



Submission to the Joint Select Committee on Constitutional Recognition of  
Local Government

Submission by



**Australian Government**

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**Department of Regional Australia,  
Local Government, Arts and Sport**



**Australian Government**

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**Attorney-General's Department**

February 2013

# Submission to the Joint Select Committee on Constitutional Recognition of Local Government

## Introduction

This is a joint submission by the Department of Regional Australia, Local Government, Arts and Sport (the Department) and the Attorney-General's Department (AGD). The Australian Government will respond to the Joint Select Committee recommendations after the tabling of the final report.

The aim of this submission is to provide the Committee with an understanding of the Australian Government's role and responsibilities in relation to local government, as well as providing some information about previous attempts to give constitutional recognition to local government and some of the underlying constitutional issues.

The Australian Government has an important relationship with local government, which has evolved with the growth of local government activity since the 1970s. Local governments today provide more than just basic property services. They perform a range of tasks fundamental to Australia's social and economic well-being including regulation, social welfare, health, environmental management and tourism and they are a critical part of the fabric of Commonwealth and state regional development and planning.

The voice of local government is highly valued and the Australian Local Government Association (ALGA) is an important member of the Council of Australian Governments (COAG). ALGA's engagement ensures the interests of local government are represented in matters of national significance. ALGA has full membership in COAG and is represented on a number of ministerial councils such as the Standing Councils for Transport and Infrastructure; Environment and Water; and Regional Australia, and Select Committees such as Immigration and Settlement; Housing and Homelessness; and Climate Change.

The Australian Government values the activities of local government and provides significant support helping all local governments to provide key services to Australians no matter where they live. It supports local government through direct funding programs such as Road to Recovery and the Regional Development Australia Fund, as well as providing financial assistance grants to all local government bodies through the states.

In this submission we start out by providing a short history of the Commonwealth and local government relations. We look at the nature of the relationship, namely:

1. the **delivery of more equitable services** to communities across the country;
2. **building local government capacity** nationally and fostering better practice management in local government; and
3. **driving solutions** to national challenges locally, including where they cross state boundaries.

This is followed by an exploration of some of the technical aspects of constitutional recognition of local government, focusing on Commonwealth funding of local government, previous referendums on constitutional recognition of local government, and the referendum process.

## **Overview of the Department of Regional Australia, Local Government, Arts and Sport (the Department)**

The Department of Regional Australia, Regional Development and Local Government was established on 14 September 2010, reflecting the Government's revamped focus on regional Australia. On 12 December 2011, under a machinery of government change, the current Department of Regional Australia, Local Government, Arts and Sport was established (the Department).

The Department supports the Government's policy of a strong, creative and liveable Australia by focusing on regional development and empowering local communities to achieve economic and social dividends. At the core of the department's work is an understanding of the significance of the regions to Australia's economy, environment, wellbeing and identity.

The Department administers over \$2 billion annually in payments to local governments via the states through Financial Assistance Grants, and has managed the \$20 million Local Government Reform Fund that works with states and territories to improve local government capability. Every year, the Department recognises the outstanding achievements of local government in innovation, business practices and service delivery through the National Awards for Local Government. It has a strong working relationship with key sectoral stakeholders such as the Australian Local Government Association, and with research partners, the Australian Centre of Excellence for Local Government, which was established in 2009.

Strong local government plays an important role in its own right but is also a critical partner in achieving the Government's regional and broader policy development goals.

### **Australian Government and local government relations**

The Commonwealth of Australia and Australia's federal system of government are established by the Australian Constitution, which commenced in 1901. The Commonwealth's main national legislative powers are enumerated in the Constitution, and include express grants of power with respect to defence, immigration, foreign affairs, customs and excise duties, trade and commerce, and taxation. This list of legislative powers does not expressly identify a number of important subjects including education, the environment, criminal law and roads. This does not mean that those subjects are wholly outside the parliament's powers. Commonwealth laws, and the Commonwealth's involvement in relation to subject-matters not expressly identified in the Constitution, routinely depend on a 'patchwork' of constitutional powers.

Local government bodies are established by state and Northern Territory legislation, which sets out what a local government body can do and how it should conduct business. Local government is recognised in the state constitutions of all six states.

For the most part, local government bodies are autonomous and have the ability to set policies, make regulations and provide community services and solutions that suit the local conditions and circumstances. Importantly, they also represent the character of the community, and residents often identify with and have pride in their local government area.

Although there are significant differences between the state systems for overseeing local governments, any local governments can be dissolved, suspended or amalgamated by a state or territory government.

Well functioning and sustainable local government is important to local community outcomes and wellbeing, as well as the delivery of Commonwealth policy and programs. The Commonwealth's involvement in relation to local government has grown with the community's expectations of services over the years. Australian communities expect their local governments to offer services, which may include childcare, youth services, environmental management, leisure, recreation and entertainment, and large special events. So-called traditional services such as libraries have evolved into community hubs for support, research, children's groups, entertainment and online services. Commonwealth funding to local government bodies now encompasses broad-scale, general financial support, capability development and direct funding for roads and infrastructure.

Equally, the community has expectations around the engagement of local communities in decision making and local government is playing a significant role in putting local perspectives into national, state and regional conversations in respect of policy and program implementation. The Australian Local Government Association (ALGA) is recognised as an important and influential national voice for local government and is a member of the Council of Australian Governments.

The role of local government is particularly important in regional and remote areas where access to a broader suite of private and not for profit services is more limited. In these regions, local government performs the most comprehensive set of services. There is a strong correlation of these areas with low Socio-Economic Indexes for Areas (SEIFA) ratings. This emphasises the strong social equity role undertaken by local government.

## The Australian Government's local government priorities

The Department of Regional Australia, Local Government, Arts and Sport (the Department) is working to implement the Australian Government's priorities to support local governments to be better prepared for and to meet the growing demands of their communities. For example, the Department is:

- working with states and territories to strengthen the capacity of local government to meet the infrastructure and service challenges facing the sector by strengthening financial and asset management frameworks through the Local Government Reform Fund;
- promoting innovative solutions and sharing better practice in service provision across the spectrum of local government services, through the Australian Centre for Excellence in Local Government, the Local Government Reform Fund and the National Awards for Local Government;
- administering increasingly more flexible arrangements to the payment of Financial Assistance Grants to local government through the states. Specifically, financial assistance payments have been brought forward in recent years to help local communities meet the serious challenges of natural disasters and the global financial crisis; and
- administering direct funding to local government to address infrastructure gaps. This was firstly through the Regional and Local Government Community Infrastructure Program (RLCIP), as part of the economic stimulus in the aftermath of the global financial crisis, followed by the Regional Development Australia Fund (RDAF), which involved Regional Development Australia (RDA) Committees directly selecting projects based on local priorities.

Recognising the increasing infrastructure demands of Australia's population, the Department commissioned an independent report into options for financing local government infrastructure. The *Strong Foundations for Sustainable Local Infrastructure Report* contributes significantly to the debate on meeting Australia's national and regional infrastructure needs and there is continuing work to progress key recommendations.

The importance of regional planning and development has been strengthened and local government is a significant partner in Commonwealth and state regional development committees.

The Australian Government's Regional Development Australia initiative brings together all levels of government to support the development of regional Australia. The national network consists of 55 committees and includes local leaders who work with all levels of government, business and community groups to support the development of their regions. The membership of the committees is diverse and includes representation from local government, non-government organisations, business, seniors, women, Indigenous, young people, disadvantaged groups and people from different cultural backgrounds.

Regional Development Australia committee members are local people developing local solutions to local issues. They build partnerships to develop strategies and deliver

sustainable infrastructure and services to their regions. They also work with each other to identify issues that cross regions.

As the regional development voice of their communities, Regional Development Australia committees:

- consult and engage with communities
- promote and participate in regional programs and initiatives
- provide information and advice on their region to all levels of government, and
- support informed regional planning.

Each committee has developed a Regional Plan which outlines priorities for the region and guides them in strengthening their communities.

### **Formalising an existing relationship**

In committing to constitutional recognition of local government, the Australian Government recognises the value of the local government sector in providing services and maintaining the local character and identity of a community. Recognising local government in the Australian Constitution is formalising the existing relationship between local government and the Australian Government that benefits all Australians by:

1. the delivery of equitable services to communities across the country;
2. building local government capacity nationally and fostering better practice management in local government; and
3. driving solutions to national challenges locally, including where they cross state boundaries.

Stronger regions, local government and communities mean a stronger nation. Local government is important to the delivery of national priorities such as economic stimulus during the global financial crisis, improving energy efficiency and mitigating the effects of climate change, working with business to create sustainable employment, improving child care and aged care services and community amenity, regional economic development and key infrastructure projects in local areas.

## 1. Delivery of more equitable services

All Australians should receive the same basic level of services regardless of where they live. The principle of social equity is central to the Australian Government's involvement in respect of local government and regional Australia. It is a key tenet of the National Principles, which guide the distribution of over \$2 billion of payments under the Financial Assistance Grants. The Australian Government recognises the value to the national economy and the wellbeing of all Australians when local governments are able to manage their own futures, including by providing essential services. Recognising local government in the Constitution would make clear the importance of the relationship between the Commonwealth and local government to ensuring equitable levels of services are delivered to communities across the country.

The Australian Government provides substantial assistance to local government, and assists local government to be financially sustainable and viable, through financial assistance grants and other local government programs.

Importantly, the most efficient and effective way of the Commonwealth assisting local government to deliver those services depends on the purpose of the funding and requires flexibility in funding approaches.

Programs such as the Regional Development Australia Fund are about developing and drawing in the local community in setting the priorities, whereas Financial Assistance Grants deliver untied funding direct to local government through state grants commissions to ensure equitable services.

### Financial Assistance Grants

As at 30 June 2012, the Australian Government had contributed over \$38 billion in Financial Assistance Grants to local government since 1974–75 under the *Local Government (Financial Assistance) Act 1995* (the Act). This funding aims to enhance local governments' capacity to deliver services to residents. The funding consists of two components:

- a general purpose component which is distributed between the States and Territories according to population (i.e., on a per capita basis), and
- an identified local road component which is distributed between the States and Territories according to fixed historical shares.

Both components of the grants are untied in the hands of local government, allowing councils to spend the grants according to local priorities. However, the program is governed by National Principles, which establish a nationally consistent basis for distributing the funding. This includes the principle of horizontal equalisation which aims to ensure equal standards of service provision across local governing bodies within each state or territory.

Financial Assistance Grants (FAGs) provide local governments with around \$2 billion per annum. Since June 2009, the government has also provided accelerated funding from the next financial year to give local government additional flexibility to assist them in responding to challenges arising from the global financial crisis and natural disasters such as the Queensland floods and Victorian bushfires. The FAGs program is currently being

reviewed by the Commonwealth Grants Commission to identify tangible measures for improving the impact of the local government funding on the effectiveness of local governments and their ability to provide services to their residents.

Further funding for local government is provided through competitive grants, which help to support high-quality, priority infrastructure for local communities and achieve regional economic development goals.

### Regional Development Australia Fund

The Government also provides additional support to local government to both bridge the infrastructure gap and further support the economic and social well being of communities, particularly regional communities, through the Regional Development Australia Fund. The fund works in partnership with state and local government and the not for profit and private sector to support high value community projects that strengthen communities. The Regional Development Australia Committees make funding recommendations which consider local priorities.

Four funding rounds have been announced to date. Round Three will provide \$50 million for projects in small towns, while Round Four will provide \$175 million for strategic infrastructure projects in regional Australia.

RDAF Round One funded 35 projects with a total value of \$418 million, with government funding of \$149.5 million, leveraging \$268 million in other funding.

RDAF Round Two funded 46 projects with a total value of \$780 million with government funding of \$200 million, leveraging \$580 million in other funding.

#### **Case Study 1: Enhancing community well-being**

##### **Karratha Leisure Centre (RDAF Round One)**

The new Karratha Leisure Complex will be a multi-purpose sporting, aquatic and recreation facility that will also provide critical emergency evacuation and welfare facilities for the region.

The Government is partnering with the Shire of Roebourne, the Western Australian Government and private industry by providing \$15 million from the Regional Development Australia Fund toward the cost of this over \$63 million project.

The Centre will provide enhanced community access to sporting facilities, including an aquatic centre, sporting fields and courts and welfare facilities in the event of cyclone events or other disasters.

The Centre will also encourage a healthier community lifestyle, employment opportunities and increase the quality of life for residents in the region. Located next to a new high school, it will provide a hub for local youth.

This program was preceded by the Regional and Local Community Infrastructure Program (RLCIP) which operated from 2008-2012 and also provided \$1 billion for local infrastructure



through allocated and strategic funding streams. Some 6400 initiatives across all local governments were funded.

### Roads to Recovery

Complementing the roads component of the Financial Assistance Grants is the Roads to Recovery program. Roads to Recovery, administered by the Department of Infrastructure and Transport, provides funding directly to local councils for road construction and/or maintenance works chosen by councils, and to states and territories for roads in areas that are not incorporated into local government areas.

The initial Roads to Recovery Program commenced in 2000-01 and the current program runs until 30 June 2014. Total funding available over this period is just under \$4.5 billion. In the 2012-13 Budget, the Government announced that it would extend the Roads to Recovery Program for a further five years from 2014-15 to 2018-19 and maintain its annual funding at the current rate of \$350 million per annum.

The program has so far provided funding for almost 42,000 local road projects.

#### **Case Study 2: Supporting Australia's road infrastructure**

##### **Areyonga Community Access Road**

During January 2010, the Areyonga District, about 220 km west of Alice Springs, experienced extreme rain events. The gravel access road of 20 km length was damaged in a number of places requiring urgent repair.

The MacDonnell Shire Council was assisted with \$238,160 from the Government's Roads to Recovery program, which is provided to Australia's local councils, state and territory Governments responsible for local roads in the unincorporated areas (where there are no councils) and the Indian Ocean Territories.

The work was completed in April-May of 2010 with edge repair, drainage repair, and construction of new floodways and approximately 2.5 km of resheeting of the gravel road.

### National Disaster Relief and Recovery Arrangements

The Australian Government supports local governments through the Natural Disaster Relief and Recovery Arrangements (NDRRA).

The NDRRA is a program through which the Commonwealth provides financial assistance to the states and territories (states) for expenditure on eligible disasters such as floods, cyclones, storms and bushfires. The financial assistance is in the form of partial reimbursement to the states for their actual expenditure on relief and recovery measures specified in the NDRRA Determination. Given the important role of local government in emergency management, a significant proportion of NDRRA funding then flows from the states to local governments. The NDRRA Determination is made by the Commonwealth Attorney-General and Minister for Emergency Management and sets out the terms and conditions for financial assistance to the states.

Broad categories of measures eligible for financial assistance under the NDRRA include: assistance to individuals to alleviate personal hardship and distress; the restoration or replacement of essential public assets; concessional loans, subsidies or grants to small businesses, primary producers, voluntary non-profit bodies and needy individuals; counter disaster operations for the protection of the general public; community recovery funds; and clean-up and recovery grants to small businesses, primary producers and non-profit bodies. Additional measures may be agreed in exceptional circumstances.

States are eligible for reimbursement of 50 per cent of eligible expenditure and up to 75 per cent depending on financial year thresholds. Arrangements between states and their local governments are determined by the states. A significant proportion of NDRRA reimbursement to the states relates to expenditure by local governments, particularly for the restoration or replacement of essential public assets such as roads and road infrastructure, bridges, footpaths, stormwater infrastructure and local government buildings.

### **Case Study 3: Enhancing capacity of local government to respond to natural disasters**

#### **2010-11 flood and cyclone recovery in Queensland**

The flooding throughout eastern Australia in late 2010 and early 2011, and the impact of Tropical Cyclone Yasi in February 2011 were unprecedented in Australia's history. Under the NDRRA, almost \$1 billion in advance payments have been made to disaster-affected local councils via the Queensland Government.

This advanced funding has allowed councils to start recovery and reconstruction as quickly as possible. Additional oversight and support has been provided through the establishment of the Queensland Reconstruction Authority and the Australian Government Reconstruction Inspectorate.

As part of the recovery effort, a \$330 million Queensland Local Council Package was jointly announced by the Australian and Queensland Governments on 27 February 2011, to help local councils repair utilities and infrastructure.

### Child care

The Australian Government's major contribution to parents' child care needs is through the provision of child care fee subsidies. However, the Government also provides both direct and indirect assistance to local governments in the provision of child care. For those local governments that own and operate child care centres, the Government provides direct assistance through measures such as the Community Support Program and the Inclusion Support Subsidy, both of which provide financial assistance toward the administration of child care services. The Government also provides indirect support to local governments (typically via funding to state and territory governments), such as the provision of \$955 million to state and territory governments over five years under the National Partnership for Early Childhood Education, to ensure all children in the year before full time school have access to a quality early childhood education program.

## Aged care services

Aged care service providers vary from small community based groups to large charitable and for-profit organisations that operate nationally, and state and local governments.

At 30 June 2012, local governments provided 2,736 home care packages (or 5 per cent of the total number of home care packages) and 1,891 residential aged care places (or 1 per cent of the total number of residential places).

Under the National Health Reform Agreement, from 1 July 2012 the Australian Government took full funding, policy, management and delivery responsibility for older people receiving basic community care services under the Home and Community Care (HACC) Program, except in Victoria and Western Australia where basic community care services continue to be delivered as a joint Australian and state government funded program.

Of the approximate 1,000 providers of the Commonwealth HACC program, approximately 150 are local government providers. This is in addition to the substantial contribution made by local government providers to HACC service provision in Victoria and Western Australia.

HACC services include domestic assistance, personal care, professional allied health care, nursing services and home modification, and are provided to support people to be more independent at home and in the community and to reduce the potential of inappropriate admission to residential care.

## **2. Building local government capacity**

The Australian Government's policy role in local government goes beyond funding support for infrastructure and regional development aims. People invest heavily in their local councils as ratepayers, volunteers, representatives, citizens and users. They rely on good governance and administration for their services, and expect their local government members to have strong values and capabilities, and to plan well and set priorities that meet community needs now and into the future. The Australian Government works with local governments to reform areas of governance, improve administrative practice, capability in project management and procurement, and workforce planning.

The Australian Government delivers this support through specific initiatives such as the Local Government Reform Fund and the Australian Centre of Excellence for Local Government. The initiatives aim to develop nationally consistent frameworks and data, and provide current research and better practice notes to build long-term capacity in asset and financial management, workforce planning, and governance reform in the local government sector.

### Local Government Reform Fund

Specifically, the Local Government Reform Fund focuses on improving the infrastructure asset management and planning in councils to build the sustainability and capacity of local government. The Department commissioned the Ernst and Young Report '*Strong foundations for sustainable local infrastructure*' which found that if local government is to

address the local infrastructure needs and attract further funding for new infrastructure, including superannuation funding, public private partnerships etc, strong financial frameworks and implementation of these frameworks are pre-conditions to further investment.

Through National Partnership agreements with states and territories the Commonwealth has supported the strengthening of the economic performance of local government nationally through the Local Government Reform Fund. Specifically, the Commonwealth government has approved over \$16.5 million for projects with states which are expected to be completed in 2013.

These projects conform with nationally consistent frameworks for local government agreed by the states. Regular reporting is already showing improvements in council's performance particularly in the areas of financial and asset management.

#### **Case Study 4: Accelerating improvement in asset and financial management in local government**

##### **Improve 68 South Australian councils' asset and financial management practices**

The Government provided \$1.65 million for the South Australian government to improve South Australian councils' asset and financial management practices under the Local Government Reform Fund. Involving the participation of 68 councils it included an audit of current asset and financial management practices to develop a common framework; development of a database of the audit figures and collaboration in the development of corporate policies and delivery of corporate services.

Continuous Improvement Plans for building capacity in each council, region of councils, and whole-of-State have been prepared. Opportunities for collaboration were also a feature of the project.

The project evaluation reported that '...the Reform Fund has accelerated the rate of improvement in asset and financial management, providing the opportunity for innovation that would not have happened without the funding and contributed significantly to a behaviour change leading to long term sustainability of councils'.

#### Australian Centre of Excellence for Local Government

Establishing the Australian Centre of Excellence for Local Government forms part of the Government's commitment to world-class local government. The Government contributed \$8 million in 2009 to run ACELG for five years. ACELG is a collaboration of university and professional bodies. This consortium is committed to advancing local government's capacity and performance through program areas including research and policy foresight; innovation and best practice; organisation capacity building and workforce development.

ACELG provides access to its research on a range of strategic and practical themes such as strengthening local government revenues, community engagement, roles of mayors and CEOs, innovation in local government, use of social media to engage citizens, and local government action for a low carbon future. It aims to be a reliable and good source of up-to-date information on local government facts and figures, including assets and workforce composition.

### **Case Study 5: Closing the Gap through place-based Indigenous employment**

The Australian Centre of Excellence for Local Government released its highly anticipated guide *Closing the Gap Through Place-Based Employment: National Local Government Indigenous Employment* at the 2nd National Local Government Indigenous Employment Roundtable- 3-4 December 2012 in Alice Springs, convened by the Local Government Managers Australia.

The guide helps local governments develop place-based workforce employment strategies for recruitment, retention, training and development, and support for Indigenous local government employees.

The practical use of the guide was put to work at the Alice Springs Roundtable where almost 90 delegates from across Australia provided an opportunity to learn from and build on approaches and strategies of successful Aboriginal and Torres Strait Islander employment initiatives.

### **3. Driving solutions to national challenges**

Local government has an important role to play in building the resilience of local communities to the many challenges facing our nation, including an ageing population, natural disasters, economic challenges, energy efficiency, water conservation and environmental management. Local government has the technical and organisational skills to deliver projects in an innovative way to suit local circumstances. Constitutional recognition could articulate the importance of a direct relationship between the Commonwealth and local government to help drive solutions to national challenges.

A serious national challenge requiring locally-driven solutions occurred during the global financial crisis. The Government developed the Regional and Local Community Infrastructure Program (RLCIP) as part of the Australian Government's Nation Building Economic Stimulus Plan. Councils were funded directly for new construction and major renovation of community infrastructure, as well as the refurbishment of assets. New and refreshed community facilities included recreational facilities, health and tourism infrastructure, children, youth and seniors facilities and environmental centres. Since its inception, more than \$1 billion has been made available to local government under the program. The Regional Development Australia Fund also provides funds directly to local government and similarly leverages regional investment and supports new construction for projects such as sporting facilities, theatres and inter-modal transport hubs.

This national approach also offers opportunities for local governments to address future challenges including a nationwide lack of infrastructure investment. The Government, through the Department, is currently implementing recommendations from the Ernst and Young report '*Strong foundations for sustainable local infrastructure*' and is consulting local governments about how the Commonwealth can help them access the private investment needed to renew ageing infrastructure now and into the future.

Local governments are also actively engaged in national effort to build resilience to climate change through the Low Carbon Communities programs. The programs help local governments to improve energy efficiency and reduce their energy costs through energy

efficiency retrofits and upgrades in council and community-use buildings, facilities and sites. The programs provide assistance for the installation of solar or heat pump hot water systems in council buildings and community facilities. In addition, through the Government's Carbon Farming Initiative, local governments who operate landfills are helping to lower emissions of greenhouse gases at landfills by capturing and combusting landfill gas emissions. This enables councils to earn carbon credits (Australian Carbon Credit Units) which can be used to offset carbon pricing mechanism liabilities, sold on the open market, and may also deliver returns through Renewable Energy Certificates.

#### **Case Study 6: Enhancing local government to participate in energy efficiency**

##### **The Community Energy Efficiency Program**

The \$200 million Community Energy Efficiency Program (CEEP) assists local governments, and not-for-profit community organisations to undertake energy efficiency upgrades and retrofits to non-residential council and community buildings, facilities and lighting; including town halls and council buildings, sporting and recreational facilities, libraries, and street lighting. .

On 13 June 2012 the Government announced \$42 million for 63 projects in the first round of the CEEP. Many of these projects are in regional and remote Australia providing energy efficiency upgrades such as the installation of ground source heat pumping and high efficiency pool and space heating technologies at the Manjimup Regional AquaCentre (WA), the Upgrade of Tumbarumba's (NSW) water supply pumping stations and the energy efficiency lighting and air conditioning upgrades in seven of City of Greater Bendigo's highest energy using facilities in Victoria.

Round Two of CEEP is open for applications until 7 February 2013.

#### **4. Technical aspects of constitutional recognition of local government**

##### Previous referendums

The Australian Constitution does not refer to local government. There have been two previous referendum proposals, in 1974 and 1988, to recognise local government in the Australian Constitution, neither of which were carried.

In 1974, four referendum proposals were put to the vote, one of which dealt with local government and proposed inserting two new provisions in the Australian Constitution:

- Proposed new section 51(ivA) would have provided that the Commonwealth could make laws with respect to '[t]he borrowing of money by the Commonwealth for local government bodies'.
- Proposed new section 96A would have provided that '[t]he Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit'.

The national vote in favour in 1974 was 46.85%; only in NSW did a majority of voters support the proposal. The proposed law was twice rejected by the Senate, and was put to the people only after being passed on two occasions by the House of Representatives under

the 'deadlock' provisions in section 128 of the Constitution.<sup>1</sup> None of the referendum proposals put to the vote in 1974 were successful.

In 1985, the Commonwealth set up a Constitutional Commission to replace the Commonwealth Constitutional Convention and instructed the new Commission to report by 1988. The Advisory Committee to the Constitutional Commission on Distribution of Powers recommended that local government should not be recognised in the Constitution, but the Trade and National Economic Management Advisory Committee did recommend constitutional recognition of local government.<sup>2</sup> In its final report, the Constitutional Commission itself recommended constitutional recognition of local government. A new section 119A recommended by the Constitutional Commission was very similar to the proposal put at the 1988 referendum, except that it would have required each State<sup>3</sup> to provide for the establishment and continuance of 'local government bodies' rather than a 'system of local government'.

The 1988 referendum proposed a new section 119A in the following terms:

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

The national vote in favour in 1988 was 33.62% and the proposal did not get majority support in any State. This proposal was one of four put to referendum in 1988 and, as in 1974, all were defeated.

The Opposition in the Commonwealth Parliament opposed both the 1974 and 1988 local government referendum proposals. All four proposals put to referendum in 1988 had historically low support. A survey conducted in July 1988, less than two months before the referendum, found very low public awareness of the upcoming referendum with only 6% of respondents aware there would be a referendum on constitutional recognition of local government.<sup>4</sup>

Historically, local government was not recognised in State constitutions. However, the Commonwealth Constitutional Convention recommended at a number of the sessions it held between 1973 and 1985 that local government be given recognition in state constitutions and/or the Australian Constitution. State constitutions were amended between 1979 and 1989 to acknowledge local government.

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<sup>1</sup> The 1974 local government proposal and three other unsuccessful referendum questions put in 1974, are the only referendums conducted under the deadlock provisions (Williams, G and Hume, D. 2010. *People Power: the History and Future of the Referendum in Australia*, UNSW Press, Sydney, p 40).

<sup>2</sup> *Final Report of the Constitutional Commission*, 1988, paras 8.18-8.22.

<sup>3</sup> The Commission specifically decided the requirement should not apply to territories: see *Final Report* at para. 8.41.

<sup>4</sup> As reported in the Canberra Times, 25 July 1988.

## The expert panel report

In December 2011, the expert panel on constitutional recognition of local government stated in its report that

[t]he 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.<sup>5</sup>

The question of constitutional support for programs having a connection with local government, as with other programs, is considered by the Government, on a case by case basis.

The fact that the Commonwealth continues to make certain payments directly to local government does not mean that an explicit statement about the Commonwealth's power to make direct payments should not be set out in the Constitution. An explicit constitutional statement could effectively remove, or at least significantly reduce, scope for argument about the limit of Commonwealth power in this regard.

The expert panel suggested that an amended section 96 of the Constitution could provide as follows:

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.<sup>6</sup>

This is similar to the 1974 referendum proposal, except that it is intended to provide some express acknowledgment that local government bodies are created by State or Territory legislation. Currently, local government bodies in Australia are created and regulated under State and Northern Territory legislation.

The former Attorney-General indicated in correspondence to the Committee dated 18 December 2012 that the Government is anticipating the findings of the Committee will constitute a critical consideration in the Government's further consideration of the substantive issues in relation to the question of constitutional recognition and also the final form of any proposal that might be introduced in the Commonwealth parliament. The Government's consideration of these issues will involve consultation with its own constitutional advisers.

The Attorney-General noted that a constitutional amendment bill, like other Government bills, must be drafted by the Office of Parliamentary Counsel (OPC) on the Government's

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<sup>5</sup> Page 2 of the Expert Panel's Final Report, December 2011.

<sup>6</sup> Section 96 uses the phrase "thinks fit" rather than "sees fit".



instructions and that it is the responsibility of the Government to instruct OPC only once all substantive policy questions have been resolved.

### Formal referendum procedure

Section 128 of the Constitution sets out basic requirements in relation to referendums. Before a referendum can be held, the Commonwealth Parliament must enact a law containing the constitutional alteration proposal. It is necessary to secure absolute majorities in both Houses (ie at least 76 votes in the House of Representatives and at least 39 votes in the Senate) or, relying on the 'deadlock provision', absolute majorities in one House on two occasions at least three months apart where the other House has rejected or failed to pass the proposed law.

Where a proposed law to alter the Constitution is passed by the Commonwealth Parliament, it must be submitted, between two and six months after passage, to those qualified to vote at federal elections.<sup>7</sup> Section 128 does not expressly apply a time period during which a referendum proposal passed twice by one House only must be put to the people. More specific rules covering the conduct of referendums are set out in the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act). The Referendum Act provides for the formulation of the 'yes' and 'no' cases by Commonwealth parliamentarians but otherwise places restrictions on Commonwealth expenditure. In 1999, parts of the Referendum Act were suspended to remove any risk that expenditure on public information activities for the 1999 republic referendum would be unlawful. As the provisions were only temporarily suspended, the operation of the Act would need to be reconsidered with respect to any public information activities proposed for this referendum.

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<sup>7</sup> If the houses are deadlocked, the Governor-General may submit the proposal to the people on the advice of the Government of the day.