



THE UNIVERSITY OF  
**SYDNEY**

## Constitutional Reform Unit

### Local Government Referendum

#### The referendum

In 2003, the Commonwealth Government announced that it would hold a referendum on the direct funding of local government at the next federal election, which was then anticipated to be held on 14 September 2013. However, the change from Prime Minister Gillard to Prime Minister Rudd led to a changed election date of 7 September 2013, which was one week earlier.

The Constitution requires that there be a minimum period of 2 months between the date the referendum bill is passed by both Houses and when it is 'submitted' to electors in a referendum. The Australian Electoral Commission received legal advice that the date a referendum is 'submitted' to voters, is not just the official polling day, but also includes any earlier date upon which postal voting or pre-poll voting is permitted. The consequence was that the local government referendum could not be held with the general election on 7 September, because the minimum period of two months would not have passed before postal voting was due to commence.

The Rudd Government stated that if it was re-elected it would reconsider whether or not to hold the referendum in its **next term**. The Opposition was uncommitted as to whether or not to hold the referendum if it was elected.

The Opposition won the election and the Bill lapsed. There have been no moves since to revive the referendum proposal. Nonetheless, as the question of direct funding of local government has arisen periodically in the past, and may do so again in the future, this site records the work done by the Constitutional Reform Unit to educate the public on the proposal.

#### The proposed amendment

The Commonwealth Parliament passed a **Bill** in June 2013 to put to a referendum a proposed amendment to section 96 of the Constitution to add the words in bold:

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 proposed question

The question asked of voters in a referendum usually gives the long title of the proposed law and then asks voters 'Do you approve this proposed alteration?'

On this basis, the question asked of voters would have been:

A PROPOSED LAW: A Bill for an Act to alter the Constitution to recognise local government by stating that the Commonwealth can grant financial assistance to local government, including assistance for community and other services.

## DO YOU APPROVE THIS PROPOSED ALTERATION?

### **Alternative Yes/No case**

The official Yes/No case had not yet been published prior to the referendum date being dropped because of the changed election date. **See page 3 of this document for an alternative Yes/No case** prepared by the Constitutional Reform Unit to inform the public about the arguments on both sides.

### **Additional Reading**

For those people who wanted to find out more about local government and the proposed referendum, including the history of previous referenda on the subject, the Constitutional Reform Unit prepared a **Bibliography on page 8 of this document**. Part A lists relevant articles, chapters and speeches. Part B provides a summary of relevant reports and submissions. Part C lists articles about the previous 1988 referendum. Part D provides links to relevant press releases and media commentary.

### **Frequently Asked Questions**

Voters need information in order to make an informed vote at a referendum. No one should feel compelled to vote 'No' simply because they don't know enough about the issues. Each referendum should be given a fair go and determined upon its merits.

The Constitutional Reform Unit prepared a list of **frequently asked questions on page 31 of this document** to give the public information that electors might need before casting a vote on this issue.

# LOCAL GOVERNMENT REFERENDUM, 2013

## ALTERNATIVE YES/NO CASE

PREPARED BY THE CONSTITUTIONAL REFORM UNIT, SYDNEY LAW SCHOOL\*

### The proposed amendment

The Commonwealth Government proposes to amend section 96 of the Constitution to add the words in bold:

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.

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\* This is not the official Yes/No case. It is an alternative prepared by the Constitutional Reform Unit. The views expressed do not represent the University or any other institution or body.

This version, dated 23 May 2013, is based upon the amendment proposed in the Draft Exposure Bill. It may not be the final version of the amendment, which is yet to be passed by the Parliament. A revised version will be published once the referendum bill has been passed by both Houses.

## YES CASE

### **1. The power of the Commonwealth Parliament to fund local government directly is in doubt**

Local government has, since the 1920s, received Commonwealth funding by way of grants to the States that require the money to be passed on to local government bodies within the State. For some years, the Commonwealth has taken an alternative route of providing some of its grants directly to local governments, by-passing the States. For example, the 'Roads to Recovery' scheme has been a significant source of direct funding for local governments. However, the ability for the Commonwealth to continue this form of direct funding was put in doubt in 2009 by the High Court's *Pape* decision. It is likely that some schemes providing direct funding of local government may be declared invalid if they were to be challenged in the High Court. The proposed change would explicitly provide the Commonwealth with the power to fund local government directly, removing any doubt created by the High Court's decision.

### **2. Constitutional recognition would acknowledge the role played by local government in Australian society**

Local government has a significant role in the provision of services. Local government bodies also work collaboratively with the State and Commonwealth governments in the development and implementation of policy objectives. This contribution will be recognised by including an express reference to 'local government' in Australia's most important legal document. Constitutional recognition of local government may help engender respect in the community for local government as an essential feature of the Australian system of government.

### **3. Direct funding of local government would avoid time-consuming negotiations with the States**

Using the existing system of funding local government bodies through conditional grants to the States may result in delays which could be problematic when urgent funding or immediate economic stimulus is needed. Funding through the States is also dependent on State wishes, which may be different from Commonwealth policies.

Any stand-off between the Commonwealth and the States as to the conditions placed on grants may result in protracted negotiations and delays to funding. Direct Commonwealth funding would allow the Commonwealth to by-pass the States, permitting funding to flow to local government more quickly. It would avoid haggling about terms and conditions and allow governments to get on with the provision of services and facilities to the public.

#### **4. The power to fund local government directly may result in more funding**

The Commonwealth may be more likely to fund existing programs or new programs at the local level if there is political advantage in doing so. Although indirect funding of local government is possible by way of conditional grants to States, the Commonwealth may prefer to implement its own policies at the local level so that it can gain the electoral credit for building roads, sporting grounds and community facilities. This may give it the incentive to increase its funding. The possibility of such direct funding may be particularly important where the priorities of the Commonwealth and the States differ.

#### **5. The Commonwealth would be better equipped to pursue national policy objectives**

Collaboration between local government and the Commonwealth may result in more targeted investment in the provision of local services and the pursuit of national policy objectives. It would avoid the Commonwealth having to negotiate with the States about shared policy aims and instead permit the Commonwealth to pursue national policy objectives by funding local government bodies to implement them on the ground.

#### **6. Direct Commonwealth funding to local government would be more equitable**

Currently, most local government funding is made by way of conditional grants to the States. It is divided amongst the States on the basis of population and then distributed within each State with 30% going to local government areas based on their population and the rest distributed according to need. This advantages the more populous States as they get a larger proportion of the funding pool. If the Commonwealth directly funded local government it would be able to distribute funding to each local government body according to need. This is a more equitable way of distributing Commonwealth funding.

#### **7. Constitutional recognition would help the voice of local government be heard**

Local government is the level of government that is closest to the people. Its voice is often lost in the development of policy at the Commonwealth and State levels and in discussions on how it should be implemented. Local government bodies know best how to implement programs in their own communities. Constitutional recognition of local government may encourage other levels of government to take local government seriously and listen to local government bodies about their needs and community wishes.

#### **8. The Constitution should be updated to recognise the entire system of government**

The Australian people elect representatives to the federal Parliament, State and Territory legislatures and local councils. Yet only the State and federal Parliaments are mentioned in the Constitution. The level of government that most closely affects the day-to-day lives of the Australian people is not even mentioned in the Constitution. It is time to fix this anomaly and ensure that the existence of local government is recognised in the Constitution.

## **NO CASE**

### **1. The Commonwealth Parliament already has the power to fund local government**

The Constitution already provides the Commonwealth with the power to make grants to the States on the condition that all the money is passed on to local government. This is the way that the Commonwealth has provided funding to local government since the 1920s and it is clearly constitutionally valid. Even if direct funding of local government is unconstitutional in light of the High Court's recent decisions, there is no doubt that the existing indirect method of funding local government could continue. There is therefore no risk at all to the Commonwealth's ability to fund local government without this amendment.

### **2. The Commonwealth would have more influence over local government policy**

Any direct funding to local government would be on such terms and conditions as the Commonwealth Parliament thinks fit. Those terms and conditions do not have to be confined to how the Commonwealth money can be spent. They could extend to anything that a local council does, regardless of whether the Commonwealth's money funds it. This may limit the ability for local governments to pursue their own objectives in their own communities. It could potentially turn them into agents of the Commonwealth, implementing Commonwealth policies. The risk is that local government bodies would lose their identity and their capacity to implement the wishes of their local community, undermining their purpose and standing in the community.

### **3. The establishment of a central authority to oversee funding arrangements may be more costly and inefficient than the current system**

Local government has different responsibilities and roles in each of the States. Because each State establishes and oversees its local government system, it already has all the necessary information about each of its local government bodies. If local government were to be funded directly from Canberra instead, a new federal bureaucracy would be needed to collect and assess this information. It would need to develop a single funding formula to fit different local government bodies across the country. This would be difficult, administratively burdensome and expensive. It would also increase the administrative burden on local government bodies as they would have to provide different information, based upon different funding formulas to two different levels of government. It is more efficient to use the systems that already exist at the State level.

### **4. Direct funding would not necessarily result in increased funding**

The Commonwealth currently provides some direct funding to local government, as well as giving funding to local government through conditional grants to the States. It can already give as much money as it wants to local government. Changing the Constitution will not put any more money into Commonwealth coffers to allow it to spend more from its budget on local government. If the aim of the amendment is to facilitate pork-

barrelling in marginal electorates as a means of getting more money to local government, then it should be rejected. The Commonwealth should fund local government properly. The Constitution should not be changed to facilitate poor behaviour.

### **5. It would centralise power in the Commonwealth**

This expansion of Commonwealth power will contribute to the centralisation of power in Australia. The proposed amendment would permit the Commonwealth to by-pass the States and fund projects at the local level on any policy area, even when it is not otherwise within Commonwealth power. The High Court in two recent cases clipped the Commonwealth's wings by telling it that it cannot spend money on programs that are not otherwise within its powers. 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.

### **6. Centralised distribution of funding may seriously disadvantage some States**

Most Commonwealth financial assistance to local government is currently distributed amongst the States on a population basis. Within each State, 30% is distributed according to the population of a local government area and the rest by reference to need. If the Commonwealth starts to give all its local government funding directly, rather than through the States, there would no longer be a distribution of funds amongst the States based on population. Instead, some form of 'equalisation' formula would most likely be applied (as with the distribution of the GST). When the Commonwealth Grants Commission looked at how such a system might work back in 1991, it calculated that New South Wales would lose about two-thirds of its local government funding. Victoria and Queensland would also have suffered significant losses. It also concluded that an equalisation system would involve extra administrative costs at the Commonwealth and State levels, reducing the size of the pool of money to be distributed.

### **7. Accountability would be reduced and the blame-game extended**

A local government body would be accountable to both Commonwealth and State governments, as well as its electorate. The Commonwealth could impose conditions on its grants which may be inconsistent with State policies or incompatible with existing structures and procedures. It may also tie up local government budgets, placing conditions on grants that local government 'match' funding or maintain funding levels in relation to particular programs. This is likely to lead to a lack of responsibility, as some areas of local government will be over-funded, some under-funded and many important matters will simply get lost in-between. The Commonwealth, State and local governments will all blame each other for these failings and no one will be accountable. It is hard enough for local government to be accountable to two masters (the State and the local community). Being accountable to three masters would be impossible.

# Bibliography

## Proposals to recognise local government in the Constitution

PART A – ARTICLES, CHAPTERS AND SPEECHES

PART B – REPORTS AND SUBMISSIONS

PART C – LITERATURE REGARDING THE 1988 REFERENDUM

PART D – MEDIA COMMENTARY AND PRESS RELEASES REGARDING THE 2013 REFERENDUM

### PART A – ARTICLES, CHAPTERS AND SPEECHES

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## **PART B – REPORTS AND SUBMISSIONS**

**(Arranged in chronological order from earliest to latest)**

### **Australian Constitutional Convention, *Proceedings*, Melbourne 1975, pp 34-56 and 171-2.**

There was a significant debate amongst members of the Convention on two motions with respect to local government. The first motion recognised the fundamental role of local government and that its traditional sources of revenue were inadequate. It also declared that local government bodies should ‘as a general principle be elected’ and that the States and Territories should foster and support the role of local government in local matters. It recommended the maintenance of the right of local government bodies to impose rates on property and that the Commonwealth and the States should co-operate in investigating means by which local government could be given access to sufficient financial resources to carry out its essential functions effectively.

The second resolution of the Convention recommended the amendment of the Commonwealth Constitution to permit the Commonwealth to borrow money for local government and to grant financial assistance to any local government body. This resolution succeeded despite the recent failure of the 1974 referendum on the same proposition.

### **Australian Constitutional Convention, *Proceedings*, Hobart 1976, pp 157-62 and p 208**

This time the Convention took a different approach to local government. After a short debate, it instead recommended that it be recognised in State Constitutions. It passed the following resolution:

That this Convention, recognising the fundamental role of Local Government in the system of government in Australia, and being desirous that the fulfilment of that role should be effectively facilitated –

- (a) invites the States to consider formal recognition of Local Government in State Constitutions;
- (b) invites the Prime Minister to raise at the next Premier’s Conference the question of the relationships which should exist between Federal, State and Local Government; and
- (c) requests Standing Committee “A” to study further and report upon the best means of recognition of Local Government by the Commonwealth.

**Advisory Council for Inter-government Relations, ‘Constitutional Recognition of Local Government’, Discussion Paper 3, Hobart, August 1980**

This paper discusses the recognition of local government under both the Commonwealth Constitution and State Constitutions. There is also a legal opinion on the constitutional status of local government by Cheryl Saunders attached as Appendix C.

The paper refers to the history of attempts to recognise local government. It notes the various proposals raised at the meetings of standing committees of the Constitutional Convention, the aim of most of which was to grant local government some degree of financial security and a degree of status. It notes the failure of the 1974 referendum and the decision of the 1976 Constitutional Convention to avoid the difficulties of the past by unanimously passing a resolution that invited the States to consider formal recognition of local government in their Constitutions.

The paper notes that local government has often been unclear as to what is meant by recognition and what is hoped to be achieved by it (para 16). The paper outlines the range of differing reasons given and aims to be achieved. In particular, it is critical of the view that local government ought to be acknowledged as a level of government in its own right:

It is not clear, however, that local government, as it is presently constituted, can be regarded as already enjoying a status comparable to that of the Commonwealth and the States. The institution of local government depends for its whole existence on State legislation. The fact that it also is elected democratically is by virtue of that legislation and does not convey to it any special legal rights. Further, while Commonwealth and State Governments are based on the Westminster model of government, local government is based on a consensus model of government. Local government usually does not have any formal opposition. Neither does it have recognised conventions (for example, ministerial responsibility and resignation) which provide both the checks and balances against the misuse of power or gross negligence and which also ensure that the democratic principles of accessibility, responsiveness, accountability and control are maintained. Basically, State Governments perform, albeit rarely, these very important functions for local government. While the form of local government continues to make necessary this residual role of State Governments, State Governments consider they would be relinquishing their responsibilities if they recognised local government as a government in ‘its own right’. (para 23)

The paper also notes local government’s desire to achieve ‘sovereign’ status under the Constitution, but observes that this would require a major rewriting of the Commonwealth Constitution, identifying the three levels of government and distributing powers amongst them. The paper observes that it is not clear that such a far-reaching kind of reform is feasible or even seriously being sought (para 24).

The paper acknowledges that the great strength of local government has been its capacity to evolve and adapt to change. It warns that constitutional recognition has the potential to

sabotage this aspect of local government and that care should be taken to ensure that any form of recognition ensures the continued ability of local government to grow and develop (para 27).

The paper notes the various forms of potential recognition. It describes a purely formal recognition which achieves nothing more, as meaningless. It would purport to recognise an institution the existence of which is reliant on State legislation. It notes that the ‘possibility of this anomaly in turn would make it hard to draft a provision to which the High Court would not attribute substantive consequences beyond formal recognition’ (para 38). If, however, the recognition went further to guarantee the existence of local government and prescribe its powers, then it would be unacceptable to some of the States and would make local government subject to federal jurisdiction (para 39).

### **Advisory Council for Inter-government Relations, ‘Implications of Constitutional Recognition for Australian Local Government’, Report 8, Hobart, August 1985**

This report discusses the roles of local government, State constitutional recognition of local government and Commonwealth constitutional recognition of local government.

With respect to Commonwealth constitutional recognition, the ACIR offered two possible approaches. One was a non-justiciable form of recognition involving a declaratory charter of principles attached as a codicil to the Commonwealth Constitution. It could set out the core roles of local government and other relevant matters, including the franchise, powers, functions, duties and financial base of local government and the circumstances in which it would be appropriate to dismiss councils and the procedures to follow in such circumstances. The benefit of non-justiciable recognition was seen as avoidance of any potential problems arising from future High Court interpretation.

The second approach was to insert a new section in the Constitution. The concerns expressed about this approach included its potential interpretation by the High Court and that it might become a ‘right of imperfect obligation’ if it had no substantial meaning.

The proposed section provided that every State and Territory shall provide by law for the establishment and continuance of local government bodies elected in accordance with State or Territory laws and charged with the peace order and good government of the local areas for which they are elected. It also included a power to make by-laws for the peace order and good government of the local area.

ACIR recommended the inclusion of such a provision in the Commonwealth Constitution because this document was the most appropriate for the recognition of the three spheres of government and to draw attention to their complementary nature and status as partners in the Australian governmental system (p 15).

**Australian Constitutional Convention, Structure of Government Sub-Committee, 'Local Government Report', April 1984, in *Proceedings*, Brisbane 1985, Vol 2.**

The Sub-Committee noted that from its inception in 1973, the Australian Constitutional Convention has acknowledged the importance of local government. It noted the Hobart resolution, above. It noted recognition in three State Constitutions. It outlined the history of the development in of local government in Australia and overseas trends in the recognition of local government.

The Sub-Committee observed that there were three fundamental issues of great importance to constitutional recognition of local government: revenue, the franchise and the evolution and devolution of powers and responsibilities of local government. With respect to the franchise, the Sub-Committee noted the shift from land interest (i.e. a franchise for land owners) to community interests (i.e. a franchise for residents). It argued that 'a natural consequence of the adoption of parliamentary franchise for municipal election is the adoption of a basic rule inherent in all democratic organizations i.e. that dismissal of an elected local government authority should be by the electors and not by another government in another jurisdiction' (p 11).

The Sub-Committee adopted 'full constitutional recognition as its maximum position'. It recommended the insertion of an amendment in the following form:

Subject to such terms and conditions as the Parliament of a State or the Northern Territory or in respect of any other Territory the Parliament of the Commonwealth may from time to time determine every State and Territory of the Commonwealth shall provide for the establishment and continuance of Local Government bodies elected in accordance with such laws and charged with the peace order and good government of the local areas for which they are elected. Each such Local Government body shall have power to make by-laws for the peace order and good government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf (p 12).

The Constitutional Convention approved the Sub-Committee's report and gave its 'strong recommendation' that a clause in this form be put to a referendum (Vol 1, p 422).

**Department of Local Government and Administrative Services, Office of Local Government, *A Case for Constitutional Recognition of Local Government*, 1987**

This pamphlet sets out the background to the proposal for constitutional recognition of local government. It discusses the role of the Constitutional Commission and its importance. It argues that constitutional recognition 'is not only desirable but essential'. It explains why, as follows:

Having the status and functions of Local Government go unrecognised has meant that:

- the Commonwealth and the States have tended to ignore its rights and responsibilities;
- its capacities have been neither sufficiently developed nor utilised; and
- its distinctive attributes of representativeness and responsiveness have not been fully exploited.

The absence of constitutional recognition has meant that Local Government has been unable to make its full contribution to the public benefit. The main impediments have been:

- negative attitudes towards Local Government by other governments and the public; and
- institutional procedures of other governments excluding Local Government participation.

Constitutional recognition must be more than ‘symbolic’ – it must have the **practical effect** of overcoming the difficulties arising out of these perceptions and practices. (p 3)

**Advisory Committee on Trade and National Economic Management, *Report to the Constitutional Commission*, (AGPS, 1987) pp 227-40**

This chapter of the report outlines the various submissions made as to why local government should be recognised in the Commonwealth Constitution. It considered local government recognition in the context of giving it an adequate financial base as this was relevant to its terms of reference concerning trade and national economic management. In particular, it discussed the tax base of local government and the effect of intergovernmental immunities and consequential rate exceptions in favour of State and federal governments, on the capacity of local government to raise revenue. The Committee was conscious of the fact that it had not received submissions on all aspects of local government and could not provide an integrated approach. While it therefore recommended in favour of the constitutional recognition of local government, it did not recommend any particular form of recognition (pp 240-1). It did note, however, that even if recognition is only symbolic, this would be an important first step in developing a more comprehensive arrangement in the future (p 240).

**Advisory Committee on Distribution of Powers, *Report to the Constitutional Commission*, (AGPS, 1987) pp 119-25**

This committee recommended against the recognition of local government in the Commonwealth Constitution. This chapter outlines the history of proposals to recognise local government, including the failed 1974 and 1988 referenda. It also outlines the recognition of local government in State Constitutions. It discusses the various submissions that it received from virtually all state local government associations, the Australian Council of Local Government Associations (ACLGA) and the Council of Capital City Mayors.



Almost all advocated recognition in the Constitution in the form proposed by the Brisbane Constitutional Convention in 1985. The NSW Local Government Association proposed the more ambitious inclusion of a separate chapter in the Constitution that would provide for the existence of local government, set out its powers and guarantee that a local government body could only be dismissed where there was just cause. It proposed that powers be redistributed in the Constitution between the three levels of government (para 7.13).

The ACLGA also later adopted the idea of a more expansive new chapter ‘specifying that a system of local self-government should exist in the States and Territories with competence to act, make by-laws and impose taxation for the peace, order and good government of their local areas’ and to ‘entrench the position of Local Government’ and describe its powers (para 7.16). It also proposed that a new tripartite body be established which would ‘advise on the allocation of responsibilities and resources’ and ‘assign taxing powers between the Commonwealth, State and Local Governments’.

The Commonwealth Department of Local Government and Administrative Services proposed that the Constitution give the Commonwealth Parliament, the power to grant financial assistance to any local government body on such terms and conditions as it thinks fit, but only after consultation with the relevant State or Territory. It also proposed that the Constitution require local government to be democratically elected.

The Committee, in analysing the proposal to insert an essentially symbolic provision in the Constitution, referred to the advice that Cheryl Saunders had given the ACIR, which ‘suggested that a reference to the existence of a system of local government in the Constitution could be interpreted to require all areas to be incorporated under local government bodies or prevent the suspension or dismissal of particular local government councils’. The Committee also referred to Saunders’ suggestion that ‘a general description of local government power might be interpreted to require particular powers to be exercisable by local government bodies, on the basis that they fall within the general constitutional description’. The Committee concluded that there were considerable doubts about the possible implications of a provision in the form proposed by the Brisbane Constitutional Convention. It noted that it would be possible to provide that such a provision was non-justiciable, but this would be unique in the Constitution and ‘appears to the Committee to be a futile exercise achieving nothing’.

The Committee concluded that the perceived need to ‘increase the status of local government’ did not justify an amendment to the Constitution (para 7.31). It also observed that the Constitution is a federal compact and it would be inconsistent with the character of the Constitution to entrench local government within it (para 7.33). The Committee observed that one must take into consideration the nature of the perceived threat to local government, which was not clear, and the fact that the recognition of local government receives little public support, other than from local government bodies. The Committee pointed out that not all important institutions are recognised in the Constitution, such as the office of Prime Minister. It would also be ‘unusual’ for the Commonwealth Constitution to oblige the States to legislate for the existence of local government. Finally, it noted that the proposed

provision would potentially oblige the establishment of local government in places where it is inappropriate to do so and prevent the appointment of administrators to carry on the affairs of local government bodies whose members are dismissed for misconduct. It would also entrench a third level of government in the Constitution, in competition with the States, which the Committee thought undesirable (para 7.35).

Attached to the Committee's report in Appendix K is a legal opinion by B Guthrie on the potential ramifications of the recognition of local government in the Constitution. It contends that if local government is established as a third tier of government, then a new type of *Melbourne Corporation* principle would extend to it, so that no Commonwealth or State law could threaten the existence of local government, or discriminate against it by subjecting it (or particular councils) to a disability not imposed upon persons generally (p 239). Guthrie also notes that the 'fewer the explicit restrictions placed on the powers of local government, that is, the more autonomous it is expressed to be, the more likely it is that implications will be drawn from federalism protecting local government from discriminatory federal or State laws'.

**Constitutional Commission, *Final Report of the Constitutional Commission*, (AGPS, 1988) Vol 1, pp 435-43**

The Commission, after taking into account the differing views of its advisory committees, recommended that a new s 119A be inserted in the Constitution, which provides:

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

The Commission regarded most of the perceived problems, such as those concerning the allocation of financial grants and the power of local government to tax, as matters to be resolved at the political level. It focused instead on the more important things: recognition, protection from abolition and the constitutional basis for inter-governmental financial arrangements.

The Commission surveyed the history of the proposal for constitutional recognition of local government, particularly through the Australian Constitutional Convention and the Advisory Committees to the Commission. It also summarised the various submissions made to the Commission.

The Commission concluded that the 'outcome should not depend upon any "perceived threat to the continued existence of local government" but, rather, on the need to accord it the status of an established part of the structure of government in Australia.' The Commission argued that it was 'time for the recognition of Local Government as a third sphere of government in the Australian Constitution.'

The Commission stated that it believed the effects of its proposed provision would require:

- (a) that the people of each State are represented by an elected Local Government body;
- (b) that Local Government bodies shall not be dismissed arbitrarily; and
- (c) that, if a Local Government body in any area is lawfully suspended pursuant to a State law, it will be restored within a reasonable period by elections.

It contended that the proposed provision would not prevent the State from altering boundaries or amalgamating local government areas.

**Northern Territory Sessional Committee on Constitutional Development,  
‘Constitutional Recognition of Local Government’, Discussion Paper No 9, June 1995.**

This discussion paper outlines the history of local government in the Northern Territory and the recognition of local government in State Constitutions. It argues that local government should exist as an independent level of government as it is the level of government that is closest to the people and most accessible. Matters considered for entrenchment in a new State Constitution include:

- The status of local government as a third sphere of government;
- The protection of local government councils against arbitrary dismissal;
- The guarantee of central core powers and functions to local government;
- The guarantee of consultation before any change is made to the powers or functions of local government;
- The guarantee of a direct franchise for local government elections; and
- The protection of local government boundaries.

It also discusses the benefit of entrenchment (as giving local government greater protection) and the disadvantage (freezing in the Constitution details about local government that may need to change from time to time).

**House of Representatives Standing Committee on Economics, Finance and Public Administration, *Rates and Taxes: A Fair Share for Responsible Local Government*, October 2003.**

This inquiry was primarily addressed at cost-shifting issues. The report discusses the roles and responsibilities of local government, cost-shifting, problems with infrastructure funding and issues concerning Commonwealth funding of local government. The report briefly discusses the constitutional recognition of local government (pp 23-4). The Committee notes the representation from ALGA that recognition of local government by the Commonwealth Parliament would be more realistic and less problematic than constitutional recognition. ALGA observed that when the ‘Australian public are ready to give constitutional recognition

at a referendum then our position will have been so entrenched that it will probably not be required anyway’.

The Committee noted that constitutional recognition was not the Commonwealth’s gift to give (p 24). It recommended, however, that a parliamentary resolution be passed which recognises local government as an integral level of governance of Australia. This was later done in 2006.

The report is most useful for its analysis of existing Commonwealth funding of local government and how it might be reformed in the future. In particular, it notes the views of the Commonwealth Grants Commission that the *per capita* distribution of financial assistance grants to States should be abolished in favour of a full horizontal fiscal equalisation approach (which would disadvantage NSW and Victoria) (para 6.34). The impediment to this has been the fact that there is ‘no agreed methodology for determining “need” across States’ (para 6.35). No doubt the dubious constitutional validity of direct funding has also led the Commonwealth to continue its funding through the States. Nonetheless, the Committee recommended that horizontal fiscal equalisation apply to the distribution of financial assistance grants (paras 6.48-6.49), while acknowledging that a more complex methodology would have to operate to apply horizontal fiscal equalisation principles to 721 councils, rather than 6 States.

The Committee acknowledged the challenges involved in direct funding of local government, including the need for a new national allocation model, the need for resolution of data collection issues and the development of administrative arrangements to operate the new allocation system. It saw as advantages of direct funding – greater transparency, due to the uniform application of one methodology and distribution of financial assistance grants on the basis of equalisation rather than *per capita* (para 6.132).

**ALGA Submission to the House Legal and Constitutional Affairs Committee Review of the Effectiveness of Legislation Administering the Conduct of Referendums, 9 October 2009,**

[http://www.alga.asn.au/submissions/2009/pdf/ALGA\\_Ref\\_submission\\_9\\_October2009.pdf](http://www.alga.asn.au/submissions/2009/pdf/ALGA_Ref_submission_9_October2009.pdf)

This submission (also discussed in the annotated bibliography on opinion polling) notes that it was accepted by local government at the 2008 Constitutional Summit, that constitutional recognition should not involve removing the nexus between state and local governments, should not guarantee the protection of any individual council from dismissal or restructure, and should not guarantee any level of funding for local government.

The submission outlines ALGA’s preferred approach to constitutional reform. It proposes that a constitutional commission be appointed to look at possible options for reform (rather than an elected constitutional convention). It proposes that the report of the commission should be considered by a joint select committee to decide on the option to be put forward. ALGA proposes that a referendum be held in November 2012. It also proposes that the

proportion of public funding be allocated to the ‘yes’ and ‘no’ cases in a manner that reflects the proportion of parliamentarians voting for and against the Bill. It also proposes that the ‘yes’ and ‘no’ texts be approved by Parliament itself, to reduce the risk of misleading statements.

**ALGA Submission to the Senate Select Committee Inquiry into Reform of the Australian Federation, 20 August 2010,**

[http://www.alga.asn.au/submissions/2010/pdf/Sen\\_Select\\_Reform\\_Aust\\_Fed\\_20Aug\\_2010.pdf](http://www.alga.asn.au/submissions/2010/pdf/Sen_Select_Reform_Aust_Fed_20Aug_2010.pdf)

This submission discusses in some detail the financial relations between local government and the Commonwealth, including local government’s declining share of tax revenue. It also discusses the *Pape* case and the risk to direct funding of local government.

**Senate Select Committee on the Reform of the Australian Federation, ‘Australia’s Federation: An Agenda for Reform’, June 2011, Chapter 6, pp 81-100**

In Chapter 5, the Committee addresses a complaint that financial assistance grants to local government are first granted to the States on the basis of population, before being made subject to horizontal fiscal equalisation within the State (see paras 5.27-5.34). It was argued that the Commonwealth should make financial assistance grants directly to local government bodies and that it should apply horizontal fiscal equalisation principles at the Commonwealth level to all local government bodies. The Committee, while sympathetic to this approach, recommended that it be investigated further by another committee.

In Chapter 6 the Committee considers local government and its funding by the Commonwealth. It notes the imbalance between local government responsibilities and resources and the problem with cost shifting through the devolving of responsibilities onto local government without equivalent resources.

The Committee considers the argument that the *Pape* case may have rendered invalid direct Commonwealth funding to local government. The Committee noted the advice of academics that direct funding was vulnerable to a constitutional challenge, but preferred the advice of the Commonwealth Government that it had reviewed the constitutionality of payments to local government after the *Pape* case, taking advice from the Attorney-General’s Department, and that it decided that its current payments, including direct payments could continue. The Committee observes at para 6.33:

The committee believes that until Commonwealth payments to local government authorities are shown definitely not to be constitutional, and given the poor record of referenda in relation to local government, that mechanisms other than constitutional amendment, such as through COAG, should be explored in an attempt to put local government authorities at ease regarding funding.

The Committee discusses the case put for other forms of constitutional recognition. It discusses obstacles in the path of a constitutional amendment, being a lack of public support, concerns about unintended consequences for constitutional interpretation, queries about whether constitutional recognition is necessary, given that local government is already recognised in a number of ways, and the utility of symbolic recognition.

The Committee concludes by stating at para 6.62:

[T]he committee believes that Commonwealth funding to local government is not as precarious as some have suggested. Until such time as it becomes clear that constitutional amendment is the only way of providing funding certainty to local government, the committee believes that plans to change the constitution to recognise local government run considerable risk of failure.

The committee observes that the greatest likelihood of success is to ‘hasten slowly’ and wait to include recognition of local government in a coherent plan for overall constitutional reform.

**Expert Panel on Constitutional Recognition of Local Government, Parliament of Australia, *Final Report* (2011) <http://localgovrecognition.gov.au/content/final-report.html>.**

The Expert Panel was established to ‘to identify options for the constitutional recognition of local government and to report on the level of support for such recognition among stakeholders and in the general community’. The Summary included in its Report set out its conclusions regarding the financial recognition of local government at pp 2-3, as follows:

‘Financial recognition has the broadest base of support among the political leadership at both federal and State levels, although much of this support is only ‘in-principle’ and subject to the precise wording of any referendum proposal. In particular, unlike democratic recognition, it has the support of the Coalition at the national level, a matter that is of critical significance when the prospects of success at a referendum are assessed. However, there is important opposition to any such proposal from the Victorian and Western Australian governments and others who made submissions to the panel. In addition, the New South Wales Government does not support financial recognition in the absence of clear evidence that existing funding arrangements are deficient. No other State expressed a specific opinion. However, in terms of the submissions and consultations with the panel, only the Western Australian Government stated that it would actively campaign against financial recognition.

A majority of panel members concluded that financial recognition is a viable option within the 2013 timeframe indicated by the terms of reference.

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, be acknowledged in the Constitution.

Financial recognition currently has the support of the federal Coalition, the majority of local councils and in-principle support from one State government. The polling undertaken by the Australian Local Government Association (ALGA), and by the panel, also indicates a substantial level of support for financial recognition in the broader community, although this support is no higher than for other forms of recognition; polling also suggests that such support may not carry through to a referendum. There is, however, an indication that the general community may support a form of limited recognition that addresses a perceived problem, such as the current uncertainty arising from the *Pape* case.

The members of the panel who support this conclusion take into account the commitment of the local government community throughout Australia to actively campaign in favour of any referendum, including by allocating substantial resources to such a campaign. They also recognise that the opposition of some State governments and of some political leaders may lead to a diminution in the level of support identified in the polling.

The majority of panel members support a referendum in 2013 subject to two conditions: first, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by ALGA necessary to achieve informed and positive public engagement with the issue, as set out in the section of this report on the concerns about a failed referendum (see page 21). Steps include allocating substantial resources to a major public awareness campaign and making changes to the referendum process.

At the same time, several members of the panel remain concerned that financial recognition per se does not currently enjoy sufficient support either among stakeholders or the general community to give a referendum a high enough prospect of success in this Parliament, even if the two conditions proposed by the majority are satisfied. They share a concern that proceeding to another unsuccessful referendum would damage rather than advance the interests of local government.'

**Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, *Preliminary Report on the Majority Finding of the Expert Panel on Constitutional Recognition of Local Government: The Proposal, Timing and Likely Success of a Referendum to Amend Section 96 of the Australian Constitution to Effect Financial Recognition of Local Government (January 2013)***

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsclg/localgovt/preliminaryreport.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsclg/localgovt/preliminaryreport.htm).

The Committee's preliminary report found in favour of proceeding with a referendum. It made the following recommendations:

**Recommendation 1**

The Committee recommends that a referendum on financial recognition of local government be held in 2013.

Given the importance of securing state and territory support, the Committee further recommends that, in addition to the efforts of the local government sector, Commonwealth Government Ministers, particularly the Minister for Regional Australia, Regional Development and Local Government, the Attorney-General and the Special Minister for State, immediately commence negotiations with state and territory governments to secure their support for the referendum proposal.

**Recommendation 2**

The Committee recommends that the referendum propose an amendment to Section 96 of the Constitution:

...the Parliament may grant financial assistance to any State *or to any local government body formed by State or Territory legislation* on such terms and conditions as the Parliament thinks fit.

**Recommendation 3**

The Committee recommends that a referendum on financial recognition of local government be held at the same time as the 2013 federal election.

**Recommendation 4**

The Committee recommends that the Commonwealth Government begin all necessary preparatory activities to ensure a successful outcome for a referendum on financial recognition in 2013. The preparatory activities include:

- the Australian Electoral Commission begin the necessary preparatory activities for a referendum in 2013;



- the Department of Regional Australia, Local Government, Arts and Sport, as lead coordinating and implementing agency, take the necessary steps for implementing a national civics education campaign and managing funding of partisan campaigns;
- the Attorney-General's Department release a draft of the constitution amendment bill by 31 January 2013 in order to begin the process of public consultation;
- temporary amendments be made to the *Referendum (Machinery Provisions) Act 1984*, to effect the following outcomes:
  - remove the legislative limit on Government spending;
  - confirm that Parliamentarians should draft and approve the 'Yes' and 'No' cases for the official referendum pamphlet for financial recognition of local government. In the event that there is no requirement for a 'No' case, the Committee recommends that there should be an official 'Yes' case only;
  - allow the official Yes/No pamphlet to be sent to every household rather than every voter;
  - enable a range of communication methods to educate and reach across all Australian demographics; and
  - use format guidelines for the official 'Yes/No' referendum pamphlet to ensure the factual nature and comparability of the cases in the hands of voters..

**Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, *Final Report on the Majority Finding of the Expert Panel on Constitutional Recognition of Local Government: The Case for Financial Recognition, the Likelihood of Success and Lessons from the History of Constitutional Referenda* (March 2013)**

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The Committee confirmed its earlier recommendation that a referendum be held at the 2013 Commonwealth election.

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# Frequently Asked Questions on the Local Government Referendum

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## 1) What is a referendum?

The Constitution is the fundamental document which provides the legal framework under which our federal system of government operates. It establishes the Commonwealth Parliament and Executive Government, and it distributes powers between the Commonwealth and the States.

The Constitution was drafted in the late 19<sup>th</sup> century. It consists of 128 sections. From time to time, there are proposals to change the wording of one or other of these sections, either to fix perceived problems or to improve its operation.

A referendum is the process which must be undertaken in order for the Constitution to be amended. It involves a vote by the entire Australian electorate on whether or not a change should be made to the Constitution. This process is required by section 128 of the Constitution. If the referendum is passed, the Governor-General gives assent to it and it becomes part of the Constitution. It can then only be changed by a future referendum.

## 2) What is necessary for a successful referendum?

For a referendum to be successful, a 'double majority' of the votes cast must be achieved. This means that the majority of the Australian electorate must vote 'yes', and a majority of the electors in a majority of the States (being four out of six States) must also vote 'yes'. (Votes in the Northern Territory and the ACT are included in the first count, but not in the second.)

For example, if 51% of the electorate voted 'yes' and a majority of people in New South Wales, Queensland, Victoria and Western Australia voted 'yes', then the referendum would succeed. However, if a majority of the electorate across Australia voted 'yes' but majorities in only three States voted 'yes', then the referendum would fail. Equally, if majorities in four States voted 'yes', but an overall majority of the Australian electorate did not, then the referendum would also fail.

## 3) When will the referendum on local government be held?

The referendum was originally proposed to be held on 14 September 2013 with a general election. The change in the election date to 7 September has meant that the referendum can no longer be held at the same time as the election, because not enough time has elapsed since the referendum Bill was passed by both Houses of Parliament.

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\* This is not an official government document. The views expressed are not those of the University of Sydney. This document only takes account of events up until 24 May 2013.

If the Rudd Government is re-elected, it has stated that it will give consideration as to whether to run the referendum. The Opposition has made no commitments as to whether to run it or not. The maximum period for holding the referendum based upon the existing Bill is 6 months, so it could be held as a stand-alone referendum up until December 2013. Alternatively, a new referendum Bill could be passed by whoever gains office at the 7 September election.

**4) What will the question be and how do I express my vote?**

At the polling booth, electors will be given a separate ballot paper that deals only with the referendum. The way it is traditionally set out is to declare that there is a proposed law, giving the long title of this Bill. This is the Bill to amend the Constitution. On the basis of the June 2013 Bill, it would say:

A PROPOSED LAW: A Bill for an Act to alter the Constitution to recognise local government by stating that the Commonwealth can grant financial assistance to local government, including assistance for community and other services.

The ballot paper would then ask whether you approve of this change to the Constitution by saying:

**DO YOU APPROVE THIS PROPOSED ALTERATION?**

WRITE "YES" OR "NO"

Voters would then have to write 'Yes' or 'No' in the box provided, indicating whether or not they approve of changing the Constitution in this way.

**5) Is voting compulsory?**

Yes, voting is compulsory in the referendum.

**6) What is the local government referendum about?**

The local government referendum is about changing the Constitution to permit the Commonwealth Government to give funds directly to local government, rather than passing those funds to local government via the States.

**7) What is the proposed change?**

The proposal is to add certain words to section 96 of the Constitution. Section 96 is known as the 'grants power'. It currently says:

'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 on such terms and conditions as the Parliament thinks fit'.



This means that the Commonwealth government can give money to the States on terms and conditions. For example, it permits the Commonwealth to make grants to the States on the condition that they pass all the money on to local government. This is the method by which local government has received Commonwealth funds since the 1920s. However, section 96 does not permit the Commonwealth to give that money directly to local government, by-passing the States. This amendment would allow the Commonwealth to fund local government directly without the consent of the States.

The referendum, if successful, would change section 96 to read (amendment in bold italics):

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 would enable the Commonwealth government to fund State and local governments directly on such terms and conditions as the Commonwealth Parliament determines.

**8) Is there a threat to Commonwealth funding of local government?**

No. The Commonwealth can always fund local government bodies by making grants to the States on the condition that they pass the money on to local government. This is how 80% of the Commonwealth's funding is provided to local government. About 20% of Commonwealth funding is paid directly to local government.

It is possible that some of the Commonwealth's direct funding is unconstitutional. The High Court decided in the *Pape* case in 2009 that the Commonwealth cannot just spend money for any purpose at all – it can only do so if it falls within the powers allocated to the Commonwealth by the Constitution. While some grants to local government might fall within existing Commonwealth powers, others may not. However, if this is the case, then the same money can simply be given to local government by the existing valid means, through conditional grants to the States.

**9) So is this just about creating an alternative way to fund local government?**

Yes. The Commonwealth wants to be allowed to fund local government directly in addition to the current valid way of funding local government through conditional grants to the States.

**10) Haven't we voted on this before?**

Yes. The Whitlam Government put a very similar referendum in 1974. If it had succeeded, it would have allowed the Commonwealth to 'grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit'. The referendum failed nationally by approximately half a million votes and failed in all States except for New South Wales.

In 1988 there was another referendum on local government. This time it didn't concern funding. Instead it was more symbolic in nature, requiring that 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'. This referendum failed nationally by approximately 3 million votes (with around two-thirds of voters opposing it) and in all States.

### **11) Where did this referendum proposal come from?**

Local government has been campaigning for constitutional recognition for many years. It held a Local Government Constitutional Summit in 2008 which recommended that any constitutional change include 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.

After the 2010 federal election, the Gillard Government promised the Australian Greens and the independents that it would hold a referendum upon the 'recognition of local government in the Constitution'. It established an Expert Panel, chaired by the Hon James Spigelman, to make recommendations regarding the options for constitutional recognition.

The Expert Panel handed down its report in 2011 which concluded:

The majority of panel members support a referendum in 2013 subject to two conditions: first, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by ALGA [the Australian Local Government Association] 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.

It recommended the amendment of section 96 of the Constitution to permit the Commonwealth to make grants to '*any local government body formed by State or Territory Legislation*' on such terms and conditions as the Parliament thinks fit. The referendum proposed by the Commonwealth is in similar terms, although the Commonwealth thought it was not necessary to include a reference to the territories as the Commonwealth can already directly fund local government in the territories under a different constitutional power.

**12) What does the Constitution currently say about local government?**

There is no current mention of local government in the Constitution. This is because local government is created by the States under State legislation. It is not an independent level of government. Where the Constitution gives express protection to the States (such as section 114, which prohibits the Commonwealth from taxing the property of the States), this also extends to protect local government as part of the States.

The proposed constitutional amendment is not intended to change this position. While the words 'local government' will be included in the Constitution, this will not give local government any greater powers or legal status. Its position in the system of government will remain the same.

**13) Will this take local government out of State control and put it under Commonwealth power?**

No. The proposed amendment refers to 'any local government body formed by a law of a State'. This means that it only deals with local government bodies established under State laws, passed by State Parliaments. It would not permit the Commonwealth to establish its own system of local government. Local government bodies will remain the creations of the States, established by State laws.

What it will do, however, if successful, is permit the Commonwealth to impose conditions on its funding to local government. This means that the Commonwealth could not only direct how local government spends the grant, but it could require local government bodies to agree to conditions on anything else within their power in order to receive the grant. So the Commonwealth would potentially have a degree of control over local government bodies, as long as they accept the Commonwealth grants with the conditions attached.

While the Commonwealth can already impose conditions on State grants, the States are at least big enough to be able to negotiate in relation to those terms and conditions. It is unlikely that individual local government bodies would have any capacity to do so.

**14) How is local government funded at the moment?**

Overall, local government is pretty self-sufficient. Most of its funding (about 84%) comes from its own sources of revenue, including rates, fees for services, sale of goods, commercial dealings and investments. Of the rest, about 8% is provided by the Commonwealth and about 8% is provided by the States.

Amongst local government bodies, however, there are variations. Some are more reliant on grants from the Commonwealth and States than others. In 2008 the Productivity Commission found that 10 percent of councils were highly dependent on grants, which accounted for more than 58% of their total revenue. These councils covered about 0.4% of the population.

In 2012-13 the Commonwealth provided \$2,204 million to local government through grants to the States under section 96 of the Constitution. The Commonwealth also provided \$440 million directly to local government without going through the States. This includes \$335 million for the Roads to Recovery program.

Accordingly, about 80% of Commonwealth funding to local government now goes through the States and about 20% is paid directly to local government. So when it is argued that we need this referendum to avoid a legal threat to the validity of direct Commonwealth payments to local government, what we are really talking about is approximately 1.6% of local government's funding, which could instead be channelled back into grants to local government through the States in any case.

**15) Wouldn't it be cheaper and more efficient to cut out the 'middle-man' and let the Commonwealth fund local government directly?**

Probably not. Sometimes it is suggested that States 'take their cut' of Commonwealth funding to local government or that they 'cream-off' part of it. The Expert Panel inquired into this and found no evidence of it occurring. This is because the Commonwealth places conditions on its grants that require that every cent goes to local government. All grant expenditure has to be audited. There is no opportunity for the States to take any of the money for themselves.

Sometimes it is also said that the States deduct from the Commonwealth grants their costs of administering the grant system through the Local Government Grants Commissions. It is argued that it would therefore be cheaper, saving \$18 million per annum, to cut the States out of the system. Again, it is clear that the States are not permitted to deduct the cost of running the Local Government Grants Commissions. The full amount of Commonwealth grants must go to local government and the States have to fund the Local Government Grants Commissions out of their own money. So to the extent that there are any costs to having a 'middle-man', they are borne by the States, not local government.

If, however, the Commonwealth took over the role of working out how to distribute grants to local government according to need, not only would it be more costly for the Commonwealth to collect all this information from each local government body in the country, but the Commonwealth would be likely to deduct its costs from its grants (as this is what it does to the States when the Commonwealth deducts its costs in collecting the GST before providing GST revenue to the States). A more likely consequence of this proposed amendment, if the Commonwealth proposed to give all its funding direct to local government, is that the administration of the grants by the Commonwealth would be more expensive and that less money would flow to local government as a result.

**16) What impact will this referendum have on my rates?**

It is impossible to tell. If the Commonwealth were to fund all local government bodies directly on an equalisation basis, then it is likely that rural and remote local government areas, which are likely to suffer greater disadvantages, would receive more Commonwealth funding and that city local government areas would receive less funding. This might affect rates. Alternatively, the Commonwealth could choose not

to change the funding model and to continue to distribute its funds amongst the States on a population basis. The financial consequences for local government bodies are therefore unpredictable.

**17) Will this amendment result in local government getting more funding?**

We do not know. Some people think that the Commonwealth will give more funding to local government if it can do so directly, because it gets greater political credit for doing so, allowing it to influence voters in its favour. Others think that what the Commonwealth is prepared to give local government is really dependent on its budgetary position and that it won't make any difference whether it has two ways of providing the funding or only one. It is even possible that local government could end up with less money, if the administrative burden on the Commonwealth of administering direct funding is high and if it deducts this cost from its payment. The answer is that no one can know for sure what will happen in the future. Even if the current Commonwealth government makes commitments as to future funding, this will not bind future governments.

**18) Will this amendment prevent local council amalgamations or the dismissal of councils?**

No. Local government bodies will still be subject to State laws, including laws concerning amalgamations and dismissals. It would be possible, of course, for the Commonwealth to place a condition on its funding to local government – eg that all local government areas have a minimum number of residents. In this way it could pressure local government bodies to agree to amalgamations in order to get Commonwealth grants. This would make it easier for the Commonwealth to administer direct funding as it would only have to deal with fewer local government bodies. No one knows whether the Commonwealth would do this in the future.

**19) Might there be unintended consequences of changing the Constitution in this way?**

There is always the possibility of unintended consequences, although this is a fairly limited change, so the possibilities are relatively few.

In recent years, in interpreting the Constitution, the High Court has identified 'essential' characteristics for institutions mentioned in the Constitution such as courts and juries. One possibility is that it would attribute essential characteristics to 'local government' once it was mentioned in the Constitution.

The Expert Panel was concerned about this, so it attempted to avoid any problems by ensuring that the provision does not *require* there to be a system of local government. The proposal only concerns Commonwealth funding to local government. So if the High Court attributes essential characteristics to 'local government' (for example, if it held that the term 'local government body' means a body that is elected and can't be dismissed or replaced by administrators), then the only consequence would be that the Commonwealth could not fund such bodies directly – not that they would be constitutionally invalid.

Nonetheless, if that happened a State would be under considerable pressure to change its system of local government so that it could receive Commonwealth funding on the same basis as other local government bodies. Although the Commonwealth could continue to fund these bodies through conditional grants to the States, it would be unlikely to do so if the High Court said that they did not meet the minimum standards or essential characteristics of 'local government bodies'.

Another question is whether the conditions placed on Commonwealth grants to local government, if included in Commonwealth legislation, would override State legislation or simply be regarded as conditions upon acceptance of the grant which have no further legal effect. We would have to wait for a High Court decision to know for sure.