



AUSTRALIAN LOCAL  
GOVERNMENT ASSOCIATION



# THE CASE FOR CHANGE

WHY LOCAL GOVERNMENT  
NEEDS TO BE IN THE  
AUSTRALIAN CONSTITUTION

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## WHY WE NEED A CHANGE TO THE CONSTITUTION

All Australians live in local communities and use local facilities every day. They use local roads, footpaths and cycle-ways, parks, playing fields, swimming pools and libraries. Their rubbish gets collected regularly and every time it rains the water drains away through a stormwater system.

Australians pay for, manage and own these services through their local council and they elect their councillors to make sure local government meets their needs. Each community is unique, with different needs and different capacities and each council is different. But they all share one thing in common—getting the best outcome for their local communities.

Of course, councils can't do the job of meeting the community's needs on their own. Local government must work in partnership with the other two levels of government—the Federal Government and the States and Territories—to deliver services and infrastructure at the local level. Providing the increasing range of services expected by the community is often beyond the limited resources of local communities, local ratepayers and therefore most councils. Grants from other levels of government are critical. And it is reasonable to expect that some of the taxes paid to the State and the Federal Government will be used to provide services and infrastructure at the local level.

Because most of the tax paid by Australians goes to the Federal Government (more than \$4 out of every \$5 in tax is collected by Federal Government) it is important that the Federal Government can provide funding directly to councils to meet local community needs. The Federal Government has been doing so now for more than 10 years, since the Howard Government established the Roads to Recovery program to help maintain local roads. The Rudd and Gillard Governments have continued and increased that direct funding and have also provided funding for other local community infrastructure. This has allowed many billions of dollars to be invested by councils in local infrastructure and services and it is difficult to know how many communities would have coped without this funding.

Recent decisions in the High Court have, however, cast doubt on the Federal Government's ability to provide this direct funding to councils. The Constitution does not mention local government, nor does it provide for the Federal Government to fund councils directly.

To fix this problem we need a simple change to the Constitution to allow the Federal Government to continue to provide direct funding to councils so they can continue to meet community needs. It won't change the way councils are elected or how they work, or the State Government's ability to make changes to councils if they think that is necessary, but it will help to make sure that communities get the local services and infrastructure they need and deserve.



## SERVING THE COMMUNITY

Every Australian is touched by local government and everyone makes use of a council program, service or facility. In their daily activities people use council-built roads, council paths, council parks and enjoy council pools and playing fields. But there is much more that local councils do to support the community that people may not realise is a council service—stormwater; waste and recycling; planning and building standards; climate change adaptation measures; environment conservation; libraries, art galleries and museums; social and welfare services such as childcare, youth services and aged care; public health services such as food inspection, animal licensing, immunisation and public toilet facilities; caravan parks and camping grounds—are among the services provided by local councils.

Local government has been looking after the needs of Australian people since 1840, when the first council in Adelaide was established to provide roads, bridges and public buildings. Councils today provide many more services to respond to the needs of their communities—to build resilience and stability in their communities and to meet the needs and expectations of their residents. In many communities local government is one of the largest employers and purchasers of goods and services, contributing significantly to the local and regional economy.

There are more than 560 councils across Australia, but no two are the same. Each council is different because it responds to the unique needs of its community, but every council shares a common goal—to achieve the best possible outcomes for its community.

After fires and floods, the local council is there to restore and rebuild the community. The council works for its residents every day of the year.

## ELECTED BY THE COMMUNITY

Local government is a democratically elected level of government which is directly accountable to the local communities it serves.

Local councils are the voice of their communities and because they are the level of government closest to communities, they are able to identify community needs and find solutions. Councillors and council staff live locally in their communities. The elected councillors and staff are generally the closest point of contact between the people and government.

Local government works in partnership with federal and state governments, as well as with businesses and other service providers, to deliver the most appropriate services to the community.

Local government consults with the community in a range of ways—liaison groups, stakeholder engagement, public forums and working groups—to find local answers to local issues and is the most accessible level of government when it comes to community contact with elected leaders and public servants.



## HOW LOCAL GOVERNMENT IS FORMED

Local government is established under state and territory government laws. The structure, powers and functions of local government are determined by state and territory governments and this will not change. However, local government's place and role as the third sphere of government needs to be included in the Constitution, which sets out how the Federation works.

## MEETING THE NEEDS OF A MODERN SOCIETY LOCAL GOVERNMENT'S EXPANDING ROLE SINCE FEDERATION

When the first local council was established in 1840, before some of the colonial governments, its role was to build roads and public buildings for the community that could not be provided by centralised administrations. Local government's role has expanded dramatically since then.

Its services have widened to include areas such as planning, environmental management, recreation, regional development and human services. Local government today provides around 150 services to its community, using only 3% of taxation revenue, raised through fees and charges and the only local government tax—property rates. It is the lowest-taxing level of government and unlike federal or state taxes, property rates go back in to the facilities and services used by the community. Australians can see where their rates are going.

The community expects local government to respond to local needs, which is why the range of services provided by local government has increased dramatically. However, providing the increasing range of services expected by the community is often beyond the limited resources of local communities, local ratepayers and most therefore most councils. Grants from other levels of government are essential.

One of the most successful partnerships between the Commonwealth and local councils has been the Roads to Recovery program. Established in 2001, this program has delivered national objectives directly through local government, benefiting local communities and enhancing economic capacity and road safety, particularly in rural and regional areas.

As the third sphere of government, local government works in partnership with the Commonwealth and state and territory governments. Through its membership of the Council of Australian Government (COAG), local government is closely consulted on national policies and is increasingly called upon as a partner in the delivery of Commonwealth initiatives.

Yet despite the evolution in the roles of all levels of government since Federation, the nation's framework for the governance of the Australian Federation, the Constitution, has changed little since 1901. Local government is not mentioned in the Constitution, nor has the Constitution been changed to reflect the greater role and responsibility undertaken by local government.

Consequently the Constitution does not reflect how modern Australia is governed and how the different levels of government work together for the community's benefit.



## **CAPACITY TO CONTINUE TO PROVIDE YOUR LOCAL SERVICES**

Of the estimated 250 taxes in Australia, local government has only one tax—the rates levied on property. This accounts for only 3% of Australia's total taxation revenue. The States raise 15% and the Commonwealth Government raises 82% of taxation revenue. Funding from the Commonwealth accounts for around 7% of local government revenue but this funding is vital to providing local services. In relative terms the funding from the Federal Government has been falling in recent years at a time when many councils are struggling to provide the level of services required by the community.

Without greater funding from the other levels of government, there is a real risk that local governments will be forced to reduce services and delay repair work. Trying to raise more revenue through property rates is not an option for many councils and most State Government budgets are already stretched.

As the Commonwealth collects the majority of taxes in Australia, Commonwealth funding is vital to support council services.

An independent report by PricewaterhouseCoopers in 2006 estimated that the impact of under-funding of local government was a \$14.5 billion backlog in repairing ageing local community infrastructure such as roads, swimming pools, libraries and town halls.

While the report made recommendations on how councils could become more efficient it also highlighted the need for local government to seek additional funding from other levels of government.

## **DIRECT FUNDING TO COUNCILS BENEFITS YOU AND YOUR COMMUNITY**

The Federal Government provides some funds each year to States and Territories with the requirement that they pass these funds on to councils. But this money is not enough to meet community needs. The Federal Government has therefore increasingly chosen to fund local government directly. Over the past decade, federal governments from both sides of politics have demonstrated their preference to use direct funding through initiatives such as the Roads to Recovery Program and the Regional and Local Community Infrastructure Program.

It is clear the Federal Government wants to support local communities directly and it has decided that providing funding directly to local governments represents the most efficient way of assisting local communities.

An important reason why the Federal Government has chosen to provide direct funding to local government is that councils are able to respond quickly and effectively to local issues. For example local government played a critical role in delivering 3,300 small community infrastructure projects to local communities across Australia during the Global Financial Crisis.

There are obvious benefits to direct funding—less bureaucracy, no delays in funding being received, greater local accountability and greater transparency.





## **WHY LOCAL GOVERNMENT IS NOT MENTIONED IN THE CONSTITUTION**

At the time the colonies were discussing the formation of the Federation in the 1890s, the focus of attention was on national matters and how the new Federal Government would work with the new State Governments. Consequently, there is no reference to local government in the Australian Constitution.

However, many thought local government should have been incorporated in to the Constitution at the time of drafting.

The growing role of local government that we see today was never envisaged in 1901. After more than a century, it makes sense to ensure that the Constitution reflects how the Federation works in modern Australia.

Local government is one of the oldest forms of government in Australia. It has proven itself to be competent, reliable, innovative, adaptable and flexible in changing policy environments and is committed to progressing national objectives in collaboration with the other levels of government. Its growing role in the Federation needs to be supported through constitutional reform to provide the capacity for direct funding from the Commonwealth so that it can continue to meet the needs and expectations of local and regional communities

## **WHY IS CONSTITUTIONAL CHANGE DIFFICULT TO ACHIEVE?**

Since 1901 very few attempts to change the Constitution have been successful. Of the 44 referendums put to the people since 1906, only eight have been successful—the last one in 1977. Since 1977 there have been three referendums, covering six questions, none of which were successful. Before 1977, the referendum to give Aboriginal people the vote was successful in 1967, and prior to that a referendum to give power to the Commonwealth to pay social service benefits in 1946. Australians will change the Constitution when they believe that it is sensible and right.

However, the fact that there has been no successful referendum since 1977 means that many voters will have no experience or knowledge in voting for a successful referendum. In fact, if you were born after 1959 you have not voted in a successful referendum.

Studies into why so many referendums in Australia have failed suggest a number of reasons for this: a general lack of knowledge among the public about the Constitution or how it can be changed (surveys showing that only 18% of Australians have some understanding of what their Constitution contains, with 47% unaware that Australia had a Constitution); the conservative nature of Australian voters; the difficulty of obtaining the “double majority” (a majority of voters in a majority of states voting “Yes” and a majority of voters overall voting “Yes”) required for a referendum to succeed; and a lack of bipartisan support.

The history of referendums provides some important lessons about the preconditions for success in a future referendum. Firstly, the public must be informed and supportive of the proposition and must be convinced that changing the Constitution will be in their interest. It is also essential for the proposition to have bipartisan support and for the public to see that the proposal is accepted by the major parties.



## WHAT HAS RE-IGNITED THE NEED FOR THE RECOGNITION OF LOCAL GOVERNMENT?

Two recent High Court decisions known as the *Pape Case* and the *Williams Case* delivered in the space of three years, have handed down judgements that challenge the Commonwealth's ability to fund activities that it believes are in the national interest. These decisions have important ramifications for local government, as both cases have rejected the Commonwealth's position that it has the capacity to spend money on whatever subject it wishes, for example continued funding for programs like Roads to Recovery.

Legal advice from leading authorities confirms that these High Court decisions have created great uncertainty about the validity of Commonwealth programs that provide funds directly to local government. Such programs, including the \$3.5 billion Roads to Recovery program, may be vulnerable to further challenge in the High Court. This threatens the financial sustainability of councils and the wellbeing of communities across Australia and could mean reducing or discontinuing vital services to local communities.

These recent High Court decisions have provided weight and urgency to the need for a change to the Constitution to allow direct federal funding of local government—what is known as financial recognition. The purpose of amending the Constitution would be to resolve the uncertainty surrounding the Commonwealth's ability to continue to provide direct funding. The only way to ensure the continuation of general direct funding is through change to the Constitution by way of a referendum.

This will secure the Commonwealth's ability to continue to provide direct funding to councils to maintain local roads, infrastructure, services and facilities.

## WHAT WILL THE CHANGE LOOK LIKE?

The Constitutional change to allow the Federal Government to directly fund local government is very simple. There is already a section in the Constitution (Section 96) which allows the Federal Government to fund state governments and the section would be changed to add in local government.

Section 96 would be amended to read:

"Parliament may grant financial assistance to any state **or local government body formed by or under a law of a state or territory**".

This change would provide the Federal Government with the power to be able to provide funding directly to local government where this was in the national interest.

Importantly, this simple change to the Constitution would have no impact on how local governments work or on their relationship with state governments.



## WHY THIS IS THE BEST OPTION

In 2007 Prime Minister Rudd made an election commitment to progress the issue of the constitutional recognition of local government. Since then local government has been working with the Commonwealth, commissioning research, seeking specialist advice and undertaking extensive consultation to identify the best option for appropriate constitutional recognition, which will be readily understood and supported by the Australian people and therefore have the best chance of success.

After five years of work, local government believes financial recognition is a simple and realistic solution to the problem of direct funding highlighted by the High Court.

But this is not only the view of local government. An independent Expert Panel appointed in 2011 by the Federal Government has come to the same conclusion. It looked at all the options for recognition of local government including recognition in a Preamble to the Constitution and more complex changes to confirm local government's status and role, but in the end it supported financial recognition, which had the broadest political support and the greatest chance of success at a referendum.

All members of the Expert Panel believed that it was appropriate for the Commonwealth to have a direct funding relationship with local government, when acting in the national interest, and for that right to be acknowledged in the Constitution.

Importantly, the Expert Panel supported local government's view that, although financial recognition was a pragmatic solution and the best option, a number of conditions needed to be met to ensure it had the best chance of success.

The Panel called on the Commonwealth to talk to state governments to get their support, and for a major public awareness campaign so that the Australian public had a better understanding about the Constitution and the referendum process. Good reforms proposed at past referendums have failed because people did not know enough about the question, which left them open to misleading and exaggerated claims.

The 2010 agreement between the Labor Government, the Greens and independents, included a commitment to hold a referendum on the recognition of local government by the end of 2013.

## WHAT CONDITIONS ARE NECESSARY FOR A SUCCESSFUL REFERENDUM?

We need to learn from the lessons of the previous 44 referendums in order to give any proposal the best chance of success.

- There needs to be support for the referendum across all political parties.
- The Government needs to lead on the issue and demonstrate its support publicly.
- The public need to be informed about our Constitution, how changes are made to it and the question being asked.
- The public needs to be informed in a factual way. An informed voter makes an informed decision at the ballot box.





The last referendum was held in 1999. Many eligible voters will have had no experience of voting in a referendum and how a referendum works.

A parliamentary committee in 2009 looked at the way referendums are conducted, and whether there need to be changes to the arrangements, some of them written in 1912. The committee concluded that there needs to be much better and clearer information provided to voters, because voters who do not fully understand a proposal are more likely to vote “no”. The vote may have more to do with a misunderstanding of the question or a fear of change, than a true assessment and vote for the proposal, the committee said.

The committee recommended to Government that that a factual education campaign was needed prior to each referendum to increase the understanding of the public about the Australian Constitution. It also wanted an independent non-political panel set up prior to each referendum to be responsible for a communications strategy, including education materials and how best to distribute them to all voters.

Local government believes that such an education campaign is essential if a referendum is to have the best chance of success.

## WHAT HAPPENS NEXT?

Local government is working with the Federal Government, the Opposition, the Greens and the independents to put in place the arrangements for a referendum on the financial recognition of local government.

An important step in the process is the establishment of a joint parliamentary committee to let the Commonwealth Parliament examine the local government question. A parliamentary committee is the most effective way of engaging with all sides of politics, obtaining bipartisan support, and making considered recommendations on the proposed change to the Constitution, timing of the referendum and a public awareness campaign, which can inform the public on the issue.

Local Government has welcomed the decision to establish a Joint Select Committee on Constitutional Recognition of Local Government and to ask it to provide a preliminary report by December 2012, followed by a final report by February 2013, if possible.

Local government is committed to supporting constitutional change to allow the Commonwealth to fund local government directly. The overwhelming majority of councils across Australia have pledged their support for constitutional recognition of local government—specifically financial recognition. Ninety percent of councils nationwide have passed resolutions at their council meetings to support financial recognition. Local councils believe this reform is crucial if local government is to remain financially sustainable in the long-term and be able to continue to meet community needs.

Councils are the best placed to make decisions for their local communities, because councils are part of the community and can best respond to the needs of their communities.

Local government believes that its growing role in the Federation must be supported through constitutional reform to recognise it as a level of government and provide the capacity for direct funding from the Commonwealth, so that it can continue to meet the needs and expectations of local and regional communities. After 110 years it is time to include local government in the Constitution as the third sphere of government. Constitutional recognition will protect what Australians already take for granted and give local government the funding security to better deliver the services that the community needs and deserves.



Financial recognition in the Australian Constitution seeks to formalize and secure the funding which has been received by local government from the Commonwealth for more than ten years. This is needed to ensure vital public services are provided to ordinary Australians every day of the year.

To follow progress on the local government question or to find out more, visit ALGA's dedicated website at <http://www.councilreferendum.com.au/>

## SOME REFERENDUM FACTS

- Any proposed law to change the Constitution must be passed by an absolute majority of Federal Parliament.
- A referendum must be held no sooner than two and no later than six months after the proposal is passed by Parliament.
- In the four weeks after the proposed bill to change the Constitution passes Parliament, a majority of those Members and Senators who voted for the proposal and a majority of those who voted against it prepare YES and NO cases. When a proposal is passed unanimously by Parliament, a NO case is not prepared.
- The Governor-General issues a writ for the referendum, polling day must be on a Saturday, and not less than 33 days or more than 58 days after the issue of the writ.
- The Electoral Commissioner has the YES and NO cases printed together with a statement showing the proposed alterations, which must be received by every elector no later than 14 days before polling day.
- Voting in a referendum is compulsory. Voters need to tick a Yes or No box to agree or disagree to the question being proposed.
- To become law, the proposed constitutional change must be approved by what is called a "double majority", which means that a majority of electors in at least 4 of the 6 states must vote yes (the territories do not count in this), as well as a majority of electors in Australia.
- Rules governing referendums are contained in the *Referendum (Machinery Provisions) Act 1984*.



## LOCAL GOVERNMENT DOES NOT PROPOSE TO CHANGE THE RELATIONSHIP IT HAS WITH THE STATES AND TERRITORIES

- Local government, in seeking recognition, does not seek to break or change the relationship between itself and the State and Territory Governments.
- In the 1988 local government referendum, a “democratic recognition” proposal was resoundingly defeated by voters and was not acceptable to State and Territory Governments. Additionally, democratic recognition would not have any real effect on rectifying the problem highlighted by the High Court decisions in 2009 and 2012. Similarly, “symbolic recognition” would not be a solution to the High Court decisions.
- The 1974 local government referendum addressed direct funding or the “financial recognition” of local government. It was put to referendum without bipartisan support, after having been rejected twice by the Senate and was accompanied by an active “no” campaign. Nevertheless the national vote at referendum supporting recognition was almost 47%. It demonstrates that bipartisan support is essential before any proposal is put to the people.
- The wording of the current financial recognition proposal reflects the lessons of the 1974 referendum. It incorporates wording to reinforce to State and Territory Governments that local government intends to remain under the jurisdiction of State and Territory Governments.



## LOCAL GOVERNMENT FACTS

### **What would constitutional recognition of local government mean for Australians?**

Recognising local government in the Constitution through a change to Section 96 will allow local governments—and through them local communities—to continue to receive funding directly from the Federal Government to meet their local service and infrastructure needs. This is the only way to protect federal funding for community services and infrastructure.

### **What exactly is local government seeking in this referendum?**

Local government wants the Federal Government to continue to be able to make direct payments to local government, so that local government has the certainty to continue to be able to provide the level of services expected by the community. The Commonwealth has been funding local government directly (for example through the Roads to Recovery program) for over a decade. Financial recognition in the Constitution is a practical solution to end legal doubt over this funding, created by two High Court cases (*Pape v Commissioner of Taxation* in 2009 and *Williams v The Commonwealth* in 2012). The cases create uncertainty about the future funding of local government and the only way to resolve this uncertainty is for local government to be included in the Constitution.

### **Will this mean more money for local government?**

Local government is not asking for more money. It wants to ensure the Federal Government can continue the current funding arrangements where it provides money directly to local communities, through programs such as Roads to Recovery.

It's actually about removing doubts about the Federal Government's ability to keep doing what it is doing—providing funding to local communities to enable them to provide better services and infrastructure at the local level.

### **Why should a State (or Territory) government support the proposed change?**

State government budgets are under pressure and the Federal Government collects over 80% of taxation. Securing funding for local governments will mean that their local communities will be able to get the services and infrastructure they need and deserve. This will not affect the states' powers relating to local government.

### **If local government is already recognized in state constitutions, why not simply change them?**

Local government is seeking constitutional certainty for funding provided to it by the Federal Government. Amending state constitutions will not fix the problem—which is to allow the Federal Government to fund local government directly to deliver local services and infrastructure.

### **Didn't the Commonwealth Government recently resolve the uncertainty created by the (Pape and Williams) High Court decisions through special legislation?**

Without changing the Constitution, there is no direct power for the Commonwealth to be able to fund local government directly. In the case of the Roads to Recovery program, which is already established under legislation, ALGA has sought legal advice which states that the Commonwealth's solution does not address the Roads to Recovery program and the program remains open to constitutional challenge.