



Draft Submission to the Expert Panel on Constitutional
Recognition of Local Government

November 2011

Executive Summary:

The Local Government Association of NSW and Shires Association of NSW strongly support the constitutional recognition of Local Government.

Our preference is for the financial recognition of Local Government, with inclusion in a Preamble if one is to be developed as well.

We support ALGA's observation in its submission that the Australian federal system of government established in 1901 has many strengths. But we appreciate that the Australian nation and the responsibilities of all spheres of government have changed significantly since 1901. If the federal system and the Constitution are to reflect contemporary Australian societal values and governance and political practice, there needs to be periodic amendments.

The constitutional recognition of Local Government has been the subject of a series of resolutions passed by councils at National General Assemblies of Local Government, Conferences of the Local Government Association of NSW, and Conferences of the Shires Association of NSW over the years. We have worked to support the work led by ALGA in response to those calls, examining the issue and determining an agreed position for an appropriate amendment to the Australian Constitution to meet Local Government's and the Australian community's needs.

While it will be a significant challenge, we believe there is evidence that the public will support the constitutional recognition of Local Government if it is designed to resolve a practical problem and deliver practical results in local communities, and if it is preceded by dispassionate information how the Constitution works and what a 'yes' case means.

Our preference for financial recognition reflects the increased use of direct funding of Local Government in recent years by the Australian Government to achieve national objectives and the continuing doubts about the constitutional validity of such direct funding.

We support ALGA in the view that the High Court decision on *Pape v Commissioner of Taxation* (2009) highlights the need for an appropriate amendment to ensure that the Australian Parliament may, if it so determines, provide grants directly to Local Government on whatever terms and conditions it sees fit so that local communities have access to adequate funding for the services and infrastructure they require. Moreover, the Associations and ALGA's preferred option reflects the view that a change to Section 96 of the Constitution to provide for financial recognition is a simple proposal that will resonate with the broader community and garner the necessary support to succeed at a referendum.

Opening:

The Local Government Association of NSW and Shires Association of NSW (the Associations) are the peak bodies for NSW Local Government.

Together, the Local Government Association and the Shires Association represent all the 152 NSW general-purpose councils and the special-purpose county councils. Further, representatives of the NSW Aboriginal Land Council are members of the Local Government Association of NSW.

The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils and promote Local Government to the community.

The Associations thank the Expert Panel on Constitutional Recognition of Local Government for the opportunity to make a submission concerning the Constitutional Recognition of Local Government. The Associations have a long standing and vital interest in the matter.

As the Associations have been closely and actively involved in the development of the Australian Local Government Association's long-term position on Constitutional Recognition of Local Government, and its response to the Expert Panel, the Associations strongly support ALGA's submission to the Expert Panel. Therefore the Associations will reiterate pertinent parts of ALGA'S submission, and add NSW perspectives where that is useful.

Purpose:

This submission will examine the case for, support for, and possible types of Constitutional Recognition of Local Government.

The Associations are aware of and support the Australian Government commitment to pursue the recognition of Local Government in the Australian Constitution.

We note that the Australian Government has established an independent Expert Panel to consult with stakeholder groups and the community on the level of support for constitutional recognition of Local Government and to identify possible forms that recognition could take. The Expert Panel will report to Government in December 2011.

We recognise that the Terms of Reference for the Expert Panel are as follows:

The Expert Panel should, report on and make recommendations regarding:

- the level of support for constitutional recognition among stakeholders and in the general community; and
- options for that recognition.

The Expert Panel will have regard to the benefits and risks of the different options as well as outcomes that may be achieved for key stakeholders through constitutional recognition of Local Government.

In conducting its inquiry, the members of the Expert Panel will consult:

- Local Governments and their representative bodies, including the Australian Council of Local Government and the Australian Local Government Association (ALGA);
- State and Territory Governments;
- Federal parliamentarians;
- Subject matter experts, such as constitutional reform, Local Government and regional government experts; and
- Interested members of the Australian community.

Background:

Before we turn to our comments on the level of support for constitutional recognition among stakeholders and the options for reform we would like to acknowledge and support the narrative spelt out in *ALGA's process – how we got to where we are* having been part of that process.

In 2007 the ALGA Board, supported by all State and Territory Local Government Associations, identified Constitutional reform as a major strategic priority within the sector. Local Government has for some decades sought this objective.

After a period of consultation and research ALGA developed a range of materials to assist councils to understand the complexity of constitutional reform and to consider options that might be pursued.

Councils were encouraged to conduct a 'council conversation'. These conversations were designed to engage councils on the issues and to assist them to determine the priority of constitutional reform and develop initial views on the nature of reform that should be pursued. We encouraged NSW Government to engage in this process.

In December 2008 ALGA convened a special Constitutional Summit of Local Government, where delegates more formally examined options for the form of constitutional recognition that could be sought by Local Government. Again we supported this summit and encouraged participation by our member councils throughout NSW. ALGA worked with a panel of constitutional law experts to develop detailed materials and inform debate, including Professor George Williams, Associate Professor Anne Twomey, Mr Scott Bennett and Mr Kerry Corke.

The outcome of the Summit was a 'Declaration' which was unanimously agreed by delegates. The Summit endorsed three core principles as the basis of any referendum on Local Government:

- The Australian people should be represented in the community by democratically elected and accountable Local Government representatives;
- The power of the Commonwealth to provide direct funding to Local Government should be explicitly recognised; and
- If a new preamble is proposed, it should ensure that Local Government is recognised as one of the components making up the modern Australian federation.

Local Government delegates further accepted that in seeking recognition, the form of any proposed referendum *should not seek to remove the nexus between State/Territory Governments and Local Government*.

Following the Summit, ALGA agreed on a comprehensive strategic framework to achieve the inclusion of Local Government in the Constitution. Work to-date has focused on:

- a) Identifying and building sectoral support for a preferred proposition;
- b) Convincing all major political parties of the need for and merit of constitutional recognition of Local Government;
- c) obtaining Government agreement to conduct a referendum on an appropriate form of recognition;
- d) encouraging the Government to establish an appropriate process to take a referendum forward successfully; and
- e) preparing to conduct a coordinated national campaign to support the 'yes case' for the referendum

Over the past two years ALGA has met with key decision-makers to discuss the importance of constitutional reform, the implications arising from national research commissioned by ALGA, and a proposed pathway for a referendum during the term of this parliament. ALGA believes that the end of 2013 offers the best option for a referendum to include Local Government in the Constitution.

In the time since the 2007 election, the Australian Government has placed the issue on the agenda of the Australian Council of Local Government, and has consulted ALGA closely on the process required. In June 2010 it provided a grant to ALGA of \$250,000, to be spent over two years, to raise the profile of constitutional recognition of Local Government, particularly in local communities, and to assist the Australian Local Government Association to support councils in engaging their communities on this issue.

ALGA notes each of the key national political parties have indicated support for progressing a referendum to recognise Local Government. We can add that the situation in NSW is positive. In the 2011 NSW elections, the Associations sought responses from the parties contesting the election on where they stood on our priority that the incoming government 'Support the national Local Government campaign to recognise Local Government in the Australian Constitution, to ensure the Australian Government can directly fund Local Government nationwide'. The NSW Liberals and Nationals, NSW Labor, the Greens and the Christian Democratic Party all expressed support for this proposition.

Local Government has long supported the inclusion of financial recognition in a constitutional reform package, based not only on the profile of the issue as a result of the 1974 referendum but also more recently on the increasing importance of direct funding programs to Local Government and the Australian Government's increasing propensity to rely on such funding mechanisms to achieve national objectives. Over the past decade, Australian Governments from both sides of politics have demonstrated their clear preference to use direct funding through initiatives such as the Roads to Recovery Program and the Regional and Local Community Infrastructure Program rather than to use the indirect mechanism of Financial Assistance Grants which flow through the States. We support ALGA's view that without the mechanism of direct funding, these initiatives would not have been implemented.

The Associations agree with ALGA, that the 2009 the High Court decision in *Pape v Commissioner of Taxation* (2009) served only to crystalise the strength of the financial recognition issue (see further discussion below under consideration of options).

Level of Support

The Expert Panel is charged with assessing the level of support for constitutional recognition among stakeholders and in the general community.

Support amongst stakeholders

We are aware that support amongst Local Government sector stakeholders is very high. Local Government is committed to supporting constitutional change to allow the Australian Government to fund Local Government directly.

Over the past 7 months, almost 80% of councils across Australia have pledged their support for constitutional recognition of Local Government – specifically financial recognition. Almost 440 of the 560 councils nationwide have passed resolutions at their council meetings to support financial recognition and inclusion in a Preamble if one is proposed. In NSW 14% of the 152 councils have passed these resolutions.

Councils believe this reform is crucial if Local Government is to remain financially sustainable in the long-term and be able to continue to meet community needs.

Funding certainty is critical to the short and long-term planning of councils, particularly in rural and regional areas where there is a greater reliance on external funding. In response to community demand, Local Government is filling gaps never envisaged in the Australian Constitution, but without being adequately resourced to do so. Councils are providing a mix of up to 150 services, while being funded primarily through property tax, which represents approximately 3% of Australia's total taxation revenue.

The financial constraints facing Local Government have been illustrated in a 2006 Pricewaterhouse Coopers report which identified a \$14.5 billion backlog in repairing ageing infrastructure and which also found that between 10% and 30% of councils would face financial sustainability challenges without reform to their revenue or expenditure patterns. The report recommended that Local Government seek funding security through (a) a Local Community Infrastructure Renewals Fund of around \$200m - \$250m per annum, (b) more secure and adequate Financial Assistance Grants funding from the Commonwealth, as well as recommending that councils undertake internal reforms to ensure that the sector is maximising its operational and financial effectiveness.

In the absence of greater funding from the Australian Government, communities face reduced services, delays in essential infrastructure work, or trying to raise additional revenue from communities which are already paying their fair share.

ALGA and State and Territory Associations research shows that the community believes that councils are the best placed to make decisions for their local communities, because councils are part of the community and can respond in locally appropriate ways. Decisions made from the state or national capitals often have limited understanding of the local priorities or social and economic imperatives.

The Australian Government clearly sees merit in providing support to local communities because it has done so for the past 30 years. Over the past decade, the Australian Government has increasingly provided program funding directly to Local Government. This is a practical solution when delivering programs at local level which are aimed at achieving a national objective.

The change Local Government is seeking, is to formalise and secure what has been occurring for the past ten years to give financial security to communities.

Support in the general community

Notwithstanding the high level of sector support, neither ALGA nor State and Territory Associations, underestimate the size of the task involved in seeking any amendment to the Constitution.

History shows that achieving constitutional change in Australia is an enormous challenge and does not happen easily.

We support ALGA's view that this referendum will be supported by the Australian people and will be successful. Independent research commissioned by ALGA in 2011 shows that when prompted support for direct funding of Local Government increased was supported by 68% of respondents nationally. (By prompted we mean that respondents in this research were informed that the Australian constitution currently does not recognise and protect the existence of Local Government and funding for Local Government only occurs through the states according to convention.)

In 2009 ALGA commissioned national research to gain a deeper understanding of Australians' attitudes to the different levels of government; to explore the level of understanding Australians have about the Australian Constitution and the process by which it can be changed; to seek an understanding of Australians' perceptions of Local Government; and to identify any differences in these factors across the states.

ALGA's research showed positive support for the general concept of constitutional recognition of Local Government. 61% of respondents said yes when asked the simple question of whether the Australian Constitution should recognise and protect the existence of Local Government. Support was strongest in the rural (69%) and regional and provincial areas (65%) compared with the outer metropolitan (62%) and inner metropolitan (55%) areas.

However, ALGA's research also highlighted, a lack of understanding amongst voters about the Constitution and processes to change it. Only 76% of Australians of voting age recognise that Australia has a Constitution, with the most informed group being males over 50 years of age and the least informed group being females between 18 and 24. Similarly, only 22% of those surveyed understood that constitutional change required the support of a majority of voters in a majority of states and 25% admitted they did not know the requirements.

Less than half of respondents were aware that State Governments were recognized in the Constitution. In terms of Local Government, 19% thought that Local Government was already recognised in the Constitution and 21% did not know.

The lack of understanding about constitutional issues, the conservative nature of the voting public and the reasons for the low success rates for referenda have been the subject of several reviews (e.g. Scott Bennett, John Warhurst, Prof Cheryl Saunders). These findings and the findings of ALGA's own research indicated that it is crucial that more effort is directed towards better informing the Australian public around what is involved in constitutional change.

ALGA's research showed that regardless of age, people need to be convinced if the merits of any referendum question. Nationally 69% of those surveyed said would make up their mind depending on the particular issue and a further 15% were very cautious about changing the Constitution, with only 7% being enthusiastic about changing the Constitution. ALGA's submission to the House of Representatives' Inquiry into the Machinery of Referendums in

2009, highlighted the need for much greater effort to inform Australians about their Constitution and how it can be amended, if they are to be fully and meaningfully engaged in any referendum debate.

On the basis of its research, ALGA recommended to the committee that before any proposals to amend the Constitution can be put to the Australian people, there needs to be a nationally funded education campaign on the nature of the Constitution and the process for constitutional change. ALGA's preferred model is for a national program run by the Australian Electoral Commission which focuses on the role of the Constitution, the mechanism by which it can be changed and the role of individual voters.

The House of Representatives Committee's report *A Time for Change: Yes/No?* recommended sweeping changes to the way in which Australians are provided with information leading up to a referendum. It concluded that material made available to electors should inform the voter of the purpose and ramifications of change because "if a proposal for change is not fully understood, it is more likely that a voter will vote 'no' and the defeat of a proposal may reflect voter misunderstanding or fear of change rather than a true assessment of the proposal" (December 2009, page 54). It considered that education of the public is vital to ensure that voters have the capacity to make an informed decision, saying that the Yes/No arguments alone are insufficient to adequately prepare voters to exercise their democratic right and responsibility in a referendum. A national civics education program was recommended by the Committee to improve the knowledge and understanding of Australians about the Australian Constitution prior to each referendum (December 2009, page 60)

It also called for the establishment of an independent, non-partisan Referendum Panel prior to each referendum, which would be responsible for developing an overarching communications strategy for the referendum, including identifying education material and methods of distributing this material.

The record of reform to date supports the view that the current process for change does not encourage participation or a positive outcome, thereby disadvantaging legitimate proposals for amendment. ALGA believes the implementation of these public education measures would result in voters having a better understanding of the referendum process, therefore leading to a better understanding of the question or questions being put at a referendum, and more informed public engagement and voting.

In February 2011 ALGA commissioned follow-up research to its 2009 survey. The 2011 findings reinforce the earlier findings. The predominant finding was that confidence in the capacity of Australian and State governments had dropped post-global financial crisis. Local Government had increased in importance, ostensibly as a result of lost confidence in Australian and State governments.

Fifty nine percent (59%) rated Local Government as very or somewhat important, compared with 62% for State Government and 64% for Australian Government. Importantly, there had been a change to the perception of which sphere of government was on the right track. Forty two percent (42%) thought Local Government was on the right track (up from 37% in 2009), 39% thought the Federal Government was on the right track (down from 56% in 2009) and 33% considered the State Governments to be on the right track (32% in 2009). Of all the spheres of government, Local Government is currently perceived as being most on track.

The importance of Local Government has increased from 55% to 73% in rural areas since 2009 and amongst women from 59% to 65%. Women in the 35-49 age group saw the biggest increase, rising by 12 points.

Overall, 57% of voters thought the Australian Constitution should recognise and protect the existence of Local Government, a little down on the 2009 figure. A significant finding in the new research, however, is that when prompted with the fact that currently the convention is for Australian Government funding to occur through the States rather than directly to councils, support for constitutional recognition rose 11 points to 68%.

Voters' knowledge of the Constitution, or awareness of whether Local Government was recognised or not, showed virtually no change since 2009. This is not surprising, as there was no attempt to increase this knowledge. The findings reinforce the need for education and communication in the lead up to a referendum.

Consideration of the Options

The Associations note that in its considerations, the Expert Panel is looking for ideas on constitutional recognition that will:

- make a practical difference,
- have a reasonable chance at a referendum, and
- resonate with the public.

We recognise that the panel has identified four ideas that appear to satisfy these three criteria and is looking for specific feedback on each of them.

We note these four ideas are as follows:

- Symbolic recognition,
- Financial recognition,
- Democratic recognition, and
- Recognition through federal cooperation.

We shall cover each in turn below.

Symbolic recognition

The Expert Panel notes that 'symbolic recognition of Local Government would seek to enhance the status of Local Government in the Australian Federation in a way that has minimal or no legal effects'.

The Expert Panel poses the following question:

- Do you think that, if the Constitution is changed to include a preamble or statement of values, Local Government should be referred to in either

Like ALGA, the Associations do not support symbolic recognition as a stand-alone option. Symbolic recognition in a new Preamble to the Constitution was one of the options considered by Local Government.

The Constitutional Convention in 1998 discussed a new Preamble if Australia became a Republic. It discussed the possible content of a new Preamble, recommending that it should make reference to the origins of the Constitution and Australia's evolution into an independent, democratic and sovereign nation; recognise Australia's federal system of representative democracy and responsible government; affirm the rule of law; and

acknowledge the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders. It rejected two different proposals for the inclusion of a reference to Local Government in the Preamble.

The Preamble is currently only four lines long and has no legal force and it is doubtful whether mention of Local Government would have any real effect on constitutional interpretation.

According to leading experts including Professor George Williams (2010) and Professor A J Brown there are several problems with inclusion in the Preamble alone: the change would be symbolic at best, would not make any substantial change to the position of Local Government, and would be unattractive to voters.

In order to vote yes, the public must be convinced of the significance of an amendment in real terms and they are unlikely to vote yes for symbolic recognition alone. However, along with ALGA, we accept, that extensive public consultation could enhance the chances of success of a preamble, especially if recognition is presented as part of a broader change.

Nevertheless, ALGA's independent research indicates that the public is unlikely to support a symbolic change. The majority of people across all age groups need to be convinced of the merits of any referendum question, with around 70% saying they would make up their mind depending in the particular issue. Research indicates that voters are more likely to vote for substantive forms of recognition which clearly go towards helping reform Local Government and improve its effectiveness, and where benefits to themselves are demonstrable.

ALGA's consultation process and research supports the view that symbolic recognition in a Preamble would not gain the acceptance of voters, neither would it be likely to gain bipartisan support. In order to rectify the problems which have been identified in the High Court's *Pape* decision, there needs to be a substantive change to the Constitution to allow the direct funding relationship between the Australian Government and Local Government, which has existed for the past decade, to continue. This can only be achieved through financial recognition.

However, in addition to financial recognition in the Constitution, if a new Preamble is proposed, we support ALGA in seeking that Local Government be mentioned as a sphere of government in the Australian Federation.

Financial recognition

The Expert Panel notes that 'many councils rely on funding, from both their State Government and the Commonwealth Government, to supplement income from rates and other charges and to provide essential services and infrastructure in their communities'.

The Expert Panel suggests amendments to section 96 could be made in the following two ways (new words are in *italics*):

1. ... the Parliament may grant financial assistance to any State *or to any Local Government body formed within the limits of a State or Territory* on such terms and conditions as the Parliament thinks fit.
2. ... the Parliament may grant financial assistance to any State *or to any Local Government body* on such terms and conditions as the Parliament thinks fit.

They go on to say: ‘the first of these two ideas more clearly affirms that the establishment of the system of Local Government is a matter for State and Territory legislation.’

The Expert Panel poses the following questions:

- Should the Constitution be changed to explicitly say that the Commonwealth Government can provide funding directly to local councils?
- Do you agree with either of the suggested changes to section 96 of the Constitution?

Like ALGA, the Associations support financial recognition in the Australian Constitution. We wholeheartedly support ALGA’s preferred position, to seek financial recognition in the Australian Constitution. This position has been determined after a comprehensive process, including extensive consultation, over several years.

ALGA commissioned Professor George Williams to examine in detail the three broad options for constitutional recognition of Local Government identified at the 2008 Summit:

- Recognition in a Preamble to the Constitution;
- Institutional recognition; and
- Financial recognition.

Professor Williams investigated each of these options as well as more general questions about the necessary preconditions for a successful referendum. It is worth noting that Prof. Williams’ advice was provided prior to the legal challenge by Bryan Pape to the Australian Government’s ability to provide a one-off bonus payment to eligible Australian taxpayers during the 2008-09 Global Financial Crisis. ALGA subsequently asked Professor Williams to provide an opinion on the implications of the High Court decision on *Pape v Commissioner of Taxation*.

Professor Williams’ original advice was that although the Australian Government used s81 of the Constitution to provide payments directly to Local Government, the need for an amendment to the Constitution to recognise Local Government remained the same as in 1974 – and while there was yet to be a successful challenge to such payment in the High Court, uncertainly remained about whether the Constitution in fact allowed the direct funding of Local Government by the Australian Government. The purpose of amending the Constitution would be to resolve the continuing uncertainty surrounding the Australian Government’s ability to continue to provide direct funding.

The findings of the High Court decision in *Pape v Commissioner of Taxation* (2009) 257 ALR 1, have brought to a head the question of whether the Australian Federal Parliament can appropriate money for any purposes it wishes under Section 81.

This is the third time that this question has come before the High Court.

The first instance was in 1945, involving the Pharmaceutical Benefits Scheme *Attorney-General (Vic): Ex rel Dale v Commonwealth (First Pharmaceutical Benefits Case)* (1945) 71 CLR 237. The High Court upheld the challenge by the Medical Society of Victoria that the Act was not authorised by the power of appropriation in Section 81 of the Constitution, but the meaning of “the purposes of the Commonwealth” was not clearly resolved. The second instance, in 1975, *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 was for the expenditure of \$5.97m for the Australian Assistance Plan to establish Regional Councils for Social Development throughout Australia. The High Court rejected the challenge 4:3, while again leaving the question of the power of the Commonwealth

unresolved. Since the AAP Case the Commonwealth has proceeded on that a broad view of its power is correct, and it may fund whatever it wishes.

The case of *Pape v Commissioner of Taxation* [2009] HCA 23 unanimously rejected the Commonwealth's broad view of its power and resolved the legal uncertainty of the first two cases. Professor Williams' advice was that the decision was a clear rejection of the Australian Government's wide view of its own spending power and that there was no express or implied provision in the Constitution which grants the Commonwealth responsibility over Local Government. Consequently the Australian Government has no general power to directly fund Local Government bodies or activities under section 81 of the Constitution. The Australian Government is only able to directly fund Local Government bodies where this can be tied back to a federal power such as corporations power, nationhood and incidental powers or other powers (such as quarantine, marriage and territories). The Australian Government's tax bonus payment was upheld by a narrow majority based largely on the exceptional nature of the global financial crisis. It was determined that a combination of the executive power in Section 61, applied through its incidental power in Section 51(xxxix) provided the basis for making the payments.

The implication of this is that funding to Local Government will need to be assessed on each and every occasion against whether it falls under Commonwealth power. The Nation Building Roads to Recovery Program, first funded in 2001 is likely to be invalid after the *Pape* decision and payments made under the Program illegal. If so, Local Government could be asked to repay the total paid under the Program, amounting to more than \$4 billion by the end of the current program in 2014.

The Community Infrastructure Program, cast as part of the Australian Government's Nation Building Economic Stimulus Plan in response to the global financial crisis, is likely to be upheld on the same basis as the tax bonus. However, as the economic crisis lessens, there will be a point where further funding will need to be justified as falling under another head of power.

The problems foreshadowed by the *Pape* case can be resolved by constitutional amendment. A precedent has been set by a constitutional amendment and referendum in 1946, to overcome the situation of the *First Pharmaceutical benefits Case*. In a similar way to inserting a new power in Section 51 (xxiiiA) to allow the Parliament to legislate with respect to "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances", Section 96 could be amended by adding the words "and Local Government" or by drafting a new Section 96A to provide: "The Parliament may grant financial assistance to any Local Government body on terms and conditions as the parliament thinks fit."

The importance of the *Pape* case in identifying the limits of the Australian Government's powers has been subsequently underlined by the reliance on *Pape* as authority by the States and Territories in the case of *Williams v Commonwealth of Australia and Others* – currently before the High Court – concerning the National Schools Chaplaincy Program.

Following the *Pape* decision, Professor Williams' further advice was that the legal uncertainty was largely resolved by the High Court Decision, which clearly rejected the Australian Government's wide view of its own spending power and held that it can only fund specific Local Government bodies where this is tied back to a federal power. The

consequence is that past funding may be constitutionally invalid. Professor Williams concludes that the only long-term means of ensuring general direct funding is to bring about change to the Constitution by way of a referendum.

Democratic recognition

The Expert Panel notes that ‘councils, like the Commonwealth and State Governments, are democratic bodies that are answerable to their communities. Many Australians expect to be able to elect their local council, and vote out a council they do not agree with, in the same way as they can for Commonwealth and State Governments.’

But they note ‘there is no guarantee at a national level that local councils must be elected. Most State constitutions describe local councils as elected bodies, but whether and how that is achieved in practice depends on a normal Act of Parliament. The relevant section in the State constitution can also usually be amended simply by an Act of Parliament. Therefore, the final decision about whether local councils are elected or not lies with the State parliament, not the people.’

The Expert Panel continues on to note: ‘State Governments and parliaments have extensive powers to dismiss local councils and appoint administrators or replacements. The limits on these powers vary between the different States.’

The Expert Panel suggests two possible proposals for inclusion in the Constitution are as follows:

1. Each State shall, and each Territory may, establish and maintain a system of Local Government bodies directly chosen by the people.
2. Each State shall, and each Territory may, provide for the establishment and continuance of a system of Local Government elected in accordance with the laws of the State or Territory.

The Expert Panel poses the following questions:

- Should democratic elections for Local Governments be guaranteed by the Constitution?
- If so, which of the proposed provisions should be included in the Constitution?

Like ALGA, the Associations do not support tackling democratic recognition in the way suggested or at this time.

As ALGA highlights the 1988 Local Government referendum proposed the recognition of the “institution” of Local Government – namely the establishment and continuance of a system of government, with Local Government bodies elected in accordance with the laws of a State and empowered to administer and make laws for their respective areas in accordance with the laws of the State.

This proposal was resoundingly defeated with only 33.6% of Australians voting in favour of the proposal and failing to obtain a majority in any State. The ‘no’ case argued that it would further centralise government and erode the power of the State governments. It was also argued that it would stop dismissals or amalgamations of Local Government.

Currently, Local Government is a democratically elected sphere of government and is directly accountable to the local communities it serves. Local Government is also required to meet numerous legal and financial reporting obligations stipulated under state legislation. The terminology in the majority of State Constitutions currently allow the ‘appointment’ (as

opposed to the election) of Local Government representatives. The NSW Constitution, for example, provides that they be “duly elected or duly appointed”.

Any proposal to restrict the power of the States to dismiss or amalgamate Local Government bodies, would attract fierce opposition from the States, similar to that in 1988. Moreover, the December 2008 Constitutional Summit Declaration unanimously agreed that in seeking recognition, Local Government did not seek to break or change the relationship between itself and the State and territory governments, nor seek protection from dismissal or restructure.

We would add from our own work in our *modernising Local Government* project, there is little support amongst councils for making it a priority to seek change to the NSW *Constitution Act* to ensure councils are elected as opposed to appointed – and therefore by extension most councils would not see it as priority for action regarding changes to the Australian Constitution. Amongst the conclusions we reached earlier in 2011, after significant consultation with members were the following two:

- Overall councils support the need for the NSW Constitution to guarantee that councils are elected by local residents (not appointed, except in cases of extreme corruption or dysfunction). However, this should not be a high priority to campaign on in contrast to other initiatives covered later (in the report) (LGSA, 2011); and
- Generally councils object in principle to councils being dismissed by the NSW Government and being replaced by administrators. However if the practice must be maintained in cases of extreme corruption or dysfunction, the period of administration should be limited to no more than 2 years. Again this should not be considered a high priority for action in contrast to other initiatives covered later (LGSA, 2011).

Under both the proposals outlined by the Expert Panel to achieve democratic recognition, the Panel notes that “it is probable that State and Territory governments would not be able to exercise their executive powers to dismiss local council, as they have done in the past. Nor could they pass legislation authorizing themselves to do so either by legislative or executive order.” The Discussion Paper also notes that authority for State Governments to dismiss a council would require the addition of specific wording to that effect – similar to existing provisions in the Victorian Constitution.

We support ALGA’s view that this recognition option would not succeed at referendum. It would not be acceptable to State and Territory Governments, it would not gain bipartisan support and it is questionable whether it would resonate with voters. The Australian Constitutional Values Survey by Dr A J Brown in May 2008 indicated that only 46% of respondents were in favour of constitutional change that made it harder for Local Government bodies to be dismissed or amalgamated – fewer than those interested in purely symbolic recognition.

Democratic or institutional recognition will not have any real effect on, or seek to rectify, the problem highlighted by the High Court’s *Pape* decision to provide financial certainty for Local Government and its communities.

Recognition through federal cooperation

The Expert Panel notes that ‘a fourth idea is to change the Constitution to explicitly encourage cooperation between governments. In any such amendment, the role of Local Government could be expressly recognised in the context of improving the relationship between all three levels of government.

They continue on to note: ‘the three levels of government cooperate on many issues. However, the High Court has determined that some forms of cooperation, upon which the Commonwealth and all State Governments and parliaments had agreed, are not legally possible under the Constitution...’

The Expert Panel poses the following question:

- If the Constitution is changed to refer to the desirability of cooperation between the Commonwealth and the States, should Local Government be included in any such provision?

Like ALGA, the Associations do not support tackling collaborative federalism in the way suggested.

The Expert Panel qualifies the option of collaborative federalism, by saying that these matters go beyond the Expert Panel’s terms of reference and to consider this possibility would require a more extensive process of consultation that the Panel is able, or qualified, to undertake. Along with ALGA we accept this view.

This option was not seriously pursued by ALGA at the Constitutional Summit, or proposed as an option for Local Government constitutional reform by Professor George Williams.

However, Professor Williams has indicated in a number of forums, including his submission to the Senate Select Committee into the Reform of the Australian Federation, that Australia’s federal system is in need of fundamental reform, rather than small amendments around the edges.

In order to achieve optimal policy outcomes, a stronger framework for collaborative federalism needs to be established. According to Prof. Williams many substantial reforms can be accomplished by agreement or through statute rather than through the more difficult process of constitutional change.

Local Government, as a sphere of government, should be recognised in the Australian Constitution to more accurately reflect the role it plays in contemporary Australian society. However, along with ALGA we believe it is appropriate for Local Government to be recognised under the Constitutions of the States and Territories, and remain under their jurisdiction.

Local Government needs greater legal certainty about direct funding through financial recognition, and that recognition of Local Government can occur independently of a wider review of the need for collaborative federalism and reform in this area.

Conclusion

We wholeheartedly concur with ALGA that Local Government has proven itself to be competent, reliable, innovative, adaptable and flexible in changing environments and is committed to progressing national objectives in collaboration with the other spheres of government. Local Government believes that its growing role in the Federation must be supported through constitutional reform to recognise it as a sphere of government and provide the capacity for direct funding from the Australian Government so that it can continue to meet the needs of the communities it serves.

Along with ALGA and our sister Associations, the Local Government Association of NSW and Shires Association of NSW welcome the commitment of the Australian Government to hold a referendum on the recognition of Local Government by 2013 and the appointment of the Expert Panel as the mechanism to assess support for the recognition of Local Government and make recommendations on possible specific changes to the Constitution.

We strongly support the option of financial recognition reached by Local Government following the processes conducted by ALGA nationally and the Associations in NSW as the only option likely to gain the necessary support for a successful referendum. This view is based on research which shows that the population will support change where it has merit and where it will achieve a concrete outcome.

References:

House of Representatives Legal and Constitutional Affairs Committee	<i>A Time for Change: Yes/No?</i> Report of the House of Representatives Legal and Constitutional Affairs Committee into the Machinery of Referendums, December 2009
Local Government and Shires Associations of NSW	<i>Modernising Local Government: consultation report</i> April 2011
Professor George Williams and Nicola McGarrity,	'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 <i>Public Law Review</i> 164
Professor George Williams,	<i>Advice re Pape v Commissioner of Taxation and direct federal funding of Local Government</i> , 6 August 2009

APPENDIX 1: Extracts from Associations' Policy Statements

Extract from Local Government Association of NSW Policy Statements

Constitutional and legislative basis of Local Government

Local Government, individually and jointly through representative bodies, has an independent role in the Australian system of government. This role, and the necessary powers to fulfil it, should be clearly defined and protected.

The Australian and NSW Constitutions should provide for legal recognition of a duly elected system of Local Government as a separate tier of Government.

The Local Government system should be based on the democratic principle of election of the governing body from, and by, the community at large.

Voting at Local Government elections should be compulsory for residents.

Local Government elections should be conducted under the preferential system where one or two positions are to be filled. Where more than two positions are to be filled, election should be conducted on the proportional systems. Provided preferential and proportional systems are used as outlined in this policy, Local Government supports uniform voting systems for all three spheres of Government.

...

There should be a high commonality of electoral systems followed by the three levels of government...

Extract from Shires Association of NSW Policy Statements

Constitutional and legislative basis of Local Government

Local Government, individually and jointly through representative bodies, has an independent role in the Australian system of government. This role, and the necessary powers to fulfil it, should be clearly defined and protected.

The Australian and NSW Constitutions should provide for legal recognition of a duly elected system of Local Government as a separate tier of Government in proper recognition and respect for the sovereignty of the people to elect their representatives.

The Local Government system should be based on the democratic principle of election of the governing body from, and by, the community at large.

Voting at Local Government elections should be compulsory for residents.

Local Government elections should be conducted under the preferential system where one or two positions are to be filled. Where more than two positions are to be filled, election should be conducted on the proportional systems. Provided preferential and proportional systems are used as outlined in this policy, Local Government supports uniform voting systems for all three tiers of Government.

...

There should be a high commonality of electoral systems followed by the three levels of government. A special review committee consisting of the Local Government and Shires Associations, Institute of Municipal Management, Electoral Office and Department of Local Government should agree upon administrative and other arrangements...