REFERENDUM QUESTION 3

"CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT": THE REAL ISSUES

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June 1988
LOCAL GOVERNMENT RECOGNITION: A SUMMARY

The proposed Constitutional amendment is detrimental to the interests of Local Government because it is not directed to Local Government Councils per se, but instead gives recognition to a 'system of Local Government' which could include regional Councils.

Further, it does not address the real concerns of Local Government (i.e. it does not guarantee satisfactory funding for local government nor does it grant protection from arbitrary dismissal or forced amalgamations).

It also does not guarantee Local Government for all parts of the States.

Indeed, the proposals clearly would not apply to Territories, not even the Northern Territory which has many Councils.

Although the proposal seems bland and innocuous, from a technical drafting point of view, the proposed Constitutional recognition of Local Government is ambiguous, and if accepted would result in lengthy and costly litigation to determine its real meaning.

The existing forms of Local Government would be replaced by the uncertainty and rigidity of a High Court determination of the meaning of a 'system of local government'. Such a centrally determined formula would take no account of the variations which must inevitably exist between over 800 local government bodies with different responsibilities, revenue bases and political constituencies.

At best, the proposal would give Constitutional recognition to what we already know, i.e., that Local Government is a State matter.

It would be more appropriate for Local Government recognition to be enshrined in State Constitutions, in fact this is already the case in 4 States.
<table>
<thead>
<tr>
<th>TOPIC</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary</td>
<td></td>
</tr>
<tr>
<td>The Proposition</td>
<td>1</td>
</tr>
<tr>
<td>The Difficulties &amp; Dangers of Interpretation</td>
<td>1</td>
</tr>
<tr>
<td>Legal Opinion</td>
<td>4</td>
</tr>
<tr>
<td>Constitutional Commission - Differing Views</td>
<td>5</td>
</tr>
<tr>
<td>No Guarantees</td>
<td>6</td>
</tr>
<tr>
<td>Coalition Record</td>
<td>6</td>
</tr>
<tr>
<td>Labor's Record</td>
<td>7</td>
</tr>
<tr>
<td>The Importance of Local Government</td>
<td>8</td>
</tr>
<tr>
<td>Other Motives &amp; Implications</td>
<td>9</td>
</tr>
<tr>
<td>Conclusion</td>
<td>9</td>
</tr>
<tr>
<td>Attachment A: Action v. Rhetoric</td>
<td>11</td>
</tr>
</tbody>
</table>
LOCAL GOVERNMENT RECOGNITION: THE REAL ISSUES

THE PROPOSITION

Local Government Referendum Question No. 3 seeks the approval of voters for a change to the Constitution by inserting new S.119A:

'Each State shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.'

THE DIFFICULTIES AND DANGERS OF INTERPRETATION

This proposal differs from the draft form of words recommended by the Constitutional Commission in that the words - 'a system of local government with' and 'the laws of the State' - were inserted by the Federal Government. No explanation of these additions has been given.

The Government would have the people believe that the proposal would simply entrench in the Federal Constitution power for the States to do what they have always done since Federation - that is control local government.

However, there will be debate as to the real meaning of the proposal in the event it were to be adopted. There are two reasons for this. Firstly, there is the novelty of the provision - i.e. there is no similar provision in the Constitution which might be used as an aid to interpretation. Secondly, the proposal itself does not define 'a system of local government' and thereby inevitably invites a legal challenge.
Normally, the High Court gives meaning to legislation by reference to the words used in that legislation. When interpreting legislation in recent years the High Court has been able to use the provisions of the Acts Interpretation Act to determine the meaning of ambiguous and badly worded expressions by reference to other materials such as second reading speeches, explanatory memoranda and even parliamentary debates. However, the proposed amendment is different. It is to apply to the Constitution which is an Imperial Act. The Acts Interpretation Act does not apply to Imperial Acts such as our Constitution and the High Court would not be able to refer to any other materials to determine the intention of the Parliament.

The consequence of the foregoing is that the interpretation given to the proposal is most likely to be seriously at odds with local government expectations and the stated intentions of the Hawke Government.

For example, it cannot be assumed that the proposal applies exclusively to local government as generally understood in the community, i.e. Municipal and Shire Councils. There would appear to be no bar to the proposal embracing electricity councils, Harbour boards, water boards, etc. provided they are elected pursuant to State laws.

Nor is it to be inferred that local government councils need to be democratically elected. Surely an adverse inference can be drawn from the fact that at the very same time the Federal Government is making a big play about giving constitutional recognition to local government, it has deliberately not applied the Fair Elections proposal to local government elections. Accordingly, gerrymanders are likely to remain a permanent feature of local government.
Furthermore, the proposal would not:

- preclude a State from undertaking the compulsory amalgamation of local government bodies;
- preclude the arbitrary dismissal of councils;
- preclude the appointment of an administrator pending new elections;
- compel a State to provide for local government recognition in any part of the State;
- preclude the withdrawal of local government recognition from any existing area; and
- guarantee satisfactory funding for local government.

Indeed, most of these shortcomings in the proposal are specifically recognised in the Explanatory Memorandum accompanying the Referendum Bill.

Once constitutionally entrenched, the whole system of local government would be at the whim of the High Court. Its expansive interpretation in recent years of the corporations power, the external affairs power and s.92 merely demonstrate the hazards of attempting to predict an interpretive outcome.

There would be the real possibility that the High Court will attribute substantial consequences beyond formal recognition to the serious detriment of local government. Concern about possible unacceptable interpretations being given by the High Court was a factor in the decision of the 1980 Constitutional Convention to oppose constitutional recognition.
At best, the proposal merely reinforces the plenary powers that States already have over local government. Any claims that the proposal will protect and enhance local government as the third tier of government are patently false and need to be recognised as such.

LEGAL OPINION

In 1904 O'Connor J. in the case of the Municipal Council of Sydney v. the Commonwealth, said:

'The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interests, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of those interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it.'

Perhaps in reinforcing this opinion, the New South Wales Labor Government dismissed the Sydney council; a dismissal that could have been effected even with the provision now proposed by the Federal Labor Government.

A noted Constitution expert, Professor Geoffrey Sawer (ANU), in 1983 said:

'It is a reasonable political inference from S.106 (of the Commonwealth Constitution) and from the course of Australian history that the Commonwealth should not intervene in state constitutional questions except to the extent that the enlargement of the Commonwealth competence and the changing of the Commonwealth-State inter-relations pursuant to S.128 necessarily does so.'

Professor George Winterton, University of NSW in 'The Australian' of May 25, 1988, (and a participant in the Constitutional Commission) makes an interesting case for non-recognition:

'The second ground for opposing the proposal to 'recognise' local government in the federal Constitution is that the proposed new S.119A could lead to numerous difficulties far outweighing any benefit to be derived from such 'recognition'.
DIVISION OF OPINION AMONGST ADVISORY COMMITTEES TO THE CONSTITUTIONAL COMMISSION

Whilst the Trade and National Economic Management Advisory Committee recommended ‘an appropriate provision be inserted in the Constitution to formalise the recognition of local government’ it made no specific recommendation, advanced no substantive arguments and conceded that the issue did not really affect its area of concern. On the other hand the Committee most concerned with the question was the Distribution of Power Advisory Committee which was strongly opposed to any form of recognition for a number of persuasive reasons:

1) There is some uncertainty as to how the High Court would interpret a provision in the form proposed by the Constitutional Convention in Brisbane.

2) Support for the proposal came almost exclusively from local government and appeared mainly to be based on a perceived need to increase the status of local government.

3) Any entrenchment of the existence of local government should take place in State constitutions under which it exists.

4) The nature of any perceived threat to local government had not been made clear to the Committee.

5) Some remote areas of Australia did not have local government and should not be compelled to have it.

6) The proposed S.108A adopted by the Australian Constitutional Convention would cast upon Federal and State Parliaments a legal duty to establish local government - an unusual course.
7) The appointment of administrators to carry on the affairs of local
government bodies dismissed for mis-conduct might become more difficult.

8) It would be undesirable to entrench in the Constitution another level of
government which would be in competition with the States.

NO GUARANTEES

The present Federal Government has progressively given less funds to local
government under its general grants (see schedule attached), and its road
funding programs, and these allocations are continuing to diminish. In fact the
Commonwealth, by sheltering behind the protection of S.114 of the Constitution,
does not pay rates to local government on Commonwealth properties. This
situation is NOT redressed in the Government’s proposal.

Therefore the guarantees that local government has sought are not included in
this amendment, particularly with regard to:

- a fair funding deal
- protection against unfair dismissal
- defence against forced amalgamations.

COALITION RECORD

The Coalition record on local government is an excellent one and is in stark
contrast to that of the present Government.

It was the last Liberal-National Party Government that:
1) Gave local government a fixed funding arrangement through personal income tax sharing;

2) Provided for local government representation on the State Grants Commissions and provided for the distribution of tax revenue;

3) Introduced the Bicentennial Road Funding levy of 2 cents per litre to provide more road funds and road work for local government;

4) Made a major submission to the Self Inquiry in 1985, urging a comprehensive review of Commonwealth/local government financial arrangements;

5) Established a forum for local government in the Advisory Council for Inter-government Relations.

LABOR'S RECORD IN OFFICE

By contrast, the present Federal Labor Government has:

1) Cut road funding by a further $35m in its May 88 Economic Statement. By coincidence this is the same amount as the cost of conducting the current referendum proposals.

2) In 1986, disbanded the Advisory Council for Inter-government Relations.

3) Pegged back the 2% of personal income tax sharing to another less favourable formula attaching conditions to the payments which relate to population rather than to need and thereby putting significant strings on the grants. The Attachment shows clearly that Labor's action falls far short of its rhetoric.
4) Indexed the Bicentennial Road levy of 2 cents per litre and failed to provide the additional revenue to road funding.

5) Reduced general revenue grants to quarterly payments further disadvantaging local government.

THE IMPORTANCE OF LOCAL GOVERNMENT

The Federal Coalition Parties strongly support local government. Many of our Members have served as councillors and have worked with local government over many years. We intend to continue to work closely with local government in the interests of our mutual constituents.

The proposal by which the Hawke Government wants to meddle in local government affairs is ill-founded and would be detrimental to the interests of local government. The Federal Department responsible for local government itself has recognised that the concept is a sham. The prospect, however remote, of Canberra making important decisions affecting local government and having demarcation disputes with State governments over responsibility for local government should encourage all associated with local government to vote ‘No’ to federal constitutional recognition.

The importance of any institution is not a factor, on its own, which can support a proposition for its inclusion in a Federal constitution. For example, the State Supreme Courts are vitally important institutions but they are not included in the Federal Constitution. More appropriately, State Supreme Courts and local government should be recognised in State Constitutions. For this reason, the 1976 Hobart Constitutional Convention invited States to recognise local government within States’ Constitutions. 4 States have already done so. Tasmania is about to do so and the matter has been raised in Queensland.
OTHER MOTIVES AND IMPLICATIONS

Up until the 1970's many Labor MP's were keen to encourage local government as a means of undermining the authority of the State Governments. Senator Burns (Labor, Queensland) made it clear in the debate on local government (May 23, 1988) that that view is still current in some Labor circles.

He said.

'I am very much inclined to the idea of giving local councils more authority and having the Federal Government looking after the rest, thereby getting rid of the State Governments. That seems to me to be a good idea.'

Whilst this Labor Government has not embraced regionalisation as enthusiastically as the Whitlam Government, it still encourages local government to accept federal responsibilities. If the amendment is approved this trend will continue as will the trend to fund local government into programs in the first year and withdraw funding in subsequent years. In the final analysis local government has more functions and programs with the long-suffering ratepayer having to meet the revenue short-fall.

CONCLUSION

The proposed referendum offers nothing for local government. It actually recognises that local government is the responsibility of the States.

The Federal Labor Government’s apparent enthusiasm for the proposal for constitutional recognition of local government is in contrast to the fact that recognition will not be extended either to its own federal territories or the Northern Territory and is also in contrast to its action in sacking the Christmas Island Assembly just two weeks after its democratic election.
The current proposal comes at a time when the Hawke Labor Government is subject to increasing criticism from Local government authorities for the continuing decrease in Federal road funds, untied grants and the application of unjustified conditions to existing grants.

This referendum is a ploy designed to provide a smokescreen to cover the Government’s manifest inadequacies in its treatment of this vitally important tier of government. It is also a ploy to seek local government support for the other questions that will be put to the people by way of referendum later this year.

The 1974 referendum on local government was rejected and this proposal is destined to the same fate.

Many important and not so important institutions are not to be found in the Federal Constitution. State Supreme Courts and Prime Ministers are not in the Federal Constitution.

The proposal is ambiguous and invites legal challenge. It is inevitable that the High Court will have to define the meaning of a ‘system of local government’. This will lead to uncertainty and a High Court blue-print for local government would be inflexible and rigid.

The Coalition urges voters to vote ‘NO’ on Question No. 3.
REAL LOCAL GOVERNMENT GENERAL REVENUE GRANTS ($,000)

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<th>YEAR</th>
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<td>1986-87 (EST)</td>
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* In 1986-87 prices using Gross Non-Farm Product Deflator. Inflation in 1987-88 and 1988-89 is estimated to be 7.25% and 5.5% respectively.

LOCAL GOVERNMENT GENERAL REVENUE GRANTS ($,000)

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<td>1976-77</td>
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