Chapter Ten

Double Celebration
The Referendum that did not Proceed

Dean Smith

7 September 2013 marks the election of the Abbott coalition Government. For me it gave cause for a double celebration. Had the now former Labor Government had their wish, this election date would also have seen Australians voting to recognise local government in the Australian Constitution, a long-held Labor Party dream which they felt was at long last within their reach. Fortunately – and this was easily former Prime Minister Rudd's best decision – Labor's decision to hold the election on 7 September meant the referendum could not proceed.

This was something I reflected on recently. Sir Samuel Griffith, a former Premier of Queensland, is best known as one of the principal authors of our Constitution and as the first Chief Justice of Australia's High Court. In all of these positions, Sir Samuel was a committed federalist and a bulwark against attempts by the Commonwealth to centralise power. Sir Samuel, I suspect, would have very quickly seen right through the rhetoric used by the supporters of the now abandoned local government referendum. He would have clearly understood the dangers lurking behind the words used by those who tried to convince Australians to change their cherished Constitution.

After all, we were told this was merely a minor change designed to ensure our Constitution reflected modern political realities. It would not threaten the power of the States, we were told. We were reassured that it would not result in any additional power for the Federal Government. We were assured also that it would not increase the power of local governments or threaten the system of checks and balances our founding fathers so carefully, consciously, deliberately established when they framed our Constitution.

Proponents of the change told us and constantly reassured us that none of these things was an issue, which only left one question: why did we need to make this change at all? Looking back, I think it was the question that Labor, the Australian Local Government Association and various other supporters were hoping would not be asked because it was at that point when this question was posed that the wheels came off the referendum bandwagon. They simply did not have an answer.

Supporters of constitutional recognition made many errors, in my view, which I will come to shortly. But their most fundamental error, one to which political elites are all too often susceptible, was to underestimate the basic common sense of the Australian people. If Australians are going to be asked to change their cherished Constitution, a Constitution that has underpinned the political stability of their nation for 112 years, then you have to offer them a compelling reason to do so. It seemed to me that the best the proponents of the referendum could muster was that somewhat nebulous claim that to vote "no" was a vote against local communities. If that is the best you can manage then, frankly, you are going to have a tough time persuading the majority of Australians in the majority of States that this is a change they need to embrace.

I still find it quite extraordinary given the length of time that discussions about constitutional recognition of local government have been running that the former Labor Government and the body which badges itself as the premier local government body, the Australian Local Government Association, could not agree on why this change was needed. The case that ALGA had pushed all along was that constitutional recognition of local government was needed because the *Williams* and the *Pape* decisions of the High Court posed a direct threat to council funding from the Commonwealth. ALGA unambiguously said that the only way around this was to recognise local government formally in our national Constitution. So I was rather surprised when, in the course of questions in Senate estimates in May 2013, the minister at the table, Labor Senator Lundy, responding to questions from an esteemed Senate colleague, said that the *Williams* decision was "not one of our justifications at all in pursuing constitutional change". Senator Lundy's view was, indeed, borne out by the wording of the Government's bill and the accompanying explanatory memorandum, neither of which mentioned the High Court nor the *Williams* nor the *Pape* decisions. So we had a situation where the two strongest proponents of constitutional recognition, the Labor Government and the Australian Local Government Association, fundamentally disagreed on why this change was needed. If they could not agree, why should the Australian people be expected to take a risk and change a Constitution that has served their nation well since 1901?

If the supporters of the referendum had damaged their cause from the start by failing to establish the case for change adequately, then the terminal blow was delivered by what they chose to do next. The Labor Government's decision to weight the level of public funding that would be provided to the "yes" and "no" campaigns based on the numbers voting for and against the referendum in the House of Representatives was a watershed moment, a death knell for the referendum. People, most particularly journalists, who had until that point been unengaged or uninterested in the constitutional principles at stake, quickly got the sense that the fix was in.

The model the Labor Government used was wholly contrived and without precedent. Public funding for "yes" and "no" campaigns at a referendum is actually a relatively recent phenomenon, having occurred for the first time in the 1999 republic referendum. On that occasion, the Prime Minister, John Howard, awarded public funding to the "yes" and "no" cases on a 50-50 equal basis. This was despite his well-known and well-founded personal preference for retaining Australia's existing constitutional arrangements. To most Australians, this seems obvious. If a government is going to fund one side of an argument, then, in the interests of democratic fairness, it must fund the other side to the same extent. We all know that the notion of a fair go is amongst the most cherished of Australian ideals. While the constitutional issues at stake in terms of recognising local government were not well understood by many – if not most – voters, it was very easy for them to understand that a Labor government that already had a reputation for dishonesty was trying to pull a fast one.

The "no" case had many strengths and I will come to some others in a moment. I believe no single argument was more important in effectively defeating the referendum than the appalling manner in which the Labor Government and groups such as the Australian Local Government Association handled the question of public funding.

I am especially pleased by one notable fact from these events. The official "no" campaign did not spend one cent of taxpayers' money during this whole process. This

was in stark contrast to those on the other side of the debate, for instance, the Australian Local Government Association, which is now seeking to be reimbursed for its expenses. I find it truly extraordinary that any organisation would spend money on a referendum campaign prior to the issue of any writ for a referendum, and then expect taxpayers to pick up the tab for their own imprudent decisions, yet this was the position of the Australian Local Government Association. I look forward to continuing discussions over this piece of unfinished business from the abandoned referendum.

Even if you do not understand the constitutional issues, common sense tells you that if constitutional recognition is as simple, is as positive, as its proponents were making out, then there would be no need to stack the deck so heavily in favour of one side of the argument. It was this dodgy funding deal that caused many Australians to take a second look at what until that point was being presented as a simple *fait accompli*.

Of course it was not only growing political debate which favoured the "no" case. As Australians came to understand, there were very sound constitutional and logistical grounds for opposing what Labor had put forward. Despite the spin, this proposed change to our Constitution was not about services nor was it about lower rates for ratepayers or the better running of councils and the services they deliver. To claim, as some did, that Canberra would not have any more power because funds are requested by local communities overlooks the salient fact that the wording of the proposed constitutional amendment explicitly stated that the Commonwealth grants were to be made on: ". . . such terms and conditions as the Parliament thinks fit".

In other words, it would have equipped the Federal Government with the constitutional power to attach any strings it wished to funding provided to local councils.

Despite the efforts of the referendum's supporters to present constitutional recognition as something that had near unanimous support of local councils around the nation, there were a significant number of local councils across our country which spoke out against the change. None of these councils did so because they wished to deny their communities improved services; they did so because they rightly feared a loss of autonomy for local communities. They feared, with justification, I believe, that the imposition of a typical Canberra one-size-fits-all approach to local government services would be to their detriment. They did so because they wished to remain what local councils should be – representatives and advocates for their local communities, not merely local branch offices of the Federal Government forced to submit to Canberra's whims simply to remain viable.

There was another important factor in the success of the "no" case building its public support, one that was not dissimilar to what we saw during the 1999 republic referendum. Constitutional recognition of local government is largely an obsession of political elites. It was very difficult to identify public supporters of this proposal who were not members of parliament, mayors, councillors, employees of local governments or members of various local government associations representing local councils. In other words, the chorus of enthusiasts for this proposal started and ended with the political elite, most particularly those who had a vested interest in further centralising power in Canberra. Many of these elites tend to view our Constitution through the prism of symbolism, of recognising things and of obsessing over having an Australian head of state. Yet none of these things will make a jot of difference to the day-to-day

lives of Australians.

The Constitution is and should remain simply a rule book that sets out how our country is governed. There is a great danger in rushing to change it if it is not undertaken with full, considered and public discussion of the risks of that change. Advocates of constitutional recognition try to pretend that there was only one side of the story and that those who thought otherwise were, in the words of the Western Australian Local Government Association, "fringe groups", parliamentarians and individuals who might want more oxygen than they deserve. This sort of intemperate rhetoric is not generally a sign of people who are confident of the strength of their argument and who believe they have right on their side.

Indeed, it is worth recalling just who some of these alleged oxygen thieves were. It is a brave person who suggests that the former Prime Minister of Australia, John Howard, who won four elections on the back of his ability to connect with mainstream Australia, represents a "fringe group". Yet Mr Howard clearly warned against constitutional recognition of local government, saying:

> . . . even a casual reference to local government in the Constitution would end up having legal implications far beyond what might be advocated by the proponents of such a change.

They are not my words; they are Mr Howard's words. Ian Callinan, a name well-known to many senators as a former High Court judge, gave a clear warning that what Labor had proposed would give rise to "endless litigation between the states, the Commonwealth and the new empowered local authorities as to who is entitled to do what and, equally important, where."

Supporters of the "yes" case had their cause further undermined when those on the left of Australian politics, who were naturally assumed to be on board, started giving voice to their own concerns. A case in point was the lack of enthusiasm by local government in Tasmania. The Deputy Premier, Bryan Green, said that he and his colleagues had ". . . made it pretty clear that we have some reservations about this matter passing".

It brought me great comfort to see over the course of the debate the former Labor Government clearly spooked by the rising tide of opposition which was quickly exposing the hollowness of its case.

I am very pleased that the Deputy Prime Minister, Warren Truss, as the minister responsible for local government, has now confirmed that the new Abbott coalition Government will not be proceeding at any point in the future with Labor's referendum.

I believe that there are a number of lessons that constitutional conservatives can take from the experience of this referendum debate and the effective defeat of this proposal. I think the biggest and most lasting of these is a simple one. Bipartisanship is a vastly overrated political commodity. Bipartisanship acts to extinguish counter-views quickly, isolates dissenters and, most dangerously, deters proper analysis and enquiry. Naturally, I am all for working constructively with those from other parties and those with other views. Partisanship purely for the sake of partisanship is rarely productive and can often inflict long-term damage. But there has been, unfortunately, a trend in our country over recent times to view bipartisanship as an inherently good end in and of itself. That simply is not true and is not demonstrated by the facts.

The period of the first Rudd Labor Government was particularly notable in this regard. The former Prime Minister would proclaim a great crisis was imminent and

demand bipartisan support for whatever it was that he proposed. We recall that until the end of 2009, for example, there was bipartisan consensus that Australians should be taxed on their carbon emissions, rather than dealing with the issue in any other way. However, just because a bipartisan consensus exists in Parliament does not mean that there is a consensus in the wider community. This was something now Prime Minister, Tony Abbott, clearly recognised when he changed the Liberal Party's approach. It is something he also recognised before the referendum was dumped by Labor when he clearly picked up on community concerns over constitutional recognition of local government and said to Australians: ". . . if you don't understand it, don't vote for it".

Bipartisanship might be nice to have but it should never come at the expense of sound policy or the stability of Australia's constitutional arrangements. It would have been very easy for those of us in the Parliament who voted "no" to the referendum to shrug our shoulders and say, instead, that the party has decided to support this in a bipartisan way and let the matter rest. But that would have absolutely been the wrong approach. Had those of us opposed to constitutional recognition not spoken out and voted accordingly in the Parliament, then there would not have been any official "no" case put to the people if the referendum had proceeded. In all likelihood, this would have ensured the referendum's success, if only by default.

The other lesson I took from what occurred with local government recognition was how important it is to challenge assertions that are being dressed up as fact. All too often those who cluster under the umbrella of "progressives" construct their arguments around sound bites, not logic. Those of us who see ourselves as constitutional conservatives can never be afraid to highlight this fact. In a legal case, the burden rests with the prosecution. Those who are proposing any constitutional change must be forced to demonstrate comprehensively the need for it, and not be allowed to slide through with glib lines and glossy brochures.

As I said, those of us in the Parliament who voted against this referendum were a small group. It is never easy to walk across the chamber and vote differently to one's colleagues. But the rewards that followed with the effective defeat of Labor's proposal were well worth the short-term discomfort.

I suspect there will be other constitutional debates in the next several years that will again prove challenging for those of us committed to maintaining the stability of our nation's constitutional arrangements. It may be that some of us again find ourselves called upon, first, by our conscience and, second, by those we represent to stand apart from the fashion or the consensus and pose difficult questions. However, despite the headlines about disunity or splits I do not think genuine disagreement automatically spells disaster.

Nor do I subscribe to the view that debate has to be damaging or divisive. One of the things I am most proud of in relation to the debate about recognition of local government is that those advocating the "no" case were entirely respectful of our opponent's point of view. But the conclusion from our experience is that we should never be afraid to challenge assertions that are presented as fact, and should never neglect core principles for the sake of a nice headline about bipartisanship.

As I have said to other audiences since becoming a senator, while it may well be true that you cannot govern if you do not win, perhaps the more interesting question is: why do you want to win if you will not then use the opportunity of governing to

pursue your core beliefs and principles? I do not yet have an answer.

Finally, can I just acknowledge some very noble Australian citizens who did not run away from their constitutional convictions, who formed the membership of the Citizens' No Case: the Hon. Nick Minchin, Mr Tim Wilson, Mr Ben Davies, Professor David Flint, Mr Rene Hidding, Mr Julian Leeser and Professor Greg Craven. Our Constitution is forever in safe hands as long as that collection of fine Australian citizens remains committed to their principles.