

Preliminary report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government: the proposal, timing and likely success of a referendum to amend Section 96 of the Australian Constitution to effect financial recognition of local government

Joint Select Committee on Constitutional Recognition of Local Government

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Foreword

The idea of recognising local government in the Constitution has been around for many decades. It has been a long-standing feature of the platform of most local government bodies. It is now an idea whose time has come for a very specific reason. Recent cases in the High Court have created considerable uncertainty about the Commonwealth's power to provide funding directly to local government. A constitutional remedy to this uncertainty requires the financial recognition of local government in the Constitution. The relevance to Australian communities of this matter at this point in time is certainty for the Commonwealth funding of vital services that are delivered by local governments across Australia. A successful referendum would return Australia to the widely understood status quo that existed before those recent High Court cases, and ensure the needs of communities are met through the continuation of important programs like Roads to Recovery.

The Joint Select Committee on Constitutional Recognition of Local Government was appointed in late 2012 to build on the work of the Expert Panel on Constitutional Recognition of Local Government. The Panel's report recommended that the Committee be established and made suggestions about the kind of work the Committee should undertake.

The Parliament has directed the Committee to inquire into 'financial recognition of local government', which is the majority finding of the Expert Panel. The Committee's terms of reference include assessing the likelihood of success for such recognition through a referendum, the consequences of recognition for local, state and territory governments, as well as whether and when a referendum should be put.

The Committee has built on the considerable work of the Expert Panel, including the comprehensive consultation that the Panel conducted. The Panel suggested that holding a referendum was a viable option for 2013, and evidence to the Committee has confirmed this. The Committee has recommended a referendum be held at the same time as the 2013 Federal Election.


The Committee has sought stakeholders' views on the particular wording proposed by the Expert Panel, and is confident that the recommended wording will remedy the uncertainty surrounding Commonwealth direct funding of local government. At the same time, state and territory governments may not be immediately comfortable with the wording. The Commonwealth should now proceed to negotiate with state and territory governments to secure their support for the wording. The local government sector must now also redouble its negotiation and lobbying efforts to secure state and territory government support for a referendum. This issue needs to be resolved as soon as possible, and stakeholders must take this opportunity to create the right conditions for reform.

There are a number of preparatory activities that the Expert Panel recommended, and the Committee has recommended that a number of these commence immediately. These activities will need to begin in the coming weeks, and will help to build public support for the referendum proposal.

This process – from the Expert Panel, to this Parliamentary Committee, and now to the Government – has been designed to ensure that stakeholders are included and listened to, and to elicit broad bipartisan support for a referendum. The Committee has continued the methodical consultation and discussion begun by the Expert Panel, and will continue in this vein as it prepares its final report, which will be tabled later this year. While this formal process has taken place, the Minister for Regional Australia, Regional Development and Local Government and local government bodies have been working in the background to build consensus and support for a referendum. This work will now take prominence as support for a referendum is secured, and as a national conversation about this issue takes place.

I thank all Members and Senators for their work on this inquiry, and commend this preliminary report to the Parliament.

Ms Michelle Rowland MP
Chair



Membership of the Committee

Chair Ms Michelle Rowland MP

Deputy Chair Senator David Bushby

Members Mr Mark Coulton MP

Senator Trish Crossin
(until 29 November 2012)

Senator David Fawcett

Mr Steve Irons MP

Ms Kirsten Livermore MP

Mrs Jane Prentice MP

Senator Lee Rhiannon

Senator the Hon Lisa Singh
(from 29 November 2012)


Senator Glenn Sterle

Mr Tony Windsor MP

Mr Tony Zappia MP

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Inquiry Secretary	Mr Thomas Gregory
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Resolution of appointment

- (1) a Joint Select Committee on Constitutional Recognition of Local Government be appointed to inquire into and report on the majority finding (financial recognition) of the Expert Panel on Constitutional Recognition of Local Government including by amending section 96 of the Constitution, and in conducting its inquiry, the Committee will assess the likelihood of success of a referendum on financial recognition, and will take into account the following matters:
 - (a) the report of the Expert Panel on constitutional recognition of Local Government, including preconditions set by the Expert Panel for the holding of a referendum;
 - (b) the level of State and Territory support;
 - (c) the potential consequences for Local Government, States and Territories of such an amendment; and
 - (d) any other matters that the Committee considers may be relevant to a decision on whether to conduct a referendum, and the timing of any referendum;
- (2) the Committee consist of twelve members, three Members of the House of Representatives to be nominated by the Government Whip or Whips, three Members of the House of Representatives to be nominated by the Opposition Whip or Whips, and one non-aligned Member, two Senators to be nominated by the Leader of the Government in the Senate, two Senators to be nominated by the Leader of the Opposition in the Senate and one Senator to be nominated by any minority group or groups or independent Senator or independent Senators;
- (3) every nomination of a member of the Committee be notified in writing to the President of the Senate and the Speaker of the House of Representatives;

- (4) the members of the Committee hold office as a Joint Select Committee until presentation of the Committee's report or the House of Representatives is dissolved or expires by effluxion of time, whichever is the earlier;
- (5) the Committee elect:
 - (a) a Government Member as Chair; and
 - (b) an Opposition Member as its Deputy Chair who shall act as Chair of the Committee at any time when the Chair is not present at a meeting of the Committee, and at any time when the Chair and Deputy Chair are not present at a meeting of the Committee the members present shall elect another member to act as Chair at that meeting;
- (6) in the event of an equally divided vote, the Chair, or the Deputy Chair when acting as Chair, has a casting vote;
- (7) three members of the Committee constitute a quorum of the Committee provided that in a deliberative meeting the quorum shall include one Government Member of either House, and one non Government Member of either House;
- (8) the Committee has power to appoint subcommittees consisting of three or more of its members and to refer to any subcommittee any matter which the Committee is empowered to examine;
- (9) the Committee appoint the Chair of each subcommittee who shall have a casting vote only and at any time when the Chair of a subcommittee is not present at a meeting of the subcommittee the members of the subcommittee present shall elect another member of that subcommittee to act as Chair at that meeting;
- (10) two members of a subcommittee constitute the quorum of that subcommittee, provided that in a deliberative meeting the quorum shall include one Government Member of either House and one non Government Member of either House;
- (11) members of the Committee who are not members of a subcommittee may participate in the proceedings of that subcommittee but shall not vote, move any motion or be counted for the purpose of a quorum;
- (12) the Committee or any subcommittee:

- (a) has power to call for witnesses to attend and for documents to be produced;
 - (b) may conduct proceedings at any place it sees fit; and
 - (c) has power to adjourn from time to time and to sit during any adjournment of the Senate and the House of Representatives;
- (13) the Committee may report from time to time but that it present a preliminary report no later than December 2012 if possible, and a final report no later than February 2013; and
- (14) the provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.



List of recommendations

Recommendation 1

The Committee recommends that a referendum on financial recognition of local government be held in 2013.

Given the importance of securing state and territory support, the Committee further recommends that, in addition to the efforts of the local government sector, Commonwealth Government Ministers, particularly the Minister for Regional Australia, Regional Development and Local Government, the Attorney-General and the Special Minister for State, immediately commence negotiations with state and territory governments to secure their support for the referendum proposal.

Recommendation 2

The Committee recommends that the referendum propose an amendment to Section 96 of the Constitution:

...the Parliament may grant financial assistance to any State or to any local government body formed by State or Territory legislation on such terms and conditions as the Parliament thinks fit.

Recommendation 3

The Committee recommends that a referendum on financial recognition of local government be held at the same time as the 2013 federal election.

Recommendation 4

The Committee recommends that the Commonwealth Government begin all necessary preparatory activities to ensure a successful outcome for a referendum on financial recognition in 2013. The preparatory activities include:

- the Australian Electoral Commission begin the necessary preparatory activities for a referendum in 2013;
- the Department of Regional Australia, Local Government, Arts and Sport, as lead coordinating and implementing agency, take the necessary steps for implementing a national civics education campaign and managing funding of partisan campaigns;
- the Attorney-General's Department release a draft of the constitution amendment bill by 31 January 2013 in order to begin the process of public consultation;
- temporary amendments be made to the *Referendum (Machinery Provisions) Act 1984*, to effect the following outcomes:
 - ⇒ remove the legislative limit on Government spending;
 - ⇒ confirm that Parliamentarians should draft and approve the 'Yes' and 'No' cases for the official referendum pamphlet for financial recognition of local government. In the event that there is no requirement for a 'No' case, the Committee recommends that there should be an official 'Yes' case only;
 - ⇒ allow the official Yes/No pamphlet to be sent to every household rather than every voter;
 - ⇒ enable a range of communication methods to educate and reach across all Australian demographics; and
 - ⇒ use format guidelines for the official 'Yes/No' referendum pamphlet to ensure the factual nature and comparability of the cases in the hands of voters.

Preliminary report

- 1.1 This report provides the Committee's major conclusions and recommendations about the majority finding of the Expert Panel on Constitutional Recognition of Local Government, as directed by the Committee's resolution of appointment.
- 1.2 This preliminary report relies on publicly available information, 131 submissions to the inquiry and evidence taken at a public hearing in Sydney on 16 January 2013.
- 1.3 The Committee will seek an amendment to its resolution of appointment to enable it to present a final report in March 2013. That report will contain a comprehensive discussion of the evidence received during the inquiry.

Addressing the uncertainty

- 1.4 Evidence emphasised the uncertainty around those programs delivered by local governments that the Commonwealth Government funds directly.
- 1.5 Previous inquiries, as well as reviews by agencies such as the Commonwealth Grants Commission and the Productivity Commission, have highlighted the expanding roles, responsibilities and functions of local government. These services provide the essential foundation and structure that enable local communities to prosper and grow.
- 1.6 Past crises in Australia have highlighted the need for governments to be able to respond rapidly and flexibly to ensure the well-being of their communities. In some circumstances the most effective way to do that is for the Commonwealth to deliver funds directly to local government. Examples of such responses involving direct funding from the Commonwealth to local government include the Regional and Local

- Community Infrastructure Program (RLCIP), which was established as a response to the global financial crisis.
- 1.7 Direct funding of local government by the Commonwealth has been common practice for the past two decades. Indeed, as noted by Professor Anne Twomey, direct funding has increased in proportion to Commonwealth grants, which are made under Section 96 of the Constitution, since the mid-1990s.
- 1.8 The High Court's decisions in *Pape*¹ and *Williams*² have created significant uncertainty about the ability of the Commonwealth Government to respond in this way in the future. These decisions have also created uncertainty regarding critical ongoing direct funding programs such as Roads to Recovery, which experts have confirmed would most likely be found unconstitutional.
- 1.9 Whilst the Commonwealth Parliament passed the *Financial Framework Legislation Amendment Act (No. 3) 2012*, to address implications of the *Williams* decision, evidence to the Committee has suggested that this legislation may itself be subject to constitutional challenge. Experts agree that if this were to occur, it would most likely be found that the legislation does not provide a basis for the Commonwealth to fund areas for which it does not have a direct legislative head of power. The legislative support for the Roads to Recovery program could be found invalid on similar grounds if challenged. As noted by Professor Anne Twomey, 'My own point of view, as a constitutional lawyer – particularly looking at the Roads to Recovery program – is that it is more likely than not that it is constitutionally invalid.'³
- 1.10 The Committee heard evidence that indicates there are already attempts to challenge the constitutionality of forms of direct funding by the Commonwealth. The High Court's decision in *Williams* is only likely to bolster the confidence of people willing and able to challenge the Commonwealth on constitutional grounds. It is therefore not a matter of 'if' but of 'when' the presently understood ability for the Commonwealth to fund local government directly is struck down as unconstitutional by the High Court.
- 1.11 The urgency of addressing the present situation comes from two sources. Firstly, there is an imperative to address potential unconstitutionality and the threat to funding it represents ahead of a possible High Court Challenge. Secondly, and as Professor Brown stated in his evidence to the

1 *Pape v Commissioner of Taxation* [2009] HCA 23.

2 *Williams v Commonwealth of Australia* [2012] HCA 23.

3 Professor Anne Twomey, *Proof Committee Hansard*, Sydney 16 January 2013, p.2.

Committee, Commonwealth funding to local government could be impacted even in the absence of a pending High Court challenge because of the uncertainty surrounding the ultimate constitutional status of such funding.

Recommendation 1

The Committee recommends that a referendum on financial recognition of local government be held in 2013.

Given the importance of securing state and territory support, the Committee further recommends that, in addition to the efforts of the local government sector, Commonwealth Government Ministers, particularly the Minister for Regional Australia, Regional Development and Local Government, the Attorney-General and the Special Minister for State, immediately commence negotiations with state and territory governments to secure their support for the referendum proposal.

Amendment proposal

- 1.12 By tasking the Joint Select Committee to look into the majority view of the Expert Panel, the Parliament directed the Committee to further develop and refine proposals for financial recognition. This includes determining the best form of words to be used as the amendment proposal.
- 1.13 The Committee supports the Expert Panel's proposed form of words for the amendment. Section 96 should be amended to insert new words (shown in italics with one drafting alteration, in square brackets):
- the Parliament may grant financial assistance to any State *or to any local government body formed by State or Territory* [!]legislation on such terms and conditions as the Parliament sees fit.
- 1.14 Evidence to the Committee confirmed that the Expert Panel's proposal would adequately address the uncertainty created by the *Pape* and *Williams* cases. Professor George Williams considers that the proposal is sufficient in legal terms to achieve certainty for direct funding of local government.
- 1.15 Professor Williams, at the public hearing on 16 January 2013, also stated that the form of words proposed by the Expert Panel adequately addressed state and territory government concerns that a reference to local

government in Section 96 would undermine their responsibility for and control of local government.

- 1.16 Contrary to assertions in some submissions, such as that from the Premier of Western Australia, constitutional experts do not believe that the form of words proposed by the Expert Panel would dilute the existing powers of state and territory governments. The submission by the Gilbert + Tobin Centre of Public Law submitted that an amendment to Section 96 in the form of words proposed by the Panel would not enable the Commonwealth to take over the regulation of local government from the states and territories. Including local government in Section 96, this submission states, 'does not amount to a head of power that can be used to over-ride the States'.⁴
- 1.17 This submission also dismissed the idea that the Commonwealth could use conditions attached to Section 96 grants that would 'force local government to operate outside the framework of regulation created by the States'.⁵ The High Court has confirmed that Section 96 is confined to granting money, and that it is not a power to make laws with respect to a general subject matter.⁶
- 1.18 In addition, these words have been in the public domain for over a year and have been considered by governments, academics and stakeholders. The proposal also has the invaluable advantage of being simple and easy to understand.
- 1.19 For many state and territory governments, no formal position on a referendum can be given until there is a concrete proposal. Because this Committee's role includes making recommendations in this regard, the Commonwealth Government has been unable to commence formal negotiations to secure state and territory government support. In addition, the Australian Local Government Association (ALGA) – and its member organisations – have not commenced negotiations and lobbying to secure similar support for the formal proposal.
- 1.20 Now that the Committee has recommended a concrete proposal, the Commonwealth Government should commence negotiations immediately with state and territory governments. Additionally, ALGA and its membership should immediately commence negotiations and lobbying to secure the support of state and territory governments for the proposal.
- 1.21 Given the importance and urgency of this issue and the need to ensure a successful referendum outcome, negotiations should begin without delay.
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4 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.3.

5 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.4.

6 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.4.

Recommendation 2

The Committee recommends that the referendum propose an amendment to Section 96 of the Constitution:

...the Parliament may grant financial assistance to any State or to any local government body formed by State or Territory legislation on such terms and conditions as the Parliament thinks fit.

Timing of the referendum

- 1.22 Evidence put significant emphasis on holding the referendum at a time that ‘maximises its chances of success’. There does not appear to be any consensus from stakeholders and experts around when the ‘right time’ may be. Indeed, there is a danger in waiting passively for the ‘right time’ to present itself.
- 1.23 The Committee believes that the uncertainty created by the *Pape* and *Williams* cases creates a moment for action. In this situation, those concerned about that continuing uncertainty must act to create the ‘right time’ for a referendum.
- 1.24 The Committee’s position is supported by evidence received from the submission from the Gilbert + Tobin Centre of Public Law that stated that referenda to address problems identified by the High Court are most likely to succeed if held as close to those decisions as possible. They noted that there is a risk that the ‘urgency and importance of the problem will lose its punch if there is a significant delay’.⁷
- 1.25 The Gilbert + Tobin Centre of Public Law submission noted one of the few successful referenda held in Australia was the one held in 1946 which was based on the need to remedy a problem identified by the High Court.
- 1.26 This referendum sought to restore the ability of the Commonwealth, which had been undermined by a High Court decision, to bring about a national pharmaceutical benefits scheme. As the submission notes, ‘Australians voted Yes to restore that scheme and the ability generally of the Commonwealth to provide important social services.’⁸
- 1.27 The Australian community is facing a similar problem right now. As noted by Professor George Williams, the referendum proposal would correct a specific problem identified by the High Court, and in substance

⁷ Gilbert + Tobin Centre of Public Law, *Submission 63*, p.5.

⁸ Gilbert + Tobin Centre of Public Law, *Submission 63*, p.5.

would merely return Australia's legal framework to the status quo that existed prior to the *Pape* and *Williams* decisions. Such a 'corrective' referendum is highly likely to succeed, as demonstrated by the 1946 example.

- 1.28 Some advocates for financial recognition of local government have expressed concerns that there is not enough time between now and the next federal election to build the necessary support. One reason for this is a belief that a better time would be when the political environment was 'less toxic'. Concerns about sacrificing a proposal to financially recognise local government ignore the evident consensus between federal parliamentary parties, as demonstrated by unanimous support for the appointment of this committee, the bipartisan participation in the work of the Expert Panel and statements by party leaders giving support for financial recognition of local government.
- 1.29 The Committee believes that, in addition to the momentum created by the *Williams* decision, there is ample time to build community support and ensure that the necessary legislation and arrangements are in place.
- 1.30 In terms of public engagement and awareness, the Committee notes that, as Professor Brown acknowledged, we are now in a digital age where social media plays a significant part in informing and influencing public opinions. A partisan campaign phase of 6 – 8 weeks, as suggested by Professor Williams, would be realistic, achievable and above all, meaningful.
- 1.31 In terms of holding the referendum with the next federal election, the Committee draws attention to the evidence provided by Professor George Williams who cited the example of New South Wales referenda which are held at the same time as state elections. Professor Williams suggested that one of the reasons for this success is because the referendum question is rarely the most contentious political issue at stake in the campaign leading to the election.⁹
- 1.32 For these reasons, the Committee believes that a referendum to recognise local government in Section 96 of the Australian Constitution should be held at the same time as the 2013 federal election.

9 Professor George Williams, *Proof Committee Hansard*, Sydney 16 January 2013, p.12.

Recommendation 3

The Committee recommends that a referendum on financial recognition of local government be held at the same time as the 2013 federal election.

Assessing the likelihood of success

- 1.33 Significant Commonwealth resources will be required to ensure an informed vote.
- 1.34 The Australian Electoral Commission (AEC) will make a vital contribution on enrolment and voting matters, particularly given the additional complexity for voters having to vote in a referendum as well as a federal election at the same time.
- 1.35 The AEC clearly demonstrated that it is well prepared for a referendum at the next election. However, the Committee understands that further delays in the development of these referendum materials could impact on the quality of these products, which may result in uninformed votes.
- 1.36 Public engagement and information beyond that provided by the AEC will also be critical for a successful outcome. The Australian community will need information on the Constitution itself, constitutional change and factual information on the question itself. This is the national civics education campaign recommended by the Expert Panel.
- 1.37 The 2009 Report of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the machinery of referendums (the LACA report) recommended that a non-partisan Referendum Panel should be established prior to any referendum to develop an overarching communications strategy for the referendum, including educational material. The Committee believes that the Commonwealth Government should consider establishing a Referendum Panel.
- 1.38 The Committee considers funding for partisan campaigns as essential to promoting public awareness and public engagement with the issue. It could also result in the type of popular ownership viewed as essential for a successful outcome.
- 1.39 The Committee disagrees with ALGA's recommendation that public funding for partisan campaigns be distributed according to the proportion of support for or against the proposal in Parliament. The Committee believes that funding should be distributed to partisan campaigns on an equal basis, with both sides of the question receiving equal funding.

The Commonwealth Government should be responsible for determining the total funding available to support well-financed partisan campaigns, and how this funding is distributed.

- 1.40 The Committee heard evidence from the Department of Regional Australia, Local Government, Arts and Sport (DRALGAS) and the Attorney-General's Department. DRALGAS advised that they have responsibility for local government policy as well as some local government programs. The Attorney-General's Department is responsible for constitutional matters.
- 1.41 Both Departments indicated that implementing this referendum merely depends on direction from Government.¹⁰ The Departments clearly display a high degree of preparedness, and given the urgency of the task, the Committee believes that the Department of Regional Australia, Local Government, Arts and Sport should be the lead Commonwealth agency in coordinating and implementing this referendum. The Attorney-General's Department, which is responsible for constitutional matters, will of course be a key player in the whole-of-government effort.
- 1.42 The Committee invited the Department of Prime Minister and Cabinet, the Department of Finance and Deregulation, and the Treasury to attend the hearing and provide submissions to the inquiry. Given that these three Departments all declined the Committee's invitation, the Committee can only assume that these Departments are comfortable with including local government in Section 96.
- 1.43 The Committee notes that, despite the current fiscal environment, trying to undertake public information and engagement activities such as the national civics education campaign and the funding of partisan campaigns cannot be done successfully on a shoe-string budget.
- 1.44 The Committee is aware of its responsibility to assist the Parliament to make decisions about temporary amendments to the *Referendum (Machinery Provisions) Act 1984*. In consideration of the Commonwealth Government's position that these changes should be considered on a referendum-by-referendum basis,¹¹ these recommendations are outlined below.
- 1.45 Funding for both a civics education campaign and the public funding of partisan campaigns would require the temporary suspension of the legislative limit on spending contained in the *Referendum (Machinery*

10 See *Proof Committee Hansard*, Sydney 16 January 2013, pp. 48-58.

11 Government response to the report of the former House of Representatives Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, 31 October 2012, p.3.

Provisions) Act 1984. The Committee believes that this limit should be temporarily suspended for a referendum on financial recognition of local government.

- 1.46 The Committee agrees with the findings of the LACA report and believes that the official Yes/No cases should continue to be drafted and approved by Parliamentarians.
- 1.47 There are other matters discussed in the LACA report that would improve the conduct of a referendum, particularly relating to the official pamphlet and communication methods. The Committee believes that addressing these matters will be beneficial for the referendum process.
- 1.48 The Yes/No pamphlet should be sent to every household rather than to every voter, in order to avoid waste. All Commonwealth Government activities relating to the referendum should utilise a range of communication methods to ensure that the referendum engages all parts of society. Format guidelines should be adopted to ensure that the Yes/No pamphlet is easily comprehensible to all voters.

Recommendation 4

The Committee recommends that the Commonwealth Government begin all necessary preparatory activities to ensure a successful outcome for a referendum on financial recognition in 2013. The preparatory activities include:

- the Australian Electoral Commission begin the necessary preparatory activities for a referendum in 2013;
- the Department of Regional Australia, Local Government, Arts and Sport, as lead coordinating and implementing agency, take the necessary steps for implementing a national civics education campaign and managing funding of partisan campaigns;
- the Attorney-General's Department release a draft of the constitution amendment bill by 31 January 2013 in order to begin the process of public consultation;
- temporary amendments be made to the *Referendum (Machinery Provisions) Act 1984*, to effect the following outcomes:
 - ⇒ remove the legislative limit on Government spending;
 - ⇒ confirm that Parliamentarians should draft and approve the 'Yes' and 'No' cases for the official referendum pamphlet for financial recognition of local government. In the event that there is no requirement for a 'No' case, the Committee recommends that there should be an official 'Yes' case only;
 - ⇒ allow the official Yes/No pamphlet to be sent to every household rather than every voter;
 - ⇒ enable a range of communication methods to educate and reach across all Australian demographics; and
 - ⇒ use format guidelines for the official 'Yes/No' referendum pamphlet to ensure the factual nature and comparability of the cases in the hands of voters.

Michelle Rowland MP
Chair



Appendix A – Submissions

- 1 Local Government Association of Tasmania
- 2 District Council of Robe
- 3 District Council of Grant
- 4 Port Augusta City Council
- 5 Cootamundra Shire Council
- 6 Serpentine Jarrahdale Shire
- 7 The Flinders Ranges Council
- 8 Sunshine Coast Regional Council
- 9 Cairns Regional Council
- 10 District Council of Yorke Peninsula
- 11 City of Victor Harbor
- 12 City of Norwood Payneham & St Peters
- 13 City of Burnside
- 14 City of Mount Gambier
- 15 Central Goldfields Shire Council
- 16 City of West Torrens
- 17 City of Prospect
- 18 District Council of Barunga West
- 19 Western Downs Regional Council
- 20 Shire of Derby/West Kimberley
- 21 District Council of Yankalilla
- 22 District Council of Franklin Harbour
- 23 Berri Barmera Council
- 24 The City of Unley

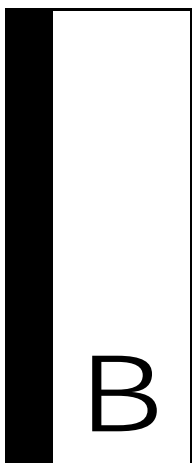
- 25 District Council of Coober Pedy
- 26 The Barossa Council
- 27 The Shire of Donnybrook Balingup
- 28 District Council of Loxton Waikerie
- 29 Kingborough Council
- 30 Logan City Council
- 31 Etheridge Shire Council
- 32 Whyalla City Council
- 33 The Rural City of Murray Bridge
- 34 Moreland City Council
- 35 Renmark Paringa Council
- 36 Lachlan Shire Council
- 37 District Council of Karoonda East Murray
- 38 City of Adelaide
- 39 Kingston District Council
- 40 City of Onkaparinga
- 41 Wujal Wujal Aboriginal Shire Council
- 42 City of Port Adelaide Enfield
- 43 Hawkesbury City Council
- 44 Tatiara District Council
- 45 South Gippsland Shire Council
- 46 Mornington Peninsula Shire Council
- 47 Broken Hill City Council
- 48 Mr Les Mallett
- 49 Ararat Rural City Council
- 50 Port Macquarie-Hastings Council
- 51 Queanbeyan City Council
- 52 Diamantina Shire Council
- 53 Glenelg Shire
- 54 Manly Council
- 55 Marrickville Council
- 56 Wollondilly Shire Council
- 57 District Council of Mount Remarkable
- 58 Ms Sylvia Lee

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- 59 District Council of Lower Eyre Peninsula
 - 60 Mid Murray Council
 - 61 Carrathool Shire Council
 - 62 Ku-ring-gai Council
 - 63 Gilbert + Tobin Centre of Public Law
 - 64 City of Palmerston
 - 65 Mackay Regional Council
 - 66 Ballina Shire Council
 - 67 Bundaberg Regional Council
 - 68 Tablelands Regional Council
 - 69 Nambucca Shire Council
 - 70 Gold Coast City Council
 - 71 Lockhart Shire Council
 - 72 District Council of Mount Barker
 - 73 Moreton Bay Regional Council
 - 74 Hornsby Shire Council
 - 75 City of Wagga Wagga
 - 76 City of Mitcham
 - 77 City of Port Lincoln
 - 78 The District Council of Ceduna
 - 79 Mosman Council
 - 80 City of Darebin
 - 81 Shire of Nannup
 - 82 Goondiwindi Regional Council
 - 83 Campbelltown City Council
 - 84 Murray Shire Council
 - 85 Liverpool Plains Shire Council
 - 86 Swan Hill Rural City Council
 - 87 Gundagai Shire Council
 - 88 Gosford City Council
 - 89 Australian Local Government Association
 - 90 Local Government Association of Queensland
 - 91 Burnie City Council
 - 92 Alexandrina Council

- 93 City of Salisbury
- 94 City of Marion
- 95 City of Perth
- 96 City of Greater Geelong
- 97 Cassowary Coast Regional Council
- 98 East Gippsland Shire Council
- 99 Longreach Regional Council
- 100 Banyule City Council
- 101 Lane Cove Council
- 102 Burdekin Shire Council
- 103 Prof Anne Twomey
- 104 Blacktown City Council
- 105 North Burnett Regional Council
- 106 Yarriambiack Shire Council
- 107 Nillumbik Shire Council
- 108 Corowa Shire
- 109 Shoalhaven City Council
- 110 Wellington Shire Council
- 111 Horsham Rural City Council
- 112 Albury City Council
- 113 Greater Taree City Council
- 114 City of Monash
- 115 City of Rockingham
- 116 Temora Shire Council
- 117 Fraser Coast Regional Council
- 118 City of Boroondara
- 119 Sutherland Shire Council
- 120 Shire of Wagin
- 121 Light Regional Council
- 122 Warrumbungle Shire Council
- 123 Brimbank City Council
- 124 City of Greater Bendigo
- 125 Naracoorte Lucindale Council
- 126 City of Whittlesea

- 127 Redland City Council
- 128 Banana Shire Council
- 129 Australian Electoral Commission
- 130 Law Council of Australia
- 131 Premier of Western Australia

Please note that, as this is a preliminary report, further submissions to the inquiry may be received. Please consult the Committee's final report for a full listing of submissions.



Appendix B – Hearings and witnesses

Wednesday 16 January 2013 – Sydney

Public hearing

Individuals

Prof Anne Twomey

Prof George Williams

Prof Alexander Jonathan Brown

Attorney-General's Department

Mr James Faulkner, General Counsel (Constitutional), Office of
Constitutional Law

Mr Jeff Murphy, Principal Legal Officer, Office of Constitutional Law

Australian Electoral Commission

Ms Marie Neilson, Assistant Commissioner Elections

Ms Gabrielle Paten, Director Electoral Policy and Reform

Mr Tom Rogers, Deputy Commissioner

Australian Local Government Association

Mr Adrian Beresford-Wylie, Chief Executive

Mayor Troy Pickard, Vice President

Mr John Pritchard, Executive Director, Policy and Research

Cr Keith Rhoades, Vice President

Department of Premier and Cabinet, South Australian Government

Mr Mick Petrovski, Director, Office for State/Local Government Relations

Department of Regional Australia, Local Government, Arts and Sport

Mrs Robyn Fleming, First Assistant Secretary, Local Government,
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Dr Matasha McConchie, Assistant Secretary, Local Government and Territories

Law Council of Australia

Ms Maureen Peatman, Chair of Legal Practice Section

Local Government Association of Queensland

Cr Margaret De Wit, President

Mr Craig Johnstone, Media Executive

Local Government Association of South Australia

Mr Chris Russell, Acting Chief Executive Officer,

The Hon John Trainer, Vice-President

Victorian Local Governance Association

Mr Toby Archer, Director, Policy

Ms Maree McPherson, Chief Executive Officer



Dissenting report – Senator David Bushby, Mr Mark Coulton MP, Senator David Fawcett, Mr Steve Irons MP, Mrs Jane Prentice MP

The Coalition members of the Committee note that the Coalition has committed to support the appropriate financial recognition of local government in the Australian Constitution, provided that change is limited to removing the question of constitutional validity in relation to direct Commonwealth funding of local government. Nonetheless, that support has always been conditional on the government proposing a specific change, something it has so far failed to do.

The Government formed the Expert Panel on Constitutional Recognition of Local Government ('the Expert Panel') to identify options for the constitutional recognition of local government and to report on the level of support for such recognition among stakeholders and in the general community.

The Expert Panel's final report stated that:

The majority of panel members support a referendum in 2013 subject to two conditions: first, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by ALGA necessary to achieve informed and positive public engagement with the issue, as set out in the section of this report on the concerns about a failed referendum (see page 16). Steps include allocating substantial resources to a major public awareness campaign and making changes to the referendum process¹.

As such, the Expert Panel was supportive of a 2013 referendum on financial recognition of Local Government, through a change to S.96 of the Constitution,

¹ Expert Panel on Constitutional Recognition of Local Government, Final Report, December 2011, p.2

provided two conditions were met. The first condition was negotiation with the States to achieve their support for the Government's proposed question and, the second, to take steps as recommended by ALGA to achieve informed and positive public engagement with the issue.

The Expert Panel's final report was delivered in December of 2011, almost two years prior to the latest possible date for the next Federal election. As at that date, the Government had plenty of time to ensure it took the blueprint for a referendum on financial recognition of local government, as provided by the Expert Panel, put it in place and proceed to put the question to Australians who have had the benefit of a full public education campaign on the issues.

We are now 10 months from the latest date for that election, yet the Government has failed to take action that could have been taken to meet either of the two conditions imposed by the Expert Panel, (neither of which have been met).

As such, the prospects of a referendum held in conjunction with this year's Federal election raise serious risks that it would be held in an environment where potential consensus of stakeholders (including the States) has not been met and where the opportunity to fully inform the voting public through public education and other avenues has not been fully realised.

Coalition members of the Committee are strongly of the view that the meeting of both of the Expert Panel's conditions are vital before any referendum on this issue (or any other constitutional change) should be put to the people.

Australia is a Federation of states and, as the evidence attests, the support of State governments can make or break referenda. If State governments are largely opposed to change, history proves it is very difficult for referenda to pass.

In the view of Coalition members, the recommendation by the Expert Panel that the Government negotiate to achieve the States' support for financial recognition, is an essential precursor to the Committee being able to make a recommendation on the likelihood of the referendum being supported by the Australian people. This view was reinforced by a number of witnesses that for the referendum to be successful, States either had to actively support the measure or at least "run dead" on the issue.

Evidence received at the hearing suggested that the Government position was that negotiation could not occur with the States until a proposal was developed. Coalition members of the Committee reject this position and consider that the Government, has failed to make best use of the time since December 2011 by failing to undertake such negotiations and that this delay has potentially undermined the prospect of a full and informed referendum proposition being put in 2013.

In any event, the Expert Panel put forward a proposed set of words in its Final Report in December 2011 and this could and should have formed a starting point

for such negotiations at that time. ALGA has since further refined these words in an attempt to allay concerns voiced by some States. Yet the Government has again failed to use these words as a starting point.

Despite these delays, either of these sets of words should now form a starting point for the Minister to immediately initiate negotiations with the States. The Minister must conclude these negotiations prior to the publishing of the final report of this committee such that final recommendations can be made cognisant of the position of the States.

Coalition members of the Committee are also strongly supportive of the Expert Panel's second condition and consider that decisions made by Australians in relation to potential changes to the Constitution should always be made on as fully informed a basis as possible.

Where a proposed change is worthy of support, a well informed public will be more likely to support it and, if a proposed change has potential pitfalls, a well informed public will be more likely to identify those problems and vote accordingly.

The desirability of the public being well informed regarding potential Constitutional change is even more important given that all Australian citizens are required to vote in a referendum. As such, it is not just those who have taken an active interest in the question, but those who are notably disinterested, who are required to make the decision.

Coalition members therefore consider that prior to a change to the Constitution being put to the people, Parliament should take all reasonable steps to maximise the likelihood that all voting Australians understand the question and have an opportunity to consider the 'yes' and 'no' arguments before making their decision.

This position is consistent with the evidence of many submitters, not least the Australian Local Government Association, which now holds grave concerns that the potential for success of a referendum has been severely harmed by the failure of the Government to take steps to meet the Expert Panel's two conditions and otherwise to advance the public education on the issues.

Their position is encapsulated by a statement of Ms McPherson of the Victorian Local Governance Association:

Ms McPherson: ...So for us, 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 as citizens? And if that campaign has not commenced then we are concerned about the timing².

² Committee Hansard, 16 January 2013, p33

The Constitutional experts who appeared at the hearing also provided support for the position that inaction by the Government has introduced risks (although their consequent conclusions differed). For example, Professor Williams stated:

*But it is a risky course-I certainly agree with that-and not the most desirable course either. The most desirable course would be that by this point, more work would have been done over the past months to actually build the level of public recognition, to get the support on board. It is dreadfully late and that itself is a major problem.*³

And Professor Brown:

Mrs Prentice: I just want to go further with AJ on the need to run a hard campaign soon and who should be running it. How long do you think we need? Do we need 18 months?

*Prof. Brown: That is a very good question, and I think the answer is that you need more than six months.*⁴

Despite the real concerns expressed by stakeholders regarding the impact of the Government's inaction on public understanding and, hence, timing of a referendum, the Chair's Preliminary Report concludes strongly that a referendum should be held in 2013 and that it should be held in conjunction with the Federal election due this year.

Coalition members of the Committee remain to be convinced that the time left between the date of this report and the latest possible election date is sufficient to be able to do the proposed constitutional change justice by ensuring a fully informed decision is made. If the election is held any sooner than the last possible date, the challenge only increases.

These challenges are highlighted by the excessively rushed process this Committee has agreed to put in place, which include the perverse outcomes of holding a hearing and the delivery of a preliminary report prior to the closing date for submissions!

The findings of the Expert Panel, evidence contained in submissions and also from some witnesses at the hearing, all highlight that the processes that need to be followed in order for Australians to be in a position to fully and carefully consider a referendum question, take time to implement properly.

Rushing these processes amounts to cutting corners and increases the likelihood of outcomes that do not accurately reflect those that would be experienced if the processes had been fully rolled out.

³ Committee Hansard, 16 January 2013, p12

⁴ Committee Hansard, 16 January 2013, p16

Coalition members note, however, that the Chair’s Preliminary Report recommends action be taken immediately to put in place the necessary steps to hold the referendum in conjunction with the 2013 Federal election.

As such, Coalition members reserve their position on the matters recommended in the Chair’s Preliminary Report, pending the outcomes of any response by the Government to those recommendations and the delivery of the final report of this Committee in March 2013.

Senator David Bushby

Mr Mark Coulton MP

Senator David Fawcett

Mr Steve Irons MP

Mrs Jane Prentice MP