Constitution Alteration (Local Government) 2013

Rob Lundie
Politics and Public Administration Section

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Constitution Alteration (Local Government) 2013

Date introduced: 29 May 2013

House: House of Representatives

Portfolio: Attorney-General

Commencement: The Bill will commence on the day it receives Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Constitution Alteration (Local Government) 2013 Bill (the Bill) is to amend section 96 of the Australian Constitution to make specific provision in relation to the granting of financial assistance to local government bodies.

Background

Section 128 of the Australian Constitution requires that a proposal to amend the Constitution must first take the form of a Bill submitted to the Commonwealth Parliament. Between two and six months after it leaves the Parliament, the proposal ‘shall be submitted’ to the voters of the states and territories in the form of a referendum.¹

Referendums in 1974 and 1988

Local government is recognised in the Constitutions of all of the states but has yet to be granted that recognition in the Australian Constitution.² This will be the third attempt to have local government recognised in the Constitution. Referendums were held in 1974 and 1988. In 1974 the Constitution Alteration (Local Government Bodies) 1974 sought to give the Commonwealth Parliament the power to borrow money for, and to make financial assistance grants directly to, any local government. The Constitution Alteration (Local Government) 1988 sought to give constitutional recognition to local government as an institution. Both failed to achieve their aims. This was largely due to lack of bi-partisan support for constitutional recognition, a lack of urgency to reform the system, the

² Constitution Act 1902 (NSW), section 51; Constitution of Queensland 2001, section 70; Constitution Act 1934 (SA), section 64A; Constitution Act 1934 (Tas), section 45A; Constitution Act 1975 (Vic), section 74A and Constitution Act 1889 (WA), section 52.

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manner in which the question was worded, and multiple questions being put to Australians that
drew attention away from the issue.3

Notwithstanding its exclusion from the Australian Constitution, local government is seen as
Australia’s third arm of government. It is increasingly called upon to assist in the delivery of
Commonwealth Government initiatives at the local level. Through its membership of COAG,
Ministerial Councils and the Australian Council of Local Government (ACLA), it is closely consulted on
national policies and programs that affect local and regional communities. At the national level, local
government has been increasingly called upon as a partner in the delivery of initiatives that foster
Australians’ wellbeing.

Parliamentary motion of recognition

In late 2006 the Federal Parliament made significant progress towards this goal when both Houses
passed a motion recognising the place and value local government has in Australian society. The
motion stated:

That the House/Senate:

(a) recognises that local government is part of the governance of Australia, serving communities through
locally-elected councils;

(b) values the rich diversity of councils around Australia, reflecting the varied communities they serve;

(c) acknowledges the role of local government in governance, advocacy, the provision of infrastructure,
service delivery, planning, community development and regulation;

(d) acknowledges the importance of cooperating and consulting with local government on the priorities of
their local communities;

(e) acknowledges the significant Australian Government funding that is provided to local government to
spend on locally determined priorities, such as roads and other local government services; and

(f) commends local government elected officials who give their time to serve their communities.4

During debate on this motion, the Labor Party had sought to push for a referendum on local
government recognition by deleting paragraph (a) and substituting the words:

‘... supports a referendum to extend constitutional recognition to local government in recognition of the
essential role it plays in the governance of Australia’.5

However, the amendment was not agreed to.

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3. L Megarritty, Local government and the Commonwealth: an evolving relationship, Research paper, 10, 2010–11,
4. Australia, House of Representatives, ‘Local government – motion by Mr Lloyd (Minister for Local Government,
5. Ibid.
ALGA Constitutional Convention

In a special Constitutional Convention of local government, convened by the Australian Local Government Association (ALGA) in December 2008, delegates closely examined options for the form of constitutional recognition that could be sought by local government. Delegates agreed that the basis of any referendum on local government should observe and uphold three core principles:

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

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 or
- guarantee the protection of any individual council from dismissal or restructure; and guarantee any level of funding for local government. 6

The major parties have had the constitutional recognition of local government as part of their election policy platforms. 7

Government agreements with the Independents and Greens

The current attempt to have local government recognised in the Constitution began in September 2010 soon after the federal election when Prime Minister Julia Gillard signed agreements with Independents Rob Oakeshott and Tony Windsor and with the Australian Greens to help her form government. In the agreement with the Independents, the Government said: ‘It is committed to working towards achieving constitutional recognition for local Government.’ 8

The Government went further in its agreement with the Greens which said that the parties will work together and with other parliamentarians to:

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Expert Panel on Constitutional Recognition of Local Government

On 8 August 2011 the Government announced an independent Expert Panel ‘to look into the level of support for constitutional recognition of local government and to identify possible forms that recognition could take.’ The panel was to report by the end of the year so that a referendum could be held either before or at the next federal election.\(^9\)

Headed by former New South Wales (NSW) Chief Justice James Spigelman AC QC, the panel circulated a discussion paper\(^11\) and conducted community consultation releasing its final report\(^12\) on 22 December 2011.

The panel considered four types of recognition; symbolic recognition, democratic recognition, financial recognition and recognition through federal cooperation. The panel noted that both symbolic recognition (via an insertion of a preamble to the Constitution) and recognition through federal cooperation gave rise to issues that extended beyond local government and therefore were beyond its scope.

The Panel commissioned Newspoll to conduct polling research on public sentiment including the level and nature of support for constitutional recognition of local government. The report pointed out that while polling showed high initial support, the reality when faced with a referendum question could be far different.

The Expert Panel report acknowledged the general historical reluctance of Australians to change the Constitution.\(^13\) It took this into consideration in recommending support for a referendum in 2013 on financial recognition, placing two conditions on the proposal: first, that the Commonwealth negotiate with the states to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by the ALGA necessary to achieve informed and positive public engagement with the issue.\(^14\)

At the time of introducing the Bill the first condition may have been satisfied in the sense that the Commonwealth negotiated with the states but not in the sense of gaining their support as New South Wales, Victoria and Western Australia are openly opposed to the referendum, and

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13. Only eight out of 44 referenda have resulted in changes to the Constitution.
Queensland has backed away from its initial support. The public engagement condition had also not been met as the civics campaign had not begun.\textsuperscript{15}

**High Court cases: Pape and Williams**

Apart from the symbolism of recognising local government in the *Constitution*, two High Court cases have raised doubts about the Commonwealth’s power to directly fund local government. In *Pape v Commissioner of Taxation* (2009)\textsuperscript{16} the High Court ruled that the Executive arm of government did not have the power to fund local government directly but that it required approval from Parliament. The Commonwealth could no longer rely on sections 81 and 83 of the *Constitution* to support legislation authorising direct grants to local government. This has led to concern that the legislation underpinning the Roads to Recovery Program may be invalid because there is no head of Commonwealth legislative power to support it.\textsuperscript{17}

In the *Williams* case (2012)\textsuperscript{18} the High Court found that the Commonwealth does not have the power to provide direct funding in areas and to organisations outside the Commonwealth’s constitutional responsibility. Specifically the High Court found that the Commonwealth could not fund a school chaplaincy program without statutory authority.\textsuperscript{19} This suggests that funding currently provided to local government through programs such as Roads to Recovery are clearly open to constitutional challenge. Constitutional lawyer George Williams indicated that this could bolster local government’s case for constitutional change to ensure that the Australian Government can continue to directly fund community services. He said:

> This decision has much broader ramifications for the Government in terms of its ability to fund programs directly. Direct funding to local government via federal programs such as Roads to Recovery are now in doubt. This decision strengthens local government’s case for constitutional recognition and for a referendum and exacerbates the findings of the earlier Pape Case. The Federal Government’s executive power is very limited and assumptions about how money could be spent are now in doubt. Following this decision, the Government has to go back and think about what this means for local government.\textsuperscript{20}

Although the results of these cases challenged the Commonwealth’s power to directly fund local government, they do not threaten its capacity to fund local government because this can still be done through section 96 grants to the states.\textsuperscript{21}

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Joint Select Committee on Constitutional Recognition of Local Government

A Joint Select Committee on Constitutional Recognition of Local Government was established in November 2012. Its preliminary report was presented on 24 January 2013 and the final report was presented on 7 March 2013. The Committee looked at the case for local government recognition in the Constitution, the likelihood of success of a referendum, and lessons from history.

The Committee expressed its support for a referendum to be held in 2013 and noted:

"... the level of state support, and the extent to which public education ‘preconditions’ have been – or can be – met. There are a number of other important strengths to the case for a referendum in 2013. There is currently bipartisan support at the federal level for the financial recognition of local government. The previous referenda on local government did not enjoy this support, and there is no guarantee that it will survive past 2013. Additionally, the Committee is pleased to report that the Australian Local Government Association (ALGA) has committed to support a 2013 referendum.

The Committee believes that these considerations, taken together with the readiness of local government to campaign for change, and the momentum already in the community, the referendum has a good prospect of success."

In a dissenting report Coalition members stated:

"The Coalition is committed to restoring funding certainty to local government programs and has indicated support for the appropriate limited financial recognition of local government in the Australian Constitution as a way to achieve this.

Coalition members consider that the existence of valid, alternative funding pathways to address the funding uncertainty introduced by the recent High Court cases reduces the imperative to pursue constitutional change in the face of the fact pre-conditions for success highlighted by the Export [sic] Panel and other stakeholders such as ALGA have not yet been met.

In brief, although the Coalition Senators support the referendum, they consider there is not enough time, and that a referendum only be held after the Expert Panel’s pre-conditions are met.

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25. Ibid., p. vi.
On 11 March 2013 when releasing the Committee’s report the then local government Minister Simon Crean confirmed the Government’s support for a referendum but indicated that its success would depend on the support of both political parties and all states. He said:

The task now is to secure that support in the next six weeks. This requires effort from all parties at all levels of government, including the Australian Local Government Association (ALGA) and its constituent units. I have already written to Premiers and Territory Chief Ministers and will be in discussion with them about the report and their views on supporting constitutional recognition. It is critical that all levels of government lobby the remaining states to secure their support.27

In response, Senator Barnaby Joyce felt that Mr Crean was ‘finding an excuse to walk away without having to say he is walking away.’ He was sceptical of the time the Minister had given himself, saying:

Given that two of the states have been publicly opposed for years, and that the Government has done nothing to convince the states otherwise for more than five years, it is not exactly clear how the Minister will achieve this.28

Deputy Chair of the Select Committee Senator David Bushby expressed the Coalition’s concern ‘that there is no longer sufficient time to get everything in order to hold a referendum with the 2013 election.’ He also indicated that the Coalition’s support for appropriate financial recognition of local government is limited to:

… removing the question of constitutional validity in relation to direct Commonwealth funding. No coalition undertaking has been provided to support change that extends, directly or indirectly, any further than this and, from the perspective of the coalition members of the committee, change that extended further than that would fundamentally impact the likelihood of their support for that change.29

The ALGA urged members of Parliament to support the Referendums (Machinery Provisions) Amendment Bill 2013 which removed public funding constraints on referendums.30

This came at a time when Simon Crean was replaced by Anthony Albanese as the Minister responsible for the referendum in late March. The new Minister met with his state and territory counterparts in mid-April and reaffirmed the Commonwealth’s commitment to the referendum.31

A week later Opposition Leader Tony Abbott urged voters not to be sidetracked at the federal election by any referendum. Although he supports the referendum in principle he said it was up to the Government to make an announcement and demonstrate such a referendum had a reasonable

27. S Crean (Minister for Regional Development and Local Government), State and bipartisan support needed for local government referendum, media release, 11 March 2013, accessed 4 June 2013.
chance of success. He suspected the Government wanted to have the referendum to ‘muddy the waters’ on polling day. He said however, that it is ‘more important to change the Government than it is to change the Constitution.’

**Referendum date officially announced**

On 9 May 2013 the Prime Minister officially announced that the referendum would take place on Saturday 14 September 2013, the same day as the federal election. She sought to allay the fears of some of the states, saying:

> We are proposing a modest and common sense change to our Constitution that simply reflects the modern reality in our local communities. This is about saying 'yes' to retaining important community benefits. This is about saying 'yes' to our communities. The change will not diminish the role of the States with regard to the administration of local government. Recognition in the Constitution does not alter the fact that local governments are created by and are accountable to State Governments. The modest change we are putting forward to the Australian people is based on advice that the Government has received from the Expert Panel led by the Hon. James Spigelman AC QC and endorsed by the Parliamentary Joint Select Committee. This proposal to change the Constitution is one that the Government expects will receive broad and bipartisan support in the Federal Parliament and across the country.

She later added:

> The referendum, the proposal for change, would not change the ability of state governments to legislate for local government, including legislating amalgamations. ... This is a proposal that has been very much advocated by local government but understanding the continuing role of state governments.

At this point, the exact wording of the change to the Constitution still had not yet been released. The Opposition reaffirmed its support for the referendum but criticised its timing and accused the Government of setting it up for failure, of not being ‘serious’ about it and of creating a ‘distraction’ and a ‘wedge’.

It declared that it would support the referendum Bill in Parliament but authorise a small number of MPs to vote against the Bill so that a ‘no’ case can be engendered. If a Constitution Alteration Bill is passed unanimously then a ‘no’ case is not distributed.

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32. T Abbott (Leader of the Opposition) and N McKenna, *Joint doorstop interview*, transcript, 26 April 2013, accessed 4 June 2013.
35. T Abbott (Leader of the Opposition) and B Joyce (Shadow Minister for Local Government), *Joint press conference*, transcript, 10 May 2013, accessed 4 June 2013.
**Exposure Draft of the Bill released**

Finally on 16 May the Government released the Exposure Draft of the Constitution Alteration (Local Government) 2013 Bill and the proposed words to give effect to a change in the Constitution to give financial recognition to local government. The new section 96 with the added words bolded, underlined and in italics would be:

... 96 Financial assistance to States and local government bodies ...

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit.

In releasing the Exposure Draft the Government said:

It is a practical change to reflect the fact that the Commonwealth has partnered with local governments to deliver local roads, sporting fields, libraries, child care and community services and much more.

The amendment is based on the wording suggested by the Expert Panel on Constitutional Recognition of Local Government, led by the Hon James Spigelman AC QC, and subsequently endorsed by the Parliamentary Joint Select Committee.

Both the amendment and the explanatory memorandum take into account recent comments by the states and territories and make it crystal clear that local government is a creation of the states.

The proposed words do not diminish the role of the States with regard to the administration of local government.

Recognising local government in the Constitution will acknowledge the delivery of programs like Roads to Recovery, which has enabled the Commonwealth to work with local governments and communities to upgrade and repair 16,000 road sites across the country.  

The Coalition reiterated its support for the legislation whilst criticising the Government for not having conducted the process more diligently and making the effort to get the states on board. It also emphasised that the local government sector ‘must stand up and mount the very best case.’

**Budget allocation for the referendum**

The Budget provided $55.6 million over two years for the conduct of the referendum. The Australian Electoral Commission received $44 million over two years to conduct the referendum and the Department of Regional Australia, Local Government, the Arts and Sport received $11.6 million to

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37. A Albanese (Minister for Local Government) and M Dreyfus (Attorney-General), *Release of draft constitutional amendment to recognise local government*, joint media release, 16 May 2013, accessed 4 June 2013. Note that the words ‘on such terms and conditions as the Parliament thinks fit’ are part of section 96 but do not appear in this press release.


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undertake a national civics education campaign to provide information to the general public on the referendum and reform process.

The Government had amended the *Referendum (Machinery Provisions) Act 1984*\(^{39}\) to temporarily suspend the limit on the amount of money it could spend on promoting, educating and informing the public about the yes and no cases. This was separate to money spent on the production and delivery of the yes/no pamphlet. The Act was also amended so that the yes/no pamphlet would only be sent to each household rather than to each voter.\(^{40}\) Liberal senator Scott Ryan expressed concern about this:

> Householder mail, while it may not say householder on the front, is not going to have the same attraction to voters to read – nor would it necessarily get to everyone in that house - as something individually mailed by the Electoral Commission.\(^{41}\)

### Policy position of non-government parties/independents

Whilst noting that the Bill passed the House of Representatives on 5 June 2013 by 133 votes to two,\(^{42}\) the following policy positions of the various parties and independents are presented as background material. Although it is necessary for there to be a vote against the Bill for a ‘no’ case to be engendered, the two Liberal Members who did vote against it (Alex Hawke and Dr Dennis Jensen) also expressed their opposition to it.\(^{43}\)

### Coalition view on the referendum

The Leader of the Opposition, Tony Abbott, in his submission to the Expert Panel said:

> The Coalition supports appropriate constitutional recognition of local government in the Australian Constitution...At the same time, the Coalition will only support a referendum that is limited to facilitating direct Commonwealth funding of local government. A referendum that sought to usurp the role of the States, or otherwise change the current order of governance of Australia, would be highly problematic and is not something the Coalition would likely to support.\(^{44}\)

On 16 May 2013 when the Government had released the proposed words to change section 96, Shadow Minister for local government, Senator Barnaby Joyce said the Coalition would support the referendum. Nevertheless, he criticised the Government for not proceeding with the referendum

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42. Australia, House of Representatives, ‘*Constitution Alteration (Local Government) 2013*’, Votes and proceedings, HVP 170, 5 June 2013, accessed 6 June 2013.

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more ‘diligently’ and for not ‘getting the states on board’. He also put the ball firmly in the court of local government to garner community support for the referendum. He said:

Local Government must stand up and mount their very best case. It’s for the local government now to really pick up the cudgel because it is for their future.\(^45\)

Despite the Opposition’s formal support for the referendum, a number of its MPs such as Cory Bernadi and Senator Dean Smith, came out against the referendum.\(^46\) Liberal Senator Concetta Fierravanti-Wells said Labor was trying to distract voters from its ‘shambolic record’ by conducting a ‘rushed’ referendum.\(^47\)

**Greens’ view on the referendum**

The Greens fully support the recognition of local government in the *Constitution*. In a speech to the National General Assembly of Local Government in Canberra on 19 June 2012, Greens local government spokesperson, Senator Lee Rhiannon urged the Government to respond to the Expert Panel report and said:

There should be no more delay – I encourage local governments and communities to campaign with the Greens in Parliament to put pressure on the Government to schedule the referendum for the next election. Local governments are on the frontline of building a clean green economy and providing essential public services, but councils are under pressure to make a small pool of money go a very long way. Constitutional recognition would provide funding security for local councils to continue to deliver services that people expect and deserve.\(^48\)

**Independents’ views on the referendum**

Independent MP Rob Oakeshott supported the referendum but was pessimistic about its chances of success:

As far as local government, I’m a little bit more neutral. In the end, that is a funding dispute, and local governments’ low rate bases - rate pegged, have infrastructure backlogs a mile long, particularly around local roads. If we can get that financial commitment - and if we need it via constitutional recognition, then I back it. But it is mainly that financial issue getting resolved. I’m disappointed that - we talked about bipartisanship a bit this morning. My understanding was that Tony Abbott was in the cart for a bipartisan referendum question being put. You need that for referendums. 8 from 44 have been successful, those 8 had a very small No campaign. But some of the rhetoric I heard this week from several senior Shadow Ministers, and from Tony Abbott himself, is bagging the exercise. So that is going to be a problem. And we may as well not even do it, if that is the path this is going to go down.\(^49\)

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\(^45\) B Joyce (Shadow Minister for Regional Development, Local Government and Water), *Local government referendum*, op. cit.


Mr Oakeshott did not speak during debate on the Bill in the House of Representatives.

Independent MP, Tony Windsor welcomed the referendum saying:

Local Government plays a very significant role in Australia and should have been financially recognised in the Constitution many years ago. The referendum will tidy up concerns about the ability the Federal Government has to directly fund local government. There have been High Court challenges that have given rise to the need to make this change to the Constitution which I trust will be seen by the Australian people as a necessary move to ensure this avenue of funding for Local Government can continue without any doubt into the future. This was the message that Rob Oakeshott and I conveyed to the Prime Minister during our negotiations in the formation of Government and had this referendum included in the final agreement. So I am pleased that this announcement today ticks another box in our agreement and thank the Government for this. I now look forward to bi-partisan support for the referendum and in doing so encourage the Australian people to recognise the need to make this change and vote ‘Yes’.  

During debate on the Bill in the House, Mr Windsor expressed his disappointment with the ‘dual attitudes’ of the Coalition who were:

... almost expressing the view that they hope it fails even though they are supportive of it, or they say they are supportive of it.  

**Position of major interest groups**

**States**

**Queensland**

Queensland was the only state to come out in support of the referendum before the Bill was introduced. Early in 2013, Queensland Premier Campbell Newman had written to all the states urging them to support the referendum. Later, he also wrote to the Prime Minister supporting the proposed wording of the referendum and indicating that he does not believe a constitutional change will erode state powers over local government. He also supported the referendum being held at the 2013 federal election or on a fixed date in 2014. The letter said:

It is the Queensland Government’s view that constitutional recognition that does not diminish the State’s primary constitutional responsibility for local government is appropriate given the breadth of interaction over recent decades between the Commonwealth and councils, and the legal uncertainty about funding that has arisen from the decisions of the High Court in the Pape and Williams cases in recent years.

However, on 5 June 2013 while the Bill was being debated in the House of Representatives, Premier Newman and his local government Minister sent a letter to Commonwealth local government Minister Anthony Albanese advising him that the Queensland Government was no longer prepared

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to support the Bill in its current wording. They were concerned that under the current proposal the Commonwealth would be able to control local government. The letter read:

The Queensland government has consistently supported constitutional recognition of local government on the basis that any amendment allowed the commonwealth government to directly fund local government without diminishing the role of the state government. We have taken advice in relation to the matter. In our opinion, having considered the matter further, the amendment in its current form does not achieve this result. Accordingly, our support for the proposed amendment is subject to the inclusion of additional wording in the bill.

They proposed changing section 96 so that it would read (with the Bill’s words underlined and their added words bolded):

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit. The terms and conditions of a grant of financial assistance to a state or to a local government body formed by a law of a state are subject to the laws of the state.

Queensland local government Minister David Crisafulli indicated that they wanted to support the Bill but not in its present form. He said:

We don’t want to be spoilers but we can’t accept the language that’s been put forward. We want to find a way to make this a yes vote but that can only be done if the commonwealth spells out that it only wants to fund local government, not control it. This process should be about strengthening the role of local councils, not binding them to the whims of the federal government by stealth.54

New South Wales

In its submission to the Expert Panel, the New South Wales Government put the view 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.55

Victoria

On 15 May 2013 the Victorian Government declared its opposition to the referendum because it felt that Victorian local councils would end up being worse off. The Minister for local government Jeanette Powell said:

We think there is a strong possibility that Victorian councils will be financially disadvantaged by this change. Victoria’s reformed and relatively better performing local government sector could lose money to subsidise poorly performing councils in other states. Victoria already receives an inequitable proportion of the GST and this could be replicated in how the Federal Government funded councils in the future. The

Commonwealth’s contribution to local government through Financial Assistance Grants fell from 1.02 percent of total Commonwealth taxation revenue in 1996-97, to about 0.65 per cent in 2011-12. There is no indication that constitutional recognition will reverse this trend. The change will do nothing to protect the current funding levels, and could, in fact, have unexpected repercussions. Local Government is already recognised in the Victorian Constitution. Changes to the Australian Constitution could blur the roles and responsibilities between the three tiers of government, leading to poorer overall outcomes for our communities. It would be a tragedy if State efforts to clean up governance failings such as at Brimbank were stymied in the courts by lawyers seeking to argue the Commonwealth now had jurisdiction. The inclusion of Local Government in the Constitution would advance the principle of centralism to the disadvantage of federalism. More power would be transferred from State Government’s to the Commonwealth and such power may be used by a Commonwealth Government to undermine polices [sic] of State Government’s by direct funding of councils to do its bidding. This proposed Referendum is more about Federal Labor’s deal with the Greens to cling to power than it is about supporting the important local government sector.56

Western Australia

About 14 May 2013 WA Liberal Premier Colin Barnett said:

We would be prepared to support constitutional recognition of local government as long as it is recognised as a function of the state and does not give new powers over local government to the Commonwealth.57

South Australia

The South Australian Government’s submission to the Expert Panel indicated that ‘it welcomes initiatives to strengthen the relationships between governments, and provide clarity of powers between all three spheres of government’. It did not support or oppose any form of local government recognition but ‘remains open to consider, on its merits, any proposal put forward on constitutional recognition of local government’.58

Tasmania

The Tasmanian Government did not provide a formal comment on the constitutional recognition of local government to the Expert Panel as it ‘did not wish to comment on any proposals until such time as a final form of amendment is available for review’. It was concerned that even minor changes to the Constitution might have unintended consequences since ‘for the nature of our Federation or how the Constitution is interpreted’.59

Local Government Associations

Australian Local Government Association (ALGA)


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The ALGA has long been a supporter of constitutional recognition. However, it has expressed frustration at its progress. During the Joint Select Committee’s inquiry the ALGA feared there would not be enough time to educate the public and convince them of the need for change. President Felicity-Ann Lewis expressed concern that (the then) Minister Crean would not be responding to the Committee’s findings until the final report was handed down at the end of March. She said:

The recommendations of the Expert Panel recognised four preconditions for referendum success: the need for strong bipartisan support; the Commonwealth negotiating with state and territory governments to achieve their support for financial recognition; a public education campaign to achieve informed and positive community engagement; and changes to the referendum process to allow public funding of referendum campaigns. It is our understanding that the Commonwealth has not negotiated with individual states or begun the process of making the necessary changes to the legislation which governs referendum processes... Local government needs greater certainty about the timing of the referendum processes if we are to give a referendum in 2013 the best chance of success.60

The ALGA planned to raise $10 million from councils across Australia to fund its ‘yes’ campaign. However, some councils were resisting paying the amount asked of them.61

Local Government Association of Queensland

On 15 May 2013 President of the Local Government Association of Queensland, Margaret de Wit wrote:

... recent High Court decisions have shown that, without a small amendment to the Constitution, funding problems may occur for those local community projects that rely on Commonwealth money. That amendment would confirm the funding relationship between the federal and local governments, allowing the flow of Commonwealth funds to local projects without fear that a High Court challenge would shut off the tap. It is a simple change but it would be no empty gesture; it would give local councils a rock solid base on which to plan for improving and maintaining the lifestyles and economic futures of their communities. It would legitimise and make secure the important relationship between the federal and local governments, thereby ensuring the efficient flow of public funds to support programs such as Roads to Recovery and various direct community grants. This relationship was legally challenged in the High Court in 2009 and again last year, the result being there is now doubt about the Constitutional validity of the Australian Government providing funds for areas where it does not have a specific Constitutional sanction to do so. In a nutshell, that is what the campaign for constitutional recognition of local government is all about – making sure the financial relationship that guarantees efficient flows of public funds direct to local communities is beyond challenge.62

Local Government NSW

Local Government NSW rejected the NSW Government’s position. Its Joint President Councillor Ray Donald said:

Local Government NSW completely rejects the Minister for Local Government’s misleading and ill-informed claims that financially recognising Local Government in the Australian Constitution will lead to


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pork-barrelling. The Howard Coalition Government initiated direct federal funding to local councils more than a decade ago. This financially-specific relationship between Canberra and councils has helped thousands of community projects get off the ground right across NSW, regardless of the politics of individual councils. This referendum seeks a modest change to our Constitution to guarantee the continued flow of direct Commonwealth funding to local communities without fear of a High Court challenge jeopardising these much needed funds. Given the recent TCorp Report into NSW council finances, it’s astounding the NSW Coalition Government won’t support a practical change to the Constitution securing tens of millions of dollars each year for NSW communities and their infrastructure. Our governments should be working together to provide a solid base for improving and maintaining the lifestyles and economic futures of our communities, and I call on the NSW Government to change its position on this crucial referendum for communities.53

The other Joint President, Councillor Keith Rhoades AFSM, also said:

There are at least 96 million reasons why the O’Farrell Government and Minister Page should support this referendum – and that’s the total Roads to Recovery funding provided to NSW councils for 2012/13. The comments made by Don Page, who continually claims to be the Minister ‘for’ Local Government, are baseless and equate to nothing more than a scaremongering campaign! It seems a tad contradictory for the NSW Coalition Government to trumpet criticism of councils’ financial sustainability, then fail to support a referendum which would protect federal grants for the most basic community needs, like local roads. The upcoming federal referendum will not erode the power of the NSW Government or change its relationship with NSW councils. The proposed amendment has been carefully crafted with expert advice from constitutional lawyers to ensure it does not reduce or remove the State’s constitutional oversight of Local Government. Minister Page should stop misleading the people of NSW and get on with the job of being the Minister for Local Government.64

Municipal Association of Victoria (MAV)

The Municipal Association of Victoria (MAV) strongly disagreed with the stance taken by the Victorian Government. Its president Bill McArthur said:

The referendum seeks a modest change to our Constitution to guarantee the direct funding relationship between federal and local government that has occurred for more than 10 years. Direct federal funding was initiated by the Howard Coalition Government and continues as a great legacy of his leadership. Financial recognition would ensure the continued flow of Commonwealth funding to local community services and infrastructure without fear that a High Court challenge would shut off the financial tap. Minister Powell’s assertion that constitutional recognition may result in Victorian councils receiving less federal funding holds no weight. Her argument just doesn’t stack up. At a time when governments should be working together to provide a solid base for improving and maintaining the lifestyles and economic futures of our communities, it is staggering to see such a blatant attempt to mislead the people of Victoria and place future funding at risk. Surely it is in the Victorian Government’s best interests to work with - not against - local government to provide financial certainty that places less pressure on ratepayers and the State Budget. We have seen no alternative plan offered by the State for how they would replace an annual loss to councils of $72.3 million in federal Roads to Recovery funding if a constitutional challenge were to succeed. There is simply no factual basis, nor evidence, to support the Minister’s suggestion that a successful referendum would limit the State’s ability to address municipal governance failings. The recommendation from an expert panel that has been accepted by the Australian Government, and the drafting of words to alter the Constitution have been guided by constitutional law experts, the Hon James

63. Local Government NSW, Stop scaremongering on referendum, media release, 16 May 2013, accessed 7 June 2013.
64. Ibid.
Spigelman AC QC and Professor George Williams AO to overcome state governments’ concerns. We need to ensure funding problems don’t occur for thousands of local community projects that rely on federal money, and where there is no plan B offered by the Victorian Government. I urge people to use your power at the ballot box to support this referendum. It is a chance for Victorians to take charge and protect the future of their communities.  

West Australian Local Government Association (WALGA)

WA Local Government Association (WALGA) President Mayor Troy Pickard said:

A referendum about Constitutional Recognition could easily be glossed over by the public as having little relevance to them but nothing could be further from the truth. What this referendum means for local communities is that they will at last have certainty for the funding of a range of Commonwealth funded projects that could otherwise be under threat. There have been some significant projects undertaken in WA and across Australia that have involved the Federal Government directly funding Local Governments. However it has become apparent through various recent court proceedings that these funding arrangements could be challenged and possibly voided in the High Court. The Referendum seeks to redress that threat.  

Later he said:

The current financial challenges faced by the State Government gives further weight to removing the uncertainty of Federal funding to Local Government by Constitutional Recognition. ... given the State Government’s fiscal concerns, the prospect of securing the Federal funding stream for local projects should be embraced. Recognising Local Government in the Constitution has nothing to do with removing state’s rights or the power of direction of Local Government by the respective State Governments. To think differently is an unfounded fear. But what Constitutional Recognition is about is securing the revenue stream from Federal Government to Local Government that should be expected to help relieve financial demands on state budgets.

Mayor Pickard said in addition to the state Government winding back previous projects, the Treasurer had also announced a temporary freeze on some payments to local governments to assist the state’s cash flow issues.

Voting YES in the September referendum is about giving certainty to the continuation of Federal payments to Local Governments. In the State Treasurer’s own words, ‘we are in a very tough financial situation’ and must ‘take steps to address what is emerging as a longer-term structural imbalance between what we spend and what we earn’. Surely those steps must include locking in the legal and Constitutional future of direct Federal funding to Local Governments? Given the seemingly fragile long term budget scenario for the State, Western Australians have every right to expect that their State Government will continue to do all it can to secure the future of Federal funding that comes into WA.

Local Government Association of South Australia

67.  Ibid.
68.  Western Australian Local Government Association,  State fiscal woes support Yes vote, media release, 16 May 2013, accessed 3 June 2013.

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On 16 May 2013 LGA President Mayor David O’Loughlin said section 96 of the Constitution only dealt with funding and the proposal was to add the words ‘or any local government body formed by a law of a state’.

This wording is exactly what every South Australian Council and the LGA of SA has asked for.

He said Councils did not want a broadly-based recognition which might cause controversy.

‘We are delighted that under Tony Abbott’s and Barnaby Joyce’s leadership the Coalition has chosen to support Local Government’s proposal which we now know the Government is acting on’, he said.

We are thrilled that both Tony Abbott and Barnaby Joyce have kept to their word and are supporting this positive initiative for every community and therefore the entire nation.

This change will simply validate direct funding programs currently in doubt such as the Howard Government’s Roads to Recovery program. 69

Think Tanks

The Institute of Public Affairs (IPA) strongly opposed local government recognition saying:

‘Constitutional recognition of local government will lead to a federal takeover of local laws, lead to rate increases, expansion of bad and petty laws and corrode Australian democracy’, said Tim Wilson, policy director at free market think tank, the Institute of Public Affairs.

The Institute of Public Affairs is strongly opposed to constitutional recognition, because it will:

– lead to creeping Canberra control of local services through funding agreements.
– undermine the role of the states and their oversight of local government.
– stop states from removing corrupt councils and amalgamating inefficient ones.
– lead to rate rises from councils without state government oversight.
– increase the volume of petty and intrusive laws into people’s lives and businesses.

Australia should be governed from local communities-up, not Canberra-down. This referendum is about governing bin collections for Broome, Buderim and Burnie from the Prime Minister’s Canberra office. With every single federal dollar comes strings attached, this plan is about centralising more power in Canberra and further away from local communities. Local government rules and regulations, from planning applications to caring for local parks, will be driven by Canberra. The referendum is a rehashing of Gough Whitlam’s failed attempt to bypass the states and promote a level of government that is easier to control from the Prime Minister’s office. Scrapping state government oversight of local government will create fiefdoms for local kingmakers and petty bureaucrats. Often state government restraints stop significant rate rises, once local government sits separately they will raise rates and increase costs to families. Local governments are already the source of the most intrusive rules and regulations into people’s lives from stopping kite flying in parks, to tying community street parties up in red tape and destroying community festivals through excessive food handling regulations. Constitutional recognition will make it worse. If this

69. Local Government Association of South Australia, Referendum wording welcomed, media release, 16 May 2013, accessed 3 June 2013.
referendum is successful the level of government closest to Australian families will be taken over by the one most distant and disconnected. It will be a disaster for Australian democracy.  

**Constitutional law and other academics**

Constitutional academics and others outside the main parties have had differing views on what the effect of a change to the *Constitution* might be.

John Wanna, Professor of Public Administration at the Australian National University, said the change would be constitutional ‘dynamite’, representing a ‘substantial erosion of state power’.

The Commonwealth could start running the health system or the forthcoming NDIS through councils and bypass the states altogether. The states will find it harder to sack corrupt councils or forcibly amalgamate them.

He suggested recognition would be implied in the *Constitution* however modest the actual wording of the change.  

Anne Twomey, a constitutional law professor at Sydney University, said:

I find it hard to believe a single councillor will get one iota more respect after such a constitutional change. [The referendum’s success would] permit the Commonwealth to engage in pork-barrelling before elections through local councils, where such action might otherwise be unconstitutional (and prompt growth in bureaucracy in Canberra). The Commonwealth can already give as much money as it wants to the states through section 96 of the constitution.

She said Victoria and NSW stood to lose the most, as federal funding for councils was based on states’ populations.

Ultimately, the Commonwealth could come up with a different funding formula that broke that link.  

She doubted that voters will want to change the *Constitution* unless the problems highlighted by the High Court cases can only be solved through constitutional means and that tangible benefits will be the outcome – both of which she disputes.  

Professor George Williams from the University of New South Wales described the proposed constitutional change as ‘worthwhile’. He said:

It is important that federal funding can continue to flow to local councils to support things like roads, child care and local libraries. The change is needed because recent High Court decisions have cast doubt on that funding. And that problem is something that does need to be fixed.  

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72. Ibid.


Constitutional lawyer and Deputy Chair of the COAG Reform Council, Professor Greg Craven said that the referendum was ‘dishonest’ and more about boosting commonwealth government power than supporting local councils and would be an excuse for councils or the federal government to raise taxes. He said:

It will be sold as a modest change that will boost funding for local governments, but it’s really about expanding commonwealth power. It’s like a scorpion, small but lethal ...State governments will and should campaign stridently for a ‘no’ vote. 75

Dr Dean Jaensch from Flinders University notes that there are many aspects of the Constitution that are ‘anachronistic’. He urges voters to take the opportunity provided by this referendum ‘to bring the Australian Constitution a bit closer to the 21st century’. 76

Professor Rosalind Dixon from the University of New South Wales law faculty believes that by putting up this referendum the Government is promoting the perception of the Constitution as a ‘living and breathing document’ which is ‘capable of speaking to all Australians’. She also believes that by keeping the proposal modest, its chance of success is enhanced. This is because the possible downsides are reduced and there is less scope for political disagreement. On the other hand, she argues that if the changes are small then voters may not see the point nor take the risk of unintended consequences. The wider ramifications for constitutional change if this referendum fails are that governments may be scared off attempting change in the areas of indigenous recognition and the republic. However, it may be that voters are more likely to support these arguably larger issues and vote for change than this local government proposal which has yet to engage their attention. 77

Lobby Groups

Proponents of the ‘No’ case, who include former local councillor, Julian Leeser, former MPs Peter Reith, Nick Minchin and Dr Gary Johns, and Tim Wilson from the IPA, have established a website: nopowergrab.com.au. As the name suggests, they oppose the referendum because they see it as resulting in the centralisation of power at the expense of the states. Its website home page reads:

Vote no to Canberra’s power grab

Our system of government isn’t perfect, but it has helped make Australia the best country on earth. Now is not the time to remove the restrictions that hold Canberra politicians to account.

Don’t be fooled: This is a massive power grab by Canberra politicians and bureaucrats!

Make no mistake: Letting Canberra control local government will:

≠ Force Councils to do what’s good for Canberra, not communities


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Harm Local Services
Increase rates
Lead to less accountability
Lead to more bureaucracy
And mean even more political buck-passing.

Politicians are arguing that change is “small” and “practical” – but we know the truth. Changing our Constitution will turn our democracy on its head, and open the doors to a massive power grab by Canberra politicians and bureaucrats to direct local services: Click HERE to learn more about just how this will just make things worse.\(^78\)

### Financial implications

The change in the Constitution would permit but not require the Commonwealth to grant financial assistance directly to local government instead of via the states. There is no guarantee that funding would be increased unless one accepted the political argument that the Commonwealth would raise the funding level so as to reap the credit from voters for having done so.\(^79\)

It has been argued that Commonwealth direct funding to local government would result in a cost saving because it cuts out the states ‘middle man’. However, Professor Twomey could find no evidence that the states take off administrative costs before they pass financial assistance grants on to local councils. Even if they did, the solution could lie with the Commonwealth tightening its grant conditions. A change in the Constitution is not required for this to happen. If the Commonwealth moved to direct funding as its major way of funding local government, it would bear the associated administrative costs.\(^80\)

The Commonwealth would also need to establish a body of information about the needs and characteristics of local government bodies if it is to directly fund them in an efficient manner. This would be an extra cost as the states have already accumulated this knowledge through their regulatory and monitoring oversight of local government. The Commonwealth Grants Commission has also pointed out that it would be very difficult to come up with an equalisation formula to cover the huge range of differences amongst local government bodies.\(^81\)

If the Constitution is changed, Professor Twomey believes it is likely that all Commonwealth funding to local government will be direct and that financial assistance grants through the states would cease. Per capita distributions to the states would also cease as funds would be supplied to local

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\(^80\) Ibid.

\(^81\) Ibid.
government bodies on an equalisation basis. The Commonwealth Grants Commission considered this basis in 1991 and concluded that it would be much more complex with more unpredictable outcomes than a per capita basis; there would be extra administrative costs; and such a move would significantly affect NSW and Victoria, being the most populous states.

Despite this, the House of Representatives Standing Committee on Economics, Finance and Public Administration has recommended that financial assistance grants be distributed on an equalisation rather than a per capita basis.\(^{82}\)

The Explanatory Memorandum states that the proposed Constitution alteration would have no financial impact.\(^{83}\)

**Statement of Compatibility with Human Rights**

The Explanatory Memorandum to the Bill states that no statement of compatibility is required as the Bill ‘is not within the scope of the Human Rights (Parliamentary Scrutiny) Act 2011’, section 8 of that Act requires a statement for ‘a Bill for an Act’.\(^{84}\) There is an argument that, strictly speaking, Constitution alteration Bills, although passed, still remain a proposed law. It is not until a successful referendum that the Constitution becomes amended or altered.\(^{85}\) Against this view, attention might be given to the long title of the Bill, which states, in part that it is ‘a Bill for an Act to alter the Constitution’. At the moment the issue as to whether a Statement of Compatibility with Human Rights is required for this Bill appears to be unsettled. This issue may receive further illumination after consideration of the Bill by the Parliamentary Joint Committee on Human Rights.\(^{86}\)

**Key issues and provisions**

If the constitutional amendment is accepted, items 1 and 2 will have the effect that new section 96 with the added words bolded, underlined and in italics would be:

96 Financial assistance to States and local government bodies:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit.

This Bill seeks to have recognised in law and in the Constitution a direct relationship between Federal and local government in the area of financial assistance. It also seeks to remove the

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82. Ibid.
83. Explanatory Memorandum, Constitution Alteration (Local Government) 2013, op. cit., p. 3.
86. The Parliamentary Joint Committee on Human Rights has not yet considered the Bill. When the Committee reports on the Bill, that report will be available at the Committee Reports webpage.

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uncertainty surrounding that relationship which has arisen from recent High Court cases (Pape and Williams).

Although the constitutional change may remove the uncertainty surrounding the direct funding of local government, financial assistance through the states to local government can still occur. If the Bill is not passed, the Commonwealth will continue to have uncertainty in relation to direct funding measures.

The Bill will not change the legal relationship between local government and the states. States will retain the power to create, dismiss or alter the structure of local government bodies. However, if local government ends up receiving most of its funding directly from the Commonwealth and on terms and conditions which are in conflict with a given state’s policies, then there could be increased confusion on the part of local government as to who it is really accountable to. While the states still have a stake in local government, financial or otherwise, the potential for blame shifting, cost shifting and responsibility shifting remains and with it local government’s problems regarding accountability.

The Commonwealth’s role as outlined in this Bill is restricted to granting financial assistance to local government including financial assistance for community and other services.

The Explanatory Memorandum states:

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

Professor Anne Twomey comments:

... a State could have a system of local government which did not meet the minimum requirements implied by the High Court, [and] the effect would be that its local government bodies could not receive direct Commonwealth funding. There would therefore be enormous pressure on a State to ensure that its system of local government complied with any minimum characteristics identified by the High Court to avoid missing out on direct funding programs, such as the Roads to Recovery program.

As to the notion that local government bodies will have the option of rejecting financial assistance and the terms and conditions upon which it is offered, there appears to be nothing preventing the Commonwealth from imposing terms and conditions which local government may not like but which

87. Explanatory Memorandum, Constitution Alteration (Local Government) 2013, op. cit., p. 5.
89. Explanatory Memorandum, Constitution Alteration (Local Government) 2013, op. cit., p. 5.
they feel they really have no option but to accept if they are to receive the financial assistance being offered. As section 96 says that financial assistance is provided ‘on such terms and conditions as the Parliament thinks fit’, local governments may find that their autonomy is reduced because Commonwealth funding is likely to become tied to conditions that impose uniform Commonwealth policies on local government. However, the Commonwealth cannot compel or coerce the states or local governments, if recognised, to accept funding.\(^91\)
