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## Constitutional recognition of local government

by Lenny Roth

### 1. Introduction

On 9 May 2013, the Prime Minister, Julia Gillard, announced that a referendum would be held on 14 September 2013 (the date of the federal election) on the financial recognition of local government in the Federal Constitution.<sup>1</sup> On 29 May 2013, the [bill](#) containing the proposed amendment was introduced into the Federal Parliament.<sup>2</sup> Section 96 of the Constitution would be amended as indicated by the words underlined below:

#### **Financial assistance to States and local government bodies**

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.

The bill passed through the House of Representatives on 5 June and is currently in the Senate.<sup>3</sup> The Federal Government is supporting this change, as is the Federal Opposition (although two Opposition members voted against it). The Queensland Government supports financial recognition but has concerns about the wording of the proposal.<sup>4</sup> The NSW, Victorian and Western Australian Governments are opposed to the amendment.<sup>5</sup> In order for the proposal to succeed it would need to be voted for by a majority of Australian electors in a majority of the States. History suggests this is a difficult task: only eight out of 44 referendums have been successful since federation; and two previous referendums to recognise local government failed.

This e-brief begins with a historical note about the Federal Constitution, and it discusses the two failed referendums. The recognition of local government in State Constitutions is then noted. The following sections discuss Federal Government funding of local government; and recent High Court decisions that cast doubt over *direct* funding. The key developments and reports leading to the current referendum proposal are then discussed. Finally, the paper presents a short version of an alternative Yes/No case prepared by the University of Sydney

Law School's Constitutional Review Unit, and it outlines views about the potential implications of the proposal for federalism.

## **2. The Federal Constitution**

Local government has a long history in NSW and Australia, dating back to the 1840s.<sup>6</sup> However, the 1901 Federal Constitution did not (and still does not) contain any reference to local government. McGarrity and Williams note that while local government was mentioned in the Federation Convention debates in the 1890s, there was “no meaningful discussion” of it being recognised in the Constitution.<sup>7</sup> They point to two factors that (at least in part) explain why this was the case:

First, local government was still in the early stages of development in some colonies in the 1890s when the Commonwealth Constitution was drafted. At this time, there was no consensus among the colonies about the role, powers and functions of local government. The view of a majority of drafters of the Commonwealth Constitution therefore appears to have been that local government was not of sufficient importance to be referred to in that document. Secondly, local government was controlled by the colonial Parliaments, and therefore regarded as “creatures” of those Parliaments.<sup>8</sup>

## **3. Two previous referendums**

There have been two failed attempts to recognise local government in the Federal Constitution: in 1974 and in 1988.<sup>9</sup>

**The 1974 Referendum:** The 1974 referendum arose out of the States' rejection of the Whitlam Government's proposal for local government to be represented on the Loan Council, and to be able to borrow money from the Commonwealth. Two changes to the Constitution were put to voters:

- An amendment to section 51 to enable the Parliament to make laws in respect of “the borrowing of money by the Commonwealth for local government bodies”; and
- A new section 96A, providing that “the Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit”.

The Federal Opposition strongly opposed this change and the bill was rejected twice by the Senate, thus becoming a double dissolution trigger for the 1974 election. States (including NSW) also opposed the referendum. Twomey has summarised the official Yes/No case as follows:

The official ‘Yes’ case for this referendum proposal stressed the need for increased funding for better roads, sewerage, health and childcare services, recreation facilities and cleaner rivers and beaches, without increasing rates. It argued that it is ‘unnecessary for national money to be provided to local government through middle-men, the States, particularly as this only increases administrative costs’. It concluded that the Commonwealth should be able to ‘deal with local government on the same terms as with the States’.

The official ‘No’ case stressed that grants to local government would be made on ‘terms and conditions’ allowing ‘Canberra’s bureaucratic fingers into every one of Australia’s 1,000 Council Chambers’...It claimed that such an amendment would require the creation of another expensive administration in Canberra that would examine the affairs of 1000

municipalities to ascertain how much assistance they needed. The 'No' case accepted that local government needed more money, but argued that it should be done under the current mechanism of s 96 of the Constitution, with grants passing to local government via the States. It concluded that the Commonwealth should seek 'co-operation instead of confrontation'...<sup>10</sup>

Nationally, only 46 per cent of people voted in favour of the changes and a majority was achieved in only one State (NSW).<sup>11</sup>

**1988 Referendum:** The Hawke Government's 1988 referendum on local government had its origins in a recommendation from the first report of the Constitutional Commission.<sup>12</sup> Instead of being a proposal about financial assistance, the proposal was for new provision stating:

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 a State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.

The Federal Opposition again campaigned against this proposal, arguing that the proposal was mere tokenism but also that it would centralise power.<sup>13</sup> The referendum failed by an even greater margin than in 1974. Nationally, only 33 per cent of people voted in favour of the proposal and a majority was not achieved in any of the States and Territories.<sup>14</sup>

### 4. Recognition in State Constitutions

No State Constitution recognised local government for much of the last century. However, between 1979 and 1989, every State Constitution was amended to recognise local government.<sup>15</sup> According to McGarrity and Williams, the "catalyst for change" was a resolution that was passed at the 1976 Commonwealth Constitutional Convention in Hobart.

By way of example, the *NSW Constitution Act 1902* was amended in 1986 with the insertion of a new section 51, which provides:

- (1) There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government.
- (2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature.

These provisions were inserted by ordinary legislation and can be repealed in the same way. The same is true of similar provisions in other State Constitutions, with the possible exception of Victoria (which, Twomey suggests, might have a chance of being effectively entrenched).<sup>16</sup>

### 5. Federal Government grants to local government

Local government receives most of its revenue from its own sources: e.g. council rates, fees for goods and services, and fines. Grants from the Federal and State/Territory Governments comprise only around 12 per cent of total local government revenue (it is not clear how this is split between

Federal and State/Territory Governments).<sup>17</sup> However there is wide variation across councils in Australia; and some councils (particularly rural ones) rely much more heavily on Federal and State Government grants.<sup>18</sup>

There are two types of Federal Government grants to local government:

- (i) Grants passed through the States; and
- (ii) Grants provided directly to local government.<sup>19</sup>

**(i) Grants passed through the States:** The Whitlam Government had a strong regionalism agenda and in 1974 it established a program for providing untied grants through the States to local government. Since that time, the Federal Government has continued to make grants to local government in this way, although the scheme has changed over time. From 1986, these grants became known as Financial Assistance Grants and the current scheme is set out in the *Local Government (Financial Assistance) Grants Act 1995 (Cth)*. These grants comprise two elements:

1. A general purpose component which is distributed between the states and territories according to population (i.e. on a per capita basis), and
2. An identified local road component which is distributed between the states and territories according to fixed historical shares.<sup>20</sup>

Both components “are untied in the hands of local government, allowing councils to spend the grants according to local priorities”.<sup>21</sup> The total amount of financial assistance grants allocated for 2012-13 is \$2.139 billion (\$669 million for local government in NSW).<sup>22</sup> State and Territory Grants Commissions recommend the distribution of these grants to local government bodies within the relevant State or Territory.

**(ii) Direct funding programs:** The Whitlam Government also provided some funding directly to local government and regional organisations through programs such as the Regional Employment and Development Scheme.<sup>23</sup> This direct funding approach was not adopted by later governments. However in 2000, the Howard Government introduced the *Roads to Recovery Program*, by which it made direct grants to local government for road projects.<sup>24</sup> This program was only intended to operate for four years, but it has since been extended a number of times.<sup>25</sup> The current [program](#) runs from 2009-10 to 2013-14 and involves \$1.75 billion in funding over this period (\$373.5 million in 2013-14). Another program in which the Federal Government directly funds local government is the [Regional and Local Community Infrastructure Program](#), which has provided more than \$1 billion to local government since 2008/09.

## **6. Doubts about validity of direct funding programs**

It is clear that the Federal Parliament has the power to make grants to local government *through the States*. This is because section 96 permits the Commonwealth to make grants to the States on such conditions as it thinks fit. However, the Commonwealth’s power to provide *direct funding* to local government has recently been thrown into doubt as a result of the High Court’s decisions in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; and *Williams v Commonwealth of Australia* (2012) 86 ALJR 213.<sup>26</sup> Those decisions interpreted narrowly sections in the Constitution which the Commonwealth has relied upon to support direct funding programs.

The *Pape* case involved a challenge to the stimulus payments of \$900 that were paid to taxpayers as part of the response to the global financial crisis. The payments were authorised under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). The Court established that sections 81 and 83 of the Constitution (relating to appropriations) do not confer a substantive spending power on the Commonwealth. However, the Court, by majority, ultimately upheld those payments on the basis that they were supported by a combination of two constitutional powers: the executive power in section 61, and the incidental legislative power in section 51(xxxix). Chief Justice French stated that the executive power:

...extends to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth.<sup>27</sup>

In the *Williams* case, a Commonwealth funding agreement for a school chaplaincy program was challenged. This program was not set up under any legislation and the Commonwealth relied upon the executive power in section 61. The High Court decided that this executive power was limited and did not support the funding agreement. As Twomey states:

A majority of the Court in *Williams* rejected the Commonwealth's 'broad' proposition that it had the capacities of a legal person to enter into contracts and expend money on any subject matter, regardless of whether or not it came under a Commonwealth head of legislative power, and its 'narrow' proposition that its executive power extends to actions that *could* be authorised by Commonwealth legislation, even though no such statute has been enacted. While the majority recognised that there were some categories of executive power involving expenditure that could be exercised without statutory authority, such as prerogative powers, the ordinary administration of government departments and the nationhood power, this particular funding program did not fall within any of those categories and therefore required the enactment of valid legislation to support it.<sup>28</sup>

The Federal Parliament responded to the *Williams* decision by enacting legislation to support a vast number of existing funding programs.<sup>29</sup> However, doubts have been raised about the validity of such legislation. It has been suggested that it is not clear that there are constitutional powers which support the full range of programs covered by the legislation.<sup>30</sup>

### 7. The recent push for constitutional recognition

The current referendum proposal has been several years in the making.<sup>31</sup> In the lead up to the 2007 election, the Federal Labor Party's policies included a commitment to the constitutional recognition of local government. In September 2008, Prime Minister Rudd reiterated this commitment and said he would use the inaugural meeting of the Australian Council of Local Governments in November 2008 to consult with local government authorities on this matter.<sup>32</sup>

In December 2008, the Australian Local Government Association (ALGA) held a Constitutional Summit, at which delegates endorsed a declaration stating that any constitutional amendment should reflect these 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.<sup>33</sup>

Following the 2010 election, in order to form government, the Labor Party entered into agreements with the Greens and the Independents, which included commitments to pursue the recognition of local government in the Constitution.<sup>34</sup> The agreement with the Greens stated that the Parties would work together and with other parliamentarians to hold a referendum during the current term of Parliament or at the next election.

## **8. Select Committee on Reform of Federation**

In June 2011, a Senate Select Committee on the Reform of Australia's Federation published its [report](#), which included discussion of local government funding and recognition in the Constitution.<sup>35</sup> The Committee examined the case for recognition as well as certain obstacles in the path of recognition. In conclusion, the Committee acknowledged that the recognition of local government had "some strong advocates", but it considered it unlikely that an ad hoc amendment would be successful.<sup>36</sup> It stated that "the greatest likelihood of success of such an amendment lies in a 'hasten slowly' approach that places such an amendment in the broader context of a coherent plan for overall constitutional reform".<sup>37</sup> The Committee recommended that the issue be among the matters proposed for inquiry by a new Joint Standing Committee on the federation.<sup>38</sup>

## **9. Expert Panel on constitutional recognition**

In August 2011, the Federal Government appointed an [Expert Panel on Constitutional Recognition of Local Government](#), chaired by Hon James Spigelman AC QC. The Panel was asked to report on the level of support for constitutional recognition of local government and options for that recognition. The Panel delivered its [final report](#) to Government in December 2011. The report identified four possible forms of constitutional recognition:

- Symbolic – recognising local government but with no legal effect;
- Financial – recognising the Commonwealth's power to provide financial assistance to local government;
- Democratic – guaranteeing that councils are elected bodies; and
- Recognition through federal cooperation – encouraging cooperation between all three levels of government.

A majority of panel members ultimately supported a referendum on financial recognition (subject to conditions noted below).<sup>39</sup> In discussing this form of recognition, the panel noted that recent High Court decisions meant that "there is a very real doubt about the constitutional validity of direct grant programs". The report then noted that it was possible for the Commonwealth to replace direct funding by making grants through the States (which is the basis for most Commonwealth funding). However, it stated that "four arguments are advanced, principally by local government, as to why this is not a desirable alternative". These arguments were:

- It lessens the ability of the Commonwealth to implement, and to be seen to be implementing, its own policies at a local level (which may impact on the amount of grants given to local government);
- It fails to recognise local government as a legitimate third tier of government in the Australian system (an issue of status but one of great significance to local councils);
- Funding via State governments is inefficient, ineffective, and may result in a reduction of the money flowing to local government by reason of deductions for administrative expenses (the panel's investigations did not find evidence to support this argument);
- As shown by the Roads to Recovery program, direct funding can create a relationship that supports, facilitates and drives collaboration among all three levels of government.<sup>40</sup>

The panel then considered the consequences of financial recognition for local government. It noted that ALGA submitted that the aim of financial recognition was to remove doubts about the constitutionality of direct grants and “to formalize and secure what has been occurring for the past ten years to give financial security to communities”.<sup>41</sup> The Panel also noted:

The panel's consultations revealed a widely held assumption that ensuring the Commonwealth can directly fund local government would result in increased funding for local government. It is widely believed that a constitutional mandate for direct funding of local government would provide the Commonwealth with a greater opportunity to influence and implement its own policies at the local level. However, while financial recognition of local government may provide a political motivation for additional funds in some circumstances, the level of Commonwealth funding to local government will always depend on Commonwealth political and policy decisions...<sup>42</sup>

After looking at the three other possible forms of constitutional recognition, the panel considered levels of support for any form of recognition at Federal, State and local levels, and in the community. As part of this, the panel noted concerns that had been expressed about federalism. It stated that “a number of submissions opposed recognition on the basis that it would disturb the federal balance by centralising power in the Commonwealth”.<sup>43</sup> The panel cited submissions from the Queensland Branch of the Australian Workers' Union, and from two academics. State Governments had also raised concerns:

Of particular concern was the need to ensure the ongoing ability of State and Territory governments to oversee and regulate local government. Some submissions warned that the Commonwealth Government might attempt to interfere with State functions by directly funding local government to deliver infrastructure and services that are typically the responsibility of State governments.<sup>44</sup>

On the other hand, it was argued that it was “appropriate for the Commonwealth to have the power to fund local government in pursuit of national policy objectives”.<sup>45</sup> The panel also noted the Local Government Association of South Australia's comment that:

...reinforcing the power of the Commonwealth to provide direct funding to local government would in no way disrupt the federal balance, but rather lead to an increase in ‘intergovernmental dialogue’ and ‘greater collaboration

in the interests of the nation'. In taking this approach local government refers to a number of successful collaborative projects through which the Commonwealth currently funds local government directly as confirmation that financial recognition would not result in excessive centralisation of power.<sup>46</sup>

In conclusion, the panel noted that financial recognition had "the broadest base of support among the political leadership at both federal and State levels, although much of this support is only in-principle".<sup>47</sup> However, it also noted that there was opposition to any such proposal from some State Governments. Notwithstanding this, "a majority of panel members concluded that financial recognition is a viable option within the 2013 timeframe".<sup>48</sup> The panel then stated its opinion that:

Recent Commonwealth programs have shown that the Commonwealth can deal effectively with issues of national importance through a direct funding relationship between the Commonwealth and local government. The decision in the *Pape* case created doubts about the constitutional validity of direct grants to local government and has potentially undermined the ability of the Commonwealth to act in the national interest in this way. All members of the panel consider that it is appropriate that the Commonwealth's right to have a direct funding relationship with local government, when it is acting in the national interest, to be acknowledged in the Constitution.<sup>49</sup>

The panel's preferred formulation for financial recognition was almost identical to the wording now proposed in the current bill.<sup>50</sup> The panel majority's support for a 2013 referendum on financial recognition was subject to the following two conditions:

...first, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by ALGA necessary to achieve informed and positive public engagement with the issue...Steps include allocating substantial resources to a major public awareness campaign and making changes to the referendum process.<sup>51</sup>

Several members of the panel did not support a referendum on financial recognition in 2013. They remained concerned that financial recognition did not enjoy sufficient support to give a referendum a high enough prospect of success in this Parliament, even if the conditions were met; and they were also concerned that "proceeding to another unsuccessful referendum would damage rather than advance the interests of local government".<sup>52</sup> These members "consider that a more substantial effort is needed to build public understanding and establish widely based social and political cross-sectional support before change is attempted".<sup>53</sup>

## **10. Select Committee on constitutional recognition**

A Joint Select Committee on Constitutional Recognition of Local Government was established on 1 November 2012. The Committee was asked to inquire into and report on the majority finding of the Expert Panel. The Committee published its [final report](#) in March 2013. It recommended that a referendum on the financial recognition be held at the 2013 election.<sup>54</sup> This recommendation was based on the following key findings:

- there is a strong case for recognition;



- lessons from the history of referenda support a 2013 referendum;
- the prospects for success are good, due to existing bipartisan support at the federal level and the readiness of ALGA and local governments to campaign in support of change;
- the prospects for success will rely on the strong commitment and campaigning by ALGA and its member bodies; and
- the prospects for success will be greatly improved by the support of state governments.<sup>55</sup>

The “strong case” was based on four arguments.<sup>56</sup> First, it would remove uncertainty created by the High Court’s decisions in *Pape* and *Williams*. Second, it would simply codify a long-standing and widely supported practice. Third, it would acknowledge the contemporary role of local government in Australia; in particular its expanding service provision role. Fourth, it would support the financial sustainability of local government. It should be noted that the Committee did not address counter-arguments.

Three Coalition Members of the Committee issued a dissenting statement which recommended that “the issue of financial recognition of local government only be held after the preconditions posed by the Expert Panel and those previously promoted by ALGA, have been met”.<sup>57</sup> Another two Coalition Members issued additional comments, which supported the Committee’s recommendation but which called for the Minister to take immediate and urgent action to remedy outstanding issues.<sup>58</sup>

### 11. Explanatory Memorandum on the bill

The proposed amendment to the constitution was set out in the introduction to this e-brief. The [Explanatory Memorandum](#) on the bill outlines the terms of the proposed constitutional change as follows:

The alteration of s 96 would establish specifically that the Commonwealth may grant financial assistance to local government bodies formed by a law of a State. This financial assistance can be for a wide range of services and facilities and, without limiting the generality of the specific provision, the long title to the Act refers to grants of financial assistance for community and other services typically provided by local government bodies. The Commonwealth would thus no longer need to rely on other, less specific sources of power to provide financial assistance to local government bodies.

However, the amendment would not enable the Commonwealth to interfere with the creation or regulation of local government bodies by the States. It would form part of an existing provision – s 96 – which does not involve any grant of power to the Commonwealth beyond the ability to provide financial assistance on terms and conditions. This financial assistance must be optional; that is, recipients must have the option of rejecting the proposed financial assistance and the terms and conditions. The alteration has thus been designed specifically to avoid any suggestion that it might permit interference by the Commonwealth with the creation or regulation of local government bodies by States, or enable the Commonwealth to compel local government bodies to accept funding or terms and conditions.

In particular, the Commonwealth could not provide financial assistance on terms or conditions that local government bodies could not meet under State law (just as currently financial assistance cannot be provided to States on terms and conditions which they cannot meet).

Further, States would not be prevented from changing their systems of local government should they wish to do so. The amendment would not prevent a State abolishing any local government body, or curtailing the activities or expenditure of a local government body.<sup>59</sup>

It also notes that the alteration to the Constitution “would not prevent the continuation of grants to States in relation to local government”, including Financial Assistance Grants paid under section 96.<sup>60</sup>

## 12. The Yes/No case for financial recognition

In due course, the Electoral Commission will publish the official Yes/No case for the referendum, as prepared by Members of the Federal Parliament who support and oppose the proposal. Both sides will receive Federal Government funding for their campaign. However, controversially, the Federal Government has indicated that it will provide \$10 million for the Yes campaign and only \$500,000 for the No campaign.<sup>61</sup> On 23 May, the Constitutional Reform Unit (CRU) in the University of Sydney Law School, released an [Alternative Yes/No case](#).<sup>62</sup> A summary is presented below.

Yes	No
The power of the Commonwealth Parliament to fund local government directly is in doubt	The Commonwealth Parliament already has the power to fund local government
Constitutional recognition would acknowledge the role played by local government in Australian society	The Commonwealth would have more influence over local government policy
Direct funding of local government would avoid time-consuming negotiations with the States	The establishment of a central authority to oversee funding arrangements may be more costly and inefficient than the current system
The power to fund local government directly may result in more funding	Direct funding would not necessarily result in increased funding
The Commonwealth would be better equipped to pursue national policy objectives	It would centralise power in the Commonwealth
Direct Commonwealth funding to local government would be more equitable	Centralised distribution of funding may seriously disadvantage some States
Constitutional recognition would help the voice of local government be heard	Accountability would be reduced and the blame-game extended
The Constitution should be updated to recognise the entire system of government	The Federal Constitution is not the right place to recognise local government <sup>63</sup>

### 13. Implications for the federal balance

If the amendment is passed, the Commonwealth could decide to change the way that it funds local government. It could shift towards direct funding and away from passing money through the States. In addition, the Commonwealth would have the power to fund local government in relation to any policy area. It would not be limited to those subject areas over which the Commonwealth has legislative powers under section 51 of the Constitution. One of the arguments in the Alternative No case is that this would lead to a centralisation of power in the Commonwealth:

This proposed amendment would allow the Commonwealth to by-pass the States and interfere in policy areas outside its powers by using local government and the conditions that it places on local government grants to do so. This would disturb the current constitutional balance between the division of State and Commonwealth responsibilities.<sup>64</sup>

Another argument in the No case is that accountability would be reduced and the blame-game extended. In Premier O'Farrell's [submission](#) to the Expert Panel, he outlined two similar concerns about financial recognition:

...financial recognition of local government could raise expectations that the Commonwealth will intervene in local government administration, thereby creating confusion about Federal, State and local government responsibilities and blurring lines of accountability that exist between governments and their constituents.

Another concern of the NSW Government is that an amendment to the Constitution that would allow the Federal Government to grant funds directly to local government may result in the NSW State Plan and other major State Government policies being sidetracked or not given due regard.<sup>65</sup>

The Queensland Government supports financial recognition but is concerned that, in its current form, the amendment would allow for "a Canberra power grab that could have far reaching consequences".<sup>66</sup> It has called for two sentences to be added to the proposed amendment, namely:

The terms and conditions of a grant of financial assistance to a State or to a local government body formed by a law of a State are subject to the laws of the State.

An entity formed by a law of a State is a local government body for the purposes of subsection (1) if, and only if, the State's law so provides.

Those in favour of the constitutional amendment argue that past experience with direct funding has shown that it would not lead to centralisation of power. On the contrary, it has been argued that it would lead to greater collaboration amongst all tiers of government. In its submission to the Joint Select Committee inquiry, the Local Government Association of NSW responded to the NSW Premier's concerns about the potential for direct funding to undermine State Government policies:

There has been no evidence that direct funding such as Roads to Recovery over its life, the Nation Building – Economic Stimulus Plan and the Regional and Local Infrastructure Program, has done anything other than allow Local Government to meet local needs in a way that is entirely consistent with the NSW Government plans of the day. The evidence strongly indicates that

these programs have complemented State Government plans and assisted Local Government in meeting their obligations under such plans. It should also be noted that the NSW Government (and other state governments) of the day, enthusiastically welcomed these programs.<sup>67</sup>

The Association also submitted that concern about the Commonwealth intervening in local government administration was “unwarranted”, stating:

ALGA & the State and Territory Associations have been clear this is not what they seek and have proposed changes to section 96 that can in no way imply such a power. Local Government is not asking for change, we are seeking protection of the Commonwealth’s ability to continue to provide direct funding to Local Government as it has done in the past: simply maintenance of the status quo.<sup>68</sup>

The Explanatory Memorandum on the bill supports the argument that the proposed changes do not go as far as has been suggested by the NSW and Queensland Governments. However, perhaps the point being made by the Queensland Government is that, to ensure that there is no doubt, the limits of the Commonwealth’s powers should be expressly stated.

#### **14. Conclusion**

The upcoming referendum on the financial recognition of local government in the Constitution is seen by some as being very important for local government and the communities they serve. It is also argued that this change will assist the Federal Government to pursue national objectives and will lead to greater collaboration between all tiers of government. On the other hand, critics assert that constitutional change is unnecessary because the Federal Government can fund local government by passing money through the States. There are also concerns, particularly from some State Premiers, that change will disturb the federal balance.

Regardless of the referendum result, the issue of the financial sustainability of local government is one that will need to be addressed. In NSW, this issue is currently being examined by the [Independent Local Government Review Panel](#), which is due to report in September 2013. In an April 2013 *Future Directions paper*, the Panel noted that a recent NSW Treasury Corporation [report](#) “paints a disturbing picture of a local government system facing major financial problems”. At the same time, the Commonwealth Grants Commission is conducting a [review](#) into “improving the impact of financial assistance grants on local government financial sustainability”. The Commission is due to report by 31 December 2013.

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<sup>1</sup> Prime Minister Gillard, [‘Referendum on Local Government Recognition’](#), *Media Release*, 9 May 2013

<sup>2</sup> [Constitution Alteration \(Local Government\) Amendment Bill 2013](#)

<sup>3</sup> Australian Parliament, [Constitution Alteration \(Local Government\) Amendment Bill 2013](#), Bill Page, [Online]

<sup>4</sup> P Karvelas, ‘Newman queries ballot wording’, [The Australian](#), 6 June 2013; and D Crisafulli, [‘Final Plea to the Prime Minister’](#), *Media Release*, 18 June 2013

<sup>5</sup> The South Australian Government appears to support the proposal. The Tasmanian Government is said to be “agnostic” about the proposal. See L Wilson, [‘Words fail States on councils’](#), [The Australian](#), 17 May 2013; and see also University of New South Wales Centre of Public Law, [Local Government Referendum FAQs](#), [Online].

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- <sup>6</sup> See J Arditi, [Local Government in New South Wales](#), NSW Parliamentary Research Service, Briefing Paper 11/08; and L Megarity, [Local Government and the Commonwealth: an evolving relationship](#), Australian Parliamentary Library, Research Paper No 10 /2010-11, 31 January 2011
- <sup>7</sup> N McGarrity and G Williams, [Recognition of Local Government in the Commonwealth Constitution](#) (2010) 21 *Public Law Review* 164 at 166
- <sup>8</sup> McGarrity and Williams, note 7, p165-166
- <sup>9</sup> This section is largely based on A Twomey, [Local Government Funding and Constitutional Recognition](#), Constitutional Reform Unit, Report No. 3, January 2013, p60. See also McGarrity and Williams, note 7, p168-169.
- <sup>10</sup> Twomey, note 9, p61
- <sup>11</sup> Australian Electoral Commission, [Referendum dates and results](#), [Online]
- <sup>12</sup> See Constitutional Commission, *First Report of the Constitutional Commission*, Australian Government, April 1988, Ch8, p571
- <sup>13</sup> Twomey, note 9, p69
- <sup>14</sup> Australian Electoral Commission, [Referendum dates and results](#), [Online]
- <sup>15</sup> J Spigelman AC QC, [Expert Panel on Constitutional Recognition of Local Government - Final Report](#), Australian Government, December 2011, Appendix G
- <sup>16</sup> See Twomey, note 9, p64
- <sup>17</sup> Australian Bureau of Statistics, [Government Finance Statistics Australia, 2011-12](#), Cat 5512.0, Table 399 (General Government – Local – Total Local)
- <sup>18</sup> Productivity Commission, [Assessing local government revenue raising capacity](#), Research Report, 17 April 2008, p36ff
- <sup>19</sup> For a more detailed history, see Twomey, note 9, p12-24; and R Webb, [Commonwealth general purpose financial assistance to local government](#), Australian Parliamentary Library, Research Paper No 9 2007/2008, 14 September 2007
- <sup>20</sup> Department of Regional Australia, Local Government, Arts and Sport, [Financial assistance grants to local government](#), [Online]
- <sup>21</sup> Department of Regional Australia, Local Government, Arts and Sport, note 20
- <sup>22</sup> Department of Regional Australia, Local Government, Arts and Sport, note 20
- <sup>23</sup> Twomey, note 9, p13
- <sup>24</sup> Twomey, note 9, p20-21
- <sup>25</sup> Twomey, note 9, p21
- <sup>26</sup> For a more detailed discussion of the cases, see Twomey, note 8, p24ff; and G Griffith, [The High Court's decision in the School Chaplains case: findings and implications](#), NSW Parliamentary Research Service, E-brief 14/2012
- <sup>27</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63
- <sup>28</sup> Twomey, note 9, p27
- <sup>29</sup> *Financial Framework Legislation Amendment Act (No 3) 2012*
- <sup>30</sup> See for example D Weight and D Spooner, [Financial Framework Legislation Amendment Bill \(No. 3\) 2012](#), Australian Parliamentary Library, Bills Digest No 175 2011-12, 26 June 2012, p6ff; and Twomey, note 9, p29
- <sup>31</sup> McGarrity and Williams, note 7, p169
- <sup>32</sup> Prime Minister Rudd, [Joint Press Conference with the Minister for Infrastructure and Local Government, Anthony Albanese, and President of the Australian Local Government Association, Paul Bell](#), Parliament House, Canberra, 18 September 2008
- <sup>33</sup> McGarrity and Williams, note 7, p170
- <sup>34</sup> [Agreement](#) between Australian Labor Party and Australian Greens, 1 September 2010, clause 3(f); See also Agreement between Australian Labor Party and Independent Members Tony Windsor and Rob Oakeshott, 7 September 2010, Annex B, para 4.3;
- <sup>35</sup> Senate Select Committee on Reform of Australia's Federation, *Australia's Federation: An Agenda for Reform*, June 2011, Ch6
- <sup>36</sup> Senate Select Committee, note 35, p99
- <sup>37</sup> Senate Select Committee, note 35, p99
- <sup>38</sup> Senate Select Committee, note 35, p100
- <sup>39</sup> J Spigelman AC QC, [Expert Panel on Constitutional Recognition of Local Government - Final Report](#), Australian Government, December 2011, p2
- <sup>40</sup> Expert Panel, note 39, p4-6
- <sup>41</sup> Expert Panel, note 39, p6

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- 62 Constitutional Reform Unit, University of Sydney Law School, [\*Local Government Referendum, 2013- Alternative Yes/No Case\*](#), 23 May 2013. See also the University of New South Wales Centre of Public Law, [\*Local Government Referendum FAQs\*](#), [Online]. The Australian Local Government Association has published a [\*document\*](#) (November 2012) outlining the case for change. On the other hand, a group formed to oppose the change has outlined its case on this [\*website\*](#).
- 63 This last argument in the No case does not appear in the Constitutional Reform Unit’s publication. It was added here to counter the last argument in the Yes case.
- 64 Constitutional Reform Unit, note 62, p5
- 65 B O’Farrell, [\*Submission to Expert Panel on Constitutional Recognition of Local Government\*](#), 25 November 2011, p2
- 66 D Crisafulli, [\*Final Plea to the Prime Minister\*](#), *Media Release*, 18 June 2013
- 67 Local Government Association of NSW, [\*Submission to the Joint Select Committee Inquiry into Constitutional Recognition of Local Government\*](#), January 2013, p6
- 68 Local Government Association of NSW, note 67, p6

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ISSN 1838-0204