

THE REFERENDUM THAT WASN'T: CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT AND THE AUSTRALIAN FEDERAL REFORM DILEMMA

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ABSTRACT

In 2010, the Commonwealth government proposed Australia's third attempt to give federal constitutional recognition to local government. In 2013, the government secured the passage through Parliament of a Constitution Alteration but, due to political events, and amid much controversy, the proposed amendment was not put to the people. This paper examines the merits and prospects for success of the proposed reform, with an eye to lessons for the future of local government's place in the federal system. It argues that the legal and constitutional cases for the alteration were strong, but limited, and poorly contextualised, theorised and articulated. We use public opinion evidence to conclude that had it proceeded, the referendum result would probably have been a third failure. These lessons are important for ongoing debate over sub-constitutional and constitutional reform to Australian intergovernmental relations, including questions of federal financial redistribution at the core of the proposal. Overall, the events of 2013 reinforce arguments that reforms to the position of local government, while important, should only be pursued as part of a holistic package of federal reform and renovation; and that more robust deliberative processes and principles must be adhered to before again attempting any constitutional reform.

I INTRODUCTION

On 24 June 2013, the Commonwealth Parliament passed the Constitution Alteration (Local Government) 2013 (Cth), clearing the way for a third referendum intended to afford local government an express place in the *Australian Constitution*. However, the intention to hold the referendum in conjunction with the approaching federal election was not fulfilled when the election date was brought forward from 14 September to 7 September 2013. On the leading interpretations of s 128 of the *Constitution*, this left insufficient time to meet the requirement that a constitutional alteration may only be

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submitted to the electors two months after its passage through Parliament, given the earlier date at which pre-polling and distribution of postal votes needed to commence.¹

By the time of its cancellation, the value of and prospects for the referendum had become a major political and constitutional controversy. This in itself reduced its prospects for success; and means, as argued below, that its cancellation should probably be assessed by history as a blessing, given the evidence of likely failure. One leading constitutionalist described the proposal as possibly 'one of the most inept attempts at constitutional change' ever attempted in Australia.² Rather than being a closed chapter, however, this gives both the proposal and the controversies surrounding an ongoing importance – for continuing debate regarding how proposals for constitutional change should be developed and progressed; for wider federal reform questions; and for the future of local government.

This article reviews, in turn, the history, merits and prospects of the proposed alteration. It provides both a chronicle of a failed attempt at constitutional change, and an assessment of what can be learned from it to inform future constitutional reform endeavours. Reviewing first the history and then the merits, we argue that while the legal and constitutional cases for the alteration were strong, they were poorly contextualised, theorised and articulated. Crucially, they did not enjoy the type of expert or political consensus required for success at referendum. Third, reviewing the prospects, we conclude that had the referendum been held, the result would probably have been failure. In support of this, we explore empirical evidence of relevant public opinion from the 2008, 2010 and 2012 Australian Constitutional Values Surveys,³ as well as public attitude research conducted for the Expert Panel on Constitutional Recognition of Local Government (2011)⁴ and other data. Fourthly, we examine the various process failures of 2013, including government mishandling of the allocation of public funding for the referendum campaign, and consider how these served to further weaken the proposal's chances of success.

Overall, the events of 2013 reinforce arguments that reforms to the constitutional position of local government should only be pursued as part of a more holistic package of reform and renovation to the federal system as a whole. Local government's

¹ See Constitutional Reform Unit, University of Sydney Law School, *Local Government Referendum* (9 August 2013) <<http://sydney.edu.au/law/cru/lgr.shtml>>. The election date was set on 4 August 2013. The window of a maximum of six months for the referendum to be submitted to electors passed in December 2013.

² Cheryl Saunders, 'Reflections on the Local Government Referendum That Wasn't' on University of Melbourne Law School, *High Court Blog* (23 September 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/2013/09/23/saunders-local-government-referendum/>>.

³ The Australian Constitutional Values Surveys (ACVS) were conducted by Newspoll for Griffith University and partners, of stratified random samples of adult residents via stand-alone twenty-minute telephone interviews in May 2008 (n=1211), March 2010 (n=1100) and October 2012 (n=1219). The ACVS was funded in 2008 and 2012 by the Australian Research Council (ARC Discovery Project 0666833) and in 2012 by Griffith University and the University of New South Wales. See Griffith University, *Federalism* <<http://www.griffith.edu.au/business-government/centre-governance-public-policy/publications/federalism>>.

⁴ See Expert Panel on Constitutional Recognition of Local Government, Commonwealth of Australia, *Final Report* (2011). See especially at 19–22, app C.

functional and financial position in the federal system remains a fundamental question for Australian intergovernmental relations, as evidenced by the national process to develop a Commonwealth White Paper on Reform of the Australian Federation.⁵ Above all, the analysis reinforces why no such proposal should be advanced without a more robust process for, and commitment to, bipartisanship and public deliberation. Whether such lessons will be heeded will depend on future proposals.

II HISTORY OF THE PROPOSAL

The proposal in 2013, had it proceeded to a vote of the Australian people, was to formally empower the Commonwealth government to provide funding directly to local government bodies. The *Constitution Alteration (Local Government) 2013* (Cth) proposed that s 96 of the *Constitution* be amended through the insertion of these underlined words:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit.

This proposal was similar to one defeated at an earlier referendum, in 1974.⁶ As reviewed elsewhere, a second, more symbolic constitutional alteration was also attempted, and failed, in 1988.⁷ However, by as early as 2004, the local government sector had again begun to promote national constitutional recognition as an important political and practical goal.⁸ By December 2008 the issue had become central enough that a Local Government Constitutional Summit resolved to pursue it in earnest. The Summit issued a declaration that any constitutional amendment should reflect certain principles, including that '[t]he Australian people should be represented in the community by democratically elected and accountable local government representatives', '[t]he power of the Commonwealth to provide direct funding to local government should be explicitly recognised', and that any new preamble should recognise local government 'as one of the components making up the modern Australian Federation'.⁹ These principles reflected the local government community's multiple

⁵ Department of the Prime Minister and Cabinet, Australian Government, *Reform of the Federation White Paper* <<https://federation.dpmpc.gov.au/>>.

⁶ The Constitution Alteration (Local Government Bodies) 1974 (Cth) ('An Act to alter the *Constitution* to enable the Commonwealth to borrow money for, and to grant financial assistance to, local government bodies') proposed a s 96A ('The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit') and also proposed to insert s 51(ivA) ('The borrowing of money by the Commonwealth for local government bodies').

⁷ A J Brown, 'In Pursuit of the "Genuine Partnership": Local Government and Federal Constitutional Reform in Australia' (2008) 31 *UNSW Law Journal* 435; Nicola McGarrity and George Williams, 'Recognition of Local Government in the *Australian Constitution*' (2010) 21 *Public Law Review* 164.

⁸ See Dean Jaensch, 'Governance, Recognition, Status, Authority: The Possibilities for Local Government' (Speech delivered at the National General Assembly of Local Government, Canberra, November 2004); Cheryl Saunders, 'Constitutional Recognition of Local Government' (Speech delivered at the National General Assembly of Local Government, Darwin, November 2007).

⁹ Local Government Constitutional Summit, 'Constitutional Recognition of Local Government Summit Declaration' (11 December 2008)

objectives – political, institutional, financial and symbolic – in pushing for recognition of local government as a third, elected sphere of government of growing importance in Australia’s federal system.¹⁰

In 2009, questions around local government recognition took on new urgency with the handing down of the High Court’s decision in *Pape*,¹¹ raising doubts about federal authority to directly fund a range of local government programs, or provide direct funds for general local government purposes. As explained further below, these doubts increased after the further decision of the Court in *Williams No 1* (2012).¹² However, it was the result of the 2010 election that provided the trigger for the issue to become a referendum priority. After the election the Labor Party, as part of power-sharing agreements with the Greens and some Independent MPs, committed to holding referenda on constitutional recognition of both Indigenous Australians and local government, at or before the next general election.¹³

Several months later, in August 2011, the government appointed an Expert Panel on Constitutional Recognition of Local Government. The Panel, chaired by former New South Wales Chief Justice, James Spigelman, was asked to report to government on options for recognition and levels of stakeholder and community support.¹⁴ The Panel’s report, issued in December 2011, examined four possible means of achieving constitutional recognition of local government.¹⁵ These four reform ideas set the terms of the subsequent debate and, a few years on, remain the main options for advancing local government recognition.

The first idea was ‘financial recognition’, in which s 96 of the *Constitution* would be amended to authorise direct financial payments from the Commonwealth to local councils – as eventually adopted by the federal government (with some changes in wording) and approved by the federal Parliament. It is discussed in detail in the next section. The second idea was ‘democratic recognition’, in which the *Constitution* would be amended to describe local governments as democratically elected, in a manner that thus required or guaranteed this to be the case.¹⁶ This was the single most strongly

<http://alga.asn.au/site/misc/alga/downloads/constit-rec/Final_Declaration.pdf>. See McGarrity and Williams, above n 7, 170.

¹⁰ [T]o ensure the quality of planning and delivery of services and infrastructure provided to all Australians, and the ongoing sustainability of local government, any constitutional amendment put to the people in a referendum by the Australian Parliament (which could include the insertion of a preamble, an amendment to the current provisions or the insertion of a new Chapter) should reflect the following principles: The Australian people should be represented in the community by democratically elected and accountable local government representatives; The power of the Commonwealth to provide direct funding to local government should be explicitly recognised; and If a new preamble is proposed, it should ensure that local government is recognised as one of the components making up the modern Australian Federation’: Local Government Constitutional Summit, above n 9.

¹¹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (*Pape*).

¹² *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams No 1*).

¹³ ‘Agreement, Australian Greens and Australian Labor Party’ (1 September 2010) cl 3(f).

¹⁴ Expert Panel on Constitutional Recognition of Local Government, above n 4, 24.

¹⁵ On the relationship between options see McGarrity and Williams, above n 7; A J Brown and Ron Levy, ‘A Tale of Two Questions? An Argument for Coordinated Constitutional Reform’ (2011) 7(25) *Indigenous Law Bulletin* 31.

¹⁶ Expert Panel on Constitutional Recognition of Local Government, above n 4, 8–9.

supported form of recognition when tested through public attitude research, but critics argued that it would interfere with existing mechanisms of State accountability over local government, such as State powers to dismiss councils.¹⁷

The third possibility considered by the Panel was 'symbolic recognition', in which there would be inserted into the *Constitution*, in a new Preamble or otherwise, a descriptive mention of local government as an existing part of Australia's system of government. This enjoyed little support among advocates for change and was unlikely to be sufficiently compelling to attract the support of electors. Research conducted for the Expert Panel in October 2011 recorded only 46 per cent of voters as feeling that local government deserved a mention in the *Constitution* '[e]ven if it doesn't make any practical difference'.¹⁸ The previous largely symbolic attempt at recognition, in 1988, attracted only 34 per cent of the national vote.¹⁹ Finally, the Panel tested the ground for a form of recognition embedded in, or accompanied by, principles in support of intergovernmental collaboration in the *Constitution*. Termed 'cooperative recognition', this tentative option attracted some positive reactions from State governments who were otherwise neutral or disinclined to support the local government proposal, as it was directed not only to local government but to 'well-known problems in the *Constitution* that afflict all three tiers of government'.²⁰

The Panel's majority view was that, of the four reform options, 'financial recognition' had the greatest and perhaps only chance of success if the referendum was to be held at or before the 2013 federal election. However, this view was made conditional on the Commonwealth negotiating with the States to achieve their support, and supporting a major public awareness campaign.²¹

The federal government made no immediate attempt to satisfy these conditions; nor, indeed, were they ever met. What followed instead were several months of inaction on local government recognition, a significant process failure to which we return below. It was only in November 2012, eleven months after the delivery of the Panel's report, that the Parliament appointed a Joint Select Committee to examine its recommendations. That Committee reported in January and March 2013, recommending that a referendum on financial recognition be held at the same time as the federal election. When the Committee's final report was handed down, the proposed election date of 14 September 2013 was fewer than six months away. Although federal Opposition support for financial recognition had been secured in 2011, by early 2013 this was already fracturing, if only because of the inadequacy of the timeframe. Opposition members of the Joint Select Committee lodged minority reports, justifiably critical of the government. Support continued to erode until it was effectively withdrawn by the Leader of the Opposition, Tony Abbott, on 2 July 2014, after polling began confirming that referendum success was unlikely, as well as additional controversy over proposed unequal funding of the 'yes' and 'no' campaigns (discussed below). Given the importance of bipartisan

17 Ibid.

18 Ibid 55.

19 See Brown, 'In Pursuit of the "Genuine Partnership"', above n 7, 446.

20 Victorian Government, Submission No 654 to Expert Panel on Constitutional Recognition of Local Government, 2, quoted in Expert Panel on Constitutional Recognition of Local Government, above n 4, 11.

21 Expert Panel on Constitutional Recognition of Local Government, above n 4, 2.

support to successful constitutional change in Australia,²² Abbott's increasingly critical stance raised new doubts about whether the referendum could succeed. On 4 August 2013, the reinstated Prime Minister, Kevin Rudd, called the federal election for 7 September 2014, meaning the referendum could not be held on that date, as explained at the outset. The newly elected Abbott government confirmed it had no intention of proceeding with the botched Labor proposal in the near term.²³

For many in the local government community, the abandonment of the referendum was undoubtedly a bitter anti-climax. However, it would be incorrect to interpret the 2013 outcomes as meaning that questions around local government recognition are dead. The Commonwealth government confirmed its commitment to direct funding of local government through programs such as Roads to Recovery, while recognising that the High Court's decisions were raising questions regarding its constitutionality.²⁴ More generally, the roles and finances of local government are included in the terms of reference of the Commonwealth-initiated process to develop a White Paper on Reform of the Australian Federation. Debate over the place of local government in the federal constitutional system, and in particular the arguments for and against financial recognition of local government, remain highly relevant to Australia's ongoing federal reform processes, and thus demand considered reflection.

III MERITS OF THE PROPOSAL

A Strengths

The arguments for 'financial recognition' of local government were, and are, threefold. First, it would achieve the important, albeit insufficient function of symbolic recognition to local government as the third tier of elected, general purpose government in Australia's federal system. Second, it would ensure that the constitutional position reflected the practice of funding flows in today's federation – and in particular, remove doubts about the validity of direct payments to local government (assuming, of course, that such payments are desirable). Third, in both its symbolic and financial aspects, and possibly others, recognition could help to address some of the wider challenges facing the federal system.

As noted above, the Declaration issued at the Constitutional Summit in 2008 recognised that local government recognition had multiple objectives. Indeed, it suggests the overall preference of the local government community was to advance reform that achieved a mix of symbolic, technical and political/institutional goals, rather than reform that was merely symbolic or merely technical. This approach confronted the overall challenge, now well-established, of supporting the evolution of local government from the weakest and least constitutionally independent level, into an increasingly integral, democratically-elected sphere of 'general purpose' government.²⁵ While

²² George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244–6.

²³ See also 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>>.

²⁴ Australian Local Government Association, *Welcome* (30 October 2013) ALGA Constitutional Reform Campaign Website <<http://www.councilreferendum.com.au/>>. See also *ibid*.

²⁵ Even after State constitutional recognition, local government remains the 'lame duck of Australian politics, limping along in a battle for survival ... in many cases not being able to

'financial recognition' progressed only certain aspects of this overall preference, it was plainly seen by its advocates as representing the minimum necessary change that would achieve a practical purpose, while also achieving a symbolic purpose and some substantive place for local government in the *Constitution*, potentially with support from federal and State political actors.

The second argument for 'financial recognition' – and in our view, a strength – was that it would update the *Constitution* to reflect the contemporary reality of federal financial relations. Much had changed since the failed 1974 referendum, when the idea of the Commonwealth providing funds directly to local government, on an ongoing basis, for general or specific purposes, was a recent and controversial policy shift. Forty years later, direct funding (alongside indirect funding via the States) was and is an accepted political, policy and constitutional practice.²⁶ It is consistently relied on by all sides of politics, at all levels, to maintain the basic sustainability of local government, and support an increasing range of Commonwealth and Commonwealth-State programs in line with the expanding social, economic and environmental policy roles of local government. As noted by James Spigelman, Chair of the Expert Panel, the results include 'a considerable body of actual experience of successful partnership amongst the three levels of government that has not undermined the fundamental constitutional responsibility of the State Parliaments for the respective systems of local government'.²⁷ The role of the Commonwealth as collector of the bulk of public finance has also further consolidated over the past four decades, to the extent that the question of direct revenue redistribution from the Commonwealth to other levels – state and local government alike – has long ceased to be one of 'whether', but rather 'how much', 'how' and 'on what terms'.²⁸

For all those relying on or supportive of the Commonwealth's ability to directly fund local government, the rationale for 'financial recognition' was especially strengthened by growing – and recently confirmed – doubts about the constitutional validity of existing general purpose, and significant specific purpose, Commonwealth direct spending on local government, without such an amendment. The Commonwealth's power to provide unconstrained direct funding was an untested legal issue in 1974. In

do much for those injured by the shifting foci of economic activity and wealth creation': Maurice Daly, 'The Challenges for Local Government in the 21st Century' in Bill Pritchard and Phil McManus (eds), *Land of Discontent: The Dynamics of Change in Rural and Regional Australia* (UNSW Press, 2000) 195, 216. On the broader pressures for recognition that this creates, see Chris Aulich and Rebecca Pietsch, 'Left on the Shelf: Local Government and the *Australian Constitution*' (2002) 61(4) *Australian Journal of Public Administration* 14; A J Brown, 'Subsidiarity or Subterfuge? Resolving the Future of Local Government in the Australian Federal System' (2002) 61(4) *Australian Journal of Public Administration* 24.

²⁶ See Anne Twomey, 'Always the Bridesmaid – Constitutional Recognition of Local Government' (2012) 38(2) *Monash University Law Review* 142, 146–51.

²⁷ James Spigelman, 'Constitutional Recognition of Local Government' (Speech delivered at the Local Government Association of Queensland 116th Annual Conference, Brisbane, 24 October 2012)

<http://councilreferendum.com.au/site/misc/alga_cr/downloads/SPEECHES_TRANSCRIPTS/LOCAL_GOVERNMENT.pdf>.

²⁸ See, eg, House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Rates and Taxes: A Fair Share for Responsible Local Government* (2003).

1975, it appeared to be resolved in favour of the Commonwealth by the *AAP Case*,²⁹ or at least the assumptions that arose from it, that ‘the purposes of the Commonwealth’ for which moneys could be appropriated (*Constitution* s 81) was not necessarily limited by its express legislative purposes nor a constrained reading of the executive power. However, in *Pape* (2009) and *Williams No 1* (2012), the High Court returned the interpretation of both the Commonwealth’s executive power, and the appropriations ‘power’, to a much more constrained reading.

The *Pape* decision was identified as having ‘substantial implications’ for direct funding of local government, as it meant that in order to make an appropriation, the Commonwealth now had to identify an ‘additional source of power’ for the appropriation beyond s 81, whether the executive power in s 61 or another express head of Commonwealth legislative power.³⁰ The legislation authorising financial payments to individuals such as Bryan Pape was upheld by majority as supported by the executive power, but it was by no means clear that general purpose grants to local government would be so supported.

In *Williams No 1*, the Court went further and showed when direct Commonwealth grants or payments might be *invalid*. The case concerned the validity of Commonwealth direct funding to providers of services under the National Schools Chaplaincy Program (NSCP), which was not supported by any legislation (other than possibly appropriations legislation, which after *Pape* was not enough). The NSCP was found to be beyond the executive power of the Commonwealth as it was not underpinned by any legislation; two justices, Hayne J and Kiefel J, went so far as to warn that they could not see how any legislation authorising the NSCP could be supported by any head of power.³¹ While again the impugned program did not involve local government, the decision threw a range of Commonwealth direct funding programs into doubt, including any to local government not clearly supported by legislation enacted pursuant to a substantive source of power. As Anne Twomey observed, this ‘left much of the direct Commonwealth funding to local government vulnerable to constitutional challenge’.³²

Within seven days of the decision in *Williams No 1*, the Commonwealth enacted a ‘rescue’ or ‘band aid’ solution that involved amending the *Financial Management and Accountability Act 1997* (Cth) to retrospectively validate over 400 diverse executive spending programmes, including a range involving local government.³³ At the time, however, there was ‘considerable doubt’ about the legal sufficiency of this solution.³⁴ Since the events of 2013, these doubts have been confirmed by the High Court in *Williams No 2*,³⁵ which involved a challenge (again by Ron Williams) to the validity of these amendments. The Court affirmed the findings of Hayne J and Kiefel J in *Williams No 1*, that federal expenditure on the NSCP was unsupported by a Commonwealth head of

²⁹ *Victoria v Commonwealth* (1975) 134 CLR 338 (‘*AAP Case*’).

³⁰ McGarrity and Williams, above n 7, 186.

³¹ See Shipra Chordia, Andrew Lynch and George Williams, ‘*Williams v Commonwealth* – Commonwealth Executive Power and Australian Federalism’ (2013) 37 *Melbourne University Law Review* 189; David Hume, Andrew Lynch and George Williams, ‘Heresy in the High Court? Federalism as a Constraint on Commonwealth Power’ (2013) 41 *Federal Law Review* 71.

³² Twomey, ‘Always the Bridesmaid’, above n 26, 153.

³³ *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

³⁴ Chordia, Lynch and Williams, above n 31, 218.

³⁵ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 (‘*Williams No 2*’).

power.³⁶ Again, the decision in *Williams No 2* did not directly concern Commonwealth payments to local councils, being confined to the validity of the remedial legislative scheme as it applied to the NSCP.³⁷ In June 2014, the federal Parliament passed amendments to preserve the continuance of the impugned legislative scheme.³⁸ However, legal doubts also continue to surround these further amendments, with leading scholars agreed that 'the full ramifications of the *Williams* litigation are biting'³⁹ in ways that demand a more thorough response.

In particular, therefore, this chain of decisions before and since the abandoned referendum has confirmed the 'very real' risk that a range of significant and successful direct funding programs are invalid – including the well known Roads to Recovery Program, contained in the *Nation Building Program (National Land Transport) Act 2009* (Cth).⁴⁰ A constitutional amendment directed at 'financial recognition' also thus served the specific, as well as general practical purpose, of putting beyond doubt the power of the Commonwealth to continue to distribute funds directly to local government, for whatever purposes might be required beyond the Commonwealth's own legislative responsibilities. This argument became the central plank of the case for the proposal in 2013.⁴¹

The third benefit of the proposal approved by Parliament was that it had some potential to help address wider challenges facing the federal system of government. These challenges are many and varied, as documented, for example, by the Senate Select Committee on Reform of the Federation, which reported in 2011.⁴² At the same time as the local government referendum fell apart,⁴³ the incoming Abbott Coalition government committed to, and has since established, the White Paper process on reform of the federation referred to at the outset, for purposes including clarifying the roles and responsibilities of all levels of government, reducing or eliminating overlap, and

³⁶ Ibid [38]–[51]. The Court dismissed Commonwealth arguments that the legislative scheme, insofar as it supported payments made as part of the NSCP, was a law with respect to 'the provision of ... benefits to students' under s 51(xxiiiA) of the Constitution; nor did it amount to a law with respect to trading and financial corporations under s 51(xx).

³⁷ Ibid [30].

³⁸ *Financial Framework (Supplementary Powers) Act 2014* (Cth).

³⁹ Andrew Lynch, 'Williams v Commonwealth (No 2)' (Paper presented at Constitutional Law Conference, Art Gallery of NSW, Sydney, 13 February 2015) <<http://www.gtcentre.unsw.edu.au/events/2015-constitutional-law-conference-and-dinner>>. See also Anne Twomey, 'Déjà Vu – The Commonwealth's response to the Williams Case', *Constitutional Critique* (3 July 2014) <http://blogs.usyd.edu.au/cru/2014/07/deja_vu_the_commonwealths_resp_1.html>; Anne Twomey and Robert Carling, Centre for Independent Studies, *Public Money; Federal-State Financial Relations and the Constitutional Limits on Spending Public Money* (2014).

⁴⁰ Spigelman, above n 27.

⁴¹ See Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, *Final Report* (2013), 9–13 [2.19]–[2.34].

⁴² Senate Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: an Agenda for Reform* (2011). See generally Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012).

⁴³ See Liberal Party of Australia, *The Coalition's Policy to Boost Productivity and Reduce Regulation*, Election Policy Document, July 2013, 20 <<http://www.liberal.org.au/boosting-productivity-and-reducing-regulation>>.

ensuring financial sustainability of local, State and federal services delivery.⁴⁴ In particular, arguments for better principles and practices of intergovernmental collaboration have featured large in federal reform debate, as indicated in the Expert Panel's exploration of 'cooperative recognition' as a potential part of the answer for local government.

The extent to which 'financial recognition' offered to help address these wider issues is discussed further below – but as the Expert Panel emphasised, direct inclusion of local government in the federal financial system, typified by successful programs such as Roads to Recovery, did have the potential to enhance intergovernmental collaboration across all levels.⁴⁵ Indeed, for proponents of a more competitive federalism, the facility for Commonwealth grants to be directed to either State or local government, depending on who could do the best job, could be seen as creating incentives for all levels to collaborate more effectively.

B Limitations and Challenges

The proposal approved by Parliament nonetheless had numerous weaknesses, which became increasingly apparent as the planned referendum approached, and to which its advocates had few ready answers. First, it was unclear that the proposal truly achieved the political symbolism of recognition demanded by the 2008 Declaration. As Cheryl Saunders noted, it was 'an odd proposal' because it did not amount to 'constitutional recognition' as a tier of government of the federation, but rather simply mentioned local government in the *Constitution* 'in passing':⁴⁶ 'It was simply assumed, rather doubtfully, that empowering the Commonwealth to make conditional grants to local government constituted recognition of the latter.'⁴⁷

Second, although the focus was on 'financial recognition', none of the arguments included any proposal to actually *increase* the amount of finance flowing to local government. At a grass-roots level in local government, much support was in fact predicated on the assumption that financial recognition would lead to an increased share of public finance, commensurate with local governments' growing roles and pressures, but there was in fact nothing to confirm that this would result. Consequently, the idea that the change would make any substantial practical difference was also minimised since, once scrutinised, it amounted to maintenance of the status quo.⁴⁸ This was

⁴⁴ Department of the Prime Minister and Cabinet, *Reform of the Federation White Paper: A Federation for Our Future* (Issues Paper 1, September 2014) v.

⁴⁵ See Expert Panel on Constitutional Recognition of Local Government, above n 4, 6.

⁴⁶ As quoted by Michael Kenny, 'Referendum Plan "Could Weaken State Governments"', *SBS World News Australia Radio* (online), 13 May 2013 <<http://www.sbs.com.au/news/article/2013/05/13/referendum-plan-could-weaken-state-governments>>.

⁴⁷ Saunders, 'Reflections on the Local Government Referendum That Wasn't', above n 2. See also Cheryl Saunders, 'Recognising Local Government needs Rethink', *The Age, Sydney Morning Herald*, 22 May 2013 <<http://www.smh.com.au/federal-politics/political-opinion/recognising-local-government-needs-rethink-20130521-2jyu9.html#ixzz2sDtSmB1I>>.

⁴⁸ See Constitutional Reform Unit, 'Local Government Referendum 2013: Alternative Yes/No Case', University of Sydney Law School, 23 May 2013; Gilbert & Tobin Centre of Public Law, *2013 Local Government Referendum – FAQs*, University of New South Wales <<http://www.gtcentre.unsw.edu.au/resources/referendums/2013-local-government-referendum-faqs>>.

important given that the many issues of reform confronting the federal system include the relative weakness, inadequate resources and perceived incompetence of local government, as evidenced in prior public opinion research, also discussed further below.⁴⁹

Third, as the case for financial recognition then revolved around the need for a technical 'fix' to the problem that existing direct funding was in constitutional doubt, the case for recognition was weakened by the fact that another solution existed — a return to the 'indisputably secure power' of the Commonwealth, through s 96 of the *Constitution*, to make conditional grants to the States requiring these funds to be passed on to local government.⁵⁰ Since the Commonwealth could still rely on many heads of power to make a range of direct grants, the quantum of programs hinging on this solution might actually be quite small. Local government advocates tended to assume rather than articulate the advantages of direct funding. The federal government also undermined its own case for change because at the same time as it proposed to put direct funding beyond doubt, it was underplaying the constitutional threat by responding to the High Court's decisions with claims that its direct funding programs were not in jeopardy. As Saunders noted, the Commonwealth's 'official position that its power was still intact' made it 'hard to mount a compelling case ... An argument that the amendment was necessary "just in case" was weak'.⁵¹

Fourth, all this also meant that the proposal did relatively little to engage with the wider issues of federal reform, even though it had potential to do so. At the technical, financial level, no attempt was made to explain why direct funding to local government represented a preferred response to the larger set of questions raised by *Williams No 1* about Commonwealth direct funding more generally. If a constitutional 'fix' was needed for local government grants, it was presumably needed for other types of direct funding, too. George Williams noted that the 'only certain path' by which the Commonwealth could restore programs such as the NSCP was to 'channel the funding through the States' under s 96, notwithstanding disadvantages;⁵² which further begged the question why this option was insufficient in respect of local government. At a broader level, the proposal offered nothing in response to the problems of confusion over the roles and responsibilities of the levels of government, financial uncertainties confronting all levels (especially the States), and lack of constitutional support for intergovernmental collaboration.⁵³ The High Court's decision in *Williams No 1* emphasised these larger questions, and not simply the technical financial issues, because it marked 'an important

⁴⁹ See Brown, 'In Pursuit of the "Genuine Partnership"', above n 7.

⁵⁰ Saunders, 'Reflections on the Local Government Referendum That Wasn't', above n 2.

⁵¹ Ibid.

⁵² George Williams, 'School Chaplains Ruling Alters Concept of Federal Funding', *Sydney Morning Herald*, 21 June 2012 <<http://www.smh.com.au/federal-politics/political-opinion/school-chaplains-ruling-alters-concept-of-federal-funding-20120620-20oet.html#ixzz2rwwXQAn1>>.

⁵³ See 'Australian Federal Reform: An Action Plan' (Outcomes Paper, Sir Samuel Griffith Legacy Series 2013 Discussion Forum, Griffith University). Public concern over the inadequacy of intergovernmental collaboration, rising significantly over the 2008–2012 period: while 92% of participants of the 2012 ACVS saw collaboration between levels of government as a desirable attribute of federalism, only 34% felt that the current system achieves it: see A J Brown, 'Australia's Federal Future: The People's View' (Paper for the Sir Samuel Griffith Legacy Series 2013 Discussion Forum, October 2013).

retreat from the principles which saw Commonwealth power expand dramatically over the course of the 20th century.⁵⁴ Even constitutional experts supportive of local government emphasised these wider problems as being either more important, or necessary to simultaneously address if recognition of local government was to be made a worthwhile goal.⁵⁵ However, neither financial recognition per se, nor the arguments presented in support of it, engaged in a systematic way with this wider context.

Finally, the proposal approved by Parliament was vulnerable to attacks, as afflicted the 1974 proposal, that financial recognition would contribute to further centralisation of power in the Commonwealth; or at the very least, as we suggest above, was not a fully thought-through reform. Greg Craven, for instance, described the referendum as 'dishonest' because it was more about expanding Commonwealth power than supporting councils, and likened the proposed change to 'a scorpion, small but lethal'.⁵⁶ John Wanna described the change as constitutional 'dynamite' due to the 'substantial erosion of state power' it could entail.⁵⁷ These criticisms were overblown, given that any idea that existing constitutional arrangements were preserving any sensible balance between federal and state power, such that local government recognition was capable of substantially disturbing, is difficult to sustain. More accurate were Saunders' assessments that 'recognition almost inevitably involves substantive change of some kind in the operation of the Australian federation, in which the relations between the other two arms of government already is under strain';⁵⁸ and that 'the muddle that is Commonwealth-state relations, which urgently needs sorting, should not be further complicated by a measure of this kind'.⁵⁹

In our assessment, the principle of constitutional recognition did and does have real merit, as does the principle that the Commonwealth should have clear power to distribute centrally-collected revenues directly to local government, for general purposes, under a reformed, renegotiated federal financial system. In the end, however, the focus on a minimalist or lowest-common-denominator reform left these merits poorly theorised, articulated and justified, against predictable counter-attacks. These weaknesses in the case also inevitably impacted on the prospects for public support.

⁵⁴ Hume, Lynch and Williams, above n 31, 3.

⁵⁵ See Gilbert & Tobin Centre of Public Law, Submission No 7 to Select Committee on Reform of the Australian Federation, *Inquiry into Reform of the Australian Federation*, 20 August 2010; Anne Twomey, Submission No 32 to Senate Select Committee on Reform of the Australian Federation, *Inquiry into Reform of the Australian Federation*, 29 August 2010; Gilbert & Tobin Centre of Public Law, Submission No 63 to Expert Panel on Constitutional Recognition of Local Government, *Inquiry into Constitutional Recognition of Local Government*, 1 November 2011.

⁵⁶ Quoted in Adam Creighton, Christian Kerr and Mark Coultan, 'Vote to Bypass States Doomed: Council Support Crumbles', *The Australian* (online), 15 May 2013, 15-16 <<http://www.theaustralian.com.au/national-affairs/state-politics/vote-to-bypass-states-doomed/story-e6frgczx-1226642499298>>.

⁵⁷ Ibid. See also John Roskam, 'Referendum a "Democratic Disaster"', *Australian Financial Review*, 17 May 2013, 42; Constitutional Reform Unit, 'Local Government Referendum 2013: Alternative Yes/No Case', above n 48.

⁵⁸ Saunders, 'Reflections on the Local Government Referendum That Wasn't', above n 2.

⁵⁹ Saunders, 'Recognising Local Government needs Rethink', above n 47.

IV PUBLIC OPINION

It is impossible to know for certain what the referendum outcome would have been. Nevertheless, by 4 August 2013 when it was confirmed that the referendum could not be held, sufficiently clear signs were emerging that it would likely be defeated. One poll in May 2013 had registered support for the proposal among 65 per cent of voters nationally, including all five mainland States.⁶⁰ However, subsequent polls suggested that support was declining rapidly: in late June, a Morgan poll indicated that fewer than half (47 per cent) of Australians backed the reform, with a majority in only one State (NSW).⁶¹ Morgan predicted failure, noting a similar pattern of falling support prior to the 'no' result in 1988.⁶² Local government associations maintained that support remained 'high',⁶³ based especially on their own, unreleased polling in the period 1–7 July 2013, indicating of the large proportion of voters who remained undecided, most would flow to a 'yes' decision if or when 'given further information about the proposal'.⁶⁴ However, most commentators took the view that the referendum 'would never have succeeded'.⁶⁵ As early as 19 June, one of its major parliamentary supporters, Nationals Senator Barnaby Joyce, said that at that point, the referendum 'would be absolutely annihilated' and did 'not stand a chance'.⁶⁶

These indications of the prospects, had the referendum proceeded, suggest it was lucky that the referendum was abandoned. However, it would be a mistake to assume that this means that constitutional recognition of local government did not, or could not, command sufficient public support to succeed. Rather, the public opinion evidence leading up to the referendum period pointed clearly to a number of specific factors on which a more successful effort might have been based, and could be based in the future.

First, given that local government recognition commenced as a relatively low priority in Australian political debate, the key question was always going to be what would persuade Australian citizens that a change to the *Constitution* was sufficiently important and worthwhile. Baseline results from the first Australian Constitutional Values Survey (ACVS) (May 2008) showed that a bare majority of respondent electors (53 per cent)

⁶⁰ This was a Nielsen poll conducted for the *Australian Financial Review* (n=1400): Phillip Coorey, 'Poll: Referendum on Local Government Likely to Pass', *Australian Financial Review*, 20 May 2013, 3.

⁶¹ Roy Morgan, 'Local Government Referendum Set to Fail', Finding No 4993, 26 June 2013 <<http://www.roymorgan.com/findings/local-government-referendum-june-26-2013-201306260321>>. N=1146, June 21–23, 2013.

⁶² Ibid. 'The last time the question on Local Government recognition was put to a referendum in September 1988 the Morgan Poll showed support for the question dropped as Australians learnt more about it. The Morgan Poll showed support for the question was 60% on July 30/31, 1988; 59% on August 6/7, 1988; dropping to 50% on August 20/21, 1988 and only 33.62% of Australians voted yes'.

⁶³ N Perry, 'Local Council Referendum Put on Ice', *The Australian* (online), 4 August 2013 <<http://www.theaustralian.com.au/news/latest-news/local-council-referendum-put-on-ice/story-fn3dxiwe-1226691012405>>.

⁶⁴ Correspondence from Adrian Beresford-Wylie, CEO, Australian Local Government Association, to the authors, 27 February and 20 March 2014.

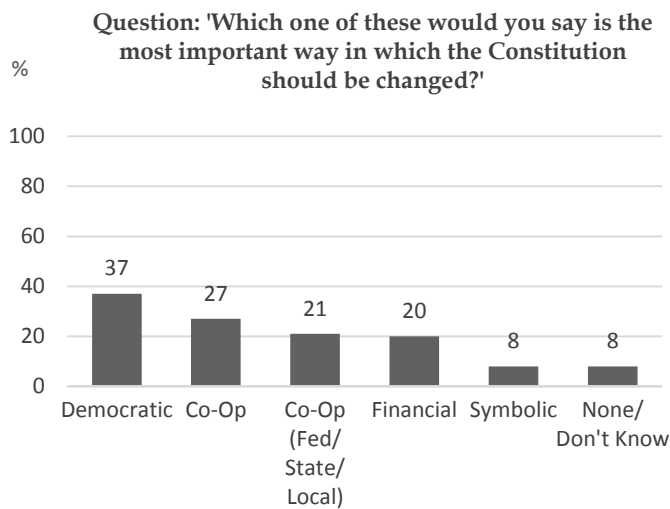
⁶⁵ Stephen Bartos, 'What Now for a Referendum on Local Government Recognition?', *Crikey* (online), 8 August 2013 <<http://www.crikey.com.au/2013/08/08/what-now-for-a-referendum-on-local-government-recognition/>>.

⁶⁶ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3367 (Barnaby Joyce).

might support recognition as a general proposition, but up to 78 per cent might support it if recognition had substantive implications for improving the funding and democratic accountability of local councils.⁶⁷ While this showed strong potential for success, a fundamental issue that had to be overcome was not only that consciousness was low, but that any change had to promise more than a status quo – rather it had to promise a better system of local government, given widespread recognition of local governments' weaknesses and incapacities.⁶⁸

Such results indicated that funding and resources of local government were significant issues, but they were not the only, nor necessarily the most important issues involved. This was confirmed by the more detailed research conducted by Newspoll for the Expert Panel in October 2011. Voter support rose to 75 per cent for financial recognition, but rose even higher, to 85 per cent, for democratic recognition (a change to guarantee that local government was democratically elected). Support for 'cooperative recognition', or a change to 'make it easier for different levels of government to cooperate', varied between 69 and 81 per cent.⁶⁹ When respondents were asked which of these different forms was the most important to pursue, close to twice as many respondents chose democratic recognition as the most important (37 per cent) that chose financial recognition (20 per cent) (Figure 1).

Figure 1: Most important change to the *Constitution* (October 2011)⁷⁰



Against this evidence, and a minority view on the Expert Panel, 'financial recognition' alone was nevertheless pursued because it was calculated that anything more than this could not secure support from State leaders and both sides of politics, and was therefore doomed to fail. As it turned out, however, that support was ultimately

⁶⁷ See Table 5 in Brown, 'In Pursuit of the "Genuine Partnership"', above n 7.

⁶⁸ See *ibid.*

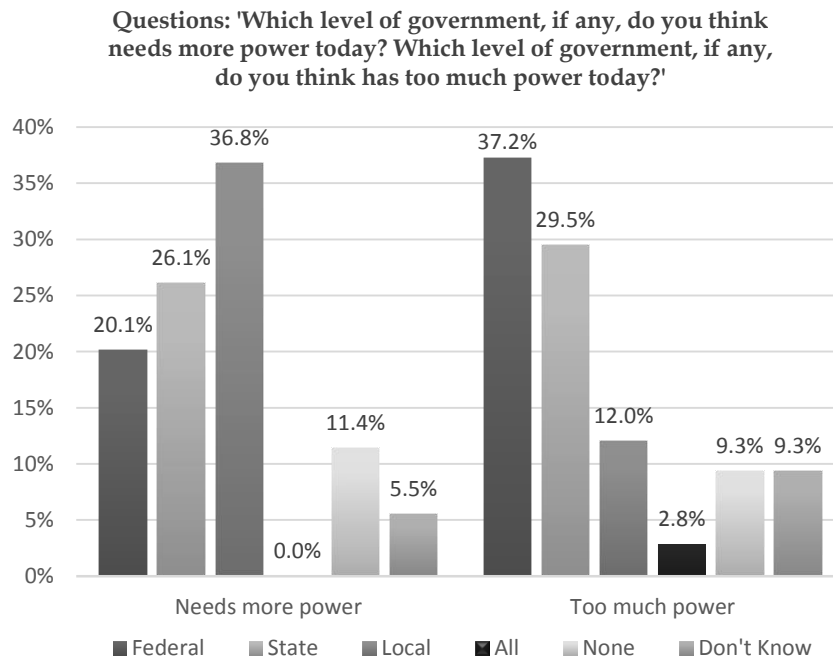
⁶⁹ Expert Panel on Constitutional Recognition of Local Government, above n 4, 54.

⁷⁰ *Ibid.* 56. Survey conducted by Newspoll, September 2011, adults aged 18+ nationally who are eligible to vote (n=1478).

withheld in any event, and not least because the proposal had not captured the public imagination, and was unlikely to do so. The question remains as to what might best capture support in the future.

A second lesson from public opinion evidence, moreover, was that while potential support existed, this would fast evaporate if the proposal was painted as expanding Commonwealth power, rather than decentralising power to councils and communities – which, predictably, is exactly what occurred. Qualitative data collected by Morgan in June 2013 indicate that, prompted by statements such as Craven's, centralisation fears were the primary reason for growing opposition to the proposal.⁷¹ While previous ACVS results showed that Australian citizens traditionally have a high level of faith and confidence in the federal level of government, they also showed that voter support would *not* be forthcoming if overall responsibility for local government was perceived as passing to the Commonwealth government,⁷² and that while local government was a level which many citizens saw as needing more power, the Commonwealth government was seen by many as already having too much power (Figure 2). These issues were plainly insufficiently anticipated by the government and other proponents when progressing the 2013 proposal.

Figure 2: Attitudes towards amount of power in levels of government – ACVS 2012



⁷¹ Morgan, above n 61.

⁷² Brown, 'In Pursuit of the "Genuine Partnership"', above n 7, 455. Importantly there was significant support, especially among supporters of constitutional recognition, for local government's roles and responsibilities to be set out in the *Constitution* itself rather than left to either of the other levels of government.

Third, both prior research and the events of 2013 confirmed that it was a mistake to progress a proposal which focused on local government recognition as a stand-alone issue, without addressing public questions about whether or how such a reform would help fix the larger questions about the federal system. Again, the qualitative data collected by Morgan suggests that where voters did support the 2013 proposal, it was more due to faith that it could deliver indirect, intangible benefits for federal reform as a whole – such as by-passing or eliminating State governments, or increasing the accountability and performance of local government – than due to the benefits of more certainty in direct federal funding.⁷³ This is consistent with longer term evidence from the Australian Constitutional Values Survey of the extent of popular dissatisfaction with the federal system.⁷⁴ The Expert Panel also presented evidence from the ACVS and its own polling regarding the importance that voters attached to different types of constitutional reforms (Figure 3, with ACVS data to the right of the dotted line). Local government recognition, as a stand-alone issue, ranks as more important than republicanism, but is significantly less important than other issues, including more general federal questions. The question remains how constitutional recognition of local government might be achieved while also addressing these larger, related issues.

Fourthly and finally, constitutional change requires a hospitable political environment in which the public engagement in a referendum question has some prospect of leading to a positive result. While it can be argued that there is no 'right time' for constitutional change, and indeed that an unpredicted crisis or a 'now or never' proposal might be the best catalysts, Australian constitutional history suggests that such debates need to occur in an environment capable of amounting to a 'utopian moment' – such as at the time of Federation – when public sentiment was characterised by 'both optimism and dismay, of disillusionment with old constitutional relations and confidence in the local ability to forge new ones.'⁷⁵

A referendum held at or around the 2013 election was never going to capture such a moment. This was a time of unprecedentedly low political confidence in national politics and institutions, as recorded by the 2012 ACVS and other polls.⁷⁶ Local government's

⁷³ Morgan, above n 61.

⁷⁴ Between 2008 and 2012, the ACVS recorded a 6.3% fall in the proportion of citizens who believe the current three-levelled system of government works well, from 67.8% to 61.5%, a statistically significant result ($F(5, 3217) = 4.896, p = .002$) along with other consistent results. See Griffith University, *Australian Constitutional Values Survey 2012 Results Release 1* (17 November 2012) Federalism, Regionalism and Devolution <<http://www.griffith.edu.au/federalism>>; Brown, 'Australia's Federal Future', above n 53. For previous results, see A J Brown, 'Thinking Big: Public Opinion and Options for Reform of Australia's Federal System' (2009) 4(1) *Public Policy* 30; A J Brown, 'Escaping Purgatory: Public Opinion and the Future of Australia's Federal System' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 365; A J Brown, 'Measuring the Mysteries of Federal Political Culture in Australia' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 310.

⁷⁵ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 212.

⁷⁶ See Brown, 'Australia's Federal Future', above n 53; Imre Salusinszky, 'Faith in Political Leaders Collapses', *The Weekend Australian* (Sydney), 17 November 2012, 1; A J Brown, 'Evolution Plan for a Workhorse: The Reform of Australia's Federal System Requires Much

own research captured the implications of this collapse in trust, for constitutional debates. Surveys conducted for the Australian Local Government Association (ALGA) in 2009 showed reasonably high levels of public support for a range of potential constitutional changes, but base support for *all* these proposals had collapsed by the time of its next survey in February 2011, including base support for constitutional recognition of local government (down from 53 per cent to 38 per cent).⁷⁷

Figure 3: Importance of holding a referendum on various issues (Newspoll 2011; ACVS 2010)⁷⁸



More Effort and Considerably Greater Clarity of Purpose', *Inquirer, The Weekend Australian* (Sydney), 17 November 2012, 19; Ian McAllister, Juliet Pietsch and Adam Graycar, 'Perceptions of Corruption and Ethical Conduct' (ANUpoll Report No 13, Research School of Social Sciences, Australian National University, October 2012) 7 <<http://www.anu.edu.au/anupoll>>.

⁷⁷ JWS Research, 'Constitutional Recognition of Local Government' (Research Presentation for ALGA, 24 February 2011) 35.

⁷⁸ Expert Panel on Constitutional Recognition of Local Government, above n 4, 68; Local Government: Newspoll conducted for Expert Panel, adults aged 18+ nationally who are eligible to vote, September 2011 (n=1478); Remaining items: Australian Constitutional Values Survey 2 conducted for Griffith University by Newspoll, adults aged 18+ nationally, March 2010 (n=1100), see Brown and Levy, above n 15.

All four lessons remain pertinent to any future proposals. They show that the 2013 reform proposal was swimming against the current of public opinion in fundamental ways. Even the best designed, best funded and best organised education and political campaigns could not have counteracted the underlying factors working against that proposal, in the six-week period remaining to the referendum. The final question becomes, how did the government and supporters of the referendum come so close to putting this proposal to the people, in circumstances where it was so likely to fail, despite all this evidence together with the well-documented lessons of prior referendum history?

V A FLAWED PROCESS

If the 2013 referendum on local government recognition had been held and succeeded, the prior sections of this article suggest it would have been despite the process that supported it. That process suffered from several deficiencies that weakened the proposal's prospects, independently of the proposal's actual substantive merits or flaws. Scholars have long noted that a referendum's chances will be enhanced if certain factors are present, including bipartisan and cross-jurisdictional support, public education and popular ownership.⁷⁹ Notwithstanding this well-known literature, in the period 2010–2013 the principal policy actors devised and persevered with a process that was ill-suited to achieving any of these factors. On the whole the lessons to be drawn are about how *not* to run a referendum.

Four process flaws in particular are worthy of discussion: inadequate timeframes; poor public engagement; government delay and mishandling; and a failure to justify a funding allocation that gave a massive advantage to the 'Yes' campaign.

As noted earlier, the path to the 2013 proposal was set by the commitment in the 2010 post-election agreements, to hold the local government referendum at or before the next federal election. This set up a highly truncated timeframe for putting in place the preconditions of referendum success. Obviously, the agreements were negotiated under political and time pressure, and reflect that a three-year term is the longest timeframe over which any of the parties could guarantee to deliver such a commitment. However, it appears that the parties were not conscious of the alternative, which was to commit to establishing a process with sufficient legal and resource continuity to continue beyond the next election. This was achieved by advocates of Indigenous recognition, who persuaded the Gillard government in September 2012 to delay holding of a referendum on that subject until there was sufficient public awareness and support. In any event, the decision to stick to such a short and arbitrary timeframe made it difficult for key actors to do the work necessary to negotiate across party lines, consult widely, and engage the general public.

While this problem was a product of the 2010–2013 period, it also points to structural weakness in Australia's approach to referendums and fundamental process reforms. Options for a more robust, institutionalised process of constitutional deliberation include past precedents such as the Australian Constitutional Convention (1973–1985),⁸⁰

⁷⁹ Williams and Hume, above n 22, 244–63.

⁸⁰ See Cheryl Saunders, 'Parliament as Partner: A Century of Constitutional Review' (Research Paper No 3, Parliamentary Library, Parliament of Australia, 2000) 21–3.

or an occasional constitutional convention, but in either case processes capable of withstanding individual changes of government.

The second major flaw concerned the Expert Panel process the government established to advance community consultation on local government recognition. The weakness lay not with the eminent and diverse Panel membership, which brought a range of perspectives, as well as expertise and political savvy.⁸¹ The problem instead was that the government provided the Panel with such limited time (less than six months) and resources that it was in a position to implement, at best, a narrow consultation program.⁸² Within those constraints, it is understandable that the Panel focused on collecting expert and stakeholder views, but this came at the expense of wider public engagement. For example, it ran just six public meetings, and even then most participants were local government personnel.⁸³ The Chair of the Panel, James Spigelman, called the consultations 'low key', observing that they 'were not as extensive [as those of the Indigenous recognition panel] and did not attract much in the way of public response'.⁸⁴

By contrast, the Indigenous recognition process was progressed with greater alacrity and resources by the government; it appointed an Expert Panel promptly in December 2010, which conducted extensive consultations over several months before reporting in January 2012.⁸⁵ Even accepting that local government recognition may not warrant an equivalent resource commitment, the contrast is striking. The government's failure to invest appropriately in the Expert Panel process established an early dynamic in which debates about local government recognition were to be conducted by elite actors, with the public having only a marginal presence. This dynamic was naturally harmful to achieving any sense of popular ownership around the issue.

Again, the experience highlights the continued reluctance of Australian governments to embrace referendum processes that encourage popular participation and deliberation. In this respect Australia is out of step with emerging international practice, with comparable nations such as Canada, the United Kingdom and Ireland embracing the use of citizens' assemblies and other deliberative processes to help advance constitutional reform. In the face of this growing practice, the Gillard government chose to conduct an elite-driven process with little scope for genuine public engagement, notwithstanding the importance of popular ownership and public education to successful constitutional reform.

The third key process flaw was delay and mishandling, primarily by the government but also by the Joint Select Committee. Having committed itself in September 2010 to a

⁸¹ The Expert Panel's membership of 18 included six current or former local government representatives, four parliamentary members (one each from Labor, the Coalition and Greens parties, and one Independent), and representatives from academia, trade unions and the community sector, and each State. See further Paul Kildea, 'Expert Panels, Public Engagement and Constitutional Reform' (2014) 25 *Public Law Review* 33.

⁸² For a detailed assessment of the Panel's program of consultation, and a comparison with that of the Indigenous recognition Panel, see *ibid.*

⁸³ Expert Panel on Constitutional Recognition of Local Government, above n 4, 68, 88.

⁸⁴ Spigelman, above n 27, 5.

⁸⁵ See Expert Panel on Constitutional Recognition of Indigenous Australians, Commonwealth of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) <<http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/html-report/>>.

truncated timeframe, the government exacerbated time limitations by failing to progress the process at key points. As noted, it took close to a year after the agreements were signed to establish an Expert Panel to take the issue forward. The second long delay occurred when the government, having received the Expert Panel's report in December 2011, waited until November 2012 to establish a Joint Select Committee to consider its recommendations. With the federal election due in the second half of 2013, this left a matter of months to develop cross-party consensus on a model, secure its passage through Parliament, and begin the task of public education.

Further mishandling occurred when the government pressured local government stakeholders to support the referendum, despite itself having failed to heed the Expert Panel's majority recommendation that it must take steps to 'negotiate with the states and territories to achieve their support' before progressing any proposal.⁸⁶ On the eve of the establishment of the Joint Select Committee, seven months after the Panel's report, Spigelman noted that no steps had been taken to implement the condition, and the Committee process remained insufficient to do so:

Neither in the ALGA submission, nor in the Panel's Report, is there any proposal about how the Commonwealth can achieve the support of the States for financial recognition. No doubt, some have in mind the traditional means by which the Commonwealth gets its way – by writing a cheque. I am by no means certain that that is an option in the current fiscal environment. I am, however, certain that a Joint Select Committee is not the forum for any such negotiations. If the local government community wishes to pursue this issue it will have to do so in other forums, particularly COAG. ... This remains a work in progress and should be regarded by supporters of the referendum as a high priority, which is unlikely to be achieved by the Joint Select Committee process.⁸⁷

The Joint Select Committee itself reinforced this issue in its preliminary report, and called on the relevant Commonwealth Ministers to 'immediately commence negotiations with state and territory governments to secure their support for the referendum proposal'.⁸⁸ However, little if anything had been achieved by the time of the Committee's final report in March 2013.⁸⁹ Instead, the Committee majority proposed that such a precondition was no longer so vital, noting that 'even if unequivocal support from state governments cannot be achieved, local governments across Australia are ready to support and campaign for the referendum on behalf of rate-payers, in the absence of state support'.⁹⁰ This assessment, not shared by Coalition members, showed all the hallmarks of a government recklessly intent on proceeding to a referendum simply in order to satisfy a public commitment to do so, even if the result was defeat.

Indeed, the proceedings of the Joint Select Committee document the government and other members pressuring the ALGA into undermining the Expert Panel's work, by effectively abandoning the key preconditions which ALGA itself had previously supported. When the ALGA maintained in its evidence that it did not support a referendum until the preconditions were met, and expressed concern regarding the

⁸⁶ Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, *Preliminary Report* (2013) 2.

⁸⁷ Spigelman, above n 27.

⁸⁸ Joint Select Committee on Constitutional Recognition of Local Government, *Preliminary Report*, above n 86, 3.

⁸⁹ Joint Select Committee on Constitutional Recognition of Local Government, *Final Report*, above n 41, 3 [1.12].

⁹⁰ *Ibid* 22 [3.19].

timeframe, it was openly criticised by government members.⁹¹ Ultimately, ALGA bowed to this pressure and wrote to the Committee in terms it then used to justify its primary recommendation to proceed, to the effect that the ALGA would support and campaign for any referendum 'as soon as it is proposed by the Federal Government'.⁹² This unfortunate dynamic of pressure, and of bowing under pressure, contributed to the momentum towards the high risk outcome.

The fourth major process failing was the government's peremptory decision to allocate unequal amounts of public funding to the 'Yes' and 'No' campaigns. Of the \$10.5 million made available to assist protagonists in promoting their arguments to the community, \$10 million (or 95 per cent) was allocated to the ALGA, and just \$500 000 to opponents of constitutional recognition. Local government Minister Anthony Albanese justified the disparity on the basis that it was in line with the levels of support that the proposed constitutional amendment had received in Parliament:

The amount of funding to be provided for each case will reflect the proportion of Members that voted for and against the Constitution Alteration (Local Government) Amendment Bill 2013. Over 98 per cent [of the House of Representatives] voted for and less than 2 per cent voted against this bill.⁹³

This formula for distributing campaign funds was based on an ALGA proposal, but it had been rejected by the Joint Select Committee⁹⁴ and, critically, was not disclosed by the government until after the House of Representatives had voted on the referendum bill. Coalition members were furious at both the funding disparity and the absence of notice. When the bill came up for a vote in the Senate on 24 June, a number of members made their displeasure known: seven Coalition senators voted against the bill and many more abstained.⁹⁵ Senators accused the government of cynicism and dishonesty,⁹⁶ and of trying to 'skew public information'⁹⁷ and 'rig the referendum'.⁹⁸

⁹¹ See Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, Sydney, 16 January 2013, 25–30; evidence to Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, Sydney, 20 February 2013, 26 (Felicity-Ann Lewis, President, Australian Local Government Association), quoted in *ibid* 24 [3.25].

⁹² Australian Local Government Association, Supplementary Submission No 89.3 to Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, 22 February 2013, 2, quoted in Joint Select Committee on Constitutional Recognition of Local Government, *Final Report*, above n 41, 22.

⁹³ Anthony Albanese, 'Funding Provided to Promote Public Debate about Constitutional Change' (Media Release, 17 June 2013).

⁹⁴ The proposal for funding proportionate to parliamentary support was noted by the Expert Panel (Expert Panel on Constitutional Recognition of Local Government, above n 4, 17), but rejected by the Joint Select Committee, stating its belief that 'funding should be distributed to partisan campaigns on an equal basis, with both sides of the question receiving equal funding': Joint Select Committee on Constitutional Recognition of Local Government, *Preliminary Report*, above n 86, 7 [1.39]; Joint Select Committee on Constitutional Recognition of Local Government, *Final Report*, above n 41, 26.

⁹⁵ Sabra Lane, *Is the Local Government Referendum as Good as Lost?* (2 July 2013) The Drum <<http://www.abc.net.au/news/2013-07-02/lane-local-government-referendum/4793956>>.

⁹⁶ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3359 (George Brandis).

⁹⁷ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2013, 3424 (David Bushby).

⁹⁸ Commonwealth, *Parliamentary Debates*, Senate, 24 June 2013, 3702 (Scott Ryan). Opposition leader Tony Abbott also wrote to the Prime Minister accusing the government of 'trying to

The government's funding announcement rapidly shifted the focus of debate from the merits of the proposal to the integrity of the process. In doing so, it caused irreparable harm to any spirit of bipartisanship, effectively dislodging the most important 'pillar' of referendum success. Bipartisanship was effectively terminated on 2 July, when Tony Abbott stated publicly that the referendum had been mishandled by the government, and encouraged electors to vote 'no' if they had concerns: 'This thing has been done badly and undemocratically ... And I say to the Australian people, if you don't understand it, don't vote for it.'⁹⁹

The Coalition's hostile reaction to the funding announcement was both foreseeable and understandable given the longstanding commitment to equal funding shares at Australian referendums. Traditionally, federal governments have not spent money on referendum advocacy outside of the production and distribution of the official information pamphlet, which gives equal space to the Yes and No cases.¹⁰⁰ In 1984 this practice was prescribed in s 11(4) of the *Referendum (Machinery Provisions) Act 1984* (Cth), which confined Commonwealth spending on referendum advocacy to the production and distribution of the official pamphlet, and ancillary activities. This legislative initiative was prompted by an attempt by the Hawke government, a year earlier, to devote public funds exclusively to the promotion of five amendments that it planned to put to a referendum.¹⁰¹ Opposition MPs described this instance of financial favouritism as 'unfair', 'unprincipled' and an 'unprecedented misuse of public funds'.¹⁰² The historical practice of funding neutrality, and the outcry following the Hawke government's departure from it, should have given the Gillard government pause before committing, at short notice, to an allocation of campaign funds which so favoured one side.

A further downside to the funding issue was that it forestalled a much-needed debate about the regulation of federal expenditure in referendum campaigns. Given the controversy in 2013, one might infer that the lesson to be drawn is that federal governments should always allocate funding equally between Yes and No campaigns. This would be unfortunate, as one can envisage circumstances in which the allocation of unequal funds might be defensible – for example, where the proposed amendment enjoys overwhelming public support, such that equal funding for the opposing, marginal viewpoint is incongruous; or, to offset spending by State governments, which face no spending constraints regarding referendum advocacy. In other words, what

buy the result' of the referendum, and that anything short of equal funding would put the 'fairness' of the process at risk: letter from Tony Abbott to Julia Gillard, 17 June 2013 <<http://freedomwatch.ipa.org.au/2013/06/exclusive-abbott-tells-gillard-equal-funding-essential/>>.

⁹⁹ As quoted by Paul Osborne, 'Council Referendum in Danger of Failing', *News.com.au* (online), 2 July 2013 <<http://www.news.com.au/breaking-news/national/council-referendum-in-danger-of-failing/story-e6frku9-1226673258771#ixzz2XyrosjnP>>.

¹⁰⁰ *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1).

¹⁰¹ This planned referendum was later abandoned.

¹⁰² Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3325 (Michael Townley); Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3320 (Noel Crichton-Browne); Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3323 (Brian Harradine).

amounts to a 'fair' allocation of funds may vary according to the context of individual campaigns.¹⁰³

However, none of these nuanced arguments were aired in 2013. Instead the Gillard government's snap announcement on funding allocation, and its assertion that allocating money in proportion to parliamentary votes constituted a fair methodology, undermined any careful debate on the issue. Now that the hostile atmosphere of the time has dissipated, the most pertinent lesson is not that equal funding is always the best approach, but that the time has arrived for Parliament to secure a more rational, durable approach to the regulation of funding shares. If nothing else, governments seeking flexibility in advocacy spending should obtain Parliament's agreement well in advance of any referendum.¹⁰⁴ However, the controversy also provides a reminder of the need to update referendum machinery laws, as highlighted by a 2009 parliamentary inquiry which was highly critical of existing funding arrangements, describing current expenditure restrictions as overly strict and an impediment to public education.¹⁰⁵ Among other measures, it recommended that the spending restrictions be lifted. The events of 2013 suggest that it is time to revisit the legal regulation of referendums with an eye to establishing fair, durable rules that are less susceptible to ad hoc manipulation.

The overall lesson from the process failures of 2013 is that decisions about referendum process inevitably impact on a reform proposal's prospects of success. Each of these misjudgments – inadequate timeframes and public engagement, delay and mishandling, and a misconceived allocation of funding – weakened the chances of a successful referendum by fashioning a political environment ill-suited to careful, public deliberation about local government recognition. A less hurried, more open, bipartisan and deliberative process would have put the 2013 proposal in a stronger position, including potentially by allowing a stronger proposal to develop, but also even by allowing fair consideration of the one presented. These lessons apply not just to local government recognition, but to all constitutional reform proposals, including the ongoing push for constitutional recognition of Aboriginal and Torres Strait Islander peoples, and other questions such as rights protection and wider federal reform issues.

VI CONCLUSION: WHAT FUTURE FOR CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT?

Is constitutional recognition of local government a dead issue? The answer is 'no', for at least three reasons. First, there continue to be doubts about the constitutional validity of direct Commonwealth funding to local government; the decision in *Williams No 2* only reinforced constitutional uncertainty about numerous federal spending programs directed at local government. It is also apparent that, notwithstanding the viability of channelling funding through s 96 grants, direct funding of local government is an

¹⁰³ For a detailed analysis of this issue, see Paul Kildea, 'Achieving Fairness in the Allocation of Public Funding in Referendum Campaigns' (2016) 37 *Adelaide Law Review* (forthcoming).

¹⁰⁴ See Paul Kildea, 'Australia's Abandoned Local Government Referendum' on United Kingdom Constitutional Law Association, *UK Constitutional Law Blog* (29 November 2012) <<http://ukconstitutionallaw.org>>.

¹⁰⁵ 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).

element of the federal financial system on which all levels of government have come to rely.

Second, pressure for local government recognition is likely to remain because it has never been simply an issue about direct federal funding. Support within both local government and the wider community has as much to do with wider arguments for improving the political status, independence, resources, competence and democratic accountability of local government, within a federal system that often struggles to deliver effective, sustainable and responsive policy and services at community levels. Third, debates about reforming Australian intergovernmental relations, including questions of federal financial redistribution, remain a significant issue, as demonstrated by the ongoing White Paper process for reforming the federation.

However, it is clear that any future attempt to achieve constitutional recognition of local government will need to heed the lessons of the failed process in 2013. More than anything, that failure suggests that local government recognition should only be pursued as part of a more holistic package of reform and renovation to the federal system. To once again pursue reform on the narrow terms of the 2013 proposal would be to ignore the interrelationship between local government funding and wider federal concerns, as well as the public appetite – well-documented through surveys of public opinion – for fundamental changes in how the federation operates. The events of 2013 also provide salient lessons about how to design a process to support any future attempt at granting constitutional recognition of local government. They reinforce the importance of bipartisanship, political leadership and public engagement to successful constitutional reform. And they underscore the need for a renewed focus for more robust processes of constitutional deliberation. Should the lessons of 2013 be heeded, there is a strong chance that the next attempt at constitutional reform in this area may not only be worthy, but successful.