



## **Dissenting report – Senator David Bushby, Senator David Fawcett and Mr Steve Irons MP**

### **Introduction**

The Government has demonstrated an extraordinary lack of action to put in place the pre-conditions for success highlighted by the Export Panel and other stakeholders, such as the Australian Local Government Association (ALGA).

As a direct consequence, the time remaining between now and 14 September 2013 is likely to be insufficient to put in place the necessary mechanics, education campaigns and other measures highlighted by expert witnesses as necessary to ensure an informed outcome for the referendum question. Coalition members are of the opinion that the referendum should only be considered once the pre-conditions identified by the Expert Panel have actually been met.

The Coalition acknowledges the constitutional uncertainty recent High Court cases have created with respect to direct funding of local government programs by the Commonwealth.

The Coalition is committed to restoring funding certainty to local government programs and has indicated support for the appropriate limited financial recognition of local government in the Australian Constitution as a way to achieve this.

Coalition members of the Committee also note the evidence received by the Committee highlighting that program-specific funding (which is currently

provided directly to local government) may still be provided (in full) via existing avenues that are constitutionally valid.

Coalition members consider that the existence of valid, alternative funding pathways to address the funding uncertainty introduced by the recent High Court cases reduces the imperative to pursue constitutional change in the face of the fact pre-conditions for success highlighted by the Export Panel and other stakeholders such as ALGA have not yet been met.

The Coalition members are mindful of the Committee TOR which called for an assessment of the “likelihood of success” of a referendum. They remain of the view that the recommendation of the main report to proceed with a 2013 referendum, despite the pre-conditions for success not being established, places at risk many millions of tax-payer dollars.

This risk, together with the risk of lack of informed and positive public engagement with the issue, appear to be unnecessary given the alternate pathways to ensure ongoing local government program funding should the direct model, in fact, be successfully challenged in the courts prior to the referendum question being put.

### **Lack of Action by the Government**

Coalition support for action to address funding issues through constitutional change has been provided subject to consideration of the specific change to be proposed by the Government and to that change being limited to removing the question of constitutional validity in relation to direct Commonwealth funding of local government. Similarly, it was offered in the expectation that the Government would approach the consideration of any such referendum question on the basis that all practical and reasonable steps were taken to ensure the Australian population made its decision on a fully informed basis.

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 process<sup>1</sup>.*

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, 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 a voting public equipped with the benefit of a full public education campaign on the issues.

As noted in the majority decision *Final report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government: the case for financial recognition, the likelihood of success and lessons learned from the history of constitutional referenda* (“the Final Report”), we now have the benefit of a nominated election date; 14 September 2013.

This date is some 10 weeks earlier than the latest possible date the election could have been held.

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

At the first hearing of this Committee, reservations were expressed by ALGA with regard to timing, were a referendum to be held in conjunction with the 2013 general election. They noted that they did not consider the question should be put to the people before a number of pre-conditions had been met.

These pre-conditions reflected the conditions recommended by the Expert Panel in their report.

Coalition members note the supplementary submission by ALGA, received after the second hearing, in which ALGA indicate they will actively support a 2013 referendum, but accept wholly the argument put by ALGA in earlier evidence of the advisability of first meeting their stated pre-conditions.

As at the date of the first hearing in mid-January 2013, evidence was received that even given the latest possible date for an election, being late November 2013, the prospect of meeting those pre-conditions in time to hold the referendum at the same time as the election were not high.

Given the nominated date for the election and the time that has since elapsed, the prospects of those pre-conditions being fully met by 14 September of this year, has only reduced.

As such, the prospect of a referendum held in conjunction with this year's Federal election raises 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.

*Lack of engagement with the states*

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 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 by the Committee 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 further refined those words in an attempt to allay concerns voiced by some states. Yet the Government again failed to use the refined words as a starting point.

We are now around 6 months from the nominated date for the election, yet the Government continues to fail to expeditiously take action open to it, to meet either of the two conditions recommended by the Expert Panel.

This observation is made by Coalition members of the Committee, despite our acknowledgment that the Committee was informed at the second hearing (20 February 2013) that the Minister had written to each of the state and territory governments requesting their views on the referendum question (as recommended in the majority finding of this Committee's preliminary report).

The Committee's Preliminary Report was tabled on 24 January of this year. Evidence received at the second hearing stated the Minister did not write to state

and territory governments until sometime around mid-February, around three weeks later, with a request for responses by 4 March 2013.

Given the importance the Expert Panel and all members of this Committee have placed upon the need to understand the views of the states (and in respect to prospects of success, to negotiate for their support), this delay, on top of the prior delays, is inexplicable.

The Minister would have known, at least on 30 January 2013, of the nominated day for the election. The task of seeking views of state and territory governments is not onerous, nor highly politically contentious. The three week delay in getting these letters out, in the face of such short timelines and the work needed to be done to conduct a meaningful referendum, raises questions about the Government's commitment to meeting the pre-conditions set by the Expert Panel (and ALGA).

If the Government proceeds to hold the referendum together with the 2013 election, it would be open for one to conclude that it is setting the question up to fail.

Coalition members recommended in their Dissenting Report to the Preliminary Report that the Minister immediately initiate negotiations with the states and that the Minister must conclude those negotiations prior to the publishing of the final report of this Committee. Unfortunately, the lackadaisical approach by the Minister has the consequence that the final recommendations contained in the majority report have been made without the benefit of knowledge of the position of the States.

**In the view of Coalition members, it is not possible to draw any meaningful conclusions regarding the prospect of success of the referendum in the absence of firm knowledge of the position of each of the States on the proposed question.**

Despite the inexplicable delays by the Minister in seeking to meaningfully engage with the states on this issue, State governments are known to have made previous statements and comments (including in submissions to this inquiry) that are, to some degree, indicative of their thoughts on the referendum question.

Despite broad acceptance by states of the principle of recognition to clarify the Commonwealth/local government financial status, known comments by all states include (at least to some extent) qualifications based on concerns regarding the potential impact of constitutional change. In some states, this has manifested as a reluctance to absolutely commit pending engagement on the actual question and, in others, a stronger rejection unless all concerns can be addressed.

Their concerns seem mostly to relate to the potential impact of proposed constitutional change on state governments' relationships with local governments. For example, one state who forwarded correspondence that was not able, due to timing, to be accepted as a submission, was concerned that the proposed amendment might later be found by the High Court to give rise to an implied constitutional obligation on the states to maintain particular systems of local government.

Evidence received (particularly by constitutional experts at the first hearing) suggested that such concerns may hold some basis.

If the concerns of some state governments *are* justified, the acceptance of the proposed constitutional change could have an impact that extended further than intended.

This would be of concern to Coalition members. As mentioned, the Coalition's support of appropriate financial recognition of local government in the Australian Constitution is limited to removing the question of constitutional validity in relation to direct Commonwealth funding of local government.

No Coalition undertaking has been provided to support change that extends (directly or indirectly) any further than this and, from the perspective of the Coalition members of this Committee, change that extended further would fundamentally impact the likelihood of their support for that change.

The abject failure of the Government to implement detailed engagement with all the states and territories to address and negotiate through any concerns they may hold, makes it very difficult for Coalition members to properly and thoroughly assess any unintended impact of the proposed change.

*Lack of informed and positive public engagement*

Coalition members of the Committee remain 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.

Past experience in referenda in this country has clearly proven that Australians tend to vote 'no' if they do not fully understand the issues behind the question.

As noted in our earlier Dissenting Report, 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 continue to 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 thoroughly consider the 'yes' and 'no' arguments before making their decision.

The Constitutional experts who appeared at the hearing provided support for the conclusion that inaction by the Government has amplified risks (although their consequent conclusions differed). For example, Professor Williams stated at the hearing in mid-January:

*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.<sup>2</sup>*

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<sup>2</sup> Committee Hansard, 16 January 2013, p12



Some seven weeks later, with a little over six months left before the nominated election date, little work has been done to address what Professor Williams described as a 'major problem'.

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.<sup>3</sup>*

Again, the Government has yet to draw together the threads required to even commence the legislative program required to implement a referendum at this year's election, nevertheless, commence the 'hard campaign'. If the evidence suggests we need more than six months for the 'hard campaign', time has run out.

In our Dissenting Report to the Preliminary Report, Coalition members expressed sympathy with the concerns of stakeholders regarding the impact of the Government's inaction on public understanding and, hence, timing of a referendum.

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. The nomination of an election date, combined with the relative inaction by the Government since the Preliminary Report, serves only to reinforce the challenge.

The findings of the Expert Panel, evidence contained in submissions and also from some witnesses at the hearing, all highlighted 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.

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<sup>3</sup> Committee Hansard, 16 January 2013, p16

*Lack of action – impact on processes*

In addition to concerns regarding the ‘hard campaigning’ on the issues pertaining to the referendum, the short timelines also now present challenges for the actual administration of the referendum.

Officers appearing before the Committee from various Departments and the Australian Electoral Commission (AEC), all indicated, as you would rightly expect, that they would work with whatever timeline the Government requested. But it was clear from their answers that this would come at a cost.

For example, the AEC made it clear that the guidelines for information-advertising campaigns they work under sets out a preferred campaign period of 27 weeks. This period would not start until the referendum mechanics legislation was in place. Given that there is around 27 weeks between the date of this report and the nominated election date, there is no prospect of those guidelines being met.

At the first hearing, the AEC stated that there would be consequences.

*Senator BUSHBY: Absolutely. Presumably, the 27 weeks is worked out not just because it complies with the guidelines but also because it delivers the best outcomes, in your view?*

*Mr Rogers (AEC): That is correct. Again, part of what we need to do is also to market test. I think we have put in the submission that, if we are able to go through the process and do market testing, the quality of the advertising that we conduct is likely to have a better outcome. The more we truncate that process, the more likely it is that the quality of the campaign itself will suffer. That could – and I am only saying ‘could’ – have an impact on something like formality, say, at the voting day itself. We are just conscious of that as we put forward that time frame.*

*Senator BUSHBY: So the further that it is truncated there is an increasing risk, presumably?*

*Mr Rogers: I think what we have said in the submission is that, like every other project, less notice means more cost and quality potentially goes down.*

*Senator BUSHBY: The South Australian representative earlier said that the Public Service will always deliver what they are told but sometimes it might come at a cost, and in this case that may well be higher actual cost in terms of dollars—*

*Mr Rogers: Correct.*

*Senator BUSHBY: but also an increase risk in terms of the impartiality and some of the other things that you discuss in your submission.*

*Mr Rogers: I certainly would not say the impartiality.*

*Senator BUSHBY: But I think in your submission you did mention impartiality in that you cannot test the impartiality of some of the material you are putting together to the extent that you would like.*

*Mr Rogers: Yes.* <sup>4</sup>

At the second hearing, the AEC was able to calculate timelines based on the nominated election date. They considered the risks remained:

*Mr Rogers: Since our last appearance before the committee, the Prime Minister has indicated that she intends to seek the Governor-General's approval to issue writs on 12 August for a polling day on 14 September. That is well known. On the assumption that the referendum is conducted on the same day, the timetable we set for complementing activities has taken on more certainty. It still remains possible for the two events to be held together on 14 September. The AEC's earlier submission provided some detail of the risks to the quality of the voter information campaign that were also canvassed at the last public hearing. They remain live risks.* <sup>5</sup>

And

*Mr Rogers: ... Again, if we had less time we could still conduct the campaign, but there are the risks associated with that that I have outlined previously* <sup>6</sup>.

Rushing these processes has amounted 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 as recommended.

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<sup>4</sup> Committee Hansard, 16 January 2013, p51

<sup>5</sup> Committee Hansard, 20 February 2013, p44

<sup>6</sup> Committee Hansard, 20 February 2013, p49

## Conclusion

Coalition members noted that the Chair's Preliminary Report recommended action be taken immediately to put in place the necessary steps to hold the referendum in conjunction with the 2013 Federal election.

We held concerns that the time was insufficient but remained open to the prospect that such immediate action may address those concerns. However, it is clear that such urgent and immediate action has not occurred and seven weeks has passed with little if any progress.

Coalition members are now of the opinion that the time remaining between now and the nominated election date of 14 September 2013 is insufficient to put in place all the necessary mechanics, formal, informal and partisan education campaigns and to otherwise ensure an informed outcome for the referendum question.

We acknowledge concerns regarding the impact of further High Court cases that may impact on the constitutionality of direct payments to local governments by the Commonwealth and that delays in granting constitutional financial recognition may come at a cost to the many valuable services provided at a local government level.

As noted, the Committee received constitutional evidence that clearly demonstrates that avenues exist for funding currently provided directly to local government, to still be provided in full, even in the face of (potential) judicial findings that direct payments are not constitutional.

The most obvious avenue is through grants through the states, tied on the basis that they must be both passed on in full and subject to use for the programs currently funded (or as directed under future Commonwealth-local government programs).

Coalition members acknowledge that this is a less clean avenue than direct payment, but accept the evidence that options such as this are available and that, accordingly, there is likely to be no potential risk of loss of funding to local government, eventuating from further developments following the *Pape* and *Williams* cases.

As such, we consider there to be little financial risk to local government in delaying the holding of a referendum on financial recognition of local government in the Constitution, until such time as the conditions previously discussed have been met.

As such, **Coalition members of the Committee recommend that a referendum on the issue of financial recognition of local government only be held after the pre-conditions posed by the Expert Panel and those previously promoted by ALGA, have been met.**

Senator David Bushby

Senator David Fawcett

Mr Steve Irons MP