



Submission to the Joint Select Committee Inquiry into Constitutional Recognition of Local Government	
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Date	January 2013
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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, the special-purpose county councils and the NSW Aboriginal Land Council.

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 are pleased to be invited to respond to the request from the Joint Select Committee on Constitutional Recognition of Local Government and make a submission to the Joint Select Committee's Inquiry into Constitutional Recognition of Local Government

Executive Summary:

The Associations have been long-term advocates for recognising Local Government in the Australian Constitution given its critical role as the sphere of government operating at the local scale.

The Associations are unequivocal in our support for holding a referendum to make a simple change to section 96 of the Constitution to allow the continuation of direct funding of Local Government by the Australian Government, when that referendum is winnable.

Owing to the lack of support amongst many State and Territory Governments, the slim level of the majority support amongst the voters, and the nature of the next election, the Associations do not believe 2013 is the time to win such a referendum.

The Associations believe the best option is to postpone the proposed referendum to a time in the course of the next Parliament and decouple it from an election if at all possible.

As the Associations have been 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 Joint Select Committee on Constitutional Recognition of Local Government, **the Associations strongly support ALGA's submission to the Joint Select Committee.**

Purpose:

The Associations understand that the Terms of Reference read as follows:

(1) a Joint Select Committee on Constitutional Recognition of Local Government be appointed to inquire into and report on the majority finding (financial recognition) of the Expert Panel on Constitutional Recognition of Local Government including by amending section 96 of the Constitution, and in conducting its inquiry, the Committee will assess the likelihood of success of a referendum on financial recognition, and will take into account the following matters:

- a) the report of the Expert Panel on constitutional recognition of Local Government, including preconditions set by the Expert Panel for the holding of a referendum;
- b) the level of State and Territory support;
- c) the potential consequences for Local Government, States and Territories of such an amendment; and
- d) any other matters that the Committee considers may be relevant to a decision on whether to conduct a referendum, and the timing of any referendum.

The Associations note the membership of the Joint Select Committee on Constitutional Recognition of Local Government was finalised on 28 November 2012. We appreciate that the Joint Select Committee moved swiftly holding its first meeting on 29 November 2012 and resolved to immediately call for submissions.

The Associations recognise that the Joint Select Committee will be consulting on the form of words proposed by the Expert Panel on Constitutional Recognition of Local Government and other issues including the timing of the proposed referendum. The Expert Panel proposed an amendment to s96 of the Australian Constitution as follows (proposed new words in italics):

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 sees fit.

We acknowledge submissions must be received by 15 February 2013, but that the Joint Select Committee is keen to receive submissions ahead of the first public hearing to be held in Sydney on 16 January 2013.

Given the Associations have been actively involved in the development of the ALGA's long-term position on Constitutional Recognition of Local Government, and its response to the Joint Select Committee, the Associations strongly support ALGA's submission to the Joint Select Committee (namely Australian Local Government Association *Submission to the Joint Select Committee on the Constitutional Recognition of Local Government* December 2012.)

Therefore the Associations will reiterate pertinent parts of ALGA's submission, and add NSW perspectives where that is useful.

The Associations support ALGA's opening comments on pages 2&3 and reinforce the following points:

The Board's preferred option is now that Section 96 be amended to read:

Parliament may grant financial assistance to any state **or local government body formed by or under a law of a state or territory** on such terms and conditions as the Parliament sees fit.

In reaching this position ALGA was mindful of the need to pursue its preference for financial recognition while acknowledging the need to address state government concerns. (ALGA, 2012, page 3)

In framing the actual question that is taken to the voters in the eventual referendum it will be important to ensure that it is written in the plainest language possible.

The Associations would also like to emphasise our support for the following:

It is important to stress that ALGA's decision to pursue constitutional recognition and the subsequent decision to support financial recognition have been the product solely of local government's own long standing vision for inclusion in the Constitution, the developments in the High Court since 2009 with the *Pape* and *Williams* cases and a realistic appraisal by the sector, over a period of more than five years, that any constitutional change needs to be practical, simple and justified.

ALGA's proposal is not aimed at supporting a centralisation of power in the hands of the Federal Government... (ALGA, 2012, page 3)

Comment on the report of and preconditions set by the Expert Panel on constitutional recognition of Local Government.

The Associations support ALGA's comments on the report of and preconditions set by the Expert Panel on pages 3 to 8 and reinforce the following points:

ALGA considers the first precondition, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option, to be absolutely critical for a successful referendum. Local government operates within legislative frameworks created by State Parliaments and ALGA accepts that the inclusion of local government in the Constitution is an important matter for the state governments. In addition, the Constitution establishes the framework for Federation and how the Commonwealth and States will work together. ALGA has always considered the support of the great majority, if not all, of the States to be essential for a referendum on the recognition of local government...

ALGA is not aware that the Commonwealth has entered into any negotiations with the states for financial recognition and indeed the Government has yet to indicate publicly whether it supports the proposal... (ALGA, 2012, page 4)

We support ALGA's conclusion about the second precondition, namely:

The establishment of the Joint Select Committee is clearly a major step forward, but there has been a substantial delay in appointing the Committee and the time frame for the Committee's report is extremely short and certainly well short of the six months ALGA considered necessary. ALGA is concerned that this will limit the Committee's ability to elicit submissions, hold public hearings and come to a carefully considered view about the timing and form of a referendum. ALGA also now believes it will not be possible for local government to run the most effective campaign in 2013, given the lack of time after a Committee report at the end of March and a subsequent parliamentary process to develop and pass a Bill... (ALGA, 2012, page 5)

We reiterate ALGA's points on what is essential to maximise success at the referendum:

- **Bipartisan support** is essential to ensure the best chance of success for a referendum proposal. With the lack of understanding in the community about the Constitution, voters rely on the political parties to formulate their opinions. Australian constitutional history demonstrates that unless there is broad bipartisan support, referendums are unlikely to succeed (ALGA, 2012, page 5&6).
- **The Government needs to take the lead** on the issue and demonstrate its support publicly to champion the change. The Government needs to take the opportunity to raise the issue above politics and avoid the temptation of using a referendum question opportunistically. The Australian public's lack of knowledge of constitutional matters, conservatism when it comes to changing the Constitution, and susceptibility to misinformation, requires the Government championing the change to be a trusted source of information on the need for, and consequence of, the change (ALGA, 2012, page 6).
- **The public needs to be informed about our Constitution**, and how to change it (ALGA, 2012, page 6).
- **The public needs to be informed in a factual way about the question** being asked, to be able to cast an informed vote at the ballot box. The official "yes" and "no" cases prepared by

Parliamentarians appear to have no requirement to adhere to facts and it has often been the case that opponents of amendments have distorted and exaggerated the dangers with the precise intention of frightening and misleading voters...ALGA believes that such exaggeration is neither appropriate nor ethical given that public funding is involved in producing and distributing this material...It recommended an independent non-political panel be set up prior to each referendum responsible for a communications strategy, including education materials and how best to distribute them to all voters (ALGA, 2012, page 7).

Comment on the level of State and Territory support.

The Associations support ALGA's comments on the level of State and Territory Government support on pages 8 & 9.

We would particularly like to highlight the following:

ALGA acknowledges that the support of most if not all of the state governments is an important factor in shaping the chances for overall success of a referendum for financial recognition. For this reason ALGA has varied its preferred set of words for an amendment to reinforce its view that the form of financial recognition sought by local government would not have an adverse impact on the powers and interest of the states with regard to local government (ALGA, 2012, page 9).

The Associations wish to expand on the position of the NSW Government as best we understand it. We think we can fairly describe the NSW Government's position as supportive of symbolic constitutional recognition but opposed to financial constitutional recognition unless and until evidence is presented that it is the only course of action to overcome a deep problem.

Up until relatively recently the Associations understood we enjoyed the support of all major parties in the NSW Parliament. In the run up to the 2011 NSW Parliamentary elections the NSW Liberals and Nationals when responding to LGSA priorities said they endorse the proposal from the Australian Local Government Association for a referendum to amend the Australian constitution to give the Australian government the power to fund Local Government and to enshrine people's rights to democratically elect their councils. The position of the NSW Liberals and Nationals on financial recognition has reversed since forming Government in 2011.

When the Expert Panel on Constitutional Recognition of Local Government reported they took the view that the NSW Government had offered in-principle support but were awaiting the panel's findings as to whether constitutional amendments are 'the best way to achieve financial sustainability and enhanced status for local government'.

In support of this general comment they offered the following observations on the nature and level of NSW Government support:

- That there was in-principle support for symbolic recognition – in summary they noted 'In principle the NSW Government supports consideration of symbolic recognition'. However, 'care should be taken to ensure that unintended legal and practical consequences do not arise'; and
- That there were reservations but not explicit opposition to financial recognition - in summary they noted '...there may be options for refining funding arrangements ... that do not require amendments to the Constitution'.

Again at the time of its report the expert panel noted 'no State political figure suggested that they would actively campaign for a 'Yes' vote'. This continues to be the case.

The latest written advice from the NSW Government, conveyed to the Associations in August 2012 by Hon Don Page, Minister for Local Government and Minister for the North Coast reads as follows:

"... the Government supports in principle consideration of symbolic recognition as a way of enhancing the status of local government. The Government considers that such recognition is

timely and appropriate as it would reflect the changing role of local government and its important contribution to the growth and prosperity of Australia's diverse local communities.

This is consistent with *NSW 2021: A Plan to Make NSW Number One*, which aims, among other things, to maximise opportunities for people to improve their neighbourhoods and environments through the enhanced status of local government.

The Government is not in a position to support financial recognition of local government for a number of reasons. These include concerns that an amendment to the Constitution may allow the Federal Government to grant funds directly to local government which could result in *NSW 2021* and other major State Government policies being sidetracked or not given due regard. They also include concerns that financial recognition of local government could raise expectations that the Commonwealth will intervene in local government administration, thereby creating confusion about Federal, State and local government responsibilities and blurring the lines of accountability that exist between governments and their constituents.

While the Government acknowledged that the High Court's decisions in *Pape v Commissioner of Taxation* and *Williams v Commonwealth of Australia and Ors* may have cast some doubt over the legal ability of the Commonwealth to provide funding to local councils other than through the States in accordance with section 96 of the Constitution, the Government is of the view that amendments to the Constitution should not be made in the absence of clear evidence that existing funding arrangements are deficient."

The Associations were very disappointed with the marked change to the negative by the NSW Liberals and Nationals Government. The Associations do not believe that each of the stated concerns either singularly or together warrant opposing financial constitutional recognition. They do not represent a compelling case to resist change when legal opinion acknowledges that Local Government may be one High Court challenge away from losing programs like Roads to Recovery. The fear that the Commonwealth Government granting funds directly to Local Government could result in *NSW 2021* and other major State Government policies being diminished or derailed seems very exaggerated. There has been no evidence that direct funding such as Roads to Recovery over its life, the Nation Building – Economic Stimulus Plan and the Regional and Local Infrastructure Program, has done anything other than allow Local Government to meet local needs in a way that is entirely consistent with the NSW Government plans of the day. The evidence strongly indicates that these programs have complemented State Government plans and assisted Local Government in meeting their obligations under such plans. It should also be noted that the NSW Government (and other state governments) of the day, enthusiastically welcomed these programs.

We struggle to see how the sorts of direct funding that ALGA & the State and Territory Associations continue to lobby for could undermine *NSW 2021* or other plans. The fear that financial recognition could raise expectations that the Commonwealth will intervene in Local Government administration, thereby creating confusion about Commonwealth, State and Local Government responsibilities and blurring the lines of accountability that exist between governments and their constituents, also seems unwarranted. ALGA & the State and Territory Associations have been clear this is not what they seek and have proposed changes to section 96 that can in no way imply such a power. Local Government is not asking for change, we are seeking protection of the Commonwealth's ability to continue to provide direct funding to Local Government as it has done in the past: simply maintenance of the status quo.

The Associations suggest there may be room to convince the NSW Government that there is now clear evidence that existing funding arrangements are deficient. We have again sought to have dialogue with the Premier and senior Ministers on this issue. It is possible the NSW Government can be won over through careful negotiations in the long run. However, this is likely to take longer than the time available between now and a 2013 election.

Comment on potential consequences for Local Government, and States and Territories.

The Associations support ALGA's comments on consequences for Local Government and for State and Territory Governments support on pages 9 to 14.

In particular, we strongly support the following observations by ALGA:

ALGA has strong legal advice and informed commentary from leading constitutional academics that the constitutional validity of the direct federal funding of local government is uncertain.

High Court decisions in the *Pape* case and the *Williams* case support this view (ALGA, 2012, page 9).

Furthermore, NSW Local Government shares ALGA's deep concerns about direct funding such as Roads to Recovery. Again we reinforce ALGA's points:

The importance of direct funding to local government through the Roads to Recovery program should not be underestimated. Over its life so far, the program has provided more than \$3.5 billion of funding to local communities for local roads. The program has been extended until 2018-19 by which time a total of more than \$5.5 billion will have been provided (ALGA, 2012, page 10).

At this point, however, it must be stressed that the Roads to Recovery program has not been challenged in the High Court or declared invalid and there is no reason why funding cannot continue.

Nevertheless, ALGA's expectation is that there will be further challenges in the foreseeable future and inevitably a High Court decision which directly goes to the validity of direct payments to local government (ALGA, 2012, page 10).

The Associations support the analysis on issues relating to Financial Assistance Grants.

The Associations need to stress that in seeking recognition, NSW Local Government does not seek to alter the relationship between itself and the NSW State Government, through setting up Commonwealth processes for intervention or protection from amalgamation or dismissal.

Comment on other matters relevant to the conduct and the timing of any referendum.

The Associations support ALGA's comments other matters on pages 14 to 16.

We strongly support the following:

ALGA is not opposed to holding a referendum simultaneously with an election, but the Board of ALGA is committed to ensuring that the referendum is held at a time which maximises the chances for success. ALGA believes that the referendum should be held when the pre-requisites identified by ALGA in its submission to the Expert Panel, and those identified by the Panel itself, have been met. This will maximise the chances of a successful referendum. There must be a commitment to a set of specific words which can achieve the financial recognition option. These words must provide the reassurance sought by State Governments regarding their Parliament's continued legislative responsibility for local government. There must be a negotiation by the Commonwealth with the States to achieve acceptance of these words and then a commitment to a public education campaign to engage the voting public. At this point ALGA does not believe that these pre-requisites can be achieved in time for a successful referendum to be held in conjunction with a Federal election held between August and November 2013 (ALGA, 2012, page 15).

On the possibility of an early Australian Parliamentary Election in 2013, the Associations also take the view that ALGA, the State and Territory Associations and member councils would not be in a position to support a referendum being held at such an election. We concur with ALGA that the short

time frame would preclude an effective campaign being run by Local Government and insufficient time to educate and inform voters (ALGA, 2012, page 15).

The Associations support ALGA's argument that options to reduce the costs associated with referendums should be explored, including the option of potentially holding a referendum by postal vote or electronic vote. In particular, the use of electronic voting is evolving and its potential use in a referendum may also help to address the concerns around costs. These options do not appear to have been previously considered. They may represent mechanisms which could help the timing of a referendum being determined by the reference to when it might succeed on its merits, rather than being the subject of politicisation as part of a broader election campaign.

Finally, the Associations stress the need for further and significant financial assistance to be provided by the Australian Government to ALGA to assist with funding of a national advertising campaign for the 'yes' case. Whilst councils across Australia are contributing towards the costs for this campaign, ALGA and its member State and Territory Associations simply do not have access to the considerable finance that will be required to fund this type of large scale national advertising campaign. A national advertising campaign to promote the merits of the 'yes' case will need to utilise the full range of communications, media and advertising channels, including a major media buy and a significant public relations and community liaison component. In addition to the significant contributions from individual Local Governments, it is reasonable to suggest, based on other large scale advertising campaigns of similar type that ALGA would require at least \$10 million in Australian Government assistance to mount a credible national advertising campaign on such a critical issue.

Conclusion

Like ALGA the Associations welcome the establishment of the Joint Select Committee.

The Associations remain committed to the financial recognition of Local Government and to a referendum being held at a time which maximises the chances for success and strongly support the work of ALGA on this.

Financial recognition through a change to section 96 of the Constitution is critical to removing uncertainty around the continued direct federal funding of Local Government.

The wording of the amendment to section 96 proposed by ALGA to allow the continuation of direct Australian Government funding of Local Government has been developed to ensure there is no impact on the power of the State Governments to legislate for Local Government.

We support ALGA's case that the chances of success for a referendum to recognise Local Government depend on satisfying the pre-requisites identified by the Expert Panel and ALGA, including:

- Commonwealth negotiation with the States to win their support;
- a publicly funded education campaign on the Constitution, constitutional change and the Local Government question; and
- amendments to the relevant legislation to allow public funding of the "yes" and "no" campaigns.

We agree with ALGA that these pre-requisites have not been met and delays in the process have significantly diminished the chances for a successful referendum in 2013.