all MPs but endorsed by just 40 per cent of voters. In 1999, all but one MP (Independent Peter Andren) supported the proposal to insert a new preamble into the *Constitution*, but more than 60 per cent of Australians voted against it. The 2013 proposal to recognise local government also enjoyed much higher levels of support inside Parliament than it did among voters. Surveys in May and June registered public backing of constitutional recognition at 65 per cent and 47 per cent, respectively: in both cases, well short of the 95 per cent registered within Parliament.[93]

An especially large disjuncture between parliamentary and public opinion is likely to occur where the referendum proposal would affect the personal interests of politicians. For example, proposals to amend the *Constitution* to significantly increase

89 See, eg, George Williams, 'Constitutional Change Makes Sense', *The Sydney Morning Herald* (online), 9 May 2013 <http://www.smh.com.au/federal-politics/political-opinion/constitutional-change-makes-sense-20130509-2j97s.html>.

90 Twomey, above n 1; Cheryl Saunders, 'Recognising Local Government Needs Rethink', *The Age* (Melbourne), 22 May 2013, 41.

91 The other 13 proposals include the eight that have been successful, and five that achieved a national majority of votes but failed to win the support of at least four states.

92 The parliamentary 'nexus' refers to the requirement in s 24 of the *Constitution* that the number of members in the House of Representatives be, as near as practicable, twice the number of members in the Senate.

93 Phillip Coorey, 'Poll: Referendum on Local Government Likely to Pass', *Australian Financial Review* (online), 20 May 2013 <http://www.afr.com/p/national/poll_referendum_on_local_government_vYtx3jbaWuWPoD180ZKNfJ>; Judith Ireland, 'Coalition Delivers Blow to Local Government Referendum's "Yes" Campaign', *The Sydney Morning Herald* (online), 2 July 2013 <http://www.smh.com.au/federal-politics/political-news/coalition-delivers-blow-to-local-government-referendums-yes-campaign-20130702-2p8we.html>.

the length of parliamentary terms (say, to five years in the House and twice that in the Senate), or enhance MP salaries, might receive strong backing from politicians but be viewed suspiciously by citizens. On such contentious proposals it would seem peculiar to apportion promotional funds according to levels of parliamentary support. In practical terms, opponents of the most blatantly self-interested reform proposals will likely attract funding from other sources, and in any event the funding question could be moot given that referendums on such proposals seem unlikely to succeed. All the same, proposals of this nature test the claimed connection between parliamentary votes and community opinion which is at the heart of the legitimacy of the proportionate funding model.

This is not to say that the views of parliamentarians and citizens never align on referendum issues. In 1967, for example, the Aboriginals proposal received unanimous support in Parliament and was endorsed by 90.8 per cent of referendum voters. But the referendum record suggests that parliamentary votes are an unreliable guide to public preferences on constitutional reform questions. This naturally raises a question as to whether those votes should be relied upon as a yardstick for allocating advocacy funds.

One response to this second challenge would be to identify a better proxy for community opinion. However, it is unclear what that might be. Opinion polls present an obvious alternative, but they suffer from their own limitations in terms of accurately capturing public opinion on an issue,[94] and lack the democratic legitimacy of a parliamentary vote.

Third, the proportionate model has the capacity to generate large disparities in funding allocation, which in turn undermines any reasonable notion of equal opportunity. This is not a merely hypothetical possibility, but will eventuate whenever there is bipartisan support in the Parliament for a reform proposal. In such cases, the No campaign will receive only the smallest share of available promotional funds. Far from ensuring equal opportunity, this outcome may damage the objective of a fair rivalry. This is the scenario that played out in 2013. Following the Gillard Government's decision to adopt proportionate funding, opponents of local government recognition faced the immense challenge of mounting a strong campaign with just $500 000 of public funding. Absent substantial private fundraising on their part, there is a risk that the referendum campaign would have been uncompetitive. Any scenario in which the No side receives a paltry share of public funding will be especially problematic where, as occurred at the 1999 republic referendum, there are divergences among referendum opponents as to why the proposed constitutional change should be resisted. In such circumstances, a scarcity of public funds may mean that the diversity of opposition views is not adequately communicated to the public, or alternatively that one view is allowed to dominate. Further, large disparities of the kind that occurred in 2013 may influence how the public views the referendum campaign. There is a risk that voters, having seen the lion's share of funding go to

94 Rodney Smith, Ariadne Vromen and Ian Cook, *Keywords in Australian Politics* (Cambridge University Press, 2006) 144–5.

supporters of the government's referendum proposal, will lose faith in the integrity of the referendum process.

C *Discretionary Funding*

A third possible approach to funding allocation is to permit the federal government to exercise complete discretion in how it apportions funds. This was the approach taken by the Hawke Government in 1983: it pledged an additional $1.25 million in funding for the Yes campaign purely as a matter of discretion and without reference to the levels of support that the five proposed amendments had attracted in Parliament.

Under this approach, the federal government is openly viewed as a partisan actor in referendum campaigns and, by virtue of this status, it spends as much public money as it likes in supporting its proposals for constitutional change. Gareth Evans expressed some sympathy for this approach during the funding debates of 1984. As non-government MPs argued in favour of expenditure limits, Evans remarked:

> I do not join in this debate with any gigantic sense of enthusiasm because this is not what I want. I want to get in there and hammer away the Yes case with a degree of vigour, and flail all the eccentrics pursuing the idiosyncratic resistance to legitimate constitutional change. That is what I would like to do with government funds. I am quite open and unashamed about that. I think that is legitimate, given the whole course of referendums in this country.[95]

In situations where the Commonwealth exercised its discretion to fund Yes campaigns exclusively, it would be up to other entities — such as state governments, or private individuals — to provide financial support to opposition campaigns.

The difficulty with this approach to funding is that it creates the conditions for all three core values to be undermined. It permits the federal government to give a major funding advantage to the Yes campaign, thus weakening equal opportunity. In turn, this undermines deliberation by making it less likely that voters will hear a balance of information. A discretionary approach also abandons any pretence of administrative neutrality.

Of course, the federal government could choose to use its discretion to allocate funds equally between partisan campaigns, or in some other way that was aimed at achieving fairness. However, without external regulation the Commonwealth would retain the ability to fund one side primarily or exclusively. Unlike proportionate funding, which also permits large disparities in funding, the discretionary model could not lay claim to an underlying democratic legitimacy as expressed through parliamentary votes.

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95 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1984, 2772 (Gareth Evans).

V Towards Fairness

A *Assessing the Three Models*

Of the three funding models, discretionary funding is the least credible. It is the least likely to produce an allocation of funds that will be accepted as 'fair'. Both equal and proportionate funding, on the other hand, are sound approaches to the apportionment of promotional funding, each with their own claims to achieving fairness in the referendum process. However, as is apparent from the discussion in Part IV, each come with their downsides and, as a consequence, there is no 'perfect' model of funding allocation that will deliver fairness in all cases.

Equal funding can claim to deliver fairness by ensuring that both supporters and opponents of a referendum proposal receive identical amounts of federal money to make their case to the public, thus fostering equal opportunity, deliberation and administrative neutrality. Proportionate funding's claim to fairness rests partly on the notion that a fair approach requires that funding reflect the balance of community opinion, and partly on the idea that variation in funding allocations is sometimes necessary to achieve a level playing field. A weakness of equal funding is that it is insensitive to existing inequalities in the campaign environment, such as the absence of regulation of third party spending, which leaves state governments free to run well-funded campaigns of their own. A commitment to equal funding may also be inappropriate where a proposed reform has broad community support, and/or unanimous approval within Parliament, as it could result in marginal views receiving substantial amounts of public money. Proportionate funding can claim to be more responsive to campaign inequalities, but it rests on a contestable connection between parliamentary votes and community opinion, and can generate highly unequal funding shares that serve to weaken competition and undermine public trust in the integrity of the process.

The strengths and weaknesses of these two funding approaches are apparent when we consider how they might play out with respect to the proposed referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. An equal allocation of funds would help to give supporters and opponents of constitutional recognition a reasonable opportunity to persuade the public of their views, ensure that voters are exposed to diverse perspectives, and permit the federal government to retain a neutral position on spending even if it otherwise campaigned in favour of constitutional change.

In other ways, however, an equal allocation of funds seems ill-suited to the issue of constitutional recognition. There is bipartisan agreement in the federal Parliament that some form of recognition is desirable, even if a shared view about which reform option should proceed to referendum is yet to emerge.[96] There also appears to be a broad public consensus on the issue. A public opinion survey conducted in

96 Malcolm Turnbull and Bill Shorten, 'Referendum Council' (Media Release, 7 December 2015) <http://www.pm.gov.au/media/2015-12-07/referendum-council>.

July–August 2015, for instance, found that 79 per cent of the general Australian community are in favour of constitutional recognition; support was slightly higher (85 per cent) among Aboriginal and Torres Strait Islander peoples.[97] This was in line with earlier polls in 2015.[98] With this in mind, it could be seen as incongruous for opponents of constitutional recognition to receive half of available promotional funds.

If proportionate funding were adopted, opponents of constitutional recognition would receive only a small share of promotional funding. Assuming the continuance of a strong parliamentary consensus, the Yes campaign could receive upwards of 90 per cent of available public money. Defenders of this funding outcome could claim that it reflected community support for constitutional recognition and was therefore fair.

However, critics would likely question the use of parliamentary votes as a proxy for community opinion, and it is doubtful that the No campaign could be competitive with so small a share of public money. It could also be argued that such funding shares do not reflect the relative merits of the cases for and against reform, given the robust critique of constitutional recognition offered by various respected commentators.[99] Were Parliament to give strong endorsement to a minimalist form of recognition (for example, the insertion into the *Constitution* of a statement of recognition), a

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97 Lenore Taylor, 'Indigenous Constitutional Recognition: Public Awareness Has Risen, Poll Shows', *The Guardian* (online), 10 November 2015 <http://www.theguardian.com/australia-news/2015/nov/10/indigenous-constitutional-recognition-public-awareness-has-risen-poll-shows>. Some argue that opinion polls overstate the level of support for constitutional recognition among Indigenous peoples: Celeste Liddle, '87% of Indigenous People Do Not Agree on Recognition. You'd Know if You Listened', *The Guardian* (online), 19 June 2015 <http://www.theguardian.com/commentisfree/2015/jun/19/87-of-indigenous-people-do-not-agree-on-recognition-youd-know-if-you-listened>.

98 Four polls conducted between March–July 2015 registered community support for constitutional recognition at 73, 75, 63 and 85 per cent, respectively: Laura Tingle, 'Fairfax-Ipsos Poll: 85pc of Voters Back Indigenous Recognition', *Australian Financial Review* (online), 6 July 2015 <http://www.afr.com/news/politics/fairfaxipsos-poll-85pc-of-voters-back-indigenous-recognition-20150706-gi5jpi>; Anna Henderson, 'Indigenous Recognition: Newspoll Finds 63 Per Cent of Voters Back Change, ahead of Crucial Progress Talks', *ABC News* (online), 20 June 2015 <http://www.abc.net.au/news/2015-06-20/majority-of-voters-back-indigenous-recognition-newspoll/6560466>.

99 See, eg, Megan Davis, 'Keating Was Right to Intervene over Recognition and Indigenous Australia's Unfinished Business', *The Guardian* (online), 21 October 2015 <http://www.theguardian.com/commentisfree/2015/oct/21/soft-recognition-alone-will-not-resolve-indigenous-australias-unfinished-business>; Paul Daley, 'The ABC Doesn't Need Andrew Bolt to Debate Indigenous Recognition', *The Guardian* (online), 9 December 2015 <http://www.theguardian.com/media/postcolonial-blog/2015/dec/09/the-abc-doesnt-need-andrew-bolt-to-debate-indigenous-recognition?CMP=share_btn_fb>; Celeste Liddle, 'Baird Calls on States to Support Indigenous Recognition. But What Difference Will It Make?', *The Guardian* (online), 15 January 2015 <http://www.theguardian.com/commentisfree/2015/jan/15/baird-calls-on-states-to-support-indigenous-recognition-but-what-difference-will-it-make>.

proportionate approach would leave little money to those who wished to prosecute the case for more substantive reform (such as a prohibition against racial discrimination).[100] Importantly, such a large disparity in the amounts received by the respective campaigns could create a perception of unfairness and damage the credibility of the referendum process. It could alienate opponents by making them feel as if their voices had not been heard. Such feelings could be deepened by a sense, held by some commentators, that the federal government's funding of the 'Recognise' campaign has given proponents of recognition a 'head start'.[101] Any controversy over funding would divert public debate from the merits of reform to the integrity of the process.

The example of Indigenous constitutional recognition demonstrates that both equal and proportionate funding, while credible models, are capable of generating outcomes that might be viewed as incongruous, unbalanced or otherwise 'unfair'. This presents a significant challenge for the regulation of referendum funding. It means that it is not possible to develop a regulatory regime that delivers optimal, fair outcomes in all cases.

This reality is reinforced by the fact that one of the main threats to equal opportunity in referendum campaign funding — the asymmetrical regulation of Commonwealth and state spending — is likely irremediable by federal action. Any attempt by the Commonwealth to pass legislation imposing expenditure restrictions on the states would be at risk of invalidity for breaching constitutional rules as to intergovernmental immunities. There would be a strong argument that federal limits on state campaign spending would amount to an undue interference with the exercise by state governments of their constitutional powers and functions.[102] This constitutional barrier casts a shadow over funding allocation, as it means that any reform attempts must begin by acknowledging that a main cause of the uneven campaign playing field is likely irrevocable.

Reform of funding allocation must therefore start by recognising that the inherent limitations of the two most credible models, and a probable constitutional barrier, make any search for a 'perfect' regulatory mechanism futile. The regulatory objective should instead be to develop the fairest possible mechanism in the circumstances.

B *Promoting Fairness in Funding Allocation*

Given these realities, five regulatory options present themselves. One is to do nothing and leave matters of funding allocation to governments on a case-by-case basis.

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100 On the different options for advancing constitutional recognition, see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) xiii–xvi.

101 Recognise receives federal funding, through Reconciliation Australia, to promote public awareness and support for constitutional recognition: <http://www.recognise.org.au/>.

102 *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; *Austin v Commonwealth* (2003) 215 CLR 185.

This approach was endorsed by the federal government in its response to the House Standing Committee's inquiry into referendum machinery and has the virtue of flexibility. It recognises that no funding approach is perfect and that the most appropriate allocation may depend on contextual factors. Its great weakness, however, is that it leaves funding decisions in the hands of the government that has proposed the constitutional amendment. It therefore provides enormous scope to the federal government to set funding rules that advance its self-interest, or at least allows for the appearance of the same. In order to ensure public faith in funding allocation, it is far preferable for some rules to be set down in advance.

Another option would be for the Parliament to specify, in legislation, that governments that elect to provide promotional funding must allocate it in line with one or other of the equal and proportionate funding models. A firm legislative commitment of this kind would bring clarity to the 'rules of the game' and in so doing enhance the integrity of future referendum processes. This would be an improvement over the status quo. Ideally, a detailed parliamentary debate about the respective merits of each model, including the different conceptions of fairness that underpin them, would precede any statutory endorsement. However, the downside of Parliament adopting one or other of these two models in their entirety is that the potential for undesirable outcomes, discussed above, would remain.

If implementing either the equal or proportionate funding models in full is problematic, it remains to be considered whether any regulatory measures exist that would help to promote fairness, while avoiding some of the weaknesses of the equal and proportionate funding models. Are there measures that would help us locate a middle ground between the two?

One such initiative would be to remove decisions about funding allocation from the hands of the government and transfer them to an independent body such as a Referendum Panel.[103] The decision to provide promotional funding would remain with the government, but the size of funding shares would be determined by the Panel. The membership of such a body would ideally be the subject of bipartisan agreement and include a mix of people, such as experts in constitutional law, retired judges, senior electoral officials and perhaps members of the general public.[104] The Panel could be tasked with determining funding shares according to a series of set criteria — these might include matters such as the likelihood of state oppositional spending, the balance of votes in Parliament and recent indications of public opinion. The advantage of this approach is that it combines independent judgment with flexibility. It would put funding decisions at arm's length from government and so help to remove any impressions that funding shares were allocated to advance self-interest or manipulate referendum outcomes. Further, the process is unlikely to generate

103 The creation of a Referendum Panel was recommended by the 2009 inquiry into referendum machinery: see House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 34, 62, recommendation 7. On the possible composition and operation of a Referendum Panel, see Kildea and Williams, above n 34.

104 Kildea and Williams, above n 34.

the incongruous or unbalanced funding shares that are possible under the equal and proportionate funding models.

However, the Panel proposal has significant drawbacks. Determinations about funding allocation, even when guided by criteria, are matters on which reasonable minds can differ. They are also consequential in that they have the capacity to influence the dynamics of a referendum campaign. These two factors make it highly likely that any Panel determinations would become the subject of debate and controversy. Campaigners unhappy with the allocation of funds would dispute the determination, and raise questions about Panel members' legitimacy and capacity to make such decisions. This would in turn shift public debate from the merits of a referendum proposal to issues of process and fairness. The transfer of funding decisions to a Referendum Panel is therefore unlikely to provide the long-term solution that this issue requires. On the contrary, it could ensure that arguments about funding arise at each and every referendum. Another downside is that Panel decisions would be subject to judicial review (given that members would be 'officer[s] of the Commonwealth' under s 75(v) of the *Constitution*), which would provide another avenue for conflict and controversy.

Another reform possibility would be to legislate to prescribe a funding floor. This would require that, should the government elect to provide promotional funding, a minimum proportion of it — say, 25 per cent — be allocated to each side. The balance would be distributed at the government's discretion. This approach would have several advantages. It would prevent large disparities in funding shares of the kind that occurred in 2013, and that are possible under the proportionate model. Even if tempted to give most or all available funds to the Yes campaign, governments would be bound to provide one-quarter to opponents. Further, this basic level of funding would be sufficient for opponents to run a competitive campaign and thus furthers the goal of fair rivalry. A funding floor would also give the government the flexibility to give more money to the Yes campaign where it felt it was justified — for example, if state-run opposition campaigns were expected, or if the proposed amendment had overwhelming public support. The main downside of a funding floor is that it still leaves significant spending discretion to the federal government — it would be free to allocate 75 per cent of funding to the Yes campaign, even if public opinion were evenly divided. This could in turn prompt conflict and controversy. Looked at another way, however, the risk of a public backlash over funding would provide a political incentive to the government to carefully justify to the public how it intends to spend the balance.

A final reform option, along similar lines to a funding floor, would be to prescribe funding bands that correspond to the balance of votes cast in Parliament. Again, the initial decision to elect to provide promotional funding would rest with the government. Beyond that, legislation would require that such funding be allocated according to a set formula. It could stipulate, for example, that equal funding must be provided where the proportion of parliamentary votes cast in favour of the referendum Bill falls within the range of 50–69 per cent. In the event that parliamentary approval of the proposed constitutional amendment exceeded this range, other bands would apply: for instance, if between 70–89 per cent of MPs supported the

Bill, the Yes campaign could receive 60 per cent of available funds; if parliamentary support exceeded 90 per cent, proponents could receive 70 per cent of any promotional funding.

This is the best of the five reform options. It is a hybrid of the equal and proportionate models, in that it effectively sets equal funding as the norm, but permits departures from funding parity should the balance of votes in Parliament warrant it. This in-built flexibility allows it to avoid some of the main downsides of those two models — for instance, the prospect of a No campaign receiving an equal share of funds despite widespread community support for constitutional change is diminished, and the baseline of a 70:30 per cent allocation guards against extreme disproportion in funding allocation and ensures the No campaign will always have sufficient funds to run a competitive campaign. Of course, this reform proposal is not without its weaknesses. It makes funding shares contingent on parliamentary votes which, as we have seen, are an uncertain guide to community opinion on constitutional matters. And it does not overcome the potential problem of third parties engaging in unlimited spending. Nonetheless, of the five options outlined here, it has the most promise in terms of advancing fairness in referendum campaigns, and providing a durable solution to the problem of funding allocation.

A much larger reform project would be to revisit the wider regime of referendum finance regulation. If fairness is the overriding objective, then at some point other elements of referendum finance — beyond issues of federal expenditure — may need to be considered. Detailed discussion of what that wider reform debate might entail is beyond the scope of this article. However, it is likely that it would include consideration of both public and private funding, and specific measures such as spending caps and more stringent disclosure obligations. It might also address the manner in which public funding is allocated *within* the Yes and No camps, in recognition of the fact that campaign groups may share an orientation towards a referendum proposal but hold entirely different reasons for doing so. The United Kingdom's referendum finance regime, discussed above, serves as a possible model should this wider debate occur, but any attempt to replicate its approach would need to take account of Australia's federal structure and the constitutional barrier posed by intergovernmental immunities.

VI Conclusion

The events surrounding the planned referendum on local government recognition in 2013 placed a spotlight on weaknesses in Australia's regulation of referendum finance. It marked the second consecutive occasion on which Parliament has suspended statutory limits on Commonwealth spending, following the precedent set in the lead-up to the 1999 republic referendum. In both cases, the suspension of those limits created uncertainty about the allocation of promotional funding between the Yes and No campaigns, and effectively left decisions about funding shares to the federal government that had initiated the referendum. The shortcomings of this ad hoc arrangement were on display in 2013, when the Gillard Government, in line with the balance of parliamentary votes on the referendum proposal, distributed

95 per cent of available funds to the Yes campaign. This funding decision was criticised for undermining the fairness of the referendum process, and proved so controversial that it ultimately damaged bipartisan support for the proposed constitutional amendment. Looking ahead, it is apparent that disagreement about funding allocation could affect the proposed referendum on Indigenous constitutional recognition and, in the absence of agreed standards, damage the legitimacy of the process.

This article has argued for a more principled approach to the allocation of promotional funding during referendum campaigns. Parliament should lift the current restrictions on federal expenditure and set down in legislation an agreed approach to funding allocation. The two most credible models for guiding funding decisions are equal funding and proportionate funding. Each, in their own way, can claim to advance fairness in referendum campaigns by fostering equal opportunity, deliberation and administrative neutrality. For the equal funding model, its claims rest on the provision of identical funding shares to supporters and opponents of constitutional change; proportionate funding, meanwhile, purports to link funding to community opinion and to offset existing inequalities in the campaign environment.

A legislative regime that implemented either of the equal or proportionate funding models would be an improvement on the status quo in that it would provide more certainty about funding rules. However, both models are capable of generating funding outcomes that seem incongruous, unbalanced or otherwise ‘unfair’ in the circumstances. For this reason, the best regulatory approach would be to provide a middle ground by prescribing, in legislation, funding bands that correspond to the balance of votes cast in Parliament. This mechanism may not produce fair outcomes in all cases, and does not address the threat to equal opportunity posed by the ability of state governments to spend unlimited amounts on referendum campaigns. However, it would go a long way to achieving fairness in referendum campaigns and is the best of the available options. It recognises the virtues of equal funding, while permitting departures from it where the weight of parliamentary votes warrants it. It allows flexibility at the same time as it provides a minimum baseline for funding and removes government discretion on the size of funding shares. Just as importantly, it promises to provide certainty and stability in the funding arrangements for referendum campaigns.